

KEY FEATURES AND CHALLENGES OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE GULF STATES

Dr. Philipp Stompfe, LL.M. (London)
Rechtsanwalt / Attorney at Law

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STRUCTURE

- 1. GCC States**
- 2. Basic Features**
- 3. Interplay of Economic Development and Arbitration (Disputes)**
- 4. Key Objectives of the „new“ Arbitration Laws**
- 5. Annulment and Enforcement of Arbitral Awards (an example of Qatar)**
- 6. Challenges**
- 7. Outlook**

THE GULF STATES (GCC)

❖ Qatar

❖ Saudi Arabia

❖ United Arab Emirates

❖ Kuwait

❖ Oman

❖ Bahrain

BASIC FEATURES

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❖ Enforcement Regime

- All GCC States are signatories to the **New York Convention**
 - including the QFC, DIFC, ADGM (Freezones)
- **Riyadh Convention** on Judicial Cooperation between States of the Arab League of 1983
- All GCC States are signatories to the **ICSID Convention**
- Wide Network of Bilateral Investment Treaties (BIT)
- All GCC States have BIT's in force with Germany

❖ Emergent trends towards arbitration friendly regimes (mostly free-standing arbitration laws)

- ❖ UAE: Law No. 6 of 2018
- ❖ Qatar: Law No. 2 of 2017
- ❖ Bahrain: Law No. 9 of 2015
- ❖ Saudi Arabia: KSA Royal Decree No. M/34 of 2012
- ❖ Oman: Royal Decree 47 of 1997
- ❖ Kuwait: Articles 173 to 188 of the Code of Civil and Commercial Procedure (Law No. 38 of 1980)

BASIC FEATURES

❖ **UNCITRAL Model Law**

- Bahrain
- Qatar
- UAE
- Saudi Arabia
- Oman
- Kuwait

❖ **No restrictions for foreign arbitral institutions to operate in the GCC States**

- Most common: ICC / LCIA / DIAC / DIFC-LCIA / CRCICA
- Less common: DIS / AAA

❖ **Comprehensive Infrastructure**

- ❖ Wide network of arbitration bodies in the GCC

BASIC FEATURES

- ❖ Recognition of the *Doctrine of Separability*
- ❖ Recognition of the principle of *Competence-Competence*
- ❖ Arbitration Agreement
 - *Conditio Sine Qua Non* – no arbitration without an arbitration agreement
 - Mostly flexible requirements
- ❖ IBA Rules on the Taking of Evidence used for guidance
 - Document Production
 - Witness Statements
 - Expert Reports
- ❖ No express restrictions on third-party funders apply in relation to commercial arbitration
- ❖ Prohibition of success fee agreements for law firms
- ❖ Permission of „Asymmetric Dispute Resolution Clauses“ is unclear

INTERPLAY OF ECONOMIC DEVELOPMENT AND ARBITRATION (DISPUTES)

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- ❖ Qatar: FIFA World Cup 2022
- ❖ UAE: Expo 2020
- ❖ Saudi Arabia: NEOM Project

INTERPLAY OF ECONOMIC DEVELOPMENT AND ARBITRATION (DISPUTES)

Example: Qatar – FIFA World Cup 2022

- **NDIA (Airport) Disputes**
- **Stadium Disputes**
- **Rail Disputes**
- Flanked by:
 - Port Disputes
 - General Construction Disputes

**INFRASTRUCTURE
(ARBITRAL BODIES)**

INFRASTRUCTURE (UAE)

- Dubai International Arbitration Centre (DIAC)
- Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC)
- Sharjah International Commercial Arbitration Centre (SICAC)
- Ras Al Khaimah Centre for Reconciliation and Commercial Arbitration
- Emirates Maritime Arbitration Centre (EMAC)
- International Islamic Centre of Reconciliation and Arbitration
- DIFC-LCIA Arbitration Centre
- DIFC Dispute Resolution Authority
- ICC MENA

INFRASTRUCTURE (QATAR)

- **Qatar International Centre for Conciliation and Arbitration (QICCA)**
 - ❖ Established in 2006 under the Qatar Chamber of Commerce and Industry
 - ❖ Institutional rules for domestic and international commercial arbitrations

- **Qatar International Court and Dispute Resolution Centre (QICDRC)**
 - ❖ Established in 2005 under the QFC
 - ❖ Disputes in connection with contracts concluded under the QFC legislation and businesses established within the QFC

