Bahraini High Court on Choice of Court and Choice of Law Agreements

I. Introduction

It is widely recognized that choice of court and choice of law agreements are powerful tools for structuring and planning international dispute resolution. These agreements play an important role in "increasing legal certainty for the parties in cross-border transactions and reducing incentives for (the harmful version of) forum shopping." (Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) p. 75). However, the realization of these objectives depends on the enforcement of the parties' choice. Unfortunately, general practice in the MENA (North Africa and the Middle East) region shows that, with a few exceptions, the status quo is far from satisfactory. Choice-of-court agreements conferring jurisdiction on foreign courts are often disregarded or declared null and void. Similarly, the foreign law chosen as the governing law of a contract is often not applied because of the procedural status of foreign law as a matter of fact, the content of which must be ascertained by the party invoking its application. The recent judgment of the High Court of Bahrain (a first instance court in the Bahraini judicial system) in the *Case No. 2/13276/2023/02 of 17 January 2024* is nothing but another example of this entrenched practice that can be observed in the vast majority of countries in the region.

II. Facts

X (plaintiff, an English company) entered into a pharmaceutical distribution and sales agreement with Y1 (defendant, a Bahraini company), in 2017 in Bahrain. The agreement provided that disputes arising out of or in connection with the agreement would be subject to the exclusive jurisdiction of the courts of England and Wales. The parties also agreed that English law should be the governing law.

Following Y1's failure to make due payments as agreed, X initiated legal proceedings against Y1, Y2 and Y3 (both Bahraini nationals and partners in Y1) in the High Court of Bahrain, seeking payment and some other related costs under

Bahraini law. The defendants challenged the jurisdiction of the Bahraini court based on the forum selection clause, but did not present any claim as to the merits of the case.

III. The Ruling

The High Court ruled as follow to affirm its jurisdiction and the application of Bahraini law:

[Regarding international jurisdiction]

"[The defendants] challenge the jurisdiction of the Bahraini courts to hear the dispute on the basis that the contract contains a jurisdiction clause which confers exclusive jurisdiction on the English courts to hear any dispute arising out of or relating to the contract. However, according to Articles 14 and 15 of the Code of Civil Procedure, the Bahraini courts have jurisdiction over actions brought against Bahraini nationals, regardless of the nature of the dispute, as long as they have Bahraini nationality at the time the action is brought, without any further conditions, except for in rem actions relating to immovable property located outside Bahrain. Thus, the jurisdiction of the Bahraini courts is based on personal nexus, i.e. the nationality of the defendant, and any agreement to deviate from this jurisdiction is inadmissible because of its connection with public policy. This is because it is the State that determines the jurisdiction of its courts in order to serve the public interest, i.e. to ensure justice, which is one of its primary functions, and to maintain order and peace within its territory. (Underline added).

[Since Y1 is a Bahraini limited liability company and Y2 and Y3, who are partners in Y1, are Bahraini nationals,] it is not permissible to waive the jurisdiction of the Bahraini courts, which retain jurisdiction over the [present] dispute.

[Regarding the applicable law]

It is clear from the contract that the parties agreed that any disputes arising out of the contract should be governed by the laws of England and Wales. Pursuant to Article 4 of Law No. 6 of 2015 on Conflict of Laws in Civil and Commercial Matters with Foreign Elements, the parties may choose the applicable law. [However], Article 6(a) of the same law requires the parties to the dispute to

submit the text of the applicable law, failing which Bahraini law shall be deemed applicable. [In the present case], neither party has submitted the agreed law governing the dispute, and X, which [as the foreign party] , requested the application of Bahraini law and relied on the provisions of the Bahraini Commercial Companies Law in its statement of claim. Since the court is not required to ask the parties [to provide the content] the applicable law, as this obligation rests with the parties themselves, Bahraini law shall be applied to the [present] dispute".

