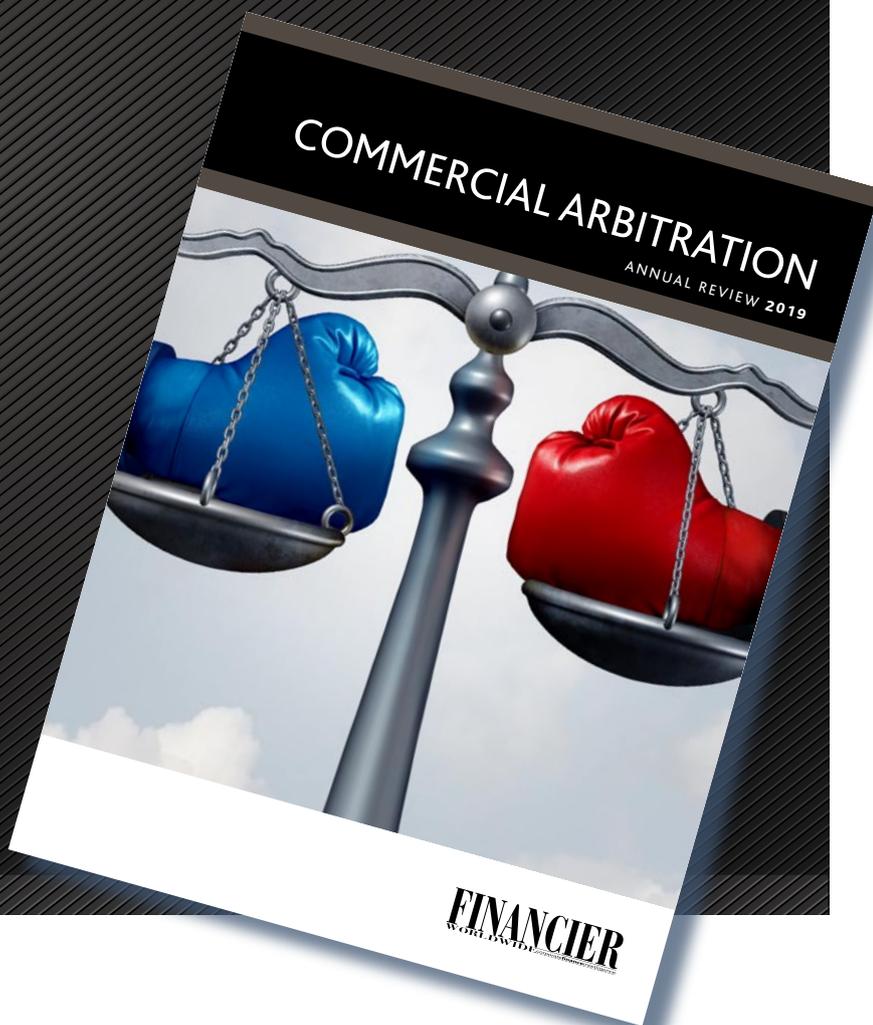


ANNUAL REVIEW

Commercial arbitration

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Saudi Arabia ■

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Wissam Hachem is a partner at EKP based in Riyadh. He has spent the last 15 years in Saudi Arabia, and has represented numerous European, US and Middle Eastern clients wishing to expand their business into the Middle East in general, and into Saudi Arabia in particular. He has a solid experience working on regulatory, corporate and commercial law matters and has an outstanding record in handling complex dispute resolution. He has also been the leading lawyer in relation to several high-profile arbitrations in Saudi Arabia within the contracting sector.

■ **Q. Reflecting on the past 12-18 months, what key trends and developments do you believe have dominated the commercial arbitration space in Saudi Arabia?**

HACHEM: To create a better regulated and more reliable environment for arbitration as an effective tool of dispute resolution, Saudi Arabia has successfully seen a number of significant reforms and developments over the last decade. The most recent of these was the enactment of the Implementing Regulations of the new Arbitration Law in 2017, which provide clarification to the 2012 Arbitration Law. Additionally, and in line with Saudi Arabia's Vision 2030 and the National Transformation Plan, a specialised commercial arbitration centre has been established – the Saudi Centre for Commercial Arbitration (SCCA) – which offers the advantage of a local institution.

■ **Q. Have any recent commercial arbitration cases gained your attention? What can they tell us about arbitration in Saudi Arabia?**

HACHEM: Notwithstanding the significant changes resulting from the enactment of the new Arbitration Law, and notably with regard to limiting the court's authority to revisit the merits of the dispute at the

enforcement phase, we have recently witnessed a case whereby the court of appeal, in the context of rendering enforcement to a domestic arbitral award, has annulled an arbitral award on the basis that the arbitrators misqualified a number of facts and evidences in their review of the dispute, which led, according to the court of appeal, to the arbitral award being issued with no sufficient evidence. The court of appeal stated in its judgment annulling the arbitral award, that its re-qualification of the facts and evidence of the dispute is not considered as a review of the merits of the case but rather a ‘tool’ to prove that the arbitral award was issued with no basis, something which contradicts Islamic Sharia principles.

