



QATAR'S NEW ARBITRATION LAW

One small step for the Emiri Diwan. One giant leap for Arbitration in Qatar.

This week will long be remembered as a milestone in the development of arbitration in Qatar as the new Qatar Arbitration Law in Civil and Commercial Matters (No. 2 of 2017) ('**QAL**') comes into force.

When Emir Sheikh Tamim Bin Hamad Al Thani signed the QAL in February 2017, it caused great excitement in Doha. The new law has been a decade in the making and preceded by some particularly controversial decisions on enforcement in the Qatari jurisdiction. There is great hope within the Persian Gulf that this is one more step in the development of a friendly environment for the efficient, confidential resolution of commercial disputes in the region. However, commercial parties, tribunals and legal representatives will ultimately make their final judgment once the QAL firmly puts down its roots.

The law repeals those legislative provisions that previously governed arbitration in Qatar: Articles 190 to 210 of the Civil and Commercial Procedure Law (Law No. 13 of 1990) ('**the Procedural Law**'). The below is not a comprehensive overview of the QAL, but rather an analysis of some of its key provisions. In addition to the usual disclaimers, it is necessary to add a general health warning: as with any commentary on the new law, which was issued in Arabic, it is subject to those linguistic nuances that may well be lost in translation¹.

1. PROVENANCE AND LEGAL EFFECT

UNCITRAL Model Law

Ostensibly modelled on the UNCITRAL Model Law 1985 (amended in 2006), there are some key differences between the eventuating QAL and the instrument from which it is derived. In particular:

- (i) The QAL applies to those disputes traditionally understood as domestic as well as international arbitrations by virtue of Article 2(1) QAL²;
- (ii) The QAL jettisons some of the detail on court-ordered interim measures that was included in the UNCITRAL Model Law.

Of course, it is inevitable that in considering the provisions of the QAL, the Qatari courts (whether QFC or otherwise) will be keen to have regard to its provenance. The UNCITRAL Model Law will not be

¹ All translations are derived from *Lexis Middle East Law*.

² 'Without prejudice to the provisions of international conventions in force at the State, the provisions of this Law shall apply to every Arbitration between persons of public or private law, regardless of the nature of the legal relationship, subject-matter of the dispute, if the Arbitration is carried out inside the State, or in the case of an international commercial arbitration taking place abroad and the parties thereof decide to make it subject to the provisions of this Law' (Article 2(1) QAL)

conclusive but may well be indicative as to the meaning and interpretation of any given article replicated in spirit or form in the QAL.

Retrospective Effect

The new law comes into effect from 12 April 2017³. Article 3 makes it clear that the law is retrospective⁴. As a consequence many awards issued prior to the effective date of the law will nonetheless be subject to the QAL's framework for applications for annulment discussed below.

Any existing arbitrations will be subject to the new law. At this stage parties and arbitrators will already be considering the ramifications of the new law. If they are yet to do so, this should be a priority.

2. ARBITRATION AGREEMENT

Agreement

Any arbitration agreement must be in writing and signed by a person with legal capacity/authority. The fact that the agreement was in writing can be evidenced by way of electronic communications proving receipt in writing (Article 7(3) QAL).

Separability and Kompetenz-Kompetenz

Article 16 of the QAL begins with the reaffirmation of two principles promoted by the UNCITRAL Model Law⁵: '*Kompetenz-Kompetenz*' (the Tribunal's authority to rule on questions pertaining to its own jurisdiction) and separability or autonomy of the arbitration clause (preserving the right to arbitrate pursuant to an arbitration clause within a contract alleged to have been terminated or rendered void).

Neither of these provisions are particularly controversial but they are given a firm foundation at least on the face of the QAL.

The extent to which *Kompetenz-Kompetenz* is in fact preserved by the QAL must, however, be subject to the provisions on correction of the award at Article 33, discussed below.

