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Arbitration in the Kingdom of Saudi Arabia

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ABSTRACT

Arbitration has a long history in the Kingdom of Saudi Arabia. It has been used for centuries under Shari'ah law in the Kingdom. However, foreign investors in recent years have experienced difficulty in using arbitration in the country. Saudi Arabia has therefore enacted a new arbitration law that is an improvement over the thirty-year old arbitration law that it replaced. The new arbitration law is based on the UNCITRAL Model Law on International Commercial Arbitration but with modifications to ensure that the arbitration process does not 'violate Shari'ah' as practiced in the Kingdom. The article reviews the important components of the new arbitration law and provides a comparative analysis of it to the previous law and international arbitration practice. It also analyses the recognition and enforcement of international arbitration awards in Saudi courts, including the impact of Shari'ah and the new arbitration and enforcement laws. Finally, it provides a narrative on the Saudi court system and its role in arbitration.

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I. HISTORY OF ARBITRATION IN THE KINGDOM

Arbitration has a long history in the Middle East and, in particular, Saudi Arabia. *Shari'ah*, which is the law of the Kingdom and which means the 'path' in Arabic, has recognized arbitration (or *tahkim* in Arabic) as a method for settling disputes from its earliest beginnings. People of the region used arbitration prior to the establishment of an Islamic judiciary and even into pre-Islamic times.¹ The *Qur'an* approves of arbitration: 'If ye fear a breach between them, then appoint arbiters . . . If they wish for peace, God will cause their conciliation, for God hath full knowledge and is acquainted with all things.'²

The Prophet Muhammad used arbitration to resolve disputes and advised others to use it. His arbitration between the clans of the Quraysh tribe during the renovation of the *Ka'ba* is significant in the history of Islam and the development of *Shari'ah*. A dispute broke out between the tribes on who would reinsert the Black Stone in the *Ka'ba* after its renovation. No clan chief wanted to relinquish this great honour to any other clan. Through his successful arbitration of that dispute, the Prophet Muhammad prevented potential war among the Quraysh tribes.

The first treaty signed by the Muslim community, the Treaty of Medina in AD 622, provided for arbitration to resolve disputes. All four major schools of Sunni jurisprudence, the *Hanbali* School (which is the predominant school in Saudi Arabia), the *Hanafi* School, the *Maliki* School and the *Shafi'i* School, have supported and used arbitration for centuries.

However, this wide acceptance of arbitration in the Middle East was challenged by a series of controversial international arbitration awards³ dealing with the oil & gas business in the region starting in the 1950's and continuing over a thirty year period. One of them was *Saudi Arabia v Arabian American Oil Co. (ARAMCO)*.⁴

The tribunal in that arbitration agreed that the law of Saudi Arabia governed the concession contract that was at the centre of the dispute but it was not prepared to fully apply *Shari'ah*. It instead supplemented *Shari'ah* with 'the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence'⁵ whenever private rights would not be secured by the law in force in Saudi Arabia. This resulted in the tribunal denying the Kingdom's right to award a transport concession to Aristotle Onassis and finding in favour of Aramco,

¹ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* 13 (Kluwer, 2nd ed. 1999). 'The Arabs of Jahiliya (pre-Islamic period) knew arbitration because adversaries (be they individuals or tribes) usually resorted to arbitration in order to settle their disputes.'

² Qur'an 4:35.

³ See generally: *Sapphire International Petroleum v. NIOC*, 13 Int'l & Comp. LQ (1964) p. 1011. *BP v. Libya*, 53 International Law Reports (1979) p. 297. *TOPCO v. Libya*, 17 ILM (1978) p. 3. *LIAMCO v. Libya* Award of 12 April 1977, Yearbook VI (1981) p. 89. *Kuwait v. AMINOIL*, 21 ILM (1982) p. 976.

⁴ *Saudi Arabia v. Arab Am. Oil Co. (ARAMCO)*, 27 ILR 117 (1963). See also: Judge Stephen M. Schwebel, *The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement*, *Journal of World Energy Law & Business*, 2010, Vol. 3, No. 3 at 245. *Saudi Al-Ammari, Saudi Arabia and the Onassis Arbitration – A Commentary*, *Journal of World Energy Law & Business*, 2010, Vol. 3, No. 3 at 257.

⁵ Schwebel, *supra* note 4 at 250.

which at the time was an American consortium that had the exclusive right to explore, exploit & transport oil within the Kingdom.

Despite its disappointment, the Saudi government accepted the tribunal's decision and continued to honour the contract. Instead of rejecting the arbitration decision and attempting to nationalize its oil industry, the Kingdom re-negotiated the concession with Aramco's shareholders. This resulted in an agreement by which the government began a staged purchase of the entire interest of the company's assets and operations. The Kingdom acquired a 25% interest in Aramco in 1973, increasing to 60% in 1974 with the final transfer of the company's assets and operations in 1980. The government then created by Royal Decree in November 1988 a new legal entity, Saudi Aramco, which resulted in the world's largest oil company.

As a result of the disappointment within the Kingdom that arose from the Aramco case, the Saudi Council of Ministers enacted Resolution No. 58, which prevented Saudi government ministries and agencies from participating in arbitration. That initial reaction began to change when Saudi Arabia ratified the Riyadh Convention⁶ among Arab League states in 1985 and the New York Convention⁷ in 1994, both of which provide for the reciprocal recognition and enforcement of international arbitration awards. In parallel with the ratification of those conventions, Saudi Arabia enacted an arbitration law (the 'Old Arbitration Law')⁸ in 1983. However, this law became to be seen as difficult and inefficient in resolving business disputes within the country. It allowed Saudi courts to intervene throughout the arbitration process, resulting in arbitrations being stymied and arbitration awards not being enforced. Saudi courts regularly re-examined the merits of arbitration awards when asked to enforce them with the result that parties were often forced to re-litigate arbitrated cases in the Kingdom's courts.

Both the New York and Riyadh Conventions permit member states to refuse enforcement of arbitral awards that are contrary to public policy. Article V.2 of the New York Convention permits, but does not require, a court to refuse enforcement based on the law or the public policy of the enforcing state.⁹ The Riyadh Convention states in Article 30(a) that any of its signatory states may refuse the recognition and enforcement of arbitral awards that are contrary to the provisions of the 'Muslim *Shari'ah*, its Constitution, or its public policy or good morals.' Saudi courts relied upon these exceptions to refuse recognition and enforcement of foreign arbitral awards if they determined that the award, the arbitral process or

⁶ Saudi Arabia ratified the Riyadh Arab Agreement for Judicial Cooperation from its inception in 6 April 1983.

