Saudi Arabia

Belal T Al-Ghazzawi, Meriel Buxton and Tammam Kaissi
Al Ghazzawi Professional Association

Many regard Saudi Arabia as a land of enormous commercial opportunity, particularly in the current economic climate elsewhere in the world, and yet major investors remain wary of the dispute resolution options available to them. There is no culture of arbitration within Saudi Arabia. In some respects this is surprising: arbitration was very common in the history of the Middle East and Islam.[1]

Yet in 2009, with Saudi Arabia implementing an ambitious programme of development to transform its social, transport and industrial infrastructure, inward investors lack confidence in arbitration as a suitable method of dispute resolution. The nervousness stems from at least three major causes:

- the prohibition on Saudi government entities from entering into contracts with arbitration as the designated method of dispute resolution;
- the absence of an arbitral institution in Saudi Arabia; and
- most importantly, the heavy intervention of the state courts in arbitration proceedings under the Saudi Arbitration Act, which has caused resistance by some legal practitioners in Saudi Arabia to use this form of dispute resolution.

Despite this resistance, local legal practitioners tend to chose arbitration on a case by case basis.

Notably there are no arbitration institutions in Saudi Arabia. The only arbitration process available in Saudi Arabia is the procedure regulated by the Act. Parties may nevertheless utilise regional arbitration centres such as in Dubai (DIAC and DIFC LCIA), in Cairo (CRCICA) or those further afield such as the ICDR, LCIA or more commonly the ICC, and then enforce the award in Saudi Arabia.

The lack of an embedded culture of commercial arbitration is a major hindrance to Saudi Arabia – inward investors have had well-documented difficulties in enforcing awards, even those that have been obtained in neighbouring Arab states.

This chapter examines the procedure available to parties wishing to arbitrate in Saudi Arabia or wishing to enforce arbitral awards against assets located within Saudi Arabia. While not wishing to over-emphasise the pitfalls that often prevent the successful conclusion of arbitrations here, these issues are addressed. However we would like to emphasise from the outset that, when properly considered from the earliest stages of a transaction, there is no reason why arbitration should not be an effective means of dispute resolution within Saudi Arabia.

Generalities

Legislation

The Saudi Arbitration Act was enacted by Royal Decree No. 46/M on 12/07/1403 corresponding to 26 April 1983 (the Act). Unusually, the Act is not based on the UNCITRAL Model Law. In fact, it is unparalleled in other jurisdictions, with key features including:

- the involvement of the state courts to a far greater degree than in other jurisdictions; and
- the public nature of arbitration proceedings.

Under the Act the supervising state judge is the judge that would have had jurisdiction over the dispute absence an arbitration agreement. Typically, the judge comes from the General Sharia Courts. However, in commercial disputes between private entities or if permission has been given for a state entity to arbitrate, a judge from the Board of Grievances will act as the supervising judge.

The Act contains the basic elements required to conduct an arbitration, but where there is a gap in detail, the arbitrators and ultimately the judge have wide discretion to step in.

Under the Act, arbitration is a public, rather than a private process, unless the arbitrators decide otherwise, either at their own initiative or on the application of one of the parties.

The state courts are involved in every single stage of the arbitration process. For example, the judge confirms the nomination of the arbitrators and reviews the award before it is enforced. The award is registered at the supervising court and the clerk at the judge's office acts as the secretary of the arbitral tribunal and deals with all notifications to the parties. The clerk also creates a register where all requests for arbitration and all relevant documents are registered.

Recent media reports have suggested that a unified arbitration law for Gulf Cooperation Council (GCC) countries may be instituted to promote the flow of trade and investment in the region and to solve cross-border disputes efficiently. Reportedly, the Federation of the GCC Chambers of Commerce has already drafted the new law, which has been sent to the GCC Secretariat, based in Riyadh, for approval.

