



## THE NEW SAUDI ARBITRATION LAW

On April 16, 2012, a new Saudi arbitration law was issued by Royal Decree No. M/34 and subsequently approved by the Bureau of Experts at the Council of Ministers in the Kingdom of Saudi Arabia. The new law, which came into force 30 days after its publication in the Official Gazette on June 8, 2012, replaced the previous arbitration law issued by Royal Decree No. M/46 on April 25, 1983 and supplemented by an Executive Regulation dated June 22, 1987. While the new arbitration law is also likely to be supplemented by an Executive Regulation, it is already significant in that it represents a more comprehensive and independent approach to arbitration than has previously existed in the Kingdom.

The new arbitration law, which is inspired by the UNCITRAL Model Law, includes several “arbitration-friendly principles,” including: affording greater independence to the arbitral process, providing for enhanced procedural powers of the arbitral tribunal, and allowing clearer enforcement of arbitration agreements and awards. This *Commentary* provides an overview of the new arbitration law, highlighting the provisions of the new law that we believe will

provide litigants with a viable arbitration alternative for their disputes in the Kingdom.

### INDEPENDENCE OF THE ARBITRAL PROCESS

First and foremost, the new arbitration law greatly limits the previous mandatory oversight of the local Saudi courts. For example, the previous law required the local courts to approve arbitration submission agreements and the Terms of Reference, and also mandated strict requirements for procedure. The new law, however, provides parties with greater discretion over the procedure of their arbitration in each of the following respects:

- **Article 11** requires a local court of competent jurisdiction to decline jurisdiction *ex officio* if the defendant requests referral of the case to arbitration prior to making any claim or defense.
- **Article 15** allows the court of competent jurisdiction to appoint the arbitrator(s), but only where the parties fail to do so.

- **Article 21** expressly provides for the separability of the arbitration clause, which protects the agreement to arbitrate from any defect affecting the underlying agreement.
- **Article 40** allows the court of competent jurisdiction, and even the arbitral tribunal if the parties so provide, to extend the period in which the tribunal may issue a final award or terminate arbitration if the arbitral tribunal does not arbitrate the matter and issue its award within the period prescribed.
- **Article 50(4)** expressly states that during any proceeding initiated to set aside the award of the tribunal, the competent court may not review the documents submitted in the proceedings, nor may it review the merits of the case. The previous law did not expressly prohibit a review on the merits.
- The new law also expressly allows the parties to choose the applicable law (**Article 38**), procedure (**Article 25** and **Article 4**), venue (**Article 28**), their arbitrators (**Article 15**), the procedure for challenging arbitrators (**Article 17**), the commencement of arbitration (**Article 26**), and whether the tribunal will be able to issue temporary or precautionary measures (**Article 23**).
- While Article 25 of the previous Executive Regulation providing implementing instructions stipulated that Arabic would be the language of the hearing and that it would be impermissible to speak another language, **Article 29** stipulates that the arbitration is in Arabic unless the arbitral tribunal decides or the parties agree to conduct the proceedings using one or more other languages.
- **Article 28** of the arbitration law expressly allows the parties to choose the venue or, failing any agreement, the arbitral tribunal may select a venue in consideration of the circumstances and convenience to both parties, while not prejudicing the authority to meet in any venue and discuss and hear witnesses.
- **Article 36** states that the arbitral tribunal may appoint one or more experts to provide the tribunal with a written or verbal report. **Article 33** implicitly allows parties to present expert witnesses as well.
- **Article 39(5)** allows the tribunal to issue interim or partial awards prior to rendering the final award unless the parties agree otherwise. In particular, **Article 23** allows the arbitral tribunal to take temporary or precautionary measures, and to compel the party seeking such measures to provide a financial guarantee. The arbitral tribunal is also authorized to take necessary actions to put the measures into effect. These measures are consistent with the judicial practice of issuing preliminary injunctions.

Under the previous law, the parties were greatly limited in all of these areas, which fell under the purview of the local court's mandatory rules and oversight.

