

Navigating the New Saudi Arbitration Law

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1 Introduction

The new Saudi Arbitration law promises to streamline the private disputes resolution process in the Kingdom of Saudi Arabia. Prior to the enactment of this law, Saudi had a hybrid system in which an arbitration could only commence after lodging a request for arbitration before a Saudi court. While this requirement has been eliminated, the involvement of the Saudi court system has not been wholly removed from the arbitral process. Indeed, at many steps along the way, the court system steps in if the parties are unable to reach an agreement on what some would consider minor matters.

Additionally, the law contains some curious distinctions which seem to lack a principled justification. For example, the law establishes one procedure to replace an arbitrator who has become permanently incapacitated and another when an arbitrator has died. While the new law permits the conduct of the arbitration in a language chosen by the parties, the supervision of the arbitration by the courts requires that all court communications be conducted solely in Arabic with appropriate translations.

While “supervision” is probably too strong a word, the enactment of provisions providing for court involvement ensures that these will be taken advantage of to slow, hinder or frustrate the arbitral process. One major innovation contained in the new law is the restriction on litigants to frustrate or delay the process by refusing to appear. The new law makes it clear that an uncooperative litigant cannot frustrate an arbitration. Instead, the arbitration will proceed without him to award or in the case of where the plaintiff stops cooperating, the arbitration will terminate. Unfortunately, no changes were made to the law regulating civil procedure in the courts. So when—because it is not so much if—Saudi court intervention is required, an uncooperative litigant will be able to stall the proceedings merely by failing to appear.

The law also seeks to foreclose the possibility of repeated *de novo* review and seeks to limit the powers of a reviewing court. The new law even uses the term “*res judicata*” which is in some ways an astonishing innovation in Saudi Arabia. The history of Islamic legal review from the time of the first caliphs was decidedly against the concept. Indeed, judges were cautioned not to be afraid to change their minds if they felt they had made a mistake.

Unfortunately, the new law retains provisions not only for initial review of the

arbitral award to ensure compliance with the Islamic shari'a but a secondary shari'a compliance review when enforcement of the award is sought. Assuming that one review is enough, there is little need for a second. Clever practitioners will undoubtedly use every opportunity to argue a position that was lost in other forums. This can only increase the possibility that the process will continue to be slow and inefficient, and uncooperative litigants will strategically fail to appear. Some of these problems may be addressed in the forthcoming implementing regulations to the law. In the meantime, I have tried to summarize the key provisions of the law.

2 Jurisdiction, Service of Process, Waiver of Defects

The new law applies to arbitrations which take place in the Kingdom or abroad where the parties have agreed that the arbitration should proceed under Saudi rules. It is not clear if this is substantive or procedural.¹

The law defines an international arbitration as one where at least one of the parties is located abroad, or if not, where the parties to the dispute have designated a foreign seat of arbitration². The law permits the use of foreign arbitration procedural rules, such as those of the ICC in Paris.³

The substantive law of the arbitration will be the contract between the parties as long as Islamic shari'a is not violated.⁴ The arbitration is deemed to commence on the day a request for arbitration is served.⁵ If the parties have not included a provision on service of process, there must be personal service on counterparty or to his representative, or by mail to the address designated in the contract or in the arbitration agreement. Service can be made in person or by mail. In a major innovation it is permitted to send the service documents to a party's last known address or to a known postal address.⁶

An objection to the commencement of the arbitration based on a violation of conditions that is not objected to within 30 days is waived.⁷ Jurisdiction to

¹Article 2

²Article 3(a); 3(3)

³Article 4

⁴Article 5

⁵Article 26

⁶Article 6

⁷Article 7

invalidate an arbitral award must be made in the court of appeal which would have had original jurisdiction to consider the dispute.⁸

In international arbitrations that court is the court of appeal in Riyadh unless the parties agree. 8(2) This means that where the parties agree they can confer jurisdiction on another court of appeal sitting in another Saudi city, such as Jeddah or Dammam.

