

THE TECHNOLOGY
DISPUTES
LAW REVIEW

Editors

Hiroyuki Tanaka and Masafumi Masuda

THE LAWREVIEWS

THE

TECHNOLOGY

DISPUTES

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PREFACE

We are very pleased to present this first edition of *The Technology Disputes Law Review*. Science and technology have developed dramatically through the information revolution of the early 21st century, and artificial intelligence-led developments continue (some people believe this trend will continue exponentially and that artificial intelligence technology, or AI, is already advancing towards ‘technological singularity’). Given this environment, technological disputes are becoming more complicated and require more extensive and deeper knowledge and practical experience. For technology companies and technology lawyers, a basic familiarity with international technology dispute resolution practice is essential to doing business in this area, and to that end this publication aims to be a touchstone for all practitioners in the field.

Whether the reader is a company executive or a private practitioner, we hope that this publication will prove useful in navigating the complex world of technology disputes and alerting the reader to important developments that may affect their cross-border business. Although intellectual property and system development have been the principal subjects of technology disputes, in certain jurisdictions, such as Singapore, there are emerging areas that reflect the most recent technology trends.

The jurisdictions featured in *The Technology Disputes Law Review* cover countries and territories spanning Europe, the American continent and Asia, including England and Wales, Brazil and Japan. We are very grateful to have the opportunity both to edit the very first edition, covering such a wide variety of jurisdictions, and to collaborate with the world’s leading law firms.

We would like to thank all the contributors, who have been so generous with their time and expertise. Without them this publication would not have been possible. We also wish to thank our colleagues Robyn Nadler and Masahiro Ueda, who have been invaluable in assisting us in our editorial duties.

Hiroyuki Tanaka and Masafumi Masuda

Mori Hamada & Matsumoto

Tokyo

September 2021

BAHRAIN

*Gareth Mills, Georgina Munnik and Thomas Catto*¹

I OVERVIEW

Bahrain continues to be a regional HUB for ICT and technology innovation with the Bahrain government (primarily through the work of the Bahrain Economic Development Board) seeking to attract and maintain a dynamic technology sector as part of its 2030 Vision strategy.

The Bahrain government has further indicated its desire to increase the digitalization of the Bahrain economy through the publication of the Fourth National Telecommunications Plan and Fifth National Telecommunications Plan which priorities the transformation of Bahrain's communication sector to fuel an uptake in next generation technological services.

In recent years these endeavors have been augmented with new legislation, in particular the Data Protection Law 2018, Legislative Decree No. 56 of 2018 In Respect of Providing Cloud Computing Services to Foreign Parties; Legislative Decree No. 54 of 2018 Promulgating the Electronic Communications and Transactions Law and Law No. 30 of 2018 with respect to Personal Data Protection.

Further the decision by the Bahrain Government to undertake the structural separation of the former incumbent telecommunications operator Batelco into two entities: Bnet (the Bahrain Broadband Network) and Batelco (as a provider of retail services only) indicates a further step towards creating a technologically advanced economy in line regional competitors.

Despite this broad diversification, the most common causes of action in technology disputes tend to be for traditional contract based disputes such as breach of warranty or failure to supply services (software design and licensing in particular). Disputes often involve claims in relation to defective technology or products, or a party not complying with their payment obligations (particularly in respect of licensing) or not performing their obligations in accordance with the contract.

There is no bar to non-contractual claims in Bahrain. These can include claims (eg, negligence, misrepresentation and pre-contractual misrepresentation) or claims in respect of restitution or unjust enrichment. Traditionally, Bahraini courts have been willing to entertain a wider gambit of claims, and 'strike outs' of these claims at an early stage are rare.

Bahrain does not have any legislation specific to business purchases of hardware, software or associated licences. The Civil Code governs and provides for the general principles of contract. Article 128 of the Civil Code specifically refers to the principle that

¹ Gareth Mills is a partner and Georgina Munnik and Thomas Catto are senior associates at Charles Russell Speechlys LLP.

agreements must be kept, namely, that the contract's provisions are deemed the law between the parties. Article 129 of the Civil Code further states that the parties must comply with the requirements of good faith and honesty.

Intellectual Property disputes are traditionally dealt with through a complaint to the Foreign Trade and Industrial Property Directorate at the Ministry of Trade and Industry (MOTI) which has wide ranging enforcement powers

Civil claims for IP breaches are rare because of the powers of the MOTI but the Kingdom has a number of laws governing intellectual property rights, including (inter alia):

- a* Legislative decree No. 22 of 2006 with respect to the protection of author's rights and attendant rights law
- b* Law No. 18 of 2012 with respect to trade names
- c* Law No. 1 of 2004 with respect to patents and forms of benefit
- d* Law No. 6 of 2014 with Approval of Trademarks Law (Regulation) of the Cooperation Council of the Arab States of the Gulf

Civil and criminal claims are possible under the provisions of these (and other) statutes via the High Court (there is no specialist court managing intellectual property disputes) but because of the cost and time of prosecuting such, save in exceptional circumstances the MOTI is usually the preferred route for claimants.

There are several laws that govern confidentiality and data protection, such as Law No. 30 of 2018 Promulgating Personal Data Protection Law, which recently came into effect as the main data protection law in Bahrain, and Law No. 7 of 2003 on Trade Secrets.

However, courts may, in certain situations, request that parties disclose information that may be deemed confidential, such as information covered by non-disclosure agreements.

II YEAR IN REVIEW

In the past year, court sessions in Bahrain have been limited because of the outbreak of coronavirus. The pandemic has had a significant effect on business in Bahrain and the wider region and this has, in turn, caused interruptions and delays to litigation and international arbitration.

