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Arbitration in the Kingdom of Saudi Arabia

An important consideration for foreign companies investing in the Kingdom of Saudi Arabia or contracting with Saudi companies or entities of the Government of the Kingdom is how they will resolve potential disputes with their Saudi counterparty. International arbitration is generally perceived by foreign companies to be preferable to relying on the courts in the Kingdom for resolving disputes. However, even if they are willing to agree to arbitration, Saudi counterparties are not always prepared to accept arbitration outside of the Kingdom.

This article explains the law applicable to Saudi-based arbitration, as well as some recent developments at the Saudi Centre for Commercial Arbitration and sets out some practical considerations to bear in mind when drafting dispute resolution clauses that refer disputes to arbitration in the Kingdom.

Background

The Arbitration Law of the Kingdom

On 8 July 2012G,¹ a new law regarding arbitration came into force in the Kingdom (the “**Arbitration Law**”). The Arbitration Law provides a clearer and more comprehensive regime than was previously in place. The Arbitration Law gives effect to “arbitration-friendly” principles prevalent in modern arbitration laws around the world, such as the ability of the arbitral tribunal to determine its own jurisdiction and party autonomy. In places, it draws upon the provisions of the UNCITRAL Model Law on International Commercial Arbitration, which was developed to provide uniformity in arbitration and has been adopted in one form or another in over 65 jurisdictions worldwide.²

The Arbitration Law does, however, retain characteristics found in other arbitration laws in the GCC region, as well as some which are specific to the Kingdom. In the latter case, the primacy of Shari’ah and considerations of Saudi public policy remain in place. As discussed further below, this is an important factor when a party is considering whether to agree to an arbitration agreement that would see any arbitration be subject to the Arbitration Law.

Arbitration not always an option in the Kingdom

It should also be noted that, depending on the identity of the Saudi counterparty and the nature of the transaction, foreign companies may face limitations when it comes to agreeing upon the dispute resolution mechanism in their contracts. Government entities are prohibited from agreeing to arbitration-based dispute resolution unless an approval of the President of the Council of Ministers is obtained or there is a specific legal provision permitting that entity to enter into arbitration. Failing this, foreign companies would have to accept the Board of Grievances, recently restructured into Commercial and Administrative Court circuits, as the adjudicator

¹ The new law was issued by Royal Decree No M/34, dated 24 Jumada 1433H (16 April 2012G), and subsequently came into force 30 days after its publication in Umm Al-Qura, the Official Gazette, on 8 June 2012G.

² Including the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC).

of any disputes. Fortunately, there have been exceptions granted in respect of this limitation, particularly in the case of “mega” or strategically significant projects (often in the energy sector) with foreign partners that are financed, in large part, by foreign lenders.

Arbitration outside of the Kingdom

When considering the potential effect of the Arbitration Law, the gateway questions are:

- Is the arbitration to have its legal “seat” in the Kingdom or elsewhere?
- If the arbitration is to be seated outside of the Kingdom, have the parties expressly elected to subject the arbitration to the Arbitration Law?

If the parties are to choose a foreign seat for the arbitration, then the arbitration law of that seat will apply in respect of the arbitration (e.g. the English Arbitration Act 1996, if the arbitration is seated in London). However, if the parties to such an arbitration have expressly agreed to subject the arbitration to the provisions of the Arbitration Law notwithstanding the foreign seat, the Arbitration Law, in so far as the Saudi courts are concerned, will apply,³ to the exclusion of the arbitration law of the seat of arbitration.

Arbitration Law v Enforcement Law

The Arbitration Law does not address the process of enforcement of awards (whether domestic or foreign) in the Kingdom. Instead, the enforcement process is dealt with in the Enforcement Law of the Kingdom⁴ (the “**Enforcement Law**”). We discuss the topic of enforcement in the Kingdom of foreign arbitration awards in a separate article.⁵

Key Aspects of the Arbitration Law

Scope of the Arbitration Law

As noted above, the Arbitration Law will apply to: (a) any arbitration seated in the Kingdom; or (b) any arbitration seated elsewhere as long as the parties have agreed to subject that arbitration to the provisions of the Arbitration Law. It is generally considered that the latter scenario is unlikely to arise in practice, since it could give rise to problems of conflicts of rules during the course of the arbitration, which parties will want to avoid.

If the Arbitration Law applies, it will apply regardless of the nature of legal relationship in dispute. There are, however, exceptions for certain civil status matters, such as personal disputes and child custody and matters in which conciliation is not permitted, such as criminal matters.⁶

As with most arbitration statutes around the world, the Arbitration Law also includes certain mandatory provisions which the parties are not permitted to exclude by agreement, such as requirements as to the composition of the arbitration tribunal.

³ Article 2, Arbitration Law 2012G.

⁴ Issued by Royal Decree No. M/53 dated 13.8.1433 AH, the Resolution of the Council of Ministers No. 261 dated 12.8.1433 AH and the circular of the Minister of Justice No. 13/T/4687 dated 10.9.1433 AH.

