

THE DISPUTE
RESOLUTION
REVIEW

ELEVENTH EDITION

Editor
Damian Taylor

THE LAWREVIEWS

THE
DISPUTE
RESOLUTION
REVIEW

ELEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Damian Taylor

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Claire Ancell

SUBEDITORS

Caroline Fewkes and Helen Smith

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-005-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARTHUR COX

ATTIAS & LEVY

AZB & PARTNERS

BENNETT JONES LLP

BOFILL ESCOBAR SILVA ABOGADOS

BONELLIEREDE

BREDIN PRAT

CLYDE & CO LLP

COLIN NG & PARTNERS LLP

COSTA TAVARES PAES ADVOGADOS

COUNSELS LAW PARTNERS

CRAVATH, SWAINE & MOORE LLP

DE BRAUW BLACKSTONE WESTBROEK

FOLEY GARDERE ARENA

GIDE LOYRETTE NOUEL

GORRISSEN FEDERSPIEL

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

LOCKE LORD LLP

LUBIS, SANTOSA & MARAMIS

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MARXER & PARTNER ATTORNEYS-AT-LAW

MERILAMPI ATTORNEYS LTD
MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH NORTON ROSE
FULBRIGHT US LLP
MOLITOR AVOCATS À LA COUR
MOMO-O, MATSUO & NAMBA
NIEDERER KRAFT FREY
SHIN & KIM
SLAUGHTER AND MAY
SOLOMON HARRIS
SOTERIS PITTAS & CO LLC
URÍA MENÉNDEZ
UTEEM CHAMBERS
WU & PARTNERS, ATTORNEYS-AT-LAW
YOUNG CONAWAY STARGATT & TAYLOR, LLP

CONTENTS

PREFACE.....	vii
<i>Damian Taylor</i>	
Chapter 1 BREXIT.....	1
<i>Damian Taylor and Robert Brittain</i>	
Chapter 2 BANGLADESH.....	15
<i>Fahad Bin Qader</i>	
Chapter 3 BRAZIL.....	23
<i>Antonio Tavares Paes, Jr and Vamilson José Costa</i>	
Chapter 4 CANADA.....	38
<i>Robert W Staley, Jonathan G Bell and John Rawlins</i>	
Chapter 5 CAYMAN ISLANDS.....	52
<i>Kai McGrielle and Richard Parry</i>	
Chapter 6 CHILE.....	65
<i>Francisco Aninat and Carlos Hafemann</i>	
Chapter 7 CYPRUS.....	78
<i>Soteris Pittas and Nada Starovlah</i>	
Chapter 8 DENMARK.....	94
<i>Jacob Skude Rasmussen and Andrew Poole</i>	
Chapter 9 ENGLAND AND WALES.....	105
<i>Damian Taylor and Smriti Sriram</i>	
Chapter 10 FINLAND.....	132
<i>Tiina Järvinen and Nelli Ritala</i>	

Contents

Chapter 11	FRANCE.....	142
	<i>Tim Portwood</i>	
Chapter 12	GERMANY.....	158
	<i>Henning Bälz and Carsten van de Sande</i>	
Chapter 13	GIBRALTAR.....	174
	<i>Stephen V Catania</i>	
Chapter 14	HONG KONG	185
	<i>Mark Hughes and Kevin Warburton</i>	
Chapter 15	INDIA	209
	<i>Zia Mody and Aditya Vikram Bhat</i>	
Chapter 16	INDONESIA.....	225
	<i>Ahmad Irfan Arifin</i>	
Chapter 17	IRELAND.....	237
	<i>Andy Lenny and Peter Woods</i>	
Chapter 18	ITALY	252
	<i>Monica Iacoviello, Vittorio Allavena, Paolo Di Giovanni and Tommaso Faelli</i>	
Chapter 19	JAPAN	265
	<i>Tsuyoshi Suzuki, Suguru Shigematsu and Naoko Takekawa</i>	
Chapter 20	KOREA	276
	<i>Joo Hyun Kim and Jae Min Jeon</i>	
Chapter 21	LIECHTENSTEIN.....	287
	<i>Stefan Wenaweser, Christian Ritzberger and Laura Vogt</i>	
Chapter 22	LUXEMBOURG.....	300
	<i>Michel Molitor</i>	
Chapter 23	MAURITIUS.....	313
	<i>Mubammad R C Uteem</i>	
Chapter 24	MEXICO	327
	<i>Miguel Angel Hernández-Romo Valencia</i>	

Contents

Chapter 25	NETHERLANDS	342
	<i>Eelco Meerdink</i>	
Chapter 26	POLAND	362
	<i>Krzysztof Ciepliński</i>	
Chapter 27	PORTUGAL	384
	<i>Francisco Proença de Carvalho and Marina Gallo Sarmento</i>	
Chapter 28	SAUDI ARABIA	396
	<i>Mohammed Al-Ghamdi and Paul J Neufeld</i>	
Chapter 29	SINGAPORE	416
	<i>Subramanian Pillai, See Tow Soo Ling and Venetia Tan</i>	
Chapter 30	SPAIN	427
	<i>Ángel Pérez Pardo de Vera and Francisco Javier Rodríguez Ramos</i>	
Chapter 31	SWEDEN	448
	<i>Jakob Ragnwaldh and Aron Skogman</i>	
Chapter 32	SWITZERLAND	460
	<i>Daniel Eisele, Tamir Livschitz and Anja Vogt</i>	
Chapter 33	TAIWAN	480
	<i>Simon Hsiao</i>	
Chapter 34	TURKEY	494
	<i>H Tolga Danişman, Baran Alptürk and Z Deniz Günay</i>	
Chapter 35	UNITED ARAB EMIRATES	518
	<i>Nassif BouMalhab and John Lewis</i>	
Chapter 36	UNITED STATES	538
	<i>Timothy G Cameron, Alex B Weiss, Sofia A Gentel and Kalana C Kariyawasam</i>	
Chapter 37	UNITED STATES: DELAWARE	554
	<i>Elena C Norman, Lakshmi A Muthu and James M Deal</i>	
Appendix 1	ABOUT THE AUTHORS	573
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	597

PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor

Slaughter and May

London

February 2019

SAUDI ARABIA

Mohammed Al-Ghamdi and Paul J Neufeld¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Saudi Arabia is an Islamic monarchy ruled by King Salman bin Abdulaziz Al-Saud. Its legal system is unique, and might be described as a modified civil code system founded in Islamic shariah. This system has its origins in the Holy Koran, the teachings of the Prophet Mohammed and the texts of the Islamic religious scholars commenting on and explaining such teachings. Scholarly opinion rather than the authority of precedent in court decisions or legislation is therefore foundational to the Saudi legal system. Each case before a Saudi Arabian court will be considered by reference to the totality of circumstances interpreted in accordance with scholarly sources.

More generally, the concept of ‘law’ in Saudi Arabia is synonymous with shariah, which is the basic and primary law of the country, as defined in Article 7 of the Basic Law of 1992 (the Basic Law).² As stated in this text: ‘The powers of ruling the Kingdom of Saudi Arabia originate from the Book of God and the Sunna of his Apostle, both of which reign supreme over this and all other laws of the state.’ Article 23 of the Basic Law further provides that: ‘The state shall protect the Islamic Creed and shall cater to the application of shariah. The state shall enjoin good and forbid evil, and shall undertake the duties of the call to Islam.’