IV. Comments:

1. *Sources of Law*

It should be indicated from the outset that in Bahrain, rules governing international jurisdiction are primarily found in the Code of Civil and Commercial Procedure of 1971 (hereafter referred to as "CCCP," articles 14-20). Regarding choice of law rules, those concerning family law and successions (i.e., personal status) are included in the CCCP (articles 21 and 22), while those concerning civil and commercial matters, including rules pertaining to general theory, are laid down in a special Law on Conflict of Laws in Civil and Commercial Matters with Foreign Elements (Law No. 6 of 2015).[(*)]

[(*)] One may wonder about the reasons behind keeping the choice of law rules in matters of family law and successions within a law dealing with civil and commercial procedure, especially since the Bahraini legislator codified the conflict of law rules in an autonomous act dealing with conflicts of laws (choice of law). There have been some calls to consolidate all private international law rules (including choice of law, international jurisdiction) in a single act dealing with legal relationships involving foreign elements (see eg., Awadallah Shaiba Al-Hamad Al-Sayed, "An Analytical and Critical Study of the Law No. 6 of 2015 on the Conflict of Laws in Civil and Commercial Matters – Kingdom of Bahrain", *Legal Studies*, Vol. 2, 2019, pp. 224 ff (in Arabic)), however, no actions have been taken so far to implement this proposal.

2. *International Jurisdiction*

Interestingly, the rules of international jurisdiction contained in the CCCP deal *mainly* with actions brought against non-Bahraini nationals, either on the basis of their domicile/residence in Bahrain (general jurisdiction, Article 14 of the CCCP) or in certain other matters depending on the category of dispute (special jurisdiction, Article 15 of the CCCP). The fact that the rules on international jurisdiction refer only to foreign defendants raised the question of whether Bahraini courts could assume jurisdiction based on the nationality of the defendant (Cf. Hosam Osama Shaaban, *Treatises on Bahraini Private International Law* (Al-Bayan Media, 2016), p. 277 [in Arabic]).

In a number of cases, the Supreme Court has ruled in the affirmative. For example, in a decision issued in 2014, the Bahraini Supreme Court held that "*even if the Bahraini legislator did not establish the rules of international jurisdiction of the Bahraini courts in the CCCP with regard to lawsuits filed against Bahraini nationals, it is understood that the jurisdiction of the national courts over [such lawsuits] stems from the consideration of [judicial jurisdiction] as a manifestation of the sovereignty of the State, which extends to what falls under this sovereignty*" (*Supreme Court, Appeal No. 531/2013 of 15 April 2014*). In another case, the Supreme Court confirmed its ruling by considering that "*persons holding Bahraini nationality are subject to the jurisdiction of Bahraini courts as a manifestation of the state's sovereignty over its citizens*", thus recognizing the jurisdiction of Bahraini courts over Bahraini nationals even if they hold a second nationality and are not resident in Bahrain (*Supreme Court, Appeal No. 77/2017 of 11 April 2018*).

In this regard, it can be said that the High Court's decision commented here is fully consistent with the well-established case law of the Supreme Court.

3. *Choice of Court Agreements*

With respect to the admissibility of choice of court agreements, it should be noted that agreements with *prorogative* effect, i.e., choice of court agreements that confer jurisdiction on Bahraini courts that are not otherwise competent, are generally admitted (see article 17 of the CCCP [dealing with explicit or tacit submission to the jurisdiction of Bahraini courts]; article 19 of Legislative Decree

No. 30 for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR) [on the jurisdiction of the BCDR based on the agreement of the parties]. See also, eg, *Supreme Court, Appeals Nos. 154 and 165/2017 of 20 May 2017* [tacit submission to the jurisdiction of Bahraini courts]).

However, with respect to agreements with *derogative* effect, although the law is silent on the matter, the Supreme Court has ruled *against* their admissibility. This is particularly the case of the Supreme Court ruling in a decision rendered in 2006 (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*). The case concerned a lawsuit filed by a former foreign employee against his Bahraini employer, claiming overdue employment rights. The employer relied on a choice of forum clause in favor of the English court, arguing that Bahrain's rules on international jurisdiction (articles 14 and 15 of the CCCP) apply only in the absence of a written agreement between the parties when one of them is a foreigner, and that rules on international jurisdiction do not concern public policy; therefore, nothing should prevent the parties from displacing the jurisdiction of Bahraini courts in favor of a foreign court. The Supreme Court disagreed. However, instead of framing its decision in the particular context of the employment relationship, where the employee – as the weaker party – deserves special protection, the Court proclaimed the principle that any agreement by which the parties derogate from the jurisdiction Bahraini courts conferred under Bahraini law "shall be deemed null and void and shall not be invoked" to challenge the jurisdiction of courts in Bahraini (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*).

