

Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation

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Since oil prices have reached historic lows in 2014, the Kingdom of Saudi Arabia, the world's largest oil exporter, has recognized the need to reduce its dependence on oil and diversify its economy. As part of a slew of reforms known as Vision 2030, Saudi Arabia has taken steps designed to prepare for the day when renewable energy becomes the new norm, when alternate energy effectively replaces fossil fuels and oil revenues no longer sustain state spending. In diversifying its human capital and economy, Saudi Arabia has recognized the need to cultivate an environment attractive to foreign investors, which the Kingdom views as essential partners in transferring knowhow and expertise to its local workforce.

Attracting foreign investment in turn requires building an environment that reassures investor confidence in legal institutions, courts and the rule of law. Such an environment must guarantee that decisions will not be taken arbitrarily but rather, in accordance with predictable rules. Recognizing the need to foster a landscape where foreign investors can resolve disputes fairly and with efficiency, Saudi Arabia has recently undertaken myriad reforms in the area of dispute resolution, including in international and domestic arbitration and commercial litigation. Recent developments include a Saudi legal judgment enforcing a multi-million dollar ICC arbitral award, the launch of the Saudi Center for Commercial Arbitration, the issuance of decisions in which Saudi courts deferred to foreign choice of forum and arbitration clauses and the establishment of the Commercial Courts as a forum for dispute resolution independent of the Board of Grievances.

Developments in the arbitration arena

Arbitration has deep roots in Middle Eastern culture and Islamic law, which encourages parties to peacefully resolve their disputes through the mediation of an elder or sheikh before resorting to the courts. Yet despite this rich heritage, arbitration has traditionally been underutilized as a method of dispute resolution in Saudi Arabia. This underutilization has been due to various causes, including concerns relating to the enforceability of arbitral awards in Saudi Arabia, the potential conflict between awards and Saudi public policy and the possibility that the Saudi courts would review arbitral awards on their merits.

Developments in Saudi Arabia indicate a change of direction, with the Saudi courts repeatedly upholding arbitration clauses and recognizing foreign arbitral awards in recent years, notable examples of which are discussed below. At the same time, the Saudi government has in recent years

made several landmark decisions to bring the Kingdom in line with international arbitration standards. These include the 2016 launch of the Saudi Center for Commercial Arbitration (SCCA) and enactment of the 2012 Arbitration Law, issued by Royal Decree no. M/34, dated 24/5/1433 H., corresponding to 16/4/2012 G. (new Arbitration Law). These developments reflect a shift in the policies of the Saudi government, which is taking steps to encourage arbitration and streamline the dispute resolution process.

Saudi Center for Commercial Arbitration

The SCCA, which was formally launched in the fall of 2016, was created by Cabinet Decree no. 257, dated 14/6/1435 H., corresponding to 15/03/2014 G.. The purpose of the SCCA is to administer arbitration procedures in civil and commercial disputes where parties agree to refer their disputes to SCCA arbitration, in accordance with regulations in force and judicial principles of civil and commercial procedure. The SCCA has broad authority to adjudicate disputes brought before it, but personal status, administrative and criminal disputes remain excluded from SCCA jurisdiction.

Saudi case law

Finally, several cases in recent years have given deference to arbitral tribunals and have upheld arbitration clauses, thus signaling a further change in direction for Saudi Arabia. One prominent example includes the decision of a Riyadh court in 2016 to confirm that a USD 18.5 million ICC arbitral award would be enforced against a Saudi data communications service company. The Saudi-domiciled debtor was ordered to make the payment to the United Arab Emirates subsidiary of a Greek telecommunications company. Prior to enforcing the foreign arbitral award, the judge was required to find that the country in which the award was rendered (the UK) would reciprocate by enforcing awards issued in Saudi Arabia. This element was met by reference to the UK's accession to the New York Convention, thereby becoming, to the author's knowledge, the first arbitral award to be enforced under the New York Convention in Saudi Arabia. The judge also held that the Saudi courts had no jurisdiction to hear the dispute owing to an arbitration clause in the contract; that the arbitration complied with due process; and that the award was in final form, was not inconsistent with a judgment or order in relation to the same dispute issued by a local court and did not contradict Saudi public policy.

The judgment of the Board of Grievances in Case number 881/2/J (November 2013), which was initiated against a company and its shareholders, further indicates a shift of direction in Saudi Arabia's dispute resolution landscape. The claimant sold his shares in the company to other shareholders, with the shares valued in accordance with the company's financial statement. However, the claimant found out after the sale of his shares that the Company financial statement was inaccurate. The respondents submitted a motion alleging that the Court had no jurisdiction due to the arbitration clause and all rights and obligations arising out of contract had been transferred to them. The Court dismissed the case, agreeing with the respondents and holding that the arbitration clause was binding. The Court of Appeal affirmed the judgment.

The decision of a court in Mecca Al Mukarama in Case number 23699557 (January 2012) is a further example in which a court, deferring to an arbitration clause, refused to exercise jurisdiction over a case. In this case, where the parties had agreed to arbitrate any dispute that arose between them relating to the interpretation of the contract. The claimant brought the case before the Court, alleging that the scope of the arbitration agreement was limited to the interpretation of the contract, while the dispute related to non-arbitrable matters of implementation. The Court dismissed the case and ruled that a dispute related to the implementation of the contract would necessarily raise issues related to its interpretation and therefore was to be resolved by arbitration.

These cases demonstrate an important shift of direction in Saudi legal practice, where the commercial courts under the Board of Grievances have historically asserted jurisdiction, applying Saudi law in contract disputes, notwithstanding foreign choice of law or arbitration clauses. While the cases discussed above indicate a shift, a Saudi commercial court would still likely assert jurisdiction in a dispute that involves public documents, such as articles of association or bylaws registered with the Ministry of Commerce and Investment, regardless of whether the parties enter into side agreements subject to foreign law or arbitration.

Developments in the litigation arena

Dispute resolution in Saudi Arabia has historically been criticized as being riddled with uncertainty and inefficiency, with cases taking as long as two to three years or longer to find resolution. In October of 2017, in an effort to increase judicial efficiency and enhance investor confidence, the Ministry of Justice launched the opening of the Commercial Courts in Jeddah, Damam and Riyadh as independent institutions directly under the Ministry of Justice rather than as a branch of the Board of Grievances, as was historically the case. The Minister of Justice stated at the launch day that the move was part of the Vision 2030 initiative to revitalize the business environment, fuel investment and accelerate economic development in the Kingdom. The Commercial Courts opened on 1 Muharram 1439 H., corresponding to 21 Sept. 2017.

The Ministry of Justice announced that the new Commercial Courts issued more than 1,181 judgments in their second month of operation. This judicial reform indicates a shift in the practice of the Saudi courts, which have historically been criticized for their slow pace in meting out judgments and inefficiency in judicial resolution.

The creation of the SCCA, coupled with recent case law upholding arbitral clauses, the creation of the Commercial Courts as independent legal institution and the issuance of the new Arbitration Law have been hailed as signaling a change of direction for Saudi Arabia, which has historically been seen as hostile to the enforcement of foreign judgments and arbitral awards. The creation of independent Commercial Courts will further boost investor confidence by ensuring that foreign companies have an efficient forum in which to resolve their disputes. Together, these developments indicate a positive shift for foreign investors wishing to invest in Saudi Arabia's rapidly diversifying economy.