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# **The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia**

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## I. Introduction to the 2012 Saudi Arabian Arbitration Law

A major concern for any outside investor in the Middle East's largest economy is that arbitration in Saudi Arabia is notoriously complicated, time-consuming, and prone to interference by the local courts, while arbitral awards have often faced difficulties in being enforced.

A new Saudi Arbitration Law<sup>3</sup> was issued by Royal Decree No. M/34 on April 16<sup>th</sup>, 2012<sup>4</sup> (the "New Law"), which came into force on 9 July 2012.<sup>5</sup> The New Law, which is covered in 58 Articles, is intended to alleviate many of the shortcomings of the Saudi Arbitration Law of 1983 (the "Old Law") and strengthen investors' confidence in the effective resolution of potential disputes in Saudi Arabia.

As a result of the growth of international commercial interaction, the number of disputes has increased and arbitration is often considered to be the preferable method of dispute resolution for reasons of expediency, technical specialization, or in order to avoid potential bias that might be encountered in national courts. Issues of arbitral award recognition and enforcement can be serious obstacles to swift dispute resolution, however, as varying customs, laws, cultures, and in the case of Saudi Arabia, religions, may result in conflicts in applying foreign arbitral awards. Saudi Arabia is an example of how a lack of a nuanced understanding of those factors can result in adverse results. Without understanding Saudi culture and the laws that regulate foreign arbitration, the country can be dismissed as anti-arbitration. Yet, there is a renewed drive to promote arbitration in Saudi Arabia, as part of the larger overhaul of the legal system in the country, in order to promote economic development. This paper presents a framework for the new updated Saudi arbitration law while laying the ground for a cautionary approach, if factors such as culture, laws, and practice are taken into consideration. The article provides a much-needed examination of the legal provisions of the New Law by way of comparison against the provisions of the Old Law and the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The paper further discusses arbitrability based on efficiency, justice to the parties in the individual case, and societal values.

### A. Overview of the Legal System

The drafters of the New Law made a conscious decision to base it on the

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3. Also referred to as the Arbitration Regulations.

4. Corresponding to 14/05/1433 AH.

5. See LAW OF ARBITRATION [NEW L. OF ARB.], ROYAL DECREE NO. M/34 art. 50(4) (2012) (Saudi Arabia) [hereinafter New Law]; *superseded by* LAW OF ARBITRATION [L. OF ARB.], ROYAL DECREE No. M/46 (1983) (Saudi Arabia) [hereinafter Old Law]. The New Law was published in the Official Gazette of the Kingdom of Saudi Arabia "*Umm Al-Qura*" on 8 June 2012.

UNCITRAL Model Law in order to create a legal framework for arbitration that is more in tune with international standards. At the same time, the drafters sought to maintain the essential principles of *Shari'a* and local practice, thus creating a hybrid set of rules that simultaneously deviate from and converge with the UNCITRAL Model Law. This is discussed in more detail below.

Navigation of the legal system of Saudi Arabia is complicated by the fact that it is primarily based on Islamic Law<sup>6</sup> or *Shari'a*.<sup>7</sup> This is in contrast to *Shari'a*-influenced legal systems in the region, where codified laws are influenced by the principles of *Shari'a*,<sup>8</sup> although in those cases, *Shari'a* is one of several factors influencing legislation. Thus, we find casinos and conventional (non-Islamic) banks, to cite just two examples, in other nations that have Islam as the State-endorsed religion, but they do not follow the *Shari'a*-centric approach to legislation adopted by Saudi Arabia. Complicating things further, in Saudi Arabia the *Shari'a* is not codified as such; thus there is no *Shari'a* counterpart to a Civil Code tome or U.S. published code. Specific laws, such as the New Arbitration Law, exist to regulate most transactions; however, these laws will overwhelmingly defer to the principles of *Shari'a*, particularly in the event of any inconsistency or where the law itself is silent. As such, all laws in Saudi Arabia exist under a penumbra of *Shari'a*. The Old Law and the Implementing Regulations of 1985 were both almost exclusively based on classical *Shari'a* principles. Therefore, arbitration as a concept is not in contradiction with *Shari'a*. In fact, arbitration that applies *Shari'a* as its foundation and governing law is endorsed in the Qur'an. However, difficulties arise when attempting to enforce arbitral awards issued under non-*Shari'a* rules in Saudi Arabia.

### **B. History of Saudi Arbitration**

Despite the historical role of arbitration as a dispute resolution mechanism in the region,<sup>9</sup> the Old Law subjected arbitration to the supervision of the national courts,<sup>10</sup> the result being a very distinct legal framework for arbitration. Examples

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6. The primary source of law in Saudi Arabia, referred to below as the *Shari'a*.

7. The sources of *Shari'a* are primarily the Qur'an and the Hadith, which contain the practices and sayings of the Prophet Mohammad (PBUH).

8. See LAW NO. 5 OF 1985 [U.A.E. CIV. CODE] (U.A.E.).

9. Arbitration (or *tahkim*), often in the sense of an *amiable compositeur*, has played an integral role as a means of resolving disputes in pre-Islamic Arabia, and the role of arbitration was also acknowledged in all four schools of Islamic legal tradition and has continued to be of widespread use in the region thereafter, including in the earliest disputes between the Saudi Arabian government and foreign oil companies. See Arthur J. Gemmill, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. OF INT'L L. 169, 173-74 (2006), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1025&context=scujil>.

10. One of the reasons for this conservative approach to arbitration, especially international

abound of intervention by the Saudi courts in arbitration proceedings, usually at the time of initiation of proceedings and during the enforcement of the arbitral award in order to ensure compliance with principles of *Shari'a*; in many instances, this amounted to a full review of the dispute by the courts.<sup>11</sup>

Saudi Arabia's accession to the New York Convention<sup>12</sup> did not impede such *de novo* reviews because they were justified as falling under the public policy exception to the Convention,<sup>13</sup> which permits the refusal of enforcement of awards on limited grounds, such as if the enforcement would be contrary to the public policy of the country where the enforcement was sought. Never mind that in order to give meaning to the Convention's goal of facilitating easy enforcement of awards across borders and jurisdictions it is imperative that such public policy grounds for refusal of enforcement should be interpreted narrowly. Failure to do so, of course, will cause the New York Convention to lose its appeal as a vehicle of global arbitral award enforcement. The New Law does purport to restrain the ability of the Saudi courts to intervene in the substance of the award,<sup>14</sup> but it remains to be seen how this will be implemented in practice.

One point to note is that even though the New Law itself has now come into force, any analysis of it at this stage can only be incomplete, as the implementing regulations which will set out the details of implementation have not yet been issued, and currently no indication is available as to when such regulations are to come into force.

This article will look at the key provisions of the New Law and how they compare to the Old Law, the extent to which they align with the provisions of the UNCITRAL Model Law, and the effect of *Shari'a* principles.

