
THE DISPUTE RESOLUTION REVIEW

SIXTH EDITION

EDITOR
JONATHAN COTTON

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

Sixth Edition

Editor
JONATHAN COTTON

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EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 3

BAHRAIN

Haifa Khunji and Kaashif Basit¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Bahrain's judiciary background

Similarly to other Gulf states, Bahrain's legal system consists of a blend of Islamic shariah,² British common law and civil law drawn principally from Egypt's civil law tradition. Bahrain's established system of law courts goes back to the 18th century, but the form its judiciary takes today can be traced back directly to developments taking place during the 1930s, when its national courts were for the first time organised by virtue of a promulgation issued by the Advisor in 1938; and in 1966 and 1971, when Bahrain issued the Code of Criminal Procedure and the Civil Commercial Procedures Law (CCPA)³ respectively.

As this chapter is aimed primarily at an international readership interested in Bahrain's business legal environment, it will focus on the CCPA, which covers court procedures in civil and commercial cases.

ii The CCPA and the judiciary

The CCPA was promulgated in 1971 and specifies the procedures for litigation before courts of civil and commercial jurisdiction. The procedures covered by the CCPA include those for bringing cases to court, hearing evidence, managing cases following hearings,

1 Haifa Khunji is a partner at KBH Kaanuun Ltd. Kaashif Basit (1969–2013) was a partner at KBH Kaanuun Ltd.

2 Shariah is the moral code and religious law of Islam. It is derived from two primary sources: the precepts set forth in the Qur'an, and the example set by the Islamic prophet Muhammad in the Sunna.

3 Hassan Ali Radhi, 'Judiciary and Arbitration in Bahrain'; Arab and Islamic Law Series, Volume 25, 2003.

ordering interim measures, examining cases and calling, challenging and executing verdicts. The CCPA also contains a chapter dedicated to arbitration.

Many amendments have been made to the CCPA since its promulgation, including:

- a* Decree No. 8 of 1978, which amends some provisions, notably in relation to the procedures for the payment of debts and deposits;
- b* Decree No. 19 of 1983, which lays down new rules on summary proceedings; and
- c* Decree No. 15 of 1985, which amends the Junior Court's jurisdiction.

iii Structure and competence of the civil and commercial courts

According to Article 7 of the CCPA, Bahrain's civil and commercial courts are the following:

- a* the High Court of Appeal;
- b* the High Court; and
- c* the courts of minor causes and courts of execution.

The courts have competence to hear all cases concerning civil and commercial matters as well as the personal status of non-Muslims.

II COURT PROCEDURE

i Procedures and time frames

Both claimants and defendants ideally want to be able to establish from the outset of a court case how long it will last and how much it will cost them. These questions are clearly interrelated, as lawyers' fees increase as a case evolves through different stages of litigation, particularly when a case is lost and then appealed. It is a common fact that Bahrain's courts currently lack the necessary case management procedures that are often taken for granted in other jurisdictions.⁴

The CCPA does however lay down some basic rules. Cases must be filed with the competent court by means of a statement of claim (Article 23), and on submission of the statement of claim the plaintiff must pay a fee as well as enclose copies of documents he or she wishes to submit to support his or her case (Article 24). A court clerk thereafter maintains a file for the case once it is submitted and delivers a copy of the statement of claim to the defendant on the day after it was submitted. The defendant then has 10 days to submit a defence accompanied by documents he or she wishes to use to support his or her defence (Article 25). Following the expiry period laid down in Article 25, the court clerk appoints a session for the case to be heard and provides both the plaintiff and the defendant with summons to attend court for the first hearing.

