



Arbitration Guide
IBA Arbitration Committee

KINGDOM OF SAUDI ARABIA

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I. Background¹

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Arbitration has historically been under-utilized as a method of dispute resolution in the Kingdom of Saudi Arabia ('KSA'). However, as there is no systematic reporting of arbitration cases in KSA, statistics on the number of arbitrations held in KSA and the nationality of the parties involved are almost impossible to come by. There are numerous instances of arbitrations involving Saudi parties taking place outside KSA and being administered under foreign arbitration rules.

The principal advantages and disadvantages of arbitration can be analyzed through the Saudi arbitration regulations, which came into effect in July 2012 and promise to modernize the Saudi arbitration system in several ways (the 'Regulations'), as well as the Saudi enforcement legislation, which also came into effect in 2012 and has resulted in the recent, unprecedented recognition and enforcement of several foreign arbitral awards. Most importantly, the Regulations curtail the courts' interventionist powers regarding arbitrations seated in KSA by recognizing for the first time the parties' autonomy to tailor their arbitration procedure in certain important respects, including by explicitly recognizing the adoption of institutional arbitration rules. The Regulations also address a key concern under the old arbitration regulations: the power of the courts to reopen and effectively re-litigate awards on their merits. The Regulations are a welcome development and promise important changes; however, the degree of change in practice remains unclear for now. Much will depend on the text of the implementing rules (yet to be enacted), and how the courts will apply the Regulations.

That said, in June 2016, an international law firm announced that the enforcement court in Riyadh, Saudi Arabia had decided to enforce an US\$18.5 million ICC arbitral award rendered in London in favor of its client, a UAE subsidiary of a Greek telecom company and that the enforcement court took only three months to issue its enforcement order. This announcement was the subject of commentary on various websites². It is unclear whether the respondent has since complied with the enforcement order or initiated proceedings objecting to the execution thereof.

The author of this Guide is aware of three other recent cases – two involving leading Japanese corporations and one involving a Jordanian trading establishment – where the Saudi enforcement courts have issued orders in favor of the foreign applicants. In the first two cases, the enforcement court in Jeddah,

¹ Reprinted in part from Jean-Benoît Zegers, 'National Report for Saudi Arabia', Supp. 74 (May 2013) in the *International Handbook on Commercial Arbitration* (Jan Paulsson ed., Kluwer 1984), as updated in 2017, with the permission of Kluwer Law International.

² See, for example, Kluwers Arbitration Blog, 13 July 2016

Saudi Arabia issued separate enforcement orders favorable to each of the foreign parties, also within a relatively short time frame following the successful filing in each case of an enforcement application based respectively on a JCAA and an ICC arbitral award rendered in Japan in 2015. Substantial funds have been frozen and await distribution. In the third case, the claimant succeeded in obtaining a court order to enforce a GAFTA arbitral award issued in its favor on 30 May 2008, albeit after lengthy legal proceedings before the Administrative Court of the Saudi Board of Grievances, which previously was the court of competent jurisdiction to hear applications for the enforcement of foreign arbitral awards until the advent of enforcement courts in mid-2012.

These cases are unprecedented in demonstrating that Saudi enforcement legislation is for the first time achieving some success in streamlining the enforcement process for foreign arbitral awards. Nevertheless, a foreign party in whose favor a Saudi enforcement order has been made by the enforcement courts faces the prospect that such order can be stayed if the respondent initiates a so-called ‘enforcement dispute’, which is defined under the enforcement legislation as a dispute relating to the conditions for enforceability (under said legislation). This in turn can lead to protracted legal proceedings, especially if the respondent appeals an unfavorable judgment before a higher court as is the case in the enforcement dispute proceeding relating to the JCAA arbitral award. In the case relating to the ICC arbitral award, the respondent has demonstrated the same resistance to execution of the enforcement order after initiating an enforcement dispute on 29 December 2016, and there is every reason to believe that said respondent will continue to resist until a final and binding judgment is issued. As for the GAFTA arbitral award case, this has also met with resistance in the form of an enforcement dispute proceeding initiated in late-2016. Another significant disadvantage is the fact that a government entity may not resort to arbitration for the settlement of disputes with a third party unless it has obtained the prior consent of the President of the Council of Ministers or unless otherwise permitted by a legal enactment.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Under the previous arbitration system, in practice, arbitrations usually took place in KSA on an ad hoc basis.

In the case of arbitration taking place in KSA, the Chambers of Commerce and Industry Law provides that the Council for Chambers of Commerce and Industry (‘CCCI’) has the authority to conduct arbitrations. However, to date none of the Chambers in KSA has developed a comprehensive set of arbitration rules such as those implemented by recognized arbitration institutions in other countries. As to the Council’s authority to conduct arbitration, the Regulations have not expressly repealed these provisions. Essentially, under the Regulations, the parties are now free to choose respectively the procedural rules of any arbitration institution and

the place of arbitration, whether within or outside KSA. In the case of foreign arbitration, with the exception of the Saudi Government or its agencies, there is no restriction preventing the parties from agreeing to arbitration outside KSA.

