

# NEW LEGISLATION FOR THE MEDIATION OF ONSHORE DISPUTES IN THE UNITED ARAB EMIRATES

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## **UAE Litigation and Dispute Resolution Alert**

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### **INTRODUCTION**

Mediation can be a useful mechanism for parties to try to resolve their disputes amicably, without the significant time and cost implications of litigation or arbitration proceedings. However, in the UAE, historically, parties have shown a reluctance to use mediation as an alternative method of dispute resolution.

Two key factors are likely to have undermined parties' confidence in the process of mediation in the UAE. Firstly, the lack of a robust legal framework for a formal mediation process; and secondly, the absence of any guarantee that information exchanged during the mediation process was protected by confidentiality.

Federal Law No. 6/2021 on Mediation for the Settlement of Civil and Commercial Disputes (FML), which came into force in the UAE on 29 April 2021, seeks to address both of these points. The FML establishes a legal framework and sets forth the process for mediation, including the commencement of a mediation, the appointment and powers of a mediator (Mediator), the payment and allocation of costs, and the termination of a mediation (whether upon full or partial settlement or otherwise). It also seeks to ensure the confidentiality of information exchanged as part of the mediation process by preventing any documents or information submitted in the mediation, or concessions made during the mediation, from being used against any party involved in the mediation in any court or other legal forum. The FML also imposes criminal sanctions for the unauthorised disclosure of confidential material.

In establishing a robust legislative framework for mediation, and providing parties contemplating mediation with certainty with regard to the process of mediation and the enforceability of any settlement agreement (Settlement Agreement), the FML should increase parties' confidence in the use of mediation, and provide parties with the opportunity to save time and costs by settling disputes amicably.

### **KEY ELEMENTS OF THE FML**

Mediation is defined in the FML as an optional and alternative means to reach an amicable settlement of the civil and commercial disputes between parties in a contractual or non-contractual legal relationship, with the assistance of an impartial third party, i.e., a Mediator.

#### **The Scope of the FML**

The FML is broad in scope, allowing mediation to be “conducted in all disputes where conciliation is possible, without contradiction to the other legislations in force or the public order or public morals of the State,”<sup>1</sup> and permitting mediation to address the whole, or part of, a dispute.<sup>2</sup>

Article 2(3) of the FML states that “The provisions of this Law shall apply in case the Mediation occurs in the State, or in case it is a mediation or an international commercial settlement abroad and both Parties have agreed on subjecting it to the provisions of this Law.” Accordingly, the FML provides that it “shall apply” to all mediations within the “State” (which is defined as the UAE), as well as mediations or commercial settlements outside of the UAE where both parties have agreed that it shall be subject to the FML.

There is potentially a question as to whether the FML will apply to mediations within the two financial free zones in the UAE, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). Article 3 of Federal Law No. 8 of 2004 Concerning Financial Free Zones provides that “All financial zones and activities shall be subject as well to the provisions of the Federal Laws, with the exception of the civil and commercial federal laws.”<sup>3</sup> Since the FML falls within the scope of “civil and commercial federal laws,” and as the FML does not expressly provide that it applies in the financial zones, there is an argument that it does not apply to mediations within the DIFC or ADGM, unless the parties specifically agree that any mediation will be subject to the FML. This would mean that if parties had entered into a contract that was stated to be subject to the jurisdiction of the DIFC or ADGM courts, and they wished to mediate in respect of a dispute arising out of that contract, the mediation would not automatically fall within the scope of the FML. However, if those contracting parties wanted to ensure that any potential mediation would be governed by the FML, they could either include additional language in the contract to the effect that any mediation is subject to and governed by the FML, or they could insert such language in any subsequent agreement to mediate.

### **The Mediation Agreement**

Article 3 of the FML sets out the legal requirements for an enforceable mediation agreement (Mediation Agreement), which is defined as a written agreement between the parties in order to seek mediation for the settlement of disputes, which may be concluded before or after a dispute arises.

A Mediation Agreement must be entered into by a person or party with sufficient capacity to bind the party to a mediation; for example, an agent of the party with a special power of attorney granting them such authority.

A Mediation Agreement may be included in a contract or in a separate document, and may be paper or electronic. An agreement to mediate by reference to a model contract or another document including a condition for mediation is permitted if the reference “clearly prescribes that such condition is a part of the contract.”<sup>4</sup>

A valid Mediation Agreement must also: identify the subject-matter of the mediation; appoint a specific Mediator (referred to as a Special Mediator) or establish the method of appointment; and identify the language of the mediation. In the event that the mediation is to be held in a language other than Arabic, all documents must be translated into Arabic.

