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INTERNATIONAL ARBITRATION AND THE RULE OF LAW IN AN EMERGING WORLD: A QATAR PERSPECTIVE

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The expansion and globalization of cross-border investment and trade has led to increased and more complex commercial relationships between businesses, investors and states. Arbitration has become increasingly popular with the international business community as a flexible method to privately resolve complex, transnational commercial disputes, as well as for the economic benefits for states perceived as promoting “arbitration-friendly” jurisdiction that promotes and upholds the rule of law.²

Through the widespread ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“the New York Convention”),³ and the lack of trust of local courts due to consistent delays and lack of neutrality, parties have increasingly adopted arbitration as the means of resolving complex commercial disputes in the Middle East and North Africa region (“MENA”).⁴ The Qatar perspective provides an example of this trend.

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² The rule of law often appears as a vague or undefined idea. See David M. Mednicoff, “Legalism Sans Frontieres? U.S. Rule of Law Aid in the Arab World”, Carnegie Papers, No. 61, September 2005. The rule of law in its narrow sense simply means that things are done in accordance with the law, but says nothing about what the law actually is. In its wider sense, which is how it is usually meant in the modern context, the rule of law also involves addressing the contents of the law. See Lord Neuberger, “Arbitration and the Rule of Law”, Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015. See also Lord Bingham, *The Rule of Law* (Oxford: OUP, 2011).

³ The New York Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states.

⁴ See International Bar Association, “The Current State and Future of International Arbitration: Regional Perspectives”, September 2015, pp. 33-34. See also, Sir William Blair, “Contemporary Trends in the Resolution of

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While Qatar's vast oil and gas reserves have been driving economic growth in Qatar for decades, in 2008 the government embarked on ambitious reforms. These were set out in its Qatar National Vision 2030, which aims to diversify Qatar's economy and create a world-class infrastructure for the rule of law, transportation, business, healthcare, and education. The result has been the emergence of Qatar's economy as one of the most robust in the MENA region. There has been growth in the international trade and construction sectors in Qatar, and increasing reliance by the international business community on arbitration to resolve complex high stakes commercial disputes in Qatar. There has also been a sustained drive by the Qatar Government and other legal actors to develop a Qatar arbitration-friendly jurisdiction as a part of a Qatar rule of law system that is focused towards attracting international investment and facilitating continued economic development.

The first important step towards developing an arbitration-friendly jurisdiction in Qatar was on 30 December 2002, when Qatar acceded to the New York Convention. This was followed in 2005 by the establishment of the Qatar Financial Centre ("the QFC") which was intended to be a separate jurisdiction within the State of Qatar with its own arbitration mechanisms. In 2006 the Qatar International Center for Conciliation and Arbitration ("the QICCA") was established within the State of Qatar as distinct from the QFC.⁵

Qatar's preparations to host the 2022 FIFA World Cup have resulted in a significant increase in construction arbitration. Initiatives have been developed in this respect, such as the preparation by the QFC of construction adjudication rules ("Q-Construct"), to provide parties with a cost and time efficient procedure to resolve their disputes. Education programs have been developed and implemented by Qatar University College of Law and the Qatar Judicial Institute to inform law students and lawyers about modern arbitration rules and trends.

The most significant recent development, however, is Qatar's Law No. (2) of 2017 Promulgating the Law of Arbitration in Civil and Commercial Matters ("the New Law").⁶ The New Law substantially reforms arbitration law in Qatar, replacing Articles 190-210 of the Code of Civil and Commercial Procedure.⁷ It is modelled on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration of 1985 ("the Model Law"). The New Law is intended to meet the highest standards and practices of modern arbitration. This Insight provides a summary of some of its key provisions.

International Commercial and Financial Disputes", Durham University Institute of Commercial and Corporate Law Annual Lecture, 21 January 2016, which benchmarks nine key factors relevant to deciding commercial disputes where parties may come from very different cultures and political and economic systems. This is particularly relevant to the international arbitration context.

⁵ Qatar has two separate jurisdictions with respect to arbitration: the State of Qatar and the QFC, the common law jurisdiction created by the Qatar Financial Centre Law (Law No. 7 of 2005). This paper considers arbitration in the context of the State of Qatar and not under the QFC arbitration system, which applies the QFC Arbitration Regulations 2005 based on the UNCITRAL Model Law and is enforceable by the QFC Court at the Qatar International Court and Dispute Resolution Centre ("the QICDRC"), which operates under international common law and is comprised of international judges.

⁶ The New Law was gazetted on 16 February 2017 and was expected to come into force on 13 April 2017. It applies to any arbitration that was ongoing at the time the New Law came into force.

