

## The Contract Regulations of the Qatar Financial Centre

### 13.1 INTRODUCTION

The Qatar Financial Centre (QFC) can best be described as a special economic zone (EEZ) and its legal system as a system within a system (the Qatari legal order).<sup>1</sup> It was set up under Law No 7 (2005) [QFC Law], which is both its founding law and its Basic Law (effectively its internal constitution). The aim of the QFC was to attract foreign investment in the financial, banking, asset management and insurance sectors, chiefly through favourable incentives. This was expanded to encompass non-regulated activities that fall outside the broader financial sector. These include holding companies, special purpose companies, trusts, single family offices, professional, corporate and business services, as well as company headquarters. Even though the QFC legal system is distinct from the ordinary Qatari legal system and a variety of regulations regulate all matters related to the QFC, several Qatari laws are applicable, particularly Law No 11 of 2004 establishing the Penal Code<sup>2</sup> and Law No 4 of 2010 Combatting Money Laundering. There are two significant incentives for incorporating in the QFC as opposed in the State of Qatar. Firstly, QFC-regulated entities are not susceptible to the regulation of the Qatar Central Bank. Secondly, QFC entities may have 100 per cent foreign ownership, which is not the case under the Qatari Law No 13 of 2000, establishing the Foreign Capital Investment Law.

<sup>1</sup> The academic literature on the QFC is feeble and most of it focuses on the QFC Court. See Z Al Abdin Sharar, M Al Khulaifi, 'The Courts in Qatar Financial Center and Dubai International Financial Center: A Comparative Analysis', 92(2016) 46 HKLJ 529; equally, I Bantekas, 'Transplanting the UNIDROIT Contract Principles into the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants' (2021) 26 Uniform LR 1.

<sup>2</sup> However, in accordance with Art 18(1) of the QFC Law, where the conduct of an entity is consistent with the laws and regulations of the QFC, such conduct shall not constitute a criminal offence under the law of the QFC or the laws of the State of Qatar.

In the remit of their roles and functions, QFC governing entities possess the power to propose regulations (effectively internal QFC law) to the Qatari Minister of Economy and Commerce, which upon approval becomes an integral part of QFC law.<sup>3</sup> The QFC Law sets out in its article 9 this authority of QFC entities to adopt regulations.

For the purposes of this chapter, our focus will be on Regulation No 4 (2005), known as the QFC Contract Regulations. This was one of the first Regulations adopted following the creation of the QFC, which in turn evinces the determination to create a legal system that is distinct from ordinary Qatari law. Because QFC-regulated entities enter into transactions both within the QFC but largely also with companies across the globe, it was important that said agreements be regulated in a way that made sense. Article 18(3) of the QFC Law stipulates as follows:

The QFC Laws and Regulations shall apply to the contracts, transactions and arrangements conducted by the entities established in, or operating from the QFC, with parties or entities located in the QFC or in the State but outside the QFC, unless the parties agree otherwise.

This is a deceptively simple conflict of laws provision with significant implications for parties that fail to adequately think about the governing clause of their contract. Several judgments of the QFC Court serve to illustrate the point.<sup>4</sup> As will become evident, the Contract Regulations were predicated (almost verbatim) in large part on the UNIDROIT Principles of International Commercial Contracts (PICC).<sup>5</sup> Given that this book assumes at least a basic understanding of contract law, where the Regulations reflect or iterate the provisions of the PICC no further analysis will be provided, other than a reference to the corresponding provisions.

### 13.2 THE RELATIONSHIP OF THE QFC CONTRACT REGULATIONS WITH THE QATARI CC

Article 2(1) of the Regulations begins with a rather cryptic statement, according to which ‘to the fullest extent permitted by the QFC Law, rules and

<sup>3</sup> Z Al Abdin Sharar, M Earley, ‘The Qatar International Court: Judicial Update’, (2018) MENA Bus L Rev 46, 47. The QFC governing entities consist of the QFC Authority, the QFC Regulatory Authority, the Regulatory Tribunal and the Civil and Commercial Court.

<sup>4</sup> See, in particular, *Daman Health Insurance Qatar Ltd v Al Bawakir Co Ltd*, [2017] QIC (F) 2.

<sup>5</sup> See, in particular, S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP 2015); M J Bonell (ed), *The UNIDROIT Principles in Practice* (Brill 2006).

regulations of the State [of Qatar] concerning the matters dealt with by or under these Regulations shall not apply in the QFC'. This is concerning because the parties to a contract governed by the Regulations may have specifically intended to exclude the application of Qatari law. In the opinion of the authors, it is quite clear that ordinary Qatari private law shall not override the Regulations, unless the parties have expressly so provided. Even so, Qatari international commitments, as these are transposed in ordinary legislative instruments, can override the Regulations, although this will be rare in practice. The QFC Law is subservient to the Qatari Constitution and as a result references in bilateral investment treaties (BITs) or regional and global free trade agreements that have been ratified by the Shura Council override the QFC Law and by extension the Regulations. Qatari public policy, as opposed to a distinct QFC public policy, is embedded in the QFC Law.<sup>6</sup>