A notable and welcome recent development in this regard was the official inauguration on 3 October 2016 of the Saudi Center for Commercial Arbitration (the 'SCCA') established by Council of Ministers Resolution No. 257 dated 15 March 2014 to administer arbitration procedures in civil and commercial disputes where parties agree to refer such disputes to SCCA arbitration or mediation. The SCCA claims to adopt the best practice standards of leading international arbitral institutions, in particular the AAA-ICDR. The inauguration of the SCCA follows the promulgation in May 2016 of the SCCA Rules, which are based on the UNCITRAL Arbitration Rules. The SCCA handbook includes Arbitration Rules, Mediation Rules, Costs and Fees Appendices and Model Clauses that parties may incorporate into their contracts and agreements. See Section II (ii) regarding the distinction between domestic and international arbitration.

(iii) What types of disputes are typically arbitrated?

Any dispute may be submitted to arbitration, except disputes relating to personal status and matters in respect of which no settlement is allowed. In addition, arbitration is prohibited in disputes between the Saudi Government or any of its agencies, and third parties (whether Saudi or foreign), including under government procurement contracts and service agency agreements between a Saudi service agent and a foreign investor in the context of a government procurement contract.

Also, disputes which relate to bankruptcy, insolvency, moratorium and liquidation laws are typically not arbitrated.

(iv) How long do arbitral proceedings usually last in your country?

Under the previous arbitration system (i.e., pre-July 2012), Saudi-seated arbitrations were often protracted in nature due to the interventionist powers of the Saudi courts. Although there is no practical experience to date of Saudi-seated arbitrations under the new Regulations, it is hoped that proceedings will be conducted more expeditiously now that such powers have largely been curtailed and in the case of arbitration conducted under the SCCA Rules due to the existence of a formal Saudi arbitration center.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

An arbitrator must be legally competent, of good conduct and reputation, and hold a university degree in Sharia law or legal sciences.

In practice, it would be advisable for the chairman of the tribunal or the sole arbitrator, as the case may be, to be Muslim and to have knowledge of Sharia law, as well as knowledge of the laws, regulations, customs and traditions applicable in KSA.

Parties, including foreigners, may be represented before the Saudi courts or quasi-judicial committees only by Saudi nationals. Such stringent requirements do not apply to arbitration in KSA.

II. Arbitration Laws

- (i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

A Saudi-seated arbitration within or outside KSA (whether for domestic or international arbitration) triggers the application of the Regulations, but with minimum supervision by the Saudi courts of the arbitral proceedings.

It is important to note that the Regulations are largely based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (or its amendments).

- (ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

The Regulations distinguish between domestic and international arbitration. Arbitration is deemed to be ‘international’ if the underlying dispute relates to a commercial matter and if (i) the principal place of business of each of the parties to arbitration is, at the time of signing the arbitration agreement, located in more than one country; or (ii) the place where the arbitration is to be conducted or the place where a substantial part of the obligations underlying the commercial relationship between the parties is outside that country; or (iii) the parties have agreed to refer the dispute to an arbitration center, organization or institution located outside KSA; or (iv) the subject matter of the dispute covered by the arbitration agreement is related to more than one country.

- (iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

KSA is party to a number of multilateral conventions as described below.

1952 Arab League Convention

KSA is party to the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards signed in Cairo on 14 September 1952 (the '1952 Convention'). The 1952 Convention deals with the enforcement of judgments and arbitral awards. However, its scope is limited to judgments and awards issued in KSA and the other Member States of the Arab League who ratified the Convention at the relevant time, namely Egypt, Iraq, Jordan, Kuwait, Libya, Syria and the United Arab Emirates.

1983 Riyadh Convention

On 6 April 1983, KSA signed (but has not ratified) the Convention on Judicial Cooperation between States of the Arab League in Riyadh (the 'Riyadh Convention'). The Riyadh Convention deals with the recognition and enforcement of foreign judgments and arbitral awards, without reviewing the subject matter of the underlying dispute, provided that such judgments or arbitral awards do not violate public order, morality or the constitution of the State in which enforcement is being sought, or the overriding principles of Sharia law.

The Riyadh Convention replaces, for those countries that adhered to it, the 1952 Convention referred to above, although KSA has not ratified the Riyadh Convention. KSA is also a signatory to the Amman Convention on Commercial Arbitration 1987, although, again, it has not ratified this convention.

New York Convention

By Royal Decree dated 30 December 1993 (the 'Royal Decree'), KSA acceded to the New York Convention. Accession was notified to the United Nations on 19 April 1994. In so doing, KSA made the reciprocity reservation limiting recognition and enforcement of awards under the New York Convention to those rendered in the territory of another contracting State which in turn accepts the recognition and enforcement of Saudi awards. In addition, by virtue of the Royal Decree, the New York Convention will not be applied retroactively to disputes initiated prior to ratification.