1 Arbitration was almost an exclusive practice in the Jahilya period before Islam and was also very common during the Islamic period as it was implicitly authorised by the Quran (in the Sourat al nissa') and by the Prophet's Sunnah (practice) – the two main sources for Islamic law. Moreover arbitration was used as a means to adjudicate the most famous Islamic dispute - which resulted in the schism between Shi'a and Sunni Muslims. After the assassination of Khalifa (the Prophet's successor) Osman Bin Affan, one part of the Muslim population (who later became the Shi'a Muslims) believed that Ali Bin Abi Taleb had the right to succeed as a Khalifa, while the other part of the Muslim population (who later became the Sunni Muslims) believed that Mou'awiya had the right of succession. To end the fighting between both parties during the First Fitna (first Muslim civil war) and more specifically the battle of Siffin (in 657 AD), Mou'awiya and Ali Bin Abi Talib ultimately decided to submit the dispute to arbitration. They drafted a compromise agreement setting out the procedure to be followed in the arbitration process including the place of arbitration – not that it had any legal consequence as to the supervising judge! – and the arbitration period. The supporters of Ali Bin Abi Taleb were divided themselves as to the appointment of the arbitrator, but finally Ali Bin Abi Taleb had to give up to what the majority wanted. An arbitration award was rendered, unfortunately the parties did not abide by it and the dispute continued... and is still ongoing 1400 years later.

Arbitrability

Arbitrability remains one of the key stumbling blocks for parties arbitrating in Saudi Arabia and seeking to enforce an award in Saudi Arabia.

The very well known dispute between Arabian American Oil Company (Aramco) and the Saudi government in the 1960s marks one of the major milestones in modern Saudi law. The non-Arab arbitrators set out in their award that Islamic Sharia did not have adequately detailed provisions to deal with energy disputes and petroleum concessions and therefore could not be the governing law to the dispute. Instead the arbitrators used the common practice in the energy and oil sectors and on that basis made a ruling against the Saudi government. This led the Saudi government in 1963 to prohibit all Saudi public entities from entering into arbitration agreements unless explicitly authorised by the government, and this remains the case today. Article 3 of the Act that provides for that rule can only be amended by the Council of Ministers. However, if a dispute has already arisen and the concerned public entity wishes to arbitrate that dispute, it can prepare a memo for the prime minister (the king) explaining the dispute and the reasons behind its wish to arbitrate. In all cases the Council of Ministers shall be notified of all the arbitration awards where one of the parties is a government entity.

Under the Act arbitration agreements are permitted in the areas of law where the parties can compromise. However disputes relating to Saudi public policy cannot be arbitrated. Consequently disputes that are deemed to be contrary to Sharia (Islamic law and the basis of the Saudi law and constitution) are off limits. An obvious example of an arbitration being contrary to Sharia in that respect would be one involving criminal law, as Sharia determines the fault and explicitly provides for the appropriate sanction. A less obvious example would be a complex financial structure for a privately funded hospital that includes non-Sharia compliant funding. A Saudi judge may regard this as causing part of the transaction to be contrary to Sharia and, therefore, he would not hesitate to annul the parts of the award related to it.

Therefore, parties to any sort of agreement should ensure that the terms of their agreement are complaint with Sharia principles if they suspect that they will at some point need to enforce a judicial decision or a foreign arbitration award in Saudi Arabia, even if the law applicable to the agreement and the rules applicable to the arbitration procedure are foreign.

Procedure

Arbitration agreement

An arbitration agreement should be made in writing; aside from this there are no specific formal requirements for it to be valid. An arbitration agreement can either be an arbitration clause in a contract, a separate agreement or a compromise between the parties after the dispute has already arisen.

To conclude an arbitration agreement, the parties should have the legal capacity to act – such as the legal capacity to conclude contracts. Nevertheless, guardians and tutors cannot enter into an arbitration agreement on behalf of their wards without the permission of the judge.

When an arbitration agreement is valid, the Saudi state courts must refuse to uphold their jurisdiction and invite the parties to start the arbitration proceedings.

Language

Arbitration under the Act must be conducted in the Arabic language throughout. As well as the hearings, all pleadings and submitted documents must be in Arabic. Where a party does not speak Arabic, they can and must be assisted by a certified translator who is required to sign on the minutes of the hearings.

