



**UNIVERSITY OF  
STIRLING**

**The Saudi Arabian Arbitration  
Regulations:  
A comparative study with the English  
Act of 1996 and the Arbitration  
Scotland Act of 2010**

**BY**

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A thesis submitted in partial fulfillment of the requirements for  
the Degree of Doctor of Philosophy

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September 2015







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## **Acknowledgements**

I first thank Allah for the help and strength he gave me to finish this work. I then thank my family for all the support they provided throughout the years, especially my beloved parents.

I am obliged to thank my supervisors Professor Fraser Davidson, who is now an Emeritus Professor for his support and help throughout the years and My sincere thanks and appreciation also goes to Dr. Hong-Lin Yu who is now my first supervisor for her great help and support to bring this work to a good standard.

I extend my thanks to everyone who supported me or wished me luck from friends and family here in the United Kingdom or back home in Saudi Arabia.



## **Declaration and Certificate**

I Albara Abdullah Abulaban declare that this thesis is all my own work, unless referenced otherwise. And has been submitted for the award of Doctor of Philosophy from the Division of Law and philosophy, The School of Art and Humanities at the University of Stirling and no other academic institution.

Albara Abdullah Abulaban

September 2015



## **Abstract**

Today we live in a world where international trade accounts for a significant proportion of the daily trade for an enormous number of companies and institutions. The number of international commercial deals that are made every day is countless. The sheer scale of international trade invariably results in an increase in the number of disputes between international partners. However, where there are problems, methods to resolve the disagreements will invariably appear. One of the main and mostly preferred methods is arbitration. Arbitration is preferred for it is convenient and cost-effective method to resolve disputes between business partners.

Saudi Arabia has recently reformed its Arbitration Regulations through the implementation of new regulations in 2012. This replaces previous regulations dating from 1983 and the implementation rules of 1985. This thesis examines, analyses and criticises these regulations and compare them to the English and the Scottish arbitration laws. Throughout this study, the old Saudi regulations and implementation rules are examined in order to determine how the rule of arbitration worked in the country. Following this, the new regulations are presented to see what has changed and if there has been any improvement. This is subsequently followed by a discussion on the scale of the improvement and whether further improvements are required in Saudi Arabia. This thesis will also carry out a comparison with the English Act of 1996 and the Arbitration Scotland Act of 2010. The conclusion address and highlight the main differences between the regulations, when present and highlights what the Saudi legislator can benefit from the laws under consideration.

One of the main aims of this study was to find if the Saudi Arbitration Regulations have improved and addressed the issues that concerned researchers and commentators in the past. The research finds that there are significant improvements in the Saudi regulations.



## **Chapter One: Introduction to the PhD**

### **1.1. Introduction**

Today we live in a world where international trade accounts for a significant proportion of the daily trade for an enormous number of companies and institutions. The number of international commercial deals that are made every day is countless. The sheer scale of international trade invariably results in an increase in the number of disputes between international partners. However, where there are problems, methods to resolve the disagreements will invariably appear. Regarding the issue of trade disputes, there are a number of methods to resolve these disputes including negotiation, conciliation, litigation, and of course arbitration. In a world saturated with international business and trade deals, it is important to remember that companies will try to find the easiest, most convenient and cost-effective method to resolve their disputes with their business partners.

Arbitration as a mechanism of dispute resolution has a number of particular advantages that makes it more attractive than other methods for parties involved in a dispute. These advantages include the following. First, arbitration is more time-effective compared to courts as the arbitration panel and proceedings have a lot less cases to deal with than courts: in general, courts can have hundreds if not thousands of cases to deal with whilst an arbitration panel could be looking at only a few such cases in the same time period. A result of this is that it can take courts years to resolve such disputes, but only a matter of months for resolution by an arbitration panel. Second, arbitration can be a more private action than taking a dispute to court. This makes maintaining commercial relations between parties a lot easier than if the case was public. Third, the freedom that the dispute parties have in choosing the arbitrator or the arbitration panel as well as the place of arbitration, the language and how the proceedings go, is a huge advantage and makes arbitration a more attractive choice than for the relevant parties to go to court where they have very little say over the process. Moreover, having the freedom to choose the arbitrator or the arbitration panel means that the parties can choose who has more knowledge of the subject matter of the dispute than a judge would have. Fourth, the enforcement of an arbitral award in countries other than where the award was originally made is much easier



than enforcing a foreign judgment, thanks to international arbitration conventions. These are the main reasons why arbitration is a leading choice when resolving disputes at a national and international level.