In an attempt to address these delays, the Ministry of Justice, Islamic Affairs and Endowments has announced that the High Criminal Courts, High Civil Courts, Administrative Courts and Lower Criminal Courts will take part in televised court proceedings.

Arbitration proceedings have largely been unaffected (as arbitration is by nature a flexible dispute resolution mechanism, and participants have been able to proceed with arbitrations with only limited covid-19 related interference, while remote hearings have become standard practice). Arbitral institutions such as the Bahrain Chamber for Dispute Resolution, International Chamber of Commerce and London Court of International Arbitration have implemented measures to streamline and improve remote working, facilitating online filing and case management.

Tribunals, legal representatives and parties have been able to adapt quickly and have been able to make use of the state-of-the-art technology available to ensure that any covid-19 interruptions are limited as far as possible. In light of this, it should be remembered that the flexibility of international arbitration means that an arbitral tribunal can often render a

decision far quicker than the domestic courts, with limited scope for appeal and a facilitated international enforcement process, so, at least in theory, the process should be more cost effective than domestic litigation.

On non- COVID related development, the passing of the Bahrain Government's Fifth National Telecommunications plan indicates a significant policy initiative aimed at increasing Bahrain's scope as an ICT hub and leveraging off the development of Bahrain National Broadband Network in 2018.

III CLAIMS AND REMEDIES

In our experience, the most common disputes occur following perceived or actual failures to deliver required technology services and lack of clarity as to each party's expectations in relation to that delivery.

As technology contracts relate to specific technical areas, it is especially important to ensure that contracts are tailored precisely to the relevant specific technology or product. Using standard contracts and generic provisions is, unfortunately, common, as it is quick and cost-efficient, but these rarely serve the best interests of either party in the event that a dispute arises.

Technology contracts should include details relating to the technology or product, including, but not limited to, how that technology or product will be protected, used and by whom. These contracts should also address any potential issues that may arise and how these are to be dealt with, such as in relation to data protection or intellectual property rights following termination. The parties should also agree upon proper dispute resolution clauses.

Both parties' interests are best served at the negotiation stage. Technology contracts should be drafted by experts who understand the intricacies involved and can draft accordingly. Taking the time to enter into properly thought out contracts at the beginning of any relationship is the most efficient way of avoiding lengthy and costly disputes.

A contract may be terminated in various ways, including, but not limited to, termination by way of mutual agreement between the contracting parties, unforeseen circumstances that render the parties' performance impossible (*force majeure*), failing to make payments in accordance with the terms of the contract, or breaching other contractual obligations. A number of these provisions are included in various Bahraini statutes, including Legislative Decree No. 19 of 2001 (the Civil Code).

The limitation period in Bahrain is generally 15 years from the date in which a personal right was infringed or an unlawful act occurred. However, the limitation period depends on the type of claim. For instance, claims arising from commercial contracts generally have a limitation period of 10 years, whereas some claims relating to construction for example have a limitation period of three years. It is essential to assess what the specific claim relates to at the outset to determine the appropriate limitation period and ensure compliance

i Remedies

Technology disputes are treated in the same manner as other disputes.

Various interim remedies are available to the suffering party. Those include, but are not limited to, freezing orders and the preservation of assets and evidence.

The claimant may submit an application to the relevant court for an interim remedy. The claim may also be submitted to the Court of Urgent Matters if the claimant requires the matter to be dealt with expeditiously.

In addition, an arbitral tribunal in Bahrain has the power to order preliminary or interim relief. The types of relief available include those set out above and orders to prevent any prejudice to the arbitral procedure.

A party requesting an interim measure must satisfy the arbitral tribunal that harm not adequately reparable by an award of damages is likely to occur, and that there is a reasonable possibility that the requesting party will succeed on the merits of its claim or defence.

An arbitral tribunal may require the party requesting an interim measure to provide appropriate security and may modify, suspend or terminate an interim measure, either on the application of one of the parties or, in exceptional circumstances, on its own initiative.

Upon application by a party, the Bahraini High Civil Court will recognise and enforce an interim measure issued by an arbitral tribunal, irrespective of the country in which it was issued, subject to limited grounds for refusing enforcement, including invalidity in law, incapacity of a party and improper composition of the tribunal.

Furthermore, the Bahraini High Civil Court has the same power to issue an interim measure in relation to arbitral proceedings, irrespective of whether the seat of the arbitration is Bahrain, as it has in relation to proceedings in the courts, and will exercise such power in accordance with its own procedures, having regard to specific features of international arbitration.

The substantive remedies that are commonly sought in Bahrain are damages and specific performance.

The courts in Bahrain generally consider all the relevant factors of the claim when assessing damages. Article 161 of the Civil Code includes that damages are limited to the loss incurred and loss of profit by the aggrieved party. Damages are also extended to cases where the damages suffered are moral (article 162 of the Civil Code).

The courts generally assess damages on a case-by-case basis, considering all the relevant factors. Loss of profits and moral damages are often included in the calculation of damages.

ii Limitation of liability

Parties should seek to limit their liability under a contract. This can be done by excluding liability for certain losses, such as those that were not caused directly by the party in breach, or by including a cap on the amount of compensation recoverable.

The Civil Code also includes several provisions relating to limiting liabilities. For instance, under article 422 of the Civil Code, in the case of sold goods, the contracting parties may agree to increase, limit or discharge liability where the goods are defective. However, any agreement to discharge or limit the liability will be deemed null and void if it is found that the seller has fraudulently concealed the defect.

iii Liquidated damages

Liquidated damages are permitted in Bahrain. Article 226 of the Civil Code states:

No agreed compensation shall be payable if the debtor proves that the creditor has suffered no damage.

The court may decrease the agreed amount of compensation if the debtor proves that the amount fixed is overestimated or if the obligation has been performed in part.