The place of the arbitration will be chosen by the parties. If they fail to do so, the competent court will determine the venue with due regard for the circumstances of the case and the suitability of the forum to both parties.⁹

3 The Arbitration Agreement

The arbitration agreement must be in writing¹⁰ and can be entered into not only pre- or post-dispute but even after suit is filed.¹¹ The requirement of a “writing” is satisfied by the exchange of correspondence, including emails specifying that the parties agree to arbitrate.¹² A reference to another document or its incorporation by reference satisfies the writing requirement where the referred-to document contains an arbitration clause.¹³ This is a significant advance since the shari’a normally prohibits, or at least discourages, incorporation by reference. It also makes it possible for the parties to agree to complex procedural rules by mentioning them in an exchange of emails, e.g., “Let’s resolve this through ICC arbitration.” “Agreed.” Such an email exchange would satisfy the requirement of a “writing” as well as adopt rules for the conduct of the arbitration.

The agreement to arbitrate is considered a separate contract which survives the termination or rescission of the contract if the arbitration clause was initially valid.¹⁴ However, an agreement to arbitrate is not valid unless it is made by a person with the authority to agree. In this regard, Saudi Arabia does not recognize the concept of apparent authority. A corporate manager may be in charge of a project but lack legal authority to bind the company in case of a

⁸Article 8

⁹Article 28

¹⁰Article 9(2)

¹¹Article 9(1)

¹²Article 9(3)

¹³Article 9(3)

¹⁴Article 21

dispute.

Thus, due diligence required in the case of corporate persons.¹⁵ A manager's representation that he has authority cannot necessarily be relied upon. The Saudi government is not permitted to arbitrate except with permission of the President of the Council of Ministers. This is a substantial change since under the previous law the Government was not permitted to arbitrate at all. To what extent the government will consent remains to be seen.

4 Court Involvement

Filing a claim in court does not bar commencement or continuance of the arbitration proceedings or the issuance of an award.

If a case is pending and the parties agree to arbitrate, the court shall issue a decision referring the matter to arbitration.

5 The Arbitral Panel

The arbitral panel must be composed of an odd number of arbitrators.¹⁶ Arbitrators must be competent and of good conduct. If there is to be a sole arbitrator, he should be a holder of a legal degree in shari'a or law; but if there are multiple arbitrators only one need possess this qualification.¹⁷ Parties may agree to appoint arbitrators.¹⁸ If they do not there is a role for the courts in determining the composition of the arbitral panel. This is unfortunate for it involves the courts in a procedure that was designed to avoid judicial intervention. Thus, if the parties do not agree, an application must be made to the competent court.

If the arbitration agreement specifies that there will be a sole arbitrator, he will be appointed by the court. If the panel is to be composed of three arbitrators, each party shall appoint one and these two will then select a third. If the two arbitrators cannot agree on a third arbitrator, the court will appoint one.

¹⁵Article 10(1)

¹⁶Article 13

¹⁷Article 13(3)

¹⁸Article 15

The actions of the court in appointing arbitrators are not appealable¹⁹ except with respect to the invalidity of the arbitration generally.²⁰ The arbitrator must be impartial and disclose any potential conflicts to the parties.²¹ In this regard, arbitrators held to the same standard as the judiciary.²² An arbitrator may only be dismissed where there are circumstances that may raise a general doubt with respect to his impartiality or where he is not qualified.²³ Article 16(3) Parties cannot complain unless the disqualifying circumstances arise after appointment.²⁴ The disqualification motion must be made in the first instance to the panel itself; if it is denied an appeal may be taken to the competent court whose decision may not be appealed.²⁵

A party may not challenge an arbitrator if that party has previously made a challenge in respect of that arbitrator for the same reasons. There can be no serial challenges unless there are new facts.²⁶ A challenge suspends the proceedings footnote Article 17(3) but the appeal of a decision denying the challenge does not stay the proceedings. It is not clear whether a court will use injunctive relief to stay the proceedings while it considers the matter in view of this clear prohibition. If an arbitrator is challenged successfully the proceedings to that point are a nullity.²⁷

An arbitrator who has become incapacitated may withdraw upon application to the competent court; the court's decision is not appealable.²⁸ If an arbitrator dies his replacement shall be made in the same way that he was appointed in the first place.²⁹

Replacement of an arbitrator who is incapacitated is different from replacement of an arbitrator who has died. The reason for two different procedures is unclear. This is different from incapacity, interestingly.