Saudi Arabia has played a significant role in international trade over the last few decades. Saudi Arabia is one of the leading countries in the world in terms of distributing oil as well as its expanding role in business, particularly after joining the World Trade Organisation (WTO). As mentioned previously, where there is a lot of business trade, there are a lot of disputes. One result of this is that Saudi Arabia is a country that needs to have good system by which to resolve these disputes and good regulations that can make the process both easy and effective for the parties involved in the disputes. Since arbitration is one of the main methods of resolving disputes, Saudi Arabia has established Arbitration Regulations in order to regulate the process.

This thesis will examine, analyse and criticise these regulations and compare them to the English and the Scottish regulations for arbitration. Saudi Arabia has recently reformed its Arbitration Regulations through the implementation of new regulations in 2012. This replaces previous regulations dating from 1983 and the implementation rules of 1985. Throughout this study, the previous regulations and implementation rules will be examined in order to determine how the rule of arbitration worked in the country. Following this, the new regulations will be presented to see what has changed. When presenting the new regulations, they will be examined to see if there is any improvement in the regulations and if they have addressed the problems that appeared in the previous ones. This will subsequently be followed by a discussion on the scale of the improvement and whether further improvements are required in Saudi Arabia. This thesis will also carry out a comparison with the English Act of 1996 and the Arbitration Scotland Act of 2010. The conclusion will address and highlight the main differences between the regulations, if present.

## **1.2. Research Methodology**

Since this study is concerned with carrying out a comparison of the Saudi Arbitration Regulations with the English Arbitration Act of 1996 and the Scottish Arbitration Act of 2010, the appropriate methodologies used here are the doctrinal analysis



approach combined with comparative law. The comparative method of research has a long history of use in legal research. This type of methodology is essential and useful in law studies to highlight similarities and differences between observed laws and regulations. It leads to finding out the reasons behind the similarities and differences in laws of different countries which brings the audience a better understanding of these laws and the reasons why they are similar or different. That is one of the reasons why a comparative method is uniquely suited to this research and can be applied to advance new knowledge about different legal systems

The comparative and analytic methodology adopted for the current research is to promote a better understanding of the Saudi Arbitration Regulations because the regulations of 1983 and the implementation rules of 1985 received a lot of criticism in the past as will be explained throughout this study. Analysing the previous and the new Saudi Arbitration Regulations will answer the research questions and determine if there was a need for a new regulations and whether the new regulations has answered the call for its modernisation.

The comparative element of the methodology is mainly applied to the examination of the Saudi Arbitration Regulations, the English Arbitration Act of 1996 and the Scottish Arbitration Act of 2010. These are three different Arbitration Regulations that have a number of similarities and differences. Comparing these legal instruments would distinguish and highlight these similarities and differences between these laws to provide an analysis on whether the Saudi arbitration Act 2012 has reached a better level of regulating arbitration proceedings to keep pace with international systems. Furthermore, the aims of using these two methodologies in this thesis are:

- To promote a better understanding and knowledge of the Saudi, English and Scottish Arbitration systems;
- To promote the Saudi law development in the subject. This happens when comparing the laws with one another in order to determine if there could be some beneficial information that could be learnt from different jurisdictions and approaches; and
- To explain the reasons how the Saudi laws were developed and to encourage a closer examination of specific legal principles.



Both the English Arbitration Act and the Scottish Arbitration Act are chosen for their advanced arbitration laws as well as the contrast among the three jurisdictions. In particular, the Scottish Arbitration Act 2010 was promulgated two years ahead of its Saudi counterpart. They would serve as a benchmark on the examination of the Saudi Arbitration Act 2012.

