

## Saudi strides

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Riyadh skyline, [istock.com/swisshippo](https://www.istock.com/swisshippo)

**Saudi Arabia was the first country in the Arab world to adopt a comprehensive arbitration law in 1983, recognising the need for fast, effective commercial dispute resolution. Now, says Majed Al Rasheed of the Saudi Centre for Commercial Arbitration, developments in the law and regulations are transforming the jurisdiction into one that is truly arbitration-friendly.**

**Saudi Arabia has come a long way. From having laws with articles on arbitration in different fields, such as the Saudi Commercial Law of 1931 and Saudi Labor Law of 1969, it moved to having a comprehensive law in 1983, the first country in the region to do so.**

**In 2012, a new law was issued by royal decree, embodying several arbitration-friendly principles of the UNCITRAL Model Law and codifying the kingdom's pro-arbitration policy.**

**This was followed by a new law on enforcement, effective in 2013, and the creation of the Saudi Centre for International Commercial Arbitration in 2014, which officially launched last year.**

**The country has been party to the New York Convention for nearly 25 years, since 1994. This year, it was among the nominations for "jurisdiction that has made great progress" at the GAR Awards in Milan.**

### **The arbitration law**

**The 2012 Saudi arbitration law is in line with international trends and helps create a more welcoming arbitration environment in the Kingdom of Saudi Arabia. It applies to any arbitration "conducted inside the kingdom" or to international commercial arbitrations held abroad with party agreement.**

**The principle of party autonomy is clearly articulated in article 4 of the law and the entitlement of parties to agree on various matters of arbitral process and procedure is repeatedly acknowledged.**

**Welcome features of the new law are the reduced role of the Saudi courts in the conduct of arbitral proceedings and the enforcement of awards, and the increased discretion given to parties.**

For example, the law prevents the re-examination of the merits of an arbitral award by the courts, by stating that the arbitration award is final, not appealable, and can only be challenged on the grounds prescribed in the new arbitration law.

The proceeding to set aside an award is also limited to specific circumstances such as where the arbitration agreement was absent or invalid; the time period for arbitration expired; a party was incapable of agreeing to arbitration; a party was not properly notified of the case or appointment of an arbitrator, preventing it from filing a defence; the law designated by the parties as the applicable law was excluded; the award decided matters beyond the scope of the arbitration agreement; the constitution of the tribunal was contrary to the law or parties agreement; or the award included provisions that violate shariah and public policy in Saudi Arabia decided matters that are inarbitrable.

An application to set aside an award does not result in an automatic stay of enforcement but the competent court may issue a stay upon the claimant's request based on "serious reasons."

The law permits the parties to extend the arbitration process by agreement. If this does not happen, the tribunal is required to issue the award within 12 months of the date of commencement of the arbitration.

Parties are given greater choice than previously as to the procedure and venue of the arbitration, the arbitrators who will hear the case and the language in which the case will be conducted. Under the old law, all proceedings were required to be conducted in Arabic.

Parties are allowed to select a foreign law of their choice to apply to the substance of the dispute rather than being limited to Saudi law, as long as there is no violation of shariah.

The law provides for court support for arbitration, including appointing arbitrators or providing interim measures, witness subpoena or requests for letters rogatory.

Moreover, it goes a long way in supporting and empowering institutional arbitration. Provisions give parties the right to agree that their dispute is administered by the rules of any institution of their choice whether in Saudi Arabia or abroad, including the Saudi centre. Parties also have the right to agree on the procedure for the constitution of the arbitral tribunal or the procedure to challenge arbitrators, including by agreeing to apply institutional rules.

Scholars including Fathy Waly, former dean of Faculty of Law, Cairo University, have highlighted that the Saudi and Algerian arbitration laws are the leading legislation in the region when it comes to empowering institutional arbitration. This is mainly because they give arbitral institutions the authority to decide on the challenge of arbitrators, which is still regarded as controversial in other countries in the absence of explicit provision in this regard.