An arbitrator dismissed without cause is entitled to compensation. It is not clear what circumstances could arise in which an arbitrator could be dismissed

¹⁹ Article 15

²⁰ Article 49, 50

²¹ Article 16

²² Article 16(3)

²⁴ Article 16(4)

²⁵ Article 17(1)

²⁶ Article 17(2)

²⁷ Article 17(4)

²⁸ Article 18(2)

²⁹ Article 19

without cause after the arbitration panel is composed. An arbitrator shall be appointed by a separate contract which must specify his fee. A copy of the appointment contract must be deposited with the presiding authority.³⁰

In the case of local arbitrations, while the authority is not identified by the new law, previously the authority was the Chambers of Commerce. If the parties fail to agree on the arbitrator's fee, the fees will be determined by the competent court in an order which is not subject to appeal.³¹ In those circumstances where the court appoints the arbitrator, the court will determine the arbitrator's fee.³²

The parties often do not consider the impact of substantial filing fees imposed by permanent authorities such as the ICC. Since these fees are shared, it is not clear what would happen to the arbitration where the parties are unwilling or unable to pay fees required by these groups, or for that matter, the court. Presumably the arbitration would have to be dismissed and the parties' sole recourse would be to the courts.

6 Powers of the Panel

Initially, the panel will decide any challenges to the arbitration based on lack of jurisdiction, the absence of an agreement to arbitrate or the waiver, invalidity or claim that the issues presented in the arbitration are outside the scope of the arbitration agreement.³³ The panel may decide jurisdictional challenges promptly or carry them with the case.³⁴

If the panel determines that a challenge is unfounded, an interlocutory appeal to the courts does not lie except when seeking an order nullifying the arbitration in accordance with Article 54. Jurisdictional challenges must be made within the timeframe of the case management plan agreed to by the parties or imposed by the arbitral panel.³⁵ In theory, these issues must be raised without delay or they are deemed to be waived.³⁶

³⁰ Article 24(1)

³¹ Article 24(2)

³² Article 24(2)

³³ Article 20(1)

³⁴ Article 20(3)

³⁵ Article 30(1)

³⁶ Article 20(2, 2nd par.)

Unfortunately, the panel is given the discretion to “accept a delayed challenge if the delay is for good cause.” In a practical sense and given the Saudi context this means that jurisdictional pleas will not always be presented promptly since in Saudi jurisprudence “good cause” is wholly subjective.

This means that in a practical sense where the parties do not agree, Saudi tribunals will have to impose case management deadlines. Practitioners and parties should be aware that the absence of such a plan issued by a court does not mean that there are no time limits at all since they may be contained in rules issued by an arbitration organization or entity such as the ICC.

7 Pre-Decision Remedies

Either the parties or the panel can order prejudgment or provisional relief.³⁷ The competent court may issue an order enforcing such a request made by the panel as well as provide general judicial assistance in regards to production of documents, summoning of witnesses and the like. This jurisdiction is in addition to the right of the panel to enter such orders itself.³⁸

Since the law recognizes the right of the arbitral panel to enter these orders, the issue will be whether they will be enforced without recourse to the courts if third parties do not comply. Unless forthcoming implementing regulations address the issue, court assistance will undoubtedly be required to enforce compliance of panel orders issued to third parties such as witnesses or record custodians.

The translation uses the term “relevant authority” instead of the more consistent, “competent court” but in the absence of guidance from the Ministry of Justice it is unclear who the competent enforcement authority would be. Since an arbitration can be commenced without initial judicial involvement, police and other authorities may be reluctant or unfamiliar with enforcing orders of a private arbitration panel.

Additionally, Article 23 raises a potential issue because it states that, “the two parties may agree that the arbitral panel shall be entitled to instruct them to take any provisional remedy that it may deem appropriate or necessary.” This is very different from the authority granted to the court or the panel to enter a

³⁷Article 22(1)

³⁸Article 22(3)

provisional order at the request of a single party under Article 22. To resolve the possible conflict, it would be best to add this consent to a Saudi arbitration clause at the time the arbitration agreement is negotiated.

A party may seek judicial relief where an order concerning a provisional remedy has been ignored.³⁹

Since both the courts and the arbitration panel have concurrent jurisdiction to issue provisional relief orders, it may be more efficient to request such relief from a competent court in the first instance rather than waiting for a private order from an arbitral panel that will be not be honored by third parties.