In theory, the Qatari CC, including its interpretation by the Court of Appeals and Cassation, could supplement the Regulations where the latter are silent on a particular issue, but such a likelihood seems to have been excluded. There is no indication in the Regulations suggesting such a supplementary role for the CC, whether directly or indirectly. The QFC Court is not expressly directed to exclude judgments by the ordinary Qatari courts and in fact it is not uncommon for the QFC Court to refer to the case law of the higher Qatari courts.<sup>7</sup> This is in tune with the QFC Court's practice of considering common law judgments as authority. Nonetheless, the application of most, if not all, QFC regulations, as is the case with the QFC Employment Regulations, entails the exclusion of ordinary Qatari law on the same matter, but not other QFC regulations, including the QFC Contract Regulations.<sup>8</sup>

A possible overlap may arise where the governing law of the parties' contract encompasses the Regulations in addition to other laws, including ordinary Qatari law. In such eventuality, the QFC Court (although the parties may well insert a choice of court or arbitration clause in their contract) may be

<sup>6</sup> Art 8 of Schedule 6 to the QFC Law provides that the QFC Court is to apply the QFC Law and pertinent Regulations 'unless the parties have explicitly agreed to apply another law provided that such law is not inconsistent with the public order of the State'.

<sup>7</sup> Several QFC Court judgments refer in substance or in passing to judgments of Qatari courts in order to aid their interpretation of provisions in the QFC Contract Regulations. See *Nasco Qatar LLC v Misr Insurance (Qatar Branch)* [2020] QIC (F) 17, para 32.

<sup>8</sup> Art 2(5) of the QFC Employment Regulations excludes the application of any other labour law. In *Chedid and Associates Qatar LLC v Said Bou Sayad*, QFC Case 02/2013, Judgment (20 April 2014), while the QFC Court determined that the dispute was governed by the QFC Employment Regulations, it had no hesitation directing the respondent to Art 36 of the QFC Contract Regulations, following an allegation of threat against the employer in order to agree to a no-competition clause.

compelled to apply the CC – or other ordinary Qatari law – where a provision in the contract is more closely connected to ordinary Qatari law.

### 13.3 SCOPE OF APPLICATION OF CONTRACT REGULATIONS

It should be pointed out that the parties to any contract, whether operating within or outside the QFC, may rely on the Regulations as their governing law. No doubt, such reliance on the Regulations is meaningful where there exists a connection to the QFC. Article 2(2) of the Regulations makes a distinction between contracts ‘incorporating’ the Regulations from those where the Regulations serve as governing law. This is a common-sense observation that does not give rise to any kind of contention. Article 2(3) of the Regulations specifies the entities upon which the Regulations apply in their contractual relationships:

- (A) contracts between the QFC Authority, the Regulatory Authority, Appeals Body or QFC Institutions and persons licensed to operate in or from the QFC; and
- (B) all contracts between persons licensed to operate in or from the QFC.

The first category listed in item (A) concerns contracts between QFC entities themselves, as well as contracts between QFC entities and persons licensed to operate in or from the QFC. Even so, article 2(4) of the Regulations makes it clear that neither of these two types of contracts are governed by the Regulations absent the consent of the parties. The application of the Regulations is optional on QFC entities and licensed persons. Where QFC entities and QFC licensed persons enter into agreements that provide no reference to their governing law (including ‘rules of law’),<sup>9</sup> the Regulations are applicable to such contracts. Paragraph 4(B) of article 2 of the Regulations further sets forth a rule of private international law, by stipulating that where QFC entities and licensed persons have failed to designate a governing law, the Regulations shall apply if ‘they are more closely connected with the contract than any other system or rules of law’.<sup>10</sup> This is a matter of contractual construction in accordance with articles 46ff of the Regulations. The absence

<sup>9</sup> The notion of ‘rules of law’ is broader than ‘laws’ and ‘legal systems’ and encompasses anything that the parties perceive as their personal, communal, or broader relationships, whether or not such ‘rules of law’ are perceived by other persons or communities as binding, let alone as ‘law’. See I Bantekas, ‘Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration’ (2021) 10 JIDS 1–19.

<sup>10</sup> See the implications of Art 18(3) of the QFC Law in the introduction to this chapter, which encompasses also contracts between QFC and non-QFC entities.

of any further clarification suggests that the drafters of the Regulations were disinclined from making a meal of this and sensibly followed a simple rule that grants significant, yet not unnecessary, discretion to the courts.

#### 13.4 THE COMMON LAW AND UNIDROIT PICC IMPRINT ON THE CONTRACT REGULATIONS

It is important to note that while the Regulations constitute an integral part of the QFC legal architecture they do not serve the same purpose as the Qatari CC. The latter encompasses mandatory provisions (i.e. good faith and public order) and in addition serves as a body of default rules. The Regulations' residual function is only as default rules and no part or provision therein possesses a mandatory character if the parties have expressly chosen to exclude the Regulations from their contract.