KEY OBJECTIVES OF THE „NEW“ ARBITRATION LAWS

KEY OBJECTIVES

- New rules regarding the requirements and enforcement of arbitration agreements
- Clarification with regards to the nullification and enforcement of arbitral awards
- Empowerment of Arbitral Tribunals to grant interim relief and conservatory measures
- Clarification with regards to the supervisory function of the „competent courts“
- Establishment of ad-hoc arbitration procedure
- Based on the UNCITRAL Model law, but no complete/unchanged implementation

(Exception Bahrain)

**ANNULMENT AND ENFORCEMENT OF
ARBITRAL AWARDS
AN EXAMPLE OF QATAR**

ANNULMENT AND ENFORCEMENT OF ARBITRAL AWARDS

❖ Major Improvement

Article 205 Law No. 13/1990 [Old Arbitration Regime]

“Awards of the arbitrators may be appealed in accordance with the relevant rules of appeal of judgments issued by the court initially competent to consider the dispute within fifteen days from the filing of the original judgment with the Registry of the court. Notwithstanding the aforementioned, the award shall not be appealable if the arbitrators were authorized to arbitrate the dispute or if they acted as such in the appeal or if the parties expressly waived their rights to file an appeal.”

➤ **Right to appeal against arbitral awards on matters of law and fact**

Article 206 Law No. 13/1990 [Old Arbitration Regime]

“With exception to paragraphs five and six in the aforementioned Article 178, it shall be permissible to appeal awards of arbitrators in an appeal to review the claim in accordance with the applicable rules pertaining to court judgments. The appeal shall be filed with the court that has jurisdiction to hear the dispute.”

➤ **Power of the Qatari courts to reconsider an arbitral award**

A NOTE ON OMAN

➤ Article 53(2) Royal Decree 47 of 1997:

„The court entertaining the suit for nullification may, by itself, nullify the arbitration award if such an award is contrary to the public order of the Sultanate of Oman.”

- Omani courts have broad and unspecified powers to nullify an award if it **conflicts with an earlier decision passed by the Omani courts**
 - ❖ Establishment of a Doctrine of Precedence
 - ❖ Unknown and foreign to international commercial (and investment) arbitration

ANNULMENT AND ENFORCEMENT OF ARBITRAL AWARDS

- **Article 33 (1) Law No. 2/2017: Finality of Arbitral Awards**

- **Article 33 (2) Law No. 2/2017: Annulment of Arbitral Awards [Cf. Article 34 (2) Model Law]**
 - A party to the arbitration agreement did not have capacity to enter into the arbitration agreement or the arbitration agreement is invalid
 - The party making the application was not given proper notice of the appointment of an arbitrator, or of the proceedings, or was unable to present its defence for any other reasons beyond its control
 - The award decides matters which go beyond the scope of the arbitration agreement
 - The composition or appointment of the tribunal, or the proceedings, were not in accordance with the agreement of the parties
 - If the subject matter of the dispute is not capable of settlement by arbitration or the arbitral award violates the public policy of Qatar (Article 33(3) Law No. 2/2017)

[Cf. Article 34 (2) Model Law]

ANNULMENT AND ENFORCEMENT OF ARBITRAL AWARDS

- **Article 34 and Article 35 Law No. 2/2017: Recognition and Enforcement of Arbitral Awards**
- The party seeking enforcement should apply for enforcement to the competent court, along with a copy of the arbitration agreement and the award, accompanied by a certified Arabic translation
 - A party can resist enforcement on the narrow circumstances listed in Article 35(1) of Law No. 2/2017, which are the same grounds that a party can rely on to challenge an award
 - In addition, a party can resist enforcement, if the award has been set aside or enforcement has been stayed in the country in which the award was issued or in accordance with the law thereof (Article 35(1)(e))
 - Further, the competent court will refuse enforcement on its own motion if the subject matter of the dispute is incapable of settlement by arbitration or the arbitral award violates the public policy of Qatar (Article 35(2))

CHALLENGES

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- ❖ Public Policy
- ❖ Administrative Contracts (Capacity to conclude arbitration agreements)
- ❖ Arbitrability
- ❖ Interest
- ❖ Commencement of Arbitral Proceedings & Time Limits

