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Bahrain Court of Cassation Explains the Effects of Mediation on the Arbitration Agreement

Reef Alfahad · Tuesday, January 23rd, 2024

The Bahrain Court of Cassation (“Court of Cassation”) recently examined the relationship between arbitration and a pre-required mediation step in its decision of 19 June 2023 in [Case No. 815 of 2022](#). The case concerned a multi-tiered dispute resolution clause providing for mediation then arbitration. The parties’ agreement in this case, however, was atypical, as they stipulated that the assessment, report and/or recommendation of the mediator would be final and binding. This case is interesting as it shows how the law on mediation and arbitration is developing in Bahrain. It clarifies the position of the courts on vital issues such as the enforceability of mediation clauses, the role of mediators and the legal value of the documents they produce, as well as the relationship between any prior steps of mediation and arbitration.

Background

A Ministry in Bahrain concluded a contract with a contracting company for the development of the Rifa’a Fulajj road with a value of more than 20 million Bahraini Dinars (BHD). The parties’ contract contained a multi-tiered dispute resolution clause that provided for mediation and then arbitration. After concluding the works, a dispute arose over the remainder of the payments, resulting in the parties initiating mediation. The parties failed to reach a settlement agreement. They, however, had agreed when initiating mediation that the evaluations and reports or recommendations of the chosen mediator would be final and binding. The mediator produced a report concluding that the Ministry owed the company BHD 124,147.267. When the Ministry refused to comply with the report, the company brought an action for a declaration that the report was valid and enforceable, to give it the force of an executive document, and alternatively, requested to be paid the sum due to it under the original contract for the road works.

The Bahrain Court of First Instance (“Court of First Instance”) concluded that the Ministry was obliged to make the payment of BHD 124,147.267. This decision was upheld by the Bahrain Court of Appeal (“Court of Appeal”), which held that the application of mediation was deemed as a waiver of the arbitration clause. The Court of Cassation, however, overturned these judgments and concluded that the substantive dispute ought to be resolved by arbitration.

The Decision of the Court of Cassation

In rendering its decision, the Court of Cassation first clarified the concept of mediation. It stated that, as a matter of principle, and under the [Legislative Decree No. 22 of 2019 Concerning Mediation For The Settlement Of Disputes](#) (“Mediation Law”), mediation is a mechanism whereby a third party aims to bring the disputing parties closer to each other to be able to reach a settlement. The process would be deemed successful if the parties reach a settlement through this process which is then binding on them. However, if the process fails, each party can resort to court or arbitration as per the respective contractual terms agreed.

In its decision, the Court of Cassation addressed different points concerning: (i) the agreement to mediate; and (ii) the effect of mediation on arbitration.

The Agreement to Mediate

The Court of Cassation recognised the binding force of mediation clauses. It held that such agreements create an obligation to engage in a process which aims at facilitating a mediated settlement. At the same time, it emphasised the non-coercive nature of the outcome. It distinguished between mediators and adjudicators, holding that the role of mediators is limited to proposing solutions on the parties, as opposed to the role of adjudicators who are empowered to render binding decisions pertaining to the dispute.

Given the purported binding nature of the mediation process stipulated by the parties, one could very well question that the parties intended for their dispute to be resolved by way of mediation irrespective of the use of the word ‘*mediation*’ in their agreement. However, despite the parties’ agreement that the reports and recommendations of the mediator were to be binding and final, the Court of Cassation held that the mediator had no power to render such binding documents or impose a settlement on the parties. The reasonings for this were not clear. However, it seemed that the Court of Cassation adopted a formalistic approach in this case. The Court of Cassation relied on its understanding of the general concepts of mediation as defined by the Mediation Law to override the parties’ express agreement rather than finding a reconciling interpretation that could render both agreements effective.

The Effect of Mediation on Arbitration

The second matter the Court of Cassation addressed was the relationship between mediation and arbitration. There were two main issues. The first was the effect of a mediation clause on the ability to arbitrate a party’s claim. The Court of Cassation held that the parties in such case would not be able to invoke arbitration before engaging in mediation. It further stated that such an agreement was binding on the arbitral tribunal as much as it was binding on the parties. That is, the arbitral tribunal should respect the parties’ agreement and not proceed with arbitrating the claim unless the parties had first resorted to mediation and failed to reach a settlement.