In equal measure, one should not conflate the jurisdiction of the QFC Court<sup>11</sup> with the application of the Regulations; the two are independent from each other. The QFC Court is meant to apply QFC laws and regulations, as well as the law set out by the parties in their contractual relationships,<sup>12</sup> albeit in practice the court, in the absence of a contrary agreement, will often rely on common law principles<sup>13</sup> and case law, not only because these are more familiar to the majority of the judges<sup>14</sup> but also because English law

<sup>11</sup> See Art 8(3)(c) of the QFC Law, outlining the jurisdiction of the QFC Court, including the entities that are encompassed under its authority; equally, Art 9 QFC Court Regulations and Procedural Rules, which is based on Art 8(3)(c) of the QFC Law. Jurisdictional dilemmas may arise where a party to a contractual dispute is not a QFC-registered entity. In *Daman Health Insurance Qatar Ltd v Al Bawakir Co Ltd*, [2017] QIC (F) 2, the claimant was a QFC-registered company, whereas the respondent was not. Their insurance agreement was governed by QFC laws and as a result the QFC Court ruled that in the absence of a choice of court agreement, it was compelled to exercise jurisdiction. Iterated in *Badri and Salim Elmeouchi LLP v Data Managers International Ltd*, [2020] QIC (F) 1, paras 15–16.

<sup>12</sup> Arts 7 and 8, Appendix 6 of the QFC Law. This is also spelt out in Art 11 of the QFC Court's Regulations and Procedural Rules, while Art 4 of the latter enunciates the principle of the 'overriding objective' of the court, which is to 'deal with all cases justly'.

<sup>13</sup> The QFC website prides itself as being a 'legal system based on the English common law', available at [www.qfc.qa/en/business/laws-and-regulations](http://www.qfc.qa/en/business/laws-and-regulations). Even though most scholarly and professional commentaries emphasise this common law dimension, no direct reference to the common law is made in QFC laws and regulations, but is certainly part of the QFC Court's consistent practice. In *Qatar Financial Centre Authority v Silver Leaf Capital Partners LLC*, [2009] QIC (F) 1, the Court emphasised that it gave effect to Qatari and English (contract) law principles, while taking into account international best practices.

<sup>14</sup> Even where the governing law of a contract is not English law, the QFC Court still relies on English contract law to flesh out general principles. In *Obayashi Qatar LLC v Qatar First Bank LLC* [2020] QIC (F) 5, para 90, Qatari law was the contract's governing law. Yet, the

is predominant in the majority of transnational commercial agreements. By way of illustration, in *Leonardo Spa v Doha Bank Assurance Co LLC*,<sup>15</sup> the QFC Court had to deal with demand guarantees under the Uniform Rules for Demand Guarantees, which were adopted by the International Chamber of Commerce in 1991. Even so, the Court went on to examine the nature of such guarantees by reference to English case law.

Despite the prevalence of transnational contracts in Qatar governed by English and Qatari law, this is irrelevant to the civil law origins of the Contract Regulations and their interpretation by the QFC Court – or other courts or tribunals with jurisdiction. The influence of common law on the Regulations is small (but present).<sup>16</sup> However, the Regulations are wholly predicated on the UNIDROIT Principles of International Commercial Contracts (PICC). Despite the frequent use of common law principles by the Court, it should be emphasised that otherwise fundamental tenets of the common law are missing from the Regulations, notably consideration. Article 31(2) of the Regulations expressly states that ‘consideration is not required for a contract to be binding’.

There are some elements of the common law that are poignant in the Regulations. This is true, for example, with respect to good faith and misrepresentation. Unlike good faith in the Qatari CC, whose observance is binding upon conclusion of the contract,<sup>17</sup> there is no similar provision in the Regulations. It must therefore be assumed that good faith is not obligatory upon conclusion of the contract under the Regulations, particularly since article 13(2) of the Regulations makes it clear that a party negotiating or ceasing negotiations in bad faith incurs liability for any losses caused to the other party. No doubt, the drafters of the Regulation felt that since English contract law was predominant in the region, therefore the absence of good faith during the lifetime of the contract would have been an attraction for potential end users of the Contract Regulations. Misrepresentation is equally derived directly from the common law tradition. It is explained in Chapter 8 that misrepresentation during negotiations is not counted as a ground for a valid defect of consent in the civil law tradition and is not counted as such in the Qatari CC.

Court relied predominantly on the English law of demand guarantees, as well as the fraud exception therein, as a condition freeing the debtor from its obligation.

<sup>15</sup> Case 3/2019, unreported, Judgment of 5 September 2019 QFC Court, para 42ff.