Another reason is that the Saudi legal system in general and the Saudi Arbitration Regulations in particular may not be well-known to other researchers outside of the Middle East, thus a comparison with two well-known systems can provide an effective means of explaining the arbitration process in Saudi Arabia by providing a recognised ‘pro-arbitration’ model, which will show whether the Saudi laws are advanced in this area or not. By adopting the comparative method, this study will also provide more information and understanding of the Saudi attitude towards arbitration and its regulations when compared with the English and Scottish laws. Further, it will provide more information on why certain laws exist in Saudi Arabia and the purpose of such laws, and it will also promote the development of the regulations where necessary and relevant.

Finally, it is important to note here that the comparative legal research methodology applied in the current research does not intend to promote the legal transplant. The researcher is of the opinion that the English and Scottish approaches to arbitration has to be considered in the context of Saudi legal culture, in particular, the Sharia law. For instance, as it will be explained later, the interactions between the Sharia law and public policy in the Saudi Arbitration Regulations will not allow the English and Scottish approaches to be transplanted into the Saudi system.

### **1.3. Significance and Aim of the Study**

The importance of this research comes firstly from the importance of arbitration as a less expensive and peaceful means to settling disputes in the field of international trade. This research provides information and understanding of the legal systems under consideration with a particular focus on the Saudi Arbitration Regulations which provides more confidence to parties wanting to establish businesses in the Kingdom of Saudi Arabia. Moreover, the significant differences between the legal systems of England and Scotland, and the legal system in Saudi Arabia as well as the differences between traditions make such a comparative study very worthwhile, as



this research will reveal the differences and highlights areas of strengths and weaknesses of the regulations in each of the three countries.

Furthermore, there is an absence of comparative studies on Arbitration Regulations in Saudi Arabia especially now that the new Arbitration Regulations of 2012 are enforced. There is very little literature written about the new regulations, let alone comparing it with other advanced legal systems and regulations. In addition, the existing gap in Saudi legal literature in general makes such a study very important and a good addition to the legal library. Further, the lack of texts and papers in English on the Arbitration Regulations of Saudi Arabia will make such a study useful for the development of domestic regulations to encourage and attract foreign investment as investors would gain a better understanding of the Saudi Arbitration Regulations. This attracts investors who would like to apply an Islamic regulation in their contracts with their partners and would also attract international investors who would gain a lot of understanding and confidence in the Saudi Arbitration Regulations.

#### **1.4. Research questions:**

The main questions that need to be answered in this thesis are as follows:

- Has the new Saudi regulations addressed the areas that were criticised in the past about the old Arbitration Regulations?

To answer this question an analysis of the previous regulations is necessary in order to determine the areas that require addressing.

- Where there are areas where the Saudi regulations have changed, does this change make the regulations more efficient than the previous regulations or not?
- What can the Saudi regulations benefit from the English and the Scottish Arbitration Acts?



- Are the Saudi Arbitration Regulations modern enough to be on a level with international Arbitration Regulations?

To answer these last two questions a comparative study with the English Arbitration Act of 1996 and the Scottish Arbitration Act of 2010 will be carried out.

### **1.5. Thesis Content and Structure**

This thesis is divided into five chapters. **Chapter One** examines the Saudi legal system. In particular, this chapter provides a general view on the concept of consultation (shura) in Saudi Arabia and how it was developed, followed by an explanation of how the Modern Council of Consultation (Majlis Ash-Shura) was developed. This chapter also sets out a general view of the key legislations in the kingdom, including The Basic Law of Governance, The Council of Consultation Law and The Council of Ministers Law.

**Chapter Two** is on the agreement to arbitrate. This chapter will cover two main features of the arbitration agreement: the forms and contents of the arbitration agreement, and the requirements for the validity of the arbitration agreement. The position in the Kingdom of Saudi Arabia will be explained and examined according to the Arbitration Regulation of 1983 and the 1985 Implementation Rules. Further, the new arbitration law of 2012 will be examined to determine what the changes in the new regulation are and to discuss whether these changes are advantageous or not and if they are sufficient to resolve any issues that might have existed in the previous regulations. This chapter will then examine the English Arbitration Act of 1996 and the Scottish Arbitration Act 2010 and compare them to the 2012 Saudi regulations to determine the differences between these jurisdictions and if there is anything the Saudi regulations can benefit from.