Any agreement to the contrary shall be null and void

Accordingly, the parties may agree on a sum that is equivalent to the potential losses suffered by one of the parties because of the other party's breach. However, this compensation would

not be enforceable if the party claiming liquidated damages did not suffer any damage. The court may also decide to reduce the amount of liquidated damages so that it is equivalent to the actual loss suffered.

IV COURTS AND PROCEDURES

Bahrain does not have a specialist court nor specialist judges to hear technology disputes as cases are heard in the regular civil courts. However, courts may appoint experts to deal with specialist matters.

Proceedings before the commercial courts and the BCDR are essentially public. Similarly, the Bahraini Arbitration Law contains no express provisions regarding the confidentiality of arbitral proceedings. Therefore, this is a matter for the court or the parties to agree on.

In practice, confidentiality is often expressly prescribed in the relevant contracts. In cases where confidentiality has not been expressly provided for in a contract, the court may decide to hear the case privately, depending on sensitivity. Many institutional arbitration rules also recognise (at least a partial) principle of confidentiality in international arbitrations.

For example, the BCDR Arbitration Rules 2017 state that an award may be made public only with the consent of all parties and that, unless otherwise agreed by the parties, all matters concerning the arbitration shall be kept confidential by the tribunal, the BCDR and any experts involved in an arbitration. However, this confidentiality requirement does not apply to the parties themselves.

Additionally, the majority of cases in Bahraini courts are submitted in writing, and judgments are only available to the parties themselves or third parties that can demonstrate they are ‘interested parties’ to a litigation. In short, a non-confidential case in Bahrain receives significantly more protection than one heard in the United Kingdom, for instance.

V EVIDENCE AND WITNESSES

Technology disputes are dealt with in the same manner as other commercial or civil disputes.

There are several laws that govern these disputes, including the following:

- a* Legislative Decree No. 12 of 1971 on the Issuance of the Civil and Commercial Procedural Law;
- b* Legislative Decree No. 14 on the 1996 Promulgating the Law of Evidence in Civil and Commercial Matters (the Bahraini Law of Evidence);
- c* Legislative Decree No. 19 of 2001 on the Issuance of the Civil Law (the Civil Code);
- d* Legislative Decree No. 20 of 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR);
- e* Resolution No. 65 of 2009 with Respect to the Procedures of the BCDR;
- f* Legislative Decree No. 9 of 2015 Promulgating the Arbitration Law; and
- g* Ministerial Decision No. 62 of 2018 with Respect to the Case Management Procedures.

Bahraini law does not recognise the concept of disclosure in the same way that common law systems do. Parties are required to submit all documents (and expert reports) they consider to be relevant with their submissions. Requests for specific disclosure can be made.

There are various statutory provisions that govern the collection and submission of evidence, but parties should ensure that they adhere to the Bahraini Law of Evidence.

Courts and arbitral tribunals have broad discretion regarding how evidence is obtained and what manner of evidence is acceptable, including the power to determine the admissibility, relevance, materiality and weight of any evidence.

Expert witnesses can be heard in litigation proceedings in Bahrain. One or three experts are usually appointed by the court; however, the parties may also agree on the expert to be heard. Where three experts are appointed, the court may allocate specific tasks to each expert. Each expert may submit independent reports unless the experts have agreed to submit a joint report.

The appointed expert is usually listed on a roster of experts. The court will also include a detailed statement of the expert's task and the urgent matters he or she may deal with in the case. The expert must then assess the claim and its merits, and provide a report setting out the results of his or her tasks and opinion, and the grounds for such. Where three experts are appointed, each expert may submit an independent report, unless the experts have agreed to submit a joint report.

An arbitral tribunal may also appoint one or more experts to report on specific issues to be determined by the tribunal, and may require a party to give such an expert any information or documents that the tribunal considers relevant to the issues pertaining to the arbitration.

The parties may also appoint their own experts with their reports accompanying their submissions to the court or arbitral tribunal.

It is important to note that Bahraini law does not recognise without prejudice communications in the same way common law jurisdictions do. That said, it is not uncommon for communications to be sent labelled on that basis, notwithstanding the Bahraini courts' position. Additional wording may also be incorporated in such communications to protect the parties' positions, such as including text stating that any statements given are not considered admissions of liability.

Likewise the concept of privilege and disclosure are not expressly recognised by Bahraini statute. However, Article 66 of the Bahraini Law of Evidence states that a public sector employee may not testify in relation to information that was not disclosed through legal means during his or her employment, and which he or she is not authorised to disclose by the competent authority unless this has been requested by the court or one of the litigants involved in the proceedings.

Article 67 of the Bahraini Law of Evidence recognises a similar concept to legal professional privilege, as it states that lawyers, agents, physicians, auditors or others may not disclose information that they have obtained during the course of their work unless the information was revealed with the aim of committing a misdemeanour or felony.

VI ENFORCEMENT

Technology disputes are not differentiated from other commercial disputes and the enforcement of judgments and awards is governed by concerns similar to those in other jurisdictions.

i Identifying assets in the jurisdiction

Identifying the asset position of another party is not always easy in any jurisdiction. Depending on the circumstances, two key approaches are available to a party seeking such information in Bahrain: either through publicly available sources or by way of enforcement or court order.

ii Publicly available information

Websites such as www.sijilat.bh offer a companies and agencies register with publicly available commercial information such as company names, registered addresses, dates of corporate registration and trading status. Information such as company accounts, articles of association and charges over company assets and properties are not available without specific request.

However, the company registration available on the Sijilat site does provide the total paid-up capital figure, the shareholders and their respective shareholdings and the ultimate beneficial owner (UBO).