What might be referred to as ‘laws’ in most civil or common law systems would be referred to as ‘regulations’ in Saudi Arabia. Unlike shariah, which is founded in Islam itself, Saudi regulations are usually enacted or promulgated as royal decrees or ministerial resolutions. Saudi regulations consist of specific rules promulgated by the government authorities to supplement and elaborate on the shariah in respect of the conduct of day-to-day activities in Saudi Arabia. For example, regulations have been adopted to address specific subjects such as foreign investment, the formation and operation of companies, capital markets, banking activity and cybercrime.

No regulation is deemed lawful if it violates a tenet of the shariah. Similarly, if an agreement or individual provision in a contract violates the shariah, it would be unenforceable (e.g., a provision that calls for the payment of interest, which is prohibited under the shariah

1 Mohammed Al-Ghamdi is a partner at Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP. Paul J Neufeld is a partner at Locke Lord LLP. The authors gratefully acknowledge the contribution of Naif Najr Al-Otaibi in the preparation of this chapter.

2 Royal Order No. A/90, dated 1 March 1992.

as applied in Saudi Arabia). Accordingly, no court in Saudi Arabia would issue a decision in violation of those principles, regardless of what the parties have agreed to in their contract or otherwise.³

Generally, the decisions of Saudi Arabian courts are not considered to establish a binding precedent for the resolution of later cases, and the principle of *stare decisis* is not recognised in Saudi Arabia. Nevertheless, court decisions including decisions of the Board of Grievances have gradually become available for review online with the parties' names redacted pursuant to Article 71 of the Board of Grievances Law issued by Royal Decree No. 78/M.⁴

i The new judicial and court system

On 1 October 2007, King Abdullah issued a Royal Decree that set the wheels in motion for material reforms to the judiciary and courts of Saudi Arabia. The Law of the Judiciary⁵ has been slow to take effect, but significant reorganisation of the court system is well under way.

A new high court, the Supreme Court, has been established, as have new courts of appeal and first instance courts in the country's various provinces. As a part of the judiciary's reorganisation, a new Board of Grievances Law⁶ has also taken effect and resulted in a narrower jurisdiction for the Board of Grievances.

The shariah courts, also known as general courts, are courts of general jurisdiction. These courts preside over commercial cases and also have exclusive jurisdiction over certain matters, such as family law and inheritance.

ii The general courts⁷

Supreme Court

The Supreme Court in Riyadh is the highest judicial authority within Saudi Arabia and carries out a review of judgments and decisions issued or endorsed by the courts of appeal. The president of the Court, as well the Court's other judges, are appointed by Royal Decree. The Supreme Court's obligation is to monitor and safeguard the application of Islamic shariah within the judicial system.

Courts of appeal

The courts of appeal review the decisions and judgments handed down by the courts of first instance. The courts of appeal operate through specialised circuits, are comprised of three judges (or five in certain cases) and handle disputes within their designated region. The various circuits deal with labour, criminal, commercial and other areas of law. The appeals courts have recently started to hold their own hearings and issue judgments. Previously, the

3 Article 48 of the Basic Law states that '[c]ourts shall apply the provisions of Islamic shariah to cases brought before them, according to the teachings of the Holy Koran and the Prophet as well as other regulations issued by the head of state in strict conformity with the Holy Koran and the Prophet'.

4 www.bog.gov.sa.

5 Issued by Royal Decree No. M/78, dated 1 October 2007.

6 *id.*

7 Royal Decree No. M/78, dated 1 October 2007; see also Article 5 of the Law of the Judiciary, Royal Decree No. M/64, 14 Rajab 1395 (23 July 1975), Umm al-Qura No. 2592 – 29 Sha'ban 1395 (5 September 1975).

appellate courts did not typically hold hearings. Rather, they would review the appeal request and decide whether to uphold the lower court judgment or return the case to the lower courts with comments.

First instance courts

Saudi Arabia's first instance courts have jurisdiction over all cases, without prejudice to the jurisdiction of the Board of Grievances, and are subdivided into five types: general courts, criminal courts, personal affairs courts, commercial courts and labour courts.

General courts have jurisdiction over a range of matters, from property disputes to suits arising out of traffic accidents. General courts are established in all provinces of Saudi Arabia and may consist of a single judge or three judges. Criminal courts have jurisdiction over all criminal cases and are typically comprised of three judges. Personal affairs courts are comprised of one or more judges and have jurisdiction to decide matters concerning proof of marriage, divorce, custody, appointment of guardians and other family matters. Labour courts are comprised of one or more judges and have jurisdiction over disputes related to labour contracts, wages, work-related injuries and termination, among other matters.

The commercial courts were set up by a Council of Ministers Royal Decree in 2007. However, the reforms and transfer of the commercial courts outside of the Board of Grievances was not fully implemented until 2017. The commercial courts are comprised of one or more judges and have jurisdiction over commercial disputes, including disputes arising between merchants or in respect of partnerships, as well as bankruptcies. There are three commercial courts – located in Riyadh, Jeddah and Dammam.

On 25 February 2018, the Minister of Justice issued a decision adding an Article to the implementing regulations of the Civil Procedure Law affecting commercial courts. The Article stipulates the following:

- a* the first hearing date for a commercial case shall not be later than 20 days from the date the lawsuit was registered;
- b* the maximum number of hearings for commercial cases, after the defendant has been notified, must be no more than three; further adjournment is not allowed except for cases of necessity, such as the illness of one of the parties or their representatives, or the inability of a witness to attend;
- c* in the first hearing, the judicial panel must determine the preliminary issues pertaining to jurisdiction and admissibility conditions;
- d* the court may, in commercial proceedings, enable the parties – via a duly recorded decision – to exchange memos and documents with the court administration; the decision must include the number of memos, the date of filing for each of them, and the date of the next hearing; and
- e* the expert appointed by the court must submit his or her report to the court within 60 days from his or her appointment to the case. If the expert is unable to submit his or her report to the court within the 60-day time limit, he or she must clarify the reason for the delay and the court may extend this period for a maximum of 30 days.

iii Board of Grievances

The Board of Grievances was originally set up to hear cases involving the government or government bodies and historically had jurisdiction over government contract and administrative disputes. In 1982, Royal Decree No. M/51 established the Board of Grievances

as an 'independent administrative judicial commission' directly responsible to the King.⁸ Among other things, the Decree authorised the Board of Grievances to assume jurisdiction over certain criminal cases, some disputes involving the government and requests to enforce foreign judgments.⁹ Subsequently, the Board of Grievances was also given jurisdiction over certain commercial matters.¹⁰ The Board is based in Riyadh and has branches in Jeddah, Dammam and Abha.

The Board of Grievances has now undergone reform in line with the Board of Grievances Law.¹¹ The reforms include the establishment of specialised administrative tribunals to hear administrative disputes relating to employees, administrative decisions, contracts, disciplinary actions and requests to implement foreign rules. The 'new' Board of Grievances has jurisdiction to determine matters involving the government, whereas the general courts take jurisdiction over the various commercial matters previously heard by the Board of Grievances. The procedures followed by the general courts are similar to those of the Board of Grievances. In 2017, the Board of Grievances launched an electronic system for the Supreme Administrative Court. This system enables the electronic transfer, registration, and receipt of objections by the Administrative Appeal Courts both to and from the Supreme Administrative Court.

iv Other tribunals

In addition to the general courts and the Board of Grievances, there are other specialised tribunals that have subject matter-specific or participant-specific jurisdiction. Examples are the Insurance Dispute Committee under the Saudi Arabian Monetary Agency (SAMA), the SAMA Committee for the Resolution of Banking Disputes and the Committee for the Resolution of Securities Disputes.

