

Arbitrating in the Kingdom of Saudi Arabia: A New Frontier

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Islamic Shari'a Law, which is the law of the Kingdom of Saudi Arabia ("**KSA**"), underpins a duty on parties to reconcile ("*sulh*"). Islamic Shari'a expressly recognizes arbitration as a method for resolving disputes. Historically, arbitration, or "*tahkeem*" in Arabic, was deeply-rooted in the Islamic Shari'a and was one of the preferred methods of resolving disputes by the Prophet Mohammed (PBUH).

Despite the use of arbitration during the Islamic era, the acceptance of arbitration in the KSA and in the wider Middle East region was first challenged during the 1950's in the wake of a series of controversial international arbitral awards specifically dealing with the oil and gas industry. Since then, and following the Kingdom's systematic legislative development over the years, the KSA has taken a major positive leap forward by departing from what was often dubbed as a hostile approach towards arbitration. Notwithstanding the tumultuous historical relationship the KSA had with arbitration, arbitration is set to play a cardinal role in enhancing the KSA's role as a global economic powerhouse.

Modernized Arbitration Framework in the KSA

The enactment of the KSA's New Arbitration Law in 2012 (Royal Decree M/34 on 24/5/1433H), which came into force on 17/8/1433H (corresponding to 7 July 2012) significantly reformed the arbitration framework in the KSA to be in line with the best practices of international commercial arbitration. The New Arbitration Law has since been supplemented by Implementing Regulations (Council of Ministers Decision No. 541), which came into force on 14/9/1438H (corresponding to 9 June 2017). Unlike the Old Arbitration Law in the Kingdom (Royal Decree No. M/46 dated 12/07/1403H (corresponding to 25 April 1983)), the New Arbitration Law is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) ("**UNCITRAL Model Law**"), which has and will undoubtedly continue to further increase user confidence.

To date, the UNCITRAL Model Law has been adopted by 85 States in a total of 118 jurisdictions. Therefore, the New Arbitration Law will provide users with a familiar framework within which they can resolve their disputes. This notwithstanding, the KSA has made certain changes to the UNCITRAL Model Law in order to address potential concerns regarding the conformity of the arbitral process with the precepts of Islamic Shari'a Law.

As such, the following provisions are worth noting as they vary from the default position provided for under the UNCITRAL Model Law:

1. **Article 2:** The rules to which the arbitration is submitted must be applied without prejudice to Islamic Shari'a Law.
2. **Article 10(2):** Unless authorized by existing legislation, the KSA governmental bodies require prior authorization to enter into arbitration agreements.

3. **Article 14:** An arbitrator must have the necessary legal capacity, be of good conduct and reputation, and hold a university degree in law or Islamic Shari'a. In a three-member arbitral tribunal, it will suffice for the presiding arbitrator to be a holder of the university degree in law or Islamic Shari'a.
4. **Article 25:** Parties are free to select any rules that will govern their dispute, including those outside of the KSA and in the alternative, the arbitral tribunal is free to select any such rules so long as such rules do not violate Islamic Shari'a Law.
5. **Article 50(2):** An arbitral award may also be nullified by the Court of Appeal, on its own initiative, if the arbitral award is contrary to the principles of Islamic Shari'a Law and the public policy of the KSA, or if it is in contravention to what was agreed upon by the parties, or if the subject of the dispute is non-arbitrable.

Moreover, the New Arbitration Law restricted the pervasive supervisory role of the Saudi Courts throughout the arbitration proceeding. The New Arbitration Law provides parties with greater procedural discretion, in particular:

1. **Article 11:** The competent court must decline *ex officio* any claims to which an arbitration agreement applies.
2. **Article 15:** The competent court may appoint arbitrators in the event the parties fail to do so.
3. **Article 40:** The arbitral tribunal may, unless otherwise agreed by the parties, extend the deadline for rendering the final arbitral award. Parties may also apply to the competent court for such an extension.
4. **Article 50(4):** The competent court is barred from examining the merits of the case during set aside proceedings.

