“Arbitration in Islamic Middle East and the Saudi Arabia’s new arbitration law”

LLM THESIS
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Introduction

Since the beginning of the civilized world when human beings first gathered in small communities, arbitration was a method employed to solve disputes. In ancient societies, the elders acted as arbitrators commonly settled disputes. The simple procedure of arbitration, in which one person acted as the judge, has evolved over time to become a far more complicated system with various advanced rules. ¹

The ability to resolve international commercial dispute due to its flexibility, is the reason that arbitration has become an alternative to the court system. However, as arbitration continues to develop, complex problems have arisen whilst easy questions have remained unanswered.

The Middle East is a very important region for international commerce, primarily due to the major deposits of oil and gas that are located in this region as well as the fact that its large population cannot be ignored by investors who would intelligently view this as a valuable market to invest in. However, political, legal and religious limitations arising from Islamic values can create difficulties in commercial relations.²

In the first part of this thesis, we will look at the international arbitration and its advantages and disadvantages, as well. We will then explore, the arbitration in Middle East in general, trying to understand the culture of Islam by having a look at its history and its sources. Finally, we will examine the new arbitration law of Saudi Arabia that demonstrates the Saudi government’s endorsement of and embracing of a legal framework that brings certainty to the legal marketplace and to foreign investments.

¹ Babak Hendizadeh, International commercial arbitration: The effect of culture and religion on enforcement of award
² Babak Hendizadeh, International commercial arbitration: The effect of culture and religion on enforcement of award
I. Arbitration in general, advantages and disadvantages

1.1. Arbitration and other ADR methods

We could define international arbitration as a specially established mechanism for the final and bidding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.³

Today, the cost of litigation seriously threatens the viability and productiveness of companies, and the individuals involved in the litigation process— for example, civil litigation in the U.S. costs over 400 billion annually. These costs reflect not only the expenses of lawyers and courts but also damage to the goodwill of businesses and the time that a company or an individual has to spend in order to prepare for and participate in legal actions. Some cases may even take from four to five years to get before the courts.⁴

Moreover, the judgment of the court will most certainly affect the business relationship of the parties, because many of judgments are not confidential, which in turn may jeopardize future business relationships with other companies who become aware of the decision. On the other hand, arbitration processes are confidential and seldom published in law journals, therefore the outcome of the tribunal will not affect the goodwill of the losing company.⁵

³ comparative international commercial arbitration. What is arbitration?
⁴ Todd ., Carver – ADR – A competitive Imperative of Business)
⁵ Babak Hendizadeh, International commercial arbitration: The effect of culture and religion on enforcement of award)
Another widely used ADR method is mediation, in which a trained neutral third party is chosen by the parties to assist them to resolve their disputes.  

Furthermore, there is another option called neutral evaluation, where an experienced evaluator will assess the issues in dispute and give a non-binding opinion about the likely outcome of the case if it goes to arbitration or to court.

There is also the option of med-arbitration, a process where the parties agree that if mediation does not produce a negotiated agreement, the mediator will change identity and act as an arbitrator to decide the dispute.

Finally, there is the so-called expert-determination, a process in which an independent expert in the subject matter of the dispute is appointed by the parties to resolve the matter. The expert’s decision is - by prior agreement of the parties - legally binding on the parties.

1.2. Advantages of Arbitration

There are numerous advantages to arbitration as a way to resolve a case. First, the parties to the dispute usually agree on the arbitrator, so the arbitrator will be someone that both sides have confidence will be impartial and fair.

Second, the parties can choose the seat of their arbitral tribunal and solve their disputes in a chosen country instead of going to national courts of two or more countries.

Third, the dispute will normally be resolved much sooner, as a date for the arbitration can usually be obtained a lot faster than a court date.

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6 Ruth D. Raisfeld, “How mediation works: a guide to effective use of ADR financial services of Ontario
7 Alen Redfern, Law and Practice of International Commercial Arbitration
8 http://www.academy-experts.org/alternative-dispute-resolution/what-expert-determination
9 Arbitration: advantages and disadvantages, R. Clayton Allen
10 Babak Hendizadeh, International commercial arbitration: The effect of culture and religion on enforcement of award
Fourth, arbitration is usually a lot less expensive. Partly that is because the fee paid to the arbitrator is a lot less than the expense of paying expert witnesses to come and testify at trial. (Most of the time the parties to arbitration split the arbitrator's fee equally). There are also lower costs in preparing for the arbitration than there are in preparing for a trial. Partly this is due to the fact that the rules of evidence are often more relaxed than in a trial, so that documents can be submitted in lieu of having a witness come to trial and testify.

Fifth, unlike a trial, arbitration is essentially a private procedure, so that if the parties desire privacy then the dispute and the resolution can be kept confidential. Furthermore, if arbitration is binding, there are very limited opportunities for either side to appeal, so the arbitration will be the end of the dispute. That gives finality to the arbitration award that is not often present with a trial decision. 12

Another very important advantage is the use of experts in arbitral tribunals, a feature that gains special significance in certain commercial cases such as intellectual property disputes, since many different and complicated technical issues are involved in this type of dispute. 13

1.3. Disadvantages of Arbitration

There are, however, also some disadvantages to arbitration as a method of resolving a dispute. First, if arbitration is binding, both sides give up their right to an appeal. That means there is no real opportunity to correct what one party may feel is an erroneous arbitration decision.

Second, if the matter is complicated but the amount of money involved is modest, then the arbitrator's fee may make arbitration uneconomical.

Third, rules of evidence may prevent some evidence from being considered by a judge or a jury, but an arbitrator may consider that evidence. Thus, an arbitrator's decision may be based on information that a judge or jury would not consider at trial.

12 Arbitration: advantages and disadvantages, R. Clayton Allen
13 (Babak Hendizadeh, International commercial arbitration: The effect of culture and religion on enforcement of award)
Fourth, discovery may be more limited with arbitration. In litigation, discovery is the process of requiring the opposing party -- or even a person or business entity who is not a party to the case - to provide certain information or documents. As a result, many times arbitration is not agreed to until after the parties are already in litigation and discovery is completed. By that time, the opportunity to avoid costs by using arbitration may be diminished. Fifth, if arbitration is mandatory or required by a contract, then the parties do not have the flexibility to choose arbitration only when both parties agree.