<sup>16</sup> In *Chedid and Associates Qatar LLC v Said Bou Sayad*, QFC Case 02/2013, Supplementary Judgment [2014] QIC (F) 3, para 3, the QFC Court made an important statement on the persuasive value of the common law on QFC law. It held that the reasoning in non-QFC judgments, such as common law courts, which concern principles, expressions or concepts similar to those in QFC laws have persuasive value in interpreting and applying QFC laws, including the QFC Contract Regulations.

<sup>17</sup> Art 172(1) Qatari CC.

Overall, it is evident that the drafters of the Contract Regulations wanted to break free from several notions of the Qatari CC, which itself is rather progressive. First and foremost, the Regulations are free from the influence, or the remnants of any influence derived from the Sanhuri tradition<sup>18</sup> and the 1948 Egyptian CC. In this manner, there is also a clear break from past and future case law of the Egyptian Court of Cassation, even if very little of that is evident in the judgments of the Qatari Court of Cassation. Secondly, as already emphasised, the Regulations are very much a verbatim reflection of the UNIDROIT PICC, albeit with notable features of English/common law that have traditionally been viewed as commerce-friendly, including the absence of good faith and misrepresentation. The infusion of sensible common law features is in line with the increased application of English law and business custom<sup>19</sup> as the governing law of contracts in Qatar and the GCC,<sup>20</sup> as well as the choice of judges sitting on the bench of the QFC Court.

### 13.5 NOTABLE ELEMENTS OF THE CONTRACT REGULATIONS

The remainder of the chapter will focus on some, but not all, of the key features of the Regulations. The Regulations provide a detailed legal framework of the entire gamut of contracts and as such they are more detailed than the contract law provisions of the Qatari CC, albeit less detailed as compared to the PICC.

#### 13.5.1 *Formation of Contracts*

The parties are free to enter any contract and determine its content, including its governing law.<sup>21</sup> That contracts are largely informal is evident not only

<sup>18</sup> As noted in Chapter 1, Sanhuri is considered the father of the contemporary civil law tradition in the Arab world and his influence is credited upon the drafters of the Qatari CC, although he himself did not participate in the drafting process. See N Saleh, 'Civil Laws of Arab Countries: The Sanhuri Codes' (1993) 8 Arab LQ 165.

<sup>19</sup> Art 11 Regulations, which renders trade usage binding, unless specifically excluded; see verbatim in Art 1.9 PICC.

<sup>20</sup> I Bantekas, 'The Globalisation of English Contract Law: Three Salient Illustrations' (2021) 137 LQR 130.

<sup>21</sup> Art 6(1) and 7 Regulations; Arts 1.1 and 1.2 PICC. In *Khaled Hassan Bahr Ahmed v Doha Bank Assurance Co LLC*, [2013] QIC F 1, at 6, the QFC Court was confronted, among other issues, with the absence of any reasons in a dismissal letter. In applying Art 6(1) of the Regulations, it came to the conclusion that the parties could validly agree to exclude the provision of reasons in dismissal notices (i.e. right to determine content). Interestingly, the QFC Court combined Art 6(1) of the Regulations with the QFC Labour Regulations and Labour Law No 4 of 2004 (i.e. the ordinary Qatari labour legislation).

by reference to article 8 of the Regulations, which goes on to say that they do not need to be evidenced in writing only, or any ceremonial form, but also by the variety of means by which to notify the other party, which may include any form of land or electronic dispatch.<sup>22</sup> The QFC has relied on exchange of emails and the parties' conduct in adducing the existence of a contractual relationship, even where the agreement (because of its informality) is not particularly detailed.<sup>23</sup>

Articles 15ff of the Regulations follow almost verbatim the sequence and language of the PICC (articles 2.1.1 to 2.1.14 PICC) as regards offer, acceptance and intention to be bound, as well as the relevant modalities for the formation of contracts. The Qatari CC is not fundamentally different but is a lot less elaborate and, in any event, does not purport to rely on the PICC. There are only slight variations in structure, but not the wording between the PICC and the Regulations.<sup>24</sup> In terms of substance there are only two differences between the PICC and the Regulations. Unlike article 1.1.20 of the PICC which regulates surprising terms, no such provision exists in the Regulations. And as we have already alluded to elsewhere in this chapter, article 31(2) of the Regulations explains that no consideration is required; albeit this is also implicit in the PICC.

### 13.5.2 Validity of Consent

Validity of consent under articles 32 to 44 of the Regulations is generally consistent, and mostly verbatim, with the PICC, but there are notable differences. The Regulations depart from long-standing civil law tradition whereby contracts are voided in the event of serious mistake, coercion, or threats, all of which are encompassed in the Qatari CC. Of these the Regulations only encompass threats and mistakes.<sup>25</sup> The Regulations equally omit any reference to gross disparity<sup>26</sup> or injustice<sup>27</sup> as a ground for avoidance. Instead, article 37 of the Regulations introduces illegality as a ground invalidating consent, as

<sup>22</sup> Art 12 Regulations; see Art 1.10 PICC.

