

THE UAE FEDERAL ARBITRATION LAW: TAKING STOCK ON ITS THIRD ANNIVERSARY

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Abstract

The present article takes stock of the United Arab Emirates [“UAE”] Federal Arbitration Law [“FAL”] after its first three years in operation. In doing so, it focuses on areas of relevance that have emerged from case law of the UAE courts in interpreting the provisions of the FAL, such as the arbitration agreement, the arbitration defence, the principle of kompetenz-kompetenz and the waiver provision. An initial analysis will show that the UAE courts continue to take guidance from the case law that originated from the former UAE Arbitration Chapter, which was repealed by the FAL with effect from June 16, 2018. The UAE courts have pursued an arbitration-friendly interpretation of the FAL without losing any of the continuity that has followed on from the previous regime under the former UAE Arbitration Chapter. That said, it is regrettable that some of the shortcomings of the new law, such as the limited powers of a tribunal to award costs or the continued qualification of arbitration as an exceptional means of dispute resolution requiring a special authority for representation, are attributable to conservative law-making by the draftsmen of the new law. Nevertheless, the FAL sends distinctly positive signals in the promotion of the electronic conduct arbitration proceedings.

I. Introduction

June 16, 2021 marks the third anniversary of the FAL,¹ which was adopted by the UAE legislature in May 2018 and entered into force on June 16, 2018. It would seem apposite to celebrate the tenth anniversary of the *Indian Journal of Arbitration Law*, which has featured so prominently in the “*Bibliography of recent writings related to the work of UNCITRAL*” over the course of its short lifetime to date, with a contribution on how the UAE Courts have so far fared in the interpretation of the FAL; the FAL itself being of United Nations Commission on International Trade Law [“UNCITRAL”] pedigree. Albeit not incorporating the body of the UNCITRAL Model Law on International Commercial Arbitration [“**Model Law**”]² as a whole, the FAL takes inspiration from and is as such based upon the Model Law provisions in relevant part.³ In recognition of its Model Law origin, the FAL has been listed in the April 2020 United Nations’ General Assembly Report as one of the world’s Model Laws, officially elevating the UAE to a Model Law jurisdiction.⁴

By way of background, with effect from its entry into force, the FAL repealed the former provisions of the so-called “*UAE Arbitration Chapter*” (i.e., Articles 235 to 238 of the UAE Federal

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¹ Federal Law No. (6) of 2018 on Arbitration (U.A.E.) [*hereinafter* “UAE Arbitration Law”].

² United Nations Comm’n on Int’l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

³ See M. Nasreddine, *The UNCITRAL Model Arbitration Law and the UAE Federal Arbitration Law: Points of Convergence and Divergence*, in THE UAE ARBITRATION YEARBOOK 2018 91–95 (G. Al Hajeri & Z. Penot eds., 2019).

⁴ See UNCITRAL, 53rd Session, New York, July 6–17, 2020. Status of conventions and model laws, Note by the Secretariat, ¶ 7, U.N. Doc. A/CN.9/1020 (Apr. 1, 2020).

Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code) [“CPC”],⁵ also known as the “UAE Arbitration Chapter,” and has become the positive law of arbitration that governs arbitral proceedings with seat in the UAE.⁶ For the avoidance of doubt, this excludes arbitrations seated in one of the offshore judicial free zones, i.e., the Dubai International Financial Centre [“DIFC”]⁷ or the Abu Dhabi Global Market [“ADGM”].⁸ These are governed by their own, standalone arbitration laws, which go beyond the scope of this article and with which the author has dealt elsewhere.⁹ The FAL also provides a regime for the recognition and enforcement of domestic awards, and it is complemented by Cabinet Decision No. 57 of 2018 for the enforcement of foreign awards,¹⁰ which equally falls outside the scope of this article.

The following study—albeit brief—endeavours to provide some initial insight into how the UAE courts have so far scored on the construction of provisions of the FAL that are closely modelled on corresponding provisions of the Model Law, or that deserve mention for their significance within the context of the application of the FAL despite not featuring in the Model Law. Given constraints of space, for present purposes, emphasis is placed on the content of UAE case law precedent at the cost of a truly comparative study,¹¹ but in the hope that it will assist in a better understanding of the operation of the FAL as a Model Law-based legislation.

In the following, this article seeks to focus on areas of relevance that have emerged from case law of the UAE courts in interpreting the provisions of the FAL, such as the arbitration agreement, the arbitration defence, the principle of *kompetenz-kompetenz* and the waiver provision.

II. The Arbitration Agreement

A. General

The agreement to arbitrate has been recognised as the source of the tribunal’s mandate and powers under the FAL.¹² It has been confirmed that pursuant to Article 4(1) of the FAL, which has no equivalent in the Model Law, and which limits the group of authorised signatories of an agreement to arbitrate to the original rightsholder and to specially authorised representatives, both natural and legal persons, i.e., individuals and body corporates, are empowered to enter into arbitration

⁵ See Federal Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code), arts. 203–218 (U.A.E.) [*hereinafter* “UAE Civil Procedures Code”]. For a full commentary, see GORDON BLANKE, COMMENTARY ON THE UAE ARBITRATION CHAPTER (2017) [*hereinafter* “BLANKE”].

⁶ Albeit that the overall scope of application of the FAL is significantly wider. See UAE Arbitration Law, art. 2. For commentary, see 1 GORDON BLANKE, BLANKE ON UAE ARBITRATION LEGISLATION AND RULES (forthcoming 2021) [*hereinafter* “BLANKE”].

⁷ See Dubai International Financial Centre (DIFC) Arbitration Law 2008 (Law No. 1 of 2008).

⁸ See Abu Dhabi Global Market (ADGM) Arbitration Regulations 2015.

⁹ See Gordon Blanke, *Free Zone Arbitration: The Mechanics*, 6(2) IND. J. ARB. L. 56 (2018); Gordon Blanke, *Free zone arbitration in the DIFC and the ADGM*, 35(1) ARB. INT’L 95 (2019).

¹⁰ See Cabinet Decision No. (57) of 2018 (Concerning the Executive Regulations of Federal Law No. (11) of 1992 on the Civil Procedure Law), Dec. 9, 2018, effective Feb. 16, 2019 (U.A.E.). For a full commentary, see BLANKE, *supra* note 6.

¹¹ It should be noted that given the UAE are a civil law jurisdiction, there is no binding precedent and any guidance from previous court rulings does not bind future courts. That said, lower courts tend to comply with dicta of the court of cassation in the competent Emirate, thus creating a *jurisprudence constante* by analogy to the French legal system.