⁷ Sections 190-201 of the Code of Civil and Commercial Procedure were widely criticized and Qatar recognized the need to update them. See, for example, Talal Al-Emadi, "Qatar Arbitration Law: Some Central Issues" (Qatar: QNRS Repository, 2011), and Zain Al Abdin Ahmed Sharer, "Does Qatar need to reform its arbitration law and adopt the UNCITRAL Model Law of arbitration? A comparative analysis", *The Legal & Judicial Journal* (Qatar: Ministry of Justice, 2011).

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Scope of application

The New Law defines “commercial arbitration” similarly to that in the Model Law as being “commercial” when a dispute arises out of a legal relationship that has an economic nature, and includes commercial transactions, investment, financial, banking, industrial, insurance, touristic, and any other transactions of an economic nature.⁸

The New Law applies to international and domestic arbitrations.⁹ Arbitrations will be considered “international” where the parties agree to attempt to resolve their dispute via arbitration in Qatar or outside Qatar, where the subject matter of the dispute is connected to more than one state, where the principal places of business of the parties subject to an arbitration are located in different countries at the time the arbitration agreement is concluded, or if one of the following is located outside Qatar: 1. the place of arbitration as set out in the arbitration agreement, 2. the place where a substantial part of the obligations arising from the commercial relationship between the parties are to be performed, or 3. the place with which the subject matter of the dispute is most closely connected.¹⁰

The New Law also applies to arbitrations involving public and private entities provided the arbitration is conducted in Qatar or when the parties to an arbitration conducted outside Qatar have agreed that their arbitration will be governed by the New Law.¹¹ Agreements to arbitration in administrative contracts are to be approved by the Qatar Prime Minister or his delegate.¹²

Arbitration agreement

While the previous arbitration provisions in Qatari law required arbitration agreements or “deeds of arbitration” to be concluded in traditional written format, the requirements in the New Law may be satisfied by the exchange of written means including written electronic communications or letters between parties where delivery is proven.¹³

The arbitration agreement may exist in the contract that is the subject of dispute or in an independent document.¹⁴ Recourse to arbitration may be made by reference in a contract to a document, or arbitration clause, that will be deemed an arbitration agreement, provided the contract is in writing and explicitly provides the arbitration document or clause is an integral part of that contract.¹⁵

The New Law also provides that the Qatar courts may not hear a case that is subject to a valid arbitration agreement.¹⁶ If a party attempts to file a case before a Qatar court regarding a dispute that is subject to a valid arbitration agreement, the court, following an objection by the other party to that agreement, shall consider the case inadmissible provided the agreement is valid.¹⁷ Qatar courts may however determine the legitimacy and enforceability of an arbitration clause.¹⁸

⁸ New Law, Art. 2(3).

⁹ Ibid., Art. 2(1).

¹⁰ Ibid., Art. 2(4).

¹¹ Ibid., Art. 2(1).

¹² Ibid. Art. 2(2). The term “administrative contracts” is not defined in the New Law.

¹³ Ibid., Art. 7(3).

¹⁴ Ibid., Art. 7(1).

¹⁵ Ibid., Art. 7(5).

¹⁶ Ibid., Art. 8(1).

¹⁷ Ibid.

¹⁸ Ibid., Art. 16(1).

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Formation of arbitral tribunal

The New Law provides the arbitral tribunal greater independence. In the arbitration agreement, the parties may determine the procedures by which arbitrators may be appointed, and may authorize an “alternative authority”, such as an arbitration institution or third party, to appoint an arbitrator or chairman in the event the parties do not agree such appointment.¹⁹

When there is no provision in an arbitration agreement for an arbitration institution to appoint arbitrators, the Qatar courts shall continue to have power to appoint arbitrators where the parties to that arbitration do not agree such appointment.²⁰ The appointment of arbitrators shall be among those persons registered at the national registry of arbitrators at the Qatar Ministry of Justice, unless the arbitration agreement specifies an arbitration institution and provides for that institution to appoint arbitrators from its lists of arbitrators.²¹

An odd number of arbitrators must be appointed to each arbitration tribunal,²² and any person with legal capacity and good reputation may be appointed an arbitrator.²³ An arbitrator must not have been convicted by final judgment of a felony or misdemeanor involving moral turpitude or dishonesty.²⁴

Arbitral procedure

Unlike the old law, the New Law consecrates the principle of severability of the arbitration clause from the contract.²⁵ When one party to an arbitration agreement challenges the legality and integrity of the contract of which the arbitration agreement forms part, it will not by that challenge alone affect the applicability of the arbitration agreement.²⁶ The New Law also includes the rule of competence-competence, empowering an arbitral tribunal to decide its own jurisdiction.²⁷

The New Law authorizes the parties to an arbitration to empower the arbitral tribunal to render interim measures.²⁸ If a party against whom the interim measure is rendered refuses to voluntarily comply with it, the other party may request a court of competent jurisdiction to issue an injunction to comply with the interim award.²⁹ Costs or damages will be recoverable from parties who seek interim measures if the arbitration tribunal subsequently decides that such measures were not required in the circumstances.³⁰

The parties may obtain interim measures via the courts before the commencement of proceedings or during arbitral proceedings where the arbitral tribunal does not have jurisdiction or is unable to act effectively.³¹ The arbitral tribunal may, once it has been appointed, order interim or provisional remedies that are dictated by the nature of the dispute or for the purpose of preventing irreparable damage.³²

¹⁹ Ibid., Art. 11(6).