The addition of the UBO details is pursuant to the recently issued Resolution No. 83 of 2020 concerning the Standards, Requirements and Rules to Determine Ultimate Beneficiaries, which requires UBOs of registered entities to submit their information (such as their passport and TIN) on the Sijilat portal. It should be noted that this is a work in progress and that this information has not yet been completed for each company listing.

iii Court orders

As set out above in relation to available remedies, a party that brings proceedings in Bahrain may apply to the Bahraini courts for an order for an individual or company to disclose certain documents as defined in a specific request. The party making the request must demonstrate to the court that it has a legitimate interest in the documents for the purpose of its case.

In addition, various enforcement or injunctive relief procedures are also available against individuals or companies and their assets. These reliefs are most commonly sought either through the court of urgent matters (at the beginning of or during litigious proceedings) or from an execution court (or indeed the High Court where applicable) when enforcing a final judgment.

Information regarding a party's assets is not publicly available from the Ministries (ie, the Survey and Land Registration Bureau for property). As such, a party wishing to obtain information relating to assets registered to another party will need a Court Order in their favour.

Upon the execution of a judgment in Bahrain, the Execution Court will exercise its jurisdiction and request confirmation of the debtor's assets from each of the relevant government entities, including the Central Bank of Bahrain (which will, in turn, contact the financial institutions). This would usually include any sums held in accounts, vehicles and property.

iv Domestic judgments

Types of domestic judgments

A party can obtain a number of different domestic judgments through the courts of Bahrain. Civil cases in Bahrain will fall under the jurisdiction of the Bahraini civil courts, which comprise the following:

- a* the small claims court;
- b* the High Civil Court;
- c* the Higher Court of Appeal;
- d* the BCDR Court;
- e* the Court of Cassation; and
- f* the Court of Urgent Matters.
- g* The Small Claims Court has jurisdiction over cases of less than BHD5,000 in value.

The High Civil Court deals with all civil disputes in Bahrain of more than BHD 5,000 in value, and acts as an appeal court to the Small Claims Court.

In 2009, the Bahraini government established the Bahrain Chamber for Dispute Resolution (BCDR), which creates both a specialised commercial court (the BCDR Court) and an alternative dispute resolution centre providing a forum for international arbitration and mediation (the BCDR-AAA). Litigation proceedings are brought pursuant to Section One of Legislative Decree No. 30 of 2009 as amended by Legislative Decree No. 64 of 2014, whilst arbitration and mediation are undertaken pursuant to Section Two thereof.

The BCDR Court (Section One) has jurisdiction over high-value commercial claims (in excess of BHD 500,000) of an international nature, or involving a Central Bank of Bahrain Licensee. These cases cannot be brought in any other civil court in Bahrain.

It is important to note that the BCDR Court is a civil court of Bahrain and its judgments are considered final judgments, with the only recourse being directly to the Court of Cassation. A point of interest is that foreign lawyers may also represent parties before the BCDR Court if they have a joint power of attorney with a Bahraini lawyer authorised to practise before the Bahrain Court of Cassation.

The Court of Cassation is the highest court in Bahrain and deals with applications for annulment of judgments and matters of state. The Court of Cassation does not re-examine the facts of a case and only reviews technical legal arguments. Court of Cassation rulings are final and enforceable; they cannot be appealed further.

Enforcement of domestic judgments

A party seeking to enforce a domestic judgment would make an application to the Court of Execution (if there are Court of Cassation proceedings ongoing, these do not automatically stay the enforcement proceedings).

The party is required to bring the following to the Court of Execution:

- a* a copy of the judgment and an ID card, if an individual;
- b* an execution copy and a ratified copy of the verdict of the final court judgment (which may differ to the above if there has been an appeal); and
- c* a Power of Attorney, if there is a lawyer acting for the judgment beneficiary.

Applications are then made to the Execution Court, requesting it to seek confirmation of the assets held by the debtor from the relevant Ministries in Bahrain. The Execution Court will exercise its jurisdiction and request confirmation of the debtor's assets from each of the relevant government entities, including the Central Bank of Bahrain (which will, in turn, contact the financial institutions). The Execution Court will then freeze assets (including cash) up to the value of the judgment debt. If there are no liquid assets, the court will seize property and sell it at auction to settle the judgment.

Almost all assets can be attached in Bahrain, including movable and immovable property, but there are of course some specific assets that cannot be enforced against, such as:

- a* public property or state-owned property;
- b* the salaries of employees;
- c* property belonging to an individual or a company that is necessary for the defendant to continue working; and
- d* the personal dwelling of the defendant's family.

Attachment orders

A domestic judgment may be enforced by an order for the attachment of assets as well as an order for assets to be sold.

An applicant wishing to make an attachment order prior to proceedings must prove to the court that there are valid reasons for doing so, such as:

- a* a risk that the defendant will dissipate its assets; or
- b* a risk that the defendant will hinder or delay the enforcement of a judgment.

Costs and time taken to enforce domestic judgments

The enforcement of final judgments in Bahrain is carried out predominantly by the Execution Court. As with any jurisdiction, the length of time it takes for a judgment to be settled is almost entirely reliant on the availability of the debtor's assets.

The Bahrain Execution Court is efficient and dependable, with systems in place for timely recovery if assets are available.

The swiftest recovery option is, of course, liquid assets held by the banks in Bahrain. The Execution Court requests the debtor's asset position from the Central Bank of Bahrain and, if there are monies held, issues an order for an amount up to the value of the judgment to be frozen and transferred to the court account. In these circumstances, enforcement can take as little as eight weeks.

However, if there are no liquid assets available and property is required to be seized and auctioned, or judicial receivers need to be appointed to manage the property (for example, in the case of a business/rental property), the time period for enforcement can be extended considerably. There is of course no fixed amount of time for recovery in these circumstances, and they are dealt with on a case-by-case basis.