However, once the first hearing takes place, there is no established procedure for the management of the case. The timeline and management of a case will depend on the particular circumstances of the case and the judge's discretion. There is also no

⁴ In England and Wales, for example, the Civil Procedure Rules give judges wide case-management powers.

coherent system of checks and balances to ensure that the parties abide by case procedural requirements. A defendant can potentially stall legal proceedings by abusing the process, for example, by failing to submit documents that may be required of him or her.⁵ Many lawyers agree that this aspect of litigation in Bahrain is in great need of reform and that cases need to be tried within specific time frames established at the beginning of a case. This is something that already takes place within Bahrain's arbitration procedures, notably within the ambit of the BCDR. Comparative law provides the local community with examples of jurisdictions where courts have strict case management powers and where parties are induced through various coercive measures to abide by all the procedural requirements of a case, especially time frames. For this reason the local legal community expects the same kind of procedural requirements from its own court system and feels a proposal for reform is in great need of discussion to ensure that plaintiffs receive more legal certainty, as currently defendants benefit from a system where procedures relating to time can be used to delay cases for their own benefit.⁶

Bahrain's CCPA contains protective and interim measures for the benefit of plaintiffs. Article 176 allows court orders for the sequestration of a defendant's property if a plaintiff has serious grounds for fearing that a defendant will abscond or smuggle his or her property abroad. This type of measure is otherwise known as a 'freezing order' in common law jurisdictions. Article 177 is a security measure that should be read in conjunction with Article 176. It allows the deposit of a surety by an applicant for a freezing order in the event that the respondent suffers loss or damage as a result of a freezing order where the applicant was not correct in his or her allegations.

Of general interest to defendants residing abroad, Article 178 of the CCPA allows a court to give an order forbidding a defendant to travel out of the jurisdiction if there are serious grounds for supposing that he or she is likely to abscond and if he or she has not provided a form of surety acceptable to the court or a form of bail in cash that would guarantee the future execution of a judgment.

ii Class actions

The CCPA contains provisions covering circumstances where there is a plurality of litigants. According to Article 73, the court has discretion to decide whether the fact that there is more than one plaintiff to a case causes confusion and delay and whether it may be more beneficial to conduct independent trials for each plaintiff. In theory, the court may also allow plaintiffs to file a case as one party or to defend a case in unison, otherwise known as 'class actions'.

However, in practice, class actions in Bahrain are rare. The judge usually opts to conduct independent trials for each plaintiff.

5 In contrast to England and Wales, where the judge has the power to strike out a statement of claim if a claimant fails to abide by the procedural rules.

6 KBH Kaanuun would like to thank Mr Ahmed Abdul Rahman Al Thukair, advocate and member of the BCDR-AAA roster for providing advice for this section.

iii Representation in proceedings

Article 40 of the CCPA allows litigants to appear without an attorney on the date for the hearing, and litigants, whether natural or legal persons, may represent themselves throughout the development of a case.

The above does not apply to proceedings before the Court of Cassation, which require a party to be represented by an attorney.

iv Service out of the jurisdiction

Defendants living outside Bahrain can be served with summons outside the jurisdiction. If the court establishes that a defendant is living outside Bahrain and that he or she has no agent in Bahrain to accept delivery of summons on his or her behalf, it may order the summons to be served to him or her through diplomatic channels, by sending the writs by registered mail with an acknowledgment slip or even by e-mail.

v Enforcement of foreign judgments and assistance to foreign courts

Articles 252 to 255 of the CCPA cover the rules for the enforcement of foreign court judgments and awards.

Article 252 of the CCPA stipulates the conditions that must be satisfied in order for a foreign judgment to be enforced in Bahrain. Those conditions may be summed up as follows:

- a* there must be reciprocity between the state in which the judgment was delivered and Bahrain;⁷
- b* the foreign judgment must have been passed by a court having appropriate jurisdiction;
- c* litigants in the foreign country should have been duly summoned and properly represented;
- d* the foreign judgment must have become final according to the law of the country where it was passed;
- e* the foreign judgment should not conflict with a judgment previously passed by the Bahrain courts; and
- f* the judgment should not contain anything contrary to public order or morals in the country in which it should be enforced.