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arbitration involving the Saudi government, may be attributed to a worry about the capability or willingness of foreign arbitrators to apply Saudi law to the dispute. This may be a result of a number of disputes in the 1950's and 60's related to oil concessions in the Gulf region, in which arbitrators issued adverse decisions, such as one arbitration involving the government of Abu Dhabi where the arbitrator decided to apply principles of English law, after determining that the *Shari'a* could not properly serve as governing law. See *In re Arbitration Between Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, reprinted in 1 INT'L & COMP. L. Q. 247, 250–51 (1951).

11. Including the notorious case of *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, in which an International Chamber of Commerce (ICC) arbitration award issued by a three-member panel of Saudi arbitrators was effectively reversed by the Saudi Board of Grievances upon enforcement. See ESSAM AL TAMIMI, THE PRACTITIONER'S GUIDE TO ARBITRATION IN THE MIDDLE EAST AND NORTH AFRICA 371 (2009).
12. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 330 U.N.T.S. 3 (entered into force June 7, 1959) [hereinafter New York Convention].
13. *Id.* at art. V(2)(b).
14. New Law, *supra* note 3, art. 50(4).

## II. General Provisions

In relation to the agreement to arbitrate, the New Law provides that it may be made in writing prior to or after the occurrence of a dispute, either independently or as part of a contract or other document such as email or letter.<sup>15</sup> Additionally, reference in a contract to another document containing an arbitration clause such as the International Federation of Consulting Engineers (FIDIC) general conditions of contract is enough to create a binding arbitration clause.<sup>16</sup> The New Law also specifically incorporates the principle of severability of the arbitration clause,<sup>17</sup> along the lines proposed in the UNCITRAL Model Law,<sup>18</sup> which was not addressed in the Old Law.

Additionally, under the New Law the parties are specifically permitted to agree to apply any procedural rules including those of international arbitration institutions such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), or the Dubai International Arbitration Centre (DIAC).<sup>19</sup> The application of such rules will automatically exclude the application of the procedural rules provided in the New Law that contradict the institutional rules.<sup>20</sup> However, in all cases, the application of institutional rules must not contravene the principles of the *Shari'a*. Parties and arbitrators should therefore be aware that the application of institutional rules might possibly breach the principles of the *Shari'a*. For example, the principles of the *Shari'a* might be breached where the application of the institutional rules would deprive a party of the opportunity to set out its case in full,<sup>21</sup> or to cross-examine a witness, or if a tribunal permits a witness to testify without taking a solemn oath.

The Old Law did not contain any provisions governing the application of a substantive foreign law on the dispute. The New Law specifically permits the parties to agree to apply the substantive law of a foreign country on the dispute, as long as this does not contradict the rules of the *Shari'a*.<sup>22</sup> Similarly, should the application of foreign law result in an outcome that conflicts with the *Shari'a*, such as an award for legal interest, then we expect the courts to carry on the practice

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15. *Id.* at art. 9.

16. *Id.*

17. *Id.* at art. 21.

18. See U.N. Comm'n on Int'l Trade Law [UNCITRAL] Res. 40/72, Model Law on International Commercial Arbitration of the UNCITRAL, 18th Sess., Dec. 11, 1985, A/40/17, at 17 (Mar. 13, 2015), available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) [hereinafter UNCITRAL Model Law].

19. New Law, *supra* note 3, arts. 4, 5.

20. See Jean-Pierre Harb & Alexander G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, 30 J. INT'L ARB., No. 2, 117 (2013).

21. Potentially including situations such as summary judgment or strike-out applications.

22. New Law, *supra* note 3, art. 38.

under the Old Law to decline to enforce the non-*Shari'a*-compliant element of the award and sever it from the rest of the award.<sup>23</sup> There is a risk, however, that where an element of an award cannot be severed, such as if the award for interest is completely imbedded within the award for damages, then the entire award could be opened up by the courts at the enforcement stage.<sup>24</sup> For this reason, and even though the issue of finality of arbitration has been enhanced, yet not fully settled, the parties intending to enforce an arbitral award in Saudi Arabia would be well advised to select arbitrators who are well-versed in the principles of the *Shari'a* as normally applied in Saudi Arabia, even if the parties choose to exercise their right to apply a non-Saudi law to the dispute.

Additionally, the New Law provides that the foreign law rules relating to conflict of laws shall not automatically apply in cases of application of a foreign substantive law, unless the parties specifically agree upon applying the foreign rules relating to conflict of laws.<sup>25</sup> This position could, in a sense, be considered an improvement on that proposed in the UNCITRAL Model Law,<sup>26</sup>—which provides for the application of the conflict of law rules that the tribunal considers applicable—as it offers some certainty on this issue.<sup>27</sup>

The venue of the arbitration proceedings is greatly facilitated and enhanced under the New Law, which allows the parties to agree to hold hearings in Saudi Arabia or in some other location; it also allows for hearings to be held in any location that the tribunal considers suitable.<sup>28</sup> Moreover, the New Law provides that the arbitration will be held in Arabic, unless the tribunal or the parties agree on another language or languages.<sup>29</sup> This is quite a significant development that is likely to make the Saudi arbitration process much more accessible to non-Saudi and non-Arabic-speaking parties, when compared against the position under the Old Law,<sup>30</sup> which required all arbitration proceedings to be conducted in Arabic.<sup>31</sup>

A further important development in the New Law is that the service of notice

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23. *Id.* at art. 55(2)(b).

24. John Balouziyeh, *Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia*, KLUWER ARBITRATION BLOG (May 29, 2013), <http://kluwerarbitrationblog.com/blog/2013/05/29/saudi-arabias-new-arbitration-law-sees-more-investors-opting-for-arbitration-in-saudi-arabia>.

25. New Law, *supra* note 3, art. 38.

26. UNCITRAL Model Law, *supra* note 16, art. 28.

27. This divergence from the UNCITRAL Model Law may have been influenced by the judgment in *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, reprinted in 27 INT'L L. REP. 117, 198 (1963).

28. New Law, *supra* note 3, art. 28.

29. *Id.* at art. 29.

30. IMPLEMENTING REGULATIONS OF THE ARBITRATION LAW, Royal Decree No. 7/2021/M (1985) (Saudi Arabia) [hereinafter IMPLEMENTING REGULATIONS].

