

## New Saudi Arbitration Regime Diverts From Checkered Past

By **Caroline Simson**

*Law360, New York (June 16, 2016, 6:53 PM ET)* -- A recent decision by a Saudi Arabian court enforcing an \$18.5 million international arbitration award may signal that the country's once-challenging arbitral regime is improving for investors, though attorneys say complications stemming from public policy exceptions do remain.

A Riyadh enforcement court confirmed the \$18.5 million International Chamber of Commerce award three months after it was transferred from the Board of Grievances following the enactment of two new arbitration laws in the country.

The award was originally issued in London in 2011 to a United Arab Emirates subsidiary of a Greek telecommunications company in an arbitration with an unnamed Saudi data communications service provider. As a result of the Riyadh court's ruling, the judgment can now be enforced in the Kingdom of Saudi Arabia.

The decision is significant, given Saudi Arabia's checkered history when it comes to enforcing international arbitration awards, particularly in light of the kingdom's policy to diversify its economy away from oil and to attract inbound foreign investment, according to Raid Abu-Manneh, global co-head of Mayer Brown LLP's international arbitration group. The two new laws are aimed at improving the country's arbitration policies.

"The report that a foreign award has been enforced under the new regime is a welcome indication of a significantly improved landscape for resolving disputes through arbitration and enforcing any resultant award against Saudi-domiciled parties who have no identifiable assets outside the kingdom in a New York Convention state," he said in an email to Law360.

The New York Convention, along with the Riyadh Convention, provides for the reciprocal recognition and enforcement of international arbitration awards. With 156 contracting states to date, the New York Convention is one of the most widely used tools for enforcement throughout the world.

Saudi Arabia enacted its new arbitration law in mid-2012, basing it largely on the United Nations Commission on International Trade Law model law — widely considered to be the gold standard when it comes to international arbitration law.

The law overhauls the procedures for determining whether an arbitration agreement may be enforced, the appointment of arbitrators and the conduct of the arbitration proceedings. Now, arbitrations no

longer need to be conducted in Arabic, and parties can choose which foreign law governs their agreement, according to Abu-Manneh.

Following the arbitration law, an enforcement law was passed in November 2013, under which mandatory oversight by the local Saudi courts is limited and enforcement is placed in the hands of a specialist enforcement court.

"The new landscape brings Saudi arbitration law more into line with international norms of arbitration law," Abu-Manneh said. "It's a positive first step in allowing parties more freedom in the manner in which their arbitration in the kingdom is conducted, and more certainty in relation to the grounds upon which an award will be recognized and enforced. It is hoped that this will become a precedent going forward."

Though the new laws adopted by the country are viewed as favorable to international investors, the country's relationship to arbitration hasn't always been so friendly. Several decades ago, some in Saudi Arabia began to believe that arbitration was inappropriate for the kingdom, according to King & Spalding LLP partner Adrian Cole.

Those feelings likely stem from a number of arbitration awards in the 1960s and 1970s that were perceived to be contrary to energy interests in the Middle East, he said. But those views began to change in the 1980s.

In April 1983, the kingdom signed the Convention on Judicial Cooperation Between States of the Arab League in Riyadh. Later, in 1994, it also acceded to the New York Convention.

Even so, mistrust of arbitration in the kingdom apparently remained. A 1983 arbitration law in Saudi Arabia made it difficult for parties to conduct arbitrations in the country since it required them to first obtain the approval of the national courts before initiating an arbitration, Cole noted. Once an arbitration began, courts commonly intervened in the arbitration process or re-examined the merits of awards on enforcement, he says — practices that are contrary to those practiced in more arbitration-friendly locations like London or Singapore.

"Accordingly, arbitration has been long considered to be difficult, expensive and not an efficient way of resolving disputes in KSA or of enforcing a foreign arbitral award," he said.

Foreign arbitration awards have historically only been enforced by Saudi Arabian courts sporadically, prompting some in the international investment community to view the country as a "black hole" in terms of the enforcement of foreign judgments and arbitral awards, according to Rupert Reed QC of the London-based Wilberforce Chambers.

The reason for that uncertainty stems in part from an exception in international law that allows national courts to deny enforcement of awards that are contrary to a country's public policy. In Saudi Arabia, that means that if awards are contrary to Sharia — Islamic law — they can be refused for enforcement.

While most of the Gulf states declare Sharia to be "the" or "a" main source of legislation, Reed says, Saudi Arabia's Basic Rule of Governance provides that the kingdom's constitution comprises the Quran and Sunna, which are the ultimate sources of law. Because the courts apply the rules of Sharia according to the Quran and Sunna as the source of judicial decisions, there is no doctrine of binding precedent. Rather, Reed says, a judge is constrained by his religious conscience.

One of the most obvious complications arising from that regime is that arbitration awards typically include the payment of interest, which is prohibited under Sharia, Cole says. Awards providing for the payment of interest are not enforced.

While the new arbitration law provides discretion to enforcing courts to order execution of those parts of the award that are Sharia-compliant and ignore offending provisions, Cole noted that it makes sense for parties to avoid making claims that may prevent enforcement of an award as a whole. The award most recently enforced by the Riyadh court did not contain interest.

And that has made enforcing foreign arbitral awards an unpredictable business, according to Henry Quinlan, head of DLA Piper's litigation, arbitration and investigations practice group in the Middle East. Quinlan helped to represent the Greek telecom in the recent enforcement case.

"Public policy is the central reason why awards have not been enforced, and the public perception was that this ground was given a very wide interpretation, making the successful enforcement of a foreign award a remote prospect for international companies," he said in an email to Law360.

Still, despite such challenges, international arbitration attorneys in the region say they're encouraged by the new regime.

"My view on the issue is very optimistic," said Faisal Baassiri, a partner from Faisal Adnan Baassiri Law Firm, who works in association with Ashurst LLP, in an email to Law360. "I truly, sincerely believe that this is a great improvement that goes well with the current times in Saudi where the country is looking into becoming a major international financial player and attracting more foreign investments."

--Editing by Rebecca Flanagan and Aaron Pelc.

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