⁷ The date of effect for Saudi Arabia's accession to the New York Convention is 18 July 1994.

⁸ Royal Decree No. M/46 dated 12 Rajab 1403H, corresponding to 25 April 1983G.

⁹ Article V.2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 provides:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

the governing law was contrary to *Shari'ah*, which is both the law and the public policy of the Kingdom. In Saudi courts, similar to other Islamic courts, violation of the mandatory provisions of *Shari'ah* is considered a violation of Islamic public policy. As a result, Saudi courts often refused to recognize and enforce foreign arbitral awards while reviewing them for compliance with *Shari'ah*.

The perception as an arbitration 'unfriendly' jurisdiction appears to be changing. The catalyst is the enactment of two new laws in 2012. Saudi Arabia's new arbitration law (the 'New Arbitration Law')¹⁰ replaces the Old Arbitration Law and a new enforcement law (the 'Enforcement Law')¹¹ is intended to improve the execution of judgments and awards of all kinds in the Kingdom. They are part of the Kingdom's broad, ongoing reform of its legal system that is intended to improve the business environment, support sustainable economic development and enhance foreign investment in Saudi Arabia.

The New Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law'). The Model Law has been used as the basis for the arbitration law of nearly seventy countries. It reflects a consensus on key aspects of international arbitration practice that has been accepted by states of all regions and from different legal and economic systems of the world. UNCITRAL encourages states to make as few changes as possible when incorporating the Model Law into their legal systems, which has resulted in many states using the Model Law verbatim in their legislation. Saudi Arabia has not. The Kingdom has used the Model Law as its starting point. It then made significant changes to address issues of concern to it, in particular by repeatedly requiring the arbitration process to not 'violate *Shari'ah*' as practiced in the Kingdom.

II. ARBITRABLE DISPUTES

The Old Arbitration Law was not clear on what kinds of disputes were allowed to use arbitration. The New Arbitration Law provides clarity in Article 2 by stating that it... shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute...' It does carve out personal disputes and matters not subject to reconciliation, e.g., criminal matters. Similar to the Old Arbitration Law, which was based upon the principle in Resolution No. 58

¹⁰ Royal Decree No. M/34 dated 24 Jumada 1433H, corresponding to 16 April 2012G. On 8 June 2012 the law was published in the official gazette, Um Al-Qura. In accordance with Article 58 of the New Arbitration Law, the law came into force 30 days after the date of its publication, which was 19 Sha'baan 1433H corresponding to 9 July 2012G. The Implementing Regulations of the New Arbitration Law were not published as of the date that this article was written. The English translation of the New Arbitration Law can be found on the website of the Saudi Bureau of Experts, which provides all official translations of Saudi laws and regulations: <http://www.boe.gov.sa>.

¹¹ Royal Decree No. M/53 dated 13 Sha'baan 1433H, corresponding to 3 July 2012G. The Enforcement Law was published in the official gazette, Um Al-Qura in Issue No. 4425, Year 90, 13 Shawal 1433H, corresponding to 31 August 2012G. In accordance with Article 98 of the Enforcement Law, the law came into force 180 days after the date of its publication, which was 16 Rabi II 1434H corresponding to 27 February 2013G. The Implementing Regulations of the Enforcement Law were published on 17 Rabi II 1434H corresponding to 28 February 2013G.

described above, Article 10.2 of the New Arbitration Law does not allow government entities to use arbitration except when approved by the Prime Minister, unless there is a special law approved by the Council of Ministers allowing that on a regular basis.

The Old Arbitration Law was restricted to domestic arbitrations. The New Arbitration Law covers both domestic and international commercial disputes. Even though the Model Law was designed with international commercial arbitration in mind, it provides a set of basic rules that can also be used in domestic commercial arbitration. Saudi Arabia has followed that route and has included domestic commercial arbitration, along with international commercial arbitration, in its New Arbitration Law. Article 3 of the New Arbitration Law defines what is considered international. It follows the principles found in the Model Law. It provides that an arbitration is international in the following situations:

- (1) If the parties to an arbitration agreement have their head office in more than one country at the time of conclusion of the arbitration agreement. If a party has multiple places of business, consideration shall be given to the place of business most connected to the subject matter of the dispute. If either or both parties have no specific place of business, consideration shall be given to their place of residence.
- (2) If the two parties to arbitration have their head office in the same country at the time of conclusion of the arbitration agreement, and one of the following places is located outside said country:
 - (a) the venue of arbitration as determined by or pursuant to the arbitration agreement;
 - (b) any place where a substantial part of the obligations of the commercial relationship between the two parties is executed;
 - (c) the place most connected to the subject matter of the dispute.
- (3) If both parties agree to resort to an organization, standing arbitration tribunal or arbitration centre situated outside the Kingdom.
- (4) If the subject matter of the dispute covered by the arbitration agreement is connected to more than one country.

Article 5 of the Old Arbitration Law required the parties to file their arbitration agreement with the courts and to obtain their approval prior to initiating an arbitration. That requirement has disappeared under the New Arbitration Law where Article 26 states that '[t]he arbitration proceedings shall commence on the day a request for arbitration made by one arbitration party is received by the other party, unless otherwise agreed by both parties.' This new procedure follows standard international practice where any party can start an arbitration by serving notice to the other party without any involvement of the courts. The New Arbitration Law allows an arbitration to proceed in the event a respondent fails to

file its defence or if one of the parties fails to appear.¹² If a party fails to object to a violation of the arbitration law or the arbitration agreement within thirty days of knowing the violation or within an agreed time limit, that party is considered to have waived its objection.¹³ It also enables the arbitrators to ask the competent agency or court for help in the arbitration process, including the summoning of a witness or ordering the production of documents.¹⁴

III. ARBITRATION AGREEMENT

The Old Arbitration Law did not require a written arbitration agreement to initiate an arbitration. It simply required that persons with full legal capacity enter into the arbitration. The ability to proceed with an arbitration was thus often at the discretion of the competent court. Similar to the Model Law, Article 9 of the New Arbitration Law now requires that the arbitration agreement be in writing. It can be entered into prior to or at the time of the dispute. It can be in a contract or independent of it. It can be in print or electronic format and it can be as simple as making reference to arbitration provisions found in another document containing an arbitration clause, a model contract or an international treaty.