Sixth, the standards used by an arbitrator are not clear, although generally the arbitrator is required to follow the law. However, sometimes arbitrators may consider the "apparent fairness" of the respective parties' positions instead of strictly following the law, which would result in a less favorable outcome for the party who is favored by a strict reading of the law. 14

2. Arbitration in Middle East

Parties from outside the Gulf region have historically faced difficult choices in agreeing to dispute resolution provisions with parties from the Gulf. Litigation often has significant drawbacks, including difficulty in enforcing foreign judgments, but it is not often clear that international arbitration agreements will be respected or that arbitral awards will be enforced. 15

The same applies for the other side. Arab states may in the distant past have felt that they would be disadvantaged as participants in the international arbitral process. They frequently saw the arbitral process as entailing the imposition of rules formulated by developed states. However, they gradually realized that arbitration is an indispensable tool, especially since it is one deeply embedded in their own legal traditions, as it would be explained thoroughly below. Hence, they have taken a number of steps over the years to strengthen the role that arbitration can play in their international commercial and investment relations. These include the adoption of liberal laws on arbitration, accession to international conventions on arbitration and the establishment

14 Arbitration: advantages and disadvantages, R. Clayton Allen

15 When International Arbitration meets Sharia, Steven Finizio and Christopher Howitt
of regional arbitration centers.\textsuperscript{16} For instance, Lebanon in 1983 adopted arbitration provisions inspired by similar French legislation of 1981. Algeria in 1993 adopted legislation inspired by both the French arbitration law of 1981 and the Swiss arbitration law of 1987. Bahrain adopted in 1994 the UNCITRAL MODEL LAW on International Commercial Arbitration. Other Arab States, such as Egypt, Jordan, Morocco, Oman, Syria and Tunisia, have adopted arbitration laws based on the UNCITRAL MODEL LAW. The latest Arab State to follow this approach is Saudi Arabia, which in 2012 issued a new arbitration law inspired by the UNCITRAL MODEL LAW.

Furthermore, with the exceptions of Iraq, Libya, Sudan and Yemen all Arab countries are today parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{17}

2.1. Historical background of arbitration in Middle East

It is tempting given the ubiquitous coverage given to the Middle East’s oil interests, to fail to acknowledge that the Islamic Muslim world has a centuries’ long commercial history.\textsuperscript{18} Arbitration, \textit{takhim} as it is known, has a long history in the Middle East stretching back to the pre-Islamic period.\textsuperscript{19} In the Pre- Islamic Arab Community, self-helped tended to be the most relied upon method of dispute resolution.\textsuperscript{20} If the parties through negotiations, failed to resolve their differences over matters such as property, succession, or torts, an \textit{hakam} (an arbitrator) was appointed.\textsuperscript{21}


\textsuperscript{17} Nassib G. Ziadé, ‘The ‘Arab Spring’ and Arab Approaches to International Arbitration’ (2013) 30 Journal of International Arbitration, Issue 5, pp. 591–595)

\textsuperscript{18} Commercial Arbitration in the Islamic Middle East, Arthur J. Gemmel, Santa Clara Journal of International Law Volume 5, Issue 1.

\textsuperscript{19} Abdul Hamid El-Ahdab, Arbitration with the Arab Countries 11 2nd ed., 1999

\textsuperscript{20} Joseph Schacht, An introduction to Islamic Law 7, 1964

\textsuperscript{21} (Commercial Arbitration in the Islamic Middle East, Arthur J. Gemmel, Santa Clara Journal of International Law Volume 5, Issue 1.)
The practice of arbitration was approved of in the Qur’an, particularly in the matrimonial context:

“If ye fear a breach between them twain (i.e. husband and wife) then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their conciliations; for God hath full knowledge and is acquainted with all things”. 22

Another often cited example is the below one: “You should always refer disputes to God and to His Prophet. And obey Allah and his Messenger; And fall into no disputes, lest you lose heart and your power to depart ; and be patient and persevering: for Allah is with those who patiently persevere.”

Islamic history also reveals that the Prophet accepted the decision of an arbitrator; he advised others to arbitrate and in fact, his closest companions used it to resolve disputes as well. 23

In fact, even the first treaty entered by the Muslim community, the Treaty of Medinah signed in 211 A.D. between Muslims, Non-Muslim Arabs and Jews, called for disputes to be resolved through arbitration. 24

Moreover the Prophet also resorted to takkim in his dispute with the Banu Qurayza tribe. 25

Not only is takhim approved of by the Qur’an and evident in the Sunna of the Prophet, the two main sources of Islamic Law, but the Ijima or consensus has also confirmed its use as an Islamic dispute resolution tool. 26

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22 Abdul Hamid El- Ahdab, Arbitration with the Arab Countries 11 2nd ed., 1999
23 Abdul Hamid El- Ahdab, Arbitration with the Arab Countries 11 2nd ed., 1999
24 Abdul Hamid El- Ahdab, Arbitration with the Arab Countries 11 2nd ed., 1999
2.2 Sharia and its role

The maximum ubi societas ubi jus succinctly expresses a trite observation, namely that to have a society, one must have rules. An appreciation of the sources, major principle, depth and dynamism of the Shari’a is imperative to understand how it can impact on international arbitration in the Middle East. 27

Hence, arbitration law under Arab systems cannot be fully understood without the preliminary study of Sharia’s background. Behind the Statutes of most Arab Countries and in the mind of an Arab party, counsel or arbitrator, lies a rich layer of Sharia. Without a working knowledge of this, a western jurist cannot grasp the essence of arbitration in Middle East. 28

The Shari’a differs from the western legal tradition in many respects including the derivation of its legitimacy, sources, and methodology for evolution or reform. 29 But there are also similarities, in particular, like most western legal systems it is a positive system of law and they are both judge made law using the case law method in their own peculiar ways. 30

The distinction must be made between Shari’a and many of the technical legal rules derived from the Qur’an and Sunnah through fiqh. 31 A faqih or jurist derived these rules and thus the decision is not eternal and it is open to re-interpretation in light of, inter alia, new social, economic, educational and political circumstances. 32 So important is the Sharia that is either a primary source or the primary source of law in

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27 The Shari’a Factor in International Commercial Arbitration, Faisal Kutty

28 Commercial Arbitration in the Arab Middle East: Shari’a, Syria, Lebanon, and Egypt: Shari’a, Lebanon, Syria, and Egypt, Samir Saleh


30 Volume 34: 1: of the Cleveland State Law review, which published lectures from the conference on Comparative Links between Islamic Law and the Common Law).

