

Kluwer Arbitration Blog

Arbitrating with Saudi Governmental Bodies: Modifying the 56-Year-Old Practice

Ibrahim Amir (University of Miami School of Law) · Tuesday, February 11th, 2020

“Recourse to arbitration has now become a right of the competent ministry with the agreement of the Ministry of Finance. Whereas recourse to arbitration was previously an exception, now, this is a clear confirmation by the government of the importance of arbitration and the government’s commitment to participate in more rapid, cost-effective litigation.”

- Saudi Minister of Finance, H.E. Mr. Mohammed Al-Jadaan¹⁾

In December 2019, the new [Government Tenders and Procurement Law](#) (the “**GTP Law**”), enacted by Royal Decree M/128 on 13/11/1440H (16 July 2019), along with the [Implementing Regulations of the Government Tenders and Procurement Law](#) (the “**Implementing Regulations**”), issued by resolution of Minister of Finance No. 1242 on 21/3/1441H (19 November 2019), came into force. This law, which replaced the old Government Tenders and Procurement Law, enacted by Royal Decree M/58 on 4/9/1427H (27 September 2006), introduces significant reform with regard to the requirements to enter into arbitration agreements for governmental bodies. Under the new legal framework, governmental bodies have the right to enter into arbitration agreements, whereas previously, government bodies were only permitted to enter into arbitration agreements in exceptional circumstances. Additionally, the GTP law and its Implementing Regulations sets out the required conditions for governmental bodies intending to enter into an arbitration agreement, which was never been the case before. This post discusses how the new legal framework replaces the prior practice that was in place for nearly 56 years.

Prohibiting Saudi Governmental Bodies and Agencies from Having Recourse to Arbitration: The 56-Year Old Practice

Since 1963, governmental bodies and agencies in [Saudi Arabia](#) have been prohibited from having recourse to arbitration as a means of settling disputes. This was first

enacted by the Council of Ministers Resolution No. 58 on 17/1/1383H (25 June 1963) (“**Resolution No. 58**”). Resolution No. 58 provided in relevant part that “[i]t is prohibited for any Governmental body to accept arbitration as method for settlement of disputes which may arise between it and contracting individuals and companies.” This prohibition was further affirmed in the [old Arbitration Law of 1983](#), enacted by Royal Decree M/46 on 12/3/1403 (11 September 1983), as well as the [new Arbitration Law](#) (the “**2012 Arbitration Law**”), enacted by Royal Decree M/34 on 24/5/1433H (16 April 2012). Article 10(2) of the latter states that “[g]overnment bodies may not agree to enter into arbitration agreements except upon [the prior] approval by the President of the Council of Ministers, unless allowed by a special provision of law.”

While Article 10(2) of the 2012 Arbitration Law allows governmental bodies to resort to arbitration where there is special statutory permission, this is an uncommon scenario. Examples of such statutory permissions can be seen in [article 58 of the Mining Investment Law](#), enacted by Royal Decree M/47 on 20/8/1425H (5 October 2004), and [article 13\(8\) of the Electricity Law](#), enacted by Royal Decree M/56 on 20/10/1426H (22 November 2005). Under these two laws, a governmental body does not need to obtain the prior approval of the President of the Council of Ministers to enter into arbitration agreements.

This prohibition was further reinforced by Saudi courts. For instance, in *OGMPV v. King Abdul-Aziz University*, Case No. 235/C/2/1416H, the 9th Administrative Panel, Decision No. 32/D/A/9 dated 1419H,²⁾ the court refused to enforce an arbitral award rendered against King Abdul-Aziz University on the ground that the arbitration agreement was signed in contravention of Resolution No. 58.

Modifying the 56-Year Old Practice: The New Legal Framework

On 19 January 2019, the President of Council of Ministers issued [High Order No. 28004](#) (the “**High Order**”), signaling a significant shift in policy with regard to arbitrating with governmental bodies and state-owned companies. The High Order states that governmental bodies and state-owned companies seeking to settle their disputes with foreign investors through arbitration shall ensure the arbitration is conducted within the Kingdom in the [Saudi Center for Commercial Arbitration](#) or [other arbitration centers licensed by the permanent committee](#) referred to in the Council of Ministers Resolution No. 107 of 19 January 2016. The High Order further requires that governmental bodies and state-owned companies obtain the necessary approvals in accordance with established procedures. While the High Order does not elaborate on this requirement and procedures, it designates specific venues for all arbitrations involving governmental bodies and state-owned companies.

The most significant reform, however, was introduced in July 2019, by the enactment of the new GTP Law. This law recently came into force on December 1, 2019, and it applies to all governmental bodies. Article 92(2) of the GTP Law provides that governmental bodies may enter into an arbitration agreement after obtaining the approval of the Minister of Finance and in accordance with the Implementing Regulations. The GTP law vests the authority to grant the required prior approval on

the Minister of Finance rather than the President of the Council of Ministers as was the case under article 10(2) of the 2012 Arbitration Law. Notably, the Implementing Regulations do not provide procedures for obtaining the approval of the Minister of Finance. It is, however, likely that such approval would be obtained by submitting a formal request to the Minister of Finance.

Furthermore, Article 154 of the Implementing Regulations, lays out three conditions for governmental bodies intending to enter into an arbitration agreement:

- The first condition limits arbitration to contracts that exceed SAR 100 million. The Minister of Finance may, however, amend this limitation as he deems it appropriate.
- Second, the Implementing Regulations specifically require that Saudi laws apply to the subject-matter of the dispute. The Implementing Regulations further provide that governmental bodies may not accept the proceedings to be conducted under the rules of arbitration centers located outside the Kingdom, *except in disputes with foreign contracting parties*.
- Third, the Implementing Regulations require that the arbitration agreement and its terms to be stipulated in the contract, which is the subject matter of the dispute.

The new legal framework is undoubtedly welcomed and further reinforces the commitment of the Saudi government to facilitate a pro-arbitration environment for foreign investors. In fact, since the introduction of the new 2012 Arbitration Law, the Kingdom has witnessed significant positive changes in its arbitration regime, as has been reported in this blog. For instance, in 2017-2018, and as was reported in [this post](#), the Kingdom recorded both the highest number of applications for enforcement of judgments and arbitral awards as well as the highest value of applications since 2014. Similarly, and as noted in [this post](#), 2016 witnessed the first female arbitrator in Saudi Arabia, and 2014 witnessed the establishment of the Saudi Center for Commercial Arbitration. These continuing positive developments will further boost foreign investors' confidence to invest in Saudi Arabia's rapidly diversifying economy.

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References

- ↑¹ statement made at SCCA19 International Conference, organized by the Saudi Center for Commercial Arbitration. *See SCCA News, Issue 2, at 8 (2019).*
- ↑² Unpublished decision, *cited in Khaled Al-Khodeer, Arbitration in the Administrative contracts in Saudi Arabia*, 1 *Judicial Journal* 134, 142-143 (2010).

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