¹² See, e.g., Dubai Court of Cassation Case No. 114/2020 (Commercial), Mar. 18, 2020; Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020.

agreements.¹³ Given the similarity in wording between Article 4(1) of the FAL and former Article 203(4) of the CPC, the Dubai Court of Cassation has been seen to rely on the UAE courts' analysis of former Article 203 of the CPC in relevant part in construing Article 4(1) of the FAL.¹⁴ Given the exceptional nature of arbitration, arbitration clauses and agreements are interpreted narrowly.¹⁵

Subject to the application of the doctrine of apparent authority in the terms set out under Part II.E of this article, the UAE courts have confirmed that a third party that seeks to submit to arbitration for and on behalf of and/or represent the original rightsholder in an arbitration, whether an individual or a body corporate, must be specifically authorised to do so by means of a special power of attorney in accordance with Article 58(2) of the CPC¹⁶ or a board resolution, subject to a number of well-defined exceptions, such as the legal presumption in favour of the binding authority of a director of a UAE-incorporated limited liability company.¹⁷ To this effect, the Dubai Court of Cassation has found in Case No. 153/2020 that “[t]he director of a limited liability company is the holder of full authority in its management and has the capacity to dispose of the rights related to its activity including the agreement on arbitration in the contracts concluded between it and others unless the company’s articles of incorporation specify its authority to deprive him of certain actions or expressly prevent him from agreeing to arbitration [...]”.¹⁸ According to more recent case law of the UAE courts, a lack of special authority may only be invoked by a principal against its agent or attorney, and not by the opponent party.¹⁹ It has also been held that where a board of directors only counts two members and the articles of association authorise one director on its own to carry out the company affairs, one director on its own is considered authorised to bind the company to arbitration.²⁰

Further, the UAE courts have confirmed that the requirement for a special power of attorney extends to the delegation of any powers to be conferred upon a tribunal in arbitration, including the power to award party costs more specifically. In Case No. 990/2019, the Dubai Court of Cassation observed as follows:

“[T]he decision according to the text of the first and third paragraphs of Article 4 of the [FAL] that 1- The agreement on arbitration is concluded only by a natural person who has the capacity to dispose of rights or from the person’s representative, the legal person who is authorized to conclude an agreement on arbitration, otherwise the agreement will be void [...] 3- And that in the cases in which this law permits the parties to agree on the procedure to be followed to decide on a specific issue, then each of them may

¹³ See, e.g., Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020.

¹⁴ See, e.g., Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019.

¹⁵ See, e.g., Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 459/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020.

¹⁶ See, e.g., Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019; Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020.

¹⁷ See, e.g., Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 1013/2019 (Commercial), Jan. 19, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020; Dubai Court of Cassation Case No. 71/2021 (Commercial), Feb. 28, 2021.

¹⁸ Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020.

¹⁹ See, e.g., Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019; Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 1118/2019 (Commercial), Feb. 19, 2020; Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020.

²⁰ See Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020.

authorize others to choose this procedure or decide on it, and it is considered among others in this regard every natural person or arbitration institution inside or outside the country. And that the text of Article (216/4) of the [CPC] under which the arbitration procedures were conducted is that resorting to arbitration is only valid for those who have the capacity to act in the disputed right and who are not qualified to resort to the judiciary, for the agreement on arbitration implies that if a person relinquishes filing a case to the state's judiciary, including the guarantees it contains for the litigants, which is an exceptional way to settle disputes, the legislator is required to agree on a private agency and that it is in the private agency that the agent has nothing but to undertake the matters assigned to it and the necessary consequences required by the nature of the behaviour and the current custom, it is not permissible to depart from the limits of this authorization, and if it exceeds those limits, then it does not apply to the right of the delegated person unless he permits this behaviour.”²¹

B. The principle of separability

In accordance with Article 6(1) of the FAL, which is modelled on Article 16(1) of the Model Law, the UAE Courts have confirmed the isolation of the arbitration agreement from the main contract and its continued integrity despite the nullity, rescission or termination of the main contract,²² provided that the agreement to arbitrate is itself not affected by an instance of invalidity.²³

Against this background, it has been held by the UAE courts that the invalidity of a board resolution (intending to confer powers upon new management to submit a company to arbitration) does not extend to an existing arbitration agreement contained in the main contract between the parties in circumstances where the existing arbitration agreement was lawfully executed by previous management of the company.²⁴

The net consequence of Article 6(1) of the FAL is that the arbitration agreement survives the termination (including in the form of a rescission) or invalidity of the main contract. In Case No. 516/2020, the Dubai Court of Cassation observed that “*the invalidity of the original contract that includes the arbitration clause, or its annulment or termination, does not prevent the arbitration clause from remaining valid and producing its effects with respect to the effects of the nullity, annulment or termination of the original contract unless the nullity extends to the arbitration clause itself [...]*.”²⁵ As a result, the arbitral tribunal retains jurisdiction to determine the question of the termination or invalidity of the main contract.²⁶

C. The in-writing requirement

The UAE courts have confirmed the in-writing requirement of arbitration agreements under Article 7(1) of the FAL,²⁷ which takes after Article 7(2) of the Model Law, and as such, an agreement to arbitrate is never presumed.²⁸ A failure to sign an arbitration provision contained in

²¹ See Dubai Court of Cassation Case No. 990/2019 (Commercial), Jan. 5, 2020.

²² See, e.g., Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020; Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020; Dubai Court of Cassation Case No. 1115/2020 (Commercial), Dec. 20, 2020.

²³ See, e.g., Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020.

²⁴ See Dubai Court of Cassation Case No. 946/2019 (Commercial), Nov. 24, 2019.

²⁵ See Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020.

²⁶ See *Id.*

²⁷ See, e.g., Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020.