Representation

Parties to arbitration under the Act can only be represented by Saudi qualified lawyers. Currently Saudi lawyers can only be male Saudi nationals.

Arbitrators, on the other hand, may be non-Saudis, but they must also be male and of the Muslim faith. As the arbitration procedure is conducted entirely in Arabic, the arbitrators – even if non-Saudis – must of course be Arabic speakers.

Number and appointment of arbitrators

Within the arbitration agreement, the parties can agree to appoint one or more arbitrators, provided that the number of arbitrators is odd. The Ministry of Commerce and Industry provides the parties with an approved list of arbitrators, which can be used by the parties to appoint arbitrators. However, this list is non-obligatory and parties have the right to appoint any arbitrator that they deem suitable for the case. It should be noted that the individuals on the list have not received specific training. They submit their credentials to the Ministry of Commerce and Industry, which adds them to the list. Consequently, the arbitrators vary widely in experience and outlook. Parties should therefore be wary of any appointments made in this way.

If the arbitration agreement is silent, each party appoints one arbitrator and the two arbitrators appoint the chairman. If the parties fail to nominate an arbitrator when the arbitration agreement provides for one arbitrator and fails to nominate an appointing authority, or if one of the parties fails to nominate an arbitrator when the arbitration agreement provided for a tribunal, the judge has the responsibility to nominate the arbitrator on behalf of the parties or on behalf of the defaulting party.

The Act sets out specific requirements for the arbitrators, namely that the arbitrators should:

- have experience in arbitration;
- be of very good reputation;
- have full legal capacity to act (essentially, this means not be bankrupt);
- not have been dismissed from any government position following a disciplinary judgment;
- not have any criminal record; and
- not be government employees, unless they obtain prior approval of the concerned authority.

Furthermore if he is a sole arbitrator or the chairman of the arbitral tribunal that individual must have expertise in the rules of Sharia, customs and commercial regulations of Saudi Arabia.

The reality is that a large number of individuals fulfil these requirements but few would be able to conduct an arbitration in the way in which many multinational corporations would expect. In the absence of a groundswell of support for arbitration among legal practitioners, it seems unlikely that the requisite expertise is going to be generated within Saudi Arabia in the near future.

Challenging the appointment of arbitrators

The nomination of an arbitrator may be challenged in the same way as challenging a state judge. The challenging party files its reasons for the challenge before the judge within five days of the nomination of the arbitrator or of the day on which it has learnt of the basis for the challenge.

The parties can agree to dismiss an arbitrator if they find a legitimate reason for his dismissal after the signature of the Terms of Reference. The dismissed arbitrator can claim damages if he considers that his dismissal was illegitimate and he had already started working on the dispute.

The Act does not specify a time frame during which the parties must appoint the new arbitrator. However, the judge can appoint the arbitrator on behalf of the defaulting party at the demand of one of the parties.

Terms of Reference

Unlike other arbitration laws but like the International Chamber of Commerce Rules of Arbitration, the Act provides for terms of reference.

The terms of reference:

- include the names of the parties;
- describe the dispute;
- include the approval of the appointed arbitrators to arbitrate the said dispute; and
- should be signed by the parties and the appointed arbitrators.

Typically, the terms of reference are first drafted by the parties. Each party states its own account of the facts and summarises its position as to the dispute, in addition to attaching all documents that it deems relevant. The arbitrators then finalise the terms of reference by accepting to arbitrate the dispute as described by the parties.

The parties and the arbitrators sign the terms of reference and then register them with the judge, who will have to give his endorsement and approval. In practice, the parties tend to make short terms of reference without adding too many documents. Also, the judge does not interfere very much with the terms of reference before endorsing them but he will typically appreciate terms of reference of reasonable length and ask the parties to reduce lengthy ones.

Within five days of the endorsement of the terms of reference by the judge, the arbitrators are obliged to fix the date for the first hearing, which is notified to the parties.