Article 21 of the New Arbitration Law provides that the arbitration agreement is separate from the contract itself. This is in alignment with the internationally accepted doctrine of separability, i.e., an arbitration clause is 'separable' from the contract in which it is included allowing the arbitration clause to be valid even if the contract is not.

IV. ARBITRATION TRIBUNAL

The Old Arbitration Law required arbitrators to be experienced, of good conduct and reputation and be of full legal capacity. Article 3 of the Implementing Regulations of the Old Arbitration Law further required arbitrators to be either Saudi citizens or non-Saudi Muslims with the chairman being conversant with the legal rules and traditions of Saudi Arabia. In addition, the *Hanbali* school of jurisprudence, which is the dominate Islamic school in Saudi Arabia, required arbitrators to have the same qualifications as Saudi judges, which in practice meant that arbitrators had to be male and Muslim since that is the profile of Saudi judges. It is still controversial whether women are prohibited from being arbitrators, which could result in Saudi courts refusing to enforce arbitral awards issued by female arbitrators. In practice, Saudi courts have generally taken the gender of the arbitrator into consideration for determining the enforceability of domestic arbitrations but not for international arbitrations.

Article 14 of the New Arbitration Law now requires that arbitrators be of full legal capacity, of good conduct and reputation, and have at least a university

¹² Articles 34.2 and 35.

¹³ Article 7.

¹⁴ Article 22.3.

degree in either *Shari'ah* or law.¹⁵ Where the tribunal has more than one arbitrator, only the tribunal chair has to meet this last requirement. A sole arbitrator would need to meet all of these qualifications. The New Arbitration Law does not provide for the selection of arbitrators on the basis of nationality, religion, gender or race. It does require arbitrators to be independent, have no personal interest in the dispute and to state so in writing.¹⁶

The Old Arbitration Law provided that the court would supervise the conduct of the arbitration, including appointing the arbitral tribunal where the parties failed to agree upon the arbitrators and replacing an arbitrator when needed. The New Arbitration Law is similar to the Model Law in allowing the parties to select their arbitral tribunal without the intervention of the courts. It provides a detailed procedure for selecting an arbitral tribunal in the event the parties have not selected an arbitration procedure in their agreement.¹⁷ The tribunal can be one or more arbitrators, as long as it is an odd number. The selection process for multiple arbitrators is similar to many institutional rules: Each party nominates an arbitrator who together then agree upon the tribunal chair. If either party fails to appoint its arbitrator or if the two arbitrators cannot agree on the chair within fifteen days following receipt of a request to do so, the competent court will appoint the arbitrator(s) within thirty days from the date of request. The New Arbitration Law also provides procedures for challenging the appointment of arbitrators.¹⁸

The New Arbitration Law requires the parties to enter into a contract with the arbitrator(s) regarding fees, a copy of which must be filed with the government entity specified in the Implementing Regulations. It is expected that the Implementing Regulations will assign that responsibility to the international arbitration institution selected by the parties in an international commercial arbitration and as determined by the parties under *ad hoc* arbitration. If no agreement is reached with the parties, the competent court will set the fees. Any appointment of arbitrators by a competent court will include the setting of arbitrator fees.¹⁹

Arbitral tribunals have the authority under the New Arbitration Law to rule on their own jurisdiction using the widely accepted principle of *Competence/Competence* and to decide whether there is a valid arbitration agreement.²⁰ They do not have to turn to the courts to determine if they have the authority to proceed with an arbitration.

¹⁵ The New Arbitration Law does not specify whether a law degree needs be issued from a certain university or jurisdiction. It is therefore likely that a law degree from another jurisdiction will not be questioned. In the event that there are questions around an arbitrator's legal qualifications, the Saudi Ministry of Higher Education can be requested to recognize an equivalent foreign degree in Saudi Arabia. This is a lengthy process involving notarization, consularization and translation of the degree.

¹⁶ Article 16.1.

¹⁷ Articles 13-15.

¹⁸ Article 17.

¹⁹ Article 24.

²⁰ Article 20.

An arbitration tribunal can also conciliate if authorized by the parties.²¹ Conciliation was the preferred method of the Prophet Mohammad and stems from the religious obligation that ‘members of the community remain at peace with one another’ and that Muslims maintain solidarity with one another. *Shari’ah* thus encourages conciliation. If arbitrators do act as conciliators however, their conciliation decision must be unanimous and must be decided in accordance with the rules of equity and justice.²²

V. PROCEDURAL RULES

The New Arbitration Law allows parties to use procedural rules of their choosing including the rules of international arbitration institutions or *ad hoc* international arbitration rules, as long as they do not contravene *Shari’ah* and the public policy of the Kingdom.²³ If the parties cannot agree, the arbitral tribunal has the authority to select the procedural rules. It is similar to the Model Law in dealing with the situation where parties have not agreed on the procedural rules that should apply to their arbitration. In such a situation, the New Arbitration Law sets out a detailed arbitration procedure that applies by default. It includes features commonly used in international arbitration (such as pleadings, witness statements, expert reports and hearings). Despite those commonalities with international arbitration practice, it is better for parties to choose procedural rules they are familiar and comfortable with rather than rely upon this default provision.

The New Arbitration Law also allows parties to select their own arbitration rules and institutions for domestic commercial arbitrations. Article 2 states that ‘... the provisions of this Law shall apply to any arbitration regardless of the nature of the legal relationship subject of the dispute, if this arbitration takes place in the Kingdom...’. This allows Saudi companies to utilize arbitration rules and institutions of their choosing in contracts with other Saudi parties for business within Saudi Arabia.

VI. SEAT OF ARBITRATION

The parties are now free to choose the seat of their arbitration, whether inside or outside of Saudi Arabia. If the parties cannot agree, the tribunal has the authority to decide taking into consideration the circumstances of the case and the convenience of the venue to the parties.²⁴ The Old Arbitration Law did not provide such flexibility.

Saudi courts are now required under the New Arbitration Law to recognize and enforce awards from international venues outside of the Kingdom. However, one needs to recognize that Saudi courts have traditionally been suspicious of arbitral

²¹ Article 38.2.

²² Article 38.2 and 39.4.

²³ Articles 5, 25 and 38.

²⁴ Article 28.

awards issued outside of the country and the Islamic region in general, because of their concern that *Shari'ah* may not have been applied in the proceedings or in the arbitral award.