²⁸ See Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27, 2020.

schedules to the original main contract will render that provision null and void *ab initio*.²⁹ It has been held that a simple amendment of a main contract, without specific reference to the underlying arbitration clause, does not displace the obligation to arbitrate.³⁰ In order to satisfy the in-writing requirement, it will suffice for an agreement to arbitrate to fall within one of the circumstances listed under Article 7(2) of the FAL,³¹ thus qualifying as having been concluded in writing.³²

Importantly, according to the UAE courts, an arbitration agreement is only binding *inter partes*, i.e., it only binds (authorised) signatory parties.³³ That said, like the position under the former UAE Arbitration Chapter,³⁴ the UAE courts have endorsed the express or implied assignment of the obligation to arbitrate to a third party provided the circumstances leave no room for doubt that the assignment has met with party acceptance.³⁵

Further, pursuant to Article 1028 of the CPC, the arbitration agreement of an insurance contract is required to be contained in an agreement separate from the general conditions of the insurance.³⁶ In circumstances where this was not done, the insurer, which was the originator of those conditions, was not able to rely upon its own failure to insert the arbitration agreement into a separate agreement to overcome an arbitration defence advanced by the insured.³⁷ It has also been held that a settlement agreement between two parties with respect to a dispute arising from a main contract that contained an arbitration clause was not referable to arbitration where that agreement did not make reference to the obligation to arbitrate.³⁸ Equally, a letter agreement adopted to replace an earlier agreement on the same subject without making reference to the arbitration clause contained in the earlier agreement was found not to give rise to an obligation to arbitrate.³⁹

D. Incorporation by reference

In application of Article 5(3) of the FAL, which is modelled on Article 7(6) – Option 1 of the Model Law and facilitates incorporation by reference, a generic reference in a subcontract to dispute resolution in the terms provided for in the main contract has been found sufficient for incorporation of a *Fédération Internationale Des Ingénieurs-Conseils* [“**FIDIC**”] dispute resolution clause contained in a main contract into a subcontract.⁴⁰

Further, the UAE courts have found, taking account of the language of Article 7(2)(b) of the FAL more specifically, that for incorporation by reference to operate, the required reference must point

²⁹ See Dubai Court of Cassation Case No. 476/2020 (Commercial), July 8 2020.

³⁰ See Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020.

³¹ Including, for example, an exchange of correspondence between authorised signatories, by sufficiently clear reference from one contract to another, an exchange of written submissions between the parties during an arbitration process.

³² See, e.g., Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019.

³³ See Dubai Court of Cassation Case No. 43/2019 (Real Estate), May 8, 2019; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020.

³⁴ See BLANKE, *supra* note 5, at II-018.

³⁵ See Dubai Court of Cassation Case No. 43/2019 (Real Estate), May 8, 2019; Dubai Court of Cassation Case No. 503 (Commercial), June 15, 2019.

³⁶ See BLANKE, *supra* note 5, at II-008.

³⁷ See Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020.

³⁸ See Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020; Dubai Court of Cassation Case No. 667/2020 (Commercial), Oct. 4, 2020.

³⁹ See Dubai Court of Cassation Case No. 358/2020 (Civil), Nov. 26, 2020.

⁴⁰ See Dubai Court of Appeal Case No. 1139/2020 (Commercial), Aug. 19, 2020; Dubai Court of Cassation Case No. 56/2021 (Commercial), Mar. 3, 2021.

to the arbitration provision in the referenced document and expressly state that the referenced arbitration provision forms an integral part of the subject contract, including more specifically within the context of the FIDIC standard conditions of contract.⁴¹ In Case No. 329/2020, the Dubai Court of Cassation observed as follows:

“[A]n agreement to arbitrate is considered any referral contained in a contract drawn up between two parties to another contract that includes an arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is not achieved unless it includes a specific reference to the arbitration clause. If the referral to the aforementioned contract is merely a general reference to the provisions of this contract without specifying the aforementioned arbitration clause specifically indicating that the parties know of its existence in the contract, then the referral does not extend to it and the arbitration is not agreed upon between the parties to the contract, [...].”⁴²

E. Apparent authority

A consistent line of case law precedent suggests that the UAE courts now recognise a legal presumption in favour of the binding effect of a person’s signature upon a company in one of the following two situations:

- (i) Where that person is not specifically designated as the company’s legal representative in the preamble of the underlying contract that contains an arbitration clause, yet—regardless of its true association with the company—signs the contract⁴³ with a legible signature.⁴⁴ In this regard, the Dubai Court of Cassation observed in Case No. 276/2020 that *“if the name of a specific company is mentioned in the preamble of the contract and another person signed at the end of this contract, this establishes a legal claim that whoever signed it signed in the name and account of the company, regardless of whether his name is associated with its name or added to it, and this will affect the rights and obligations of the company.”⁴⁵*
- (ii) Where that person is specifically designated as a company’s legal representative in the preamble of the contract, but the signature placed under the contract is illegible.⁴⁶ The Dubai Court of Cassation further observed that *“[i]f the name of the legal person is mentioned in the preamble of the contract only and not associated with the name and description of the legal representative and the end of the contract is signed with an illegible signature and the contract includes the arbitration clause, in this case there is a conclusive legal presumption that the signature is attributed to the legal*

⁴¹ See Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 459/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020.

⁴² See Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020.

⁴³ See, e.g., Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

⁴⁴ See Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020.

⁴⁵ See Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

⁴⁶ See, e.g., Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

representative of the person possessing the capacity to act and the capacity to agree to arbitration and it is not accepted from him in this case to challenge this signature in accordance with the principle of good faith.”⁴⁷

Conversely, where a person is specifically designated as the company’s legal representative in the preamble to the contract that contains the arbitration clause, yet the signature under the contract is legible and as such identifiable or identified as that of another person, the legal presumption in favour of binding authority is displaced.⁴⁸ The Dubai Court of Cassation further observed that “[i]f the name of the legal person is mentioned in the preamble of the contract coupled with the name and description of the legal representative and the end of the contract is signed with a legible signature of another person and the contract includes the arbitration clause, then in that case the legal person may claim the nullity of the arbitration clause for its signature by a person other than the legal representative who has the capacity to agree to arbitration.”⁴⁹

For the avoidance of doubt, a legible signature at the end of a contract in the absence of any (contradictory) designation of the legal representative in the preamble to the contract will not displace the legal presumption in favour of binding authority.⁵⁰ It has hence been found that ordinary employees of a corporate entity that neither held a managerial position, nor were furnished with special authority, did bind that entity to arbitration by signing (legibly) a settlement agreement that contained an arbitration clause.⁵¹ The UAE courts also appear to have recognised that the placement of a company seal on the arbitration agreement (bar proof of fraudulent interference by the agent) binds the company to arbitration and as such serves as conclusive evidence of the proper execution of the arbitration obligation by a legal person in its own right (irrespective of any other signature requirements).⁵²

In finding in favour of the application of apparent authority, the UAE courts have relied upon an overarching obligation of good faith in the terms set out at Article 70 of the UAE Federal Law No. (5) of 1985 issuing the Civil Transactions Law [**Civil Transactions Code**].⁵³ In Case No. 236/2019, the Dubai Court of Cassation observed as follows:

“[I]n accordance with the principle established by Art. 70 of the [Civil Transactions Code], whoever is seeking to set aside what he has concluded on this part will be rejected, and the defendant may not take from his own actions/ grounds to validate/constitute his claim against [a] third party, which is an application of the general principle that is based on moral and social considerations to combat such behaviour

⁴⁷ See Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

⁴⁸ See, e.g., Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020.