### **Two Paths: Judicial and Non-Judicial Mediation**

The FML provides for two separate paths for mediation: “Judicial Mediation” (Judicial Mediation, as detailed in Chapter 2 of the FML) and “Non-Judicial Mediation” (Non-Judicial Mediation, as detailed in Chapter 3 of the FML). However, with both pathways, the mediation process must go through a “Centre” - a legally designated mediation and conciliation centre stipulated in Federal Law No. 17 of 2016, or other local law (Centre). Currently, each of the

emirate courts and the federal courts have one Centre.<sup>5</sup> In the case of Judicial Mediation, the mediation process will be overseen by a “Competent Court” (Competent Court), whilst Non-Judicial Mediations will be overseen by a “Supervisory Judge” who supervises the relevant Centre (Supervisory Judge). The Competent Court and the Supervisory Judge have the same powers in terms of estimating the costs of the mediation, appointing the Mediator, and ratifying any Settlement Agreement.

Judicial Mediation can arise only once the dispute has been referred to court. The FML allows the Competent Court (i.e., the court with jurisdiction over the lawsuit) to refer the dispute to mediation at any stage of the proceedings, in order to implement a Mediation Agreement, or at the parties' request.<sup>6</sup> The Competent Court does this by way of a “Referral Decision,” which shall mention: (i) the parties' approval and commitment to attend specified sessions and to provide the appointed Mediator with all information and documents related to the dispute; (ii) the subject-matter of the mediation; (iii) the duration of the mediation (which must not exceed three months from the date of informing the Mediator of his or her appointment); and (iv) the initial expenses of the mediation and the method of their allocation to the parties (Referral Decision). Judicial time limits shall be suspended from the issuance of a Referral Decision and shall not resume unless the mediation is terminated.

Non-Judicial Mediation is an option available to parties before a dispute is referred to court. Where parties choose to mediate without first filing a judicial lawsuit, they can directly approach a Centre to coordinate a mediation. An application to the Centre must include: (i) the approval of the parties to mediate; (ii) an undertaking to attend sessions and provide the Mediator with the necessary information and documents; (iii) details of the subject-matter of the dispute; (iv) the identity of the Special Mediator according to the Mediation Agreement, and (v) the agreed duration for the mediation process (up to a maximum of three months from the date on which the Mediator accepts his or her appointment).<sup>7</sup>

Under both Judicial Mediation and Non-Judicial Mediation, the duration of the mediation may not exceed three months from the date on which the Mediator accepts his or her duty. This time period may be extended once, for a similar period, by virtue of a decision of the Competent Court (for a Judicial Mediation) or the Supervisory Judge (for Non-Judicial Mediations), based on the agreement of the parties to the mediation. Therefore, under the FML, the parties have a maximum period of six months in which to mediate.<sup>8</sup>

## **MEDIATORS**

The FML anticipates that Centres will establish and maintain “Lists of Mediators,” identifying registered mediators who can be appointed to mediate disputes. The FML defines a Mediator as “every physical person or juristic entity assigned by the parties for the purpose of reaching an amicable resolution for the dispute there between, whether he is a special mediator or a mediator registered in the lists of mediators at the Centre.” A Special Mediator is defined as a Mediator that is not registered on a “List of Mediators,” but is specifically “assigned by the parties to carry out the duty of mediation.”

A Mediator may be appointed in one of two ways: (i) the parties may identify a specific Mediator in the Mediation Agreement (either someone who is on an official List of Mediators maintained by a Centre or someone who is not on a List of Mediators, i.e., a Special Mediator), or agree on a method for the appointment of a Mediator; or (ii) the Competent Court or Supervisory Judge may select the Mediator from an official List of Mediators.<sup>9</sup>

Should a party object to a specific Mediator, the Competent Court (for Judicial Mediations) or the Supervisory Judge (for Non-Judicial Mediations) may appoint another Mediator from the official list, if they approve the recusal of the Mediator.<sup>10</sup>

The FML requires Mediators to be neutral and independent, and free from any bias.<sup>11</sup> Furthermore, certain restrictions are placed on Mediators. For example, a Mediator is prohibited from: (i) acting as an arbitrator or an expert for either party concerning the dispute they have mediated; (ii) giving evidence against either party (unless by agreement of the parties or with respect to a crime); and (iii) acting as a Mediator in a dispute where they are related (by blood or marriage) to any party, up to a fourth degree relative.<sup>12</sup> A “Code of Business Conduct” for Mediators is also expected to be issued in due course.<sup>13</sup>

## CONFIDENTIALITY

Before the enactment of the FML, there was no guarantee that information exchanged during mediations would remain confidential. This meant that any admissions or agreements, or information or documents exchanged during a mediation could potentially be used as evidence in court (or arbitration), if a settlement was not reached.