Upon ascertaining whether the above conditions are satisfied, an applicant must make a request for an order of enforcement, which must be submitted to the Civil High Court pursuant to the ordinary procedures for filing lawsuits and subject to the payment of a prescribed fee.⁸

⁷ Otherwise known as the 'equal treatment condition' or 'condition of reciprocity'. A foreign judgment will be treated in Bahrain, from the point of view of its enforceability, in the same way as a Bahraini judgment is treated in the foreign country from which the judgment in question ensues.

⁸ Jalila Sayed Ahmed, 'Enforcement of Foreign Judgments in some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain'. *Arab Law Quarterly* [1999] pp. 169–176.

It should also be borne in mind that Bahrain ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Agreement for the Enforcement of Court Judgments among GCC states and the 1983 Riyadh Agreement for Judicial Cooperation. All contain additional rules with regards to the enforcement of foreign judgments by Bahrain courts as well as with regards to assistance to foreign courts that complement the rules contained in the CCPA.

vi Litigation costs

The courts of Bahrain have broad discretion in determining how to apportion the costs of a case. Article 192 of the CCPA gives the court power to order costs, including lawyers' fees, to be paid by a litigant losing a verdict. However, in practice lawyers' fees are borne by each party and the winning party's legal fees will not be ordered to be reimbursed by the losing party.

The courts tend to see the client–lawyer relationship as a personal one that has no financial bearing on the case. Bahraini lawyers agree this is another area in need of reform, especially considering the rise in lawyer costs associated with the increase in the commercial complexity and technicality of some legal cases.

The question of the reimbursement of legal costs by a losing party to a winning party is also one in need of serious consideration. At present the law relegates the relationship between a lawyer and his or her client to an inherently private sphere unrelated to the damages claimed in a civil or commercial case. This is despite the fact that legal fees have increased exponentially over the last decades especially for commercial cases that have become not only lengthy but also complicated and technical, thus requiring knowledge from lawyers who will charge clients a premium for their expertise. For a plaintiff this means he or she is likely to fight a legal battle and bear important legal costs that in retrospect make litigation a less cost-effective method of compensation for damages, whereas for a defendant it is an incentive to make a case drag on to the point of financial harassment or even choking of the other party. Many Bahraini lawyers agree that they urgently need a system where the lawyer representing the winning party can submit his or her fee agreement to the judge and request that the legal fees associated with having to lodge and pursue the case be borne by the losing party.⁹

III DOCUMENTS AND THE PROTECTION OF PRIVILEGE¹⁰

Part 5 of the CCPA covers the procedure for the disclosure of documentary evidence.¹¹ According to Article 140 of the CCPA, a litigant may ask his or her opponent to submit any document at his or her disposal that has a bearing on the action:

9 KBH Kaanuun would like to thank Mr Ahmed Abdul Rahman Al Thukair, advocate and member of the BCDR-AAA roster, for providing advice for this section.

10 KBH Kaanuun would like to thank Mr Abdulla Al Shamlawi, barrister at the Cassation & Constitution court and partner at Al-Shamlawi law firm, for contributing to this section.

11 Known as disclosure in the United Kingdom or discovery in the United States. The approach to disclosure in Bahrain is somewhat less invasive than in common law jurisdictions.

- a* if the law permits that the opponent be required to submit such document;
- b* if it is a joint document applying jointly to both parties that establishes their mutual rights and obligations; or
- c* if one of the parties has used this document as a form of support at any stage during the action.

A petition has to be drafted and submitted to the judge giving a description of the document sought, as well as its purpose and evidence that the document is actually at the disposal of the other party. The petitioner must also outline on which grounds he or she believes the document should be disclosed.

There is therefore no obligation on either party to submit a document that would undermine its own case or support the other's case. The CCPA rules on disclosure therefore contrast sharply with those found in the civil procedure rules of well-known jurisdictions such as England and Wales. For example, Part 31 of the Civil Procedure Rules of England and Wales give a party a right to inspect any document that might either benefit its case or adversely affect its counterpart's. In practice, disclosure in Bahrain is limited to documents that apply jointly to both parties and whose copy one of the parties may have lost or not have had in its possession, and that establish both parties' mutual rights and obligations.

