

Kingdom of Saudi Arabia Clarifies Certain Aspects of its Arbitration Law

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The Kingdom of Saudi Arabia (“KSA”) has enacted the Executive Regulations of the Arbitration Law (“Executive Regulations”). The Executive Regulations were published in the Saudi Gazette and came into force on 9 June 2017. Arbitration in the KSA is governed by the Arbitration Regulation issued under Royal Decree No. M/34 dated 24/5/1433H (which corresponds to 16 April 2012 in the Gregorian calendar) (“Arbitration Law”). The Executive Regulations aim to clarify certain key provisions of the Arbitration Law.

Key Provisions of the Executive Regulations

The Executive Regulations clarify the following issues in the Arbitration Law.

- Article 2 of the Executive Regulations states that the Competent Court referred to in the Arbitration Law, which is tasked with the supervision of Saudi-seated arbitrations, is the Saudi Court of Appeal. This helps practitioners to clearly identify the Competent Court in the KSA. The Arbitration Law provides the Competent Court with jurisdiction in a number of arbitration matters. According to Article 8 of the Arbitration Law, the Saudi Court of Appeal has jurisdiction to consider an action to nullify an arbitration award. Article 8 also states that, in the case of international commercial arbitration within the KSA or abroad, the Court of Appeal located in Riyadh has jurisdiction unless the parties agree otherwise. Moreover, Article 15 of the Arbitration Law provides that the Court of Appeal has the jurisdiction to appoint an arbitrator or the president of an arbitral tribunal in the event that the parties fail to reach an agreement. In addition, the party seeking to challenge an arbitrator can petition the Court of Appeal (Articles 17 and 18 of the Arbitration Law). Article 10 of the Executive Regulations further clarifies Article 15 of the Arbitration Law by providing that, where parties fail to agree on the appointment of a sole arbitrator, the Court of Appeal may appoint the arbitrator at the request of the party seeking to accelerate the arbitration proceeding. Such an appointment must be made within 15 days from the date of submission to the Court of Appeal. We presume that these provisions only apply to ad hoc arbitration in KSA and in the absence of any institutional rules, but that remains to be clarified in due course. Article 22 of the Arbitration Law permits the parties to request precautionary measures prior to the commencement of arbitration procedure from the Court of Appeal. In the absence of an agreement on the arbitration tribunal’s fees, the Court of Appeal will decide on the matter pursuant to Article 24 of the Arbitration Law. Additionally, Article 50 provides the Court of Appeal with jurisdiction to deal with the nullification of the award, while Article 53 provides the Court of Appeal with jurisdiction to issue an order for enforcement of the arbitration award.
- Article 3 of the Executive Regulations provides that a written notice can now be served electronically (e.g., by email). Previously, written notices could only be served in person or to the mailing address specified in the contract, unless otherwise agreed upon by the parties pursuant to Article 6.1 of the Arbitration Law.
- Article 7 of the Executive Regulations provides that the copy of the “contract concluded with the

arbitrator” must be deposited with the competent authority. According to Article 24 of the Arbitration Law, a separate contract must be concluded with the arbitrator, upon appointment, which specifies the arbitrator’s fees. The Executive Regulations added a further requirement to this provision, by which the parties are now required to deposit this contract with the competent authority administering the case. This new requirement is a step forward in transparency and clarity in the arbitration proceeding.

- Article 13 of the Executive Regulations introduces a new provision whereby an arbitral tribunal may agree to the joinder of a third party in the arbitration proceedings, provided that the parties to the arbitration and the third party to be joined all consent.

Article 17 of the Executive Regulations clarifies the process for challenging arbitral awards. The Arbitration Law provides that if the Competent Court, i.e., the Saudi Court of Appeal, decides to set aside the award, the parties can appeal its decision to the Saudi Supreme Court within thirty (30) days following the date of notification of the decision.

Commentary

The 2012 Arbitration Law aimed to codify an emerging pro-arbitration policy within the KSA. Alongside the Enforcement Law of 2013, the Arbitration Law heralded a number of key developments, including a reduced role for the Saudi courts in the conduct of arbitral proceedings and increased party autonomy. These developments have brought the KSA more in line with the international tenets of arbitration practice and will help develop it into one of the leading arbitration nations in the Arab world.

The Arbitration Law aims to create an independent and arbitration-friendly environment in the KSA. The Arbitration Law is largely based on the UNCITRAL Model Law, while still maintaining the essential principles of Shari’a. The parties are free to agree on a set of procedural rules to govern the arbitration; however, they must always ensure that they conduct the arbitration in accordance with the principles of Shari’a. The Arbitration Law applies to both international and domestic arbitrations within the KSA, and parties may choose the Arbitration Law to govern international commercial arbitration proceedings conducted outside of KSA.

The Executive Regulations are an important complementary source to the Arbitration Law, as they clarify a number of important issues. The Executive Regulations, when viewed in the context of a move away from earlier distrust in arbitration in the KSA to a gradual acceptance of arbitration as a dispute resolution method, represent a significant development for arbitration in the KSA by clarifying aspects of the Arbitration Law and helping to develop an arbitration-friendly environment in the jurisdiction.

There are, however, a number of areas that would benefit from further clarification. Under Article 2 of the Arbitration Law, for instance, all disputes are subject to arbitration with the exception of personal-status disputes and matters that are not subject to reconciliation. It would be helpful to clarify whether this exception is exhaustive (i.e., confirmation that all other disputes are permissible under the Arbitration Law). It would also help to clarify whether this provision applies to both domestic and international arbitration.

For example, it remains unclear whether real estate disputes are capable of being resolved by arbitration. The Law of Procedure before Shari’a Courts, which was enacted by Royal Decree No. M/1 dated 22/1/1435H (which corresponds to 16 April 2012 in the Gregorian calendar), made it clear that in real estate disputes, the competent court is the General Court where the real estate in dispute is located in the KSA. This strongly suggests that the Saudi courts have exclusive jurisdiction over real estate matters in the KSA. Hence, it would be helpful if future amendments to the Arbitration Law or to the Executive Regulations would clarify the position.

This is important since the Enforcement Law enacted by Royal Decree No. M/53 dated 17/4/1434H

and its Executive Regulation Dated 17/4/1434H (which were passed after the Arbitration Law) provides that foreign judgments shall not be enforced in cases where Saudi courts have exclusive jurisdiction, e.g., in cases in rem involving real estate located in the KSA (Article 11.6 of the Executive Regulation). Article 12 of the Enforcement Law states that “[t]he provisions of the preceding Article shall be applicable to the arbitral awards issued in a foreign country”, which means that foreign arbitral awards issued in cases in rem involving real estate located inside KSA may not be enforceable in the KSA if indeed real estate disputes are not arbitrable.

In addition, a question mark remains over whether certain other commercial and civil disputes are arbitrable, such as rental disputes, insurance related disputes, commercial agency disputes, and civil and commercial disputes touching on mandatory rules of law and public policy. It would be helpful to clarify the position in order to avoid the confusion that has arisen on these points in other Middle Eastern states.

There is no doubt that the KSA is making significant strides to provide a comprehensive and independent approach to international arbitration. It has taken a significant step by designing the Arbitration Law and Executive Regulations in line with the international standards set out in the UNICTRAL Model Law. This brings further reassurance to foreign investors who have opted to resolve disputes related to their commercial dealings in the KSA by means of arbitration.