31. *Id.* art. 25.

upon the other party can now be effected by the parties themselves.<sup>32</sup> This will surely simplify and expedite arbitration proceedings compared to the situation under the Old Law, which required that notices be issued via a notary public.<sup>33</sup>

#### A. *Enhanced and Extended Jurisdiction*

The New Law applies by default to any arbitration conducted within Saudi Arabia. Additionally, the New Law may apply to any international commercial arbitration taking place abroad should the parties to the dispute agree to apply this law, something which the Old Law did not entertain.<sup>34</sup> In this regard, the New Law<sup>35</sup> defines an international arbitration<sup>36</sup> in a similar manner as that set out in the UNCITRAL Model Law.<sup>37</sup> In theory, it is now possible for parties to international commercial disputes involving Saudi Arabia to agree to apply the New Law to arbitral proceedings, with a view to increasing the chances of the successful enforcement of an arbitral award in Saudi Arabia. Although, as stated above, it is not yet clear whether the application of the New Law will, in practice, restrain the courts' discretion to revise arbitral awards.

Like the Old Law,<sup>38</sup> the New Law excludes disputes relating to matters of personal status, criminal matters, public matters, and administrative law matters from being referred to arbitration.<sup>39</sup> Additionally, the rule preventing government authorities from participating in arbitration unless the approval of the Prime Minister is obtained has been maintained in the New Law,<sup>40</sup> although the New Law allows for the implementation of specific legislation to provide otherwise.<sup>41</sup> For example, it now appears possible, in principle, for a law to be issued which provides that all contracts entered into by a specific government entity are to be referred to arbitration.

One of the most distinctive marks of the Old Law was the requirement that the Competent Court approve arbitration proceedings prior to their initiation.<sup>42</sup> A major development in the New Law is that this requirement has been completely

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32. New Law, *supra* note 3, art. 6.

33. IMPLEMENTING REGULATIONS, *supra* note 28, art. 11.

34. *Id.* at art. 2.

35. *Id.* at art. 3.

36. This includes (i) disputes of an international commercial nature; (ii) disputes involving international parties; and (iii) disputes governed by agreements to apply the rules of non-Saudi international arbitration organizations such as the ICC.

37. UNCITRAL Model Law, *supra* note 16, art. 1(3).

38. Old Law, *supra* note 3, art. 2.

39. New Law, *supra* note 3, art. 2.

40. *Id.* at art. 10(2).

41. *Id.*

42. Old Law, *supra* note 3, arts. 5, 6.



disposed of. In both the Old and New Laws, the Competent Court is defined as the court possessing the original jurisdiction to hear the dispute subject of the arbitration.<sup>43</sup> For the majority of commercial disputes this would usually be the Board of Grievances. However, this may change in the future, as Saudi Arabia is in the process of revamping its judicial and court system.<sup>44</sup>

The New Law specifically provides that national courts must decline jurisdiction to hear a dispute subject of a valid arbitration clause should any of the parties raise a challenge on this point in court.<sup>45</sup> This is consistent with the approach proposed by the UNCITRAL Model Law,<sup>46</sup> and the practice is prevalent within the national laws of the region.<sup>47</sup> The situation in Saudi Arabia under the Old Law was more complex,<sup>48</sup> as it was previously necessary for the parties to deposit an arbitration document with the competent court in order to obtain the court's approval before any arbitration could be commenced.<sup>49</sup> The requirement for a court-approved arbitration document under the Old Law meant that even if there had been an existing arbitration clause in a contract, it was still be possible for one of the parties to refer a dispute to the courts in the absence of a court-approved arbitration document. In such situations, the courts would not be required to decline jurisdiction over the dispute.<sup>50</sup> Additionally, the New Law also obliges a court to refer an ongoing dispute before it to arbitration should the parties so agree.<sup>51</sup>

Another development in the New Law is that the tribunal is specifically empowered to rule on its own jurisdiction as provided by the UNCITRAL Model Law,<sup>52</sup> while the Old Law was silent on this issue. The New Law also provides

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43. New Law, *supra* note 3, art. 1(3) (defining the Competent Court as “the court of the regulatory authority to judge in the disputes that are agreed to be under arbitration”).
44. *See, e.g.*, LAW OF JUDICIARY PROMULGATED BY ROYAL DECREE NO. M/78 (2007) (Saudi Arabia).
45. New Law, *supra* note 3, art. 11.
46. UNCITRAL Model Law, *supra* note 16, art. 8.
47. For example, Article 109 of the Jordanian Code of Civil Procedures states:  
1-A litigant may, before addressing the subject of the dispute, request that the court issue its judgment on the following defenses, on the condition that they be submitted jointly in an independent application within the time periods set out in Article 59 of this law:  
a) lack of local jurisdiction.  
b) existence of arbitration clause.  
c) res judicata.  
d) passing of period of prescription.  
e) invalidity of service of claim documents.
48. Old Law, *supra* note 3, art. 5.
49. *Id.* (stating that the arbitration document is a separate document, resembling a terms of reference, which was signed by the parties to the dispute or their legal representatives, in addition to the arbitrators).
50. *See* Old Law, *supra* note 3, arts. 5, 6, 7, 9, 17, 22.
51. New Law, *supra* note 3, art. 12.
52. *Id.* at art. 20; UNCITRAL Model Law, *supra* note 16, art. 16.

that a challenge to the tribunal's jurisdiction can only be made within certain time limits, which is considered necessary for the maintenance of the stability of the arbitration proceedings.<sup>53</sup>

Although the UNCITRAL Model Law provides the tribunal with wide powers to issue interim or provisional measures,<sup>54</sup> the drafters of the New Law have chosen to place such powers within the Competent Court's jurisdiction as long as such measures are made upon a party's request prior to the initiation of proceedings or based on the tribunal's request during the arbitration, unless the parties agree otherwise.<sup>55</sup> This would suggest that the parties may decide to award jurisdiction to issue interim or provisional measures to the tribunal, although it is uncertain how this could be enforced in practice. A possible solution may be found in the same article of the New Law, which allows the arbitral tribunal to address courts and other authorities directly in order to request their assistance.<sup>56</sup>

Article 37 of the New Law concerns issues that may arise during the course of arbitration but which fall beyond the jurisdiction of the tribunal.<sup>57</sup> These include challenges to the authenticity of documents submitted in the arbitration or other criminal acts. In such cases, the tribunal may continue with the arbitration proceedings as long as it does not consider the resolution of the issue that falls beyond its jurisdiction as necessary for the issuance of its award. Otherwise, the tribunal should suspend proceedings until a final decision is issued in relation to the matter falling beyond its jurisdiction.<sup>58</sup> The text of Article 37 is almost identical to that found in the Implementing Regulations of the Old Law.<sup>59</sup> However, no equivalent provision exists in the UNCITRAL Model Law.

### ***B. Choice of Arbitrators***

Under the Old Law, arbitrators had to be Muslim males, and in case of a multi-arbitrator tribunal, there was a requirement that the chairman be familiar with the rules of the *Shari'a*.

These requirements have been revised in the New Law, which now merely requires that arbitrators be of full legal capacity and of good conduct and makes no reference to gender or nationality. It is therefore unclear whether this means that

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53. New Law, *supra* note 3, art. 20(2).