## PROCEDURAL POWERS OF THE TRIBUNAL

Additional provisions of the new law also provide greater procedural powers to the arbitral tribunal (and in some respects, the parties themselves) than was allowed in the previous law. For example:

- **Article 14** provides that an arbitrator must have full capacity, good conduct and behavior, and a degree in *Shari'a* law (this last requirement is applicable only to the presiding arbitrator if there is more than one arbitrator). This represents a change from Article 3 of the Executive Regulation of 1987, which specifically stipulated that the arbitrator must be Muslim.
- **Article 20** expressly states that the tribunal shall decide on its own jurisdiction prior to deciding the merits of the case but may join the issue to the merits if necessary.

It is important to note that the new arbitration law still provides deference to the principles of *Shari'a* law that dominate the legal landscape in the Kingdom, providing in **Article 5** that the rules to which the arbitration is submitted must be applied without prejudice to *Shari'a* law.

## CHALLENGE AND ENFORCEMENT

Once the arbitral award is rendered, **Article 49** of the new law provides that the award is final and not appealable, but that a proceeding to set aside the award may be initiated. (**Article 8** stipulates that appeals from international commercial arbitrations will be heard by the competent Riyadh Court of Appeals unless otherwise agreed.) **Article 50** expressly defines the criteria for setting aside an arbitral award, including circumstances in which:

- No arbitration agreement exists, said agreement is invalid or subject to invalidity, or the period provided for arbitration has expired;
- One of the parties to the arbitration agreement does not have the requisite capacity to enter into the agreement;
- A party has difficulty filing its defense due to improper notice regarding the appointment of an arbitrator or arbitration procedures, or for other reasons beyond the party's will;
- The award excludes application of the rules to which the parties have agreed;
- The tribunal was formed or arbitrators were appointed contrary to the new arbitration law or the agreement of the parties;
- The tribunal ruled on issues not covered by the arbitration agreement (although these issues may be separated from other parts of the award); or
- The tribunal did not observe the necessary provisions regarding the arbitral award or relied on invalid arbitral procedures, which affected the content of the award.

**Article 50(2)** provides that a state court may raise annulment *ex officio* if the award includes provisions that violate *Shari'a* and public policy in the Kingdom, violate the agreement of the parties, or where the subject of the dispute is not permitted to be arbitrated under the arbitration law.

Interestingly, **Article 54** states that a challenge seeking to set aside the award does not result in an automatic stay of enforcement, but rather the competent court may stay enforcement if the claimant's request is based on "serious reasons." The arbitration law does not define what would constitute a "serious reason," although we believe that a court would find awards that violate *Shari'a* law or public policy to be sufficiently serious to warrant a stay of enforcement.

Finally, under **Article 55** of the new law, enforcement of an arbitral award requires that three conditions be verified by the competent court:

- The award does not contradict an award or decision rendered by a court, committee, or board having jurisdiction over the settlement of the dispute in Saudi Arabia;
- The award does not violate *Shari'a* and public policy in the Kingdom (if possible, the violating part can be separated and the nonviolating part executed); and
- The party against whom the award has been rendered has been properly notified.

The challenge and enforcement provisions of the new Saudi arbitration law contain many similarities to recent arbitration laws released in sister Gulf countries such as the UAE and Qatar. For example, similar to several other Gulf countries, arbitration awards may be challenged where the local court of competent jurisdiction finds that the person agreeing to the arbitration clause was without capacity to bind the company, and awards may be unenforceable where found to be in violation of *Shari'a* law or public policy, or where the local defendant against whom enforcement is sought has not been properly notified. Thus, while the new Saudi arbitration law can be said to significantly advance the position of arbitration in the Kingdom, the local Saudi courts and local law will still play an important role in the challenge or enforcement of any such awards in the Kingdom.

## CONCLUSION

In conclusion, the new Saudi arbitration law is more in line with international tenets of arbitration law, embodying several "arbitration-friendly" principles of the UNCITRAL Model Law such as *competence-competence* and separability. While the new law will still be subject to certain intricacies of Saudi local law with respect to the challenge and enforcement of an arbitral award in the Kingdom, it nevertheless remains a great step forward by providing the tribunal and the parties greater discretion over the procedure of their arbitration in the Kingdom. Thus, we believe the new law will help to pave the way towards creating a more welcoming arbitration environment and a viable choice for litigants who find themselves with irreconcilable disputes in the Kingdom of Saudi Arabia.

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