More recently in an attempt to tackle some of the loopholes in the CCPA with reference to disclosure issues that may result in significantly increasing the period for settling cases, the legislature attempted to resolve this in at least labour cases when the new Labour Law was promulgated in September 2012. This Labour Law of 2012, to impose through its articles a pretrial management stage known as the Labour Dispute Administrative Office. This requires the judge in the proceedings to issue a fixed timetable for the management of the matter.¹² Further it limits the time frame in which the parties are permitted to submit all supporting documents, evidence and put forth all witnesses supporting their case claim.¹³ Consequently, this legislation appears to strictly regulate cases where parties are required to disclose all related documents in their possession at the initial administrative stage. In addition, it strictly controls the number of sessions taking place in which the parties submit their pleadings and evidence hence preventing unnecessarily prolonging cases that keeps the courts flooded. As a measure to enforce disclosure, the legislation prevents litigants from submitting new pleas, claims or evidence once the case goes before the Higher Courts from the Labour Dispute Administrative Office.¹⁴ Therefore, claimants are forced to disclose all documents in their possession that they may wish to rely during the proceedings when the matter is examined fully before the Higher Courts. The CCPA leaves abusing process concerning disclosure unregulated unlike, for instance, the Australian jurisdiction under the Uniform Civil Procedure Rules 1999 (UCPR). Pursuant to Article 211,¹⁵ parties have the duty to disclose documents

12 Article 122 Labour Law No. 36 of 2012

13 Article 124 Labour Law No. 36 of 2012

14 Article 132 Labour Law No. 36 of 2012

15 Article 211 of the UCPR of 1999

in their possession or control, directly relevant to an allegation made or relevant to a matter in proceeding. Consequences of non-disclosure are not tendering the document, held liable for contempt and costs. Hence, such measures may be perceived as upholding the pillars of justice by preventing abusing the courts and process, which possibly can translate to affecting the image and reputation of the whole justice system. Therefore, the CCPA is in need of being amended in order to regulate the cases along with the behaviour of litigants.

IV ALTERNATIVES TO LITIGATION¹⁶

i Overview of alternatives to litigation

Bahrain has a strong tradition of ADR, in particular arbitration and mediation. In the early 1990s the Bahrain International Commercial Arbitration Centre and the Gulf Cooperation Council Commercial Arbitration Centre were established in Bahrain. In 2009, in response to added pressure on Bahrain's court system and the rise in commercial disputes and litigation caused by recent economic challenges, the Bahrain Chamber for Dispute Resolution, a centre designed to facilitate and encourage both statutory ADR tribunals and mediation and arbitration, was established in partnership with the American Arbitration Association (BCDR-AAA).

ii Arbitration

Although arbitration has its many benefits, unfortunately under the Bahrain legal system if an arbitration agreement lacks a clause that renders the award final, parties may seek the jurisdiction of the courts leaving all arbitral efforts wasted, as the issue will be reconsidered *ab initio*. As it appeared that following arbitration the 'losing' parties always found a way through the appeal process to have the case reconsidered before the courts the BCDR addressed this loophole by regarding its judgments 'final'. Therefore, BCDR judgments can only be appealed at the Cassation Courts under specific circumstances mentioned under section 2 of Decree 30. This characteristic of the BCDR encourages investors and commercial entities to establish in the Kingdom as it has ensured that its decisions are final and enforceable.

Royal Decree 30 of 2009 (Decree 30) was the legislative instrument that established the BCDR-AAA, providing for both statutory dispute resolution tribunals ('jurisdiction under the law') arbitration by agreement ('jurisdiction by agreement') to be conducted under the auspices of the BCDR-AAA.

