

FACTORS TO BE CONSIDERED BEFORE ARBITRATING IN THE ARAB MIDDLE EAST IN OIL CONTRACT

Khaled Abdalhadi A. Hamad*

INTRODUCTION

The Arab Middle Eastern countries represent some of the leading business market participants in the world.¹ Moreover, many Arab countries own the lion's share of the planet's crude oil resources and by 2012, nine of the world's ten largest oil refineries will exist in the Middle East.² In addition, the Middle East presents many dynamic trade and investment opportunities,³ particularly because of its favorable geographical position, availability of natural resources, and competitively priced labor. Also, its growing population and an increasingly young population integrated with Western pop culture through technology has increased demand for American and Western products in general. Furthermore, there has been a strong inclination by American and European investors towards investing in the Arab Middle East.⁴

Arbitration has historically not been a popular method of dispute resolution in the Kingdom of Saudi Arabia. The historic distrust of parties in using arbitration to resolve their disputes was not assisted by the courts intervention in the arbitral process and the uncertainty surrounding the enforcement of arbitral awards. In the past, many arbitral awards which have sought to be enforced in Saudi Arabia have fallen victim to the courts willingness to look into the merits of the case, and their wide interpretation and application of what constitutes public policy. In some instances, the courts have refused to enforce awards on generic public policy grounds and have even conducted a complete hearing de novo of the underlying dispute.⁵

However, with the passing of the new Law of Arbitration (new Arbitration Law), along with

* Research Scholar @ Dept. of Legal studies & Research, Acharya Nagarjuna University, Guntur, (A.P.)

¹ NisrineAbiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study 51 (2008).

² Turkey [Constitution] 1961, Art. 2; see also Kemal Gözler, Turkish Constitutional Law Material in English, Available at: <http://anayasa.gen.tr/english.html>

³ Tunisia [Constitution] June 1, 1959, No. 57, Ch. 2; see also The Republic of Tunisia, Representatives Council, The Constitution, Available at: <http://www.chambre-dep.tn/>

⁴ Constitution of The Arab Republic of Egypt, 11 Sept. 1971, as amended on May 22, 1980, May 25, 2005, March 26, 2007. See also <http://www.egypt.gov.eg/english/laws/Constitution>

⁵ The infamous case of *Jadawel International v. Emaar Property PJSC* being a prime example

the new Enforcement Law (new Enforcement Law) in 2012, there is reason to be quietly confident that the arbitration landscape in Saudi Arabia is changing for the better. The proposed establishment of a commercial arbitration centre in 2014, the Saudi Centre for Commercial Arbitration, is also encouraging. The cause for optimism is supported by the authors recent experience of enforcing in Saudi Arabia, under the new enforcement provisions, a US\$18.5 million International Chamber of Commerce (ICC) award handed down in London against a Saudi Arabia award debtor (the first of its kind that the authors are aware of), with the enforcement process before the Enforcement Court taking less than three months⁶.

However, there needs to be a note of caution: for the most part, it remains to be seen how the new arbitration and enforcement provisions will be applied in practice and, in particular, whether the judiciary will consistently apply the pro-arbitration laws that have recently been passed by the legislature. Further, the Implementing Regulations which are contemplated by the new Arbitration Law have not yet been enacted; it remains to be seen how effective these regulations will be in helping to re-shape the arbitration landscape in Saudi Arabia.⁷

APPLICABLE LEGISLATION

The new Arbitration Law applies to arbitrations (both domestic and international) conducted in Saudi Arabia. Parties can also agree to the application of the new Arbitration Law to international commercial arbitration proceedings conducted outside of Saudi Arabia (Article 2 of new Arbitration Law). The new Arbitration Law is largely based on the UNCITRAL Model Law. However, the drafters have also sought to maintain the essential principles of Shari'a, therefore creating a hybrid set of laws which, in some instances, depart from the UNCITRAL Model Law. The new Enforcement Law is also an important piece of legislation which applies to the enforcement of arbitral awards in Saudi Arabia.⁸

Arbitration conducted in Saudi Arabia must be conducted in accordance with the principles of Shari'a (Article 2, new Arbitration Law). While parties are free to agree and adopt a set of procedural rules, including those of the major arbitral institutions, in all cases the application

⁶ Malaysia [Constitution] 1957, art. 3.1. See also Constitution of Malaysia, Part I- The States, Religion, And The Law Of The Federation, Available at: <http://confinder.richmond.edu/admin/docs/malaysia.pdf>

⁷ Yemen [Constitution] 1994, Article 1-3 & 23; see also Republic of Yemen Supreme Commission for Elections and Referendum, The Constitution of the Republic of Yemen, Available at: <http://www.scer.org.ye/>