Execution Court fees are governed by Legislative Decree No. 3 of 1972 (as amended) (the Judicial Fees Law). In accordance with this legislation, the Execution Court charges a fee per enforcement order – this means that each application for a freeze or a seizure of assets is charged separately in accordance with the value of the claim.

Post-judgment procedures for determining defendants' assets

The Execution Court in Bahrain is key to post-judgment procedures for determining a defendant's assets. The Execution Court is responsible, pursuant to a claimant's application, for obtaining the requisite information from the relevant Ministries and government authorities. The Execution Court judge issues requests for information held by the authorities and, once this is received, will make the necessary orders to seize the same.

In addition, and as discussed above at Options to Identify Another Party's Asset Position, a court may make a disclosure order against a defendant compelling them to disclose their assets, including any property owned and monies held in bank accounts.

Challenging enforcement of domestic judgments

Appeals and challenges to judgments in Bahrain differ depending on the stage of proceedings and the court that issued the judgment.

Once a judgment is handed down, a party may appeal from the Small Claims Court to the High Civil Court, or from the High Civil Court to the Higher Court of Appeal if

they believe there has been an error of fact or law. Appeals from the Higher Court of Appeal to the Court of Cassation may be made on points of law only. BCDR Court judgments are non-appealable; the only recourse available is annulment to the Court of Cassation.

Appeals/challenges to the Court of Cassation can only be made on limited grounds of challenge, predominantly those in relation to errors in fact and law.

A party has to file its appeal/challenge at the relevant court within 45 days of receiving notice of the judgment (subject to some exceptions). Notice is issued if the judgment is presented to all parties at a hearing, and the right to appeal is lost if the timeframe for filing the appeal expires.

As per articles 259 to 260 of the Bahrain Civil and Commercial Procedures Act 1971 (the CCPA), the role of the Execution Court is to enforce the judgments received without entertaining objections by a party to the judgment itself. If there appears to be any element of a judgment that is unenforceable **in practice**, an Execution Court judge must not offer any opinion as to resolution and instead must seek clarification of the relevant section in writing from the trial judge. Moreover, the Execution Court judge has the ability to advise the interested parties to approach the relevant court if it appears to them, in the course of enforcement, that there are certain matters that require resolution.

Challenge of attachment orders

The party against whom the attachment order is imposed may appeal to the court within eight days of receiving notification of the attachment order.

As the attachment is approved by the court, even if the attachment had been wrongly granted, a creditor is not liable for any damages caused by the attachment to the debtor.

v Foreign judgments

Legal issues concerning enforcement of foreign judgments

Enforcing foreign judgments in Bahrain is not an overly onerous or complex process, provided you have access to the original documents and can have these legalised or apostilled (depending on the country the judgment is issued in, of course).

Bahrain is a signatory to a number of reciprocal recognition treaties, including:

- a* the Hague Convention for the Pacific Settlement of International Disputes 1907;
- b* the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965;
- c* the Riyadh Arab Agreement for Judicial Cooperation 1983 (the Riyadh Convention);
- d* the Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications 1995 (the GCC Convention); and
- e* various bilateral investment treaties and free trade agreements.

Generally speaking, Bahraini courts will enforce a foreign judgment without requiring prior recognition proceedings if the judgment originates from a country that is also a signatory to one of the same treaties. For example, the Riyadh and GCC Conventions apply to all GCC countries, so a judgment in the UAE is likely to be automatically recognised in Bahrain (subject to the below).

Where reciprocal recognition is not established via treaty between Bahrain and the foreign country, the recognition of foreign judgments is governed by the CCPA, and foreign

judgments may still be recognised following an application for such to the High Civil Court (this is essentially a fresh claim in which the court may choose to re-examine the issues if the defendant submits a defence).

Under Article 252(3) of the CCPA, no enforcement order of a foreign country judgment may be passed except after ascertaining the following:

- a* that the Bahrain law courts are not competent to hear the case in respect of which the court judgment or order was passed, and that the foreign courts which passed it are competent in accordance with the international rules of jurisdiction set down in the laws thereof;
- b* that the litigants to the case in respect of which the judgment was issued were duly summoned and properly represented;
- c* that the court judgment or order has become final in accordance with the law of the court that passed it; and
- d* that the court judgment is in no way inconsistent with any judgment or order previously passed by the Bahrain courts and does not provide for anything that constitutes a breach of public order or ethics.

Variations in approach to enforcement of foreign judgments

As discussed above, the treatment of foreign judgments will depend on the country from which the judgment originates and whether a treaty exists between Bahrain and that country.

A party seeking recognition of a foreign judgment in Bahrain must be aware that, while the Civil and Commercial Law of Bahrain is not governed primarily by Islamic Law, the courts will consider certain principles of Islamic law as forming part of Bahrain's public order and ethics, and therefore may use Article 252(3)(4) of the CCPA to justify rehearing the case.

Categories of foreign judgments not enforced

Under the Riyadh Convention, judgments against governments or government employees that relate to their administrative duties are not recognised.

- Recognition of a foreign judgment is also rejected under the Riyadh convention if:
- a* recognition would contradict the principles of Islamic law or the constitution and public order of the requested country;
 - b* the party against which the judgment is invoked was not duly summoned;
 - c* the laws of the requested country concerning the legal representation of ineligible persons or persons of diminished eligibility were not taken into consideration;
 - d* the dispute is subject to a final judgment in the requested country, or in a third country, provided that the requested country has already recognised this judgment; or
 - e* the dispute is subject to a case currently being heard by the requested country's courts filed prior to the application for recognition being made.