In accordance with Article 9 of Decree 30, the Jurisdiction under the Law of the BCDR-AAA is for cases where the value of the claim exceeds 500,000 dinars and involves:

- a* disputes among financial institutions licensed according to the provisions of the Law of the Central Bank of Bahrain or between these institutions and other institutions, companies or individuals; or

16 KBH Kaanuun would like to thank Mr Abdulla Al Shamlawi, barrister at Cassation & Constitution court and partner at Al-Shamlawi law firm, for contributing to this section.

- b* international commercial disputes. The dispute shall be deemed international if the location of one of the disputant parties or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the location most closely connected with the dispute, is outside the Kingdom.

Decree 30 thus provides that claims conforming to (a) or (b) above, which would otherwise have been within the jurisdiction of the courts of Bahrain, are required to be, and will be, referred to the BCDR-AAA. Article 15 of Decree 30 provides that a judgment award rendered as a result of jurisdiction under the law is to be considered a 'final judgment issued by the courts of Bahrain'.

The applicable rules for jurisdiction under the law matters are contained in Resolution No. (65) for the Year 2009 (Jurisdiction under the Law Rules). Pursuant to these Rules, non-Bahraini lawyers may represent parties before statutory dispute resolution tribunals, but only if they work jointly with a Bahraini lawyer who is licensed to appear before the Cassation Court. The default language will be Arabic, and the default laws will be the governing laws of Bahrain.

One motivation for the creation of these statutory dispute resolution tribunals was to remove some of the caseload from an already congested local court system and to provide a specialist forum for handling international or financial disputes (or both) of a value greater than 500,000 dinar. As such, the Jurisdiction under the Law Rules are reflective of the procedural rules of the courts of Bahrain, as opposed to the usual rules common to arbitration centres around the world.

Article 19 of the Decree additionally creates a free arbitration zone (FAZ) whereby parties can agree in writing to have disputes referred to the BCDR-AAA, regardless of the value or subject of the claim, or whether the dispute is international in nature (jurisdiction by agreement). Non-Bahraini lawyers are entitled to represent parties and conduct any necessary actions in FAZ arbitration proceedings without being required to work jointly with a Bahraini lawyer.

The BCDR-AAA Arbitration Rules (FAZ Arbitration Rules) are the default rules that apply where parties have agreed to have disputes referred to the BCDR-AAA without designating particular rules (as distinct from the rules that apply to the statutory arbitration proceedings). The parties may, however, adopt, in writing, modifications to the FAZ Arbitration Rules. The FAZ Arbitration Rules are based largely upon the International Centre for Dispute Resolution Rules, and allow the parties to nominate the applicable law and language of the proceedings. For Section 2 arbitrations, where the parties have failed to agree on the relevant language and laws, the Tribunal shall determine the most applicable law.

Enforcement of arbitral awards outside of Bahrain may prove to be difficult in circumstances where the parties have not agreed to arbitrate any dispute (an agreement to arbitrate being a requirement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Arbitration has been a reasonably common method of dispute resolution in Bahrain in the past; however, there has also been reluctance to arbitrate in Bahrain arising out of concerns that the courts of Bahrain would not uphold arbitral awards.¹⁷

The establishment of the BCDR-AAA and its provisions for recognising awards will no doubt allay some of those insecurities.

There are significant differences between the procedural rules applicable to statutory dispute resolution tribunals and FAZ arbitrations. Most particularly, Section 1 statutory dispute resolution tribunals fall within the supervision of the Supreme Judicial Council and the laws of Bahrain are the governing laws. The purpose for establishing the BCDR-AAA as a centre to hear and determine these Section 1 disputes statutory disputes was to help unburden the courts and to ensure the swift resolution of these specific types of cases. As such Section 1 statutory dispute resolution tribunals rules are reflective of the procedural rules of the courts of Bahrain. Given the mandatory aspects of jurisdiction under the law arbitrations, there will likely be a significant number of cases that will fall within the scope of Section 1 of Decree 30 and the automatic jurisdiction of the BCDR-AAA. In addition, it is likely that the BCDR-AAA will see an increasing volume of FAZ arbitration proceedings, although naturally the Centre will need to establish a satisfactory track record to attract potential users.