**Chapter Three** is on arbitrators and the arbitral tribunal. This chapter will discuss the conditions required for an arbitrator, how an arbitrator is appointed and the number of arbitrators required. This chapter will also examine the issues of the removal, challenge and resignation of arbitrators. Arbitrators' authorities as well as their duties and responsibilities. Finally this chapter will look at what happens when



the arbitrators' job is finished. The chapter will be structured the same way the previous chapter was structured in regards to dressing the Saudi regulations then following them by the English and the Scottish regulations.

**Chapter Four** focuses on the arbitration proceedings. In this chapter the following points will be discussed: the law applicable to the procedure, the place of arbitration, the language of arbitration, time-periods, experts, witnesses, statements of claim and defence, the arbitration sessions, administration and record, presence and absence of the parties, stay and interruption of the proceedings, and finally the end of the proceedings. Again, this chapter will be structured like the previous chapters were structured.

Finally **Chapter Five** will look at the main issues related to the arbitral award. The issues discussed in this chapter are the law applicable to an arbitral award, the issue of majority vote, types of the arbitral awards, form and contents of the award, registration and notification of the award, notification of the award, correction and interpretation of the award, correction and interpretation of the award. Again, the same structure is followed in this chapter as well.



## 2. Chapter Two: The Saudi legal system

### 2.1. Introduction

The Kingdom of Saudi Arabia is one of the main and few countries that state clearly in its law that it implements Sharia law as the system of the government. It will be of interest to highlight the main factors of the Saudi Arabian legal system before discussing the main subject of this thesis, arbitration.

The Saudi regime states in The Basic Law of Governance that “Monarchy is the system of rule in the Kingdom of Saudi Arabia”.<sup>1</sup> However, the king is bound by Sharia law in ruling the country. This rule was stated from the very start of the kingdom when King Abdul-Aziz called for the application of consultation (Shura) in Mecca in 1924. He stated:

*“The source of legislation and provisions can only be from the book of Allah, what the messenger of Allah stated, what has been agreed on by the main scholars by analogy and what they unanimously agreed on from which is not in the book of Allah nor the Sunnah (the prophet’s statements or traditions). Only what Allah has permitted shall be permitted in this land and only what he forbidden shall be forbidden.”*<sup>2</sup>

The Basic Law Of Government also clearly states that the kingdom’s constitution is “Almighty God's Book, The Holy Quran, and the Sunna of the Prophet (PBUH)”.<sup>3</sup> This chapter will provide a brief background on the history of consultation (shura) in the Kingdom and the modern Council of Consultation (Majlis Ash-Shura). This chapter will also highlight the main points in the key Saudi legal system laws starting with The Basic Law of Governance, The Council of Consultation Law and The Council of Ministers Law. This chapter will then provide a brief background on the history of arbitration in Saudi Arabia.

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<sup>1</sup> The Basic Law Of Government 1992. art 5 (a).

<sup>2</sup> The Consultation Announcement 1924. art 5.

<sup>3</sup> The Basic Law Of Government 1992. art 1.



## **2.2. Consultation (Shura):**

In order to insure the implementation of Sharia law in the country, King Abdul-Aziz chose the Consultation (shura) system. In this section, the history and stages of Consultation (shura) in the kingdom of Saudi Arabia will be highlighted.

Shura has passed through several stages since the arrival of King Abdul-Aziz in Mecca in 1924. The first stage was the establishment of the first elected council in 1924 under the title of (The Consultative National Council). The council consisted of twelve members. At that time, when the state structure was not yet completed, the council was entrusted with drafting the basic laws for the administration of the country. At that early stage, there was no law to specify the functions of the council. However, that council continued for six months.

To expand the circle of participation, the previous council was dissolved and a Sultanic decree issued to form a new elected council representing all 12 districts of Mecca. Two religious scholars and one member representing commerce were to be among the twelve elected members. The council included three additional members nominated by the Sultan from the distinguished citizens of Mecca.