Framework for alternative dispute resolution (ADR) procedures

Disputes in Saudi Arabia can generally be submitted to arbitration.¹² The judicial (or quasi-judicial) body that would have had original jurisdiction to hear the dispute has historically retained a large measure of control over arbitration. As discussed below, however, a new arbitration law came into effect in 2012 which provides considerable procedural guidance. The implementing regulations for that law went into effect in June 2017. These regulations provide additional clarity regarding, among other things, the courts competent to settle disputes related to arbitration.

Except in respect of family disputes, labour disputes and disputes between a Saudi distributor and its principal, there are no laws, rules or regulations in Saudi Arabia dealing with the resolution of disputes through mediation.

8 Article 1 of Royal Decree No. M/51, 17/7/1402 AH (11 May 1982), superseded by Royal Decree No. M/78, 29/9/1428H (1 October 2007).

9 Article 8 of Royal Decree No. M/51 (superseded).

10 In 1987, the power to settle certain commercial disputes was transferred to the Board of Grievances pursuant to a resolution of the Council of Ministers No. 241, dated 26/10/1407 AH.

11 Royal Decree No. M/78, dated 1 October 2007.

12 Royal Decree No. M/34, dated 16 April 2012.

II THE YEAR IN REVIEW

In recent years, Saudi Arabia has sought to instil confidence in its judicial system by, among other things, authorising the creation of new commercial courts and appellate bodies, including a Supreme Court, to establish a clear and reliable appeals process.¹³

To complement reform efforts focused on the legal system and profession, the Ministry of Justice has also embarked on infrastructure projects, including new court houses and information technology, with the aim of linking courts in the Kingdom together and standardising court procedures.

Saudi Arabia has also implemented judicial reforms through legislation. A new Enforcement Law came into effect in March 2013. The Enforcement Law transfers jurisdiction over the enforcement of foreign judgments from the Board of Grievances to a specialised enforcement judge.

In 2014, the Ministry of Justice also announced the launch of new traffic courts located primarily in Riyadh, Mecca, Medina and the Eastern Province. Further, the Ministry of Justice issued an order allocating certain powers of the notaries public to eligible attorneys, including the power to issue powers of attorney, authenticate contracts and handle real estate sales.

In 2015, practitioners saw significant changes to substantive law alongside continued court reform. For example, on 7 April 2015 a press conference was held by the Saudi Arabian Minister of Labour, confirming a number of amendments to the Saudi Arabian Labour Regulations, including an increase in the probation period for new employees from 90 to 180 days. Meanwhile, the Labour Commission established five new circuits in different regions of the Kingdom to improve efficiency. (More recently, the labour courts have been put under the umbrella of the Ministry of Justice instead of the Labour Commission). The much-anticipated Companies Law 2015 was published in the Umm Al-Qura gazette on 4 December 2015 and came into operation on 2 May 2016.

2016 also saw several significant procedural developments. Perhaps the most important of these was a decision by the Enforcement Court in Riyadh to confirm an ICC award against a Saudi party. The significance of this case stems from the perception that the arbitration and enforcement regimes in Saudi Arabia – which foreign parties had been sceptical of – are beginning to show progress in streamlining the dispute resolution process.

For example, the enforcement circuit now has a direct online connection to other government entities such as SAMA. Meanwhile, the Supreme Judicial Council issued an announcement in 2016 stating that court hearings should not be postponed if a judge is undergoing training, on vacation or has been sent on a mission; doing so would be a violation of a judge's judicial duty. In the event that a judge is unable to meet the date of a hearing, an acting judge should fulfil the responsibilities of the original judge on the hearing's scheduled date.¹⁴

While 2017 did not see as many procedural developments, the issuance of the Implementing Regulations of the Arbitration Law was significant. The Implementing Regulations further supplement and clarify the 2012 Arbitration Law. The regulations went into effect on 9 June 2017. Another development in 2017 was the full implementation of

¹³ Royal Decree No. M/78, dated 1 October 2007.

¹⁴ Fatima Al-Dibais, 'Delayed court hearings violation of judicial duties', Saudi Gazette (17 August 2016), available at <http://saudigazette.com.sa/saudi-arabia/delayed-court-hearings-violation-judicial-duties/>.

three commercial courts in Riyadh, Jeddah and Dammam. Finally, the Board of Grievances introduced an electronic system for the Supreme Administrative Court relating to interdepartmental and court objections.

The year 2018 has seen substantial efforts to raise the profile of international arbitration in Saudi Arabia, while also bolstering the courts. In particular, the Saudi Center for Commercial Arbitration (SCCA) hosted its first international conference, SCCA18, which was held in Riyadh in October in partnership with the International Centre for Dispute Resolution under the auspices of the Ministry of Justice and the Ministry of Commerce and Investment. Dozens of arbitration experts and government representatives were in attendance. The SCCA aims to facilitate business and attract foreign investment by providing an alternative and flexible form of dispute resolution familiar to many investors abroad.

Meanwhile, the court system continues to undergo developments of its own: the labour courts have been brought under the umbrella of the Ministry of Justice instead of the Labor Commission; various forms of electronic summons have been approved; the Ministry of Justice has begun publishing all judgments on its website; the appellate courts have begun issuing judgments rather than returning cases to the lower courts with comments; and the Ministry of Justice has introduced a new article to the implementing regulations to the Civil Procedural Law. The latter law introduces amendments to procedure regarding deadlines as well as evidentiary and jurisdictional issues.

III COURT PROCEDURE

i Overview of court procedure

The Law of Procedure before shariah courts¹⁵ contains articles dealing with various aspects of procedure in Saudi Arabia.¹⁶

Procedure in the Board of Grievances is set out in the Procedural Rules before the Board of Grievances.¹⁷ These Rules contain guidance on issues such as jurisdiction, the filing of cases, the hearing of cases and judgments, ways of objecting to judgments and various other matters.

ii Procedures and time frames

Litigation in Saudi Arabia is often slow-paced. However, recent amendments to the implementing regulations of the Civil Procedure Law, including a limitation on the maximum number of hearings in commercial cases (to three), may quicken the pace.

The litigation process is commenced by filing a statement of claim and serving notice of the claim and of the first hearing date on the defendant. The defendant is expected to attend the first hearing. However, absence of the defendant at the first hearing results in an automatic postponement of the matter to a subsequent hearing, about which the defendant must be notified.¹⁸ If the defendant is absent from the second hearing or any other hearing

15 Royal Decree No. M/21, dated 19 August 2000. Articles 96 to 232 have been superseded by the new Enforcement Law described below.

16 The Law of Procedure before Shariah Courts, issued by Royal Decree No. M/21 20 Jumada 1421 (19 August 2000) has been amended by Royal Decree No. M/1, 22/1/1435 (25 November 2013) (the Law of Procedure before Shariah Courts).

17 The Procedural Rules before the Board of Grievances, issued by Royal Decree No. M/3, 22/1/1435.

18 Article 55 of the Law of Procedure before Shariah Courts.

without an excuse acceptable to the court, the court in its discretion may award a default judgment in favour of the plaintiff.¹⁹ Likewise, if the plaintiff is absent from any hearing without an acceptable excuse, a default judgment may be awarded in favour of the defendant.²⁰ Historically, Saudi courts have been very reluctant to issue default judgments even when the delay tactics of a party are extreme. More recently, however, this trend has begun to reverse.

Assuming a default judgment is not awarded, the litigation process continues through a series of hearings where the parties submit and respond to pleadings. When the parties have had the opportunity to respond to each other's pleadings to their satisfaction and the satisfaction of the court, the court will close the case for judgment. Saudi courts do not typically award legal costs to the successful litigant.