Provided that a certificate of final judgment/enforceability can be obtained from the country in which the judgment was obtained, default and summary judgments can be recognised and enforced in Bahrain.

Process of enforcing foreign judgments

A foreign judgment in Bahrain is enforced by bringing the judgment before the Bahraini High Civil court for recognition and paying the prescribed court fees (see Costs and Time Taken to Enforce Foreign Judgments).

A foreign judgment will only be enforced if it meets the criteria set out in ‘Legal Issues Concerning Enforcement of Foreign Judgments’. In accordance with the CCPA, it is essential that the Bahraini judge is satisfied that the litigants have been duly summoned and properly represented.

If the award is recognised, a party must seek enforcement from the Bahraini Court of Execution. Domestic authorities must execute the foreign judgments as issued (ie, not in part), provided that they do not oppose Shari’a law and public order.

Recognition of judgments from treaty countries

The GCC Convention (Article 1) states that each of the GCC countries shall ‘execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement, provided that the court that issued the judgment has the jurisdiction in accordance with the international jurisdiction as applicable in the member state where the judgment is required to be executed or has the jurisdiction in accordance with the provisions of this agreement.’

Enforcement under the Riyadh Convention (Article 32) requires the competent judicial body to establish that the judgment complies with the provisions of the Riyadh Convention and confirm this in its judgment. The competent body will then order appropriate measures to be taken to give the judgment the same enforceable status as it would have had if it had been made by the requested party.

Recognition of judgments from non-treaty countries

In the absence of a treaty such as the GCC or Riyadh Conventions being in place, or in the absence of a principal of reciprocity between Bahrain and the jurisdiction in which the foreign judgment originates, a fresh claim must be filed before the competent court requesting that it acknowledges and recognises such judgment – the foreign judgment may be used as evidence in support of this application.

Challenging enforcement of foreign judgments

Appeals of foreign judgments are subject to the limitations set out in Challenging Enforcement of Domestic Judgments.

To appeal a foreign judgment that has been enforced by a Bahraini Court of Execution, a party must submit an application to the Bahrain High Civil Court.

vi Arbitral awards

Legal issues concerning enforcement of arbitral awards

There is an established history of enforcement of arbitral awards in Bahrain, and the principle of arbitration itself is a well-recognised and respected form of dispute settlement. Bahrain is a leading centre for arbitration proceedings, and the following enforcement of awards.

A favourable approach towards arbitration

Arbitration is a popular means of dispute resolution in Bahrain and, as discussed in Types of Domestic Judgments, the jurisdiction established its own arbitration institution in 2009, the BCDR-AAA, which ranks among the most competitive in the region. The Arbitration Rules of the BCDR (the BCDR Rules) have been developed in partnership with the American Arbitration Association, with the most recent amendment to these rules taking place in 2017.

Another important institution headquartered in Bahrain is the Gulf Cooperation Council Commercial Arbitration Centre (GCCAC), a regional arbitration authority established in 1993.

Other arbitral institutions commonly used for international commercial arbitration in Bahrain are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the Dubai International Financial Centre-LCIA (the DIFC-LCIA), the Dubai International Arbitration Centre (DIAC) and the Abu Dhabi Global Market Arbitration Centre (ADGMAC).

Legal framework for the enforcement of arbitral awards

The New York Convention

Bahrain has been a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 6 April 1988.

In accordance with the terms of Bahrain's accession to the New York Convention, Bahrain will recognise and enforce:

- a* on the basis of reciprocity – ie, only those foreign arbitral awards made in the territory of another Contracting State party to the New York Convention; and
- b* subject to commerciality – ie, only those foreign arbitral awards resulting from disputes arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State of Bahrain.

Variations in approach to enforcement of arbitral awards

There are two routes to enforcing arbitral awards in Bahrain. The first route applies to the enforcement of arbitral awards rendered under the BCDR Rules, while the second route is relevant to the enforcement of other domestic and international arbitral awards.

Enforcement of arbitral awards rendered under the BCDR Rules

Pursuant to Article 23 of the BCDR Law, enforcing an arbitral award rendered under the BCDR Arbitration Rules requires an order of a judge of the High Court of Appeal.

When making an application for an enforcement order to the High Court of Appeal, the applicant must provide:

- a* the original award together with an Arabic translation if the award was originally drawn up in another language; and
- b* an Arabic copy of the arbitration agreement.

The High Court of Appeal allows for rounds of submissions by the parties and, upon the application of the party seeking enforcement, can hand down freezing orders over the debtor's assets concurrently with its enforcement order.

Subject to the judge of the High Court of Appeal being satisfied that the arbitral award does not contravene Bahrain's public order, the judge will issue a 'reasoned' enforcement order in favour of the applicant or, in the unlikely event that the award is in breach of public policy, an order denying enforcement.

The enforcement order can be challenged within 30 days of its notification, on any of the limited grounds for setting aside an arbitral award as set out under Article 24 of the BCDR Law (see Challenging Enforcement of Arbitral Awards).

The judge that has issued the enforcement order shall not be 'included in the composition of the court selected to adjudicate the petition' challenging the enforcement order.

Enforcement of arbitral awards not rendered under the BCDR Arbitration Rules

In accordance with Article 252 of the CCPA (as amended by Legislative Decree No. 21 of 2019), enforcing an arbitral award – whether domestic or international – that is not made under the BCDR Arbitration Rules requires making an application to the High Civil Court.

When making an application for an enforcement order to the High Civil Court, the applicant must provide:

- a* the original award or a copy thereof, together with an Arabic translation if the award was originally drawn up in another language; and
- b* an Arabic copy of the arbitration agreement.