31 M.H. Kamali “ Source, Nature and Objectives of Shari’a”, Islamic Quartely 211 at 212, VoL XXXIII, 1989

32 The Shari’a Factor in International Commercial Arbitration, Faisal Kutty)
the constitutions of Syria, Egypt, Kuwait, Yemen, Bahrain, Qatar and the United Arab Emirates. 33

Neither Saudi Arabia nor Oman has formal constitutions and each apply the Sharia as the only Islamic Law. 34 The Saudi Constitution was enacted as the Basic Law of Government. 35

At Chapter 1, Art. 1, the Saudi Basic Law states “the Kingdom of Saudi Arabia is a sovereign Arab Islamic State with Islam as its religion; God’s Book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution…” Supplemental Saudi laws (relating to various aspects of modern life) are called “regulations” and enjoy the full effect of law, provided they are consistent with Shariah law.

2.3. Islam and its importance

“Islam is a complete way of life: a religion, an ethic, and a legal system all in one. 36 The word Islam means submission, specifically submission to the one eternally existent God or Allah. 37 In this sense, Islam is the most extreme example of monotheistic religions that emphasize the power, dominance and immanence of God. It is derived from the word salaam, which means peace. The Shari’a is the path to achieve this submission. 38

Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a large measure of agreement because the starting point and the basic principles are identical. The differences that exist are due
to historical, political, economic and cultural reasons and it is therefore, obvious that this system cannot be studied without a proper regard to its historical development. 39

Revelation provided both the principles and the mechanism for its renewal in order for the Shari’a to conform to changing human conditions. The fundamental principles of the law and the methodology for its development were instituted in Islam under divine instruction.

Shari’a has four primary sources. 40 Divided into 114 Surahs (chapters) the Koran is the primary source for the Shari’a, as it is considered by Muslims to be the revealed word of God in the Arabic Language through the Prophet Muhammad. 41

The Sunna are the second primary sources of the Shari’a. Sunna are the sayings and traditions of the Prophet Muhammad, having been recorded into what is known as the Hadith. Sunna are deemed secondary sources inasmuch as the primary source, the Koran, is held to be the literal word of God. 42

Thirdly, Ijima, usually translated as “consensus”, becomes a valid source of Islamic law only after there has been widespread consultation (Shu’ ra) by Islamic scholars and the use of juristic reasoning (Itjihad). 43

And lastly, Qiyas are legal principles arrived at by analogy or analogical deduction. However, the logic utilized must be based on the Koran, Sunna or Ijima. Khaliq writes that Qiyas are often used to apply Islamic principles to the modern era. 44

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40 The sources of Shari’ a come from Urfan Khaliq, Beyond the Veli? An analysis of the provisions of the Women’s convention in the Law as stipulated by the Shari’a

41 Albert Hourani, A history of the Arab People I, 1992

42 The sources of Shari’ a come from Urfan Khaliq, Beyond the Veli? An analysis of the provisions of the Women’s convention in the Law as stipulated by the Shari’a

43 Basic Law of Government [constitution] art. 1 Saudi Arabia, Adopted by Royal Decree of King Fahd, Mar 1992 Royal Order No A/90

2.4. The schools of interpretation of Islam

To compound the difficulty of comprehending commercial arbitration in the Islamic Middle East, another ingredient has to be added to the mix: the schools of interpretation of Islam. The two major interpretive groups of Islam are the Sunni and the Shi’a. Both Sunni and Shi’a Muslims share the most fundamental Islamic beliefs and articles of faith. The differences between them initially stemmed not from spiritual differences, but over leadership: who was to lead the Muslim nation after the death of the Prophet? 45

2.5. The schools of Shari’a interpretation

Beside the Sunni-Shi’a division, there are within the Sunni branch of Islam four schools of Sharia interpretation and each school varies its doctrinal approach to the resolution of disputes.46

(i) The Hanafi School

The Hanafi School was founded by Abu Hanifa Al- Na’mam Bin Thabet. This scholar of Persian origin and born in Al Kouffa in 699, was a textile trader before studying the Fiqh and becoming famous. This school is based on reasoning. The Hadith (report of the sayings of the Prophet) is only accepted with difficulty. Apart from the four sources of Moslem Law, the Hanafi school adopted the Istihsan (preferential opinion) which means that in any given case, one is not to resort so much to reasoning by analogy, but should rather adopt that which is more convenient for people’s lives, on the basis of custom and necessity and the doctrine that difficulty must be eased. 47

Hanafi scholars emphasize that the contractual nature of arbitration and arbitral awards are characterized by the use of subjective opinions.48

45 Commercial Arbitration in the Islamic Middle East, Arthur J. Gemmel, Santa Clara Journal of International Law Volume 5, Issue 1
46 Samir Saleh, Commercial Arbitration in the Arab Middle East, 2nd ed. 1984
47 General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab)
48 Samir Saleh, Commercial Arbitration in the Arab Middle East, 2nd ed. 1984
The Hanafi School is the most widespread of the Sunni Schools, the number of its followers making up today about one third of the Muslims, throughout the world. It was the basis for the Medjella and can be found mostly in the countries of the Middle East, except Egypt and Saudi Arabia.  

(ii) The Maliki School

The Maliki School was founded by Malek Ben Anas in Medina, where he was born in 713. It is a conservative school, privileging the Koran and the Hadith, to the extent of being called “the family of Hadith”. In addition to the four sources of Moslem Law, it relies also on the concept Al- Masaleh al Mursala i.e., if a question is raised for which there is no text, it must be settled by taking into account the general interest and needs. This school extends throughout the countries of the Maghreb, the Hijaz (region around Mecca and Jeddah) and Nigeria.

The Maliki School relies on the use of the Ijima of the Medina legal scholars, local Medina customs, the Koran and the Sunna and Qiyas. For the Malikis, the notion of public good is a valid jurisprudential principle.

The Malikis evidence a unique trust in arbitration by permitting one of the disputants to be chosen as an arbitrator by the other disputing party. Unlike the other three schools, this school holds that an arbitrator cannot be removed after the commencement of the arbitration proceedings.

(iii) The Shafii School

The Shafii school was founded by Mohamed Ben Indriss Al Shafii, who was born in Gaza in 767. He was a traveling Imam, seeking the knowledge of the Fiqh. His search

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49 General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab
50 General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab
51 Samir Saleh, Commercial Arbitration in the Middle East
52 Abdul Hamid El- Ahdab, Arbitration with the Arab Countries.
53 Zeyad Alqurashi, Arbitration under the Islamic Sharia
led him to the Hijas, where he became acquainted with the Imam Malek and to Iraq where he was taught by the Imams of the Hanafi School. Thus the Shaffi School lies between the Hanafi and Maliki Schools. It accepts, of course, the four sources of Moslem Law and also the Istidllal, i.e. the doctrine that things must be kept as they are, or the presumption that a rule of right has not been set aside. For example, if an asset belongs to a person at any given time, it will be presumed later that it still belongs to such person, unless the contrary is proved.  