One strategy that parties can therefore use to increase their ability to enforce an international arbitration award in Saudi courts is to select an arbitration venue in either Saudi Arabia, in a GCC country or in the Islamic world at large. International companies now have some viable options to implement such a strategy. There are a number of venues that have been recently established in the GCC region that are arbitration friendly, employ modern international arbitration practices and function within the Islamic world. Choosing one of them as a venue could ensure both an interference-free and effective arbitration in the place of arbitration and an enforceable award in Saudi Arabia.

VII. SUBSTANTIVE LAW OF THE CONTRACT

The Old Arbitration Law was silent on the parties' ability to choose the governing law of their contract. It simply required that an arbitral award be issued pursuant to *Shari'ah* and the 'laws in force'.

Article 38 of the New Arbitration Law allows the parties to choose the substantive law of their contract and requires the arbitrators to apply that law. If the parties have not agreed upon the substantive law of the contract, the arbitral tribunal shall apply the law most connected to the disputed subject. However, this must be done without violating *Shari'ah* or the public policy of the Kingdom. *Shari'ah* does not require that the substantive law applied in an arbitration be *Shari'ah*. Choosing a non-Islamic legal system where one of the disputing parties is not a Muslim is considered valid by the various Islamic schools of jurisprudence. However, provisions of the chosen substantive law, which are contrary to express stipulations of *Shari'ah* are unenforceable. Therefore, parties and arbitrators need to apply the chosen law in their contracts and awards in a way not to violate the principles of *Shari'ah*. Failure to do so will adversely affect the enforceability of an award in Saudi Arabia.

One way of directly addressing that risk when parties have selected a non-Saudi law for their contract but wish to ensure enforcement in Saudi courts is by drafting a choice of law or governing law clause similar to the following:

This agreement is governed by and all disputes arising under or in connection with this agreement shall be resolved in accordance with the laws of _____, except to the extent it may conflict with *Shari'ah*, in which case *Shari'ah* shall prevail in that particular conflict.

VIII. LANGUAGE

Article 25 of the Implementing Regulations of the Old Arbitration Law required that 'Arabic shall be the official language to be used before the arbitral tribunal

whether at the hearing or in correspondence. Neither the tribunal nor the arbitrators shall speak any language but Arabic. The foreigner who cannot speak Arabic may bring an interpreter who will sign with him the record of the interpreted statements from the session.' Article 29 of the New Arbitration Law is much more flexible in providing that the:

Arbitration shall be conducted in Arabic, unless the arbitration tribunal or the two parties to [the] arbitration, agree on another language or languages. Such agreement or decision shall apply to the language of the written statements and notes, oral arguments and any decision, message or award made by the arbitration tribunal, unless otherwise agreed by both parties or decided by the arbitration tribunal.

The result is that parties can choose to have their contracts in a non-Arabic language, such as English, conduct their arbitration in that language and have the arbitral tribunal issue its award in that language and still be recognized and enforced in Saudi courts. It is important, however, to clearly state the selected language in the dispute resolution clause if the parties wish to use a different language from Arabic. Otherwise, Article 29 provides that the default language is Arabic. If the selected language is a language other than Arabic, Article 53.3 requires that when Saudi courts are requested to enforce an award not issued in Arabic that there is an '... Arabic translation of the arbitration award attested by an accredited authority ...' submitted to the court. That accredited authority must be a translation service certified by the Saudi Ministry of Commerce and Industry.

IX. EXPERTS

Similar to the Model Law, an arbitral tribunal now has the right to appoint one or more experts to report on specified matters and the parties are required to provide such expert(s) with requested information. The tribunal must provide a copy of the expert's report to each party who has the right to provide feedback. At the discretion of the tribunal, the expert shall participate in a hearing where the parties are given the opportunity to hear from and put questions to the expert.²⁵

X. INTERIM MEASURES AND PRELIMINARY ORDERS

Interim measures, preliminary or temporary orders, and injunctive relief are available, but not often used, in Saudi courts. The Old Arbitration Law did not provide for such measures. That has changed in the New Arbitration Law, which reflects the approach of the Model Law that does provide for them. The New Arbitration Law follows the 1985 version of the Model Law, which is brief about interim measures, rather than the 2006 version of the Model Law, which has an expanded section on interim measures. Article 23 of the New Arbitration Law

²⁵ Article 36.

simply provides that the ‘... arbitration tribunal shall, upon the request of either party, order either party to take, as it deems fit, any provisional or precautionary measures required by the nature of the dispute.’ If the order is ignored, the party that requested the order has the right to request the ‘competent agency’, which would be the Saudi courts, to enforce that order.

In addition to the tribunal’s authority described above, the New Arbitration Law under Article 22 allows any of the arbitration parties to go directly to the Saudi courts for interim measures prior to the arbitration or for the tribunal to seek such assistance from the courts at any time.

XI. ISSUANCE OF AN ARBITRATION AWARD

Arbitration awards under the Old Arbitration Law had to be issued within ninety days from commencing the arbitration, unless the parties had agreed upon another period in the arbitration agreement or the supervising court or the arbitral tribunal itself extended the time for the award to be issued. Upon that time period expiring, either party was entitled to commence a separate proceeding in the supervising court. This allowed a party to ignore the arbitration process, which often resulted in the arbitration agreement and award having no effect.

The New Arbitration Law provides that the ‘... arbitration tribunal shall render the final award ending the entire dispute within the period agreed upon by both parties. In the absence of agreement, the award shall be issued within twelve months from the date of commencement of arbitration proceedings’, subject to the tribunal’s authority to extend it for six months.²⁶ This is a much more realistic timeframe to hear and decide upon major commercial disputes than was the case under the Old Arbitration Law. However, for the sake of certainty around the enforceability of an award, parties should provide in their arbitration clause that the tribunal can issue its award within a reasonable time after the completion of the arbitration proceedings.

The New Arbitration Law requires that the arbitration award not violate *Shari’ah* or the public policy of Saudi Arabia.²⁷ Tribunals can issue interim or partial awards. Arbitration awards must be rendered by a majority of the tribunal.²⁸ The award must be in writing, reasoned and signed by the arbitrators. It must include the date and place of issue, names and addresses of the parties and the arbitrators, and a summary of the arbitration agreement, pleadings and reports, along with the fees and expenses of the arbitration.²⁹ The award must be kept confidential unless the parties have provided their written approval.³⁰

A party may request the tribunal, with a copy to the other party, within thirty days from receipt of the award to clarify any ambiguity in the award. The

²⁶ Article 40.

²⁷ Article 38.

²⁸ Article 39.1.

²⁹ Article 42.

