

Bahraini Constitutional Court Rejects Challenge to GCC Commercial Arbitration Centre's Arbitration Rules

Saad Al Doseri

April 2017

In this article, we look at the facts of the case, a dispute between two Bahraini companies, and provide commentary and analysis on it in light of our own experiences in a similar case.

Facts

The appellant (the defendant in the underlying dispute) began proceedings before the High Civil Court to annul the arbitral award number 74/2013 issued against it by the Centre. The High Civil Court rejected the appellant's action and it appealed to the Court of Appeal. During the appeal, the appellant challenged the constitutionality of Article 36 of the Centre's Arbitration Rules.

Article 36 reads as follows (unofficial translation):

1. An award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.
2. The relevant judicial authority shall order the enforcement of the arbitration award unless one of the litigants files an application for the annulment of the award in the following specific events: (a) If it was passed in the absence of an arbitration agreement or in pursuant to an invalid arbitration agreement, or if it was prescribed by the lapse of time or if the arbitrator goes beyond the scope of the agreement. (b) If the award was passed by arbitrators who have not been appointed in accordance with the law, or if it was passed by some of them without being authorised to hand down a ruling in the absence of others, or if it was passed pursuant to an arbitration agreement in which the matter of the dispute was not specified, or if it was passed by a person who was not legally qualified to issue such award.

Upon the occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award".

Constitutional Court Legislative Decree No. 27 of 2002 allows parties in a dispute to challenge the constitutionality of an article, whether in a law or in a regulation. If the relevant court deems that such challenge is serious, it shall adjourn the case and grant a period of no more than a month in which the appellant must file a challenge in the form of a case before the Constitutional Court. Otherwise, the party's challenge must be dropped.

Grounds of appeal

The appellant challenged Article 36 of the Arbitration Rules and alleged that this Article violated the Articles of the Constitution of Bahrain, namely Article 20(f), which guarantees the rights to litigate under the law, and Article 30, which states: "*The organising of rights and freedoms laid down in this Constitution and their delimitation will be as per law or based on it. Such organisation or determination will not be prejudicial to the essence of the right or the freedom.*"

The appellant argued that both the restriction on filing a direct annulment action against an award issued by the Centre (in a similar way to an ad-hoc arbitration, where an annulment action against an award must follow any enforcement application by the successful party) and the limited annulment grounds under Article 36 removed the appellant's constitutional right to litigate before the Bahraini courts.

The appellant also claimed that Article 36 breached the Constitution because it treats parties unequally and discriminated between those who referred a dispute to arbitration from those who referred a matter to the civil courts.

The appellant also argued that the Arbitration Rules were unconstitutional because they had not been issued by the Bahraini parliament as the competent legislative authority, but were instead ratified by the King as head of the executive authority.

The ruling of the Constitutional Court

The Constitutional Court ruled in its judgment that Article 36 of the Arbitration Rules was constitutional because there had been no violation of either Articles 20(f) or 30 of the Constitution.

The Constitutional Court addressed the appellant's allegations by stating that the Arbitration Rules were issued pursuant to Article 28 of the Centre's Charter, which was ratified by Legislative Decree No 6 of 2000. The Constitutional Court noted that Article 36 of the Arbitration Rules provided detail for what was described in general terms at Articles 14 and 15 of the Centre's Charter. The Court also found that the Centre's Rules could be regulated by the executive authority without violating the Constitution, by taking into consideration the contractual nature of arbitration.

On the other hand, the Constitutional Court indicated that parties who voluntarily choose to resolve their disputes through arbitration are different in their legal status compared with those who seek to resolve their disputes through ordinary courts. Each has its own legal status, obligations, and procedures. In light of these differences, equal treatment is not a necessity and, accordingly, any inequality between litigants in arbitration and those before the courts does not breach the general right of equality before the law. The Court further explained that legislators may vary the regulation of the right to litigate, distinguishing between different types of dispute resolution without breaching the principle of equality before the law.

Commentary

It appears that the appellant attempted all possible methods to attack the arbitral award issued by the Center, as the appellant began an application to annul the award before the other party could commence execution of the award. After the court of first instance refused the annulment application, the appellant then brought the claim on the grounds of unconstitutionality at the appeal stage. It is likely that the ruling of the court of first instance described in detail the reasons for rejecting the application, leaving the appellant with no recourse but to bring proceedings in the Constitutional Court.

The issue of the Constitutional Court's ruling does not necessarily end the journey for the appellant as it may still file a second application for the annulment of the arbitral award when the claimant, as judgment creditor, files for execution as under Article 36 of the Center's Arbitration Rules. The path to requesting annulment of the arbitral award remains open despite the rejection of the claim of unconstitutionality including the rejection of the annulment action.

