

Seven years in Bahrain: The Bahrain Chamber for Dispute Resolution updates its Arbitration Rules

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The Bahrain Chamber for Dispute Resolution (“Centre”), a dispute-settlement institution based on a joint venture between the Bahrain Ministry of Justice and the American Arbitration Association, launched new arbitration rules in order to bring the Centre in line with the best practices of arbitration. The new Bahrain Chamber for Dispute Resolution Arbitration Rules (“2017 Rules”) came into effect on 1 October 2017. The 2017 Rules are drafted in Arabic, English and French versions.

Background

The Centre is established by Bahrain Legislative Decree No. 30 of 2009 as amended by Legislative Decree No 65 of 2014 (“Decree”). The Decree confers two types of jurisdictions on the Centre: jurisdiction by law under Section 1 and jurisdiction by party agreement under Section 2. Under Section 1, the Centre has jurisdiction to resolve disputes, which are originally within the jurisdiction of the Bahrain courts or any authority with competent jurisdiction, whenever the amount of the claim is in excess of US\$1.3 million (these disputes comprise of: (1) disputes where one or all parties are financial institutions; and (2) international commercial disputes). Under Section 2, the Centre has jurisdiction to hear the disputes that the parties agree in writing to resolve through the Centre.

In respect of disputes under Section 2 of the Decree, the former Bahrain Chamber for Dispute Resolution Arbitration Rules were adopted in 2010 (“2010 Rules”). The 2010 Rules were closely modelled on the International Centre for Dispute Resolution (“ICDR”) Arbitration Rules. However, since the enactment of the 2010 Rules, several arbitration institutions (e.g. the ICDR itself, the London Court of International Arbitration (“LCIA”) and the International Chamber of Commerce (“ICC”)) revised their arbitration rules in order to reflect the changes in the arbitration market.

In an effort to update the 2010 Rules in accordance with the latest arbitration developments, the Board of Trustees of the Centre structured a three-member Rules Review Committee (composed of Antonio R. Parra, Adrian Winstanley and Nassib G. Ziadé). The Rules Review Committee considered all the observations contributed by commentators and incorporated amendments that enhanced the rules. The 2017 Rules are intended to reflect the best practices of the arbitration community.

The 2017 Rules only apply to disputes under Section 2 of the Decree, which are disputes handled and resolved by the Centre under the agreement of the parties. The 2017 Rules amended a handful of the outdated provisions of the 2010 Rules and welcomed additional provisions to the rules, as seen below.

Amendments to the 2010 Rules

Filing Requirements

The 2017 Rules amend the current filing requirements of the Centre. Previously, under the 2010 Rules, arbitration was commenced by the claimant filing a “Notice of Arbitration and Statement of Claim” to which, in reply, the respondent was required to file a “Statement of Defense”.

However, the 2017 Rules now introduce a new approach under Article 2 (Request for Arbitration) and Article 4 (Response to the Request). The Centre has adopted a similar approach to that of the leading arbitration centres, by not requiring the Request for Arbitration and the Response to the Request to exhaustively describe the positions of the parties. This amendment is intended to reduce the disadvantage that respondents may face when required to produce a complete defense and counterclaim within a tight deadline, after receiving the notice of arbitration (which might have taken the claimant months to prepare). Under the 2017 Rules, the parties ought to have ample opportunity to present and to defend their case in subsequent written submissions (Article 17).

Prima Facie Jurisdiction

The 2017 Rules incorporate a new provision which deals with prima facie jurisdiction. Article 3 expressly empowers the Centre to decline to register a request for arbitration filed pursuant to a clause with no effective reference to the Centre. The addition of this provision is intended to avoid the unnecessary expense and time related to the appointment of an arbitral tribunal which lacks jurisdiction.

Appointment of Arbitrators

The 2017 Rules amend the provision which relates to the appointment of arbitrators. Under the 2010 Rules, the parties could agree upon any procedure for appointing arbitrators “with or without the assistance” of the Centre. However, the 2017 Rules adopt a new procedure, under Article 9, whereby the appointment of arbitrators must be made and/or confirmed by the Centre. The 2017 Rules also provide additional safeguards in relation to the independence and impartiality of arbitrators in Article 10.

Notification of Challenge

The 2017 Rules introduce changes to the procedure for the notification of challenges of arbitrators. The 2010 Rules only required the party, wishing to challenge an arbitrator, to send the notice of challenge to the administration of the Centre. The notice of challenge was not sent to the tribunal, and the Centre would usually advise the challenged arbitrator of the challenge and request information from him relating to the challenge.

However, Article 9 of the 2017 Rules now requires the party intending to challenge an arbitrator to send the written notice of challenge to the Centre, to the arbitral tribunal and to all other parties involved in the dispute. This amendment provides the challenged arbitrator with a right of reply. The input of the other members of the tribunal, in some instances, may also be beneficial, as they are well-informed and may be able to express a view on whether the challenge is appropriately motivated.

Summary Procedure

The 2017 Rules add a new provision which deals with summary procedures, under Article 18. This new provision expressly empowers the arbitral tribunal, on the written application of a party (with copy to all other parties and to the Centre), to determine, on a summary basis any legal or factual issue considered by the applicant party to be materia

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to the outcome of the arbitration. The introduction of Article 18 empowers the tribunal to determine applications for summary disposal of all or part of claims and defenses without legal merit or outside the tribunal’s jurisdiction. This provision is advantageous, especially where escalating time and costs associated with arbitration are increasingly the subject of criticism.

Party Representation

The 2017 Rules introduce a new provision, in Article 21, which deals with party representation. This provision closely follows the IBA Guidelines on party representations and the 2014 LCIA Arbitration Rules’ Annex of “general guidelines for parties’ legal representatives”. The provision regulates the party representation in the arbitration and empowers the Centre and the tribunal to request a “written proof of authority of any named legal representative” at any time during the arbitration. Article 21 also regulates the conduct of the party’s legal representative (e.g. the legal representative shall not engage in ex parte communications with the tribunal). The provision is also backed by sanctions for violation of the guidelines similar to those proposed by the IBA.

Privilege

The 2017 Rules also introduce a new provision in relation to privilege. The Centre has rather uniquely included guidance on the issue of privilege in the arbitration. The rules provide that the tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between the lawyer and client. When the parties, their counsel, or their documents would be subject to different rules of privilege, the arbitral tribunal shall, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

Arbitrator Fees

The 2017 Rules now take the more usual approach of referring to a fee schedule in regards to determining the arbitrators’ fees. This provides a clearer approach in contrast with the 2010 Rules approach, which based its determination on the arbitrators’ “stated rate of compensation” and caused avoidable friction in arbitration cases.

Commentary

A significant number of arbitration centres are emerging in the Gulf region, making it important for these centres to ensure that their rules are regularly reviewed and updated to reflect the latest arbitration developments. The Centre’s amended 2017 Rules reflect best practices and are a welcome contribution in the region. They incorporate the latest developments in arbitration. The drafting of the 2017 Rules is straightforward and the provisions are easy to understand and navigate. The amendments ought to provide the Centre with a modern and advanced set of arbitration rules, which should make it attractive to international parties.