As at the date of this Guide, however, KSA has not enacted any legislation aligning the Regulations with the New York Convention.

Washington Convention

In 1980, KSA acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention'), providing for a means of resolution of investment disputes between member states and nationals of other states who are parties to the ICSID Convention, under the aegis of the International Centre for the Settlement of Investment Disputes ('ICSID'). As at the date of this Guide, KSA has not concluded an investment

agreement referring investment disputes to ICSID arbitration and no dispute arising out of an investment in KSA has been submitted to ICSID.

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

In the absence of a specific substantive law designated by the parties, the Regulations give the arbitral tribunal the discretion to determine and apply the substantive law which in its opinion is the most closely related to the subject matter of the dispute. However, there are no practical examples of the application of these subjective criteria by arbitral tribunals given the lack of publication of awards in KSA.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

Form and content requirements

An arbitration agreement must be in writing; otherwise it is null and void. Thus, an arbitration agreement or contract cannot be concluded orally. However it can be recorded by other means such as through authenticated written exchanges, including electronic communications.

In the case of an arbitration clause, the contract containing such clause would be prima facie evidence of the parties having agreed to refer future disputes to arbitration.

Model arbitration clauses

There is no model arbitration clause under the Regulations. However, because Sharia law respects the rights of contracting parties to fix the terms of their relationship, in principle, a foreign party to a contract with a Saudi party (other than with a government entity) is free to negotiate the arbitration clause in such contract as it wishes.

A foreign party contemplating arbitration as a means of dispute resolution needs to bear in mind that, if it agrees to Saudi arbitration, under the Regulations, in the event of proceedings to set aside the arbitral award, the competent court will not only scrutinize the arbitration agreement to ensure that it meets all form requirements (see above), but it may also on its own motion set aside the arbitral

award if that award contains anything that contravenes the provisions of the Islamic Sharia or public order in KSA.

From a practical standpoint, therefore, specificity and thoroughness, as well as an understanding of potential public order issues, are particularly essential to a workable arbitration clause under Saudi law to limit the risk of having the award set aside.

Opting for foreign arbitration in contracts between a Saudi party (other than a government entity) and a foreign party may seem futile. Nevertheless, a standard ICC arbitration clause can be tailored to enhance the chances of recognition and enforcement of a foreign arbitral award by the Saudi courts. Given that recognition and enforcement of foreign arbitral awards remains an uncertain prospect in KSA, it would be advisable for the governing law of the contract to be Saudi law, for the venue of the arbitration to be in one of the Gulf Cooperation Council ('GCC') states other than KSA, and for the presiding arbitrator to be Muslim with knowledge of Sharia law and of the commercial laws of KSA.

With the advent of the SCCA, parties seeking to conduct arbitration proceedings under the SCCA Rules have the choice of various model clauses. The SCCA recommends that parties wishing to make reference to SCCA arbitration in their contracts use the following standard clause:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration administered by the Saudi Center for Commercial Arbitration (the “SCCA”) in accordance with its Arbitration Rules.”

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Under the text of an arbitration agreement, the main effect of an agreement to arbitrate is that a dispute brought before a Saudi court in violation of such agreement must be referred to arbitration. In other words, the competent court must decline jurisdiction *ex officio* if the respondent requests referral of the case to arbitration prior to making any counterclaim or defense, and the filing of such a claim cannot be used as an impediment to the commencement or continuation the arbitration.

In reality, however, if one of the parties to a contract disregards the arbitration agreement and files an action before a Saudi judge, there is no guarantee that the court will stay such action, in particular where the contract provides for foreign arbitration. Regrettably, there are instances where the Administrative Courts of

the Board of Grievances has shown a readiness to disregard the parties' choice of foreign arbitration and governing law and compelled them to submit their dispute to arbitration under Saudi arbitration law.

Arbitrations conducted inside KSA may be given better treatment; however, the decision of a Saudi court whether or not to stay an action and refer parties to arbitration when one of the parties expressly invokes the arbitration agreement remains untested under the Regulations.

Circumstances where an award will not be enforced

Violation of public policy is a common ground for refusing to enforce and, instead, setting aside arbitral awards, especially international arbitral awards, although there is no codified set of rules or exhaustive list in KSA defining public policy or what would constitute a violation thereof. An oft-cited example of grounds for refusal of enforcement is when the award contains an order for the payment of interest or damages for consequential losses, both of which are prohibited by Sharia law. Other grounds include the alleged lack of capacity of the arbitrators appointed by the parties, or where the dispute arose under an agreement for the provision of prohibited goods or services; or contractual dealings with the State of Israel, which is the subject of a boycott by the Saudi Government.