Shafi teaching is eclectic, borrowing from the Hanafis and the Malikis, and often appears to be torn between logic and traditional teaching. Shafis stress the importance of both the Koran and the Sunna, but select the Sunna more critically than Malikis.

Shafi arbitration is a legal practice; however the position of arbitrators is inferior to that of judges since arbitrators under this school may be removed by the parties up to the time of the issuance of the award.

(iv) The Hanbali School

It was founded by Imam Ahmed Ben Hanbal, who was born in Baghdad in 780. He was a travelling Imam, seeking knowledge. First, he was a student of Imam Shafii but then he developed an independent school, influenced by the Koran and the Sunna. This school does not rely much on the Idjima except if it matches the Koran and Sunna. Qiyas is only resorted to in the case of need. This is the most conservative school of the Sunni Rite and the least widespread. It survived, notably, because of the famous scholar Ibn Taimiyya and was renewed in the 18th century by Imam Mohammed Ben Abdul Wahab (founder of the Wahabi movement) in Saudi Arabia. This movement called for a return to the original tradition and source, on the basis of

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54 General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab
55 Commercial arbitration in Middle East, Arthur Gemmell
56 Samir Saleh, Commercial Arbitration in the Middle East
57 Commercial arbitration in Middle East, Arthur Gemmell
the Koran and Sunna. It spread during the beginning of this century namely at the time of Abdul Aziz Al Saud and it is today the state religion of Saudi Arabia. ⁵⁸

Hanbali teachings are deeply centered on the Koran and uncritically accept the authenticity of the Sunna, even those rejected by other schools. The Hanbalis make few concessions to personal reasoning (ra’y) or equity.

2.6. The Shi’ite rite

The Shi’ite rite was born out of a dispute which was referred to arbitration. Thus, the arbitration has a prime role in the creation of Shi’ism. A dispute over power broke out after the death of the third Rachidin Calif, Osman Ben Afan. Mouawiyat (Governor of Damascus) refused to recognize Osman Ben Afan’s successor, Ali Ben Abi Taleb as Calif of the Muslim and fourth successor of the Prophet.

Due to this, the armies of Mouawiyat and Ali Ben Abi Taleb met in Saffine and started to fight. Ali’s partisans were going to win when suddenly Mouawiyat’s troops brandished Korans on their lances. Ali then had to stop the combat and send messengers to Mouawiyat asking him why this was done. Mouawiyat replied: “I wish that we choose one man of ours and one man of yours so that both settle the dispute between us and make their award in compliance with the Koran.” The messengers reported this reply to Ali. Most of his counselors agreed, although a few disagreed.

The arbitrators met and wrote down the point on which each of the parties agreed. Thus the agreement to arbitrate was made in writing. They decided that Ali and Mouawiyat should not govern and that a new Calif should be appointed. The representative of Ali then appointed a successor but Mouawiyat’s representative went back on his word and said that Mouawiyat was the Calif. Thus the Muslim world divided and the war continued because the partisans of Ali were divided over the question of accepting arbitration. ⁵⁹

3. Arbitration in Saudi Arabia and the New Arbitration Law

On April 16, 2012, a new Saudi arbitration law was issued by Royal Decree No. M/34 and subsequently approved by the Bureau of Experts at the Council of Ministers in the

⁵⁸ General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab
⁵⁹ General Introduction on Arbitration in Arab Countries, Abdul Hamid El Ahdab
Kingdom of Saudi Arabia. The new law, which came into force 30 days after its publication in the Official Gazette on June 8, 2012, replaced the previous arbitration law issued by Royal Decree No. M/46 on April 25, 1983 and supplemented by an Executive Regulation dated June 22, 1987. The new Law represents a more comprehensive and independent approach to arbitration than has previously existed in the Kingdom. And since its enactment, 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. Due to its inspiration by the UNCITRAL Model Law, it includes several "arbitration-friendly principles," including: affording greater independence to the arbitral process, providing for enhanced procedural powers of the arbitral tribunal, and allowing clearer enforcement of arbitration agreements and awards. 60 While anchored in the arbitral tradition of the Hanbali madhab, the new 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. 61 While arbitrators and parties must respect the tenets of Shari’a in numerous area of procedure and substance, the new law removes the supervisory role afforded to local courts under the previous 1983 Law and 1987 Executive Regulation. In addition, the new law expressly provides for the separability of the arbitration clause and allows the parties to choose the applicable law, procedure, venue, arbitrators and other procedural questions.

The new law will encourage a more welcoming arbitration environment, one in which Saudi Arabia is a viable choice for litigants involved in irreconcilable disputes in the Kingdom. It can be distinguished from recent attempts to modernize national laws concerning arbitration as the law seeks not only to bring the Kingdom’s arbitration laws in line with more recent developments in the word of arbitration, but also to harmonize this modernization with immutable principles articulated by Ahmed ibn Hanbal and his students (known as the Hanbali Madhhab or School) over 1.000 years.

60 The new Saudi Arbitration Law, Jones Day publication
in Baghdad. For this reason, among others, the new Law may seem puzzling to uninitiated, even a specialist in international arbitration.  

3.1. The Kingdom of Saudi Arabia and its arbitration history

The history of the modern Kingdom of Saudi Arabia (officially in its third apparition after relatively brief periods of Saudi rule from 1806-1813 and 1818-1840) begins in 1932. The Quran continues to be the officially recognized constitution of the Kingdom, although a 1992 Basic Law of Government issued by King Fahd has codified attempts to reconcile the Islamic, tribal and modern legal traditions that had until then, been the purview of the Ulema (religious exegetes). The Basic Law provides for a Consultative Council (Majlis Ash-Shura), which issues non–binding opinions on general political questions of the state and provides some legislative input to the Council of Ministers, headed by the Crown Prince, successor to the King chosen by the royal family) in a role akin to the Prime Minister.

The judicial brunch, the Courts is independent from both the Consultative Council and the Council of Ministers and is only subject to the authority of Shari’a (Islamic jurisprudence).

The courts are divided between: (1) religious courts of “common” jurisdiction; (2) the Board of Grievances (Diwan al – Mazaalim), which have jurisdiction over disputes between government entities and private parties as well as disputes relating to forgery, corruption and trademarks; (3) the Board for the Settlement of Commercial Disputes; and (4) the Labour Courts.  