#### **The enforcement law**

Approved by royal decree and in force since March 2013, Saudi Arabia's enforcement law invests responsibility for the enforcement of arbitral awards with specialist enforcement judges, sitting in a dedicated enforcement circuit rather than with the Board of Grievances as was previously the case.

The procedure before specialist judges is more expedient, with the law guaranteeing that the merits of the dispute are not revisited and subject to review by the local courts.

Awards initiated by enforcement orders — in accordance with the law of arbitration are enforceable under the law. Moreover, foreign arbitral awards can be submitted to the competent enforcement judge who will verify that they meet the enforcement conditions and stamp them with the seal of enforcement.

Article 11 of the law sets out the requirements for enforcing foreign arbitral awards. It provides that the enforcement judge may not enforce any court judgment or arbitral award passed in any foreign country except on the basis of reciprocity.

The judge must also verify that the Saudi courts had no jurisdiction over the case in respect of which the court award was rendered and that the foreign court or arbitral tribunal had jurisdiction in accordance with its conflict of law rules; that parties to the case were duly summoned and properly represented or able to legally represent themselves; that the award has become final in accordance with the law of the seat; that the award does not contradict a judgment or order previously passed by the Saudi courts; and that it does not violate Saudi public policy.

#### Treaty-based enforcement

Enforcement of arbitral awards may be based on Saudi enforcement law or alternatively on international treaties. Saudi Arabia acceded to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards in 1994, with a reciprocity reservation limiting its coverage to awards rendered in the territory of other contracting states which in turn accept the recognition and enforcement of Saudi awards.

Saudi Arabia is also party to the 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League. The Riyadh Convention deals with the recognition and enforcement of foreign judgments and arbitral awards, without reviewing the subject matter of the underlying dispute, provided that they do not violate public policy, morality or the constitution of the state in which enforcement is being sought.

A recent case may represent a tangible sign that the enforcement of foreign arbitral awards in Saudi Arabia has entered a new era. In this, Saudi state courts enforced a US\$18.5 million foreign arbitral award rendered under ICC rules against assets held in the kingdom. The enforcement of the award, rendered by common-law arbitrators seated in the UK, appears to indicate that parties can enjoy flexibility in their choice of arbitrators and seat without compromising the enforceability of the award.

#### The Saudi Center for Commercial Arbitration

In 2014, Saudi Arabia's Council of Ministers resolved to establish the Saudi Center for Commercial Arbitration (SCCA) in Riyadh with a view to possibly expanding it into other cities in the country. The SCCA was inaugurated on 2 October 2016. The opening marks a further significant step for commercial dispute resolution in the Kingdom and the Gulf region – as the centre aims to promote trust in arbitration by creating a more predictable and attractive regulatory environment for foreign and local investment.

The SCCA provides a number of alternative dispute resolution services in both Arabic and English, including arbitration and mediation, as well as related training. Its rules and procedures are based on internationally accepted standards and adopt the state-of-the-art innovations of the ADR industry.

SCCA has created a number of partnerships, especially with the International Centre for Disputes Resolution (ICDR) of the American Arbitration Association (AAA). They participated in drafting the SCCA arbitration and mediation rules as well as codes of ethical conduct for arbitrators, parties and staff.

The SCCA is free of any form of external control or influence. This is underlined by the constitution of the Centre's board of directors, who have been drawn from diverse backgrounds in the private sector – business, law and arbitration – and are precluded from holding any government position.

The SCCA has published its own arbitration and mediation rules, in Arabic and English. The SCCA rules have been developed from the UNCITRAL rules, with some innovations including provisions on emergency arbitrators; emergency, provisional or precautionary measures, joinder and provisions to enhance the role of the arbitration administrator in conducting the proceeding in an efficient manner.

As befits an arbitral institution, the SCCA uses efficient case management technology in its administration of arbitrations.

SCCA has also adopted codes of ethics for arbitrators and mediators and a code of conduct for parties and representatives. The code of ethics for arbitrators sets out a number of standards intrinsic to their functions. The code of conduct for parties sets out 12 standards of conduct by which they and

their representatives must abide and requires them to sign a statement of commitment to those standards.

