

Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia

Kluwer Arbitration Blog

May 29, 2013

John Balouziyeh (Dentons)

Please refer to this post as: John Balouziyeh, 'Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia', Kluwer Arbitration Blog, May 29 2013, <http://arbitrationblog.kluwerarbitration.com/2013/05/29/saudi-arabias-new-arbitration-law-sees-more-i-nvestors-opting-for-arbitration-in-saudi-arabia/>

and Amgad T Husein, Dentons (Managing Partner, Saudi Arabia)

1. Overview

Since the enactment of Saudi Arabia's new Arbitration Law in July 2012, more foreign investors have opted for arbitration in Saudi Arabia rather than in foreign forums. By simplifying dispute resolution and streamlining the enforcement of arbitral awards, the Arbitration Law has sought to bring the protection of foreign investors up to international standards. The Arbitration Law, largely modeled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, has modernized Saudi Arabia's dispute resolution mechanism and sought to remove much of the unpredictability involved in bringing arbitral awards before the Saudi Arabian Board of Grievances for enforcement.

However, despite these reforms, some issues remain.

2. Public policy considerations and the *Shari'a*

The provisions of the new Arbitration Law apply to arbitrations held under the Saudi Arbitration Law without prejudice to the provisions of the Islamic *Shari'a*. The Islamic *Shari'a* reservation is one that is reiterated throughout the Law, nearly a dozen times.

Perhaps the most important of the *Shari'a* reservations is in Part 6 of the Law, which deals with the annulment of arbitration awards (including foreign awards). Under Article 50.2, an award can be annulled if it contains any violation to the provisions of Islamic *Shari'a* and Saudi Arabian public policy or any violation to the agreement of the arbitration parties. Such an award can also be annulled if the arbitration panel is formed in violation of the Law or of the agreement of the parties or if the Arbitration Panel fails to take the conditions that should be available in the award into consideration in a way that effects the final decision (Art. 50.1).

Although the new Arbitration Law demonstrates the Saudi government's endorsement of and embracing of a legal framework that brings certainty to the legal marketplace and to foreign investment, the continuous, repeated reservations on the basis of Islamic law and Saudi public policy do, to a certain extent, undermine this certainty.

Interpreting and predicting how a Saudi judge or arbitrator will apply the *Shari'a* remains difficult and somewhat evasive. Whereas some *Shari'a* principles are well-established principles rooted in tradition, others are subject to a judge's individual view or considerations as to fair application under equity.

One thing that remains clear is that a Saudi judge could still refuse to apply a contract or a foreign arbitral award on the basis of Saudi Arabian public policy and *Shari'a* considerations, as under the old Arbitration Law.

3. Saudi arbitration court in the United Kingdom?

Reports were released in late 2012 that the Saudi government, in order to further promote foreign investment in Saudi Arabia, is mulling plans to establish jointly with the British government an arbitration court in the United Kingdom to resolve disputes arising out of Saudi Arabia (see, e.g., Caroline Binham and Helen Warrell, "Saudis Seek to Establish Arbitration Court in the UK" (*Financial Times*, 31 Oct. 2012)). The *raison d'être* of such a court would be to counter investor concerns about the Saudi legal system and the time and difficulty involved in obtaining and enforcing judgments in Saudi Arabia.

If a new arbitral process will allow parties to easily and efficiently enforce foreign awards in Saudi Arabia, this would be its main strength and benefit, given the current difficulty inherent to enforcement and the onerous requirements established in the Grievances Board Law. However, nothing in the plans to set up a UK-based arbitration court would resolve the principal concern of foreign investors in Saudi Arabia: the difficulty inherent to enforcement of foreign arbitral awards in Saudi Arabia. Therefore, although arbitration in the United Kingdom may conceptually be appealing to non-Saudi investors, it remains more important for any proposed dispute resolution mechanism to allow foreign arbitration awards to be enforced in a more regular and standardized fashion. This would go a long way in encouraging further large-scale foreign investment in the Kingdom.

4. Risk mitigation

Given the current legal framework and options open to foreign investors, the best plan of action for risk mitigation remains agreeing to apply Saudi law in arbitration proceedings and then ensuring that an arbitration panel is comprised exclusively of legal experts with extensive training in the *Shari'a* and Saudi law. Such experts should bring broad experience in identifying any issues that could potentially impede the certification of an award based on Saudi public policy considerations. Unless a foreign investor can enforce an arbitral award against property held outside of Saudi Arabia, such a duly-constituted panel remains the best measure that foreign investors have in ensuring no elements that may impede enforcement in Saudi Arabia make their way into the final arbitral award.

*John Balouziyeh and Amgad Husein are corporate attorneys in Saudi Arabia and co-authors of the **Legal Guide to Doing Business in Saudi Arabia** (forthcoming).*