Interim relief in Saudi Arabia is available only in extremely limited circumstances. Parties may request interim relief if the matter is urgent and there is a risk that a delay in receiving relief will be damaging. For example, a creditor may obtain a protective attachment of a debtor's assets where there is a risk that the assets may be hidden or smuggled out of the country. It is important to note, however, that while injunctive relief is available in theory on an interim or permanent basis, in practice it is very rare.²¹

iii Class actions

Class actions are not permissible in Saudi Arabia. However, multiparty litigation has become more prevalent, particularly in cases filed by government agencies against multiple defendants.

iv Representation in proceedings

In general, a litigant may either be self-represented or represented by a lawyer who appears on the list of practising lawyers in Saudi Arabia.²² Although self-representation is permitted, in practice it is uncommon and rarely seen outside labour disputes and minor criminal proceedings. A major practical limitation to self-representation for most foreign parties is that court proceedings in Saudi Arabia are conducted in Arabic. All oral testimony and argument, as well as documentary evidence, must be submitted in Arabic. It is permissible to use a private or court-appointed translator. A legal entity other than a natural person may represent itself through an in-house lawyer or a non-lawyer legal representative.²³ As a matter of practice, this in-house or legal representative must be a Saudi national.

In any circumstance where a representative appears on behalf of a party, including where a party is represented by an in-house lawyer or a non-lawyer in its employ, the court will require a power of attorney evidencing that representative's authority to appear on behalf of the party.²⁴ A power of attorney executed outside Saudi Arabia will need to be authenticated in the country where it is signed. Where a litigant fails to produce a power

19 *ibid.*

20 *ibid.*

21 See Articles 205 to 210 of the Law of Procedure before Shariah Courts, in respect of injunctions.

22 Articles 1, 3 and 18 of the Code of Law Practice, issued by Royal Decree No. (M/38) 28 Rajab 1422 (15 October 2001), Umm al-Qura No. (3867) 17 – Sha'ban 1422 – 2 November 2001 (the Code of Law Practice).

23 *id.* at Article 18(c).

24 Articles 49 to 50 of the Law of Procedure before Shariah Courts.

of attorney, the court may, at its discretion, issue judgment in favour of the opposing party, although in most cases the court will allow the party at least one additional opportunity to comply with this requirement.

v Service out of the jurisdiction

Article 20 of the Law of Procedure before shariah courts sets out the mechanism by which parties may serve legal process outside Saudi Arabia in cases heard by the shariah courts. This Article states: ‘If the place of residence of the person to be served is in a foreign country, a copy of the process shall be sent to the Ministry of Foreign Affairs, for communication by diplomatic means. A reply stating that the copy has reached the person to be served shall be sufficient.’

In Board of Grievances cases, the procedure to be followed for service out of jurisdiction is almost identical to that followed in the shariah courts. Article 43(f) of the Board of Grievances’ Rules and Procedures²⁵ states: ‘As regards persons who are resident outside the Kingdom service shall be effected through the Ministry of Foreign Affairs; in this case it would be adequate to receive a reply purporting to have served the summons.’

The requirements of the shariah courts and the Board of Grievances are not altered when the documents to be served are those that initiate proceedings, nor is there any distinction made between natural and corporate persons.

IV ENFORCEMENT OF FOREIGN JUDGMENTS

i Procedures for enforcing foreign judgments

In Saudi Arabia, the authority competent to enforce foreign court judgments is the special circuit created by the enforcement regulations.²⁶ A foreign court judgment is enforceable upon issuance of an enforcement order by the judge of the circuit. Such an order has the same status as a court judgment.

There are two main procedures by which a party may seek to enforce a foreign court judgment. The first procedure involves requesting enforcement of a foreign judgment pursuant to Royal Decree No. M/53.²⁷ The second procedure involves requesting enforcement of the foreign judgment pursuant to a reciprocal enforcement treaty.

ii Enforcement under Royal Decree No. M/53

A new Enforcement Law has been in effect since March 2013 under Royal Decree No. M/53. The new Enforcement Law supersedes Articles 96 to 232 of the Law of Procedure before Shariah Courts (as enacted by Royal Decree No. M/21 dated 20/5/1421 H), Article 13(g) in the Board of Grievances Law (as enacted by Royal Decree No. M/78 dated 19/9/1428) and all other statutory provisions that are inconsistent with the Enforcement Law.

Under Article 1 of the Enforcement Law, enforcement is the jurisdiction of a specialised enforcement judge defined as ‘the chairman of the enforcement circuit, the judge of the enforcement circuit or the court judge who handles the tasks of the enforcement judge, according to the case’. Article 2 grants the enforcement judge power to enforce judgments

25 The Procedural Rules before the Board of Grievances, issued by Royal Decree No. M/3, 22/1/1435.

26 Royal Decree No. M/53, dated 13/8/1433 H, 3 July 2012.

27 *ibid.*

and decisions handed down in administrative and criminal actions and in arbitration. The enforcement judge has broad authority to enforce judgments, including foreign judgments and foreign arbitral awards, and to make orders for the disclosure and attachment of assets. Decisions of the enforcement judge may be appealed.

Article 11 provides requirements for the enforcement of foreign orders, judgments and arbitral awards. Among other things, the enforcement must not be contrary to the public policy of Saudi Arabia and there must be enforcement reciprocity with Saudi Arabia in the jurisdiction where the order, judgment or award was rendered. Historically, the reciprocity requirement has been difficult but not impossible hurdle to overcome. Successful litigants in this regard include a party who obtained a sworn statement from an American judge confirming reciprocity of enforcement for Saudi court judgments.²⁸

Practitioners have generally welcomed the Enforcement Law and hope it will reduce delay and the likelihood that a judgment or award will be reopened and reconsidered on the merits. An enforcement judge would enforce a foreign arbitral award without questioning the award, provided the arbitration award meets the requirements of Article 11 of the Enforcement Law. However, since Article 11 is subject to the 'requirements of international treaties and conventions', grounds for overturning a foreign arbitral award in such treaties and conventions would presumably still apply. Article 50 of the new Arbitration Law also contains such grounds and may likewise come into play.

iii Enforcement under regional treaties

A judgment creditor may seek enforcement under two regional treaties: the 1983 Riyadh Arab Agreement for Judicial Cooperation (the Riyadh Convention) and the 1995 Protocol on the Enforcement of Judgments, Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council (the GCC Protocol). These two treaties apply to judgments rendered in their respective Member States (GCC members consist of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates). These states are also part of the larger group of Riyadh Convention members.

The Riyadh Convention and the GCC Protocol provide that court judgments of a signatory state may be enforced in any other signatory state, if the court rendering the judgment had proper jurisdiction and the dispute has been finally adjudged. These treaties also allow the court where enforcement is sought to refuse enforcement if, among other reasons, the judgment is contrary to shariah law or the Constitution, or the public order of the jurisdiction where enforcement is sought.²⁹ Both the Riyadh Convention and the GCC Protocol provide that judgments issued by one Member State's courts may be executed in any of the Member States, provided such judgments would be executed in the state where the court that rendered the judgment is located.³⁰

iv Assistance to foreign courts

Parties or courts outside Saudi Arabia may seek the assistance of Saudi courts via a number of international and regional agreements.