The hearings are attended by the parties or their representatives pursuant to a power of attorney issued by a notary public. Nevertheless, the arbitrators can require the parties to attend personally if they deem necessary.

If a party is duly notified but fails to appear at the first hearing, the arbitrators can proceed with the arbitration process. However they may only render an award if both parties file their demands and defences or if both parties attend at least one hearing. If that is the case, the award would be rendered as if the parties have duly appeared at the hearings.

Notifications

All notifications are in Arabic and shall include:

- time and date of receipt of the notification by the party;
- name, address and title of the person notifying and his representative;
- name, address and title of the person to be notified;
- name and title of the person who undertook the notification;
- name and title of the person that received the notification and his signature on the original document of the notification;
- name of the arbitrators and place of arbitration; and
- object and deadline of the notification.

The notifications can be given to the party or one of its representatives. If the party fails to notify the other party, it shall give the notification to the police station closest to the place of residence of the party who shall be notified.

The notification shall be made at the ministries or the governor's office if the entity to be notified is the government or at the headquarters of the legal representatives if the entity to be notified is in the form of a company or any sort of legal entity, whether public or private.

Arbitral tribunal

The principal role of the chairman of the arbitral tribunal is to administer the arbitration process. He can also ask questions of the parties and the witnesses and demand clarifications from them. In accordance with the Act, the co-arbitrators may do the same through the chairman.

The arbitral tribunal shall guarantee the right of defence to the parties who shall be informed of all procedural issues, all arguments and documents used by the other party and have an equal right to answer.

If a matter out of the jurisdiction of the tribunal arises (such as the falsification of documents) the tribunal is obliged to stay the proceedings. They are resumed after the competent authority renders its decision on the subject matter.

The parties can request the arbitral tribunal to include in the minutes of the hearing any agreement, settlement or waiver.

Taking evidence and document production

The tribunal decides on issues of taking evidence throughout the proceedings. Its discretion includes the right to change positions as to issues of taking evidence during the arbitration process, provided that reasons are given.

The arbitral tribunal may, at its own initiative or at the request of one of the parties, require a party to produce document if that document:

- is common to both parties and especially if it creates rights and obligations on both parties;
- has been referred to by one of the parties in its submissions but has not been produced; or
- is required by law.

As in other jurisdictions, parties may not go on an evidential 'fishing expedition'. When a party asks for document production it must:

- describe the document requested;
- set out the content of the document if possible;
- prove that the other party has possession of such a document
- set out the reasons for asking for such a document; and
- set out the reasons why the other party should produce such a document.

The judge may, at his discretion, uphold or dismiss a document production claim depending on whether he deems the document relevant to the dispute or not.

Expert witnesses

The parties can use witnesses to support their case and the arbitrators have the right to question any witness. The arbitrators also have the right to question the parties by addressing specific questions to them.

The arbitrators may also employ independent expertise to assist them on technical issues. Preferably, these experts should be male and Muslim, and they typically are. If they are not based in Saudi Arabia, they tend to come from one of the GCC countries or Egypt. The tribunal decide on the expert's fees and on which of the parties should bear the costs.

If the arbitrators seek such expert opinion, they are not, however, bound by the expert's opinion. An expert is entitled to hear both parties' positions before giving his report. After giving his report, the arbitrators can cross-examine the expert during the hearing – either asking him specific questions or requesting that he submit further reports to complete his initial report.

In all cases, if the arbitrators base their decision on the expert's report, this shall be well established in their award.

The arbitrators may also decide to undertake a site visit if that is necessary. In this case, they issue a report summarising their findings.

Interim and conservatory reliefs

Arbitrators can grant interim and conservatory relief. These, however, should go to the supervising judge for endorsement before their enforcement.

Duration of the arbitration

The duration of the arbitration should be determined by the parties in the arbitration agreement. If the parties fail to do so, the arbitrators are obliged to render their award within 90 days of signature of the terms of reference.