This council had more organisation than its predecessor. The instructions to form the council came in six articles. These instructions specified the qualifications for membership, the closing date for voting, and eligible voters. The jurisdictions of the council were formulated in seven articles that included regulating all affairs in courts, municipalities, endowments, education, security, and commerce in addition to forming permanent committees to solve the problems related to the social traditions that did not contradict Sharia.

In 1926 King Abdul-Aziz issued approved to a new Basic Law of Governance. In this law the council title was renamed Consultation Council (Majlis Ash-Shura) instead of its previous title, National Council.

In 1927 the new council law was issued in 15 articles reflecting the council's previous experience. This new law represents the first law drafted for Majlis Ash-



Shura. The law stipulates that membership is to consist of eight full-time members presided by the deputy of the King, His Royal Highness Prince Faisal Bin Abdul-Aziz. The council had to convene twice a week, and it could convene more than that upon the request of its president when necessary. The year 1927 is considered the actual founding date of Majlis Ash-Shura during the reign of King Abdul Aziz who inaugurated the council's first session on Sunday 17<sup>th</sup> July 1927.

The council continued working under the above mentioned law without any amendments, and went on exercising wide jurisdictions until the founding of the Council of Ministers in 1953 when many of the jurisdictions of Majlis Ash-Shura were distributed between the Council of Ministers and other apparatus of government which were developed according to their regulations. However, Majlis Ash-Shura continued to hold sessions and to look into issues referred to it, albeit with a reduced level of power.

### **2.3. The Modern Council of Consultation (Majlis Ash-Shura)**

After the Kingdom achieved enormous progress in development, the Custodian of the Two Holy Mosques, the late King Fahd bin Abdul-Aziz, issued decrees to modernise all major laws in the country. In his historical speech, which he delivered on the 24<sup>th</sup> of November 2000, he introduced three major laws: the Basic Law of Governance, the Council of Ministers Law and the Council of Consultation Law.

King Fahd strengthened the foundations of Consultation in the kingdom by issuing the new Council of Consultation Law to replace the previous law which was issued in 1929 and by approving the bylaws of the council and their supplements on the 18<sup>th</sup> of August 1993. He launched the first term of the council with a speaker and 60 members. In the second term, the council consisted of a speaker and 90 members. In the third term, the council included a speaker and 120 members. In the fourth term, the council consisted of a speaker and 150 members, representing people of knowledge, experience and competence.

On the 1<sup>st</sup> of August 2005, King Abdullah bin Abdul-Aziz came into power. Since he was the Crown Prince, King Abdullah has been giving the council his utmost



attention by supporting its progress and strengthening its goals. He also showed his support of the council through amending some articles of the council's law to cope with the growing positive changes in the Kingdom. For example, article 3 of the Shura Council law states that:

*“The shura council shall consist of a Speaker and One hundred and fifty members chosen by the King from amongst scholars, those of knowledge, expertise and specialists, provided that women representation shall not be less than (20 %) of member’s number. Their rights, duties and affairs shall be determined by a Royal Order”*.<sup>45</sup>

## **2.4. The Saudi legal system:**

When looking at the history of the Kingdom of Saudi Arabia the reign of King Fahad stands out clearly with all the changes and progress brought by him to the country. Amongst the most important things he established during his rule were the creation of the Basic Law of Governance and the development of the systems of the Council of Consultation and the Council of Ministers. These three matters will be discussed briefly in the following three sections.

## **2.5. The Basic Law of Governance**

The Basic Law fulfils the role of the Constitution as it organises the rules of power. It is divided into nine sections. The main characteristics of the Basic Law are as follows:

The first two sections are on general principles and the law of government. They state that “The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Quran, and the Sunna (Tradition) of the Prophet (PBUH)... which are the ultimate sources of

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<sup>4</sup> “This is the text after it was amended by the Royal Order number A/44 dated 29/2/1434 H, where the previous text was:” The shura council shall consist of a Speaker and One hundred and fifty members chosen by the King from amongst scholars, those of knowledge, expertise and specialists. Their rights, duties and affairs shall be determined by a royal order” (The Shura Council law 1992. art 3.)