28 Board of Grievances, Judgment 78/D/F20 (2007).

29 Article 30 of the Riyadh Convention; Article 2 of the GCC Protocol.

30 Article 31 of the Riyadh Convention; Article 3 of the GCC Protocol.

Articles 16 to 21 of the Riyadh Convention address requests for assistance from judicial authorities in Member States, including for the purpose of obtaining witness testimony. Under Article 17 of the Convention, a request for a rogatory commission may be refused for a limited set of reasons: if the recipient court lacks competence to implement the request; if the request would prejudice the sovereignty of the contracting party; or if the request concerns a crime that the contracting party considers to be of a 'political nature'.

Article 13 of the GCC Protocol provides that authorities in Member States may request 'any judicial procedure in connection with an existing suit, including hearing the statements of the witnesses, receiving and discussing the experts' reports, conducting surveys or requesting to put to oath in all civil, commercial, administrative, penal and personal affairs cases'. The limited grounds for refusing such requests are set out in Article 15 and reflect those in the Riyadh Convention.

Saudi Arabia has also entered into judicial cooperation agreements. For example, under Article 5 of the 2005 Judicial Cooperation Agreement between the Kingdom of Saudi Arabia and the Syrian Arab Republic, '[t]he subjects of either state party residing within the borders of the other shall have the right to judicial assistance in line with that provided for its nationals in accordance with its laws'. The Ministry of Justice in Saudi Arabia is to receive requests for assistance and determine the appropriate authority to respond.

Notwithstanding the provisions of these treaties, such assistance by a Saudi court is very rare in practice.

v Access to court files

There is generally no public access to court files in Saudi Arabia. Court files do not become available to the public even after the proceedings have ended. While there is no established, comprehensive case reporting system in Saudi Arabia, pursuant to the Law of the Judiciary, the Ministry of Justice has begun publishing all the judgments to their website on a no-name basis. While past decisions of Saudi Arabian courts are influential, they are not considered to establish a binding precedent for deciding later cases.

vi Litigation funding

There is no provision or established practice for third-party litigation funding in Saudi Arabia. More generally, under Saudi Arabian law a claim or defence will not be accepted where the proponent has no existing legitimate interest.³¹

V LEGAL PRACTICE

i Conflicts of interest and information barriers

In Saudi Arabia, the Code of Law Practice prohibits a lawyer from undertaking representation of a client in circumstances where a conflict of interest is deemed to exist.³² In such circumstances, a lawyer is prevented from undertaking the representation personally or through another lawyer. The Code of Law Practice does not provide an exception or permissible method for obtaining a waiver of a conflict.

31 Article 3 of the Law of Procedure before Shariah Courts.

32 Articles 14 to 17 of the Code of Law Practice, Royal Decree No. (M/38) 28 Rajab 1422 (15 October 2001), Umm al-Qura No. (3867) 17 – Sha'ban 1422 – 2 November 2001.

The Code of Law Practice contains an outright prohibition on a lawyer accepting a case or rendering advice against his or her employer or a former employer within five years of termination of the relationship with that employer.³³ A lawyer also may not represent an adversary in connection with a previously handled case or in connection with any other related matter.³⁴ Further, a lawyer who has been retained for periodic representation cannot accept a case or render advice against the client within three years of the termination of the retainer agreement.³⁵

In Saudi Arabia, the ability to eliminate a conflict through screening or an information barrier is uncertain. There is no express prohibition against information barriers. On the other hand, there are also no express procedures regarding the proper application of an information barrier. Historically, in Saudi Arabia the practice of law has been performed on an individual basis. The practice of law within a professional firm is a relatively recent development.

ii Money laundering, proceeds of crime and funds related to terrorism

Saudi Arabia has taken significant steps towards combating money laundering and the funding of terrorism. In 2003, Saudi Arabia introduced the Anti-Money Laundering Law (AML).³⁶ Under the AML, lawyers are subject to certain obligations designed to prevent money laundering and the financing of terrorism. Among these obligations are strict requirements that a lawyer verify the identity of the client and put in place certain internal measures designed to detect and combat money laundering and the financing of terrorism.³⁷

Lawyers are also under an obligation to report unusually large, complex or suspicious transactions to the Financial Intelligence Unit (FIU).³⁸ A lawyer's reporting obligation includes the turning over of documents and information requested by the FIU, judiciary or concerned authorities without regard to any legal privilege that may apply.³⁹ The AML also imposes an obligation on lawyers to maintain records and documents that identify the client and explain and relate to conducting, concluding or closing a client account for at least 10 years from the date the account is closed.⁴⁰ Failure to comply with the obligations imposed by the AML may result in a fine or imprisonment.⁴¹ However, an exception to liability under the AML exists for violations that occur while acting in good faith.⁴²

iii Data protection

The Basic Law of Governance, Decree No. A/90 creates a right of privacy concerning personal communications except as otherwise provided by law.⁴³ While there is no specific cause of action for breach of privacy in this context, a tort claim may lie where an individual has wrongfully disclosed private personal information without consent. In this regard, where it

33 id. at Article 14(1).

34 id. at Article 15.

35 id. at Article 14(2).

36 Anti-Money Laundering Law, as enacted by Royal Decree No. (M/39) dated 25/6/1424H (24 August 2003).

37 id. at Articles 4, 6 and 10.

38 id. at Article 7.

39 id. at Articles 8 and 13.

40 id. at Article 5.

41 id. at Article 18.

42 id. at Article 22.

43 Article 40.

is foreseeable that personal information may need to be collected and transmitted, it may be advisable to obtain such consent in advance (e.g., by including a provision to this effect in an employment contract). Where information is being gathered through information networks or computers, the Anti-Cyber Crime Law (2007), Decree No. M/17 may also be applicable. For example, the Anti-Cyber Crime Law imposes criminal and civil penalties for unlawfully accessing computers for the purpose of modifying, deleting or redistributing private data. Likewise, intercepting data transmitted through an information network or computer without legitimate authorisation is prohibited. The Telecommunications Act sets out penalties for breaches of privacy in the telecommunications sector at large.⁴⁴ Where no specific provisions are applicable courts will apply general principles of shariah law.

VI DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The concept of privilege as a right of the client does not exist in Saudi Arabia. Instead, the protection afforded to confidential client information arises from an obligation on the lawyer. Under the Code of Law Practice, any confidential information communicated to or learned in the course of practice by a lawyer is prohibited from being disclosed by the lawyer even after expiry of the power of attorney.⁴⁵ This obligation, however, does not apply where non-disclosure would violate a shariah requirement.⁴⁶

Although Saudi Arabia does not provide a right of privilege as is common in other legal systems, Saudi Arabian law does protect privacy. The Basic Law expressly safeguards an individual's communications from confiscation, delay, reading or listening except where provided by statute.⁴⁷ Moreover, during the course of a dispute the ability to compel any testimony or documents is extremely limited. The combination of a right to privacy and the inability to compel information makes it difficult for an opposing party to discover a client's confidential information.

As a practical matter, however, it is important to note that where client confidences are disclosed, they may be freely used against a party. For example, in negotiating the settlement of a dispute, there is no 'without prejudice' privilege under Saudi law and anything disclosed during settlement negotiations can be used against the disclosing party in proceedings.

ii Production of documents

Litigation in Saudi Arabia is document-driven. Oral testimony and argument is rare and is considered to be of little probative value. Notwithstanding the focus on documents in Saudi Arabian litigation, a litigant's ability to discover documents from the opposing party is extremely limited.