³⁰ Article 43.2.

clarification must be issued within thirty days from the date of the request.³¹ A party can also request the tribunal within thirty days from receipt of the award to address claims missed in the award that were submitted in the arbitration. It must notify the other party of such request prior to submitting it to the tribunal.³² The tribunal can also correct its clerical errors in an issued award.³³

The New Arbitration Law has a unique provision that places a new obligation on the tribunal when it issues its arbitration award. Article 44 requires the arbitration tribunal to file the award along with an Arabic translation at the competent court within fifteen days from its issuance. It states that:

The arbitration tribunal shall deposit the original award or a signed copy thereof in its original language with the competent court within the period set in Article 43 (Paragraph 1) of this Law, accompanied by an Arabic translation of the award attested by an accredited body if the award is issued in a foreign language.

Article 43.1 of the New Arbitration Law requires the arbitration tribunal to deliver a copy of the arbitration award to each arbitration party within fifteen days from its date of issuance. Article 44 therefore requires the arbitration tribunal to deposit the original award and an Arabic translation from a Saudi accredited translation agency at a Saudi court within the same time period (fifteen days after issuance of the award) that it delivers the award to the parties.

This is contrary to Article 36(2) of the Model Law and what parties and tribunals would expect under standard international arbitration practice:

The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

This article of the Model Law has a footnote that states:

The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Unlike Article 44 in the New Arbitration Law, international arbitration practice, as reflected in Article 36(2) of the Model Law, provides that:

1. The award is filed in the court by the party seeking to enforce the award, not by the arbitration tribunal; and
2. The award is only filed in the court at the point of time when one of the parties wants to enforce it, not when the tribunal issues it.

³¹ Article 46.

³² Article 48.

³³ Article 47.

The vast majority of international arbitration awards are carried out voluntarily without recourse to the courts. It is the exception rather than the rule that a winning party has to enforce its arbitration award in a court of law. One study³⁴ found that only 11% of arbitration awards needed to proceed to the courts for enforcement. That means that nearly 90% of international arbitration awards are voluntarily enforced and do not go to the courts at all.

Article 44 forces the winning party (through the tribunal) to translate and file its arbitration award in a Saudi court in all cases within fifteen days of issuance, even if the other party eventually pays the award on a voluntary basis. This is highly unusual and onerous in international arbitration, especially when the award has to be translated by an accredited translation service in Saudi Arabia within that time period.

This provision has not been tested in Saudi courts yet, but caution would dictate that a party should ensure that the tribunal (or at least that party with the tribunal's approval) file the translated award in the appropriate Saudi court within fifteen days of the tribunal issuing the award rather than when the award is to be enforced in Saudi Arabia. Otherwise, the enforceability of the award may be put at risk because of the requirements of Article 53 described below in the section on enforcement of arbitration awards. Since this is not standard practice for international arbitration institutions or tribunals, parties need to build this requirement into their arbitration schedule, including the need to make an official translation of the award (which is neither quick nor easy for a lengthy, complex award) prior to the end of the fifteen day period after the issuance of the award.

XII. CHALLENGE OF AN ARBITRATION AWARD

Article 49 of the New Arbitration Law states that the '[a]rbitration awards rendered in accordance with the provisions of this Law are not subject to appeal, except for an action to nullify an arbitration award filed in accordance with the provisions of this Law.' Article 50.1 specifies those instances:

- a. If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term;
- b. If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;
- c. If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;
- d. If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;

³⁴ 'International Arbitration: Corporate Attitudes and Practices', School of International Arbitration and Queen Mary, University of London (2008) at 8-10.

- e. If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;
- f. If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration;
- g. If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.

A party wanting to invalidate an arbitration award must submit an application³⁵ to the competent court within sixty days of being notified of the award. The New Arbitration Law places the onus on the complaining party to raise any objection about the award within the sixty-day time period, rather than putting the onus on the successful party to justify the award when it seeks to enforce it (which was the case under the Old Arbitration Law). In considering the validity of an arbitration award, the competent court cannot inspect ‘the facts and subject matter of the dispute.’³⁶ An enforcement order can only be requested after the expiry of the sixty-day period that the losing party has to challenge the award.³⁷

If the competent court rules that the arbitration award is valid and enforceable, there is no appeal allowed. If it rules the award is invalid, that ruling is appealable within thirty days of notification.³⁸

XIII. THE COMPETENT COURT

Similar to the practice in other jurisdictions, parties in a Saudi arbitration will need to call upon Saudi courts to address issues such as the appointment of arbitrators in an *ad hoc* arbitration when they cannot agree on such an appointment, temporary or injunctive relief, and the recognition and enforcement of an arbitration award (whether it is foreign or domestic). The New Arbitration Law provides that the ‘competent court’ will decide such matters.

Article 1.3 of the New Arbitration Law simply states that the ‘competent court’ is ‘a court having legal jurisdiction to decide disputes agreed to be referred to arbitration’. Article 8 of the New Arbitration Law provides some detail on the ‘competent court’. Firstly, that article states that the ‘competent court’ will be a court of appeal (rather than a trial court or court of first instance) and secondly, there is a distinction made between international commercial disputes and domestic commercial disputes as to what court of appeal has jurisdiction.

³⁵ The Arabic legal term is *ta’an*, which translates as ‘challenge’.

³⁶ Article 50.4.

³⁷ Article 55.1.

³⁸ Article 51.2.

Article 8.1 provides that in commercial domestic arbitrations, the competent court for considering an action to nullify the arbitration award and other matters referred pursuant to the New Arbitration Law shall be the ‘... court of appeal originally deciding the dispute’. Article 8.2 states that the ‘competent court’ for an international commercial arbitration, as defined in Article 3, held inside or outside of the Kingdom, is ‘... the court of appeal originally deciding the dispute in the city of Riyadh ... , unless the two parties to [the] arbitration agree on another court of appeal within the Kingdom.’

This last point is a significant development since it prevents lower courts and judges in districts outside of the capital from being involved in international arbitrations. This approach has been used successfully in other jurisdictions, which have used specially designated appeal courts and trained judges who are supportive of the arbitration process. It is unknown at this time how Saudi courts will eventually interpret and apply the New Arbitration Law. However, Article 8 improves its chances of being interpreted and applied correctly if the Saudi government ensures that the judges of that appeal court are educated on international arbitration so as to be supportive, rather than obstructive, of the arbitration process.³⁹

Commercial cases in Saudi Arabia are heard in the administrative judicial body formerly titled the Board of Grievances (*Diwan al-Mazalem*). Under the Board of Grievances Law,⁴⁰ those courts were placed under the umbrella of the Administrative Courts. There are presently three branches of the Saudi Administrative Courts: Commercial Circuit, Criminal Circuit and Administrative Circuit. The Commercial Circuit deals with business disputes amongst private parties, the Criminal Circuit deals with criminal matters, and the Administrative Circuit deals with disputes with the government. The hierarchy of the courts within each branch starts with the Administrative Courts (which are the trial courts or courts of first instance), followed by the Administrative Courts of Appeals, and finally the most senior court, the High Administrative Court.