<sup>23</sup> *Nasco Qatar LLC v Misr Insurance (Qatar Branch)*, [2020] QIC (F) 17, paras 15–17. The QFC Court relied on *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504.

<sup>24</sup> For example, conflicts between standard and non-standard terms are regulated in two distinct provisions in the PICC (Arts 2.1.19 and 2.1.21), yet they are subsumed within a single provision in the Regulations (Art 30).

<sup>25</sup> Arts 36 and 33, respectively, of the Regulations.

<sup>26</sup> Art 3.2.7 PICC.

<sup>27</sup> Art 143 Qatari CC.



well as misrepresentation, to which we have already alluded.<sup>28</sup> This result is incongruous. While illegality, mistakes and threats apply as grounds for avoiding a contract upon (and not before) the conclusion of the contract under the Regulations,<sup>29</sup> in conformity with general principles of the civil law tradition, illegality is generally not considered as a ground for avoidance;<sup>30</sup> illegality generally serves to render the contract void *ab initio*. The QFC Court has correctly assimilated (in certain cases) illegality with public policy and public order. In *Nasco Qatar LLC v Misr Insurance*, it was noted *obiter dicta* that if it was found that an insurance broker was operating without a valid license, its underlying contract with the insurance company would have been illegal under QFC laws and by extension in violation of the Qatari public order.<sup>31</sup>

Moreover, misrepresentation is peculiar to English law and concerns false statements made prior to the conclusion of the contract.<sup>32</sup> In the opinion of the authors, the conflation of the various grounds is misplaced, creating unnecessary confusion. Given the absence of misrepresentation in the Qatari CC and the common law influence in article 35 of the Regulations, the QFC Court would be well placed to marry misrepresentation in the civil law underpinnings of Part 4 of the Regulations, article 44 of which iterates its mandatory character.

### 13.5.3 *Contractual Interpretation and Contents of a Contract*

Articles 45 to 51 of the Regulations echo, largely verbatim, Part 4 of the PICC concerning interpretation of contracts, save for article 4.8 of the PICC, which concerns omitted terms. This is covered in Part 6 of the Regulations regarding implied terms. We have already alluded to *Chedid and Associates Qatar LLC v Said Bou Sayad*,<sup>33</sup> where the QFC Court held that the reasoning in non-QFC judgments concerning principles, expression, or concepts similar to those in QFC laws have persuasive value in interpreting the QFC Contract Regulations.

Part 6 of the Regulations concerns unexpressed terms of a contract. Under the civil law tradition this befalls contractual interpretation, while in the common law this issue is dealt by reference to terms implied in law and terms implied in

<sup>28</sup> Art 35 Regulations.

<sup>29</sup> See Chapter 8 for a discussion of the position under the Qatari CC.

<sup>30</sup> See Art 3.3.1 PICC.

<sup>31</sup> *Nasco Qatar LLC v Misr Insurance (Qatar Branch)* (n 23), para 20.

<sup>32</sup> Under the leading case of *Smith v Hughes* (1871) LR 6 QB 597, it was famously held that there exists no general duty to disclose information and in principle mere silence is not a ground for avoiding a contract. The English Misrepresentation Act 1967 identifies three types of misrepresentation, namely, fraudulent, negligent and innocent.

<sup>33</sup> *Chedid and Associates Qatar LLC v Said Bou Sayad*, [2014] QIC (F) 3, para 3.

fact.<sup>34</sup> Articles 52 to 60 of the Regulations reflect their counterparts in articles 5.1.1 to 5.1.9 of the PICC, save for the fact that article 53 of the Regulations provided a detailed statement on terms implied in fact in the case of sale of goods contracts. It is important of course to note that the duties of cooperation and best efforts are specifically referred to as drivers of the parties' mutual performance,<sup>35</sup> despite the absence of a good faith provision in the Regulations. The duty of cooperation is narrower than good faith, which is much broader. Moreover, Part 6, unlike Part 4, of the Regulations is not mandatory, which reinforces the notion that there is no general duty of good faith in the Regulations.

#### 13.5.4 *Agency*

The provisions on agency in the Regulations<sup>36</sup> are equally a reflection of articles 2.2.1 to 2.2.10 of the PICC. Interestingly, article 66 of the Regulations adds to the discussion by setting out the duty of the agent towards the principal. These involve: a) duty of care and skill; b) duty of loyalty; c) duty to account for profits; d) duty not to act as adverse party; e) duty not to compete as regards the agency's subject matter; f) duty to avoid all possible conflicts of interest and g) duty against disclosure to a third party.

