



THE NEW ENFORCEMENT LAW OF SAUDI ARABIA: AN ADDITIONAL STEP TOWARD A HARMONIZED ARBITRATION REGIME

Following on the heels of last year's reform of the arbitration regime in the Kingdom of Saudi Arabia, a new Enforcement Law (the "new Enforcement Law") came into effect in March of this year by virtue of Royal Decree No. M/53.¹ The new Enforcement Law, which replaces the relevant provisions of the 1989 Rules of Civil Procedure before the Board of Grievances, will have a particular impact on the enforcement of arbitral awards, whether domestic or international. While it is well known that arbitration is an institution that appears in Islamic law and that the legal system of the Kingdom of Saudi Arabia is based on *Shari'a* or Islamic law, it may come as a surprise to adepts of international arbitration that awards do not need confirmation by a *qadi* (or judge) in the Hanbali legal tradition (which is applied in Saudi Arabia), as this school considers that an award already has the characteristics of a court judgment.² Nonetheless, in practice, if the opposing party is not willing to enforce the award, the confirmation by a *qadi* must

be sought. It is against this backdrop that the new Enforcement Law was promulgated.

This new Enforcement Law contains provisions that affect all aspects of enforcement of domestic and foreign judgments as well as arbitral awards.

Prior to the new Enforcement Law, parties had to bring applications for the enforcement of foreign judgments and arbitration awards before the Board of Grievances.³ Procedure before the Board was lengthy and rigid because the Board was not created solely to hear enforcement requests but also to deal with some of the more important, commercial issues before Saudi courts. As such, the Board of Grievances would undertake a full review on the merits of each award to make sure that the award was compliant with *Shari'a*; parties were met with the possibility that their award would be refused enforcement due to an arbitrator's unfamiliarity with such

Shari'a requirements. In addition, all relevant documents from the arbitration needed to be submitted to the Board in Arabic to allow such a review. Parties seeking the enforcement of foreign judgments or awards thus faced significant delays and were exposed to a retrial of the dispute on the merits by the Board.

The *Jadawel Intl. v. Emaar Property* case is a notorious example that left a bitter taste for one of the parties. In 2006, Jadawel started arbitration before a three-member tribunal seated in Saudi Arabia. It claimed damages in the amount of US\$1.2 billion based on the breach by Emaar of a joint venture agreement relating to a construction project. Jadawel contended that Emaar had formed a partnership with another party in breach of the joint venture agreement. The arbitration spanned a two-year period; finally Jadawel's claim was dismissed and Jadawel was ordered to pay legal costs. However, the award was submitted to the Board of Grievances for enforcement. The Board re-examined the merits to ensure compliance with *Shari'a*. In its ruling, the Board of Grievances reversed the award; the damages awarded to Emaar were annulled and Emaar was ordered to pay more than US\$250 million of damages to Jadawel. Such scenario is unlikely to happen under the new Enforcement Law.

The new Enforcement Law abandons the old system of enforcement proceedings before the Board of Grievances and entrusts enforcement to a relatively new jurisdiction, the Enforcement Judge.⁴ Several changes are worthy of mention:

- Article 1 of the new Law defines the Enforcement Judge as “the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court.” This new jurisdiction was created in late 2007 to deal with all enforcement issues. Whereas procedure before the Board of Grievances was lengthy and cumbersome, procedure before a judge specialized in the enforcement of such awards and judgments aims to be more expedient.
- While the previous regime applied only to foreign judgments and merely by extension to arbitral awards, Article 12 of the new Law makes express mention of arbitral awards.
- Article 2 empowers the Enforcement Judge to enforce and monitor the enforcement of judgments and awards

in Saudi Arabia, except for those rendered in administrative and criminal matters. Furthermore, the Enforcement Judge is required to follow and to respect *Shari'a* principles in the course of enforcement, unless the law stipulates otherwise.

- Article 9 provides for compulsory enforcement upon presentation of an executive deed, including a final arbitral award.
- Article 10 stipulates that appeals of the Enforcement Judge's decision suspend enforcement, parting with a trend in recent domestic legislation in other parts of the world, such as Article 1526 of the French Civil Procedure Code.
- Article 11 of the new Enforcement Law states that the Enforcement Judge may enforce a foreign arbitral award only on the basis of principles of reciprocity⁵ and if the party seeking enforcement can ensure that (i) Saudi courts do not have jurisdiction with regards to the dispute, (ii) the award was rendered following proceedings in compliance with the requirements of due process, (iii) the award is in final form as per the law of the seat of the arbitration, (iv) the award does not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in KSA, and (v) the award does not contain anything that contradicts Saudi public policy.
- Article 7 allows the Enforcement Judge to take “all precautionary steps” and “seek assistance from the concerned authorities” if a party should resist or violate enforcement. In addition, the new Enforcement Law lays out the procedures available to an Enforcement Judge in pursuit of enforcement; they include provisional attachment (Arts. 23-33), enforceable attachment (Arts. 34-48), attached funds sale (Arts. 49-59), debtor funds under third-party custody (Arts. 60-67), direct enforcement (Arts. 68-72), and those in case of insolvency of the party against whom the award is being enforced (Arts. 77-92).

The new Enforcement Law represents a great step toward harmonization of Saudi law with international standards and a facilitation of enforcement of arbitral awards with the creation of a specific jurisdiction and specific procedures applicable to such enforcement. It should, in theory, guarantee that the merit of the dispute will not be revisited. However, it remains to be seen what effect these provisions

will have in practice. For example, the new Enforcement Law cannot guard against any public policy issues found in awards rendered by foreign arbitrators not versed in Saudi law or Islamic concepts. An arbitral award that violates Saudi public policy, for example, by granting interest (or *riba*), which is prohibited under *Shari'a*, may run into problems in enforcement. In such cases, Enforcement Judges may require the entire damages aspect of an arbitration to be reheard, especially where the payment of interest is not severable from the award. Nonetheless, the new Enforcement Law remains a further step toward international legal principles and a strong compliment to the 2012 Arbitration Law.

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ENDNOTES

- 1 Saudi Arabia's new Enforcement Law was issued through Royal Decree No. M/53 of 13 *Sha'ban* 1433 *Hejra* corresponding to July 3, 2012 Gregorian.
- 2 See S. Saleh, *Commercial Arbitration in the Arab Middle East*, 2006, p. 66.
- 3 See Article 13(g) of the Grievances Board Law.
- 4 The office of the Enforcement Judge is relatively new, having been created by the Judiciary Regulation, Royal Decree No. M/78 of 19 *Ramadan* 1428 *Hejra* corresponding to October 1, 2007 Gregorian.
- 5 Invoking the reciprocity reservation to the New York Convention, Saudi courts have refused to enforce arbitral awards from jurisdictions that would not enforce Saudi judgments or awards.

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