The ‘competent court’ for an international commercial arbitration would therefore be the Administrative Court of Appeal for the Commercial Circuit in Riyadh, unless the parties agree on one of the three other Administrative Courts of Appeal in the Kingdom, which are located in Jeddah, Dammam and Abha. The ‘competent court’ for a domestic commercial arbitration would be the Administrative Court of Appeal for the Commercial Circuit responsible for the area where the defendant is located. The Saudi Government is still in the midst of

³⁹ The Saudi Ministry of Justice has been providing training and education on international arbitration to its senior judges both inside and outside of the Kingdom.

⁴⁰ Royal Decree No. M/78 dated 1 October 2007 consisted of two laws: the Law of the Judiciary and the Board of Grievances Law. The former re-organized the structure and jurisdiction of the Saudi court system and the latter restricted the jurisdiction of the Board of Grievances to government matters. These laws have not been fully implemented yet and therefore the various courts are still referred to by different names, which causes some confusion. The new Saudi administrative courts are still known as and called the Board of Grievances by many practitioners, which adds further confusion.

re-organizing its court system. It is therefore likely that the name and designation of the 'competent court' found in the New Arbitration Law may change.

In addition to the 'competent court' under the New Arbitration Law, parties seeking to enforce an arbitration award will also have to deal with another court under the Enforcement Law.

XIV. ENFORCEMENT OF AN ARBITRATION AWARD

Article 20 of the Implementing Regulations of the Old Arbitration Law provided that '... the arbitrator's award shall be applicable when it is final by order of the entity which is primarily competent to look into the dispute.' This meant that the award had to be ratified by the supervising court to be enforceable. That was the Grievances Board⁴¹ under the Old Arbitration Law. Before ratifying any arbitral award, the Grievances Board would hear any objection raised by a party to ascertain whether there was anything in the award that prevented its enforcement under *Shari'ah*. The supervising court could and did reconsider the merits of the dispute in the course of the enforcement process, which meant that there was a significant risk that the court would impose its own decision on the dispute notwithstanding the decision of the arbitration tribunal. This was illustrated in an ICC case, *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*.⁴² In that case, the arbitration tribunal dismissed Jadawel's claims in its final award issued in September of 2008. Jadawel challenged the award at the Second Commercial Court of the Board of Grievances, who proceeded to re-examine the merits. The Board of Grievances declined to enforce the award, reversed it and ordered Emaar to pay damages to Jadawel.

This has changed under the New Arbitration Law. Article 52 of the New Arbitration Law provides that '[s]ubject to the provisions of this Law, the arbitration award rendered in accordance with this Law shall have the authority of a judicial ruling and shall be enforceable.' In addition, the competent court cannot inspect 'the facts and subject matter of the dispute'.⁴³

Article 53 of the New Arbitration Law describes the documents that must be submitted to the competent court for it to order the execution of the arbitration award: an original or attested copy of the award, a true copy of the arbitration agreement, a certified Arabic translation of the award if issued in a foreign language and proof that the award was filed with the competent court at the time of its issuance as required by Article 44. Article 55 further requires the competent court to verify that the award does not contradict a previous judgment in Saudi Arabia, that it does not contain any part that violates the provisions of *Shari'ah* or

⁴¹ Article 13(g) of the Grievances Board Law, Royal Decree No. M/78 dated 19 Ramadan 1428H, corresponding to 1 October 2007G, which covered both foreign court judgments and foreign arbitral awards. This provision was formerly 8(1)(g) of the Grievances Board Law, Royal Decree No. M/51 dated 17 Rajab 1402H, corresponding to 11 May 1982G, which only covered foreign court judgments.

⁴² See Essam Al Tamimi, *The Practitioner's Guide to Arbitration in the Middle East and North Africa* 371 (2009).

⁴³ Article 50.4 of the New Arbitration Law.

public policy (subject to such part being severable from other parts that can be enforced), and that the award has been properly notified to the other party.

If the above requirements have been met, Article 53 of the New Arbitration Law provides that the ‘...competent court, or designee, shall issue an order for enforcement of the arbitration award’. However, the enforcement process does not end there. Once the competent court issues the enforcement order, the Enforcement Law then requires that the enforcement order be submitted to the Enforcement Circuit for the actual enforcement of the arbitration award.

The Enforcement Circuit is part of the Saudi general courts and is responsible for overseeing the enforcement of judgments issued by various courts in Saudi Arabia, and awards issued by arbitration and administrative tribunals. That includes the enforcement and supervision of a diverse mix of judgments and awards in Saudi Arabia, including personal debts, divorce, custody of children, court judgments, commercial bills, etc. Only administrative⁴⁴ and criminal matters are excluded from its jurisdiction under Article 2 of the Enforcement Law. Arbitration awards (both domestic and international) are just part of that mix. As specifically provided under Article 9(2) of the Enforcement Law: ‘Compulsory enforcement may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are . . . Arbitral awards which include [an] enforcement order in accordance with the Law of Arbitration.’

An Enforcement Judge who is defined as the ‘head of the enforcement circuit and its judges, the judge of [the] enforcement circuit, or a judge with the power of an enforcement judge’⁴⁵ will decide whether to enforce an enforcement order issued by the competent court. Similar to the requirements under the New Arbitration Law, the Enforcement Judge is required to follow *Shari’ah* principles in enforcing any judgment or award, unless the law stipulates otherwise.

Articles 11 and 12 of the Enforcement Law require that a party seeking enforcement of an international arbitration award with its seat outside of Saudi Arabia must satisfy the requirements under the Enforcement Law before it will be enforced in Saudi Arabia. This is in addition to the requirements under the New Arbitration Law.⁴⁶ Article 11 specifically applies to a foreign court judgment or order. But Article 12 states that ‘[t]he provisions of the previous article shall apply to the arbitral awards issued in a foreign country’ resulting in international arbitration awards with their seats outside of Saudi Arabia having to meet the same requirements that are applied in the enforcement of foreign court judgments and orders under Article 11.