Although no regulation dedicated exclusively to arbitration existed until the Royal Decree of 1983, arbitration was in use from the birth of the modern Kingdom as the primary means of resolving disputes, as it was mentioned at the beginning of this paper.

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62 The new Saudi Arbitration Law: Modernization to the tune of Shari’a, Jean –Pierra Harb, Alexander G. Leventhal


64 The new Saudi Arbitration Law: Modernization to the tune of Shari’a, Jean –Pierra Harb, Alexander G. Leventhal
However, as the nascent State found itself bound by arbitration clauses containing unfair terms in contracts with foreign companies, this attitude somewhat changed. In 1963, the Kingdom prohibited government agencies from resorting to arbitration without approval from the Council of Ministers beforehand. 65

This regulation came on the heels of dissatisfaction with a 1958 ruling in the well-known ARAMCO arbitration. For private parties, arbitration was subject to the Commercial Court Act; however the Board for the Settlement of Commercial Dispute, a Shari’a Court set up in 1965 with jurisdiction over arbitration, ignored arbitral provisions, nullifying any effect of an arbitration clause based on the speculative nature of arbitration agreements. (Abdulrahman Baamir & Ilias Bantekas, Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice, 25 Arb. Intl. 249 (2009) ). Institutional arbitration occurred through the Rules of the Chamber of Commerce, a Saudi institution charged with organizing arbitrations, with no ability to choose an alternate institution.

The 1983 Arbitration Law and 1985 Implementing Rules codified a set of rules and regulations for arbitration that brought arbitration in the Kingdom in line with existing regulations in other countries. Found in these documents are certain principles which continue in the most recent regulation. 66

Saudi arbitral law places Shari’a in the place reserved to public policy in many other legal systems, but in practice the Hanbali School is the only madhhab consulted by Saudi courts. Saudi arbitral law continues to maintain an express role for Shari’a with which the new Law is meant to accord, akin to the role of public policy in other legal systems.

For example, Article 25 allows the parties to agree to any procedure so long as this procedure does not violate Shari’a. Under the previous legal regime, institutional arbitrations subject to Saudi law tended to be governed automatically by the Arbitration Rules of the Chamber of Commerce, the only legal arbitration institution


66 The new Saudi Arbitration Law: Modernization to the tune of Shari’a, Jean –Pierra Harb, Alexander G. Leventhal
in Saudi Arabia. The new Law therefore frees the parties from such procedural restrictions, allowing them to submit their arbitration to the rules of any arbitral institution. The ramifications of this article are felt throughout the new Law, which includes default provisions ‘unless the parties agree otherwise’. In other words, by virtue of Article 25, arbitral parties are able to submit their arbitration to the rules of an arbitral institution and thereby bypass many default provisions of the new Law, which was not the case under the previous legal regime. The new Law also mandates that due process be respected in this procedure: Article 27 provides that both parties shall be treated equally, with a full chance to present and defend their cases.

However, one can also find differences to public policy next to Shari’a. For example, Art. 38 of the new Law instructs the tribunal in the choice of law provided that the application of such provisions does not prejudice Shari’a or public policy in the Kingdom. The article provides that the tribunal shall apply the rules that the parties agree upon and if no such law is chosen, the tribunal can decide the most relevant law. The tribunal must follow the terms of the contract and take into consideration the prevailing customs in the type of dealing and dealings between the parties. As mentioned in the new Law, public policy would most likely include public morals, interests and customs. However it is difficult to draw a clear delineation between public policy and Shari’a because religion and government are inextricably linked in the Kingdom of Saudi Arabia. 67

It is worth noting that the Kingdom ratified the New York Convention in 1983. However, since the 1983 Law came into effect, Saudi Law did not make a substantive distinction between international and domestic arbitration. This is somewhat changed today: while the new Law applies to all arbitrations within the Kingdom, it only applies to international arbitrations if the parties agree. The text of the new Law itself makes only one express accommodation for disputes related to international trade (defined in art. 3 of the new Regulation): for such disputes, the court of competent jurisdiction (for hearing set aside and other procedures relating to international arbitration) will be the Court of Appeal of Riyadh unless the parties agree to another Court of Appeal in the Kingdom. The new Law provides, in its Article 3, an extensive

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67 The new Saudi Arbitration Law: Modernization to the tune of Shari’a, Jean –Pierra Harb, Alexander G. Leventhal
definition of internationality based on ‘international trade’. In addition, internationality, according to the new Law, exists if the arbitration involves parties of different nationality; the venue or arbitral tribunal is based abroad; or the subject of the dispute is connected to more than one country. However, this provision does not appear to have great impact on the actual application of the new Law itself. The new Law itself is only applicable to international commercial arbitrations held abroad if the parties to the dispute agree to subject their arbitration to the new Law. However, the new Law differs from other contemporary arbitral laws in that it does not provide for an express distinction between international and domestic arbitration, with different provisions applying to each. Indeed, the only other place in the rules where the international nature of the arbitration would appear to come into play would be in Article 8, which names the Court of Appeal of Riyadh as the competent court to hear set aside and other procedures relating to international arbitration. However, this distinction illustrated in Article 3 provides greater predictability and removes any impact of the place of arbitration on the internationality of the arbitration.\(^\text{68}\)

A further related distinction that is not expressly made concerns arbitration subject to Saudi Law held within the Kingdom and those arbitrations whose procedures take place outside of the Kingdom. This distinction is of particular importance given the supervisory role of courts under the previous law. Although a literal reading of art. 18 of the previous Law would lead to the conclusion that the competent court would continue to exercise authority over arbitral proceedings held abroad but subject to Saudi Law, case law regarded the arbitral tribunal as the supreme authority under these circumstances with the Saudi Court playing only a supervisory role. However, for domestic arbitrations held within the Kingdom, the competent court continued to exercise its supervisory authority.\(^\text{69}\)

In the new law which includes a diminished supervisory role for domestic courts internationally is important insofar as the new Law only applies to arbitrations held in

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\(^{68}\) Minas Khatchadourian, La nouvelle loi saoudienne sur l’ arbitrage, Rev. Arb. 685 No 3, 2012

the Kingdom and international commercial arbitrations in respect of which parties have agreed to subject their arbitration to the new Law.  