#### 13.5.5 *Performance*

Part 7 (articles 72–85) of the Regulations effectively iterates articles 6.1.1 to 6.1.13 of PICC, with one notable exception. Paragraphs 2–4 of article 73 of the Regulations make an important contribution to the question of timely performance, by allowing a party to prematurely terminate the contract where a) it is anticipated that the other party will not perform on time and b) time is of the utmost importance (essential) to the terminating party. The Regulations omit any reference to the likelihood of non-performance where the party required to apply for permission by the State is denied such permission. Although this is well entrenched in the PICC,<sup>37</sup> its omission in the Regulations is somewhat baffling. Permissions requested by a QFC entity from the State of Qatar are regulated by the ordinary laws of the State of Qatar, over which QFC laws have no authority. This omission will allow the QFC Court, when dealing with such an issue, to introduce principles arising from the common law, but

<sup>34</sup> See R Austen-Baker, 'Implied Terms in English Contract Law: The Long Voyage of the Moorcock' (2009) 38 *Comm L World Rev* 56.

<sup>35</sup> Arts 54 and 55 Regulations.

<sup>36</sup> Arts 61–72 Regulations.

<sup>37</sup> Arts 6.1.4–6.1.7 PICC.

not the PICC, as it is clear that the latter's regulation was specifically rejected. Other than that, there is no reason as to why the provisions of the PICC, *mutatis mutandis*, should not apply to determine non-performance.

### 13.5.6 Non-Performance and Force Majeure

Part 10 of the Regulations is once again reflective of articles 7.1.1 to 7.1.5 of the PICC. This is not surprising. Even so, there was always going to be controversy about non-performance (generally) and *force majeure* more specifically. This is because of the particularities of *force majeure* across regions, as well as the differences in approach across the civil law and common law traditions.<sup>38</sup>

Article 85 of the Regulations sets out the general rule, whereby performance that becomes onerous for one of the parties does not free that party from performing its obligations. Article 85 makes it clear that where the onerous level of performance reaches the status of *force majeure* the implications are different. Article 94 of the Regulation does not follow the mould of article 7.1.7 of PICC and is in fact far more elaborate and extensive than the PICC in this regard. Paragraph 1 of article 94 of the Regulations defines *force majeure* to mean:

any circumstances which are not within the reasonable control of the party concerned and which that party could not be reasonably expected to have taken into account at the time of conclusion of the contract, including without limitation strikes, damage to premises, plant and equipment, breach of a contract by an unrelated third party, governmental action, civil commotion, riot or war and natural physical disaster.

While the general definition is consistent with article 7.1.7 PICC the types of incidents that may give rise to *force majeure* are exceptional. There are some types of incidents in the list of paragraph 1 that are clearly reasonably foreseeable, such as damage to premises. Breach of contract by an unrelated third party is baffling, given that a third party cannot possibly breach a contract to which it is not a party; the only possible explanation is that the unforeseen impossibility to perform arose from the unexpected termination or breach of another contract with one of the parties, which (contract) was crucial for that party to perform its obligations in the first contract. The list is evidently favourable to the distressed/affected party, far more than any statutory definitions the present authors are aware of. Be that as it may, paragraph 2 of article 94 of the Regulations stipulates that where *force majeure* exists neither party is in

<sup>38</sup> Readers should consult the discussion on unforeseeable circumstances and *force majeure* in the Qatari CC, as set out in Chapter 12.

breach of its contractual obligations nor is it liable for its non-performance. The party not affected by such *force majeure* shall be relieved from any obligation to make payment to the affected party for so long ‘as the performance is suspended except in respect of performance which has been actually carried out, and which complies with the terms of the contract’.<sup>39</sup>

A party whose performance is delayed or prevented by *force majeure* must, in accordance with article 94(4) of the Regulations:

- (A) forthwith notify the other party of the nature, extent, effect and likely duration of the circumstances constituting the *force majeure*;
- (B) use all reasonable endeavours to minimise the effect of the *force majeure* on the performance of its obligations; and
- (C) subject to Article 94(5) forthwith after the cessation of the *force majeure* notify the other party thereof and resume full performance of its obligations.

Paragraph 5 of article 94 of the Regulations caters for the likelihood of the extension of the *force majeure* well beyond an initial impossibility. Hence, where it prevents or delays performance for a continuous period in excess of six months, the non-affected party shall be entitled to give notice to the affected party to terminate the contract. This is consistent with the FIDIC Standard Contracts, whereby once an exceptional event takes place, a notification is required. A further notification is required once such an event has ceased so that performance can resume. If, however, the exceptional event continues beyond six months, the innocent party can seek termination of the contract. The FIDIC Rules assume that *force majeure* is temporary in nature and suspends performance only for a limited period of time. Yet, it does not render performance impossible for the future. Therefore, termination is only admissible if the duration of such event exceeds six months. The FIDIC Rules reflect to some extent the notion of frustration under English law,<sup>40</sup> especially given that English Law discharges the parties from future performance only.<sup>41</sup>

### 13.5.7 Remedies

Articles 95–99 of the Regulations correspond verbatim to articles 7.2.1 to 7.2.5 of the PICC. These concern performance generally. Oddly, articles 7.4.2 to

<sup>39</sup> Art 94(3) Regulations.

<sup>40</sup> See the rules under term 19 of the FIDIC Red Book 2017.