8 Rules of Procedure–Conduct of Hearings

The parties may select the procedural rules of a designated authority.⁴⁰ In the absence of such a selection, the panel may impose whatever rules it deems appropriate as long as they do not violate the Islamic shari’a. There are few shari’a procedural rules and most of these have to do with the weighing of evidence and the greater value accorded male witnesses over female and Muslim over non-Muslim. The shari’a simply does not address cross-examination, production of documents, pre-hearing deposition of witnesses, the propounding of interrogatories to a party or the narrowing of issues pursuant to requests to admit and all of the other procedural tools available to civil litigants in other legal systems.

The general rule in arbitrations is that the law of the seat of the arbitration is used for procedural matters. In the absence of such laws or procedures, the parties may well consider referring to external rules for them, especially given that even the rules of designated authorities such as the ICC fail to address such matters comprehensively. The tension between lawyer-driven procedures traditionally used in common law jurisdictions and judge-driven procedures used in civilian jurisdictions is well known.

The procedural rules of the Interamerican Bar Association strive to strike a fair balance between the two, but these rules for the most part are not well-known in the Eastern Hemisphere and are viewed as alien. A feature of Saudi trials is

³⁹ Article 23(2)

⁴⁰ Article 25(1)

interrogation by the judge who is assisted by arguments of counsel. There are no well-developed rules of civil procedure and cross-examination is an unfamiliar process.

Whichever rules are selected, both sides must be treated fairly and given a “full opportunity” to state a claim or present a defense.⁴¹ What constitutes a “full opportunity” should be taken into account in advance and particularly with respect to case management. A party who has scheduled five days of expert witness presentations for a three day arbitration and is thus prevented from offering that evidence may claim that he was not afforded a “full opportunity” and a court may seize on the restriction to invalidate the arbitration.

The concept of cumulative evidence is for the most part unknown. Article 32 additionally grants a party the right to submit further documentation in support of his case “unless the panel decides not to accept the same so as to avoid any delay in deciding the dispute.” This again leaves open the possibility that a party whose additional documents were rejected was not given a “full opportunity” to present his case.

The panel may initially meet at the place chosen as the seat of the arbitration⁴², but may meet at other times and places in order to deliberate, examine witnesses or experts, conduct inspections or to examine documents.⁴³

The arbitration shall be conducted in the Arabic language unless the parties otherwise agree. The panel may, but need not, require the production of a translation with respect to any document used in the arbitration.⁴⁴

If judicial assistance is required, keep in mind that proceedings in Saudi courts are conducted solely in Arabic, whether the language of the arbitration is English or not. For those arbitrations where the cooperation of a party is unlikely or not guaranteed, as a practical matter translations of key documents will be required in order to present them before the competent Saudi court.

The claimant begins by filing a written statement of his claim with a request for relief summarizing the relevant facts and attaching supporting documents.⁴⁵

⁴¹Article 27

⁴²Article 33(1)

⁴³Article 28

⁴⁴Article 29(2)

⁴⁵Article 30(1)

Failure to file the written statement terminates the proceedings.⁴⁶ The defendant then files a reply raising appropriate defenses, including that of set-off.⁴⁷

The inclusion of set-off can vastly enlarge the scope of the issues to be decided. The set-off defense may be made at a later stage of the proceedings if there was reasonable cause for not raising it initially.⁴⁸

If a defendant fails to file an Answer the panel may nonetheless proceed with the arbitration. Copies of the pleadings must be served on each party and provided to the individual members of the panel.⁴⁹ The pleadings should be filed timely in accordance with the agreement of the parties or a schedule prescribed by the Tribunal.⁵⁰ Copies of any document filed with the panel must be served on the other party.⁵¹

The panel may appoint experts.⁵² Expert reports and conclusions are to be filed with the panel. The parties must cooperate with the experts.⁵³ The panel shall mediate any dispute between the parties and any experts, and an order by the panel in connection with such a dispute is not appealable.⁵⁴ Expert reports are to be served upon the parties.⁵⁵ The parties have the right to examine any documents upon which an expert decision is based.⁵⁶ The parties may submit objections to the expert reports. The expert shall then issue a final report after considering the parties' objections.⁵⁷ The panel must afford the parties a hearing if requested.⁵⁸ Otherwise, written filings may be deemed sufficient.