54. UNCITRAL Model Law, *supra* note 16, art. 17.

55. New Law, *supra* note 3, art. 22.

56. *Id.*

57. *Id.* at art. 37.

58. *Id.* (explaining that if proceedings are suspended under these conditions, the running of the fixed time period for the issuance of the arbitral award is also suspended).

59. IMPLEMENTING REGULATIONS, *supra* note 28, art. 37.

women can now also act as arbitrators.<sup>60</sup> The New Law also requires that a sole arbitrator—or in the case of a multi-arbitrator tribunal, the chairman of the arbitral tribunal—hold a university degree in *Shari'a* or law.<sup>61</sup> In this regard, it remains to be seen whether the system of creating an official arbitrators' roster, as stipulated under the Old Law,<sup>62</sup> will be maintained in the implementing regulations of the New Law. We hope that this requirement will be disposed of, as it would considerably limit the choice of potential arbitrators that may be appointed by parties. In both cases, however, the tribunal must be comprised of an odd number of arbitrators.<sup>63</sup>

In relation to the appointment of arbitrators under the New Law, the Competent Court will appoint the single arbitrator if the parties are unable to agree on the appointment themselves.<sup>64</sup> In case of a multi-arbitrator tribunal, the parties will each appoint one arbitrator, and the arbitrators should agree on the chairman within a period of 15 days, otherwise either party may request that the court appoint the chairman (this must also take place within 15 days of receipt of the request).<sup>65</sup> This method for composing the tribunal closely resembles that provided in the UNCITRAL Model Law,<sup>66</sup> although it is notable that the 30-day periods proposed in the Model Law have been shortened to 15 days in the New Law.<sup>67</sup>

Furthermore, the New Law provides that the Competent Court must observe the parties' agreement in relation to the characteristics of an arbitrator, such as his nationality or qualifications, for example, so long as such requirements do not contradict the requirements of the law.<sup>68</sup> The decisions of the courts in relation to the appointment of arbitrators are not subject to appeal.<sup>69</sup>

Arbitrators acting under the New Law have a continuous obligation to disclose to the parties in writing the existence of any circumstances that may give rise to justifiable doubts about their ability to act independently or impartially.<sup>70</sup> This obligation is a direct rendition of the UNCITRAL Model Law,<sup>71</sup> for which the Old

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60. New Law, *supra* note 3, art. 14 (contending that it may be arguable that a female arbitrator would not enjoy full legal capacity under Saudi Arabian law).

61. *Id.*

62. IMPLEMENTING REGULATIONS, *supra* note 28, art. 5.

63. Old Law, *supra* note 3, art. 4; New Law, *supra* note 3, art. 13.

64. New Law, *supra* note 3, art. 15.

65. *Id.*

66. UNCITRAL Model Law, *supra* note 16, art. 11.

67. New Law, *supra* note 3, art. 15.

68. *Id.* at art. 15(3).

69. *Id.* at art. 15(4). Note, however, that it remains possible to challenge the validity of the award itself in accordance with Articles 49 and 50 of the New Law.

70. New Law, *supra* note 3, art. 16(1).

71. UNCITRAL Model Law, *supra* note 16, art. 12(1).

Law had no equivalent.

Under the Old Law, parties were permitted to challenge an arbitrator's appointment on the same grounds that applied to the challenge of judges under Saudi Arabian law.<sup>72</sup> This position has been modified in the New Law, which provides that an arbitrator is prohibited from acting *per se* should any of the grounds of challenge that apply to a judge under Saudi Arabian law be applicable upon the arbitrator.<sup>73</sup> The difference here is significant, because the suggestion is that under the New Law, it may be possible, in theory, for an award to be considered invalid, should it come to light that an arbitrator was acting in spite of the existence of one of the grounds of challenge of judges, even if the parties had not actively objected to it, and possibly even if the arbitrator himself had not known of the existence of the ground of challenge. As such, caution needs to be taken when appointing arbitrators.

The position on the challenge of arbitrators under the New Law is closely modeled on the UNCITRAL Model Law, which provides that an arbitrator may be challenged only if circumstances that give rise to justifiable doubts as to his impartiality or independence exist, or if he does not possess the qualifications agreed upon by the parties, including the general qualifications required by the New Law.<sup>74</sup> Moreover, a party may not raise a challenge against an arbitrator it has appointed unless the grounds for the challenge become known only after the appointment has been made.<sup>75</sup>

The New Law also provides that arbitration proceedings are to be suspended upon the issuance of a written challenge to the tribunal, although the proceedings need not be suspended if the matter is referred to the competent court.<sup>76</sup>

The New Law provides for stricter time periods for the challenge procedure than those provided in the UNCITRAL Model Law.<sup>77</sup> Moreover, Article 17(4) of the New

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72. Old Law, *supra* note 3, art. 12. Reasons for the disqualification of judges under Saudi Arabian law include: (i) if he was the spouse of a litigant, a relative, or an in-law to the fourth degree; (ii) if there is an existing dispute between the judge or his wife and one of the litigants or their spouse; (iii) if the judge was an agent, a guardian, or a possible heir of one of the litigants, or if he was married to a guardian of one of the litigants or if he was related to the fourth degree to such a guardian; (iv) if he, his wife, one of his relatives or in-laws, his principle, or his ward has an interest in the dispute; (v) if he had advised or represented one of the litigants in the dispute or had written an opinion, even if this was prior to his appointment as a judge, or if he had previously been involved as a judge, expert or arbitrator, or if had previously testified in relation to the dispute or had commenced formal investigations in relation to it. See Saudi Arabian Law of Procedure before Sharia Courts, art 92, Royal Decree No. M/21, 20 Jumada I, 1421 (Aug. 19, 2000) (Saudi Arabia).

73. New Law, *supra* note 3, art. 16(2).

74. *Id.* at arts. 14, 16(3); UNCITRAL Model Law, *supra* note 16, art. 12(2).

75. New Law, *supra* note 3, art. 16(4).

76. *Id.* at art. 17(3).

77. *Id.* at art. 17; UNCITRAL Model Law, *supra* note 16, art. 13.