<sup>41</sup> See Law Reform (Frustrated Contracts) Act 1943; also *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783.

7.4.6 of the PICC are omitted from the Regulations. These provisions of the PICC set out the general principles for assessing the right to damages, namely, certainty and foreseeability of harm, as well as damages for non-pecuniary losses. Article 100 of the Regulations addresses the right to damages, stipulating that damages arising from non-performance are available where the loss can ‘fairly or reasonably’ have been contemplated at the time the contract was made. Although not expressly stated in the PICC,<sup>42</sup> article 101 of the Regulations emphasises that damages for breach of contract effectively translate into such compensation that places the affected party in ‘the position it would have been if the contract had been properly performed’. No doubt, this is not the same as restitution. Just like the PICC, the aggrieved/affected party’s right to damages is limited where it failed to mitigate harm or partly contributed to the harm.<sup>43</sup> It is not clear why the drafters of the Regulations omitted articles 7.4.2(2) and 7.4.3–7.4.4 of the PICC, but the wording of article 100 of the Regulations effectively renders this question moot. Given the QFC Court’s practice in respect of other Regulations, it is not at all clear whether the Regulations recognise, or not, physical suffering and emotional distress as a loss that is susceptible to damages.<sup>44</sup>

The provisions on interest and the manner of payment in the Regulations<sup>45</sup> correspond almost verbatim with their counterparts in the PICC.<sup>46</sup> This is important in order to dispel any doubts as to whether the QFC Court – or other courts and tribunals applying the Regulations – are empowered to award interest. The QFC Court possesses discretion to award pre-judgment interest by taking into account all relevant circumstances. It has held that:

Interest is generally awarded to compensate a party for being kept out of money rather than for damage done, such as alleged lost investment opportunities, or to punish or to call the defendant to account for his use of the money. The merits of the underlying case are not relevant to the award of interest, but delay in the prosecution of that case may well be.<sup>47</sup>

<sup>42</sup> Art 7.4.2(1) PICC.

<sup>43</sup> Arts 102 and 103 Regulations.

<sup>44</sup> In *Khaled Hassan Bahr Ahmed v Doha Bank Assurance Co LLC*, (n 21) at 12, the QFC Court awarded damages to an employee for ‘worry and anxiety’ arising from the breach of its contract by the employer. In the case at hand, the QFC Court did make reference to the Contract Regulations, in conjunction with applicable labour law, and did not specifically explain the legal basis of such damages. Hence, it may reasonably be adduced that where the Court applies the Contract Regulations in employment cases non-pecuniary damages may be awarded.

<sup>45</sup> Arts 104–106 Regulations.

<sup>46</sup> Arts 7.4.9–7.4.13 PICC.

<sup>47</sup> *Dentons and Co (QFC Branch) v Bin Omran Trading and Consulting LLC*, [2020] QIC (F) 15, para 13.

In applying such discretion, the QFC Court will not uphold contractually agreed rates of interest, if these are found to be excessive and hence not ‘in the interests of justice’,<sup>48</sup> or are otherwise higher than the interest rates applicable in Qatar.<sup>49</sup>

Article 107 of the Regulations makes a significant innovation that is prevalent in the common law, as indeed the practice of transnational commercial contracts,<sup>50</sup> by allowing the parties to agree in advance in their contract to the so-called liquidated damages. Article 107(1) stipulates that:

Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

Paragraph 2 of article 107 of the Regulations, in concert with practice limiting the parties’ ability to impose any sum in respect of liquidated damages, stops short of penalty-style or grossly excessive liquidated damages. It goes on to say that:

However, notwithstanding any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

### 13.5.7.1 Limitation Periods for Damage Claims

Articles 108 and 109 of the Regulations are oddly placed in the Part dealing with remedies (Part 11). The same principles are regulated in a distinct chapter in the PICC (Chapter 11). The Regulations do not discuss limitations in general, but only in respect of damages. Given the importance of limitations in both civil codes and the common law, it is slightly puzzling why the drafters of the Regulations thought this was a good idea. The only reasonable explanation seems to be that the forward-thinking rationale of the Regulations had little place for an extensive set of limitations, which prudent commercial parties can dispense with. Article 108(1) of the Regulations posits the rule that an action for breach of any contract must be commenced within six years<sup>51</sup> after

<sup>48</sup> Ibid, para 17.

<sup>49</sup> Ibid, para 17 and *Badri and Salim Elmeouchi LLP v Data Managers International Limited* [2020] QIC (F) 3.

<sup>50</sup> See, for example, *English Hop Growers v Dering*, (1928) 2 KB 174, CA; s 2-718(1) US Uniform Commercial Code; Art 1226 French CC.