The panel will follow the Saudi practice of taking minutes of the hearing, 33(3) which are then signed by the parties. The problem with this procedure is that these "minutes" are not a verbatim record but the notes of a clerk who is not a court reporter and so inaccuracies may be introduced. After submission of an

⁴⁶ Article 34(1)

⁴⁷ Article 30(2)

⁴⁸ Article 30(2)

⁴⁹ Article 30(1,2)

⁵⁰ Article 30(1,2)

⁵¹ Article 31

⁵² Article 36(1)

⁵³ Article 36(2)

⁵⁴ Article 36(2)

⁵⁵ Article 36(3)

⁵⁶ Article 36(2)

⁵⁷ Article 36(4)

⁵⁸ Article 33(1)

expert report, the panel may order or a party may request a hearing to consider the report.⁵⁹

At such a hearing the parties may cross-examine the expert concerning the contents of his report.⁶⁰ In recognizing the right to cross-examine an expert witness at a hearing, it is hoped that this right will be extended to the examination of other witnesses at any hearing in the case, though this is not entirely clear.

The concept of *expressio unio est exclusio alterius* is not a feature of the shari'a. One of the defects of the Saudi judicial system is that a non-cooperating party can frustrate the proceedings simply by failing to appear. Under the arbitration law, this is not the case. The panel may proceed with the hearing and may issue an award where a party that has been duly notified of the hearing has failed to appear.⁶¹

This is a major procedural improvement. However, since the assistance of Saudi courts are required at various steps along the way of a contested arbitration, a party who seeks to frustrate the arbitration can do so by failing to appear in court.

9 Issuance of Award

After considering the evidence and insuring that neither the shari'a or other laws of the Kingdom are violated, the panel shall apply the rules agreed upon by the parties to the subject matter of the dispute. The panel may apply the law of a foreign country as long as that law does not violate the shari'a.⁶²

If the parties fail to agree on the applicable law, the panel shall apply the law which it believes is most applicable.⁶³ The award shall take into account trade practices and the dealings between the parties.⁶⁴ The panel has the power to act as amiable compositeur, that is, to settle the matter equitably, if that authority

⁵⁹ Article 36(4)

⁶⁰ Article 36(4)

⁶¹ Article 35

⁶² Article 38(1(a))

⁶³ Article 38(1(b))

⁶⁴ Article 38(1c)

has been expressly conferred by the parties.⁶⁵ This authority may only be exercised by a unanimous decision of the panel.⁶⁶ Otherwise, the award shall be made by majority vote after confidential deliberations.⁶⁷

If it is not possible to achieve a majority vote, the panel may appoint an ex-tranumerary (i.e, an additional arbitrator) within fifteen days after a majority vote was deemed unattainable. If the parties do not agree on an additional arbitrator, one shall be appointed by the court.⁶⁸ Since the Tribunal will always consist of an odd number of arbitrators, the only time where there cannot be a majority decision would be where one or more arbitrators do not vote. Barring death or incapacity—for which there are substitution rules—it is hard to see how Article 39(2) would have any practical effect.

Before a final decision is issued, the Tribunal may issue a provisional decision on any issue.⁶⁹ A final award must be issued within the time specified by the parties. If not time limit has been specified, a decision must be reached within twelve months from the date of the request for arbitration.⁷⁰ The Tribunal may extend the time period for decision by six months without the consent of the parties; a continuance for a longer period requires their consent.⁷¹

If an arbitrator is properly replaced under the rules, the relevant time period is extended by thirty days.⁷² Death or incapacity of a party extends the period for an additional thirty days unless otherwise agreed.⁷³

If the Tribunal fails to timely issue an award, either of the parties may request that the court extend the period for decision or terminate the arbitration.⁷⁴ In the latter case, either party may commence litigation in court against the other.⁷⁵

This provision suggests that a party who has agreed to arbitration is barred

⁶⁵ Article 38(2)

⁶⁶ Article 39(4)

⁶⁷ Article 39(1)

⁶⁸ Article 39(2)

⁶⁹ Article 39(4)

⁷⁰ Article 40(1)

⁷¹ Article 40(2)

⁷² Article 40(4)

⁷³ Article 41(2)

⁷⁴ Article 40(3)

⁷⁵ Article 40(3)

from ignoring that agreement and simply initiating a case in court. The arbitral proceedings cease with the issuance of an award,⁷⁶ except in the following cases:

- A decision by the Tribunal terminating the proceedings;
- Where the parties have agreed to end the arbitration
- If the Plaintiff abandons the arbitration or fails to file a statement of claim
- Where it is useless to continue the arbitration or where it is impossible to proceed⁷⁷

Where the Plaintiff has abandoned the arbitration, the panel may proceed upon a claim by the Defendant that he has a genuine interest in pursuing the matter.⁷⁸

The award must be in writing and contain reasons therefor and be signed by a majority of the arbitral panel. 42(1) The reasons for a negative vote or abstention by the minority must be stated in the minutes of the Tribunal.⁷⁹

Contents of Award

The award shall contain the following:

- Date of issuance
- Place of issuance
- Names and addresses of the parties
- Names, addresses and nationalities of the arbitrators
- Summary of the arbitration agreement
- Summary of the initial pleadings filed by the parties

⁷⁶Article 41(1)

⁷⁷Article 41(1(a-d))

⁷⁸Article 41(1(b))

⁷⁹Article 42(1)

- Summary of documents relied on by the parties
- Summary of the expert report, if any
- Arbitrator’s fees, costs and apportionment thereof between the parties⁸⁰

Where the parties have settled the matter, they may request that the panel enter the terms of the settlement into the record and issue an award that incorporates the terms of the settlement.⁸¹ Such an award shall have the same force and effect as any other arbitral award.⁸²

Within fifteen days of issuance, a copy of the award shall be served on the parties.⁸³ The award shall be private and unpublished unless both parties agree.⁸⁴ The original or a signed copy shall be filed in court within fifteen days along with an Arabic translation.⁸⁵ Responsibility for translation costs are not specified in the law.

The parties have fifteen days within which to petition the panel to correct any material errors in the award.⁸⁶ “Material error” is not defined, but reference is made to “the text or the accounts” which suggests that such errors relate to mathematical or typographical mistakes. The panel may also correct such errors on its own initiative.⁸⁷

The parties must be notified of any correction within fifteen days of the panel’s revision of the award. ⁸⁸ If the panel has exceeded its powers in issuing a correction, that correction is null and void.⁸⁹ A claim that the correction is beyond the authority of the panel is subject to the rules for nullification of the arbitral award generally.⁹⁰

The parties have thirty days within which to request that the panel explain any

⁸⁰ Article 42(2)

⁸¹ Article 45

⁸² Article 45

⁸³ Article 43(1)

⁸⁴ Article 43(2)

⁸⁵ Article 44

⁸⁶ Article 47

⁸⁷ Article 47(1)

⁸⁸ Article 47(2)

⁸⁹ Article 47(2)

⁹⁰ Article 47(2); 50, 51

ambiguities in or clarify the award. The panel shall answer within thirty days.⁹¹ Within thirty days of the issuance of the award, either party may request that the panel issue an additional award on matters that had been raised during the arbitration but were not covered by the award.⁹²

The panel must issue its decision within 90 days of such request.⁹³ The Tribunal is granted an initial period of 60 days which may be extended by an additional 30 within which to issue a supplementary award.⁹⁴

10 Appeal

Appeal of an arbitral award must be taken to a reviewing court made within sixty days.⁹⁵ Any waiver of appeal made before the issuance of an arbitral award is ineffective, including any waiver contained in the arbitration agreement.⁹⁶

Arbitral awards are not subject to appeal save in the following circumstances:

(a) Where no arbitration agreement exists, or where the agreement is void or voidable or has expired by lapse of time.

(b) If one of the parties to the arbitration agreement was, at the time of signing that agreement, incompetent or was not fully competent pursuant to the law to which he is subject.

(c) If one of the parties to the arbitration was unable to submit his defense by reason of not being duly notified of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond his control.

(d) If the arbitral award excludes the application of any of the rules that the two parties to the arbitration had agreed to apply to the subject matter of the dispute.

(e) If the arbitral panel has been set up, or if the arbitrators have been appointed in a manner contrary to these regulations or to the agreement of the parties.