#### **Recent established Saudi judicial principles**

Recent court decisions reveal new trends in Saudi courts' interpretation of arbitral norms. This is just a sample.

##### ***The scope of arbitration agreements and arbitrability***

In one case issued by a court in Makkah Al Mokarama in January 2012 (case number 23699557), the parties had agreed to settle by arbitration any dispute that arose between them relating to the interpretation of the contract. The claimant brought the case before the court, alleging that the scope of the arbitration agreement was limited to the interpretation of the contract while the dispute related to the non-arbitrable matter of its implementation. The court dismissed the case and ruled that a dispute related to the implementation of the contract would necessarily raise issues related to its interpretation and therefore was covered by the arbitration agreement.

##### ***The independence of arbitration clauses***

In a case that came before the Riyadh General Court in February 2012 (case number 32328746) the parties' contract contained a general reference to Saudi legislation, specifying that all terms of the contract would be interpreted according to these norms. The arbitration clause in the contract, however, provided for arbitration to be conducted in accordance with the ICC rules. The respondent submitted a motion to dismiss the case. The claimant alleged that the general reference should prevail in case of conflict with the specific arbitration clause and would exclude any norms other than those set out in Saudi arbitration law. The court disagreed and concluded that the arbitration clause is independent and is not supposed to be interpreted or limited in light of other substantive terms of the contract.

##### ***Arbitration agreements are binding on the successor to universal title***

A case before the Board of Grievances in November 1988 (case number 269/3/J) was initiated against the heirs of one party to the arbitration agreement. The respondents submitted a motion alleging that the court had no jurisdiction as there was an arbitration clause and all rights and obligations arising out of this contract had been transferred to them. The court dismissed the motion, concluding that the arbitration clause is binding on the successor to universal title ("*l'ayant cause à titre universel*"). No recent precedents could be identified on the applicability of the arbitration agreement to the successor to a particular title ("*l'ayant cause à titre particulier*"). However, an arbitration agreement, as with any other agreement, should be binding and transferable to all successors. Therefore, it was held the previous ruling should be applicable to the successor to a particular title *mutatis mutandis*.

##### ***Arbitration agreements are binding even if not used by parties***

In a case before the Board of Grievance in November 1988 [number 250/2/J], the parties had an arbitration clause in their contract. However, in previous conflicts between them, based on the same contract, they had accessed the judiciary without using or invoking their arbitration agreement. On this occasion, the claimant initiated the case before the court and the respondent requested its dismissal based on the existence of the arbitration agreement. The claimant argued that the respondent had not invoked the existence of the agreement previously and that it should be considered withdrawn. The court disagreed, ruling that the agreement was binding and could not expire or be extinguished by non-use. The court dismissed the case.

##### ***Mandatory and non-mandatory provisions of arbitration law***

In a case before a court in Riyadh in January 2013 (case number 32328746) the respondent requested the dismissal of the case for lack of jurisdiction because the parties' contract contained an arbitration clause. The claimant alleged that the arbitration clause was null and void as it provided for the arbitration to be conducted according to ICC rules and not in conformity with the Saudi arbitration law, despite naming Saudi Arabia as the seat. The claimant contended that where this is the case, all provisions of the Saudi law are mandatory and must be applied by the tribunal. The court accepted the respondent motion based on article 25 of the Saudi arbitration law, concluding that the parties may agree on the procedure adopted by the arbitral tribunal and are entitled to select the rules of any ADR or arbitration center in Saudi Arabia or abroad, provided they do not violate shariah law. The court went on to rule that it had no jurisdiction over the case and that the parties should abide by their arbitration clause.

##### ***Appointment of arbitral tribunals***

In a case before the Riyadh Administrative Court of Appeal in August 2015 (case number 5396/1436 H), it was ruled that if parties have not agreed to a procedure for the constitution of the arbitral tribunal and the case is governed by Saudi arbitration law, each party should appoint an arbitrator and the two arbitrators should agree on the appointment of the third arbitrator who will chair the arbitral tribunal.