The 90-day period can be extended at the discretion of the arbitrators (as long as the reasoning for that extension is set out in the award) or by 30 days if a new arbitrator is nominated. If after 90 days an arbitration award has not been rendered, the parties can agree to extend the duration of the arbitration or if they do not agree, either party can refer to the judge to extend the period of the arbitration or to ask him to make a ruling over the dispute.

When the arbitral tribunal decides that it is ready to render its award, it closes the proceedings and deliberates confidentially to render the award. After the closure of the proceedings the arbitrators should not accept any comments, clarifications or documents from either party. The arbitrators may, however, decide that the comments, clarifications or documents submitted by one of the parties are important. If so, the arbitrators may re-open the proceedings and give the other party the opportunity to examine the new information and answer as appropriate.

Award

The award is rendered by the majority of the votes of the arbitrators. After the award is drafted, the arbitrators fix a hearing to render their award. This hearing should be within 90 days of the terms of reference or the agreed arbitration period.

The arbitrators are only bound by the Act and its implementing regulations to render an award. They are not bound by the normal rules of procedure. Nevertheless, the award must be compliant with Sharia principles.

The award shall include:

- the terms of reference;
- a summary of the parties' positions;
- arguments and supporting evidence filed by the parties;
- the arbitrators' reasoning and reasons behind the position of the award;
- date of issue of the award; and
- the signature of the arbitrators and the clerk.

If one of the arbitrators refuses to sign the award, his reasons for doing so should be specified in the award.

All awards – whether partial or final, as to the procedure or to the merits - are registered at the judge's office and notified to the parties within five days of the date of rendering.

The arbitrators can be asked to correct any material mistake in the award. They can also be asked to interpret or clarify sections of the award if the parties consider that they are unclear.

Appeal

Either party can object to the award before the judge within 15 days of being notified of it. The judge will either confirm the award or annul the award and make his own new ruling.

If neither party objects to the award within this period, either party can ask the judge to issue a decision confirming that there is nothing in Sharia that prohibits the enforcement of the award and therefore making it final and binding. After the judge's decision the award is treated in the same manner as a judgment from a state court.

The award is only final and binding and ready for execution after the judge endorses it.

Legal fees

The parties agree on the fees of the arbitrators. The part that is not paid up front to the arbitrators shall be put at the court office within five days of the endorsement of the terms of reference by the judge. The court shall pay the arbitrators the remainder of the fees within one week of the date on which the final award is endorsed by the judge.

If the parties do not agree on the fees of the arbitrators or a dispute arises regarding the fees, the judge will determine the fees of the arbitrators.

Al Ghazzawi Professional Association

Jeddah
Jeddah Commercial Centre,
Al Maady Street
PO Box 7346
Jeddah 21462
Saudi Arabia
Tel: +966 26531576

Riyadh
King Faisal Foundation
North Tower, level 4
PO Box 9029
Riyadh 11413
Saudi Arabia
Tel: +966 14632374

Dammam
Arabian Business Centre
Prince Mohammed Street
P.O.Box 381
Dammam 31411
Saudi Arabia
Tel: +966 38331611

Al-Ghazzawi Professional Association (GPA) is a leading Saudi full-service law firm with regional offices in Dammam, Jeddah and Riyadh. GPA enjoys an enviable reputation for commitment to providing quality legal advice to clients and delivering international standard service. GPA is highly experienced, having acted on some of the largest transactions and projects in the region. GPA's lawyers respect and understand the cultural nuances of doing business in the region and continue to provide clients with valuable assistance navigating the local regulatory, legal and business processes. GPA represents and advises many of the largest domestic and multinational corporates operating in the region including a large number of Fortune 500 companies. With the fast-growing demand across the Middle East for international energy and projects expertise allied with GPA's full service law capability in corporate, finance and dispute resolution work, GPA is the first port of call for advice on all aspects of international law and Sharia compliance in the region.

GPA is also involved with some of the largest and most complex disputes work within Saudi Arabia. The disputes team, comprising over 20 lawyers, is engaged in litigation (before the Sharia Courts, the Board of Grievances and the specialist committees under the auspices of the Ministry of Finance and Commerce and Industry), arbitration under the Saudi Arabitration Act and under international rules and mediation.