3. APPOINTMENT AND ARBITRABILITY

The pre-qualification provisions for arbitrators are undoubtedly more stringent than the UNCITRAL Model Law. Of particular note are the requirements for any arbitrator to be:

(i) appointed from among those accredited arbitrators on the Ministry of Justice's arbitrator's registry pursuant to Article 11.1.; and

(ii) '*of good conduct and reputation*' pursuant to Article 11.1.c.

Article 11.1 appears to be softened by the acknowledgement in Article 11.10 that arbitrators may be appointed from an arbitration register at 'other Arbitration Centres'. As a consequence, the provision at Article 11.1 would appear only to apply to ad hoc arbitrations. It is not necessary to spell out why the concepts described at Article 11.1.3 are malleable in the absence of any legislative definition.

³ Coming into effect 30 days after publication in the Official Gazette

⁴ The provisions of the enclosed Arbitration Law in Civil and Commercial Matters shall apply to every existing Arbitration on the date of its entry into force or following its entry into force (Article 3, QAL).

⁵ See Article 16 of the UNCITRAL Model Law and paragraphs 25-26 of Explanatory Note by the UNCITRAL secretariat.

The arbitral Tribunal itself will consist of three arbitrators in default of agreement by the parties.

One outstanding issue of debate is the extent to which the QAL applies to the blurred line between those disputes classified as 'private' and 'public' in nature.

Article 2 of the QAL stipulates that in respect of 'administrative contracts' entrance into an arbitration agreement must be approved either by the Prime Minister or by a party exercising the powers delegated by the Prime Minister. The definition of 'administrative contracts' is not settled in Qatari law. However, the Article goes further and asserts that '*the persons of public law⁶ shall not, in any case, refer to Arbitration to resolve the disputes arising between them*'.

The wording of the Article would appear to anticipate that the absolute non-arbitrability provisions apply only to those contracts arising between two or more public bodies. If these provisions apply to any and all contracts entered into by a public body with private institutions, for example, then the application of the non-arbitrability clause to 'administrative contracts' would be rendered otiose.

Neither '*administrative contract*' and '*persons of public law*' are defined terms within the QAL, though it is worth noting that the concept of an '*administrative contract*' within the context of Qatar's Civil Code has long been an issue of debate within the Qatari legal community. For common law lawyers, the QAL perhaps throws up many interpretive challenges. However, it is important to bear in mind that despite the lack of resort to precedent within those jurisdictions deriving their jurisprudence from the Egyptian Civil Code, legislation does not (as common lawyers often think) operate in a complete vacuum.

4. ISSUING, CHALLENGE AND ENFORCEMENT

Ministry of Justice

Perhaps one of the slightly more controversial elements of the QAL is that Article 31(11) requires the Arbitral Tribunal to serve an electronic copy of the award on the Ministry of Justice's '*administrative unit specialised in Arbitration affairs*' within two weeks of issuance. At a practical level, the nature of the unit and even the address to which the award must be sent is at present unclear and so it would be appropriate to make these enquiries with the Ministry of Justice as soon as possible.

There are, of course, also questions about the threat to the confidentiality of proceedings if a party complies with the above requirement, which have not as yet been addressed.

Challenge of the Award

Annulment

Article 33 QAL sets out the means for making an application to challenge the arbitral award. Such a challenge has been streamlined into an 'application for annulment', which must be made to the '*Competent Court*'. This facilitates greater choice for the parties by virtue of the definition of '*Competent Court*'.

This differs from Article 206 of the Procedural Law, which permitted appeals from an Award in tandem with the '*application for nullity*' pursuant to Article 207-209.

The relevant party has a month to issue the application in the Competent Court following delivery of the copy of the arbitral award.

Competent Court is defined in Article 1 QAL as:

⁶ On occasion, 'persons of the public law', appears to be translated as '*public entities*'.

- (i) The Department of Arbitration of Civil and Commercial Disputes at the Court of Appeal; or
- (ii) The Trial Chamber at the Civil and Commercial Court of Qatar Financial Centre, based on the agreement of the parties.