Although only operational since early 2010, the BCDR-AAA has already handled 27 cases, 13 of which were filed in the BCDR-AAA's first year of operation, and 1434 in 2011. It is to be expected that the number of cases filed annually will grow, particularly as prospective parties become aware of the benefits of the BCDR-AAA as a FAZ.

Available rights of appeal under Section 1 of Decree 30

Technically, there is no right of appeal from a dispute resolution tribunal award rendered through Section 1 of Decree 30. Article 15 of Decree 30 provides that an award under Section 1 is deemed to be a final judgment issued by the courts of Bahrain. Despite this, Article 13 of Decree 30 provides for limited circumstances in which a party may challenge an award issued by the Tribunal and seeking nullification in the Cassation Court. These circumstances are set out in Articles 13(1) to (8), and include the following situations:

- a* where there was a failure to properly serve notice of the appointment of a member of the Tribunal or the dispute resolution procedures, or the respondent was not allowed to present a defence (Article 13(1));
- b* the composition of the Tribunal or the dispute resolution procedure is contrary to what is stipulated in the regulation (Article 13(2)); the award contradicts the public order of the Kingdom of Bahrain (Article 13(3));
- c* there is an act of deception or fraud by a party or its representative that influences the judgment (Article 13(4)); if, after the issue of the judgment, it is admitted or adjudicated that papers on which the judgment is based were forged, or if it is determined that a witness gave false testimony (Article 13(5));

17 John M Townsend. "The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone"; Dispute Resolution Journal, February/April 2010, p. 76.

- d* if a party obtains decisive papers in the case after the issue of the judgment that were obstructed by the opposing party (Article 13(6)); and
- e* if the Tribunal ruled on an issue not claimed by a party or ruled for more than had been claimed (this may, however, lead only to the nullification of those rulings, and not the entire judgment) (Article 13(7)); or if the judgment contradicts another judgment having *res judicata* status (Article 13(8)).

Article 14 of Decree 30 provides that a challenge on the above grounds must be made within 30 days of the date of issue of the award (or the date of its notification to the parties). In the circumstances set out in Article 13(4) to (6) (that is, where there has been a finding of some misconduct by a party after the issue of the award), the challenge must be filed within 30 days of the day on which the misconduct is discovered.

Available rights of appeal under Section 2 of Decree 30

Additionally, for Section 2 disputes under jurisdiction of the BCDR-AAA by parties' agreement, a party may challenge an order of the High Court of Appeal for the enforcement of an arbitral award pursuant to Article 24 of Decree 30 for the following reasons:

- a* there is no valid arbitration agreement, due to the incapacity of one of the parties or the arbitration agreement contravening provisions of the applicable law chosen by the parties (Article 24(a)(1));
- b* there have been procedural irregularities (Article 24(a)(2));
- c* the composition of the Tribunal or the procedures are contrary to what was stipulated in the arbitration agreement (Article 24(a)(3));
- d* the award ruled on matters not contained in the scope of the arbitration agreement or not put forward by a party (although only those rulings will be held to be set aside, not the entire award); or
- e* the award goes against public order in the Kingdom of Bahrain.

Enforcement of foreign arbitral awards in Bahrain

Bahrain has been a signatory of the New York Convention since 1998. Provided that the conditions of the New York Convention are met, a foreign arbitral award from a country that is also a signatory to the New York Convention may be enforced through the courts of Bahrain, without further review of the merits. The courts of Bahrain, will, however, take into consideration whether the dispute is one that is arbitrable under Bahraini law, whether the award is final and binding on both parties and whether the award is contrary to public policy in Bahrain.