⁴⁹ See Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

⁵⁰ See Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019.

⁵¹ See Dubai Court of Cassation Case No. 246/2020 (Civil), Sept. 24, 2020.

⁵² See Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 865/2020 (Commercial), Oct. 11, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020. *But cf.* Dubai Court of Cassation Case No. 960/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 1037/2020 (Commercial), Dec. 9, 2020.

⁵³ See, e.g., Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

and not to deviate from the seriousness of the principle of good faith that must be complied with in all actions and procedures.”⁵⁴

On occasion, the courts have also found support in Article 14(2) of the CPC. For instance, in Case No. 51/2020, the Dubai Court of Cassation observed as follows:

“It is not permissible – according to Article 14(2) of the Civil Procedure Law – to claim nullity that is not related to public order from the party who caused it, whether it was caused intentionally or by negligence or the one who caused it was the same person or someone working for them. It is established that a party to the arbitration may not claim before the court a defense that leads to the nullity of the arbitration award due to defects related to the arbitration agreement or to the arbitration procedures resulting from its own actions.”⁵⁵

III. The Arbitration Defence

The arbitration defence pursuant to Article 8 of the FAL, which takes after corresponding Article 8 of the Model Law, has been found to operate as an exception to the general rule in favour of the jurisdiction of the UAE courts in civil and commercial disputes.⁵⁶ According to the arbitration defence, a court before which an action on the merits has been initiated, is obligated to dismiss that action in the event that the opponent raises the existence of an obligation to arbitrate, unless the underlying arbitration agreement is found to be unenforceable, whether for being invalid or otherwise.⁵⁷ For this purpose, an arbitration agreement will be found unenforceable in circumstances where the parties fail to make payment of the advance on costs prescribed under

⁵⁴ Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; *see also* Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 681/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

⁵⁵ Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020. *See also* Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020.

⁵⁶ *See* Dubai Court of Cassation Case No. 1071/2019 (Commercial), Feb. 16, 2020.

⁵⁷ *See, e.g.*, Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020; Dubai Court of Cassation Case No. 319/2019 (Commercial), Dec. 8, 2019; Dubai Court of Cassation Case No. 399/2019 (Commercial), Feb. 23, 2020; Dubai Court of Cassation Case No. 521/2019 (Commercial), Jan. 30, 2020; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 604/2019, Nov. 24, 2019; Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 853/2019 (Commercial), Feb. 2, 2020; Dubai Court of Cassation Case No. 903/2019 (Commercial), Nov. 11, 2020; Dubai Court of Cassation Case No. 986/2019 (Commercial), Dec. 15, 2019; Dubai Court of First Instance Case No. 1646/2019 (Commercial), Mar. 3, 2020; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 135/2020 (Civil), May 14, 2020; Dubai Court of Cassation Case No. 142/2020 (Real Estate), Nov. 3, 2020; Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020; Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020; Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 218/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27, 2020; Dubai Court of Cassation Case 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020; Dubai Court of Cassation Case No. 367/2020 (Commercial), Aug. 7, 2020; Dubai Court of Cassation Case No. 421/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 732/2020 (Commercial), Sept. 30, 2020; Dubai Court of Cassation Case No. 803/2020 (Commercial), Oct. 25, 2020; Dubai Court of Cassation Case No. 865/2020 (Commercial), Oct. 11, 2020; Dubai Court of Cassation Case No. 960/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 1037/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 10/2021 (Real Estate), Feb. 23, 2021.

the Dubai International Arbitration Centre [“**DIAC**”] Rules of Arbitration, 2007,⁵⁸ and the case is considered withdrawn and the arbitration procedure is consequently closed within the meaning of Article 2.9 of the Appendix on Costs of the DIAC Rules.⁵⁹

Importantly, as confirmed by the UAE courts, an opponent party must raise the arbitration defence before making any submissions on the merits (rather than at the first hearing, as was the case under the former UAE Arbitration Chapter),⁶⁰ otherwise the opponent will be considered to have waived the right to enforce the arbitration obligation against the claimant.⁶¹ In such a case, the courts—to the exclusion of an arbitral tribunal—will be properly competent to hear the action on the merits.⁶² The UAE courts have found that for this purpose, pleadings on the merits include submissions before an expert appointed by the court to assist in resolving the parties’ dispute.⁶³

The UAE courts have further found that for an arbitration defence under Article 8(1) of FAL to succeed, it must meet three cumulative conditions:⁶⁴ (i) the opponent files a case before the courts in violation of an existing arbitration agreement; (ii) the aggrieved party raises the arbitration defence before arguing the case on the merits; and (iii) the subject arbitration agreement is valid and as such enforceable as between the parties. It has been found that condition (ii) allows a party to request an extension of time in the first hearing before the competent court to appoint a legal representative, who in turn raises the arbitration defence in the second hearing before the court.⁶⁵ Equally, the opponent party will be allowed to request an adjournment before the court to review the case file before formally raising the arbitration defence in the second hearing (or at a later hearing to the extent that it reserves its position on the merits). The UAE courts have been seen to entertain an arbitration defence raised by an attorney at a second hearing, following a successful application for adjournment of the first hearing in order to review the file.⁶⁶ The UAE courts have also granted the arbitration defence on the basis that the plaintiff in the court proceedings had advanced a counterclaim in competing arbitral proceedings pending in parallel.⁶⁷

In case of multiple parties, where both signatories and non-signatories to the arbitration agreement are involved, and provided that the dispute between the parties is indivisible, the UAE courts have found that they have general jurisdiction on the basis that arbitration is an exceptional form of dispute resolution.⁶⁸

⁵⁸ See Dubai International Arbitration Centre (DIAC), Rules of Arbitration 2007 [*hereinafter* “DIAC Rules”].

⁵⁹ See Dubai Court of Cassation Case No. 215/2019 (Commercial), July 7, 2019.

⁶⁰ See BLANKE, *supra* note 5, at II-040–II-041.