A Saudi enforcement judge may only enforce a foreign arbitral award, on the basis of reciprocity, and after verifying the following:

- (i) Saudi courts do not have jurisdiction to consider the dispute on which the award has been issued, and that the foreign court [arbitral tribunal], issuing such award is competent to do so.
- (ii) The parties to the case in respect of which the award was rendered, were duly served, properly represented and able to defend themselves.
- (iii) The award has become final in accordance with the regulations of the court issuing same.
- (iv) The award does not contradict another judgment or order which has been issued on the same matter by a competent judicial authority in Saudi Arabia.
- (v) The award does not contain any part which is contrary to the provisions of the public order in the Kingdom.

In practice, however, there is no certainty as to what constitutes a ground for refusal of enforcement, and there is little practical experience of how Saudi

enforcement judges will interpret and apply the relevant provisions of recent Saudi enforcement legislation. will interpret and apply the law.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

It is quite common to find multi-tier arbitration clauses in engineering, procurement and construction contracts in KSA. Multi-tier clauses are enforceable. The consequences of starting arbitration in disregard of such a provision include the risk of non-arbitrability or having the award set aside by a Saudi enforcement judge.

- (iv) **What are the requirements for a valid multi-party arbitration agreement?**

The Regulations are silent on the issue of multi-party arbitration. However, because parties are now able to tailor their arbitration procedure in certain key respects, including authorizing parties to adopt the rules of arbitration centers or institutions located outside KSA, multi-party arbitration will be governed by the relevant provisions of such rules (e.g., Art. 8 of the ICC Arbitration Rules, as the case may be).

- (v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

No.

- (vi) **May arbitration agreements bind non-signatories? If so, under what circumstances?**

No.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

See Section I.(iii) above for types of disputes that may not be arbitrated.

Under Article 20(1) of the Regulations, parties may file an application challenging whether matters in dispute fall within the scope of the arbitration agreement. Under Article 20(2), an application to establish whether matters in dispute fall within the scope of the arbitration agreement must be filed at the

outset, otherwise a party's right lapses unless the tribunal, in its own discretion, considers that there are valid reasons for accepting a late application.

Under Article 20(3), the arbitral tribunal must issue a decision regarding an application to challenge matters referred to in Article 20(1), before deciding the subject matter of the dispute. However, the arbitral tribunal may also join the application to the subject matter of the dispute and issue an award on both. If the arbitral tribunal decides to reject the application, that decision may be challenged by instituting an action for annulment of the decision before the competent court under the provisions of Article 54 of the Regulations.

The Regulations do not expressly cover matters pertaining to the admissibility, relevance, materiality and weight of evidence submitted by the parties to the tribunal. It is expected that such matters will be addressed in the implementing rules to the Regulations, which have yet to be promulgated.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

Article 11 of the Regulations expressly requires the court of competent jurisdiction to decline jurisdiction if the defendant requests referral of the claim to arbitration prior to making any counterclaim or defense. (See Section III.(ii) above for more details.)

Under Article 7 of the Regulations, if one of the parties to the arbitration continues with the arbitration proceedings – knowing that there has been a violation of a provision of the Regulations or a clause in the arbitration agreement – and fails to raise an objection within an agreed deadline or within thirty days from learning of such violation in the absence of an agreed deadline, such party waives its right to object.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Under the Regulations, arbitrators may decide on their own jurisdiction as the principle of competence-competence is generally recognized in KSA.

Regarding the nature and intrusiveness of the control (if any) exercised by courts over the tribunal's jurisdiction see Section IV.(i) above

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The Regulations contemplate a number of scenarios regarding the appointment of arbitrators, including where the parties have not provided for the appointment of arbitrators in their arbitration agreement, in which case the competent court will appoint the sole arbitrator (Article 15(1)(a)), or in the event of a three-person arbitral tribunal, in which case the competent court will appoint the co-arbitrators or the chairman as needed (Article 15(1)(b)).

Decisions of the competent court with respect to the appointment of arbitrators under Articles 15(1) and (2) cannot be appealed, except where a party files an application to have an arbitral award set aside under Articles 49 and 50.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Under Article 16(1), an arbitrator must not have any interest in the relevant dispute. Moreover, from the date of his appointment and throughout the arbitral proceedings, he is obliged to disclose to the parties in writing all circumstances that are likely to raise a reasonable doubt as to his impartiality, unless he has previously informed the parties of such circumstances. Failure to do so could ultimately result in dismissal of the arbitrator.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Under Article 14 of the Regulations, an arbitrator must be legally competent, of good conduct and reputation, and hold a university degree in Sharia law or legal sciences.

In addition to the requirements prescribed by Article 14 of the Regulations, under Article 16(1) an arbitrator must be impartial and independent vis-à-vis the parties and the matter in dispute.

In practice, it would be advisable for the chairman of the tribunal or the sole arbitrator, as the case may be, to be Muslim and to have knowledge of Sharia law, as well as knowledge of the laws, regulations, customs and traditions applicable in KSA.