Saudi Law has historically distinguished between institutional and ad hoc arbitration. Art. 5 of the new Law allows the parties to subject their relationship to any document that is arbitral rules. Although the new law provides for court proceedings in certain circumstances for functions like approval of arbitrators, it is the parties agreement exists and thus the institutional rules to which they may submit their relationship, that holds if such an agreement exists. Under the previous law, such differences were submitted to the “competent” authority. Although some speculation existed that this referred to the relevant arbitral institution, courts had opined that the authority, in fact, refers to a state legal authority (Board for the settlement of Commercial Disputes, Board of Grievances, etc). 

The new Law no longer uses the language of “authority” but instead expressly refers to a court of competent jurisdiction throughout the text of law. In addition it decreases the courts supervisory role, leaving the arbitral institution to play such a role depending on the content of the arbitral procedure chosen by the parties.

Saudi law has maintained a distinction between ex post agreements to submit a particular dispute to arbitration, and ex ante agreements to submit any disputes arising out of a relationship to arbitration. Under the previous law and Executive Regulation, the former had to be submitted to a host of formalities. For example, arbitration submission agreements were required to specify the precise matter submitted to arbitration, the names of the arbitrators and their acceptance of their mission and needed to be confirmed by state courts. However, these formalities appear to be absent from the new law.

Article 2 of the new Law states that, without prejudice to Shari’a and international conventions to which the Kingdom of Saudi Arabia is party, this new Law will be applied to arbitrations held in the Kingdom, or those international commercial arbitrations in respect of which parties have agreed to subject their arbitration to the new Law.  


arbitrations held abroad, so long as the parties have agreed to subject their arbitration to the new Law. In effect, this means that the new Law applies to all domestic arbitrations and only those international arbitrations in which the parties agree to apply the Saudi Arbitration Law. In addition, this is the first mention of Shari'a found in the new Law. Interestingly, this provision also mentions international conventions as well, subjecting the new Law to conformity with the panoply of international agreements that the Kingdom has signed, including the New York Convention, as well as Shari'a.

The new Law also contains provisions that introduce the principle of competence-competence, the tribunal's ability to decide on its own jurisdiction, and respect for the parties' choice of arbitration (over state court proceedings).

Article 20 expressly states that the tribunal decides on its own non-jurisdiction prior to deciding the merits of the case, but may join the issue to the merits if necessary. No such provisions existed in the previous Law. Article 11 requires a local court of competent jurisdiction to decline jurisdiction ex officio if the defendant requests referral of the case to arbitration prior to making any claim or defense. The previous Law and its implementing Regulations were silent as to challenges to jurisdiction. However, given that the previous state of the law empowered the Saudi judiciary to supervise arbitration throughout the proceedings, the courts were, therefore, logically by extension, able to resolve such issues. The new Law goes even further by requiring a court to decline jurisdiction ex officio if arbitration proceedings have already begun. In this vein, Article 12 requires courts to withdraw if, during court proceedings, the parties decide to submit their dispute to arbitration.

Lastly, Article 37 states that if, during proceedings, the tribunal is presented with an issue beyond its jurisdiction, such as a question of criminal behaviour or forgery of a document submitted, the tribunal may proceed if it deems that settling the issue is not necessary to decide the subject of dispute. However, if the issue is necessary to deciding the subject of dispute, the tribunal must stay proceedings until a final decision is taken on the issue by the competent authority. This also has the effect of extending the time limit for rendering an award. Under the previous legal regime, the Executive Regulation's Article 37 did not allow the tribunal to separate the issue
outside of its jurisdiction from the subject of the dispute, forcing it to stay proceedings until a judge had made a decision.

In accordance with greater flexibility and liberalization, the new Law allows parties to choose procedure, subject only to accordance with Shari'a and due process.

Article 4 of the new Law allows the parties to authorize a third party to choose procedure. In effect, this provision allows the parties to have recourse to any arbitral institution and its rules, which was not the case under the previous Law. While, under the previous law, parties to an international arbitration could choose a foreign tribunal, parties to a ‘domestic’ arbitration were forced to choose Saudi institutions.

Under Article 28 of the new Law, the parties are also free to choose the venue or, failing any agreement, the arbitral tribunal may select a venue in consideration of the circumstances and convenience to both parties, while not prejudicing the power to meet in any other venue and discuss and hear witnesses.

Although parties are free to choose their arbitral procedure, the new Law still retains default rules to be applied in the absence of an agreement by the parties. However, these provisions are also marked by greater liberalization: namely, the omission of the requirement that proceedings be held in Arabic and the provision of interim relief.

Perhaps, the most salient procedural change from the 1983 legal regime to the present one is that it is no longer obligatory to conduct arbitrations in Arabic; Arabic has therefore become a default provision. While Article 25 of the previous Executive Regulation providing implementing instructions stipulated that Arabic would be the language of the hearing and that it would be impermissible to speak another language, Article 29 stipulates that the arbitration is in Arabic unless the arbitral tribunal decides or parties agree to conduct the proceedings using one or more other languages.

An equally important addition to the new Law is that it now allows for interim relief where the parties have agreed to provide such relief. Article 22 allows the competent court of jurisdiction to order temporary or precautionary measures based on the request of the tribunal or either of the parties prior to the commencement of arbitration. The same article allows the tribunal to request assistance from the competent court of jurisdiction as it sees fit, that is, in calling witnesses or experts, or the production of documents, etc. Article 23 allows the tribunal to take temporary or
precautionary measures if both parties have agreed to such a procedure. The previous law was silent as to interim relief pending arbitration. In theory, arbitration parties could apply for attachment to the Saudi courts; however, in practice, the lengthy time period before such an application were to be granted may have provided significant dissuasion to parties to do so. The new provisions in Articles 22 and 23 represent a significant liberalization of Saudi arbitration law in facilitating the granting of such relief, both by courts and arbitral tribunals. This development also brings Saudi law to the forefront of developments in the rules of arbitral institutions, which have, of late, begun to expressly provide for such relief in their own rules. For example, the Rules of the International Chamber of Commerce (ICC) provide for interim or temporary relief in Article 28 of the 2012 Rules (as did the 1998 Rules in their Article 23).

In addition to the above-mentioned provisions, the new Law introduces a number of procedural provisions, designed to further facilitate arbitration, particularly as default rules.