⁵ Please refer to our September 2016 article entitled “Enforcement of Foreign Judgments and Arbitral Awards in the Kingdom of Saudi Arabia” for a consideration of enforcement of foreign judgments and awards in the Kingdom.

⁶ Article 2, Arbitration Law 2012G.

Commencing Arbitration under the Arbitration Law

In order to commence arbitration proceedings, the parties must have an arbitration agreement in place. The arbitration agreement must be in writing⁷ and the parties to the arbitration agreement are entitled to agree upon:

- the composition of the arbitral tribunal,⁸ provided that the number of arbitrators is odd;⁹
- the procedures to be followed during arbitration, including rules of international or domestic institutions (e.g. the Rules of Arbitration of the International Chamber of Commerce),¹⁰ provided that such procedures do not violate any provisions of Shari'ah or public policy;
- the seat of arbitration;¹¹
- whether, on application by a party, the arbitral tribunal shall have the right to order precautionary or temporary measures against a party to an arbitration, such as injunctive relief;¹²
- the substantive law of the underlying contract to be applied;¹³
- the language(s) of arbitration;¹⁴ and
- the period within which a final award must be issued.¹⁵

To the extent that any agreement by the parties, or any rules chosen by them, do(es) not cover a particular issue on which the parties are permitted to agree (but have not agreed), the Arbitration Law will fill that gap. As a practical matter, we would recommend that if an arbitration agreement will be subject to the Arbitration Law, the parties should always agree upon the matters set out above within the arbitration agreement. Failure to do so may compromise the efficiency and effectiveness of potential arbitration proceedings between the parties. For example, in the absence of an agreement to the contrary, the Arbitration Law specifies that the language of the arbitration will be Arabic.

Qualifications of Arbitrators

Article 14 of the Arbitration Law specifically requires that the arbitrator (or the president of the tribunal, where the tribunal is composed of more than one arbitrator) must, among other things, hold a university degree in Shari'ah or law. It follows that an arbitral decision made by a single independent expert in case of "technical" disputes, where such an expert does not have the requisite university degree, would not constitute a valid award under the Arbitration Law.

⁷ Article 9, Arbitration Law 2012G.

⁸ Article 15(1), Arbitration Law 2012G.

⁹ Article 13, Arbitration Law 2012G.

¹⁰ Article 25, Arbitration Law 2012G.

¹¹ Article 28, Arbitration Law 2012G, which is based on the equivalent provision in the UNCITRAL Model Law and also provides that the arbitral tribunal has the right to meet at a location other than the seat agreed by the parties for the purposes of deliberation, hearings, examination and perusal of documents.

¹² Article 23, Arbitration Law 2012G. It is worth noting that, in cases where one party refuses to voluntarily comply with such an order, the arbitral tribunal would need to apply to a competent court to enforce that order.

¹³ Article 38, Arbitration Law 2012G.

¹⁴ Article 29, Arbitration Law 2012G.

¹⁵ Article 40, Arbitration Law 2012G.

Court measures in support of the Arbitration

The Arbitration Law permits the parties to an arbitration to apply to a competent Saudi court (i.e. an appeal-level court in the Kingdom) for orders in respect of temporary or precautionary measures, such as injunctions or freezing orders, prior to commencement of the arbitral process. Once the arbitration has commenced, the applications for such orders must be made to the arbitration tribunal.¹⁶ During the arbitration, the tribunal may also directly seek assistance from competent authorities in the Kingdom, including authorities such as the police, in respect of subpoenaing witnesses or experts, ordering discovery of documents, and other matters required to ensure proper progress of the arbitration, in addition to the general courts in the Kingdom.¹⁷ Under the Kingdom's rules of civil procedure,¹⁸ the courts have a very wide discretion to make orders in respect of injunctive and preliminary matters, including any order that the presiding judge may consider appropriate given the nature of a dispute or other considerations that the judge considers relevant.

The Arbitral Award

The Arbitration Law permits arbitral tribunals to issue provisional or partial awards, unless the parties agree otherwise. Also, in the absence of agreement between the parties as to the duration of the arbitration, the arbitral tribunal will need to issue its award within 12 months of the commencement of proceedings, with the possibility of a further six month extension. If, after this time, no further extension is sought from, and granted by, the competent court, then either party may apply to terminate the arbitration.

In addition to other formalities set out in Article 42 of the Arbitration Law, when an award has been issued, it must be filed with the competent court in the Kingdom by the arbitration tribunal along with a certified Arabic translation (if the award is in a language other than Arabic) within 15 days of its issuance.¹⁹ As a practical matter, in any non-Arabic language arbitration it would make sense for the parties to recommend that the arbitral tribunal seek to have a translation of its draft award prepared in advance of its finalisation and issuance, so that no issue arises in relation to the 15 day time limit.

