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Saudi Arabia

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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 as arbitration was very common in the history of the Middle East and Islam.

Yet in 2010, with Saudi Arabia implementing an ambitious programme of development to transform its social, transport and industrial infrastructure, inward investors lack confidence in arbitration, either domestic or international, as an effective and enforceable method of dispute resolution. The nervousness stems from at least three major causes:

- the general prohibition on Saudi government entities from entering into contracts with arbitration as the designated method of dispute resolution, without the express permission of the Saudi government;
- the absence of an arbitral institution in Saudi Arabia; and
- 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 of the local legal practitioners, lawyers choose 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 (DIFC-LCIA), in Bahrain (BCDR-AAA), 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. Whilst not wishing to over-emphasise the pitfalls which often prevent the successful conclusion of arbitrations in Saudi Arabia, these issues are addressed in this chapter. 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 Arbitration Act was enacted by Royal decree number M/46 on 12/07/1403h corresponding to 26 April 1983g. Unusually, this 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 Arbitration Act, the supervising state judge is the judge who would have had jurisdiction over the dispute absent 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 Arbitration Act contains the basic elements required in order to conduct an arbitration process, but where there is a gap in detail, the arbitrators and, ultimately, the supervising state judge has a wide discretion to step in to regulate the arbitration.

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

The state courts are involved at every stage of the arbitration process. For example, the supervising state judge confirms the nomination of the arbitrators and reviews the award before it is enforced. The secretary to the arbitral tribunal will be an individual from a list maintained by the Chambers of Commerce. He will also create a register where the Request for Arbitration and other relevant documents are registered.

Media reports have suggested that a unified arbitration law for the Gulf Cooperation Council (GCC) countries may be instituted in order to promote the flow of trade and investment in the region and to solve cross-border disputes efficiently. Allegedly, 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. However, no developments have been made in this regard in the last 12 months.

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 Sharia (Islamic law and the basis of the Saudi law and constitution) did not have adequately detailed provisions to deal with energy disputes and petroleum concessions, and therefore could not be the governing law of 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. In 1963, this led the Saudi government to prohibit all Saudi public entities from entering into arbitration agreements unless explicitly authorised by the government. This remains the case today. Article 3 of the Arbitration Act, which provides for that rule may only be amended by the Council of Ministers. However, if a dispute arises and the concerned public entity wishes to arbitrate the dispute, it should 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 Arbitration Act, arbitration agreements are permitted in the areas of law where the parties may compromise. However, disputes relating to Saudi public policy cannot be arbitrated. Consequently, disputes that are deemed to be contrary to Sharia 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 sin and explicitly provides for a sanction. A less obvious example would be a complex financial structure for a privately funded hospital which 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 parts of the award which are related to it.

This rule applies to both domestic arbitrations and enforcement of foreign arbitral awards in Saudi Arabia. Therefore, parties to all types of agreement should ensure that the terms of their agreement comply with Sharia principles if they may need to enforce a judicial decision or a foreign arbitration award in Saudi Arabia one day, even if the applicable law 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 that, there are no specific formal requirements in order for it to be valid. An arbitration agreement may either be an arbitration clause in a contract, a separate agreement or a compromise between the parties after the dispute has arisen.

In order 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 supervising state 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. As well as the hearings, all pleadings and submitted documents must be in Arabic. Where a party does not speak Arabic, they must be assisted by a certified translator who is required to sign the minutes of the hearings.

Representation

Parties to arbitration under the act may only be represented by Saudi-qualified lawyers. Currently Saudi lawyers may only be male Saudi nationals.

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

Number and appointment of arbitrators

Within the arbitration agreement, the parties may agree to appoint one or more arbitrators, provided that there is an odd number of arbitrators. The Ministry of Commerce and Industry provides the parties with an approved list of arbitrators, which may be used by the parties in order 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. Instead, 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 supervising state judge nominates the arbitrator on behalf of the parties or on behalf of the defaulting party.

The Arbitration Act sets out specific requirements for the arbitrators; the arbitrators should:

- have experience in arbitration;
- be of very good reputation;
- have full legal capacity to act (essentially, this means that they are not 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 get 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, Saudi custom and commercial regulations.

The reality is that a large number of individuals fulfil these requirements, and could be appointed to a tribunal, 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 amongst legal practitioners, it seems unlikely that the requisite expertise is going to be generated within Saudi Arabia in the 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 supervising state judge within five days of the nomination of the arbitrator or of the day on which it has learnt the base fact for the challenge.