Law has no equivalent provision under the UNCITRAL Model Law. This article provides that, should the arbitrator withdraw his office based on a challenge by one of the parties, or should the court revoke his mandate based on such a challenge, then the result will be that any arbitral proceedings that have taken place until that stage, including the arbitral award, shall be considered null and void.<sup>78</sup>

Apart from the usual method of challenging an arbitrator described above, the New Law also allows the parties to apply to the Competent Court to terminate an arbitrator's mandate should he fail to carry out his duties, is delayed in taking up his role, or if he has been interrupted in a manner which causes unjustifiable delay to the proceedings and he refuses to withdraw.<sup>79</sup> However, unless the Competent Court has appointed the arbitrator in question, then his mandate may be revoked only by agreement between the parties, in which case the arbitrator may be entitled to compensation if the reason for termination of the mandate was not due to a fault of the arbitrator.<sup>80</sup>

A distinctive feature of the New Law is that a contract must be entered into with an arbitrator upon his appointment.<sup>81</sup> Such contract should state the arbitrator's fees, and a copy of the contract should be deposited with an official body that is to be specified in the New Law's Implementing Regulations. Should the arbitrator's fees not be decided upon,<sup>82</sup> or should the arbitrator be appointed by the court, then the competent court will be responsible for specifying the arbitrator's fees, and the court's decision in this regard is not subject to appeal.<sup>83</sup> This provision appears to be unique to the New Law, and no equivalent exists in the UNCITRAL Model Law.<sup>84</sup>

### C. Procedure

The new Saudi Arabian arbitration law sets out rules of procedure that shall

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78. The reasoning underlying the incorporation of this a rule is possibly based upon the Islamic legal maxim "*that which has been built on a falsehood shall also be false.*"

79. New Law, *supra* note 3, art. 18(1).

80. *Id.* at art. 18(2).

81. *Id.* at art. 24.

82. *Id.* at art. 24(2). The wording of this article is unclear as to whether the lack of agreement on the arbitrator's fees is due to the inability of the parties and the arbitrators to agree or due to a simple omission or oversight by the parties. It is more likely to be the former only, as the requirement under Article 24 to form a contract with the arbitrator at such an early stage makes the possibility of an omission unlikely.

83. *Id.*

84. Again, this seems to be influenced by classical Islamic legal principles, and perhaps, the requirement to establish an arbitrator's fees in advance is intended to avoid the possibility of uncertainty (*gharar*) in the contract between the arbitrator and the parties.

apply by default to arbitrations taking place under the law,<sup>85</sup> unless the parties have agreed on some other rules of procedure, as set out earlier. The procedural rules provided in the New Law are more detailed than those provided in the Old Law and are closely based on those in the UNCITRAL Model Law.

In relation to the statements of claim and defense, the provisions under the New Law are based on the UNCITRAL Model Law, with some superficial differences.<sup>86</sup> The New Law also follows the same approach regarding the holding of hearings and written proceedings, where it is closely based on the UNCITRAL Model Law,<sup>87</sup> although one addition in the New Law is that it specifically requires a written record of the hearing to be made. This written record should be signed by the tribunal and all those in attendance, including witnesses, experts, and the parties or their representatives, and copies of the records should be provided to the parties, unless otherwise agreed, as per the usual practice in the region.<sup>88</sup>

The provisions under the New Law regarding the repercussions for a default by one of the parties are a reflection of the UNCITRAL Model Law,<sup>89</sup> with the exception that the UNCITRAL Model Law provides that a respondent's failure to file a statement of defense would not be taken as an admission of the claimant's allegations; this provision is conspicuously omitted from the New Law.<sup>90</sup>

#### **D. Experts**

The position concerning the appointment of experts by the arbitral tribunal under the New Law is comparable to that under the UNCITRAL Model Law.<sup>91</sup> There are, however, some differences between the two versions, as Article 36 of the New Law specifies: (i) that the expert's report should be communicated to the parties and that the parties are entitled to examine the documents which the expert depended on in making his report; (ii) that the expert shall issue his final report after reviewing the parties' comments on his (preliminary) report; and (iii) that a party is required to give the expert any relevant information, or to produce or provide access to, any relevant documents, goods, or other property for his inspection, and that the tribunal shall determine any dispute that may arise between the expert and one of the parties in this regard by a decision that is not capable of being appealed in any form.<sup>92</sup> By way of contrast, the Implementing

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85. New Law, *supra* note 3, arts. 25-37.

86. *Id.* at arts. 30, 32; UNCITRAL Model Law, *supra* note 16, art. 23.

87. New Law, *supra* note 3, art. 33; UNCITRAL Model Law, *supra* note 16, art. 24.

88. New Law, *supra* note 3, art. 33(3).

89. *Id.* at arts. 34-35; UNCITRAL Model Law, *supra* note 16, art. 25.

90. New Law, *supra* note 3, art. 34.

91. *Id.* at art. 36; UNCITRAL Model Law, *supra* note 16, art. 26.

92. Article 26 of the UNCITRAL Model Law provides that "[u]nless otherwise agreed by the parties,

Regulations of the Old Law focused on the procedural aspects of the appointment of experts and the payment of their fees but did not specifically require the parties to provide any support to experts.<sup>93</sup> The Old Law also stated that the tribunal is not bound by the opinion of the experts, and that the parties are at liberty to submit their own consultative reports to the tribunal. It is to be seen whether these two aspects will be maintained in the Implementing Regulations of the New Law, which have not yet been implemented.

### *E. Awards*

The Old Law contained a somewhat optimistic stipulation that in the absence of an agreement to the contrary by the parties, the tribunal must issue its award within 90 days of the issuance of the arbitration document, although this could be extended by the court. A more realistic reflection of actual arbitration practice is now provided in the New Law, which has extended this period to 12 months from the start of proceedings, with the possibility of a 6-month extension.<sup>94</sup> In both cases, however, a party may request that the dispute be referred to the courts upon the expiry of the specified period, although, the New Law allows the party to request further extensions from the court or to request the termination of arbitration proceedings.

As discussed earlier, the drafters of the New Law have gone some way towards softening the strict provisions under the Old Law on the application of time limits for issuing awards.<sup>95</sup> Moreover, the New Law permits the application of a foreign substantive law as proposed by the UNCITRAL Model Law,<sup>96</sup> while the Old Law had no equivalent provision that allows for a tribunal to apply foreign law in deciding on the substantive issues in dispute.

The parties may agree to permit the tribunal to act as *amiable compositeur* under the New Law.<sup>97</sup> However, no provision is made for acting *ex aequo et bono*,<sup>98</sup> even though the UNCITRAL Model Law proposes both approaches.<sup>99</sup> The New Law also specifically states that a tribunal should observe the terms and

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the arbitral tribunal . . . (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.”

93. IMPLEMENTING REGULATIONS, *supra* note 28, arts. 33-34.

94. New Law, *supra* note 3, art. 40.

95. *Id.*; Old Law, *supra* note 3, art. 9.

96. New Law, *supra* note 3, art. 38; UNCITRAL Model Law, *supra* note 16, art. 28.

97. New Law, *supra* note 3, art. 38(2).

98. *Ex aequo et bono* is a Latin term meaning “according to the what is just and fair,” essentially, this means that tribunals are given the authority to decide equitably based on the merits of the case rather than purely based on the strict rules of law.