44 Issued under the Council of Ministers Resolution No. 74, 2001.

45 Article 23 of the Code of Law Practice.

46 *id.*

47 Article 40 of the Basic Law of Saudi Arabia, Royal Decree No. A/90 Shaban 1412 H, corresponding to 1 March 1992 G.

There are no specific rules in Saudi Arabia governing the discovery of documents.⁴⁸ In practice, however, parties are permitted to submit a request to the court seeking to compel production of specifically identified documents that can be shown to exist. For example, a party may request the court to compel production of a document that is specifically referenced in another document already before the court. Specifically identified documents can be compelled from a counterparty and third party alike. Parties are not permitted to make broad or general requests for information. During the course of the litigation, a court can, of its own motion, compel the production of documents from either party.

VII ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The alternatives to court litigation in Saudi Arabia are primarily direct negotiation between the disputing parties to resolve the dispute or arbitration. Mediation is also available (and sometimes mandated as a condition to seeking judicial review).

ii Arbitration

The old Arbitration Law

Prior to July 2012, arbitration in Saudi Arabia was governed by Royal Decree No. M/46, the old Arbitration Law,⁴⁹ which subjected arbitration to substantial judicial oversight by the Saudi courts (generally the Board of Grievances for matters involving non-Saudi parties). The old Arbitration Law required all arbitration proceedings in Saudi Arabia to be conducted in Arabic and awards could be rejected and reformed at the discretion of the court. The court was responsible for approving the parties' agreement to arbitrate and appointing arbitrators if the parties failed to do so. The court also supervised and ruled on disputes arising during the arbitration, including procedural objections, arbitrator recusals and requests for interim relief.

In addition, under the old Arbitration Law the relevant court was responsible for enforcement of arbitral awards (foreign and domestic) and conducted whatever level of review it deemed necessary to ensure that the arbitration award was compliant with shariah. In practice this typically amounted to what appeared to be a *de novo* review of the entire matter. In at least one instance, the Board of Grievances has reversed and rewritten an award (e.g., vacated the arbitral award and awarded new damages to the party who lost on the merits in the arbitration).

The new Arbitration Law

On 8 June 2012, Saudi Arabia published its long-awaited arbitration reform law. The new Arbitration Regulation, Royal Decree No. M/34 dated 24/05/1433 H (the new Arbitration Law) replaced the previous Arbitration Regulation, Royal Decree No. M/46 (the old Arbitration Law) and the Rules for the Implementation of the Arbitration Regulation

48 However, Article 149 of the Law of Procedure before shariah courts permits the court, of its own motion or at the request of a litigant, to 'decide to introduce documents or papers from government agencies of the Kingdom if the litigants are unable to do so'.

49 Royal Decree No. M/46.

(Ministerial Resolution No. 7/2021/M). The new Arbitration Law was published in the Official Gazette (Umm Al Qura) on 18/07/1433 H (8 June 2012) and became effective on 18/08/1433 H (8 July 2012).

The new Arbitration Law⁵⁰ applies to arbitral proceedings in Saudi Arabia (except those related to personal affairs). It also applies to international arbitration abroad if the parties have agreed to apply the new Arbitration Law.⁵¹

Importantly, the new law does not alter the requirement that arbitral awards be shariah compliant and expressly recognises the court's authority to review arbitral awards for shariah compliance.⁵² However, in other respects, the new Arbitration Law borrows from the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 and, accordingly, more closely aligns Saudi law with international arbitration norms (e.g., regarding competence-competence⁵³ and separability).⁵⁴ The new Arbitration Law also grants more control to the parties and provides greater clarity on several issues.

The new Implementing Regulations to the Saudi Arbitration Law

In May of 2017, the Council of Ministers issued Implementing Regulations to supplement the Saudi Arbitration Law. These came into effect on 9 June 2017. The Implementing Regulations provide clarifications to the 2012 Arbitration Law. Key provisions of the Implementing Regulations include the following:

- a Article 2 provides the Court of Appeals with original jurisdiction to hear issues relating to an arbitral dispute including challenges to arbitration awards;
- b Article 3 provides that electronic service of notices is now permissible;⁵⁵
- c Article 8 establishes that in the event the parties have failed to agree on the procedural rules to be followed by the arbitral tribunal and the tribunal chooses to then follow specific rules, the tribunal must give notice to the parties at least 10 days prior to implementing them; and
- d Article 17 clarifies that the Supreme Court is the court that shall hear appeals following a decision by the Court of Appeals to set aside an award.

Arbitration agreements

Prior to the new Arbitration Law, there were no written guidelines regulating arbitration agreements (except the requirement that the arbitration agreement be made by a person with full legal capacity). By contrast, the new Arbitration Law provides guidelines for determining whether an agreement to arbitrate may be enforced and how.⁵⁶ This change provides parties with some additional clarity when forming agreements.⁵⁷

50 Royal Decree No. M/34.

51 New Arbitration Law, Article 2.

52 *id.*, Article 50(2).

53 *id.*, Article 20.

54 *id.*, Article 21.

55 The Saudi Ministry of Council recently issued a Royal Decree allowing courts to serve summons by email, mobile messages or any account registered at the Ministry of Interior.

56 New Arbitration Law, Articles 9–12.

57 *id.*, Article 1: 'Arbitration Agreement: is an agreement between two or more parties, providing that they resort to arbitration all or some specific disputes that have arisen or that may arise between the parties

Jurisdiction of the arbitral tribunal

Under Article 11 of the new Arbitration Law, a court should decline jurisdiction in cases where there is an arbitration agreement, if the defendant requests referral of the case to arbitration prior to making any claim or defence. The new law also provides that arbitrators shall settle pleas of non-jurisdiction, including alleged defects in the arbitration agreement, thus adopting the principle of competence-competence.⁵⁸ In this regard, the arbitration agreement is also treated as separable from the underlying agreement (i.e., the annulment, cancellation or termination of the underlying contract ‘shall not result in the annulment of the arbitration condition if such condition is valid by itself’).⁵⁹

Arbitrator appointments and language requirements

With respect to the appointment or recusal of arbitrators, the new Arbitration Law provides detailed procedures (e.g., in the event the parties fail to agree on the appointment of a sole arbitrator, the competent court will make the appointment unless the parties have agreed otherwise).⁶⁰ Also, whereas the old Arbitration Law required arbitration to be conducted in Arabic, the new law allows arbitral proceedings to be conducted in a language other than Arabic if ordered by the arbitration panel or the parties so agree. However, awards must be translated into Arabic prior to enforcement.⁶¹

Time limits

In addition to easing language requirements, the new Arbitration Law provides more flexibility regarding time limits. Under the old Arbitration Law, the arbitral tribunal was required to issue an award within 90 days of the date of the decision approving the arbitration agreement (unless the parties otherwise agreed), although this requirement was not typically observed in practice. Under the new Arbitration Law, in the absence of agreement by the parties, awards shall be issued within 12 months of the commencement date of the arbitral proceedings. This period can be extended by up to six months by the arbitral tribunal (or more, if the parties agree).⁶²

Choice of rules

The new Arbitration Law allows parties the freedom to choose which arbitration rules will apply and provides guidance on choice of law issues.⁶³ The old Arbitration Law was silent in this regard other than requiring that arbitral awards must abide by the provisions of Islamic shariah and the ‘laws in force’ (i.e., applicable Saudi law).

concerning a specific regular relationship, whether contractual or not and whether the Arbitration Agreement shall be in the form of an arbitration condition stipulated by a contract or in the form of an independent arbitration stipulation.’

58 *id.*, Article 20.

59 *id.*, Article 21.

60 *id.*, Articles 13–24.

61 *id.*, Article 29.

62 *id.*, Article 40.