<sup>5</sup> The Sura Council Law 2005. art 3.



reference for this Law and the other laws of the State”<sup>6</sup> and the “Government in the Kingdom of Saudi Arabia is based on justice, consultation and equality according to Islamic Sharia”.<sup>7</sup>

Article 5 is one of the most important articles in this law as it states the system or rule in the country and how the king and the crown prince are appointed. It states that “(a.) Monarchy is the system of rule in the Kingdom of Saudi Arabia. (b.) Rulers of the country shall be from amongst the sons of the founder King Abdul-Aziz Al-Saud, and their descendants”.<sup>8</sup> It also states that the power is given to the most convenient. It states “Allegiance shall be pledged to the ‘best’ amongst the family of King Abdul-Aziz to exercise power according to Almighty God's Book and His Messenger's Sunna (Tradition)”.<sup>9</sup>

This article also states that “(c.) The King shall choose the Crown Prince and relieve him by a Royal Decree.” and “Upon the death of the King, the Crown Prince shall assume the Royal powers until a pledge of allegiance (bay'a) is given” (The Basic law of Government of 1992, Art. 5 c, e). After that “citizens shall give the pledge of allegiance (bay'a) to the King, professing loyalty in times of hardship and ease.”<sup>10</sup>

It is important to note here that King Abdullah established a new regulation called The Law of the Allegiance Commission in 2006. The members of the council include surviving sons of Abdul-Aziz, grandsons whose fathers are deceased, incapacitated or unwilling to assume the throne and the sons of the King and Crown Prince.<sup>11</sup> The commission is responsible for determining future succession to the throne of the country and to appoint a Crown Prince once a new King succeeds to the throne.<sup>12</sup>

Chapter three of The Basic Law of Government is concerned with the values of Saudi society. It establishes that “The family is the nucleus of Saudi Society”<sup>13</sup> and

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<sup>6</sup> The Basic Law Of Government 1992. art 1.

<sup>7</sup> *ibid.* art 8.

<sup>8</sup> The Basic Law Of Government 1992. art 5 (a) (b).

<sup>9</sup> *ibid.* art 5 (a).

<sup>10</sup> *ibid.* art 6.

<sup>11</sup> Succession Commission Law 2006. art 1.

<sup>12</sup> *ibid.*

<sup>13</sup> The Basic Law Of Government 1992. art 9.



that “The state shall aspire to promote family bonds and Arab-Islamic values. It shall take care of all individuals”.<sup>14</sup>

Chapter four is on economic principles where it talks about natural resources and that they are all “under the authority of the State”.<sup>15</sup> It provides that “The State shall guarantee private ownership”<sup>16</sup> and that “no taxes or fees shall be imposed, except in need and on a just basis”.<sup>17</sup> However, “Zakat shall be collected and spent for legitimate expenses”.<sup>18</sup>

Chapter five is on rights and duties. The main highlights of this chapter are that “The State shall protect the Islamic Creed [and] apply the Sharia”,<sup>19</sup> “The State shall guarantee the rights of the citizens and their families in cases of emergency, illness, disability and old age and shall support the Social Insurance Law”.<sup>20</sup> Also states that “The State shall grant the right of political asylum provided it is in the public interest”,<sup>21</sup> and finally the “Councils held by the King and the Crown Prince shall be open for all citizens and anyone else who may have a complaint or a grievance. A citizen shall be entitled to address public authorities and discuss any matters of concern to him”.<sup>22</sup>

Chapter six is a rather important chapter because it highlights the Authorities of the state. It states in article 44 that the Authorities of the State consist of: The Judicial Authority in the first place followed by The Executive Authority, and then the Regulatory Authority.<sup>23</sup> Further, it points out that “The King is the ultimate arbiter for these Authorities”.<sup>24</sup>

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<sup>14</sup> *ibid.* art 10.

<sup>15</sup> *ibid.* art 14.