The Regulations are silent on the ethical duties of arbitrators. However, Sharia law, as practiced in KSA, underpins every aspect of society, and in particular the administration of justice. Accordingly, a Muslim arbitrator appointed under the Regulations will be bound by the tenets of Islam regarding such matters.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

No. However, nothing in the Regulations would prevent the parties from mutually agreeing to adopt specific rules or codes of conduct concerning conflicts of interest for arbitrators, including the IBA Guidelines on Conflicts of Interest in International Arbitration.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Under Article 23(1) of the Regulations, the parties may agree that the arbitral tribunal, at the request of a party, may order such interim measures of protection as the arbitral tribunal deems necessary and as warranted by the nature of the dispute.

Under Article 42(1) of the Regulations, the arbitral award must be in writing, reasoned and signed by the arbitrators. If the arbitral tribunal comprises more than one arbitrator, it is sufficient for the award to be signed by the majority of arbitrators, provided that the reasons of the dissenting arbitrator are recorded in the case file. Under Article 42(2) the arbitral award must state the date on which the award is issued; the place of issuance; the names and addresses of the parties; the names, addresses, nationalities and roles of the arbitrators; a summary of the arbitration agreement; a summary of the statements of, and relief claimed by, the parties; the written pleadings of, and evidence relied upon by, the parties; a summary of the expert report, if any; the arbitrators' fees; and the arbitration costs and how such costs are to be apportioned between the parties; but all of the foregoing without prejudice to the provisions of Article 24. The Regulations are silent as to the form of orders. However, it is reasonable to assume that the same requirements as to the form of awards would apply to orders.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

The competent court may order interim measures of protection to be taken, prior to commencement of the arbitral proceedings at the request of a party, or during the course of the arbitration proceedings at the request of the arbitral tribunal. Such action may be cancelled in the same manner unless otherwise agreed (Article 22(1)).

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

The Regulations are silent on the granting of evidentiary assistance in support of the arbitration by the courts. See Section VI.(iii) above for the granting of provisional relief by the courts.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The Regulations are silent on the issue of discovery.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

See Section VII.(i) above.

- (iii) **Are there special rules for handling electronically stored information?**

See Section VII.(i) above.

VIII. Confidentiality

- (i) **Are arbitrations confidential? What are the rules regarding confidentiality?**

In practice, arbitral proceedings are usually held behind closed doors. Because KSA has no privacy laws per se, if the parties wish to ensure the confidentiality of the proceedings and the award, they will need to agree in advance. However, it should also be borne in mind that in practice, because arbitral awards (and related judgments) are not published in KSA, privacy issues do not generally arise. Documents filed in legal proceedings for recognition and enforcement are not available for public scrutiny.

Hearings in relation to recognition and enforcement are confidential to the extent that it is not customary for any person not directly involved to be authorized by a Saudi judge to sit in on such hearings.

- (ii) **Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

The Regulations are silent as to the arbitral tribunal's power to protect trade secrets and confidential information.

- (iii) **Are there any provisions in your arbitration law as to rules of privilege?**

There are no provisions in the Regulations as to rules of privilege.

IX. Evidence and Hearings

- (i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

Under the Regulations, parties are free to adopt the rules of any institution to govern arbitration proceedings, including the IBA Rules on the Taking of Evidence in International Arbitration. However, to date there is no practical experience of parties or arbitral tribunals having done so.

- (ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?**

Under Article 33(1), the arbitral tribunal may limit proceedings to the exchange of written pleadings and supporting documentation, unless the parties agree otherwise, in which case the tribunal must convene hearings to enable each of the parties to outline its case, and to present oral arguments and testimony.

Prior written notification from the tribunal advising of the date, time and venue of hearings, or meetings to view the site of the dispute or inspect documents, or the reading of the arbitral award must be sent to the addresses of each of the parties to the arbitration (Article 33(2)).

Under Article 33(3), the tribunal must arrange for the taking of minutes of each hearing and these minutes must be signed by witnesses or experts, as well as by each of the parties (or their duly authorized representatives) attending the hearing and by the members of the tribunal. A copy of these minutes must be delivered to each of the parties, unless otherwise agreed.

- (iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

There are no express provisions in the Regulations regarding the admission and presentation of witness testimony. As mentioned above in the absence of any guidelines in this regard, the admission of witnesses and hearing of their statements will be conducted before the arbitral tribunal under the Sharia rules, and the other party may refute such testimony in the same manner. It is worth noting that under Sharia law, it is a serious offence to bear false witness.

In practice, the chairman of the arbitral tribunal controls and manages proceedings, directs questions to the parties or witnesses and has the right to dismiss from the hearing anyone in contempt. In addition, each arbitrator has the

right to direct questions and examine the parties or the witnesses through the chairman. Also, the arbitral tribunal may cross-examine the parties at the request of either party or on its own motion. It is unclear under the Regulations whether the parties' right to question experts under Article 36(4) extends to witnesses.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

Regarding the rules on who can or cannot appear as a witness, see Section IX.(iii) above. The Regulations expressly give arbitrators the right to compel a witness to appear before them. Under Article 22, without prejudice to its right to do so independently, the tribunal may also seek the assistance of the competent court to ensure the proper conduct of the arbitral proceedings, including *inter alia* summoning a witness or an expert.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (e.g., legal representative) and the testimony of unrelated witnesses?