⁸ Saudi Arabia [Constitution] 1992, Article 1; see also Kingdom of Saudi Arabia Ministry of Foreign Affairs, The Basic Law of Government, Available at: <http://www.mofa.gov.sa/>

of the rules must not contravene the principles of Shari'a (Article 25(1), new Arbitration Law). For example, the principles of Shari'a might be breached if a tribunal permits a witness to give evidence without taking oath, or if the application of the rules would deprive a party of the opportunity to set out its case in full (this could include the situation where a tribunal grants the relief sought in a summary judgment or strike-out application)⁹ Further, while parties are also free to agree and adopt a governing law other than Saudi Arabian law to govern the substance of their dispute, it is important that the arbitral award does not contain any findings or make any determinations which are contrary to Shari'a law and public policy (Article 38(1), new Arbitration Law). For example, an award which provides for interest will most likely be unenforceable in Saudi Arabia either in part (if the interest element of the award can be severed from the remainder of the award) or in whole (if the interest element is embedded in the award for damages and cannot be separated out). Similarly, awards which provide for punitive or exemplary damages may not be enforceable in Saudi Arabia, in whole or part.

As a practical measure, if the arbitration is seated in Saudi Arabia, or if it is likely that a foreign arbitral award will have to be enforced in Saudi Arabia, it is advisable that the arbitral tribunal has some expertise in Shari'a law, or is alive to the need to render an award which is Shari'a law compliant.¹⁰

DOES THE LAW PROHIBIT ANY TYPES OF DISPUTES FROM BEING RESOLVED VIA ARBITRATION?

The new Arbitration Law mandates that disputes relating to personal status and matters in respect of which no settlement is allowed cannot be referred to arbitration (Article 2, new Arbitration Law). This will be taken to include criminal matters, matters involving public policy and administrative law matters. In addition, arbitration is prohibited in disputes involving Saudi Arabia government bodies, unless the approval of the Prime Minister has been obtained or arbitration is provided for under a special provision of law.

LIMITATION

If parties have agreed a limitation period in their contract, this will be upheld under Shari'a

⁹ See also Article 27, new Arbitration Law

¹⁰ Qatar [Constitution] 2003, art. 1. See also Embassy of the State of Qatar in Washington DC, Constitution of Qatar, Available at: <http://www.qatarembassy.net/constitution.asp>

law. Otherwise, save for any specific legislative provisions relating to certain discrete categories of claims, there is no time limit prescribed in the new Arbitration Law (or elsewhere) for commencing an arbitration.¹¹ Under Shari'a law, there are no prescribed limitation periods, as one of the applicable maxims of Saudi Arabia law is a just right never dies. That said, in practice, the courts in Saudi Arabia have been known to dismiss disputes if more than ten years have passed from the date of the relevant events which have given rise to the dispute, unless there is good reason why this should not be the case.

The new Arbitration Law provides that, in the absence of agreement between the parties, the final award will be issued within 12 months from the date of the commencement of the arbitration proceeding (Article 40(1), new Arbitration Law). However, the tribunal can extend this period by up to six months on its own initiative. It is open to the parties to agree a longer period (Article 40(2), new Arbitration Law).

APPLICABLE PROCEDURAL RULES

Article 25(1) of the new Arbitration Law upholds the principle of party autonomy, and provides that the parties can agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Specifically, the parties can agree to subject the proceedings to the rules of any organisation, agency or arbitration centre in Saudi Arabia or abroad. To the extent of any inconsistency between the rules agreed by the parties and the procedural rules in the new Arbitration Law, the rules agreed by the parties will prevail (except where the relevant Saudi Arabian law is mandatory).

However, there is an important proviso: any rules agreed by the parties must not be in conflict with Shari'a law. Again, this shows the importance of appointing at least one member to the arbitral tribunal who has relevant Shari'a law expertise and who (in the context of a three member tribunal) will be able to provide guidance to the tribunal on whether the application of a particular rule might be in conflict with Shari'a law.

DEFAULT RULES

The new Arbitration Law contains a default set of procedural rules which are to apply to the arbitration in the absence of agreement by the parties. Further, Article 25(2) provides that, in the absence of agreement, the arbitral tribunal can, subject to the provisions of Shari'a and

¹¹Article 10(2), new Arbitration Law

the new Arbitration Law, determine the procedure to be adopted as it deems fit.

The default procedural rules in the new Arbitration Law are largely based on those in the UNCITRAL Model Law, although some differences do remain. For example, the new Arbitration Law provides for both written statements of case (Article 30) and the holding of hearings and proceedings to be determined on the papers (Article 33). However, the new Arbitration Law mandates that the tribunal must record the summary of each hearing in minutes which are to be signed by those in attendance, including any witnesses, experts, attending parties or their agents, along with members of the tribunal. A copy of the signed minutes must be delivered to each party, unless the parties agree otherwise. This reflects the usual practice in the region. In practice, a signed transcript of any hearing would satisfy these requirements.

CONCLUSION

Enforcement proceedings in Saudi Arabia must now be brought before the Enforcement Court and are dealt with under the new Enforcement Law provisions. While there is no expedited procedure as such, the authors recently transferred an enforcement action from the Board of Grievances to the Enforcement Court where the enforcement process was duly completed within three months. However, there is not yet an established track record of enforcement actions in the Enforcement Court, and it is possible that an enforcement action commenced afresh before the Enforcement Court might take longer than the three months experienced by the authors.