<sup>16</sup> *ibid.* art 18.

<sup>17</sup> *ibid.* art 20.

<sup>18</sup> *ibid.* art 21.

<sup>19</sup> *ibid.* art 23.

<sup>20</sup> *ibid.* art 27.

<sup>21</sup> *ibid.* art 42.

<sup>22</sup> *ibid.* art 43.

<sup>23</sup> *ibid.* art 44.

<sup>24</sup> *ibid.* art 44.



With regard to Judicial Authority, article 46 states that “The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia”.<sup>25</sup> Moreover, “The King or whomsoever he may deputize shall concern himself with the implementation of judicial rulings”.<sup>26</sup>

With regard to the Executive Authority, article 56 states that “The King is the Prime Minister. Members of the Council of Ministers shall assist him in the performance of his mission according to the provisions of this law and other laws”.<sup>27</sup>

With regard to the Regulatory Authority, article 67 states that the concern of this authority lies in making the laws and regulations: “Its powers shall be exercised according to provisions of this Law and the Law of the Council of Ministers and the Law of the Shura Council”.<sup>28</sup> Although the Shura council was established in the rule of King Abdu-Aziz it is now officially regulated in the basic law of government. Article 68 states that “The Shura Council shall be established. Its Law shall specify the details of its formation, powers and selection of members. The King may dissolve and reconstitute the Shura Council”.<sup>29</sup>

Finally, chapters seven, eight and nine are on financial affairs, institutions of audit and general principles. It mentions matters such as the State budget, it’s revenues and expenses<sup>30</sup> and that all that shall be subsequently audited to ensure proper use and management and that all Governmental institutions.<sup>31</sup>

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<sup>25</sup> *ibid.* art 46.

<sup>26</sup> *ibid.* art 50.

<sup>27</sup> *ibid.* art 56.

<sup>28</sup> *ibid.* art 67.

<sup>29</sup> *ibid.* art 68.

<sup>30</sup> *ibid.* art 72, 78.

<sup>31</sup> *ibid.* art 79, 80.



## 2.6. The Council of Consultation Law

The Council of Consultation Law was issued by Royal Decree No. A/91 in March 1992,

published in Umm-al-Qura Gazette, No.3397 5 March 1992, Article 1 of the Council of Consultation Law shows why it was set. It states “In compliance with Allah Almighty words:

[Those who respond to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what we bestow on them for sustenance].<sup>32,33</sup> It further states:

*“It is part of the Mercy of Allah that thou dost deal gently with them. Werd thou severe or harsh-hearted, they would have broken away from about thee: so pass over (their faults), and ask for (Allah's) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast taken a decision, put thy trust in Allah. For Allah loves those who put their trust (in Him)].<sup>34,35</sup>*

Article 1 also states:

*“And following His Messenger Peace Be Upon Him (PBUH) in consulting his Companions, and urging the (Muslim) Nation to engage in consultation. Shura Council shall be established to exercise the tasks entrusted to it, according to this Law and the Basic Law of Governance while adhering to Quran and the Path (Sunnah) of his Messenger (PBUH), maintaining brotherly ties and cooperating unto righteousness and piety.”<sup>36</sup>*

The council “consists of a Speaker and One hundred and fifty members chosen by the King from amongst scholars, those of knowledge, expertise and specialists, their rights , duties and affairs shall be determined by a royal order.”<sup>37</sup>

Article 4 states the conditions that must be provided in a member of the council. A member must be a Saudi national by descent and upbringing. He must be well known

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<sup>32</sup> The Holy Quran. 42 (38).

<sup>33</sup> Shura Council Law 1992. art 1.

<sup>34</sup> The Holy Quran. 3 (159).

<sup>35</sup> Shura Council Law 1992. art 1.

<sup>36</sup> *ibid.* art 1.