Article 14 of the FML redresses this, by stating expressly that “the Mediation procedures are confidential.”<sup>14</sup> Except for the provisions of any Settlement Agreement and any documents deemed necessary for its enforcement, the FML provides that the mediation “procedures or any documents and information submitted or any agreements or concessions made by the Parties, shall not be used against any of them before any court or any entity.”<sup>15</sup>

Therefore, the mediation procedure, any documents and information disclosed during the course of a mediation and any concessions made by the parties are confidential and cannot be used against any party or person involved in the mediation before any court or other legal forum (such as arbitration).<sup>16</sup> There is only one exception to the confidentiality provisions of the FML; confidential information revealed during the course of a mediation may be disclosed (e.g., in court or arbitration proceedings) if all of the parties to the Mediation Agreement approve the disclosure of that information.<sup>17</sup>

Furthermore, the FML makes it a criminal offense for any party involved in the mediation to breach this confidentiality, providing that “The Centre, the Mediator, the Parties and every person participating in the Mediation shall not disclose any information revealed during the Mediation procedures unless by approval of all the Parties, otherwise this shall be deemed as a crime.”<sup>18</sup>

The confidentiality provisions are a crucial element of the FML, which should increase parties' confidence in entering mediations, enhancing the likelihood of successful outcomes as parties can afford to be more open in any settlement negotiations.

However, the FML does not include any exceptions regarding the confidentiality of information or documents exchanged during a mediation, unless all of the parties agree to waive confidentiality. A typical exception you might expect to see in a confidentiality clause may be an exclusion for documents that were already within the possession of the other party, or within the public domain. Upon a strict reading, Article 14 of the FML arguably precludes a party from being able to use evidence that was deployed in a mediation in subsequent legal proceedings, even if that evidence was already in its possession prior to the mediation. Another issue that might arise relates to tiered dispute resolution clauses, where an attempt to mediate a dispute is stated to be a

necessary pre-condition to being able to proceed to subsequent court or arbitration proceedings. Where a party objects in such subsequent proceedings that a particular claim has not been subject to mediation as required by the parties' agreed dispute resolution procedure, conceivably that party might seek to argue that documents from the mediation showing the claim was in fact discussed in the mediation are not admissible in the subsequent court or arbitration proceedings.

Although the FML does not on its face appear to give the courts any latitude with regard to accepting as evidence any documents, information or concessions made during a mediation, courts may nonetheless decide that some material is admissible (e.g., if a document was already in the possession of another party, or if it already existed in the public domain). This could potentially lead to some uncertainty regarding the enforceability of the confidentiality provisions of the FML.

## **ENFORCEABILITY OF A SETTLEMENT AGREEMENT**

Where a settlement is reached (in whole or part), it must be submitted to the Centre, signed by the parties and then sent to the Competent Court (or Supervisory Judge in the case of Non-Judicial Mediation) for ratification.<sup>19</sup> The Competent Court shall ratify the agreement, terminate the relevant dispute (in whole or in part), and upon ratification, the agreement shall be "deemed a writ of execution."<sup>20</sup> The ratified Settlement Agreement will be binding, irrevocable, and "shall be deemed as equally authentic as the judicial judgements."<sup>21</sup> The parties are prohibited from raising the same dispute (i.e., the same subject-matter and grounds) again before the courts.

There are very limited grounds to object to a ratified Settlement Agreement, and a party seeking annulment must prove either: (i) the person/party entering the Settlement Agreement lacked capacity; (ii) there is no Settlement Agreement or the agreement is invalid or voidable or concluded after the mediation deadline (which cannot exceed six months from the appointment of the Mediator); (iii) the Mediation Agreement is invalid or unenforceable; or (iv) a party was not properly notified of the mediation procedure so could not present a defence.<sup>22</sup>

This is another important element of the FML, which serves to ensure that parties enter into mediations confident that any Settlement Agreement arrived at will be enforceable, and parties will not be permitted to re-litigate the same issues.

## **TERMINATION OF A MEDIATION**

As mediation is a voluntary process, there are multiple ways a mediation may be terminated, including unilaterally.

As noted above, in the event that a mediation is terminated because the parties arrive at a settlement, the Mediator shall submit a report to the Competent Court (or the Supervisory Judge in the case of a Non-Judicial Mediation), along with the Settlement Agreement signed by the parties, so the Settlement Agreement may be ratified.