63 See new Arbitration Law, Article 25 (regarding arbitration rules) and Article 38 (regarding the permissibility of party agreements on applicable law, subject to the provisions of shariah law).

iii Practical considerations

The new Arbitration Law provides increased flexibility with respect to selecting the venue of the arbitration, the governing law, the language, the arbitrators and other matters. However, this flexibility is still clearly subject to the Saudi courts' oversight and mandate to ensure shariah compliance. For example, while the new Arbitration Law does not require that all arbitrators in a three-member tribunal be competent in shariah (e.g., arbitrators may have a civil law degree), parties should take the arbitrators' familiarity with shariah law into consideration when selecting arbitrators so as to protect the enforceability of the award before Saudi courts.

During the arbitration process, the new Arbitration Law requires Saudi courts to act within certain time limits when performing supervisory functions. For example, if a party fails to appoint a wing arbitrator within 15 days of a petition to this effect by the other party, the court must do so (according to the procedures set out in the new Arbitration Law) within 15 days of a party's application.⁶⁴ These time limits should help to move the arbitration process along more quickly. However, it is still unclear whether the courts will consistently enforce time limits in practice.

Interestingly, the new Arbitration Law permits the arbitration panel to issue temporary or injunctive relief if the parties agree that the arbitration panel may do so.⁶⁵ A second provision provides that a 'competent court' may order temporary or preventive measures upon application from a party.⁶⁶ It is unclear whether such measures, which are extremely rare in Saudi Arabia, will be enforced or applied by Saudi courts.

Although many of the provisions in the new Arbitration Law will be familiar to parties who opt for arbitration in other jurisdictions, for the reasons noted above, parties must still consider Saudi-specific practice issues in deciding what dispute resolution mechanism to choose. For many contracts, choosing Saudi courts as the forum for dispute resolution may remain a better alternative than choosing arbitration in Saudi Arabia.

iv Arbitral institutions

Historically, the Saudi Chamber of Commerce and Industry facilitated arbitration with the agreement of the parties. In 2014, the Council of Ministers established the SCCA. The Arbitration Rules for the SCCA were finally completed in 2016 and came into effect on 31 July 2016.⁶⁷ The Rules were formulated with the UNCITRAL Arbitration Rules as an initial template, but contain several significant differences. For instance, the SCCA's rules on pleadings and the appointment of the arbitral tribunal depart from the UNCITRAL rules. In addition to the development of its rules, the SCCA plans to expand beyond Riyadh and to establish a branch in Jeddah.

v The popularity of arbitration as a dispute resolution mechanism

Courts remain the most popular forum for disputes involving local commercial transactions. Under the old Arbitration Law, an arbitration clause did not necessarily affect the right of the

64 New Arbitration Law, Article 15.

65 *id.*, Article 23.

66 *id.*, Article 22.

67 Arbitration Rules, Saudi Center for Commercial Arbitration, July 2016.

parties to pursue court litigation.⁶⁸ In such cases, arbitration could end up adding additional steps to the dispute resolution process. This is not the case under the new Arbitration Law.⁶⁹ However, at least for domestic disputes, continued court supervision may ensure compliance with shariah law and thus increase the likelihood of enforcement.

Notwithstanding its limitations, arbitration has been a familiar form of dispute resolution in Saudi Arabia for centuries. Both the Koran and the Sunnah of the Prophet refer to arbitration as a dispute resolution mechanism.⁷⁰ Arbitration has historically served as method of resolving certain tribal disputes. It has also evolved into a valid method of resolving commercial disputes, including those concerning oil concessions.

Significant limitations remain on arbitration for some disputes, especially those involving government agencies. The limitations involving government agencies continue under the new Arbitration Law. The new Arbitration Law expressly prohibits government bodies from entering into arbitration agreements, unless approved by the Prime Minister.⁷¹ In part, these limitations are deemed to stem from a landmark case, *Saudi Arabia v. Arabian American Oil Co (Aramco)*, in which the arbitral tribunal rendered an award against the Saudi Arabian government. In the *Aramco* decision, the tribunal concluded that since Saudi law contained 'no particular rules which define mining concessions in general and petroleum concessions in particular', Saudi law had to be 'interpreted or supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence'.⁷² In response to this award, a Council of Ministers resolution barred government agencies from entering into arbitration without approval of the President of the Council of Ministers, and required that contracts with Saudi government agencies be subject to Saudi law.⁷³ In a similar vein, although Saudi Arabia is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention),⁷⁴ Royal Decree No. M/8⁷⁵ precludes investment disputes involving oil or acts of sovereignty from being adjudicated under the terms of the ICSID Convention. These restrictions have limited the popularity of arbitration for major transactions, as many such transactions continue to involve government agencies.

vi Rights of enforcement and appeal in arbitral proceedings

A duly issued arbitral award in Saudi Arabia has *res judicata* status and may be executed as such under Article 52 of the new Arbitration Law. A party may seek to enforce an award after 60 days of its issuance. Arbitral awards issued in accordance with the new Arbitration Law

68 For example, in one instance the Review Committee for the Board of Grievances considered an arbitration clause nullified because the defendant only appealed to the arbitration clause after the dispute was already being litigated. *Diwan al-Mazalim*, Decision No. 72/T/4 of 1411 AH (1991).

69 In particular, see Article 11 of the new Arbitration Law, regarding courts' obligation to decline jurisdiction where there is an arbitration agreement and the defendant has invoked it prior to making a claim or defence.

70 Verses 4:35 and 49:9 of the Koran are sometimes cited as examples.

71 New Arbitration Law, Article 10.

72 *Saudi Arabia v. Arabian American Oil Co (Aramco)*, *ad hoc* award (23 August 1958), 27 ILR 117, 145 (1963).

73 Council of Ministers Resolution No. 58, dated 03/02/1383 AH (25 June 1963); see also Article 8 of the Implementing Regulations.

74 The ICSID Convention came into force on 14 October 1966 when it had been ratified by 20 countries.

75 Dated 22/3/1394 AH (28 September 1979).

are generally not appealable, but may be subject to annulment actions.⁷⁶ Under Article 50, a party may petition for the annulment of an arbitral award within 60 days of notification of the award (i.e., before enforcement proceedings can begin). In principle, it is thus possible that enforcement proceedings could run concurrent to annulment proceedings unless stayed.

Article 8 states that jurisdiction over petitions relating to international commercial arbitration will be heard by the competent Riyadh court of appeal unless the parties agree on another Saudi court. Importantly, and unlike the old Arbitration Law, Article 50(4) of the new Arbitration Law explicitly provides that, during any set-aside proceeding, the court may not review the merits of the case: ‘The Competent Court shall consider the annulment claim in the cases aforementioned in this Article without having the right to examine the facts and subject of the dispute.’

vii The New York Convention and other options for enforcing foreign arbitral awards

Awards from the states of the Arab League and the Gulf Cooperation Council may be enforced under the reciprocal enforcement arrangements in the 1995 GCC Protocol and the 1983 Riyadh Convention. Awards may also be enforced in Saudi Arabia under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which Saudi Arabia acceded to in 1994, with a reciprocity reservation pursuant to Article 1(3) of the New York Convention.⁷⁷ The reciprocity reservation means that the New York Convention will be applied only to arbitral awards made in states that are signatory states to the New York Convention.