⁶¹ See, e.g., Dubai Court of Cassation Case No. 1159/2018 (Commercial), July 21, 2019; Dubai Court of Cassation Case No. 319/2019 (Commercial), Dec. 8, 2019; Dubai Court of Cassation Case No. 399/2019 (Commercial), Feb. 23, 2020; Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020.

⁶² See Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020.

⁶³ See Dubai Court of Cassation Case No. 604/2019, Nov. 24, 2019.

⁶⁴ Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020.

⁶⁵ *Id.*

⁶⁶ See, e.g., Dubai Court of Cassation Case No. 1159/2018 (Commercial), July 21, 2019.

⁶⁷ See, e.g., Dubai Court of Cassation Case No. 56/2021 (Commercial), Mar. 3, 2021.

⁶⁸ See Dubai Court of Cassation Case No. 153/2019 (Commercial), Apr. 28, 2019; Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 17/2020 (Real Estate), May 14, 2020.

Where no indivisible link can be established between a first contract that contains an arbitration clause and a second contract that does not, the tribunal will be competent to hear the dispute arising from the first contract to the exclusion of the general jurisdiction of the UAE courts.⁶⁹ The arbitration defence has failed with respect to matters that fall within the proper competence of the courts, particularly those that qualify as of public policy, including, for example, the registration of off-plan real estate;⁷⁰ and in circumstances where a party was not a signatory of the underlying sale contract that contained the subject arbitration agreement.⁷¹ Subject to parties agreeing otherwise, the courts will also regain general jurisdiction in the event that an arbitration agreement cannot be performed for some reason, including, *inter alia*, the parties' failure to defray the costs of the arbitration, for example, within the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.⁷² The UAE courts have dismissed the arbitration defence where the dispute between the parties did not fall within the scope of the disputed arbitration agreement, as it arose from circumstances not covered by that agreement.⁷³ In Case No. 265/2020 the Dubai Court of Cassation refused to entertain as a debt enforcement action a claim for payment of a debt, which the debtor party had admitted was outstanding by email, declining the court's jurisdiction in favour of the existence of an arbitration clause under Article 8(1) of the FAL.⁷⁴ The UAE courts have also refused to accept that a Final Payment Certificate, within the meaning of the FIDIC Conditions of Contract for Construction, is suitable for enforcement as a debt by the competent courts irrespective of the existence of an arbitration clause.⁷⁵

IV. Jurisdiction and *Kompetenz-Kompetenz*

The UAE courts have confirmed that Article 19 of the FAL, which is closely modelled on Article 16 of the Model Law, contains the principle of *kompetenz-kompetenz*, according to which a tribunal serving under the FAL has the power to determine its own jurisdiction as a preliminary matter to the exclusion of the courts.⁷⁶ The courts have confirmed that pursuant to Article 19(1) of the FAL, the tribunal may decide on an issue of jurisdiction as a preliminary matter (by way of a "*preliminary decision*"), allowing a tribunal to bifurcate the proceedings into an initial phase on jurisdiction and a subsequent phase on the merits.⁷⁷

The UAE courts have further found that a failure to comply with the FIDIC conditions precedent in the terms of Clause 67 of the fourth edition of the FIDIC Conditions of Contract for Works of Civil Engineering Construction, 1987 [**"Red Book"**]⁷⁸ and, in particular, to make a timely referral to the Engineer under Clause 67.1, renders the commencement of arbitration proceedings

⁶⁹ See Dubai Court of Cassation Case No. 803/2020 (Commercial), Oct. 25, 2020.

⁷⁰ See, e.g., Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

⁷¹ See Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27, 2020.

⁷² See Dubai Court of Cassation Case No. 791/2019 (Commercial), Jan. 19, 2020.

⁷³ See Dubai Court of Cassation Case No. 1071/2019 (Commercial), Feb. 16, 2020.

⁷⁴ Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020.

⁷⁵ See, e.g., Dubai Court of Cassation Case No. 692/2020 (Commercial), Sept. 23, 2020.

⁷⁶ See Dubai Court of Cassation Case No. 358/2020 (Civil), Nov. 26, 2020.

⁷⁷ See, e.g., Dubai Court of Cassation Case No. 933/2018, Feb. 10, 2019; Dubai Court of Cassation Case No. 1059/2018, Mar. 17, 2019. In both of these cases, the parties agreed to bifurcate the proceedings.

⁷⁸ See Fédération Internationale Des Ingénieurs-Conseils (FIDIC), Conditions of Contract for Works of Civil Engineering Construction (4th ed. 1987), cl. 67.

premature.⁷⁹ Further, according to the courts, in circumstances where the Employer fails to give the Contractor written notice of a change of Engineer, the Contractor is allowed to refer to arbitration under Clause 67.3 of the Red Book, without a Clause 67.1 referral for an Engineer's decision.⁸⁰ It has also been found that service of a request for arbitration following escalation of the parties' differences confirms a lack of willingness on part of the parties to reach amicable settlement within the meaning of Clause 67.2 of the Red Book and allows the commencement of arbitration in order to avoid unnecessary delay in the arbitral proceedings.⁸¹ Further, a party's silence in response to an invitation to settle amicably followed by escalation to arbitration within the contractual time limits demonstrates a failure to settle amicably.⁸² Similarly, an architect's refusal to entertain settlement discussions between two contracting parties has been found to exhaust a pre-arbitral obligation by the parties to refer a dispute for settlement by the architect.⁸³ Conversely, the conditions precedent under Clause 67 of the Red Book and, in particular, the requirement to attempt amicable settlement have been found unenforceable in circumstances where the courts retained their general jurisdiction over the subject dispute due to the unenforceability of the underlying arbitration agreement.⁸⁴

Article 19(2) of the FAL allows a challenge of an affirmative ruling on jurisdiction under Article 19(1).⁸⁵ By contrast, a negative ruling on jurisdiction can only be challenged by recourse to the formal challenge provisions contained in Articles 53 and 54 of the FAL.⁸⁶ Under Article 19(2) of the FAL, a party is empowered to request the competent curial court to rule on the matter of jurisdiction within 15 days from the date it has been notified of an affirmative ruling on jurisdiction.⁸⁷ The 15-day time limit is strictly enforced by the competent court in accordance with Article 3 of the CPC.⁸⁸ For the avoidance of doubt, the competent court for present purposes is the Court of Appeal, and not the Court of First Instance, at the seat of the arbitration.⁸⁹ Choice of the wrong court will likely affect the timely filing of the challenge, as a result of which the challenging party will be considered to have waived its right to challenge under Article 19(2) of the FAL.⁹⁰ According to prevailing court practice, the 30-day time limit provided for the Court to decide such request is regulatory and as such not strictly binding. Importantly, the UAE courts have confirmed that the curial court's decision under Article 19(2) of the FAL is final and binding,

⁷⁹ See Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020.