99. UNCITRAL Model Law, *supra* note 16, art. 33(3).

conditions of the contract subject of the dispute, and that it should also take into account the customs and usages of the relevant trade as well as previous dealings between the parties when issuing its award.<sup>100</sup>

The New Law diverges from the UNCITRAL Model Law in relation to the arbitrators' decisions in that the New Law makes it compulsory for all awards to be issued by a majority of the arbitrators, while the UNCITRAL Model Law allows the parties to agree otherwise.<sup>101</sup> The New Law also provides for the appointment of an umpire arbitrator by the tribunal, or failing that, by the Competent Court, should it be impossible for the tribunal to agree on a majority decision. The New Law also permits the issuance of awards on procedural matters by the chairman of the tribunal alone, if so agreed in writing by the parties or if the other members of the arbitral tribunal permit him to do so, although the parties may agree otherwise.<sup>102</sup> The position under the Old Law was more rigid in this regard, as it was based on the procedures applied by state courts in issuing judgments.<sup>103</sup>

In relation to the termination of proceedings, the New Law closely resembles the UNCITRAL Model Law.<sup>104</sup> Like the Old Law, the New Law states that the deadline for the issuance of the award shall be extended by 30 days upon the death of one of the parties, unless the arbitrators decide to extend it by a longer period.<sup>105</sup> The principle underlying such provisions in both cases appears to be that a legal right is not extinguished upon the death of the party claiming it or by his incapacitation. In the case of the New Law, however, for practical reasons, more time may be required for the proceedings to continue. This also seems to entail that the agreement to arbitrate itself is not necessarily bound with the person that had originally agreed to the arbitration but can be taken up by his successors.

Certain requirements are to be observed in relation to the form and contents of awards under the New Law.<sup>106</sup> These go beyond the requirements set out in the UNCITRAL Model Law<sup>107</sup> and are quite formalistic in nature. Like the UNCITRAL Model Law,<sup>108</sup> the New Law requires awards to be made in writing and to be signed by the arbitrator or arbitrators, although, a majority of arbitrators

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100. New Law, *supra* note 3, art. 38(1)(c). The Arabic word used here “*tura’ee*” (تُرَاعَى) means “to observe or to take into consideration,” while Article 35(3) of the UNCITRAL Model Law, *supra* note 16, states: “In all cases, the tribunal shall decide in accordance with the terms of the contract . . .”

101. New Law, *supra* note 3, art. 39; UNCITRAL Model Law, *supra* note 16, art. 29.

102. New Law, *supra* note 3, art. 39(3).

103. IMPLEMENTING REGULATIONS, *supra* note 28, arts. 38-44.

104. New Law, *supra* note 3, art. 41; UNCITRAL Model Law, *supra* note 16, art. 36.

105. Old Law, *supra* note 3, art. 13.

106. New Law, *supra* note 3, art. 41.

107. UNCITRAL Model Law, *supra* note 16, art. 34.

108. *Id.* at art. 34(3).



would suffice as long as the reasons for the omitted signatures is stated.<sup>109</sup> The New Law requires that the reason upon which an award is issued be stated in all cases,<sup>110</sup> a divergence from the UNCITRAL Model Law, which permits the parties to agree that the reason for the award not be given. The New Law also requires that the award contain such details as (i) the date and place of issuance of the award; (ii) names of the parties and their addresses; (iii) names and titles of arbitrators, their addresses, and nationalities; (iv) a summary of the arbitration agreement, the parties' oral and written pleadings, applications, documents, and any expert reports; (v) the verdict; and (vi) the arbitrators' fees, arbitration expenses, and the allocation of such expenses.<sup>111</sup>

The New Law also requires that true copies of the award be delivered to the parties within 15 days of its issuance, and that such awards not be published unless the parties agree otherwise in writing, as is usually the case in arbitration.<sup>112</sup> Under the Old Law, arbitral awards had to be delivered to the parties and deposited with the Competent Court within 5 days.<sup>113</sup> This requirement has been maintained under the New Law, save that the deposition period has been extended to 15 days and that an authenticated translation must accompany awards issued in a language other than Arabic.<sup>114</sup>

Should the parties to the arbitration agree to amicably settle their dispute, the New Law provides that the parties must request that the tribunal record the terms of the settlement, issue the award according to the agreed terms of settlement, and as a result, conclude the proceedings.<sup>115</sup> The tribunal's award in this case shall have the same force upon execution as that of a usual arbitration award. The UNCITRAL Model Law provides for similar procedures, except that under the UNCITRAL Model Law, there is no requirement to record the settlement in form of an award should the parties choose not to do so. In this regard, the approach taken in the New Law is more similar to that followed by other courts in the region.<sup>116</sup>

The New Law, like the UNCITRAL Model Law, provides that either party to the arbitration may, upon giving notice to the other party, request that the tribunal clarify any ambiguity in the wording of the award within 30 days of its issuance;

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109. New Law, *supra* note 3, art. 42(1).

110. *Id.*

111. *Id.* at art. 42(2).

112. *Id.* at art. 43.

113. Old Law, *supra* note 3, art. 18.

114. New Law, *supra* note 3, art. 44.

115. *Id.* at art. 45.

116. See generally, e.g., U.A.E. Civ. Proc. Law. arts. 200-218 (1992) (U.A.E.), available at <http://www.diac.ae/idias/rules/uae/chapter3/>.

although, the UNCITRAL Model Law allows the parties to agree on a different period of time for doing so.<sup>117</sup> The New Law imposes an obligation on the tribunal to issue a response containing its interpretation within 30 days of receiving the request, and in such a case, the tribunal's interpretation becomes part of the award itself.<sup>118</sup> In the UNCITRAL Model Law, however, the tribunal is given the option to respond to the request based on whether it considers it to be justified.<sup>119</sup>

In relation to the correction of clerical, typographical, or calculation errors, the New Law provides for such errors to be corrected at any time by the tribunal on its own initiative, but also upon the request of one of the parties.<sup>120</sup> The UNCITRAL Model Law makes similar provisions, although it restricts this to a period of 30 days from the issuance of the award, unless the parties have agreed upon another period of time.<sup>121</sup> On one hand, the approach taken by the UNCITRAL Model Law has the benefit of ensuring that the award becomes final and does not remain indefinitely open to amendment; on the other hand, the approach taken by the New Law ensures that the rights of the parties are not lost due to a mistake of the tribunal. Moreover, both the New Law and the UNCITRAL Model Law contain similar provisions that allow for the parties to request, within 30 days of the receipt of the award, that the tribunal issue an additional award on those claims that were presented to the tribunal but have been omitted from the original award.<sup>122</sup>

#### ***F. Annulment of the Award***

Under the Old Law, the parties were effectively given an unlimited right to challenge the arbitral award before the Competent Court.<sup>123</sup> As discussed above, this meant that it was not uncommon, in practice, for awards to be reopened by the courts and overturned on the merits or in form. Perhaps the most major development of the New Law is that it now restricts the grounds of annulment to specific circumstances, mostly, but not fully, based on those provided in the New

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117. New Law, *supra* note 3, art. 46; UNCITRAL Model Law, *supra* note 16, art. 33.