⁹¹Article 46

⁹²Article 48(1)

⁹³Article 48(2)

⁹⁴Article 48

⁹⁵Article 51

⁹⁶Article 51

(f) If the arbitral award has covered some issues that were not included in the arbitration agreement; however, if it is possible to separate those parts of the award related to the matters which are subject to arbitration from the parts related to the matters that are not subject to arbitration, the annulment shall apply only to the parts that were not subject to arbitration.

(g) If the arbitral panel has failed to observe the prerequisite conditions for the award and if such failure has resulted in a negative impact on the content thereof, or if the award was based on unlawful proceedings.

If a reviewing court upholds an award it shall be enforced and there shall be no further appeal.⁹⁷

The decision of the reviewing court invalidating an arbitral award is itself subject to further judicial review.⁹⁸ Secondary appeal must be taken within 30 days of the issuance of the decision invalidating the award.⁹⁹ In reviewing an award, the reviewing court is not to examine the facts nor the subject matter of the dispute. Retrying the case is not permitted.¹⁰⁰

However, on its own motion the reviewing court may nullify an award if it contains anything which violates the shari'a.¹⁰¹ This is unfortunate, for the reviewing court is therefore not given authority to strike the un-Islamic components of an award but must invalidate the award as a whole if any part of it violates shari'a. This provision also suggests that there will be automatic review of each and every award, even where neither party has sought review.

If a reviewing court determines that the award is invalid, the parties' arbitration agreement nevertheless survives and presumably the parties are returned to the arbitration.¹⁰² It is not clear whether they must start with a new arbitration or merely request that the arbitration panel modify the award in light of the decision by the reviewing court.

An arbitral award issued in accordance with the provisions of the Arbitration Law is final, enforceable and shall have the effect of *res judicata*.¹⁰³ Following

⁹⁷ Article 51(2)

⁹⁸ Article 51(2)

⁹⁹ Article 51(2)

¹⁰⁰ Article 50(4)

¹⁰¹ Article 50(2)

¹⁰² Article 50(3)

¹⁰³ Article 52

expiration of the time for appeal,¹⁰⁴ a court of competent jurisdiction may issue an order for enforcement of the award.

An application for enforcement shall contain the following:

- The original or a certified copy of the award.
- A true copy of the arbitration agreement.
- A translation of the arbitral award to the Arabic language. This translation must have been certified by accredited translators if it had been issued in a foreign language.
- Evidence that the arbitral award has been filed with the competent court pursuant to Article 44 hereof.

Filing a separate claim seeking nullification of the award does not stay enforcement.¹⁰⁵ The court may issue an order suspending enforcement while it reviews the award if petitioned to do so based or require appropriate security.¹⁰⁶ The court's decision on an application for enforcement of the award must be issued within fifteen days. The court has 180 days to review the award.¹⁰⁷ The court may not issue an enforcement order except after determining the following:

- a) that the award is not inconsistent with any judgment or decision of a court, committee or Tribunal;
- b) that it does not violate shari'a
- c) That it has been duly served to the person against whom enforcement is sought.

A decision ordering enforcement may not be appealed; but an order dismissing enforcement may be appealed within 30 days of issuance.

The enforcement procedure adds an additional and in the opinion of this author unnecessary level of judicial review. The court receiving the application for enforcement is to re-examine the award for compliance with the Islamic shari'a

¹⁰⁴Article 55(1)

¹⁰⁵Article 54

¹⁰⁶Article 54

¹⁰⁷Article 54

even after exhaustion of the appellate process which resulted in the affirmation of the Tribunal's award.

There seems to be no reason for this additional level of review. Further, if the award contains non-shari'a compliant components, these may not be enforced while the shari'a compliant portions may be. This seems to contradict paragraph 2 of Article 50 which does not provide for rewriting the award to strike non-shari'a compliant portions.

Article 55 seems also to add an additional layer of review in that a reviewing court may have already determined that an award is valid and does not violate shari'a. The point of an additional layer of review is unclear. Further, making sure that the award is consistent with other Saudi decisions is not a trivial task in a legal system in which judicial decisions are not published.

11 Conclusion

While the new law constitutes a major improvement over its predecessor, the involvement of Saudi courts before, during and after arbitrations only guarantees that the process will be inefficient. The requirement of what is no less than continued judicial supervision requires translation into Arabic even where the parties have agreed that the arbitration should be conducted wholly in another language. It remains to be seen whether the Implementing Regulations resolve these ambiguities and address these potential problems.