In addition to termination upon the parties' entering a Settlement Agreement, the mediation may be terminated: (i) by agreement of the parties and the Mediator for any reason; (ii) in the event that one party informs the Mediator or Centre that it does not wish to continue the mediation; (iii) by notifying the Mediator or Centre that the



mediation is not effective and there is no means to reach a resolution; (iv) in the event that one party fails to appear at two consecutive sessions; or (v) in the event that the mediation deadline expires.

Accordingly, notwithstanding that a party may have agreed to mediate a dispute, it may unilaterally terminate a mediation at any time simply by informing the Centre or the Mediator that it does not wish to continue with the process.<sup>23</sup> There are unlikely to be any negative consequences for terminating a mediation, except for potentially having to pay the costs of an aborted mediation. There is also no guarantee that parties engaging in the mediation will seek, in good faith, to reach a settlement. Therefore, there is a risk that a defendant may exploit the mediation procedure set out in the FML, using it as a delaying tactic, since a counterparty cannot progress any claims whilst a mediation is ongoing. There may also be a risk that a party exploits the mediation process to try to prevent subsequent deployment in evidence of documents used in the mediation.

## **COSTS**

For both Judicial Mediations and Non-Judicial Mediations, before a mediation commences, the parties are required to pay the initial expenses of the mediation directly to the Centre.

The final costs of the mediation will be estimated by the Competent Court or Supervisory Judge, which will also decide how the costs are split between the parties, whether on an equal basis, in accordance with the percentage of the interest of each of them in the lawsuit, or entirely by one party. In any event, a Special Mediator's fee must not exceed five percent of the value of the subject-matter of the dispute.<sup>24</sup>

Upon the conclusion of a Judicial Mediation, the Competent Court shall oblige the parties, by virtue of an order on petition, to settle the final expenditures of the mediation as indicated in the Mediation Agreement and the Referral Decision. It may oblige the party deemed responsible for the failure of the mediation (i.e., by not attending the sessions) to pay the full costs of the mediation.

In the case of Judicial Mediation, if the parties reach a settlement, they are entitled to recover the judicial fees paid for the litigation process. If a partial settlement is reached, they may recover half of the judicial fees.<sup>25</sup> The FML is silent on whether this applies regardless of the stage of the legal proceedings prior to the mediation.

## **CONCLUSION**

The FML is an important step in establishing a legislative framework for mediation. However, it remains to be seen how mediations under the FML will work in practice, including how efficiently the Centres will administer the mediations, whether the Centres are able to establish an adequate list of Mediators with appropriate backgrounds, skills and expertise, and whether mediations will be cost effective (regarding both the administrative costs and Mediators' fees). There is also a question as to how strictly the confidentiality obligations will be construed.

Given these uncertainties, contracting parties are unlikely to rush to include Mediation Agreements in their commercial contracts in the near future. It is more likely that we will see parties agreeing to attempt to mediate disputes after a dispute has arisen, particularly in those cases where it is important that the dispute is resolved quickly, or where the amounts in dispute do not justify the potentially significant costs of litigation or arbitration.

## FOOTNOTES

<sup>1</sup> Federal Law No. 6/2021 on Mediation for the Settlement of Civil and Commercial Disputes [hereinafter *FML*] art. 2(1); “State” is defined as the UAE.

<sup>2</sup> FML art. 2(2).

<sup>3</sup> Federal Law No. 8 of 2004 Concerning Financial Free Zones art. 3(2).

<sup>4</sup> FML art. 3(4).

<sup>5</sup> The FML also contemplates that a Cabinet decision will be issued regarding the establishment and licensing of new mediation centres and branches of foreign mediation centres in the UAE.

<sup>6</sup> FML ch. 2 art. 5(1).

<sup>7</sup> FML art. 23(2).

<sup>8</sup> FML arts. 5(2)(c) and 23(2)(d).

<sup>9</sup> FML arts. 6 and 7.

<sup>10</sup> FML arts. 7(2) and 23(4).

<sup>11</sup> FML arts. 7(3) and 8.

<sup>12</sup> FML art. 15.

<sup>13</sup> FML art. 26.

<sup>14</sup> FML art. 14(1).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> FML art. 18(1).

<sup>20</sup> FML art. 18(2).

<sup>21</sup> FML art. 20.

<sup>22</sup> FML art. 19(1).

<sup>23</sup> FML arts. 16(1)(c) and 23(5).

<sup>24</sup> FML art. 6(3).

<sup>25</sup> FML art. 21(2).

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