118. New Law, *supra* note 3, art. 46(2).

119. UNCITRAL Model Law, *supra* note 16, art. 33.

120. New Law, *supra* note 3, art. 47.

121. UNCITRAL Model Law, *supra* note 16, art. 33.

122. New Law, *supra* note 3, art. 48; UNCITRAL Model Law, *supra* note 16, art. 33.

123. Old Law, *supra* note 3, art. 19. Although this was temporally limited to 15 days from the day that the party is notified of the award, Article 19 of the Old Law provides:

Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.

York Convention.<sup>124</sup>

Moreover, the New Law now clearly states that the arbitration award would not be subject to any form of appeal other than by the method provided for setting aside the award.<sup>125</sup> It also specifically states that the Competent Court may not examine the facts or the subject of the dispute when hearing claims for annulment,<sup>126</sup> although the New Law does contradict this to a certain extent by permitting courts to annul awards that are in contravention with the rules of the *Shari'a* or when the subject of the dispute is not capable of being arbitrated.<sup>127</sup>

Under the New Law a claim for the annulment of an arbitration award may be heard by the Competent Court only in specific circumstances, which are:<sup>128</sup>

- (i) if the award is rendered in the absence of an arbitration agreement or the Arbitration Agreement is null or is voidable or if it has expired;<sup>129</sup>
- (ii) if one of the parties to the arbitration agreement lacked capacity to enter into such an agreement;<sup>130</sup>
- (iii) if one of the parties to the arbitration was not able to submit his defense as a result of not being correctly notified of the initiation of arbitration proceedings, or of the appointment of an arbitrator, or for any other reason beyond his control;<sup>131</sup>
- (iv) if the arbitration award fails to apply any of the procedural rules that the parties had agreed to apply (this is an addition to the conditions provided under the New York Convention);
- (v) if the tribunal was formed, or if arbitrators were appointed, in a manner that violates the New Law or the agreement of the parties;<sup>132</sup>
- (vi) if the arbitration award deals with matters that fall beyond the scope of the Arbitration Agreement (although, if such matters can be separated from those included in the Arbitration Agreement, then only the matters

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124. New Law, *supra* note 3, art. 50; New York Convention, *supra* note 10, art. V.

125. New Law, *supra* note 3, arts. 49-51.

126. *Id.* at art. 51(4).

127. *Id.* at art. 50(2). Article 2 of the New Law states that “[t]he provisions of this Regulation shall not apply to disputes related to personal status and issues where reconciliation may not be permissible.”

128. *Id.* at art. 50.

129. This roughly corresponds to Article V(1)(a) of the New York Convention, *supra* note 10.

130. *See also id.* at art. V(1)(a).

131. This is based on Article V(1)(b) of the New York Convention, although the New York Convention somewhat vaguely includes situations where “[t]he party against whom the award is invoked . . . was otherwise unable to present his case.” *Id.* at art. V(1)(b).

132. *See also id.* at art. V(1)(d).

falling beyond the scope of the Arbitration Agreement will be annulled);<sup>133</sup>  
or

(vii) if the tribunal failed to observe necessary provisions in relation to the award, or if the award is based on void arbitration procedures which have affected it (this is an addition to the conditions provided under the New York Convention).

As set out above, the New Law also permits the Competent Court to nullify an arbitration award, either upon the application of one of the parties or on its own accord, if the contents of the award are in contravention with the rules of the *Shari'a* or if the subject of the dispute is not capable of being arbitrated.<sup>134</sup> It should be noted here that Saudi Arabia is a signatory to the New York Convention, but nevertheless these two circumstances for setting aside the award would fall under the public policy exception under Article V(2) of the New York Convention.

A claim for the annulment of an arbitral award must be submitted by any of the parties to the Competent Court within 60 days of that party being notified of the award, otherwise the award will become final.<sup>135</sup> Should the Competent Court decide to uphold the arbitration award, then its decision will also contain an order for the enforcement of the award, and the award would then become final.<sup>136</sup> Conversely, if the Competent Court decides to annul the award, then this decision would be open to appeal within a period of 30 days from the notification of the Competent Court's judgment.<sup>137</sup>

A remarkable provision in the New Law seeks to protect the parties' right to request the annulment of the award. This provides that even if a party forfeits its right to seek annulment prior to the issuance of the award, the award cannot be enforced so as to prevent the Competent Court from hearing that party's claim for annulment; it is understood, however, that a party may forfeit such right after the issuance of the award.<sup>138</sup>

### III. Recognition and Enforcement of Arbitral Awards

The New Law now expressly provides for the finality and enforceability of arbitration awards issued under it, albeit subject to complying with the relevant requirements.<sup>139</sup> This was not the case under the Old Law, as all awards had to be

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133. See also *id.* at art. V(1)(c).

134. New Law, *supra* note 3, art. 50(2).

135. *Id.* at art. 51(1).

136. *Id.*

137. *Id.* at art. 51(2).

138. *Id.* at art. 51(1).

139. *Id.* at art. 52.

approved by the Competent Court before taking on a final and binding effect, a process that could easily take months.<sup>140</sup> As there are potential annulment proceedings, in addition to enforcement proceedings, to take into account, the effect of this provision is to simplify the requirements and the process of enforceability rather than to make all arbitral awards final and enforceable *per se*.<sup>141</sup> In comparison with the position under the Old Law, this is still a significant development.

An application for the enforcement of an arbitral award may only be tendered after the passing of the 60-day period within which annulment proceedings may be initiated.<sup>142</sup> This appears to be the case regardless of whether or not annulment proceedings are in fact commenced.<sup>143</sup> In other words, it may be possible under the New Law to have concurrent enforcement and annulment proceedings, although, enforcement proceedings may be suspended upon the applicant's request should there be serious grounds for suspension, and the court may order the applicant to provide a guarantee under such circumstances.<sup>144</sup>

The Competent Court, prior to issuing an order for the enforcement of the award must actively ensure that (i) the award does not contravene a previous judgment issued by a Saudi court, committee, or authority possessing jurisdiction over the subject matter; (ii) does not contravene the *Shari'a* and if so, then the offending portion of the award would be severed, while the rest of the award would be enforced; and (iii) the losing party had been correctly notified of the award.<sup>145</sup>

#### IV. Issue of Arbitrability and Public Policy

It is important to recognize that too often parties are too readily using boilerplate templates and clauses from other documents when drawing up new contracts, and thus are likely to be inserting arbitration clauses without considering the suitability of arbitration as an effective dispute resolution mechanism. The truth is that not every type of dispute is arbitrable, and many factors ranging from financial to legal considerations must be weighed before a decision is made to adopt arbitration as a dispute resolution mechanism. This becomes more complicated when dealing with foreign jurisdictions where the laws are not familiar to English-speaking lawyers. Such unfamiliarity often leads to

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140. Old Law, *supra* note 3, arts. 18-20.

