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Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards

Minas Khatchadourian (Qatar International Center for Conciliation and Arbitration) · Monday, September 23rd, 2013

A controversial decision by Qatar's Court of Cassation has ruled on the necessity for arbitral awards to be rendered in the name of His Highness The Emir of Qatar. The said ruling issued on 12 June 2012 (Petition No. 64/2012) set aside an arbitral award rendered under the auspices of the Qatar International Center for Conciliation and Arbitration (QICCA).

The award was made in the settlement of a disagreement between the partners in a Qatari Limited Liability Company (LLC) when one of them (the Plaintiff) decided to step out of the Company and assign his shares to the other partners (the Defendants) in return of a disputed amount of money.

The partner who wished to leave the LLC initiated the arbitration proceedings in 2008 as the other partners disagreed on the value of his shares. The award rendered by a sole arbitrator in 2010 obliged the Defendants to pay to the Plaintiff an amount of QAR 8,843,023 (about \$2,429,500).

Shortly after, the Defendants filed a civil case with the Tribunal of First Instance in Qatar, seeking to nullify the validity of the impugned award. The Tribunal of First Instance rejected the Defendants' case. Later in 2011, the Defendants brought the decision of the Tribunal of First Instance before the Court of Appeal. Nevertheless, in a Judgment delivered in January 2012, the Court of Appeal affirmed the finding of the Tribunal of First Instance. Finally in March 2012, the Defendants lodged a further appeal with the Court of Cassation to set aside the same award and the Supreme Qatari Court pronounced the said judgment.

In justifying the necessity of rendering any arbitral award in the name of H.H. The Emir of Qatar, the Supreme Court built its reasoning on several legal texts placed in hierarchical order: The first one is article 63 of the Qatari Constitution which states that "*Judicial Authority shall be vested in the Courts in the manner prescribed in this Constitution and **Judgments** shall be issued in the name of the Emir*". This text was completed by article 69 of the Qatari Civil Procedure Code which provides "***Judgments** are issued and executed in the name of H.H. the Emir of the State of Qatar*" (emphasis added). Then, the Court decided to analyze some of the legal provisions which govern arbitration in particular (art. 190 to 210 of the Civil Procedural Law) and where the Arabic text of the law makes no distinction between the terms "award" and "judgment".

For example, article 198 stipulates that "*Arbitrators render their **judgments** ... provided they do not violate the rules of public order and morality*". Also, article 204 provides that "*Arbitrators'*

judgments are not enforceable unless an order of execution is granted by the President of the Court with whose clerk the original judgment was registered, upon request of any of the concerned parties". Moreover, the Court added that article 207 specifies

"Parties may request the setting aside of arbitrators' **judgments** in the following cases:

– if the award was made without there being an arbitration agreement

[...]; or

– if it breaches one of the rules of public order or morality".

In the light of the above-mentioned articles, the Court considered that the legislator qualified the decision of the arbitrator as a "judgment", insisting on its binding effect on the parties and the authority of the Court to issue an execution order to implement and enforce its terms. Therefore, by virtue of Article 204 of the Civil Procedure Code, the arbitrator's judgment (award) should be issued in the name of H.H. The Emir.

The Court added

"rendering the **judgment** in the name of H.H. The Emir confirms that it is supported by Public Force and is enforceable as such in accordance with the public order. Any decision or judgment of the arbitral tribunal should be rendered in the name of H.H. the Emir; otherwise, it shall be considered null and void, contrary to public order and the Court may sua sponte declare it as such".

It is obvious that the Qatari Judges have ill-conceived the status of the Arbitrator and confused between the "permanent mandate" of the national judge to render justice by "judgments" on one hand, and the "temporary mission" of the Arbitrator who is not part of the Judicial Authority and renders "awards" or "decisions" on the other hand. Part of this misperception lays in the Arabic text of the law. As previously mentioned in this article and to reiterate, Arabic makes no distinction between the words "award" and "judgment".

It should be recalled that the source of an Arbitrator's powers and authorities is the common will of the parties who have freely chosen him/her to settle their dispute. Furthermore, arbitrators do not have either a proper forum or a specific national law to follow and their decision-making power does not derive from any national jurisdiction.

The origin of arbitral authority and power does not change the qualification of arbitration which is a form of non-State justice. Arbitrators are empowered to examine claims brought by the parties to a dispute, whether granting or rejecting such claims. They render binding and conclusive decisions with a *res judicata* effect and enforceable before national courts.

This controversial ruling has been criticized by arbitration practitioners in Qatar and has raised several concerns on:

A- The enforcement in Qatar of foreign arbitral awards (such as ICC, LCIA, AAA, SCC, DIAC awards, etc.) rendered by arbitrators abroad who – in the absence of any specific *lex fori* – may

reject the idea to render an award in the name of a King, a Sultan or an Emir.

B- Does this mandatory requirement as stated by the Qatari Judiciary, represent part of the *lex loci arbitri* which the arbitrators should abide by, if the seat of arbitration is fixed in Qatar? Does this apply also to an international arbitration (i.e. to ask a German Arbitrator, for example in an ICC case between a Qatari contractor and a Turkish sub-contractor, to render his award in the name of the Emir of Qatar)?

C- As a final point, as long as Qatar has ratified in 2002 the New York convention where article V 2(b) authorizes the national judge of *exequatur* to refuse *proprio motu* the enforcement of an award if such enforcement would be contrary to public policy, how can a concerned party overcome this situation where his award cannot be enforced and simply rejected by a non-knowledgeable judge in arbitration?

Finally, it is worth noting that between June 2012 and August 2013, few other arbitral awards have been simply set aside for the same reason by lower Qatari jurisdictions following the same rationale of the Supreme Court. However, the outcome in each case has been different as article 209 of the Qatari Civil Procedural law stipulates:

“The Court having jurisdiction over the request for setting aside may either confirm the award, or set the award aside totally or partially. **If the award is totally or partially set aside, the Court may refer the case back to the arbitrators to repair the violations contained in the award, or the Court may decide on the merits of the case itself if it hold that it has jurisdiction to do so**“ (emphasis added)

Therefore, some Qatari judgments have set aside the award without any further directions, others ruled – after setting aside the award- to refer the case back to the arbitrators to repair it and lastly a Court decided to hold jurisdiction and to decide on the merits of the case!

The author is the Director of the Qatar International Center for Conciliation and Arbitration and can be contacted at drminas@qcci.org.

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