

Enforcing foreign arbitral award in Saudi Arabia: winds of change?

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The Kingdom of Saudi Arabia (KSA) has been a signatory to the Riyadh Convention since 1983, and to the New York Convention since 1994. However, it was not until quite recently that arbitration has, at last, begun to emerge as a truly viable form of dispute resolution.

There have been monumental changes to KSA's legal landscape in recent years. Against the backdrop of wide-ranging reforms to the judicial system initiated in the late 2000s, two landmark enactments were promulgated in 2012: a new Arbitration Law (repealing the earlier Arbitration Law of 1983) and the Enforcement Law. The Implementing Regulations of the Arbitration Law subsequently came into force in 2017, providing welcome clarity on the mechanics of the new legislation.

The country's first formal arbitration institute, the Saudi Centre for Commercial Arbitration, was established by Royal Decree in 2014, and it has since become fully operational. It is therefore fair to say that arbitration is enjoying something of a moment in the Sun in KSA.

That the Kingdom's overhaul of its legislative framework for arbitration comes during a period of unprecedented economic diversification and expansion is no coincidence. Large-scale public infrastructure and development projects are in progress across the Kingdom, and foreign investment reached record levels in 2019 – with much of that being directed towards non-hydrocarbon sectors of the economy.

Arbitration is, of course, well-established as the "default" mode of resolution for construction and engineering disputes in the Gulf and wider Middle-East. Historically, however, parties – especially foreigners – had good reason to be wary of resorting to arbitration in KSA, or even against Saudi counterparties in international arbitrations. To put in context the significance of the recent legislative reforms and judicial trends in the Kingdom, a brief recap of the pre-2012 legal position is in order.

The position prior to 2012

Depending on the arbitral award's country of origin, it was (and remains) open to successful parties to seek its enforcement in KSA under either the Riyadh or New York Convention. To do so, one was required to file the award before the Board of Grievances – an administrative judicial body with vested with broad jurisdiction, ranging from commercial disputes to claims against the Saudi government.

Although the earlier Arbitration Law of 1983 contained an express "presumption" in favour of giving effect of the decision of the arbitral tribunal, in practice, matters were far from straightforward when it came to the recognition and enforcement of a foreign award.

In practice, it was common for the Board of Grievances to embark upon an extensive review of any foreign award placed before it – both in terms of compliance with local formalities and as to the substance of the decision itself.

Aside from the need to establish reciprocity between the state of award and KSA, the Arbitration Law required the Board to scrutinise the award to ensure that it was not in conflict with Sharia principles, Saudi public policy, or any previous decision or ruling of the competent Saudi authorities (which included, but was not limited to, judicial decisions).

Undertaking a review at so many levels necessarily entailed a consideration of the substance of the decision itself, and from the Board's perspective, the temptation to assume the role of an appellate tribunal was indeed a strong one.

While Saudi judgments have not been routinely published until very recently, the consensus is that prior to 2013, enforcing foreign arbitral awards in KSA was akin to Russian roulette: the outcome being unpredictable at best, and potentially catastrophic at worst.

In dealing with arbitral awards, it was not unusual for the Board to adopt an interventionist stance so as to do "justice" where, in the Board's opinion, the circumstances of a particular case so warranted. Domestic Saudi awards, in particular, were prime targets for judicial intervention; however, that is not to say non-domestic awards fared any better.

A well-known illustration of the pre-2013 approach is *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*, an action for the enforcement of an ICC award issued in 2008. The background to the case was that Jadawel had brought a \$1.2 billion claim against Emaar arising from a construction project before a three-member ICC tribunal seated in KSA. The tribunal eventually dismissed Jadawel's claims in their entirety, and it was ordered to pay Emaar's legal costs. The award was then filed with the Board for enforcement.

Upon review, the Board clearly took exception to the tribunal's findings, and in a memorable decision, it not only refused to enforce the award, but reversed the underlying decision itself – ordering Emaar to pay over \$250 million in damages to Jadawel. The decision in *Jadawel* is perhaps best viewed as being somewhat outlandish, even by the standards of its time; nonetheless, it is usefully exemplifies all that was wrong with previous legislative regime, and the anti-arbitration ethos it helped foster.

2013 – Present

The Arbitration Law of 2012 is a modern, UNCITRAL Model Law-based statute, which addresses many of the criticisms and perceived shortcomings of its 1983 predecessor. It has been well-received by the legal profession in the region, and heralded as a genuine game-changer.

The Arbitration Law is complemented by the Enforcement Law, which established specialised enforcement courts in the Kingdom– greatly simplifying the procedure for enforcing foreign judgments and arbitral awards. The enforcement courts (rather than the Board of Grievances) are now vested with exclusive jurisdiction in relation to the enforcement or setting aside of arbitral awards, both domestic and foreign.

Chapter 6 of the Arbitration Law confirms that arbitral awards are not subject to appeal, and are to be treated as having the force of a court judgment. The only recourse available against an arbitral award is an action to set aside, pursuant to Article 50 of the Arbitration Law. A decision to enforce an award is final and not subject to appeal.

It remains the case, however, that as a precondition to enforcement, the enforcement judgment will need to be satisfied that the award does not contradict any previous ruling or decision by the Saudi courts, and that it does not conflict with any principle of the Sharia or Saudi public policy (which may be one and the same).

The potential for a re-examination of an arbitral award on merit therefore remains, and with it, lingering doubts as to the residual scope for judicial interference in awards. Nonetheless, anecdotal reports of recent decisions by the enforcement courts are encouraging, with the Saudi Ministry of Justice itself reporting that several (substantial) foreign awards and judgments had been successfully enforced in KSA between 2016 and 2018.

It is hoped that the new legislative framework will serve to boost confidence both in the Saudi legal system and in KSA more generally, as a seat of arbitration.

Conclusion

Although it is perhaps still too early to offer conclusive views as to the actual mechanics of the new system, early case law suggests that decisions such as *Jadawel* are now a thing of the past: the future for arbitration in KSA looks bright.