■ **Q. What challenges and issues exist for parties undertaking commercial arbitration in Saudi Arabia?**

HACHEM: The enforcement of arbitral awards is still a tricky step within the context of arbitration in Saudi Arabia, and is seen as the main hurdle by local and foreign investors who are considering arbitration as a dispute resolution tool. Public policy in Saudi Arabia, which is based on Sharia law, may, at some point, have an

‘undesirable’ impact on the arbitral award during the arbitration phase and the enforcement phase for both local and international arbitral awards. While parties are free to agree and adopt a set of procedural rules for arbitration, including those of the major arbitral institutions, the application of such procedural rules must not contravene Sharia law. Moreover, while parties are also free to agree and adopt a governing law other than Saudi Arabian law to govern the substance of their dispute, it is imperative that the arbitral award does not contain any verdicts which are contrary to Sharia law. For instance, an award which provides for payment of interest, known as Riba, will most likely be unenforceable, in respect to the interest payment component.

■ **Q. In your opinion, how might the processes and protocols for conducting commercial arbitration be improved to enhance aspects such as speed, cost and efficiency for the benefit of the parties involved?**

HACHEM: The current arbitration regime, coupled with the establishment of the Saudi Centre for Commercial Arbitration (SCCA), is a significant milestone, when compared to



the former regime. Yet, Saudi Arabia needs to continue developing its arbitration laws and practices in order to achieve its intended target of becoming one of the leading arbitration nations in the Arab region. For the purposes of nurturing a supportive environment for arbitration in Saudi Arabia, we believe that there are certain matters which should be highlighted and reviewed, including time limits in arbitration, cost allocation by providing more guidance, and the role of Saudi legislators, by provisions of the new arbitration system rather than resisting it.

■ Q. How robust, would you say, is arbitral enforcement in Saudi Arabia? What can parties expect when trying to compel an award through local courts?

HACHEM: In an aim to establish a smoother and faster enforcement process, the new Enforcement Law has abandoned the old system of enforcement proceedings before the Board of Grievances by assigning the enforcement process and prerogatives to specialised enforcement courts. Such courts are encouraged to limit their review to specific elements of the award or judgment subject of enforcement. This statutory change is advantageous to award creditors, as it will serve to significantly reduce the enforcement timeline. However, at the same time, enforcement courts are still required to ensure the award complies with Sharia principles. This means that

the enforcement courts still have the discretion to invalidate an arbitral award, whether domestic or foreign, that violates Sharia principles. There is not yet an established track record of enforcement action in the Enforcement Court, however we believe that an enforcement action would likely take around three to five months, on average.

■ Q. Would you advise companies to include arbitration provisions in their commercial agreements? What factors should they address when doing so?

HACHEM: We would advise companies to choose arbitration as a means of dispute resolution, where applicable, providing that the parties develop a full-fledged arbitration agreement. In fact, a superficial drafting of an arbitration agreement will render parties intending to do business in Saudi Arabia frustrated. There are several practical and contractual considerations that parties must take into account. First, the arbitration tribunal should consist of one or several arbitrators, provided that there is an odd number. The arbitrators must hold at least a degree in Sharia law, otherwise the arbitration will be void. Second, we advise parties to select the laws of Saudi Arabia as the laws applicable to disputes arising under their arbitration agreements, or to make sure that the awards are compliant with Sharia law. When an award is issued, it must be filed with the Saudi

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competent court of appeal by the arbitration tribunal, along with a certified Arabic translation, if the award is in a foreign language, within 15 days of its issuance.

■ Q. How do you expect commercial arbitration to develop in Saudi Arabia over the coming months and years?

HACHEM: With the recent launch of the SCCA, we have an optimistic view of the future of commercial arbitration in Saudi Arabia. We believe that Saudi Arabia can become one of the leading arbitration nations in the Arab region. The SCCA has agreed to a strategic partnership with the International Centre for Dispute Resolution

of the American Arbitration Association (ICDR-AAA), which has translated into a series of strategic projects, the most notable outcomes of which are the preparation of arbitration and mediation rules and conducting specialised arbitration and mediation programmes to train Saudi professionals. While other international arbitration centres have taken more than 10 years to register their first case, in less than two years since its launch the SCCA has been successfully able to register an unprecedented number of cases involving local and international parties, some of which exceed \$100m in value. Interestingly, the time average to adjudicate a case at the SCCA is 25 weeks. ■

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