<sup>51</sup> The general limitation period in Art 10.2 PICC is three years, or exceptionally a maximum of ten years from the day the right can be exercised.

the cause of action has accrued.<sup>52</sup> This is not a mandatory limitation period and the parties may validly agree to reduce the period of limitation to not less than one year<sup>53</sup> but they are not allowed to extend it.<sup>54</sup>

In *Nasco Qatar LLC v Misr Insurance (Qatar Branch)*, the broker had set up a single account with the insurer on the basis of which all referral fees would be paid as agreed in the claimant's bank account. The respondent claimed that the limitation period prescribed in article 108 of the Regulations commenced from the date of the last payment for each referral, with each referral constituting a distinct contract subject to distinct limitation periods. The QFC Court disagreed. While agreeing that the Contract Regulations did not expressly provide for running accounts in the context of limitation, nor indeed in most statutes such as the English Limitation Act, even so, the courts in England had made such distinction. In particular, the QFC Court referred to English authority, according to which where a customer has a current account with a bank, a cause of action does not accrue to the customer until a demand for payment is made on the bank.<sup>55</sup> Exceptionally, it may accrue earlier if in the meantime the business relationship comes to an end.<sup>56</sup> The QFC Court went on to emphasise that

For the purposes of Article 108 [of the QFC Contract Regulations] the relevant starting date for any limitation period is the date of the relative breach. Where a claim is made with respect to a sum said to be due under a contract, the date of the breach is not necessarily the date when the claimant became 'entitled' to the sum in question but may be the (possibly later) date when the creditor failed or declined, expressly or implicitly, to make payment.<sup>57</sup>

The Court subsequently noted that under the terms of the single running account (contract) in question, the proper inference is that a breach of

<sup>52</sup> The QFC Court in *Nasco Qatar LLC v Misr Insurance (Qatar Branch)* (n 23), para 23, made a useful distinction between actions arising from breach and those predicated on a simple claim for payment under the contract. It held that Art 108 of the Regulations did not apply to the latter.

<sup>53</sup> Consistent with Art 10.3(2)(a) PICC.

<sup>54</sup> Art 108(2) Regulations explains that a cause of action occurs when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

<sup>55</sup> *Nasco Qatar v Misr Insurance* (n 23), para 28, citing with approval *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, cited with approval by Lord Reid in *Arab Bank Ltd v Barclays Bank* [1954] A.C. 495 at 531.

<sup>56</sup> *Ibid*, citing with approval, *In re Russian and Commercial Bank* (1955) 1 Ch. 148, per Wynn-Parry, J at 157.

<sup>57</sup> *Ibid*, para 30.

contract arose only when the respondent declined to settle the outstanding balance on the single account. That event may have been when the Claimant first demanded payment and the demand was not met.<sup>58</sup> It was not a far leap for the Court to reject the respondent's contention that the limitation period under article 108 of the Regulations had not expired.

As regards the question as to whether the limitation period may be interrupted by a partial payment, the QFC Court referred with approval to article 29(5) of the English Limitation Act 1980, which so provides. The Court conceded that this represents good law in the absence of an express provision in the QFC Contract Regulations and referred to common law authority to this effect, noting its equitable underpinnings.<sup>59</sup> The QFC Court further relied on article 414 Qatari CC to that effect, which in its opinion reflected a general principle of contract law, thereby seeing no reason 'why it should not be recognised judicially as implicit in the Contract Regulations'.<sup>60</sup>

Article 109 of the Regulations is a verbatim reflection of article 10.9 of the PICC, according to which the expiration of the limitation period does not extinguish the right, merely its exercise against the other contracting party. The right itself may be asserted in other contexts (i.e. for tax purposes).

### 13.5.8 *Termination of Contracts*

Termination under articles 110–115 of the Regulations reflects articles 7.3.1 to 7.3.7 of the PICC, save that the restitution provisions in the PICC are significantly more elaborate than article 115 of the Regulations.

### 13.5.9 *Transfer of Rights and Obligations*

Articles 116–129 of the Regulations concerning assignment (transfer of a right) constitute a verbatim iteration of articles 9.1.1 to 9.1.15 of PICC. There is a slight variation in the Regulations regarding the assignment of future rights, which the Regulations (following mandatory Islamic law principles)<sup>61</sup> reject in the first instance, but ultimately seem to accept once the right comes into existence.<sup>62</sup>

<sup>58</sup> *Ibid*, para 31.

<sup>59</sup> *Ibid*, para 33, citing with approval *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481, per Kerr J at 487.

<sup>60</sup> *Ibid*, para 33.

<sup>61</sup> See E Injadat, 'Futures and Forwards Contracts from the Perspective of Islamic Law' (2014) 1 *Journal of Economics and Political Economy* 241.

<sup>62</sup> Art 119 Regulations.



The transfer of an obligation (novation) is regulated in articles 131 to 134 of the Regulations, which correspond to articles 9.2.1 to 9.2.8 of the PICC, albeit the PICC is a lot more elaborate.

#### 13.5.10 *Third-Party Rights*

These are regulated in articles 135–138 of the Regulations, corresponding to articles 5.2.1 to 5.2.6 of the PICC.