⁸⁰ See Dubai Court of Appeal Case No. 8/2018, Jan. 16, 2019.

⁸¹ *Id.* (“[T]he escalation of the differences between the parties and the [...] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties’ contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings.”).

⁸² See Dubai Court of Appeal Case No. 19/2020, Sept. 9, 2020.

⁸³ See Dubai Court of Cassation Case No. 864/2020 (Commercial), Nov. 4, 2020.

⁸⁴ See Dubai Court of Cassation Case No. 215/2019 (Commercial), July 7, 2019.

⁸⁵ See Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020; Dubai Court of Appeal Case No. 38/2019, Jan. 8, 2020.

⁸⁶ See, e.g., Dubai Court of Appeal Case No. 19/2020, Sept. 9, 2020.

⁸⁷ See Dubai Court of Appeal Case No. 3/2018, Sept. 26, 2018; Dubai Court of Appeal Case No. 8 of 2018, Jan. 16, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Appeal Case No. 7/2020, Nov. 4, 2020; Dubai Court of Appeal Case No. 12/2020, Oct. 21, 2020; Dubai Court of Appeal Case No. 23/2020, Sept. 9, 2020.

⁸⁸ See Dubai Court of Cassation Case No. 198/2020 (Commercial), May 13, 2020. See also Dubai Court of Appeal Case No. 33/2020, Nov. 25, 2020.

⁸⁹ See Dubai Court of Cassation Case No. 198/2020 (Commercial), May 13, 2020.

⁹⁰ See *Id.*

and cannot be appealed.⁹¹ Pending an application under Article 19(2) of the FAL, the arbitration proceedings will be stayed unless decided otherwise by the tribunal upon the request of a party.⁹² In this sense, the stay of the proceedings is automatic.⁹³

Under Article 19(2) of the FAL, the curial courts appear to enjoy a comparatively wide margin of discretion, being invited to review the actual merits of the tribunal's findings on jurisdiction and hence to decide the matter of jurisdiction afresh on the basis of the text of and the information provided by the award.⁹⁴ A supervisory court's negative finding on jurisdiction will result in the nullification of the tribunal's affirmative ruling on jurisdiction,⁹⁵ and require the parties to initiate a fresh arbitration unless they decide otherwise.

The UAE courts have further confirmed that pursuant to Article 20(1) of the FAL, jurisdictional objections must be filed by the time of the submission of a statement of defence and counterclaim within the meaning of Article 30 of the FAL.⁹⁶ In the alternative, an objection that the other party's pleadings fall outside the proper limits of the tribunal's mandate and are as such *extra petita* must be raised in the hearing following the hearing in which those pleadings were originally made.⁹⁷ Failure to do so has been held to be tantamount to a waiver of right.⁹⁸

V. Waiver of right

According to the waiver of right provision at Article 25 of the FAL, a party that fails to raise an objection to the violation of or a failure to comply with any requirement of the underlying arbitration agreement or a non-mandatory provision of the FAL within an agreed period of time or within seven days from becoming aware of the instance of the violation or non-compliance is deemed to have waived its right to object.⁹⁹ This has been found to include the challenge of arbitrators for lack of impartiality and independence or competence.¹⁰⁰ In reliance on Article 25 of the FAL, the UAE courts have found that an award debtor had waived its right to object to the appointment of a tribunal, the scope of the tribunal's jurisdiction and the language of the

⁹¹ See Dubai Court of Cassation Case 225/2019 (Commercial), May 19, 2019.

⁹² See Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020.

⁹³ See Dubai Court of Cassation Case No. 8/2018, Jan. 16, 2019.

⁹⁴ See Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020.

⁹⁵ See Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19 2020, in which the tribunal found in favour of its own jurisdiction despite the claimant's failure to comply with the FIDIC conditions precedent.

⁹⁶ See Dubai Court of Appeal Case No. 3/2018, Sept. 26, 2018; Dubai Court of Appeal Case No. 8/2018, Jan. 16, 2019; Dubai Court of Cassation Case No. 1078/2019 (Commercial), Jan. 22, 2020; Dubai Court of Appeal Case No. 5/2020, Aug. 12, 2020; Dubai Court of Appeal Case No. 26/2020, Sept. 30, 2020; Case No. 33/2020, Dubai Court of Appeal Nov. 25, 2020; Dubai Court of Cassation Case No. 240/2020 (Commercial), June 3, 2020; Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020.

⁹⁷ See, e.g., Dubai Court of Appeal Case No. 5/2020, Aug. 12, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

⁹⁸ See, e.g., Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

⁹⁹ See, e.g., Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020; Dubai Court of Appeal Case No. 27/2019, Nov. 13, 2019.

¹⁰⁰ See Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

arbitration in favour of Arabic (instead of English), in circumstances where such objections were only raised by way of challenge under Article 53 of the FAL.¹⁰¹

VI. Electronic Conduct of Arbitration Proceedings

According to the UAE courts, unlike the Model Law, under Article 28(2)(b) of the FAL, the tribunal is empowered to conduct arbitration hearings remotely¹⁰² through modern means of communication, such as video-conference and phone, unless otherwise agreed by the parties.¹⁰³ The use of electronic means of communication in the conduct of the arbitration process and the tribunal's deliberations has been found to take after UAE Law No. (10) of 2017,¹⁰⁴ which introduces electronic communication into the conduct of civil procedures before the courts. In Case No. 1083/2019, the Dubai Court of Cassation observed as follows:

“Decree-Law No. 10 of 2017 added a new section to the Civil Procedures Law related to the use of remote communication technology in civil procedures, with the aim of facilitating litigation procedures, as it allowed for the conduct of the trial to take place remotely, so that the litigants would attend and plead the case, express their defense and take evidence procedures in it. The deliberation of judges, the issuance of judgments, their implementation and appeals against them is done remotely by using the means of audio-visual communication and modern electronic technologies, in a manner that does not require the personal presence of the litigants before the court in order to facilitate the procedures of litigation and to achieve with it the principle of confrontation between the litigants in a way that guarantees allowing them to present their defense aspects in the lawsuit remotely; and that the new [FAL] came in line with the provisions of this Chapter Six of the [CPC], as stipulated in Articles 28 and 33 of the permissibility of holding arbitration sessions with the parties to the dispute and deliberating the ruling between the arbitrators through means of communication and modern electronic technologies and the unnecessary presence of litigants in person.”¹⁰⁵

Further, according to recent case law precedent, Article 33(3) of the FAL allows hearings before the tribunal to be conducted electronically, *“through modern means of telecommunication.”*¹⁰⁶ This is evidently also assisted by the tribunal's power to question witnesses remotely without the need for the witness's physical presence pursuant to Article 35 of the FAL.