iii Mediation¹⁸

Mediation is well known among the international legal community as the fastest and most effective means to resolve disputes and is another popular and effective form of dispute resolution now widely available to parties to commercial, other legal, diplomatic, employment or family disputes. Described sometimes as ‘assisted facilitated negotiation process leading to a mutually agreed settlement,’ mediation’s popularity in the world’s mature legal systems is due to the potential it offers for creative solutions to disputes that often appear to have reached a stalemate. Its advantages are generally cited as cost effectiveness, confidentiality, control, compliance, mutuality and support however first and foremost mediation can be characterised as a non-belligerent form of dispute resolution that strives to preserve relationships between the parties. The latter is very important when considering the future of mediation in a country like Bahrain and in the GCC where 85 per cent of businesses are family businesses that own in excess of \$2 trillion worth of assets worldwide, represent more than 83 per cent of the GCC private sector and control 62 per cent of the wealth in the GCC.

During an investigative report on the use of mediation in Bahrain carried out by the BCDR-AAA, it was found that more than 70 per cent of the respondents had been exposed to a form of mediation either directly, by taking part in a mediation or using the mediation process or indirectly by knowing individuals or companies who had. However, what the BCDR-AAA found was that the respondents had in fact been exposed to a form of mediation more akin to a conciliation process, where the parties in dispute called upon either a leader in their industrial sector or common kindred who could help the parties resolve their differences. This form of conciliation revealed itself to be a popular form of dispute resolution in Bahrain and, although not entirely the same as the formal mediation process that is now well known in the legal industry, it shares many of its characteristics and, if anything, demonstrates the propensity of the Bahrain market to open itself to a fully fledged mediation culture.

In fact the BCDR-AAA is playing a pivotal and instrumental role in promoting a culture of mediation in Bahrain, the Gulf region and beyond. To date it has trained 281 individuals in the kingdom not only to become mediators, but to use mediation as a process in their profession. BCDR-AAA is actively participating in the training and certification of mediators in such places as Oman, Saudi Arabia, Jordan, Syria, Morocco and Lebanon. It is also in talks with Bahrain providers of superior education for a project to create a mediation diploma similar to the one currently offered by St Joseph University in Lebanon.¹⁹ It is also cooperating with the Qatar International Court and Dispute Resolution Chamber, Dubai International Arbitration Centre and other ADR partners, thus paving the way for a truly regional platform of alternative dispute resolution services which includes mediation, beside arbitration, as one of its main attractions.

18 KBH Kaanuun would like to thank Mr Al Aradi, Mediation and Arbitration Chief Registrar and Assistant Chief Executive for Mediation at the Bahrain BCDR-AAA, for providing information for this section.

19 In fact the St Joseph diploma in mediation was created with the help of the BCDR-AAA.

Aside from its involvement in promoting and encouraging a culture of mediation and the use of mediation as a form of alternative dispute resolution for businesses, law firms and government ministries at home and abroad, the BCDR-AAA also offers its own mediation services.

Launched in 2012 the BCDR-AAA mediation service is yet another option to resolve disputes offered by the forum to international, regional and local individuals and organisations who contract in the Gulf and beyond. The BCDR-AAA designed a set of Mediation Rules that apply whenever parties to a dispute agree in writing to mediate disputes under them or when the parties provide for mediation or conciliation services of existing or future disputes under the auspices of the BCDR-AAA without designating particular rules.²⁰ Briefly, the BCDR-AAA mediation rules govern the procedures for initiating mediation within the ambit of the forum and also establish key principles such as the mediator's duty to remain impartial, as well as that of confidentiality and privacy of mediation proceedings.

The BCDR-AAA is therefore truly at the forefront of the alternative dispute resolution developments that have been holding sway in Bahrain for the past five years and is concretising its plans to institutionalise mediation by creating industry-specific mediation schemes tailored to the needs of major sectors of the economy including banking, insurance and employment. The BCDR-AAA is also finalising a code of conduct for mediators, bringing the sector in line with that of well-established dispute resolution forums around the world.

VI OUTLOOK AND CONCLUSIONS

As with other countries in the region, Bahrain is striving to develop a reputation as a regional hub for commerce and finance. An important factor in attracting international business to the country involves having effective means for dispute resolution in place that are both cost-effective and timely. It is widely considered, however, that current court procedures are not ideal and would benefit from reform. In particular, as highlighted above, there is a lack of effective case management once a first hearing has been held, and no system for ensuring that parties comply with timelines.