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In line with the push towards making arbitration in the KSA more attractive and adequate to servicing the needs of both local and global users, the inauguration of the Saudi Center for Commercial Arbitration ("**SCCA**"), which was established by Council of Ministers Resolution No. 257 dated 14/6/1435H (corresponding to 15 March 2014), is a significant and welcome development. The SCCA is a testament to the growing need for institutional arbitration dispute resolution offering in the Kingdom. In the 2020 edition of the Dispute Resolution Statistics of the International Court of Arbitration of the International Chamber of Commerce ("**ICC**") in Paris, the world's leading dispute resolution services provider, Saudi Arabia ranked in the eleventh place for the most frequent nationalities among parties in ICC arbitration.

The SCCA, located in Riyadh, is the first institutional arbitration center in Saudi Arabia. The SCCA administers arbitration and mediation procedures in civil and commercial disputes in both Arabic and English under either the SCCA Arbitration Rules or any other rules, which the parties agree to. The SCCA Arbitration Rules are based on the UNCITRAL Arbitration Rules and are therefore familiar to international arbitration practitioners. The SCCA Arbitration Rules include provisions on the appointment of emergency arbitrators (Article 6(1-6)), provisional or precautionary measures (Article 6(7-9)) and joinder of parties (Article 7). More recently, in timely fashion, the SCCA introduced the Emergency Mediation Program to help individuals and businesses that are in financial distress due to the COVID-19 pandemic and need immediate attention to their dispute.

Enhanced Enforcement Framework of Arbitral Awards

Regionally, the KSA ratified the Riyadh Arab Agreement for Judicial Cooperation ("**Riyadh Convention**") in 1983 and the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications ("**GCC Convention**") in 1996. Internationally, the KSA acceded to the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards of 1958 ("**New York Convention**") in 1994 with the following declaration: *"On the basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and enforcement of arbitral awards made in the territory of a Contracting State."* All three of these conventions provide for reciprocal enforcement of foreign arbitral awards and provide that the enforcement of arbitral awards shall be refused if contrary to public policy. Both the Riyadh Convention and the GCC Convention also expressly provide for the denial of enforcement of arbitral awards that are contrary to Islamic Shari'a Law.

Notwithstanding the Kingdom's accession to such conventions, the Old Arbitration Law was criticized for its inconsistent and ambiguous approach with regards to the finality and enforceability of arbitral awards. These concerns were addressed following the enactment of the New Arbitration Law and its Implementing Regulations and the Enforcement Law (Royal Decree No. M/53 dated 13/08/1433H (corresponding to 3 July 2012)), which came into force on 27 February 2013 and was supplemented by Implementing Regulations (Minister of Justice Circular No. 13/T/4892 dated 17/03/1434H (corresponding to 28 February 2013)).

Furthermore, Article 52 of the New Arbitration Law provides that for the purposes of enforcement, the final arbitral award shall have the authority of a judicial ruling. In addition, Article 55 provides that an arbitral award must satisfy three requirements in order to be verified by the competent court:

1. The arbitral award does not contradict an arbitral award or decision rendered by a court, committee, or board having jurisdiction over the settlement of the dispute in the KSA.
2. The arbitral award does not violate Islamic Shari'a Law and public policy in the KSA (usually these two are one in the same, however, in the event there is a violation, the relevant part of the award can be separated from the non-violating part).
3. The party against whom the arbitral award has been rendered has been properly notified.

The Enforcement Law established a specialized enforcement court in the KSA, which simplified the procedure for enforcing (or setting aside) both domestic and foreign arbitral awards. Under the Enforcement Law, the enforcement judge has to be satisfied of the criteria prescribed under Article 11 of the Enforcement Law in order to enforce an arbitral award, which mirror those found under Article 55(2) of the New Arbitration Law.

Furthermore, Articles 46 and 47 of the Enforcement Law provide the execution judge with a wide range of powers in order to enforce his/her decision. If the judgment/award debtor does not implement the judgment or disclose on property that is adequate for payment of the debt, within five days from the date of being notified of the enforcement order, then the enforcement judge may impose travel bans, order a freezing injunction on the debtor's bank accounts or order the disclosure and seizure of assets, among other things.

