

Arbitration in the Region

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The popularity of arbitration in the Middle East continues to grow, and in January 2010 Bahrain's BCDR-AAA became the latest in a number of arbitration centres to open in the region. The BCDR was created in accordance with Bahrain's new Arbitration Law ¹, which also created what has been called the world's first "Free Arbitration Zone".

This article looks at the BCDR, and what the "Free Arbitration Zone" means in practice.

The BCDR

The BCDR is a partnership between the Bahrain Chamber for Dispute Resolution (BCDR) and the American Arbitration Association (AAA), a longstanding and highly respected international arbitration centre. The BCDR is located in Manama, the capital of Bahrain.

The BCDR is in many respects like any other arbitral institution. Its role is not to arbitrate disputes itself, but to provide the administrative and procedural support necessary to enable an independent Tribunal to hear and decide a particular matter. Parties can choose to use the BCDR either before or after a dispute has arisen, provided the agreement to do so is in writing.

The BCDR Rules closely follow those of the AAA. This means users of the BCDR will have the comfort of using a set of rules that have been tried and tested and are of the highest international standards.

With regards to fees, although the administrative fees of the BCDR are modest and fixed according to the amount in dispute, the fees of the arbitrators (which tend to be substantial) are not fixed. Instead, under Article 32 of the Rules, the arbitrators are to be paid a daily or hourly rate based on the size and complexity of the case, and such rate is to be agreed with the parties. If agreement cannot be reached, then the BCDR will determine the appropriate rate.

In comparison, many other arbitral institutions in the region (such as DIAC) fix the fees of the arbitrators depending on the amount in dispute. The BCDR approach is not however unique to the region, as the DIFC-LCIA also operates a system whereby arbitrators charge an hourly rate. The DIFC-LCIA specifies that the hourly rate is to be between AED 1,085 - AED 2,525, and although the BCDR gives no such indication, it is expected that its rates will be similar to those of the DIFC-LCIA.

The Free Arbitration Zone

In order to understand what the Free Arbitration Zone is, it is first necessary to understand how arbitral awards are enforced internationally.

Once an arbitral award has been rendered by a Tribunal, the parties are contractually obliged to comply with that award. There will however be occasions where the losing party does not wish to comply, and the winning party must seek to enforce the award in the country where the losing party has assets.

In order to facilitate this enforcement process, a number of states have signed up to the 1958 New York Convention, under which contracting states agree to recognise arbitral awards made in other states, and may only refuse to do so if the losing party shows that one of the following procedural irregularities has occurred:

- The parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement was invalid either under the law applicable to the agreement or under the law of the country where the award was made.

- The losing party was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present his case.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.
- The composition of the Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

The Free Arbitration Zone is relevant to this last ground. Under Article 25 of Bahrain's new arbitration law, parties to an award that has been issued in Bahrain are not entitled to challenge the award in the Bahraini courts, provided the award is being enforced outside of Bahrain and the parties have agreed in writing that:

- A law other than Bahraini law applies to the dispute.
- The parties will not challenge the award before the courts of Bahrain.
- Any challenge against the award will be before a competent authority in another state.

Bahrain can therefore be said to be a "Free Arbitration Zone" in that its courts will not interfere or set aside an arbitral award made in Bahrain, provided the above conditions have been satisfied. This is a unique approach and one that firmly establishes Bahrain as one of the most arbitration-friendly countries in the region.

However the benefits of the Free Arbitration Zone must not be overstated. Under the New York Convention the fact that an Award has been set aside in the country in which it has been made is only one of a number of factors that may enable a signatory state to refuse to enforce the award. The new law therefore only removes the possibility of a potential ground for non-enforcement from occurring. The Free Arbitration Zone does not guarantee that awards issued in Bahrain will be enforceable overseas (nothing can guarantee this), it only guarantees that the Bahraini Courts will not interfere or set the award aside.