Article 11 of the Enforcement Law states that (subject to relevant treaties and conventions) an Enforcement Judge may only enforce on the basis of the principles of reciprocity and after being satisfied that (i) Saudi courts do not have jurisdiction

⁴⁴ Administrative matters in Saudi courts involve matters dealing with the government.

⁴⁵ Article 1 of the Enforcement Law.

⁴⁶ There is an argument under Articles 34(1), 34(2)(a) and 9(2) of the Enforcement Law that Enforcement Judges are required to issue the final enforcement order without any further consideration or application of the requirements under Article 12 of the Enforcement Law since the competent court under the Arbitration Law has properly considered all the necessary requirements in issuing its enforcement order.

to adjudicate the dispute, (ii) the litigants were represented and were given the opportunity to defend themselves, (iii) the judgment or order is final in accordance with the law of the court that issued it, (iv) the judgment or order does not contradict a judgment or order issued on the same subject by a competent judicial authority in the Kingdom, and (v) the judgment or order does not contain anything that contradicts Saudi public policy.

It is unclear whether the provisions of Article 11 literally apply verbatim to international arbitration awards or whether they can be read to apply similar, broad principles as found in international arbitration or in the New Arbitration Law itself. It is clear however that the Enforcement Judge must find that there is reciprocity between the jurisdiction of the arbitration venue and Saudi Arabia. This is a continuation of the requirement it replaced under the Grievances Board Rules of Civil Procedure that provided 'the party seeking enforcement must show that the jurisdiction that issued the foreign judgment will reciprocally enforce judgments of the courts of Saudi Arabia.'⁴⁷

There has been at least one case⁴⁸ where the Board of Grievances demanded a specific example of an enforcement of a Saudi judgment in a U.S. court. The party seeking enforcement of its arbitral award in Saudi Arabia was not able to do so, but instead provided an opinion from the Legal Office of the U.S. State Department that U.S. courts would recognize and enforce Saudi judgments. The Saudi court was not satisfied by that legal opinion and refused to recognize and enforce the international arbitration award issued in the United States.

Article 11(5) of the Implementing Regulations of the Enforcement Law states that: '[t]he Enforcement Judge shall ascertain by an official statement from the Ministry of Justice that the country issuing the foreign order or judgment has a reciprocal relationship with the Kingdom.' There is presently no official statement or list of reciprocal countries published by the Saudi Ministry of Justice. The Enforcement Judge (and not the applying party) will therefore have to determine that from the Ministry of Justice on a case by basis. In theory, international arbitration treaties to which the Kingdom is a party, including the Riyadh Convention and the New York Convention, should establish the necessary reciprocity.⁴⁹ If the Saudi Ministry of Justice applies that protocol properly, arbitration awards issued by tribunals seated in countries that have ratified either of those conventions should satisfy the requirement of reciprocity since Saudi Arabia has ratified those same conventions and has acquired similar reciprocal rights.

One other provision of note under the Enforcement Law is Article 21(1), which provides that state owned property cannot be attached or executed upon by an

⁴⁷ Article 6 of the Rules of Pleadings and Procedures of the Grievances Board, as issued by Council of Ministers Resolution No. 190 dated 16 Dhu'l-Qa'dah 1409H, corresponding to 20 June 1989G.

⁴⁸ Muddassir Siddiqui, 'Arbitration under the Shari'ah: With Case Study of Saudi Arabia' International Dispute Resolution Committee of District of Columbia Bar, 11 January 2004.

⁴⁹ In addition, Article 94 of the Enforcement Law provides that 'The application of this Law shall not prejudice treaties and agreements concluded between the Kingdom and countries, international institutions and organizations.'

Enforcement Judge. This would arguably result in international arbitration awards against Saudi state entities being unenforceable in Saudi Arabia, even if the state entity waived its sovereign immunity.

The Enforcement Law provides for an appeal process on the decisions of an Enforcement Judge. Article 6 states that 'All decisions of the enforcement judge shall be final. His judgments relating to enforcement disputes and insolvency claims shall be subject to appeal and the appeal judgment shall be final.'

It has been difficult in the past for Saudi legal practitioners to determine with any certainty whether a particular foreign arbitration award would be enforced or not in the Kingdom. In addition to the problems that arose from the Old Arbitration Law, this was because Saudi legal cases were not published in the public domain and because Saudi courts have customarily not applied the concept of *stare decisis* as practiced in Western jurisdictions. As a result, many Saudi law firms advised foreign clients to simply go directly to Saudi courts rather than select arbitration as their dispute resolution mechanism, because of the risk of re-litigating the whole matter in Saudi courts. There should be more predictability to the Saudi legal system in the future since the Saudi government has recently attempted to improve transparency in its courts by publishing hundreds of Saudi court judgments for the first time.⁵⁰

Despite the procedural improvements under the New Arbitration Law, parties will continue to have significant challenges in enforcing international arbitration awards in Saudi courts. An enforcing party will first have to submit its arbitration award to the competent court under the New Arbitration Law and meet the requirements specified under that law. If it is successful at that stage, it will then have to submit the enforcement order issued by the competent court to an Enforcement Judge who will apply the requirements under the Enforcement Law before actually enforcing the arbitration award. As a result, parties seeking enforcement of their arbitration awards will face a multi-step, complicated process in multiple courts rather than a simple, straightforward decision from a single judge.

XV. SHARI'AH AND INTERNATIONAL ARBITRATION

As repeatedly enunciated in the New Arbitration Law, parties and arbitrators must take *Shari'ah* into account when dealing with international arbitration awards that will be enforced in Saudi Arabia. Failure to do so will result in the award not being recognized and enforced in Saudi courts. An award that cannot rely upon the 'muscle' of the local courts where the assets of the losing party are located is of little or no value. Therefore, consideration of *Shari'ah* and its requirements must be part of any successful strategy for the enforcement of an arbitration award in the Kingdom of Saudi Arabia.

⁵⁰ 'Saudi Arabian Courts Publish Judgments for the First Time' *Arabian Business* (17 July 2013).

Arbitration is recognized and accepted in the two primary sources of *Shari'ah*: the *Qur'an* (meaning the 'recitation', which Muslims consider as the verbatim word of God) and the *Sunnah* (the acts and sayings of the Prophet Muhammed). It is also accepted in the supplementary sources of *Shari'ah*: the *Qiyas* (reasoning by analogy to solve a new legal problem), *Ijtihad* (intellectual writings of mujtahid or legal jurists), *Ijma* (consensus of the community) and *Urf* (custom or business practices). These supplementary sources allow *Shari'ah* to be modified over time in accordance with changing circumstances.