The Regulations are silent in this regard.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Under Article 36(1), the arbitral tribunal may appoint one or more experts to produce a written or oral report to be entered in the minutes of the hearing concerning particular issues as decided and specified by the tribunal. The tribunal must provide a copy of the minutes to each of the parties unless otherwise agreed. Under Article 36(4), once the final report has been issued, the tribunal may decide on its own motion, or at the request of one of the parties, to convene a hearing to hear the testimony of the expert and to give the parties the opportunity to hear the expert and question him on the content of his report.

There are no formal requirements in the Regulations regarding independence and/or impartiality of expert witnesses. However, the admission of witnesses and hearing of their statements will be conducted before the arbitral tribunal under the Sharia rules, and the other party may refute such testimony in the same manner. As mentioned above, under Sharia law, it is a serious offence to bear false witness.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

See Section IX.(vi) above. There are no express provisions in the Regulations to enable party-appointed experts.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

See Section IX.(iii) and (iv) above. Witness conferencing is not practiced in this jurisdiction.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There are no rules or requirements in KSA as to the use of arbitral secretaries, nor is it common for them to be used.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Decision-making

Under Article 38(1) of the Regulations, without prejudice to rules of Islamic Sharia and the laws of KSA, in deciding a dispute the arbitral tribunal must apply the rules agreed upon by the parties to the subject matter of the dispute, or absent such agreement, the substantive rules of the law which the tribunal thinks that it is most closely related to the subject matter of the dispute. In issuing the award, the arbitral tribunal must adhere to the terms of the underlying contract, and take into account the trade usages, the practice and the previous dealings between the parties.

Under Article 39(1), if the arbitral tribunal consists of more than one arbitrator, the final arbitral award must be issued by majority vote after confidential deliberations. However, under Article 39(2), if there are divergent views among arbitrators making it impossible to reach a majority decision, the arbitral tribunal may appoint an umpire within 15 days from the date it has decided that it was not possible to reach a majority decision, failing which the umpire shall be appointed by the competent court. This provision appears to contemplate situations where, in the case of a three-person tribunal, each arbitrator reaches a different conclusion regarding, for example, the quantum of damages to be awarded to a party.

Under Article 39(3), decisions regarding procedural matters may be issued by the chairman of the arbitral tribunal, subject to the prior written consent of the parties, or by unanimous consent of all members of tribunal, unless otherwise agreed.

Time limits

Under Article 40(1) of the Regulations, the arbitral tribunal must issue a final award within the time limit agreed by the parties, or in the absence of such agreement, within twelve months from the date of commencement of the arbitral proceedings.

Under Article 40(2), the tribunal has the power to extend the deadline for rendering the award provided that such extension does not exceed six months, unless the parties agree on a longer period. If the tribunal fails to render the award within the time limits stipulated in Articles 40(1) and (2), any of the parties to the dispute may request the competent court to issue an order extending that period, or terminating the arbitral proceedings, whereupon either party may file its claim with the competent court (Article 40(3)). If an arbitrator is replaced by another, the deadline for issuing the award is extended by thirty days (Article 40(4)).

In practice, the deadline for rendering the award will be determined by the procedural rules agreed by the parties. In the absence of such agreement, the provisions of Article 40 would apply.

Form of the award

Under Article 42(1) of the Regulations, the arbitral award must be in writing, reasoned and signed by the arbitrators. If the arbitral tribunal comprises more than one arbitrator, it is sufficient that the award be signed by the majority of arbitrators, provided that the reasons of the dissenting arbitrator are recorded in the case file.

In addition, under Article 42(2) the arbitral award must state the date on which the award is issued; the place of issuance; the names and addresses of the parties; the names, addresses, nationalities and roles of the arbitrators; a summary of the arbitration agreement; a summary of the statements of, and relief claimed by, the parties; the written pleadings of, and evidence relied upon by, the parties; a summary of the expert report, if any; the arbitrators' fees; and the arbitration costs and how such costs are to be apportioned between the parties; but all of the foregoing without prejudice to the provisions of Article 24.

Types of relief

In general, an order for the payment of interest or damages for consequential losses, both of which are prohibited by Sharia law, are not permissible types of relief and are oft-cited examples of grounds for refusal of enforcement.

- (ii) **Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

Arbitrators cannot award punitive or exemplary damages as they are bound by the Islamic concept of damages. Generally, the right to damages is limited to compensating the direct loss which the person has suffered to its property, excluding loss which is speculative or uncertain in nature.

Similarly arbitrators are forbidden under Sharia law to order the payment of any type of interest.

(iii) Are interim or partial awards enforceable?

The Regulations do not expressly distinguish between partial and final awards. However, under Article 39(3) of the Regulations, the arbitral tribunal may issue provisional decisions on any of the relief claimed before issuing a final decision on the dispute, unless otherwise agreed.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

The Regulations are silent on dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

The parties to arbitration may, at any time during the proceedings, request the arbitral tribunal to acknowledge that they have reached a settlement.