The High Court's decision commented here is consistent with this ruling. In fact, the underlying part of the first paragraph of the High Court's decision quoted above is almost a verbatim copy from the Supreme Court's decision of 27 February 2007 mentioned above.

Finally, it should be indicated that the position of the Bahraini courts on this issue is broadly similar to that of other countries in the region, as noted in the Introduction. (For a brief overview of some relevant Supreme Court decisions from various MENA Arab countries and the implications of this position for the enforcement of foreign judgments in the region, see Béligh Elbalti, "Perspective of Arab Countries," in M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), p. 188.)

4. *Party Autonomy – Principle*

The principle of party autonomy is enshrined in Article 4 of Law No. 6 of 2015, which states that the "[p]arties may agree to choose the applicable law […]". Bahraini courts have recognized the principle of freedom of parties to choose the applicable law (eg, *Supreme Court, Appeal No. 641/2011 of 27 May 2011*). The courts did so even in the absence of legislative guidance prior to the adoption of the current applicable rules (see eg, *Supreme Court Appeal No. 143/1994 of 4 December 1994*). The High Court in the present case did not deviate from this "well-established" principle, which is rooted in both Bahraini statutes and case law. (For a detailed study based on Bahraini case law, see Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger *et al*. (eds.), *Choice of Law in International Commercial Contracts – Global Perspective on the Hague Principles* (OUP, 2021), pp. 414 ff).

5. *Party Autonomy – Practice*

In practice, however, as demonstrated by the High Court decision, there is a gap between the affirmation of the principle of party autonomy on the one hand and the actual application of the chosen law to a concrete case on the other. This gap arises from the fact that, under Bahraini law as regularly confirmed by case law, foreign law is treated as a fact, the content of which must be determined by the party requesting its application (see eg, Article 6 of Law No. 6 of 2015. For further details and examples, see Elbalti & Shaaban, *op cit.*, at 420-421). Consequently, failure to ascertain the content of the foreign law would normally result in the application of Bahraini law. The same principle applies even in cases where the parties have made a choice of law agreement. For example, in the aforementioned Supreme Court decision in the *Appeal No. 143/1994 of December 4, 1994*, although the Court recognized that the parties had (implicitly) agreed on Pakistani law as the applicable law, it ultimately excluded the application of the chosen law because its content had not been established. (For further details and examples, see Elbalti & Shaaban, *op cit.*). The High Court did not deviate from this general approach showing by this some degree of consistency in the Bahraini courts' practice.

6. *Epilogue*

In the case commented here, the court justified the application of Bahraini law on the grounds that the content of the law chosen by the parties had not been submitted to the court. To some extent, it may be questioned whether such a justification is acceptable, as it could be argued that there was a tacit agreement to apply Bahraini law instead of the chosen law (on the issue of tacit choice of law under Bahraini law and the relevant Supreme Court cases, see Elbalti & Shaaban, *op cit.,* pp. 423-425). However, as evidenced by the facts of the case, the defendants in this case did not present any arguments on the merits, but merely challenged the jurisdiction of the Bahraini court. The mere fact that the plaintiff based its claim on Bahraini law by relying on the relevant provisions of the Bahraini Commercial Companies Law does not in itself constitute an "implied" agreement to apply Bahraini law.

On this particular point, it is interesting to compare the decision of the High Court discussed here with another decision issued by the same court just thirteen days earlier in a case involving similar legal issues, namely the admissibility of a choice of court agreement in favor of the Cayman Islands courts and the application of Cayman Islands law as the law chosen by the parties (*High Court, Case No. 5/11341/2023/02 of 4 January 2024*). In this case, the High Court ruled in exactly the same way as in the present case with regard to the admissibility of the choice of court agreement. However, with respect to the application of Cayman Islands law, the court held that there was an implied agreement to apply Bahraini law in lieu of the chosen law because both parties based their claim on the provisions of Bahraini law and relied on relevant Supreme Court decisions.