This definition affords the parties the opportunity to elect the Competent Court in which to issue a challenge to the award. Those options include the QFC Court of First Instance, which has particularly experienced enforcement judges applying common law principles and may be attractive to certain commercial entities operating in Qatar.

The grounds for annulment are set out at Article 33.2:

- (i) Lack of legal eligibility or capacity of the Arbitrator;
- (ii) The applicant for annulling the award was not duly notified of appointing an arbitrator or of the Arbitration proceedings, or the applicant failed to submit a defence for any reasons falling beyond such applicant's control.
- (iii) The Arbitral Award exceeds the ambits of the jurisdiction afforded to the Tribunal;
- (iv) The composition, appointment or proceedings of the Tribunal were not in accordance with the parties' agreement or, in the absence of such agreement, in violation of the Arbitration Law;
- (v) Invalidity, or stay, of an Award by virtue of an order of the courts in which the arbitration was seated pursuant to the laws of that state.

Article 33(5) empowers the Competent Court to suspend the annulment proceedings at the election of one of the parties, unless the parties have agreed otherwise in order to allow the Arbitral Tribunal to correct the offending elements of the underlying proceedings.

The concept of allowing the parties to make representations for the correction of minor clerical errors is well known to arbitral lawyers (sometimes referred to as the Slip Rule). It is enshrined in Article 33 of the UNCITRAL Model Law. However, it would appear that the QAL may go somewhat further as it permits the Tribunal to take measures, which it deems 'proper' to 'remove the reasons of nullity'. This seems to go much further than the restrictive ambit of a 'slip rule'.

The Explanatory Note to the UNCITRAL Model Law clearly dissuades more than *de minimis* court interference. It establishes the mandate of the arbitrator and the facilitation of the proceedings: '*Beyond the instances of these two groups, no court shall intervene, in matters governed by this Law.*' There is to my mind an important question here as to whether Article 33 goes beyond this *de minimis* threshold.

The provisions relating to an application for annulment are quite clear. Once the Competent Court has made a ruling on the question of annulment it cannot be subject to appeal (Article 33.6).

Enforcement

An unsuccessful application for annulment will not bar the same party from seeking to challenge the enforcement of the award, though a party seeking to enforce must wait until the period for raising an annulment challenge has expired.

A decision on the enforcement of an award is subject to the right of appeal to the Competent Court. However, there is no specific provision equivalent to Article 33.6 that bars a further appeal of the Competent Court's decision.

There are some features to the existing arbitral landscape in Qatar that the QAL does not change. As practitioners in the middle east will be well aware, it has been common to find what might be referred to as '*form over substance*' arguments successfully deployed at the enforcement stage of proceedings in the UAE and Qatar.

The decisions of the Qatar Court of Cassation requiring awards to be issued in the name of the Emir and the suggestion that institutional arbitrations seated in Qatar might still be considered 'foreign' arbitral awards are in no way overridden. Arguments about legal capacity and authority (which are often deployed) can still be employed by parties challenging enforcement of an award.

These are all important factors for parties to consider in order to preserve the enforceability of any award, which survive the coming into force of the QAL.

Further to the above, not all provisions of the Procedural Law pertaining to arbitration have in fact been repealed. Article 380 of the Procedural Law deals with the execution of judgments in Qatari courts. Article 381 stipulates that '*the provisions of the preceding two Articles shall apply to the arbitration decisions passed in a foreign country. Arbitration decisions shall be passed on a matter which may be decided on by arbitration according to the laws of the State of Qatar.*'¹

Articles 380 and 381 have not been repealed by the new law. It remains to be seen what (if any) impact that omission has for the purpose of enforcement under the QAL.

CONCLUSION

The general view in the legal and business community in Doha is that this legislation represents progress for arbitration on the peninsular. As with all legislative reforms, the legal community will take some time adjusting to the practical application of the law.

The most important advice for all legal professionals and their clients operating in the State of Qatar is to take nothing for granted.

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⁷ With thanks to Paul Prescott for his valuable insights.