The parties may agree to dismiss an arbitrator in case they find a legitimate reason for his dismissal after the signature of the terms of reference (see below). The dismissed arbitrator may claim damages if he:

- considers that his dismissal was illegitimate; and
- had already started working on the dispute.

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

Terms of reference

Unlike the arbitration laws of other countries (but like the ICC Rules of Arbitration), the act provides for terms of reference.

The terms of reference must:

- include the names of the parties;
- summarise the dispute;
- include a statement from each party with an exhaustive list of their claims in the matter;
- include the approval of the appointed arbitrators to arbitrate the said dispute; and
- should be signed by the parties as well as 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 supervising state judge who must give his endorsement and approval. In practice, the parties tend to prepare short terms of reference without adding many documents. The judge does not interfere extensively 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 supervising state 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 may 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 may proceed with the arbitration process. However, they may only render an award if both parties file their claims 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 must be in Arabic and include the:

- 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 intended recipient;
- name and title of the person who undertook the notification;
- name and title of the person who actually received the notification and his signature on the original document of the notification;
- names of the arbitrators and the place of arbitration; and
- object and deadline of the notification.

The notifications may be given to the intended recipient or one of its representatives. If the party fails to notify the intended recipient, it must give the notification to the police station next to the place of residence of the intended recipient (who must be subsequently notified).

The notification shall be made at:

- the ministries or the governor's office if the intended recipient is the government; and
- the headquarters through the legal representatives if the intended recipient is a company or other type 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 may also ask questions of the parties and the witnesses and demand clarifications from them. In accordance with the Arbitration Act, the co-arbitrators may do the same through the chairman.

The arbitral tribunal guarantees the right of defence to the parties who are 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 may 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 a 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 trip. 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 reason for asking for such a document; and
- set out the reason why the other party should produce such a document.

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

Expert witnesses

The parties may 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.

In addition, the arbitrators may 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 decides on the expert's fees and on which of the parties should bear the costs.

If the arbitrators seek such expert opinion on a technicality, they are not, however, bound by the expert's opinion. An expert is entitled to hear both parties' position before giving his report. After giving his report, the arbitrators may 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 may grant interim and conservatory relief. These measures, however, should go to the supervising state 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 may be extended at the discretion of the arbitrators (so 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 may agree to extend the duration of the arbitration or in case they do not agree, either party may refer to the supervising state judge in order 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 in order 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 in order 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 in order 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 court 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 supervising state judge's office and notified to the parties within five days of the date of rendering.

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

Appeal

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

If neither party objects to the award within this period of time, either party may 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 upfront to the arbitrators shall be lodged at the court office within five days of the endorsement of the terms of reference by the supervising state 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.

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Al-Ghazzawi Professional Association (GPA) is a leading Saudi full-service law firm with 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 more than 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 Arbitration 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 three Herbert Smith associates and one Herbert Smith partner on secondment to GPA.

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

A successful party may recover its legal costs. Typically, arbitrators in Saudi Arabia are more likely to award costs for the winning party than state judges. 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 of domestic awards

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

Enforcement of international awards

Given the overriding supervision of the supervising state judge in domestic arbitrations, many foreign companies consider that the best means of settling a dispute with a Saudi counterparty whose assets are predominantly in Saudi Arabia is through international arbitration. However, enforcing a foreign award has proved to be challenging.

While Saudi Arabia is a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards, some of the judges charged with enforcing foreign awards are not aware of the New York Convention or its terms. 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 in order to ensure that no violation of 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 which are considered as contrary to Sharia law and make its own ruling in the case.

Foreign parties continue to experience a number of difficulties at the enforcement stage. Examples of this are annulments on grounds that include: interest on financial sums being incorporated into the award; the structure not being Sharia compliant in the view of the Saudi judges (and yet was approved by a Sharia board); the contract providing for a waiver of future rights; and a tribunal failing to meet the criteria stipulated under the act.

Even if it is successful, the procedure is very lengthy and might take anything from six months to two years to complete – which is significantly longer than the legal systems of the many of the other state signatories to the convention.

* * *

What we see, therefore, is a jurisdiction which is economically extremely important but which 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 and the enforcement are duplicative and far from the standard practice in other jurisdictions. The next decade will determine 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 – or not.

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Dr Belal Talal Al-Ghazzawi is the senior managing partner of Al-Ghazzawi Professional Association. He has been practising law since 1984, specialising 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.

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Meriel received a BA (Hons) in history from Durham University in 2002, a post-graduate qualification in law from BPP Law School in 2003 and undertook the LPC at the Oxford Institute of Legal Practice in 2004.

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