Article 26 states that arbitration procedures begin when the Request for Arbitration is received by the opposing party, unless the parties agree otherwise. Article 6 provides guidelines for the service of notices. For example, the previous Law provided a detailed list of mandatory information in the notice (must be in Arabic in two or more copies and include, among other information, the date the summons was made; the name, surname, title, profession and domicile of the party requesting summons and his representative; the name of the messenger who forwarded the notice; his employer and his signature in original and copy). In addition, the new Law contains detailed provisions for the delivery of the notice should the recipient or his representative not be present (e.g., if the messenger does not locate the recipient or a person listed by the law as capable of receiving the notice, he must state this on the original and deliver it to the Police Commissioner or Mayor or a representative of either and send the person summoned a registered letter within twenty-four hours). The provisions regarding notice delivery are substantially reduced and, to a certain extent, liberalized in comparison to those found in the previous Law. Article 7 states that a party who does not raise a violation of the new Law within thirty days of its occurrence waives its right to invoke such a claim. This provision represents a great improvement in efficiency because it immunizes the arbitral procedure from the actions of recalcitrant parties. Article 36 provides that the arbitral tribunal can appoint one or more experts
for a written or verbal report. In addition, Article 33 implicitly allows parties to present expert witnesses as well.

Articles 30 through 35 set out the general provisions regarding the exchange of briefs and holding of hearings. These provisions do not differ significantly from what would be expected or provided for in other modern arbitration laws: the order of exchange of documents and the ability to attach exhibits (Article 30); the requirement to submit copies to the opposing party (Article 31); the ability to amend claims or complete them during proceedings (Article 32); the procedure for hearings (Article 33); the procedure to follow should a party fail to file a claim (Article 34); and should a party fail to attend a hearing (Article 35). However, most notable in these provisions in comparison with the previous Law is the absence of strict requirements regarding the Terms of Reference (or ‘arbitration instrument’) and notification. Notably, Article 5 of the previous Law required the parties to file an ‘arbitration instrument’ (undefined, but understood to be the Terms of Reference) with the competent authority and set out express requirements for this document. Article 8 of the previous law charged the clerk of the competent authority of jurisdiction with conducting all summons and notifications and laid out complete instructions regarding delivery and other issues related to notifications. Lastly, Article 8 assigns the Court of Appeal originally concerned with the dispute as the jurisdiction competent to hear set aside challenges and other issues mentioned in the new Law. This will be the Court of Appeal for the city of Riyadh for international arbitration cases unless the parties agree otherwise.

The new Arbitration Law, in its Article 9, stipulates that an agreement to arbitrate may arise out of an ex ante agreement, whether independent or contained in a particular document, or ex post, in which case the agreement must specify the issues to be arbitrated. The former, which are referred to as arbitration agreements, were considered as binding under Article 6 of the Regulation of the previous Law and did not require any new agreement. This, in and of itself, was a major development at the time as, prior to this, Shari'a courts considered arbitration agreements as speculative contracts or conditions under Islamic law and thus unenforceable. The latter, which are referred to as arbitration submission agreements by Article 5 of the old Law, required approval within fifteen days by the competent authority originally having jurisdiction. Arbitration submission agreements were also required to be signed and specify the precise matter or matters submitted to arbitration and the names of the
arbitrators (with proof of acceptance of their mission). By remaining silent on judicial approval of arbitration submission agreements and apparently treating such agreements equally with traditional arbitration clauses, the new Law appears to represent a further liberalization of Saudi arbitration law.

In addition, Article 9 requires the arbitration agreement be in writing (Article 9(2)) and allows an arbitration agreement by reference (Article 9(3)) so long as the reference to the clause makes clear that this clause is a part of the contract. The previous Law had no provisions regarding incorporation by reference; however, in principle, no restrictions on such agreements existed so long as the arbitration clause was made in writing and signed.

An agreement to arbitrate under the new Law is not valid unless made by a natural or legal person that possesses rights to do so. Article 10 states that government bodies may not agree to arbitrate without the approval of the Cabinet unless Saudi law allows for it. As stated above, the distrust of arbitration involving government bodies that Saudi law holds arises out of the experience of the ARAMCO arbitration. In essence, in the ARAMCO case, an arbitral tribunal applying Saudi law and custom found that a concession agreement made to ARAMCO allowing the company to unilaterally choose its means of transport took precedence over a royal decree. The new Law does nothing to change this general prohibition of state entities from arbitrating disputes. As under the previous regime, a potential arbitral party should be advised to consult the exceptions to this rule in Saudi law. For example, concession contracts of vital interest and technical disputes were exempted by Royal Decree No. 58 in 1963, the decree that forbade arbitration involving government bodies before the previous Law was passed. However, the general prohibition of state entities from arbitrating disputes has become even further restricted since this Decree by virtue of the Kingdom's accession to the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1980. While the Kingdom of Saudi Arabia made two reservations on matters which it refuses to refer to arbitration, petroleum matters and

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any matters relating to national sovereignty, the Kingdom is now bound to arbitrate valid investor-state disputes by virtue of its accession to the ICSID Convention.

Finally, Article 21 expressly provides for the separability of the arbitration clause, which protects the arbitration agreement from any defect affecting the underlying agreement. No such express provisions existed in the previous Law, although this concept appears to have been understood in practice by Saudi courts.73

In the spirit of the general liberalization of Saudi arbitration law that the new Law represents, it is also provided that the parties can agree on how to select arbitrators, absent which a role is provided for the competent court of jurisdiction. For arbitrations involving one arbitrator, the court chooses the sole arbitrator, whereas, with three or more arbitrators, each party selects its arbitrator(s) with these arbitrators choosing the chairman. Article 15 further allows the court of competent jurisdiction to appoint the arbitrator(s) should the parties fail to do so within fifteen days. This is in line with Article 10 of the previous Law that allowed the competent ‘institution’ to appoint an arbitrator on behalf of a party. According to Article 15(2), it is the court of competent jurisdiction that selects the procedure should the parties fail to do so. These decisions are not subject to appeal.

Nonetheless, the new Law retains certain mandatory provisions. For example, Article 13 mandates that the number of arbitrators be odd; otherwise, the arbitration is null and void, as did the previous Law's Article 4. In addition, Article 24 provides that a separate employment contract must be concluded with the arbitrators and filed with the body that determines the implementing regulation of the new Law. In this document, the parties and the arbitrator must expressly include the arbitrator's fees, which will be decided by the competent court in a decision not subject to appeal if the parties and the arbitrator cannot agree. This provision would also appear to suggest that even institutional arbitrations must conclude such an employment contract and file it with the body, which the new Law does not clearly define.

The Kingdom of Saudi Arabia's new Arbitration Law provides standard requirements for arbitrators (independence, impartiality, neutrality) and also provides further liberalization to Saudi law in this domain, for example, by omitting any requirement that an arbitrator be Muslim and male.

To this end, Article 16 provides that an arbitrator may not have an interest in the dispute at hand and must notify as to any doubts regarding his neutrality and independence. Article 16(2) provides that this standard is the same as for judges.