In an effort by the KSA Ministry of Justice ("**Moj**") to instill confidence in users wishing to enforce their judgments in Saudi, the Moj has recently published data on the enforcement of foreign arbitral awards in Saudi. A considerable increase of foreign enforcement applications is proof that the developments undertaken by the government have been well received by arbitration users. In 2015, there were 69 reported foreign enforcement applications whereas in 2018 there were a total of 257 applications. In this regard, **there was a steady 35% increase year-on-year, with a total of 618 applications valued at USD 3,410,176,000 from 2015 to 2018.** More recently, **in 2021, the Moj announced that there were 297 applications for the enforcement of foreign arbitral awards, which were valued at approximately USD 640,000,000.**

In addition, during the 2021 edition of the Dubai Arbitration Week, the SCCA shared its findings resulting from the analysis of KSA arbitration-related court decisions from the year 2017 to 2021. Interestingly, of the 107 motions to annul an arbitral award, 94% were denied and only 6% were granted. The study showed that 50% of the granted annulment applications were because the arbitral award violated principles of Islamic Shari'a Law and public policy.

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Looking Ahead: Saudi Vision 2030

Through the Saudi Vision 2030 initiative, the Kingdom’s efforts are geared towards its plans to grow and diversify its economy as well as enhance its government’s effectiveness. In view of supporting its ambitious vision, many recent legislative developments in the KSA have been aimed towards enhancing the credibility and effectiveness of alternative dispute resolution, at the forefront of which is arbitration.

Acceding to the United Nations Convention on International Settlement Agreements Resulting from Mediation (“**Singapore Convention**”) is but one of these initiatives. The new 2020 Commercial Courts Law (Royal Decree No. M/93 dated 15/08/1441H (corresponding to 8 April 2020)) (“**CCL**”) and the 2021 Judicial Fees Law (Royal Decree No. M/16 dated 30/01/1443 (corresponding to 7 September 2021)) are two other legislations, which in our view will drive parties towards an increased use of alternative dispute resolution, namely arbitration and mediation.

The CCL modernizes the court system in the KSA by encouraging parties to resort to alternative dispute resolution (“**ADR**”) tools such as conciliation and mediation, and will make ADR tools mandatory in some cases. The Judicial Fees Law, which is set to come into effect on 10/8/1443H (corresponding to 13 March 2022) is likely to promote the use of ADR and out of court settlement of disputes by imposing an *ad valorem* approach on court cases in the amount of 5% of the value of the claim and with a cap of SAR 1 Million. The Judicial Fees Law applies to all claims, petitions and requests filed before the Saudi Courts save for certain categories of claims, some of which include: criminal claims, claims that fall under the jurisdiction of the Personal Status Courts as well as claims brought by employees regarding their employment contracts. Prior to the Judicial Fees Law’s enactment, there was no such requirement pertaining to the imposition of such fees in Saudi litigation. As such, the Judicial Fees Law aims to avoid vexatious claims and encourages parties to either resort to ADR to avoid such court fees, or to settle the disputes in order to take advantage of the relief provided by the law.

Moreover, another welcome development is the new Government Tenders and Procurement Law (“**GTPL**”) (Royal Decree No. M/128 dated 13/11/1440 AH (corresponding to 16 July 2019)) which provides that, subject to approval by the Minister of Finance, Saudi governmental bodies may agree to resolve disputes through arbitration in accordance with the relevant Implementing Regulations (Article 92(2) of the GTPL). This development helps ease the stringent general rule, whereby Saudi governmental bodies require prior authorization from the Prime Minister to enter into arbitration agreements, unless authorized by existing legislation (Article 10(2) of the New Arbitration Law). In this regard, Article 154 of the new Implementing Regulations of the GTPL (issued by the Minister of Finance Resolution No. 3479 dated 17/08/1441H (corresponding to 10 April 2020)) prescribes the following three cumulative conditions that have to be satisfied for Saudi government bodies to validly enter into arbitration agreements:

- The estimated value of the contract subject matter of the arbitration has to exceed 100 million Saudi riyals. Adjustments to the limit are within the discretionary powers of the KSA Ministry of Finance.
- The governing law of the contract has to be the laws of the KSA and the arbitral proceedings may be conducted in accordance with arbitration rules of international arbitration centres located outside the KSA only if the dispute is with a foreign contracting party.
- The arbitration agreement and its terms have to be set out in the contract.

The foregoing developments in the KSA constitute a step in the right direction closely aligning the Kingdom’s legislative and institutional framework with international best practice. The positive trend in enforcement of arbitral awards is a key indicator that the jurisdiction is being perceived as “arbitration friendly”. This perception should help to increase foreign direct investment, as the government aims to attract hundreds of international organizations to set up regional headquarters in the KSA by 2023 as part

of the Ministry of Investment's Regional Headquarters program, which was announced in early 2021

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