The High Civil Court allows for rounds of submissions by the parties. Subject to having ascertained that 'there is nothing preventing [the Arbitral Award] implementation', the President of the High Civil Court will then issue an enforcement order in favour of the applicant or an order denying enforcement. See also 'Challenging enforcement of arbitral awards' below.

Categories of arbitral awards not enforced

An award that has not yet become final and binding on the parties (ie, is still subject to proceedings) or that has been set aside or suspended by a court of the country in which, or under the law of which, it was made, may be declared unenforceable in Bahrain, upon the application of a party.

When an award is subject to ongoing set-aside proceedings in the country in which, or under the law of which, it was made, the Bahraini courts may suspend enforcement proceedings and may also, upon the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

It is also rather more difficult to enforce any interim award in Bahrain on the basis that this would not be the 'final' award in any proceedings.

Although a state or state entity may raise a defence of sovereign immunity at the enforcement stage, the Bahraini courts take their judicial independence and the rule of law seriously and, as such, a state or state entity would need to show genuine and sufficient evidence to successfully defend enforcement on such grounds.

Process of enforcing arbitral awards

As briefly outlined above under Variations in Approach to Enforcement of Arbitral Awards, an application for an enforcement order must be made in writing to either the Bahraini High Court of Appeal (for arbitral awards rendered under the BCDR Arbitration Rules) or the Bahraini High Civil Court (for other arbitral awards).

Once obtained, the enforcement order is then taken to the Bahrain Court of Execution, where the enforcing party can apply for the following measures:

- a* the issue of attachment orders on property;
- b* ordering a forced sale of property subject to such attachment order;
- c* ordering the payment of amounts under the judgment;
- d* collecting payments and transfers of payments to the award debtors;
- e* seeking assistance from Bahrain police forces;
- f* seeking an order for the arrest of the debtor;
- g* levying a distraint over assets; or
- h* ordering the sale of any property by public auction.

Orders made by the Court of Execution can be referred to the High Civil Court, whose decision is deemed final.

Costs and time taken to enforce arbitral awards

Court fees for applications for the recognition and enforcement of arbitration awards and for challenges and appeals are subject to the rules based on which judicial fees are levied, as per the Judicial Fees Law, on a case-by-case basis.

Challenging enforcement of arbitral awards

Main grounds for challenging enforcement of arbitral awards

The enforcement of arbitral awards can be challenged during the initial application for the enforcement of arbitral awards filed with either the High Court of Appeal or the High Civil Court (depending on whether the arbitral award in question has been rendered under the BCDR Arbitration Rules or not – see Variations in Approach to Enforcement of Arbitral Awards), on the following limited grounds:

- a* incapacity of either party;
- b* invalidity of the arbitration agreement;
- c* lack of proper notice of the appointment of the tribunal or of the arbitral proceedings to the defendant;
- d* the defendant was unable to present their case;
- e* the tribunal has exceeded its jurisdiction;
- f* the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or with the law of the country; or
- g* the subject matter of the dispute is not capable of settlement by arbitration under the laws of Bahrain, or is otherwise contrary to the public policy of Bahrain.
- h* Consequences on Enforcement of an Application to Set Aside an Arbitral Award

Filing an application to set aside an arbitral award before the Court of Cassation (for arbitral awards rendered under the BCDR Arbitration Rules) or the High Civil Court (for other arbitral awards) will not automatically stay the enforcement of the arbitral award.

The party resisting enforcement may request an interim order for a stay on enforcement of the arbitral award, pending the determination of the application to set aside. However, such orders are rarely obtained.

VII ALTERNATIVE DISPUTE RESOLUTION

The Kingdom of Bahrain has a long history of arbitration, and international commercial arbitration is an increasingly popular form of dispute resolution.

As a modern and business-friendly jurisdiction with a lively and diverse private sector economy, Bahraini business relationships give rise to a wide range of commercial agreements, often prescribing arbitration as a dispute resolution mechanism.

Inevitably, in international business relationships, disputes occasionally arise that cannot be resolved amicably between the parties, who must instead rely on their chosen formal dispute resolution mechanisms.

Bahrain was one of the first states within the Gulf region to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which it did in 1988; it is also home to the GCC Commercial Arbitration Centre (the GCCAC), a long-established regional arbitration institution.

To ensure that this arbitration-friendly framework continues into the future, Bahrain has passed a number of statutory measures in recent years, aimed at substantially modernising its arbitration regime and adopting the best-practice approaches established by international groups, institutions and practitioners. It is no surprise, then, that arbitration, both domestic and international, has a firm following in Bahrain. These include:

i Adoption of the UNCITRAL Model Law

Legislative Decree No. 9 of 2015 (the Bahrain Arbitration Law) adopts the provisions of the UNCITRAL Model Law (the Model Law) in its entirety. The Bahrain Arbitration Law adds further substantive provisions, including:

- a* appointing a single court competent for arbitration assistance and supervision (Article 3 confirms that the High Civil Court is entrusted with considering and determining all arbitration-related applications);
- b* authorising the representation of parties by non-Bahraini lawyers (Article 6 states that parties can be represented by foreign lawyers in international arbitrations held in Bahrain); and
- c* the removal of arbitrator liability (Article 7 removes liability from arbitrators in the course of their appointment, unless they acted in bad faith or committed gross misconduct/serious error).

In accordance with the provisions of the Model Law, the Bahrain Arbitration Law will recognise any arbitral award as final and binding subject to a few limited grounds for refusing enforcement or recognition, as set out under Categories of Arbitral Awards Not Enforced.

ii The BCDR Law

Legislative Decree No. 30 of 2009 with respect to the BCDR (the BCDR Law) sets out specific rules applying to the enforcement of arbitral awards rendered by the BCDR under the BCDR Arbitration Rules (see Variations in Approach to Enforcement of Arbitral Awards).