If a party fails to appoint an arbitrator, the court shall, upon request, perform the function of the defaulting party. The party which makes the request should appoint an arbitrator first and reach an agreement over compensation, then notify the other party. Fifteen days after the date of the delivery of the notice, the request for court appointment may be made.

#### *Scope of judicial review over arbitral awards*

In a case before the Riyadh Administrative Appeal Court in February 2014 (case number 3389/1434), the claimants challenged arbitral awards on the ground that they were manifestly ill-founded and that evidence submitted to the tribunal was insufficient to establish the case. In this case and in some similar cases, the court concluded that it has no jurisdiction to re-examine the substance of the case decided by the arbitral tribunal and said that, based on article 50 of the arbitration law, the award can be set aside only if the arbitration agreement is null and void or if the tribunal did not respect due process and procedural requirements, decided matters beyond the scope of the arbitration agreement or decided matters that violate public policy. The court's findings have been repeated in various other judicial decisions.

#### *Scope of shariah compliance test*

In a case before the Board of Grievance in September 2011 (case number 4248/1), the arbitral award was challenged before the court based on non-compliance with shariah. The claimant alleged that the arbitral tribunal's interpretation of the terms and conditions of the lease contract between them violated shariah. The court concluded that the award would be considered in violation of shariah if it violates a well-established or authoritative and unambiguous provision of the Quran or Sunnah or an existing scholarly consensus (*ijma*).

In another case before the Board of Grievance in July 2010 (case number 474/3/1423), a challenge was initiated against the arbitral award based on the invalidity of the arbitral tribunal's findings related to the interpretation of the contracting agreement between parties. The court dismissed the challenge, stating, clearly that *ijtihad* [editor's note: a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the Quran and the Sunnah] could not be overruled by a similar *ijtihad*. Therefore, the court interpretation of the scope of rights and obligations of parties as per their contract could not be considered in any way inconsistent with Sharia. Again, the court said the award would be considered inconsistent with Sharia, if it violates the authoritative and unambiguous texts of Quran and Sunnah or where there is an existing scholarly consensus ("*ijma*").

#### *Tribunal's discretion in conducting proceeding and establishing facts*

Article 50 of the Saudi arbitration law says that an arbitral award can be set aside if arbitral tribunal did not take into consideration the conditions that should be met in the award to the extent that affects its content, or if the award is based on false arbitration proceedings that have affected it. The fact that an arbitral tribunal has decided to appoint an expert but in later stages decided that the case does not require expertise, does not constitute in itself a ground to set aside the award. In April 2015, a Riyadh appeal court (case number 4151/1/1436) held that the arbitral tribunal has the discretion to decide how to conduct the proceeding. Deciding the case based only on parties' submissions and documents does not constitute a violation of due process that can lead to a challenge of the award. The court also stated that the scope and terms of reference of the mission of the expert appointed by the arbitral tribunal falls within the discretion of the tribunal and does not violate the parties right to due process.

#### *Correction of the award*

A case before the Grievance Board in July 2010 (case number 474/3/1423) held that the arbitral tribunal is the exclusive entity that has jurisdiction to make correction of clerical, typographic or computational errors in the award. The court has no jurisdiction to make such correction. The request submitted to correct the award falls beyond the court mandate and therefore is ill founded.

#### *Enforcement order within the challenge procedure*

A Riyadh appeal court in April 2014 (case number 300/comm/1/1435) held that if the challenge to set aside the arbitral award was denied, the court shall order the enforcement of the award if so requested. There is no need therefore to start a new procedure or submit a new request to the competent court.

#### **A roadmap for development**

In order for the SCCA to deliver on its promise to users and other stakeholders, it is committed to:

- continuing research to enhance understanding of Court decisions and practices
- Open dialogue with judiciary
- Efficient coordination with regional ADR centers
- Building trust in institutional ADR within the business and legal communities.

#### **Authors:**

**Majed Alrasheed, CEO & Judge Mostafa Abdel-Ghaffar, Head of ADR, Saudi Center for Commercial Arbitration**