Thus, under Article 38(2), if the parties have expressly authorized the arbitral tribunal to enter a settlement, it may find accordingly under the rules of fairness and equity. However, under Article 39(4), if the arbitral tribunal is authorized to enter a settlement, a decision to this effect must be unanimous.

Furthermore, under Article 45, if the parties to the arbitration agree during the course of the arbitral proceedings to settle their dispute, they may request the arbitral tribunal to enter the terms of such settlement into the record, in which case the tribunal must issue a decision that incorporates the terms of such settlement and terminate proceedings. Upon enforcement, this decision shall have the same force of an arbitral award.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Correction

Under Article 47(1) of the Regulations, the arbitral tribunal must correct any material error in the arbitral award, whether in the wording of the award or in the computation of amounts, on its own motion or a request to do so by one of the parties.

Interpretation

Under Article 46(1), either party may, within 30 days from the date of receipt of the arbitral award, request that the arbitral tribunal explain any ambiguities in the wording of the award. The applicant requesting such explanation must notify the other party at the address indicated in the arbitral award before submitting it to the arbitral tribunal.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Other than an indirect reference to arbitration costs in Article 42(2) in connection with the requirement that the arbitral tribunal state these and how they are to be allocated among the parties in the final award, the Regulations are silent on the issue.

(ii) What are the elements of costs that are typically awarded?

Current practice in KSA is that the legal costs of arbitration are shared equally by the parties, unless otherwise agreed. Nevertheless, under Article 42(2) the arbitral award must state, inter alia, the arbitration costs and how such costs are to be apportioned between the parties, which suggests for the first time that current practice may be about to change.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Under Article 24(1) of the Regulations, an arbitrator must be appointed under a separate agreement specifying his fees. A copy thereof must be deposited with the authority to be specified in the rules to these Regulations. At the time of publishing this Guide, supplementary legislation has yet to be enacted, so the identity of such authority remains a matter of speculation.

Under Article 24(2), if the parties to the arbitration and the arbitrators fail to agree on fees, fees will be decided by the competent court whose decision is not subject to appeal. In cases where arbitrators are court-appointed, the competent court will determine their fees.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

See Section XI.(ii) above.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

There are no express provisions in the Regulations to this effect.

XII. Challenges to Awards

- (i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Under Article 49, an arbitral award that has been issued under the Regulations cannot be appealed in any way, other than by means of an application to have the award set aside on limited grounds. Under Article 50(1) of the Regulations, an application to have an arbitral award set aside will only be accepted in limited circumstances, including: (i) where no arbitration agreement exists or such agreement is void or has expired by lapse of time; (ii) incapacity of one of the parties at the time of the signing of the arbitration; (iii) lack of due process; (iv) if the tribunal excludes the application of rules agreed by the parties; (v) irregularities in the constitution of the tribunal; (vi) if the tribunal exceeds its mandate; or (vii) if the tribunal fails to comply with the requirements for issuing the award and if such failure has resulted an adverse effect on the award.

Under Article 54, the filing of an application to have an award set aside does not cause enforcement proceedings to be suspended on its own; however, the competent court may issue an order for suspension of the enforcement of the award if the application to have the award set aside contains a request to that effect, and if such a request is based on valid grounds. The competent court must issue a decision on the application for enforcement of the award within 15 days from the date on which the application has been filed. If the competent court orders the suspension of enforcement proceedings, the court may order the applicant to provide security or a monetary guarantee. If an order to this effect is made, then the competent court must render its decision regarding the application to have the award set aside within 180 days from the date of such order.

To date, there is no practical experience of legal proceedings initiated under the Regulations to challenge an arbitral award.

- (ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Not applicable.

- (iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Appeals to a second arbitral instance are not allowed under the arbitration law of KSA. No distinction is made between domestic and foreign arbitration in this regard. Only the authority originally competent to hear the dispute (ie the relevant Saudi court) can be called upon to consider appeals as there is only one level of appeal. For the grounds for appeal, see Section XII.(i) above.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

There are no express provisions in the Regulations to enable courts to remand an award to another arbitral tribunal.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Domestic awards

Until recently, the court of competent jurisdiction for the enforcement of domestic arbitral awards was the Saudi Board of Grievances. However, this has now changed with the advent in July 2012 of the enforcement legislation, which introduces for the first time into the Saudi judicial system the institution of the *qadi al tanfiz* or enforcement judge.

Thus, under Article 9(2), the Enforcement Law applies to enforcement proceedings in respect of arbitral awards under the Regulations.

The Regulations contain relatively detailed provisions regarding the time frame and procedure to be followed for enforcement of domestic arbitral awards. Under Article 55(1) of the Regulations, an application for enforcement of an arbitral award will not be accepted until the 60-day time limit stipulated in Article 51 for filing an application to have the award set aside has elapsed. Moreover, under Article 55(2), no order for enforcement of an arbitral award will be issued unless the enforcement order: (i) does not contradict any existing judgment or decision a Saudi court of competent jurisdiction; (ii) does not include anything contrary to the rules of Islamic Sharia and the laws of KSA; and (iii) has been duly communicated to the person against whom it was issued.