Article 14 provides that an arbitrator must have full capacity, good conduct and behavior, and a degree in Shari'a or law. This last requirement is only applicable to the presiding arbitrator if there is more than one arbitrator; the provision therefore provides some flexibility to parties when choosing arbitrators as it allows them to choose arbitrators who are not lawyers but may have expertise in the subject matter of the dispute, so long as one arbitrator has a legal background. This article represents a significant difference from Article 3 of the previous Enforcing Regulation, which specifically stipulated that the arbitrator must be a Muslim.

While the new Law allows the parties to agree upon procedures to challenge an arbitrator, it also provides default provisions in the event that the parties do not agree upon such a procedure. Article 17(1) stipulates that the parties may agree upon specific procedures; otherwise, it is the courts that decide. However, notably, Article 18(1) allows the parties to apply to the courts to dismiss an arbitrator if something happens to the arbitrator causing unjustifiable and unplanned for delays. This decision is not appealable.

According to Article 39, tribunal's award must be by majority (or unanimous in equity), as under the previous Law, and stipulates that a divided tribunal can select a casting arbitrator to decide issues (or, failing to do so, the competent court of jurisdiction), and that procedural issues shall be decided by the presiding arbitrator unless agreed otherwise. This article also provides that the tribunal can issue interim or partial awards prior to rendering the final award unless the parties agree otherwise. Such relief was not available under the previous legal regime and, as has been stated above, echoes recent developments in the rules of arbitral institutions.
The tribunal is expressly allowed to extend the duration of the arbitration for a period of up to six months unless the parties agree to a greater period in Article 40. The previous law did not provide any specific direction as to the length by which the time period could be extended, but allowed the tribunal to do so if circumstances of the dispute required (Article 15) and by the parties’ agreement or, failing such agreement, an application to the courts (Article 9).

Articles 41 through 45 cover the termination of arbitration procedures and general requirements for rendering an award. Notably, Article 44 requires the tribunal to file an original award or a copy with the competent court of jurisdiction within fifteen days of rendering it. Under the previous law, this period was five days. Article 45 also allows the parties to register a settlement before the tribunal, which will have res judicata effect when executed.

Articles 46 through 48 cover award amendments, either to resolve confusion upon the request of one of the parties (Article 46) or to correct clerical or mathematical errors (Article 47). Absent in the previous law, Article 48 allows the parties to request an additional arbitration award on issues submitted during proceedings, but omitted by the tribunal in its award.

The new Law provides legal guidelines for the nullification of arbitral awards; the previous Law did not and awards were annulled on the basis of form and merits, making the arbitral process long and costly. The following provisions therefore provide a significant development in the Kingdom of Saudi Arabia's arbitration law and bring it in line with contemporary arbitration regimes.

Article 49 provides that awards can only be appealed on the grounds that they are invalid and article 50 sets out the grounds for declaring an award invalid. Interestingly, Article 54 states that a challenge seeking to set aside the award does not result in an automatic stay of enforcement, but rather the competent court may stay enforcement if the claimant's request is based on "serious reasons." The arbitration law does not define what would constitute a "serious reason," although we believe that a court would find awards that violate Shari'a law or public policy to be sufficiently serious to warrant a stay of enforcement.
On a practical level, the fact that Saudi Arabia is a signatory to the New York Convention provides no security to foreign corporations who have entered into contracts in or with Saudi Arabian entities, in terms of enforceability of arbitral awards.\textsuperscript{74}

Pursuant to art. V(2)(b) of the Convention signatories who have availed themselves of this reservation, including Saudi Arabia, do not have to recognize an arbitral award that is contrary to its public policy. Public order in Saudi Arabia is determined by reference to the Shari’a, including its measure of the common good of humanity not just the parties involved in a dispute.\textsuperscript{75}

Finally, under Article 55 of the new law, enforcement of an arbitral award requires that three conditions be verified by the competent court: The award does not contradict an award or decision rendered by a court, committee, or board having jurisdiction over the settlement of the dispute in Saudi Arabia; The award does not violate Shari’a and public policy in the Kingdom (if possible, the violating part can be separated and the non-violating part executed); and The party against whom the award has been rendered has been properly notified. The challenge and enforcement provisions of the new Saudi arbitration law contain many similarities to recent arbitration laws released in sister Gulf countries such as the UAE and Qatar. For example, similar to several other Gulf countries, arbitration awards may be challenged where the local court of competent jurisdiction finds that the person agreeing to the arbitration clause was without capacity to bind the company, and awards may be unenforceable where found to be in violation of Shari’a law or public policy, or where the local defendant against whom enforcement is sought has not been properly notified. Thus, while the new Saudi arbitration law can be said to significantly advance the position of arbitration in the Kingdom, the local Saudi courts and local law will still play an important role in the challenge or enforcement of any such awards in the Kingdom.

\textsuperscript{74} Kristin Roy, \textit{The New York Convention and Saudi Arabia: Can a country use the Public Policy Defense to Refuse Enforcement of non–domestic arbitral awards?}

\textsuperscript{75} (Hassan Mahassani: Moslem Law is a main part of Saudi public order)
CONCLUSION

It is clear that the new law provides clearer, detailed rules for conducting an arbitration arising under the law of the Kingdom. Further, the new law takes a strong step towards helping the arbitration tribunal meet its mandate of facilitating private justice to consenting businesses and parties. It is intended to bring the Kingdom in line with the international best practice. By enabling parties to resort to a neutral and internationally recognized forum for the resolution of their disputes, it is also designed to encourage foreign direct investment. However, the real test of the new law will be to see how it is going to be interpreted in practice by the local courts. If it is interpreted purposively with the intention behind the laws finally in mind, then the future of arbitration in Saudi Arabia will be bright.

Unfortunately, even though the new arbitration law was approved on April 16, 2012, commercial arbitration in Saudi Arabia is still considered weak and ineffective by companies and lawyers. As Majed Qaroub, a member of the consultant arbitration committee at the Saudi Justice Ministry, and head assistant of the Arab Chamber of Arbitration and Documentation states on 8/6/2013, i.e. a year after its implementation: “We don’t know if the new commercial arbitration law is effective or not, because we haven’t tested it yet. Once we test the new law, we can decide whether to keep it as is or update it. I think the Kingdom needs between seven and 10 years to test the new arbitration law and the commercial judicial system has not reacted to any commercial case either by implementing or opposing any case.”

Only time will show if Saudi Arabia was prepared and intended to modernize its legal system and endorse arbitration or the new Law was just a firework.