VII. The Award

A. Signing of award

Recent developments under Article 41(3) of the FAL provide some initial guidance on the signature requirement for arbitral awards under the new Law. Article 41(3) contains a mandatory signature requirement in the following simple terms: *“the award shall be signed by the arbitrators.”* No further guidance, other than this, can be found in the new law.¹⁰⁷ Recent case law precedent

¹⁰¹ See Dubai Court of Cassation Case No. 492/2020 (Commercial), July 15, 2020.

¹⁰² See, e.g., Dubai Court of Cassation Case No. 29/2020 (Commercial), July 12, 2020; Dubai Court of Cassation Case No. 34/2020 (Commercial), July 12, 2020.

¹⁰³ See, e.g., Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020.

¹⁰⁴ See Federal Decree No. 10 of 2017 (amending Federal Law No. (11) of 1992 on the Civil Procedure Law), Sept. 28, 2017 (U.A.E.).

¹⁰⁵ See Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

¹⁰⁶ See *Id.*

¹⁰⁷ See Gordon Blanke, *Your signature, please: recent developments under article 41(3) of FAL*, PRACTICAL LAW ARBITRATION (Aug. 20, 2020), available at <http://arbitrationblog.practicallaw.com/your-signature-please-recent-developments-under-article-413-of-fal>.

confirms the public policy nature of the signature requirement and requires signature on both reasoning and dispositive parts of the award in the same way and manner as used to be the case under former Article 212(5) of the CPC.¹⁰⁸ In doing so, the UAE courts have acknowledged that in the event that the reasoning and dispositive parts of the award overlap on one and the same page, it is sufficient to sign that page of the award, in addition to the final page provided that the dispositive part of the award extends beyond the overlapping page.¹⁰⁹ In Case No. 1083/2019, the Dubai Court of Cassation has observed as follows:

“It is also established by the case law precedent of this Court that the arbitrator’s signature is a form and content requirement that should be included in the award, given that the signature is the only evidence affirming that the award lawfully exists. If the award is not signed by the arbitrator, no one may attribute the award to the arbitrator. For that purpose, the arbitral award means the reasoning and the dispositive parts of the award. The arbitrator should sign both the reasoning and the dispositive part of the award. Otherwise, the award will be invalid. This excludes the case in which the reasoning of the award, or part thereof, is connected to the page which contains the dispositive part of the award and which is signed by the arbitrator. The legal effect of such a signature is that it extends to the reasoning of the award in a way that satisfies the legislator’s intention with respect to the signature of the award. However, if the reasoning is contained in a page that are all separated from the dispositive part of the award, all pages shall be signed by the arbitrator in addition to the final page that contains the dispositive part of the award. Otherwise, the award will be invalid. Such invalidity is of public order, to be raised of the courts’ own motion.”¹¹⁰

B. Time limit for award

In application of Article 42(1) of the FAL, which empowers the parties to agree on a time limit for rendering the award, the UAE courts have found that to the extent that there are no specific provisions in the selected arbitration rules, such as the DIFC-LCIA Arbitration Rules (effective January 1, 2021), that govern the time limit for rendering an award, no such time limits find application to the arbitration.¹¹¹ Further, a party who is responsible for a delay in the arbitration process that prompts the expiry of the time limit may not raise the expiry of that time limit as a ground for challenge on the basis that a party must not benefit from its own wrongdoing.¹¹²

C. Notification of award

According to recent case law precedent, notification of the award under Article 44 of the FAL needs to be effected on the parties in person as opposed to their legal representative.¹¹³ This is on the basis that pursuant to Article 45(1) of the FAL, an arbitral award ends an arbitration process and as such, the notification provisions that apply over the course of that process do not extend

¹⁰⁸ See Dubai Court of Cassation Case No. 1083/2019, June 14, 2020; see also BLANKE, *supra* note 5, at II-108.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020. To the extent that there specific provisions providing time limits for the tribunal to render an award, such as under Article 36.2 of the DIAC Rules, they do find application to arbitration. See Dubai Court of Cassation Case No. 764/2019 (Commercial), Oct. 16, 2019; Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 19, 2020.

¹¹² See Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

¹¹³ See Dubai Court of Cassation Case No. 1201/2018 (Commercial), May 26, 2019; Dubai Court of Cassation Case No. 242/2019 (Commercial), May 26, 2019.

to the notification of the award.¹¹⁴ The burden to prove that the award has not been received on time rests upon the aggrieved party.¹¹⁵

D. Costs

In Case No. 1029/2018, the Dubai Court of Cassation confirmed a restrictive interpretation of Article 46(1) FAL to exclude a tribunal's power to award party costs and observed as follows:

“The text [...] the meaning of th[e] text [of the first paragraph of Article (46) of Law No. (6) of 2018 regarding arbitration] is that the arbitration expenses assessed by the arbitral tribunal [...] are the fees and expenses incurred by any member of the arbitral tribunal in order to implement its duties and the expenses of appointing experts by the tribunal. Therefore, the costs that the parties pay to the legal representatives who represent them in the arbitration procedures or prepare and attend the lawsuit and advise the parties before the start of the arbitration procedures do not fall within these legal expenses. And in the absence of a legal text or explicit wording in the arbitral clause to that effect and given that the arbitration deed concluded between the two parties to the lawsuit did not include an agreement that one of the parties would bear the legal expenses, so it is not obligatory [...] and the agreement concluded between the two parties did not include an agreement on fees, expenses and legal costs [...].”¹¹⁶

More recent case law precedent suggests that legal or party representatives are unable to confer upon a tribunal a power to award counsel fees unless having been specifically authorised to do so by the original rightsholder, for example, by a special power of attorney in accordance with Article 58(2) of the CPC. This is on the basis that the entitlement to such fees arises from the contractual engagement between the legal or party representative and the original rightsholder, which in turn is distinct and as such separate from the contract subject to and of the dispute in arbitration.¹¹⁷ Further, case law precedent of the UAE courts confirms that in derogation from the limited scope of recoverable costs under the DIAC Rules, parties are free to confer an express power on the tribunal to award party costs.¹¹⁸