Along with the other grounds for refusal of enforcement under the New York Convention, Saudi courts may also refuse to enforce awards under the public policy exception in Article V(2)(b) of the New York Convention. The most common violation of public policy is failure to comply with shariah law.

viii Recent developments and trends in arbitration

Current examples of arbitration involving Saudi state entities are limited, as such disputes do not often reach arbitration.⁷⁸ Arbitration of commercial disputes involving private parties is more common, though enforcing a resulting award has historically been difficult. This is well illustrated by the ICC case *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*. The arbitration proceeded under court supervision in Saudi Arabia and a final award was issued in September of 2008 dismissing Jadawel’s claims. However, the award was subsequently challenged and the Second Commercial Court of the Board of Grievances re-examined the merits. In April 2009, the Board of Grievances declined to enforce the award and, moreover, reversed it. In reversing the award, the Board of Grievances reportedly ordered Emaar to pay damages and make other reparations to Jadawel.

76 New Arbitration Law, Article 49.

77 Royal Decree No. 11, dated 16 Rajab 1414 (30 December 1993).

78 One example is *Ed Züblin AG v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/03/1 (regarding the construction of university facilities, discontinued in 2003 at the request of the claimant following a settlement agreement between the parties).

The *Jadawel* case highlights the obstacles parties face in reaching a final resolution. These may include the initial jurisdictional proceedings, the arbitral proceedings, the judicial review of the award, and a subsequent appeal. It is hoped that the new Enforcement Law will streamline this process.

In contrast to *Jadawel*, a recent case has signalled that the era of arbitral enforcement difficulty in Saudi Arabia might be coming to a close.⁷⁹ The case – between a UAE telecommunications company and a Saudi data communications provider – involved an ICC award which was rendered in London in 2011. In the midst of the enforcement proceedings in Saudi Arabia, the new Arbitration Law and Enforcement Law were both passed. As a result of a procedural change under the Enforcement Law, the claimant transferred the enforcement proceedings from the Board of Grievances to an enforcement court. The Enforcement Court in Riyadh ruled that the US\$18.5 million award should be enforced against the Saudi respondent. This decision was in compliance with the new Enforcement Law, which permits a foreign award or judgment to be enforced provided that it meets the requirements of Article 11 of the Law.

The Enforcement Court's decision has been viewed as evidence of progress under the new arbitration and enforcement regime in Saudi Arabia. It is yet to be seen, however, how the enforcement courts will decide in the case of awards that might be deemed contrary to public policy. It is important to note that the ICC award did not contain an award of interest, which is incompatible with shariah as applied in Saudi Arabia.

ix Mediation

In Saudi Arabia, formal non-binding mediation is generally only available in family disputes, labour disputes and disputes between a Saudi Arabian distributor and its principal. Mediation is offered by the court judge or by a special committee.

The Saudi Arabian Labour Law requires mediation as a first step in the filing of a labour dispute. At the time the labour dispute is filed with the competent Labour Office, the parties are required to attend one or more mediation sessions in an effort to settle the dispute amicably. The first step in the process is to file the complaint at the Amicable Settlement Department of the Labour Office. This department will have 21 days to settle the claim between the two parties amicably. Otherwise, the case will be moved to a Labour Court. The Labour Courts are divided into a Lower and Appellate Level. The Appellate Level issues the final and enforceable judgment, which cannot be appealed.

In the event that a dispute arises between a distributor and its principal, if the distribution agreement has been registered with the MCI, the Saudi Arabian Commercial Agency Regulations afford the terminated distributor the opportunity to submit a claim to the Commercial Agents Disputes Reconciliation Committee.⁸⁰ The Committee consists of a Deputy Minister of Commerce and two officials from the Chamber of Commerce. If the dispute cannot be settled through the mediation efforts of this Committee, it is submitted to the Saudi courts (or Saudi arbitration) for formal adjudication.

Outside the context of family disputes, labour disputes and disputes between a distributor and its principal, mediation is informal and there is no pressure from the Saudi

79 Caroline Simson, 'New Saudi Arbitration Regime Diverts from Checkered Past', Law360 (16 June 2016), available at www.law360.com/articles/806561/new-saudi-arbitration-regime-diverts-from-checkered-past.

80 Commercial Agency Regulations, Royal Decree No. M/11 20/2/1382 AH (22 July 1962).

Arabian courts to mediate. There are also no specific rules governing how mediation is to be conducted or concluded, providing the parties complete freedom to agree between themselves all aspects of the mediation.

x Other forms of alternative dispute resolution

The Saudi Arabian courts have discretion to assign one or more experts to prepare a written or oral opinion to assist the court in deciding a matter.⁸¹ The expert's opinion is non-binding but guides the court's determination.⁸² Experts may be appointed by agreement of the parties, with the approval of the court.⁸³ Where the parties cannot agree, however, the experts may be court-appointed.⁸⁴ The cost of the experts is borne by the parties.⁸⁵ In practice, the use of experts is becoming more common in disputes concerning technical matters, which require specialised training and experience.

VIII OUTLOOK AND CONCLUSIONS

In 2007, Saudi Arabia embarked on a sweeping restructuring of its judicial system. Progress has been slow but significant. Perhaps the most significant development is the reorganisation of the Board of Grievances to include a Supreme Administrative Court, administrative courts of appeal and administrative courts.

The jurisdiction of the administrative courts is set forth in Article 13 of the new Law of the Board of Grievances.⁸⁶ In sum, the jurisdiction of the Board of Grievances has been significantly narrowed and no longer includes commercial disputes and criminal offences over which it had jurisdiction pursuant to Decree No. M/51.⁸⁷ The Board of Grievances retains jurisdiction over disputes involving government parties, including 'contract-related disputes'.⁸⁸ However, jurisdiction over private-sector commercial disputes now resides with the commercial courts.⁸⁹

The prospering economy and an increase in foreign investment has prompted Saudi Arabia to take steps towards modernising the way disputes are resolved, both in court litigation and in alternative dispute resolution. These steps include, among other things, introducing a new court system, a new arbitration law and a new enforcement law. While these developments have, in some cases, resulted in greater harmony with practices in other jurisdictions, Saudi Arabia remains a unique and complex jurisdiction for dispute resolution.

81 Article 120 of the Law of Procedure before shariah courts.

82 *id.* at Article 138.

83 *id.* at Article 130.

84 *id.*

85 *id.* at Article 119.

86 Article 13 of the Law of the Board of Grievances, issued by Royal Decree No. M/78 dated 19/9/1428 AH (1 October 2007).

87 Article 8 of Royal Decree No. M/51, dated 17/7/1402 AH (11 May 1982), to be superseded by Article 13 of Royal Decree No. M/78, dated 19/9/1428 AH (1 October 2007).

88 Article 13(d) of Royal Decree No. M/78, dated 19/9/1428 AH (1 October 2007).

89 Article 9 of the new Law of the Judiciary, Decree No. M/78 (1 October 2007).

ABOUT THE AUTHORS

MOHAMMED AL-GHAMDI

Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP

Mohammed Al-Ghamdi is a partner in Norton Rose Fulbright US LLP's Riyadh office, where the firm practises in association with the Mohammed Al-Ghamdi Law Firm. Mr Al-Ghamdi is experienced in commercial litigation in Saudi courts, as well as domestic and international arbitration. He also advises on commercial transactions, including joint ventures, licensing and distribution agreements.

PAUL J NEUFELD

Locke Lord LLP

Paul Neufeld is a partner at Locke Lord LLP and is based out of Houston and London. Mr Neufeld's practice focuses on international arbitration and litigation, as well as advice on cross-border transactions and investments. He serves as counsel in arbitral proceedings conducted under the ICC, LCIA, AAA/ICDR, DIAC and UNCITRAL Arbitration Rules, among others.

Law
Business
Research

ISBN 978-1-83862-005-9