141. It would be very rare for arbitral awards to be considered final and enforceable *per se*, no matter what legal framework governs the proceedings.

142. New Law, *supra* note 3, art. 55(1).

143. *Id.* at art. 54.

144. *Id.*

145. *Id.* at art. 50(2).

adoption of arbitration as a tool that will “transfer” the dispute to more familiar jurisdictions applying more familiar procedures.<sup>146</sup> As discussed in the first part of this paper, the finality of the foreign arbitration award and its enforceability in the home jurisdiction of the dispute is often ignored or not fully considered, which may sometimes result in what can only be described as a pyrrhic victory. After all, what value is any dispute resolution award that cannot be enforced where the defendant’s assets are located?<sup>147</sup> Furthermore, there should be a clear distinction between recognition of an international arbitral award and its enforcement, whereby a national court could recognize an arbitral award but its application is rejected for a particular reason, for example, the arbitral award is contrary to public policy.<sup>148</sup>

Choosing arbitration as a dispute resolution approach requires not only knowledge of the local arbitration law; rather, the totality of the laws affecting the parties and their transaction(s) must be considered, analyzed, and assessed. The “totality” approach must be framed within the understanding that civil law in general, and *Shari’a* law in particular—in ways not too different from common law, one must add—have not developed a general theory for allocating specific dispute resolution methods to different types of disputes. The totality approach to arbitration becomes even more pressing once we consider the rather constrained nature of the powers of the arbitrator, who is appointed by the parties themselves and not by the state.

Additionally, arbitration as a tool has considerable scope differences between developed and developing countries. Developed common law jurisdictions such as the United States or the United Kingdom have had developments that now allow, if the parties agree, for arbitration of otherwise previously prohibited disputes for public policy reasons. Such newly found arbitration areas include financial relief under pre-nuptial agreements,<sup>149</sup> shareholders’ disputes,<sup>150</sup> intellectual property

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146. See Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT’L 395, 396–430 (1998).
147. See James M. Rhodes & Lisa Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSNAT’L L. 19 (1984); Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT’L. & COMP. L. Q. 358, 359-87 (1981); David J. Branson & Michael W. Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT’L L. 917 (1983).
148. See JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 1* (Kluwer Law International, 2003), available at [http://books.google.com/books?hl=en&lr=&id=b1OgnDQ2UnwC&oi=fnd&pg=PR1&dq=comparative+International+Commercial+Arbitration+\(Kluwer+Law+International,+2003\)+690.&ots=l6RiHigoUU&sig=-r4pGjBb18ZswyM33r1NFu3FI4k](http://books.google.com/books?hl=en&lr=&id=b1OgnDQ2UnwC&oi=fnd&pg=PR1&dq=comparative+International+Commercial+Arbitration+(Kluwer+Law+International,+2003)+690.&ots=l6RiHigoUU&sig=-r4pGjBb18ZswyM33r1NFu3FI4k).
149. See Nancy R. Schembri, *Pre-nuptial Agreements and the Significance of Independent Counsel*, 17 J. CIV. RIGHTS ECON. DEV. 313 (2003).
150. Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for*

licensing agreements,<sup>151</sup> and even anti-competitive transactions,<sup>152</sup> which are traditionally the preserve of state courts.

The issue of public policy and the debate about it is more fluid and transitional in developing jurisdictions like Saudi Arabia in particular, and other Gulf Cooperation Council (GCC) countries in general. This is due to various factors such as the lack of transparency, the unclear legislative process that usually centers on royal edicts rather than parliamentary debate, and the varying treatment and protections granted to contractual obligations of the government versus those of the private sector.

Thus, given the rapidly evolving social, economic, and legal nature of the Saudi environment, the achievement of efficient dispute resolution via arbitration can very much depend on the way the claim is formulated and the nature of the relief sought. Thus, the expense of ample time analyzing the most viable dispute resolution mechanism is a worthy investment for contracting parties; likewise, the conducting of arbitration proceedings in a manner that is sensitive to the requirements for enforcement in Saudi Arabia is of vital importance.

## V. Conclusion

International contracting parties are keen to avail themselves of the unique features afforded to arbitration versus litigation in national courts in commercial disputes, such as choice of neutral forum, the ability to appoint arbitrators with a technical background appropriate to the subject matter of the dispute, enhanced enforceability of decisions internationally, and greater procedural flexibility and privacy of procedures. The Old Law fell short on many of those fronts. Even though the New Law might still leave more to be desired compared to other more progressive arbitration laws, especially given the restrictions on finality of award presented by the *Shari'a* public policy exception, it can only be seen as a step in the right direction when it comes to the attitude of Saudi authorities towards arbitration. A commendable step, the New Law is likely to be considered more familiar and approachable to international litigants than the Old Law, particularly

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*Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187 (2013); Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829 (2013); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65 (2013).

151. See Thomas D. Barton & James M. Cooper, *Symposium Introduction: Advancing Intellectual Property Goals Through Prevention and Alternative Dispute Resolution*, 43 CAL. W. INT'L L.J. 5, (2012); Jacques De Werra, *International Intellectual Property Arbitration: How to Use it Efficiently?*, SINGAPORE LAW GAZETTE 27, 27–30 (January 2012).

152. Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID REVIEW (Jan. 9, 2014).

as it provides the arbitral tribunal with more control over the process than before. Based upon this, there is hope that the arbitration proceedings and awards instituted under the New Law will usher in a new era for the enforcement of arbitral awards in Saudi Arabia. Recent developments, including the issuance of a new Enforcement Law in July of 2012<sup>153</sup> and the establishment of a commercial arbitration center, the Saudi Center for Commercial Arbitration (SCCA) in Saudi Arabia in July 2014,<sup>154</sup> are particularly encouraging.

But the New Law is still untested, as no major awards have yet been brought for enforcement,<sup>155</sup> and there are still major issues keeping people away from Saudi dispute resolution, such as the lack of suitably qualified arbitrators, the lack of a professional lawyers' syndicate, and the lack of arbitration centers in Saudi Arabia. More importantly, the court system requires a major overhaul and a codified civil transactions law (even one based on *Shari'a*), in addition to accurate reporting of Saudi court jurisprudence. These reforms are ultimately necessary to create more certainty and to build confidence in the Saudi legal system, otherwise risk averse international parties will continue to seek arbitration abroad.

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153. Royal Decree No. M/53 dated 13 Sha'baan 1433H, corresponding to 3 July 2012G (Saudi Arabia).

154. Abdul Rahman Al-Zamil, *CSC sets up center for commercial arbitration*, ARAB NEWS (July 16, 2014, 12:13 AM), <http://www.arabnews.com/news/602551>.

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