Regarding circumstances where an award will not be enforced, see Section III.(ii) above.

Once an order for the enforcement of an arbitral award has been rendered under the Regulations it cannot be appealed; however, an appeal can be filed with the

competent authority (namely, the Administrative Courts of the Board of Grievances) against an order dismissing the enforcement of an award provide such appeal is filed within 30 days from the date on which such order has been issued (Article 55(3)).

Foreign awards

In the case of KSA, until recently there was no specific legislation on the enforcement of foreign arbitral awards, and the Administrative Courts of the Board of Grievances were empowered to consider applications for the enforcement of foreign judgments and arbitral awards under Article 13(g) of the Board of Grievances Law dated 1 October 2007. However, as previously mentioned, with the advent of the enforcement legislation in July 2012, enforcement judges are empowered to hear applications *inter alia* for the enforcement of foreign arbitration awards although at the time of publishing this Guide, how and the extent to which the law will be interpreted remain matters of speculation.

The procedure for enforcement of a foreign arbitral award is the same as for a domestic award, and is initiated by a petition submitted to the competent court by the party in whose favor the award has been rendered. After ensuring that the award does not contravene the mandatory principles of Sharia law, the competent court may invite the parties to present oral submissions. If the competent court is satisfied that the award should be recognized, it is empowered to grant an enforcement order.

In the case of a foreign arbitral award, the party applying to the competent court for an enforcement order will need to submit written evidence from the relevant judicial authorities in the foreign jurisdiction where the award was rendered confirming that the award is final.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Under Article 2 of the Enforcement Law, enforcement judges are empowered to enforce awards and have complete oversight of the enforcement procedure. To that end, under that law, enforcement judges are assisted by process servers and enforcement officers. Enforcement judges may also solicit the assistance of the police or other competent authorities, and order travel bans, imprisonment, mandatory disclosure of assets and other provisional measures.

(iii) Are conservatory measures available pending enforcement of the award?

Under the Enforcement Law, enforcement judges are empowered to order disclosure, freezing and/or attachment of a debtor's assets.

- (iv) **What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

Historically Saudi Board of Grievances has been reluctant to enforce foreign awards and has been more inclined to enforce domestic awards. As mentioned above, one area in which the Regulations fail to improve matters is the enforcement of foreign arbitral awards in KSA, which to date has been an uncertain prospect. Although the Regulations affirm that the competent court will have due regard to KSA's obligations under international agreements, nothing more is said about enforcing foreign awards. Nevertheless, please see Section I(i) regarding the recent trend involving the recognition and enforcement of several foreign arbitral awards by the Saudi enforcement courts.

- (v) **How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

See Section XIII.(i) above.

XIV. Sovereign Immunity

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Yes. Article 10(2) of the Regulations affirms the principle that a Saudi Government authority is not permitted to resort to arbitration for settlement of disputes with third parties, except after obtaining the consent of the President of the Council of Ministers, or unless otherwise permitted by a legal enactment.

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

Not applicable.

XV. Investment Treaty Arbitration

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

ICSID Convention

KSA is a party to the ICSID Convention. See Section II.(iii)(d) above.

GCC

As a member of the GCC, KSA has been involved in discussions at various levels on bilateral free trade agreements ('FTAs'). The GCC has been working as a group to establish FTAs with others, including Australia, China, the European Union, India, Iran, Japan, Jordan, Korea, New Zealand, Turkey, Syria and Singapore.

(ii) Has your country entered into bilateral investment treaties with other countries?

Over the past twenty years KSA has signed around 16 bilateral investment treaties ('BITs') of which approximately 9 have been ratified. No official model text is used, so the wording of each of the BITs varies slightly from country to country.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

'National Report for Saudi Arabia', Supp. 74 (May 2013) in the *International Handbook on Commercial Arbitration* (Jan Paulsson ed., Kluwer 1984), as updated in January 2017.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

No.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

No.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

KSA has not adopted the UNCITRAL Model Law on International Commercial Conciliation. Traditionally, conciliation and mediation are favored methods of dispute resolution in KSA. However, practitioners should be aware that, in practice, the roles of mediator and arbitrator are sometimes regarded as interchangeable. As there are no rules of conciliation or mediation in KSA, the parties are at liberty to define the conciliator or mediator's mandate as narrowly or as broadly as they wish.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Perhaps the most noteworthy development since the promulgation of the Regulations has been the enactment of enforcement legislation and the creation of enforcement judges (see Sections I, III and XIII above for more details). Nevertheless, although the Regulations and enforcement legislation are welcome developments and promise important changes, the degree of change in practice remains unclear for now. Much will depend on the text of the implementing rules (yet to be enacted) and how the courts apply the Regulations and enforcement legislation.