The second issue was the waiver of arbitration. The Court of Cassation denied the proposition that invoking mediation in this case was a waiver of arbitration. It concluded that the parties’ agreement for the assessment and/or recommendation of the mediator to be binding and final did not amount

to an implicit waiver of arbitration. However, reaching a mediated settlement of the parties' dispute would have constituted a waiver of arbitration. The Court of Cassation stated that the mediator's recommendation could only amount to an implicit waiver if it was later adopted by the parties in a settlement agreement. This suggests that any mediated settlement would be conceived as final, and consequently, the parties would not be able to initiate arbitration at least for the matters that the settlement disposed of.

Comments

The judgment of the Court of Cassation serves as a welcome development, affirming the courts' willingness to uphold pre-required dispute resolution steps as binding on parties and arbitral tribunals. There are, however, some matters that still require further clarification. It remains unclear whether the courts in Bahrain conceive these steps as requirements for the admissibility of a claim or for the jurisdiction of an arbitral tribunal. This may have crucial implications on potential awards that may be obtained without first complying with the pre-required dispute resolution steps.

The Bahraini courts also seem to be willing to adjust and uphold pathological dispute resolution clauses so long as they can make sense of what the parties must have wanted. This would be in line with article 125 of the [Civil Code 19 of 2001](#) which addresses the interpretation of contracts. This article provides that where the wording of a contract is clear, it cannot be deviated from in order to ascertain, by means of interpretation, the parties' intention. But where contractual provisions have to be construed, it is necessary to ascertain their common intention and go beyond the literal meaning of the words taking into consideration the nature of the contract and commercial usage. The case shows that mediation is conceived as a non-coercive dispute resolution mechanism aiming at facilitating voluntary settlements. This understanding may influence the way courts interpret the parties' agreement in cases of doubt. If parties in their agreement attempt to alter this non-coercive nature by giving the mediator's reports a binding and final effect, this would perhaps not render the mediation agreement void. The courts may disregard the agreement that gives the mediator's reports such effect. But it may nevertheless uphold the obligation to engage in mediation.

This position can be supported by another recent Bahrain Commercial Court ("Commercial Court") Judgment rendered on 26 June 2023 in [Case No. 6/05353/2023/02](#), which highlights the influence of general concepts and understandings of dispute resolution mechanisms on the interpretation of dispute resolution clauses. The case concerned an arbitration clause, which provided for disputes to be settled through amicable arbitration and where the settlement through amicable arbitration fails, the dispute ought to be resolved by the courts of Bahrain. The Commercial Court held that the term '*amicable arbitration*' showed that the parties did not intend to submit to arbitration but rather they wanted an amicable settlement or resolution without resorting to arbitration. Accordingly, the Commercial Court concluded that the clause was not an arbitration clause and, therefore, it refused the request for the appointment of three arbitrators. The Commercial Court also emphasised the need to interpret such clauses restrictively and in accordance with their nature. Though the Commercial Court did not address the bindingness of the dispute resolution provision in this case, it demonstrated a willingness to construe dispute resolution clauses in a way that would make them operative and respected the parties' agreement as much as practicable.

Furthermore, the Court of Cassation when rendering its judgment indicated that reaching a mediated settlement would amount to a waiver of arbitration. However, what was meant by a ‘*waiver of arbitration*’ remains unclear. Indeed, the effect of reaching a settlement is that the cause of action under the original contract would cease to exist and merge into the settlement. But the question that arises here is how should disputes arising out of the settlement itself be resolved if the settlement agreement does not include a dispute resolution clause. It is not clear from the judgment whether the parties under Bahraini law would need to invoke the arbitration clause in the original contract or resort to the national courts to resolve matters arising out of the settlement. This will probably depend on the wording and scope of the arbitration clause itself as the jurisdiction of the arbitral tribunal is based on the consent of the parties.

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