²⁰ Ibid.

²¹ Ibid., Art. 11(10).

²² Ibid., Art. 10.

²³ Ibid., Art. 11(1).

²⁴ Ibid.

²⁵ Ibid., Art. 16(1).

²⁶ Ibid.

²⁷ Ibid., Art. 16(1).

²⁸ Ibid., Art. 17(1).

²⁹ Ibid., Art. 17(3). The New Law defines “Competent Court” as the Qatar Court of Appeal, Circuit of Commercial Arbitration Disputes Settlement, which is to be established, and the QFC Court of First Instance. Ibid., Art. 1.

³⁰ Ibid., Art. 17(4).

³¹ Ibid., Art. 9.

³² Ibid. Art. 17(1).

The award

The New Law promotes confidentiality by expressly precluding the publication of the arbitral award, partially or wholly, unless both parties have agreed otherwise.³³ It also promotes efficiency. Absent contrary agreement between the parties, the arbitral tribunal will be required to render its final award on the merits of the dispute within one month from the closing of the arbitration pleadings.³⁴

The New Law acknowledges the finality of arbitral awards.³⁵ The losing party will no longer be able to appeal an award on substantive grounds, but will be able to challenge it through an annulment, within one month of receipt of the arbitral award or judgment, on the ground of lack of procedural integrity.³⁶

Concluding remarks

The New Law is to be commended and it is expected it will promote international commerce and investment in Qatar in the long term. It is likely the reforms will take time to bed in and advance local perceptions of international standards in the short term, but the international business community should gain confidence from recent promising signs that the Qatar courts are gradually developing a more arbitration-friendly approach.

In September 2014, Qatar's final court of appeal, the Court of Cassation, in its decision No. 2216/2013, ruled that the requirement in the Qatar Code of Civil and Commercial Procedure for legal decisions to be issued in the name of His Highness the Emir, does not apply to foreign arbitral awards. In this case, the arbitration was seated in Qatar, between Qatari entities, in respect of a Qatari project, with Qatar law governing and proceedings conducted under the International Chamber of Commerce Rules of Arbitration ("the ICC Rules"). Despite the fact that there was no apparent foreign "ingredient" in the arbitral proceedings, other than the proceedings being subject to the ICC Rules, the Court of Cassation classified the arbitration award as a "foreign award" and the requirement of it being issued in the name of His Highness the Emir did not apply.

In February 2016, the Qatar Court of Appeal in its decision on Appeal No. 1716/2015, reversed a decision of the Court of First Instance that refused to recognize an arbitration award issued under the ICC Rules because a finality certificate was not provided.³⁷ The Court of Appeal considered that the ICC Rules expressly stated that arbitral awards rendered pursuant to those rules are final and binding and that this was sufficient to satisfy the requirement of finality.

While the Qatar courts do not recognize binding precedent under the Qatar legal system, first instance courts in Qatar do generally follow the principles set by the Court of Appeal and Court of Cassation. It is expected that the combined impact of the issuance and application of the New Law, an increasingly rational approach by the Qatar courts to the understanding and implementation of the New York Convention, and the development of arbitration institutions and

³³ Ibid., Art. 31(8).

³⁴ Ibid., Art. 31(5).

³⁵ Ibid., Art. 31.

³⁶ Ibid., Art. 33.

³⁷ In 2016, under Qatar Law, a party seeking enforcement of a foreign judgment or arbitral award was required to first seek an exequatur, or grant of the power of a writ of execution, to such decision, prior to commencing enforcement proceedings. To grant an exequatur, the applicant was required to submit, among other documents, a certificate of finality in respect of the award of the courts of the foreign jurisdiction where the award was issued. It was required that the certificate had to state the award was final and was not subject to any recourse under the laws of the foreign jurisdiction.

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arbitration education programs in Qatar, will strengthen the confidence of the international business community that Qatar is an arbitration-friendly jurisdiction committed to a rule of law system that can adequately protect their interests. This is essential for Qatar to achieve its vision to be an attractive investment destination and for its overall economic development.

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