CHALLENGES

PUBLIC POLICY

- ❖ **No differentiation between National Public Policy and International Public Policy**
- ❖ **Wide scope of mandatory rules**
 - **Shari`a Principles**
 - **Tort Liability**
 - **Mandatory Employment Law Regulations**
 - **Decennial Liability (in respect of construction works)**
 - **Local Shareholdings (51% - 49%)**
 - **Regulations regarding Contract Interpretation**
 - **Good Faith**
 - **Claims based on Unjustified Enrichment**

 - **Award must be rendered in the Name of the Emir (Qatar)**

CHALLENGES

ADMINISTRATIVE CONTRACTS

Administrative Contracts: “contracts concluded between a legal person of public law, which relate to the operation of a public service, include exceptional and unusual conditions which are distinct from the ambit of private law.”

(Qatar Court of Cassation Appeal No. 49/2008)

Pre-Conditions:

1. one of the parties thereto must be a public authority;
2. it must be related to a public service (courts, provision of electricity, education, public schools, public universities, public parks, emergency services, health care, military, postal service, public security, public transportation, social services, telecommunications, transportation, infrastructure, water supply, and sewer systems) or be classified by the law as an administrative contract; and
3. it must include an “exceptional” or “onerous” clause or condition from the public law.

CHALLENGES

ADMINISTRATIVE CONTRACTS

Consequence:

- ❖ **No valid arbitration agreement without express prior approval of the competent authority**
 - Saudi Arabia: Approval of the Prime Minister is imperative (Article 10(2) KSA Arbitration Law)
 - Qatar: Prime Minister's approval is imperative (cf. Article 3(5) of Law No. 7/2007 on the Settlement of Administrative Disputes)
 - UAE:
 - Federal government authorities: Prior Approval from the UAE Council of Ministers
 - Note: Further approval requirements and restrictions may apply in each Emirate (cf. Dubai Government Contracts Law No. 6 of 1997)
 - Similar provisions must be observed in Egypt and Libya

CHALLENGES NON-ARBITRABILITY (UAE)

- Employment Law Disputes
- Commercial Agency Disputes
- Criminal Matters

CHALLENGES

INTEREST

- **Saudi Arabia:** Award of Interest may violate Shari`a principles (prohibition of interest – *ribâ*)
 - Unenforceable and subject to challenge pursuant to Article 50 KSA Arbitration Law
 - Right of the KSA Court of Appeal to nullify awards on its own initiative in cases of violation of Shari`a principles (Article 50(2) KSA Arbitration Law)
 - Note: possible isolation of award on interest

- **Qatar:** No Statutory Interest Rate

CHALLENGES

COMMENCEMENT OF ARBITRAL PROCEEDINGS & TIME LIMITS

- ICC: **Commencement of Arbitration** with receipt of the **Request for Arbitration** by the ICC Secretariat
 - Qatar: Article 21 Law No. 2 of 2017
 - Saudi Arabia: Article 26 KSA Arbitration Law
 - Kuwait: no regulation
- UAE: Commencement of Arbitration on the day of **Constitution of the Arbitral Tribunal** (Article 27(1))
- Strict Statutory **Time Limits** to Render an Award
 - UAE: 6 months from the Date of Commencement (one permissible extension of 6 months)
 - Qatar: 1 month within the conclusion of the proceedings
 - Saudi Arabia: 12 months from the Date of Commencement (also in Oman)
- ❖ **Clear inclusion of international arbitration institutions in the arbitration clause**

OUTLOOK

OUTLOOK

- Positive development
- Long-lasting call for reform has been heard and followed
- “Arbitration friendly” jurisdiction
- Uncertainty of a 100% acceptance remains

“Three prominent arbitrators have been convicted and sentenced to imprisonment by a court in Qatar in connection with their role on a tribunal that issued an award against a relative of the Qatari royal family.” (GAR News 12 December 2018)

THANK YOU



Dr. Philipp Stompfe is an attorney of Alexander & Partner. Within the team of Alexander & Partner, he is primarily involved in international litigation and arbitration. He is an expert in international investment law and advises on international contract law and on the structuring and implementation of cross-border investment projects.

Alexander & Partner Rechtsanwälte mbB
Joachimsthaler Straße 30
10719 Berlin
Germany

ps@alexander-partner.com

T +49 (0)30 887780526

M +49 (0)176 32327868

F +49 (0)30 887780599