VIII. Public policy

The UAE courts have found that the public policy exception under Article 53(2)(b) of the FAL, which allows the successful challenge of an award that violates UAE public policy and corresponds to Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, encapsulates the definition of UAE public policy within the meaning of Article 3 of the Civil Transactions Code.¹¹⁹ In Case No. 22/2019, the Dubai Court of Cassation observed as follows:

“[A]lthough [the Law] does not specify what is meant by public order, but it is agreed that it includes the rules that aim to achieve the supreme interest of the country, whether in terms of political, social or economic and related to the natural, material and moral condition of an organized society in it; this interest takes precedence over the interests of individuals, and its idea is based on the interest of the whole group, ‘with what it leads’, the idea of public order affecting the entity of the state or relating to a basic and general

¹¹⁴ See Dubai Court of Cassation Case No. 1201/2018 (Commercial), May 26, 2019.

¹¹⁵ See Dubai Court of Cassation Case No. 33/2020 (Commercial), Oct. 4, 2020.

¹¹⁶ Dubai Court of Cassation Case No. 1029/2018 (Commercial), Apr. 28, 2019.

¹¹⁷ See Dubai Court of Cassation Case No. 990/2019 (Commercial), Jan. 5, 2020.

¹¹⁸ See, e.g., Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019.

¹¹⁹ See, e.g., Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 1, 2020.

*interest of the group. This and what I consider public order is stipulated in Article (3) of the [Civil Transactions Code]. Among them are those related to personal status, freedom of trade and the circulation of wealth and other rules and foundations upon which society is based that do not violate the peremptory provisions and the basic principles of Islamic law.*¹²⁰

Given its public policy nature, failure to comply with the signature requirement prompts the absolute invalidity of the award, i.e., renders the award null and void *ab initio*,¹²¹ and as such constitutes a valid ground for nullification. That said, courts are required to give priority to the procedural validity of the arbitration process over reasons for annulment of an award in accordance with Article 54(6) of the FAL, including where the ground for annulment is one of violation of public policy, and allow the rectification of any clerical shortcomings within the meaning of Article 54(6) of the FAL. In Case No. 1083/2019, the Dubai Court of Cassation observed as follows:

*“[U]nder the new Arbitration Law [i.e., the FAL], the legislator reduced the causes of invalidity by stating that the requirements of procedural action should supersede the grounds of its invalidity or deficiency, considering that the objective of the action is to serve the right. For such purpose, the legislator provided for Art. 54(6) [FAL], allowing the tribunal – upon request from a party – to correct an invalidity in the form of the award, which in turn complies with the general principles of procedure according to which no invalidity may be adjudicated if the instance of invalidity is rectified [...].”*¹²²

The termination of agreements relating to the sale and purchase of land (short of matters of registration) do not qualify as of public policy and are as such capable of being arbitrated.¹²³ Conversely, matters of registration with respect to off-plan lands or real estate do and therefore cannot be arbitrated.¹²⁴ The UAE courts have also refused to nullify an award of contractually-agreed compound interest, which, according to the courts, does not constitute *riba* or usurious interest and falls within the arbitrator’s discretionary powers to assess compensation, which in turn does not constitute a valid ground for nullification. In Case No. 217/2019, the Dubai Court of Cassation observed as follows:

*“[I]t is well established that the contractually-agreed [compound] interest that is payable to the creditor upon the debtor’s delay in paying the debt despite its due date does not qualify as *riba*, but rather is a form of compensation for the harm suffered by the creditor as a result of the debtor’s delay in paying the debt despite its due date, and prevents the creditor from benefiting from it, which is a presumed damage that does not admit proof to the contrary and the creditor must be compensated for it in exchange for a debtor’s fault, just for the delay in payment by itself, it does not change its nature as compensation and its legitimacy in determining it in a certain percentage as agreed upon by the two parties at the conclusion of the contract. The legislator did not intend to criminalize dealing with interest in civil and commercial transactions except between natural persons as explicitly stipulated in Article 409 of the Penal Code. [...] As for the claim*

¹²⁰ Dubai Court of Cassation Case No. 22/2019 (Real Estate), Mar. 27, 2019.

¹²¹ See Dubai Court of Cassation Case No. 1083/2019, June 14, 2020.

¹²² *Id.*

¹²³ See, e.g., Dubai Court of Cassation Case No. 231/2019 (Real Estate), Dec. 4, 2019; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

¹²⁴ See Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

*that the plaintiffs are not entitled to these benefits, it is in fact a controversy over the arbitrator's discretionary authority to assess compensation that does not fit a ground of nullity of the arbitration award, and then the court decides to reject this reason [...].*¹²⁵

More recently, the UAE courts have confirmed that contracting parties cannot contract out of requirements of public policy.¹²⁶ In Case No. 217/2019, the Dubai Court of Cassation further observed as follows:

*“[I]t is decided that the legal rules that are considered public order are rules intended to achieve a general political, social or economic interest related to the higher society system and override the interest of individuals, so that all individuals must take into account and realize this interest and they may not oppose it by agreements among themselves even if they have concluded these agreements for their own individual interests.”*¹²⁷

IX. Conclusion

The preceding study of the first three years of case law precedent under the FAL demonstrates that the UAE courts have pursued an arbitration-friendly interpretation of the new law without losing any of the continuity that has followed on from the previous regime under the former UAE Arbitration Chapter. It is regrettable that some of the shortcomings of the new law, such as the limited powers of a tribunal to award costs under the FAL or the continued qualification of arbitration as an exceptional means of dispute resolution requiring a special authority for representation (albeit that the courts' more recent, yet persistent pursuit of the apparent authority doctrine has taken much of the force that the special authority restrictions used to have), are attributable to conservative law-making by the draftsmen of the new law. That said, the FAL sends distinctly positive signals when, for example, promoting the electronic conduct of arbitrations, being one of the first arbitration laws in the world to support the digitalization of the entire arbitration process. Time will tell how the FAL will ultimately fare compared to the competing free zone arbitration laws, but given its Model Law origin and a positive first three years of its application, there is all reason to look ahead with confidence.

¹²⁵ See Dubai Court of Cassation Case No. 217/2019 (Commercial), May 19, 2019.

¹²⁶ See, e.g., Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 1, 2020.

¹²⁷ See Dubai Court of Cassation Case No. 217/2019 (Commercial), May 19, 2019.