Shari'ah is not opined upon and established by one single authority or from one single source. Consequently, its principles are subject to considerable variation within the Islamic region. The four main Islamic schools of jurisprudence are *Maliki*, *Hanbali*, *Hanafi* and *Shafi*. The predominant school in Saudi Arabia, the *Hanbali* School, holds that a decision made by an arbitrator has the same final and binding nature as a court's judgment.

Shari'ah provides that contracts are divine in nature and that there is a sacred duty to uphold them except for matters that *Shari'ah* has deemed void or unenforceable. Therefore, contracts are usually strictly enforced in Saudi Arabia. The general rule of contract under *Shari'ah* is 'all is permitted unless specifically prohibited'. Under Islamic law, parties are therefore free to enter into any contract they wish and will be bound by its terms, except for certain matters prohibited by *Shari'ah*.

Those prohibitions include *riba*, which literally means 'an excess'. *Riba* is interpreted in Saudi Arabia to mean interest of any kind. Other contractual prohibitions include: *gharar* (speculation or gambling on a specified but unsure event, e.g., selling shares in an unformed company), *jahala* (uncertain or unclear terms), *ghabn* (deceit, such as large discrepancies from the market price), and *Wa'ad Ta'aqud* (a future promise or an 'agreement to agree'). The prohibition on *gharar* may prevent a party from claiming lost future profits, because such claims are considered speculative and unearned.

Parties can claim damages under *Shari'ah*. However, it takes a more restrictive approach in determining the amount of eligible damages than what international companies are accustomed to in common law (or even in civil law) jurisdictions. Saudi courts have traditionally only awarded damages that arise as a direct consequence of a breach of contract. This is because *Shari'ah* will only restore a party to the position it was in before the breach, not to where it would have been had the obligations been performed. Otherwise, this would be speculative in nature, which is not enforceable under *Shari'ah*.

Saudi courts have wide discretion in assessing the extent of damages, the amount of compensation, the determination of fault and any negligence by one of the parties. Despite that flexibility, Saudi courts tend to only award actual, direct damages that are quantifiable and that can be established with certainty, pursuant to the principles of *Shari'ah*. As a result, consequential, indirect, punitive and speculative damages are not awarded in Saudi courts. This restriction extends to lost profits, loss of use, emotional stress and pain and suffering, which results in much smaller damage awards in Saudi courts. This approach will likely be

repeated when Saudi courts are asked to recognize and enforce damages awarded in international arbitration awards, since the New Arbitration Law and the Enforcement Law require them to be *Shari'ah* compliant.

None of the major international institutional arbitration rules or the UNCITRAL *ad hoc* rules address or deal directly with any of these *Shari'ah* principles. The UNCITRAL *ad hoc* arbitration rules and the ICC arbitration rules are silent on the issue of interest. The LCIA arbitration rules state that 'The Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal determines to be appropriate, without being bound by legal rates of interest imposed by any state court, in respect of any period which the Arbitral Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.'⁵¹ The ICDR arbitration rules provide that '... the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.'⁵² None of the rules deal with or apply usury.

The imposition of interest is not mandatory under any of those international arbitration rules. Instead, those rules are either silent on the issue or allow the tribunal to include interest at its discretion based upon the contract and applicable law. The net result for all of these procedural rules is the same. They neither encourage nor discourage the use of interest. They are essentially neutral on the issue. As a result, the procedural rules of international arbitration institutions by themselves do not contravene *Shari'ah* and will not invalidate an award's enforceability in the Kingdom. It is only when an arbitration award contains interest that the award's enforceability is placed at risk. If an award does not contain interest, then it will not violate *Shari'ah* and it should be recognized and enforced by a Saudi court. Therefore, both claimants and tribunals need to take this into account when drafting their respective pleadings and awards. They should not include interest (or *riba*) or other non-*Shari'ah* compliant items.

Including any of the above prohibited items does not automatically invalidate the entirety of an international arbitration award. Article 55.2(b) of the New Arbitration Law states: '... If the award is divisible, an order for execution of the part not containing the violation may be issued.' This provision should allow a party to enforce those parts of the award that are *Shari'ah* compliant. However, this is at the discretion of the competent court since the New Arbitration Law states that the court 'may' rather than 'shall' enforce the non-violating parts. As a result, an award that is partially non-compliant could potentially be not enforceable in its entirety. The safest strategy is to therefore not claim nor have the tribunal issue an award that contains damages, interest or speculation that are unenforceable under *Shari'ah*.

⁵¹ Article 26.6, LCIA Arbitration Rules (Effective 1 January 1998).

⁵² Article 28.4, ICDR International Arbitration Rules (Effective 1 March 2008).

XVI. ARBITRATION INSTITUTIONS IN THE KINGDOM

At the present time, there are no competent arbitration institutions in the Kingdom to appoint arbitrators or administer domestic or international commercial arbitrations. Arbitration proceedings have been typically administered in local Chambers of Commerce. The Bureau of Experts (the Legal Department of the Council of Ministers) that drafted the New Arbitration Law is drafting new legislation to create a National Arbitration Centre (NAC). This planned new centre will administer arbitration proceedings and will oversee and regulate private arbitration centres that would be created under the new legislation. This should eventually result in a better selection of arbitration institutions and arbitrators within the Kingdom.

XVII. CONCLUSION

Overall, the New Arbitration Law provides a significant improvement over the Old Arbitration Law. The New Arbitration Law more closely aligns Saudi law with international arbitration practice. It respects the right of parties to manage their dispute resolution process with minimal interference from the courts. Parties will have greater flexibility in choosing their arbitrators, in selecting the arbitral rules and institutions for their arbitration, their seat of arbitration, and the language they want to use in their arbitration.

Both the New Arbitration Law and the Enforcement Law require that *Shari'ah* is not violated in the arbitration agreement, the arbitration process and the issued award. The requirements under these two new laws still present a challenge to international companies seeking to enforce their arbitral awards in Saudi Arabia. However, well prepared parties and arbitrators should be able to manage those issues. That can be done by taking the requirements of *Shari'ah* and these new Saudi laws into consideration throughout the arbitration process.

In deciding where to do business and resolve disputes, international parties look for arbitration laws and local courts that offer maximum judicial support of and minimum intervention in the arbitration process. Saudi Arabia is moving in that direction with the enactment of its New Arbitration Law and Enforcement Law.