After working together on a regular basis, GPA and Herbert Smith LLP secured in April 2008 a formal and exclusive association, which enables the two firms to offer the best combined international and local legal services. There are currently four Herbert Smith associates on secondment to GPA.

A successful party can recover its legal costs. Typically, arbitrators in Saudi Arabia are more lenient than state judges in being likely to award costs for the winning party. Accordingly it is usually advisable for parties to put this in the terms of reference since any appeal is made before a judge, who will not typically award legal costs.

Enforcement

The enforcement of domestic awards rendered under the Act tends to be very straightforward, as a Saudi judge is heavily involved throughout the arbitration process.

Conversely, enforcing a foreign award has proved itself to be very tricky, despite the fact that Saudi Arabia is signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards. In fact, some of the judges charged with enforcing foreign awards are not aware of this New York Convention. The Board of Grievances – which is the competent Saudi court for enforcement of foreign judgments and awards – will review all aspects, including the merits, of any award submitted to them for enforcement to ensure that no violation of the Sharia principles occurs in the award. The Board of Grievances will also review all the documents submitted and will not hesitate to annul parts of the foreign arbitral award that are considered as contrary to Sharia and make his own ruling over the case. Even if it is successful, the procedure is very lengthy and might take anything from six months to two years.

***

What we see, therefore, is a jurisdiction that is economically extremely important but that is far from being one where arbitration is either the preferred or the most practical method of dispute resolution. Heavy state intervention in accordance with the Act means that the arbitration process is duplicative and far from the ideals exhibited elsewhere in the world. The next decade will reveal whether the increasingly sophisticated Saudi economy generates a culture of arbitration – where domestic practitioners commonly use it as a method of dispute resolution, an arbitration centre based in Saudi Arabia is established and foreign awards are enforced in accordance with the principles and practices of the New York Convention rather than re-tried by the Board of Grievances.

Belal T Al-Ghazzawi
Al Ghazzawi Professional Association

Dr Belal Talal Al-Ghazzawi is the senior managing partner of Al Ghazzawi Professional Association. He has been practising law since 1984 and specialises in litigation and arbitration and frequently appears before arbitral tribunals, the sharia courts and the Board of Grievances. Additionally he undertakes mediations and conciliations, both in Arabic and English. He has extensive experience of advising large industrial and commercial entities in Saudi Arabia and overseas.

Dr Belal holds an LLB in Shariah Law from Kuwait University (1984), an LLM in Maritime Law from King Abdul Aziz University in Jeddah, Saudi Arabia (1994) and a LLD in Comparative Islamic Law, cum laude, from Al Azhar University in Cairo, Egypt (2001).

Meriel Buxton
Herbert Smith LLP

Meriel is an associate in Herbert Smith's Middle East dispute resolution team. She trained and qualified in Herbert Smith's London office and, after working in London as a solicitor, joined the Middle East team in 2007. Meriel's experience includes working on construction, energy, product liability and finance disputes. She is currently on secondment to the Jeddah office of Al Ghazzawi Professional Association.

Meriel received a BA (Hons) in History from Durham University in 2002, a postgraduate qualification in law from BPP law school in 2003 and undertook the LPC at the Oxford Institute of Legal Practice in 2004.

Meriel speaks English, Russian, German and French.

Tammam Kaissi
Al Ghazzawi Professional Association

Tammam is a junior associate of Al-Ghazzawi Professional Association (GPA)'s disputes team. Tammam has worked in arbitration departments of international law firms in both Paris and London before joining GPA.

Tammam is trilingual (Arabic, French and English), and has participated in disputes concerning a wide range of subject areas and especially energy related arbitrations and litigation, governed by both civil and common law legal systems.

Tammam holds a degree in French and Lebanese law from Saint-Joseph University in Beirut, Lebanon (2006), in addition to a Masters Degree in International Commercial Arbitration from the University of Versailles in France (2007) and a Masters Degree in Management from HEC and Escp Europe business schools in Paris, France (2008).