In our view, the rash action of the appellant in requesting annulment of the arbitral award at the outset brings to mind a rule of jurisprudence which states that *"whoever hastens what is not yet due, is to be deprived of it."* The Arbitration Rules do allow a request for annulment but this must be conducted in a specific timeframe i.e. only once the application for the enforcement of the award is made.

The Court of Cassation gave its opinion on the judicial authority that may be requested to annul an arbitral award: *"What is meant by the competent judicial authority in these articles (i.e. the Centre's Arbitration*

Rules) that looks into enforcement of the award is the competent judicial authority in the state where the award will be enforced, and where the award is deposited if required by local law. There is nothing in the Arbitration Rules or the Center's Charter that affords the High Civil Court in the State of Bahrain competency in this regard, and this is notwithstanding the fact that the Center's premises are in Bahrain and established as an independent and active judicial authority and subjected to its own regulation of arbitration and rules of proceedings." Case No. 101/2010, session of 2/4/2012. As such, it was incumbent upon the appellant to wait until notified of the request to enforce the arbitral award. Only then could the appellant bring a request for annulment of the award according to the reasons cited by Article 36 of the Arbitration Rules, if any. For instance, if enforcement was requested in the United Arab Emirates, the courts of the UAE would be the competent judicial authority to bring an annulment request before them regardless of the Center's location being in the Kingdom of Bahrain.

Despite upholding the constitutionality of the Arbitration Rules in this case, such claims – whether upheld or rejected – contribute to the enrichment of legal jurisprudence. If there is any consolation to the appellant, it may perhaps be that such important constitutional principles emerge that related to both litigation and arbitration.

The Constitutional Court's judgment is final and not subject to any form of appeal. The appellant is likely to bring annulment proceedings once enforcement proceedings are issued.

Other case law

In a similar case, where we are representing the defendant who received an arbitral award in its favour, the High Civil Court in Bahrain issued a ruling in which it refused to enforce the arbitral award despite the facts that (a) the defendant had not submitted a request for enforcement in Bahrain, and (b) the complete absence of any evidence to justify this decision. The enforcement request was actually submitted in the UAE.

The High Civil Court determined that it had competency to consider such a case after making the following points:

"..The court makes reference to its competence and judicial specialisation,

And with regards to the defence presented by the defendant claiming non-competence of the courts of Bahrain to consider the case,

And with the arbitral award being unenforceable except by virtue of an order by the head of the court where the original award was deposited based on a request of any of the parties,

And in view of the annulment request normally being submitted to the competent court in compliance with Article 243 of the Civil and Commercial Proceedings Law, which is the High Civil Court as related to the presented case,

And based on the foregoing, and with the arbitral award in this case having been issued from the GCC Commercial Arbitration Center, and is therefore subject to Law No. 6 of 2000 and its Arbitration Rules that have been ratified by the GCC Commercial Cooperation Committee in 16/11/1994, as amended in 5/10/1999,

And since Article 36 of Centre's Arbitration Rules stipulates that an arbitral award issued by the tribunal is binding and final and enjoys enforceability at GCC member states after being ordered to be enforced by the competent judicial authority, unless a party requests annulment, in which case it must verify the accuracy of such request and rule against enforcing the arbitral award,

And since the competent judicial authority in the presented case is the High Civil Court as described earlier, and the appellant submitted this case to prevent enforcement of the arbitral award which is a

competency of the court since it is the judicial authority responsible for verifying the accuracy of the annulment request, which is in addition to the fact that the award enjoys enforceability in GCC member states, and Bahrain is such a member state,

As such, the courts of Bahrain are competent to consider the dispute, and the defence becomes without basis and must be rejected."

It is obvious that the decision of the High Civil Court concerned a mixture of laws, including the arbitration provisions of the Civil and Commercial Procedures Law (which have since been repealed) and the Arbitration Rules of the Center. This is despite the fact that legal provisions concerning arbitration in the Civil and Commercial Procedures Law are not applicable in an institutional arbitration that is subject to the rules and procedures of a given center (in our case, the Centre). This also represents an unusual departure from the usual position of upholding the arbitration agreement of the parties.

Establishing that arbitral awards issued by the Center are enforceable in GCC member states does not automatically assign competency to all courts of the member states. Establishing competency is intrinsically tied to the order to enforce from the competent judicial authority, as stipulated by Article 15 of the Centre's Charter. It was incumbent on the court to firstly verify the existence of such an enforcement request or enforcement order.

As such, it is legally unsound to establish competency for all courts of GCC member states based on the general principles of the local, Bahraini Civil and Commercial Procedures Law, especially with regards to the annulment of arbitral awards issued by the Center in particular or generally any other institutional or international arbitration. Each such type of dispute resolution avenue has its own considerations and requirements.

The High Civil Court's decision has been appealed in a manner that coincides with the principles previously established by the Court of Cassation, and we eagerly await the results by the end of April 2017.