Although litigation remains the primary dispute resolution mechanism in the Kingdom of Bahrain, international arbitration is an increasingly popular alternative.

Parties to international arbitrations in or concerning Bahrain have indicated that the main drivers for their choosing arbitration over litigation or other forms of dispute resolution are the confidential nature, flexible procedure and international enforceability of arbitral awards.

A cultural preference to resolve disputes ‘behind closed doors’ means that parties to international contracts or disputes in or concerning Bahrain (in keeping with those based across the Gulf Cooperation Council and Middle East region) are often attracted to arbitration over other forms of dispute resolution.

The BCDR

In 2009, Bahrain issued Legislative Decree No. 30 of 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (the BCDR Law).

The BCDR Law established the Bahrain Chamber for Dispute Resolution (the BCDR), which operates in partnership with the American Arbitration Association (the AAA).

The BCDR operates two separate and distinct dispute resolution components:

- a* statutory court procedures through the BCDR Court (see above); and
- b* arbitration through the BCDR-AAA international arbitration centre.

The BCDR has jurisdiction over disputes in relation to which the parties have agreed in writing that the BCDR-AAA Arbitration Rules (the BCDR Rules) will apply, and it will also administer arbitrations under non-institutional rules or procedures, where the parties have made a written agreement to that effect.

In 2017, the BCDR Rules were updated to take account of changes to Bahrain’s arbitration legislation, and developments to the approach to international arbitration in the rules of other leading institutions, and in the UNCITRAL Arbitration Rules 2010.

iii The Bahraini Arbitration Law

While Bahrain’s previous arbitration law provided comprehensive statutory support for arbitration, Bahrain has nevertheless sought to continue to develop and update its legal framework.

As part of this, in July 2015 Bahrain issued Legislative Decree No. 9 of 2015, promulgating the Bahraini Arbitration Law (the Arbitration Law).

The Arbitration Law adopts the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) in its entirety, and therefore gives businesses and individuals the freedom to make use of arbitral proceedings in accordance with the internationally accepted best-practice in arbitration.

The Arbitration Law also made a number of further changes to the existing arbitration regime, including the stipulation that non-Bahraini lawyers may now represent parties in international commercial arbitrations in Bahrain, and the limitation of arbitrator liability under the Arbitration Law, except in cases of ill will or gross negligence.

iv The Prague Rules

One issue in international arbitration that is perennially in the spotlight is the different approach and, sometimes, outcomes of the Civil Law versus the Common Law systems.

As a popular location for international arbitration, and a Civil Law jurisdiction based on the Egyptian/French/Roman legal systems, Bahrain's arbitrations and especially Bahraini arbitrators have often leaned more towards the inquisitorial, rather than adversarial, approach to the resolution of disputes.

It is therefore important, in this context, to note the introduction in December 2018 of a comprehensive set of rules for the taking of evidence in international arbitration in Civil Law systems, in the form of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules).

The Prague Rules provide a more inquisitorially focused system of guidance in relation to evidence in Civil Law-based arbitrations. Bahraini parties or those from other Civil Law jurisdictions will no doubt often prefer this approach, as it more closely aligns with the approaches taken by their respective domestic courts, particularly in respect of disclosure/discovery and witness evidence and cross-examination.

Practitioners in Bahrain have welcomed the Prague Rules. While many are very familiar with the International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules), the adoption of a Civil Law-tailored alternative will doubtless become more and more popular in Bahrain.

VIII OUTLOOK AND CONCLUSIONS

The coronavirus

Bahrain has implemented various restrictions and requirements to address the covid-19 pandemic; these include:

- a* encouraging private sector enterprises to maintain remote working and limit the number of employees at a location, and for those present to adhere to social distancing measures;
- b* implementing a draft law regarding the payment of salaries of private sector employees for certain periods;
- c* paying the Electricity and Water Authority utility bills for individuals and businesses for certain periods with a corresponding restructuring of the government's administrative costs to offset additional costs incurred;
- d* exemptions from municipal fees, industrial land rental fees and tourism levies for certain periods;
- e* increasing the size of the Liquidity Support Fund;
- f* increasing the Central Bank of Bahrain's loan facilities to allow the deferment of debt instalments and the extension of additional credit;
- g* redirection of Tamkeen (the government agency responsible for the provisions of loans and assistance to businesses) programmes to support adversely affected businesses and the restructuring of debts issued by Tamkeen;
- h* Bahrain Clear has provided a new service enabling the management of the general assemblies of listed companies to meet remotely;
- i* recommendations by the Ministerial Committee for Financial and Economic Affairs and Financial Balance to reduce port operating costs and maritime fees have been approved, meaning the handling charges for bulk materials such as sugar, gypsum, iron and sponge iron will be reduced by 20 per cent in response to market dynamics; and

- j* the creation of an online platform (the eCommerce Gateway) to which businesses (including small and medium-sized businesses) can register with the aim to bolster online sales.

It is undeniable that covid-19 has had an impact on some commercial contracts. Therefore, it is prudent that parties:

- a* assess the provisions of contracts that may have been affected (especially those relating to performance);
- b* examine the risks of breaching or terminating contracts;
- c* comply with any contractual or statutory notice periods; and
- d* attempt to come to a mutual understanding with the other contracting party.

A party may also invoke *force majeure* provisions (either by contract or by statute) where its obligations (whether fully or partially) have become impossible to perform, as this may grant some form of relief to the breaching party.

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In addition, Thomas advises on dispute avoidance measures, and on alternative dispute resolution, including mediation.

Thomas's work frequently has an international element, and he works closely with local advocates and litigators in other jurisdictions, including in the Middle East, Europe and Asia-Pacific regions, to resolve disputes efficiently and effectively.

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Appendix 2

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