There is also a need for reform of the regulation of the conduct of Bahraini advocates. The Advocacy Act provides for some regulation of the conduct of advocates; however, there is significant scope for expansion of the duties of advocates. In particular, despite a historically strong international focus, there are aspects of legal practice in Bahrain that do not match international standards. For example, there is currently no requirement for Bahraini advocates to undertake anti-money laundering checks when taking on new clients. This is severely out of step with the efforts and expectations of the wider international community, and is a particularly striking failing.

It is suggested that more stringent regulation of the Bahraini legal profession will have the effect of improving the stature of Bahraini advocates and the Bahraini legal system in the international community.

20 Article 1 BCDR-AAA Mediation Rules.

Through the establishment of the BCDR-AAA Bahrain has addressed, in particular, the issue of delay in litigation proceedings, and provided for statute-mandated dispute resolutions for certain domestic cases and a free arbitration zone for international disputes. This unique approach is likely to be attractive particularly to financial corporations considering doing, or already doing, business in Bahrain. International financial institutions may well be encouraged to know that disputes carrying a significant monetary value will be heard under the auspices of the BCDR-AAA in a more timely fashion than would otherwise be the case in litigation through the courts. Moreover, the judges presiding as arbitrators over jurisdiction under the law cases are specially trained by the BCDR-AAA and equipped to handle financial and international disputes, thus creating a specialist body for disputes of this nature.

It remains to be seen whether the statutory arbitrations will significantly reduce the caseload before the courts of Bahrain, and it depends largely on whether a significant enough number of cases fall within the criteria of Decree 30 for automatic referral to arbitration.

The innovative developments through the establishment of the BCDR-AAA, if coupled with reforms of court procedures and the legal profession, will no doubt serve to make Bahrain a very attractive option for international business and a forum of choice for alternative dispute resolution.

Appendix 1

ABOUT THE AUTHORS

HAIFA KHUNJI

KBH Kaanuun Ltd

Haifa Khunji has more than 11 years' experience in transactional work and litigation. She trained and subsequently worked with leading international law firms in Dubai, Doha and Kuwait prior to joining KBH Kaanuun at its inception and now manages the Bahrain operation. She advises on a range of contentious and non-contentious matters with an emphasis on corporate finance and banking. Haifa acts for major local and international banks as well as leading international and regional companies both in arbitration and court proceedings taking place in Bahrain and Kuwait. In non-contentious matters she advises on corporate structures, corporate finance and activities such as acquisitions, mergers, demergers, joint ventures as well as both conventional and Islamic banking and finance.

KAASHIF BASIT

KBH Kaanuun Ltd

Kaashif Basit (1969–2013) had a broad-based contentious and non-contentious practice with particular focus on the media, financial services and real estate sectors. He had strong commercial and DFSA-centred regulatory focus with a range of US, far eastern, subcontinent, European and UAE financial institutions and insurance companies as clients.

Mr Basit particularly specialised in commercial dispute resolution, international commercial arbitration, ADR and insolvency. He had particular expertise in relation to southern Asia and advised a number of Indian blue-chip corporations as well as acting for multinational – particularly UAE companies doing business in India. The litigation and arbitration practice has covered issues as diverse as explosions at petrochemical plants, oil production-sharing contracts, aircraft leases, insurance coverage cross-border partnerships, joint venture and shareholder (including institutional and offshore investor) matters. He had been involved in a number of the early litigation and arbitration cases

in the DIFC, including undertaking the advocacy on behalf of the appellant in the first ever appeal before the DIFC Court of Appeal. Mr Basit also advised and managed cases in conjunction with UAE advocates, particularly property-related matters, in the UAE courts. He had represented parties in regulatory investigations by the DFSA, as well as the restructuring of regulated and non-regulated entities in the DIFC.

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