Ultimately, though, it is the arbitration tribunal, rather than the enforcing party, that must file the award with the competent court, and so the timely translation and filing of the award is not within the enforcing party's control. This is another factor which parties must consider when determining whether arbitration should be subject to the Arbitration Law, especially given that 15 days is a short period of time for an award to be translated into Arabic and filed with the competent court and failure to comply with this filing requirement may result in the validity of the award being challenged.

Enforcement of the Award

When it has been duly filed, an award has the authority of a judicial ruling and becomes enforceable,²⁰ though only to the extent that it complies with Shari'ah and public policy. The Arbitration Law provides that if it is possible to separate out a non-compliant aspect of an award, then it may be possible to enforce the compliant portion of the award. The requirement to comply with Shari'ah and public policy is an all-pervasive requirement

¹⁶ Article 22(1), Arbitration Law 2012G.

¹⁷ Article 22(3), Arbitration Law 2012G.

¹⁸ Procedures Before Shari'ah Courts, issued by Royal Decree No. M/1 dated 22.01.1432H.

¹⁹ Article 44, Arbitration Law 2012G.

²⁰ Article 52, Arbitration Law 2012G.

clearly stated in the Enforcement Law²¹ and must be taken into account by parties when they are deciding whether to agree to arbitration in the Kingdom.

Annulment of Awards subject to the Arbitration Law

It is possible for a party to apply, within 60 days of the award being issued, to the relevant court of appeal in the Kingdom to annul an award that has been issued in accordance with the provisions of the Arbitration Law or is otherwise subject to such Arbitration Law. The grounds upon which an award may be annulled are as follows:²²

- absence of an arbitration agreement, or the arbitration agreement being void or voidable, or terminated due to expiry of its term;
- lack of legal capacity of either party to enter into an arbitration agreement;
- inability of a party to present a defence due to lack of notice or for any other reason beyond that party's control;
- failure to apply the rules or the law agreed upon by the parties;
- the composition of the tribunal violated the Arbitration Law or the agreement of the parties;
- the arbitration award covers matters not subject to the arbitration agreement, with the parts that cover such matters being severable from the rest of the award; and
- the arbitration tribunal failing to observe conditions required for the award in a manner affecting its substance, or if the award is based on invalid arbitration proceedings where such validity has affected the substance of the award.

The Arbitration Law adopts a “pro-arbitration” approach by explicitly confirming that consideration of an application for annulment does not entitle the competent court to examine, in the words of Article 50(4) of the Arbitration Law, “the facts and the subject matter of the dispute.” However, enforcement proceedings may only be commenced, in the absence of voluntary compliance, upon the expiry of the 60 day period during which an application for annulment may be made.²³

The Saudi Centre for Commercial Arbitration

In 2014, the Council of Ministers mandated the establishment of the Saudi Centre for Commercial Arbitration (the “**SCCA**”).²⁴ The SCCA is an arbitration institution based in Riyadh. As the SCCA only began formally accepting disputes for arbitration and mediation in October 2016, it has not yet established a meaningful case load. The SCCA issued its Arbitration Rules and Mediation Rules (the “**SCCA Rules**”), which may be chosen by the parties as the procedural basis for the arbitration proceedings, in July 2016. Among other things, the SCCA Rules set out procedures governing the conduct of the arbitration proceedings and the fees charged by the SCCA, which are, at present, a mix of fixed fee and lump sum calculated as a percentage of the value of dispute.

²¹ Article 11(5) Execution Law 2013; Regulations 2(1) and 11(3) of the Implementing Regulations of the Enforcement Law 2013.

²² Article 50, Arbitration Law 2012G.

²³ Article 55, Arbitration Law 2012G.

²⁴ The Council of Ministers' Resolution No. (257) dated 1435H (2014G); <http://sadr.org/>.

Summary

The Kingdom's arbitration regime, as it stands now, as established by the Arbitration Law and supplemented by the SCCA, is undoubtedly an improvement on the former regime and thus a welcome development. The Arbitration Law unequivocally allows the parties to freely manage certain aspects of the arbitration process, such as tribunal selection and rules of procedure that will apply to arbitration proceedings, allowing for greater certainty and flexibility, with almost no interference from the courts of the Kingdom. The SCCA offers the advantage of a local institution. This means, therefore, that foreign entities that are compelled to have their disputes resolved in the Kingdom now have the opportunity to have those disputes resolved through a modern and fit-for-purpose arbitration regime, whereas in the past they did not.

There are of course still matters of concern, such as the requirement to comply with the Kingdom's public policy and Shari'ah as a pre-condition to the enforcement of the award. However, this will apply equally to awards rendered by tribunals seated abroad upon their enforcement in the Kingdom.

Unless a foreign company is specifically required to enter into an agreement containing an arbitration clause which specifies Riyadh or another city in the Kingdom as the seat of the arbitration, arbitration using a foreign seat will remain the preferred dispute resolution method. While the ability to enforce foreign arbitral awards in the Kingdom remains subject to considerations of Shari'ah and Saudi public policy, foreign companies will at least have the comfort of knowing that the law of the seat will not provide for annulment of the award on that basis.

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