<sup>37</sup> *ibid.* art 3.



for uprightness and competence and not less than 30 years of age.<sup>38</sup> “Speaker, Vice-Speaker, Assistant Speaker and Secretary General [are] appointed and released by royal decree. Their ranks, rights, duties, and all their affairs shall be defined by royal decree”.<sup>39</sup> The Council term is four Hijri years, at least two-thirds of members, including the Speaker or whoever may be deputised for the meeting to be valid and resolutions are not considered valid without the members' majority approval.<sup>40</sup> In the event that the term of the current council ends before a new council is formed, the current Council remains active until the new formation is accomplished. The number of the newly selected members cannot be less than half of the current Council.<sup>41</sup>

With regard to the issue of resigning members, “a member may submit a request to resign his membership to the Speaker, who in turn shall bring it before the King”<sup>42</sup>, “No member may exploit his membership for his own interest”.<sup>43</sup> If a member fails to perform his duties accountability and a trial takes place according to rules and procedures to be issued by royal decree,<sup>44</sup> and “On vacancy of a member position, the King shall choose a substitution”.<sup>45</sup>

With regard to the powers of the Council of Consultation and its duties, article 15 states that “Shura Council shall express its opinion on State's general policies referred by Prime Minister. The Council shall specifically have the right to exercise the following:

- a. Discuss the general plan for economic and social development and give view.
- b. Revising laws and regulations, international treaties and agreements, concessions, and provide whatever suggestions it deems appropriate.
- c. Analysing laws.

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<sup>38</sup> *ibid.* art 4.

<sup>39</sup> *ibid.* art 10.

<sup>40</sup> *ibid.* art 13, 16.

<sup>41</sup> *ibid.* art 13.

<sup>42</sup> *ibid.* art 5.

<sup>43</sup> *ibid.* art 8.

<sup>44</sup> *ibid.* art 6.

<sup>45</sup> *ibid.* art 7.



- d. Discuss government agencies annual reports and attaching new proposals when it deems it appropriate.”<sup>46</sup>

The council’s resolutions are submitted to the king who decides what resolutions are to be referred to Cabinet: “If views of both Shura Council and Cabinet agree, the resolutions are issued after the king approval. If views of both councils vary the issue [is] returned back to the council to decide whatever it deems appropriate, and send the new resolution to the king who takes the final decisions.”<sup>47</sup>

The council has the jurisdiction to propose a draft of a new law or an amendment of an enacted law and study them within the council. Following this, the speaker may submit the council’s resolution of the new or amended law to the king.<sup>48</sup> Finally, “Laws, international treaties and agreements, and concessions [are] issued and amended by royal decrees after being reviewed by the Shura Council”<sup>49</sup>

## **2.7. The Council of Ministers Law**

The law of the council of ministers was issued by Royal Order No. (A/13), 20 August 1993, and published in the Umm al-Qura Gazete No. 3468, on 27 August 1993.

The Council is a regulatory authority presided over by the King.<sup>50</sup> Article 3 of the law states the conditions that must be provided in a member of the council: a member must be a Saudi national by upbringing and descent, well known for uprightness and competence and not previously convicted of a crime impinging on religion and honour.<sup>51</sup>

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<sup>46</sup> *ibid.* art 15.

<sup>47</sup> *ibid.* art 17.

<sup>48</sup> *ibid.* art 23.

<sup>49</sup> *ibid.* art 18.

<sup>50</sup> Law of The Council of Ministers 1993. art 1.

<sup>51</sup> *ibid.* art 3.



The Council of Ministers is composed of The President of the Council of Ministers who is the King,<sup>52</sup> deputies of the President of the Council of Ministers, Ministers with Portfolios, Ministers of State appointed as members of the Council of Ministers by Royal Order, and Counsellors of the King, who are appointed as members of the Council of Ministers by Royal Order.<sup>53</sup> The “Members of the Council are appointed, relieved of their posts and their resignations accepted by Royal Order”.<sup>54</sup> The council meetings are “presided over by the King, the President of the Council, or by one of the King’s deputies. The resolutions of the Council of Ministers become final upon the King’s approval”.<sup>55</sup> “The term of the Council does exceed four years, during which a new Council shall be reconstituted by Royal Order. If the term expires before the reconstitution of the new Council, the current Council shall continue performing its duties until the new one is reconstituted.”<sup>56</sup> Further,

*“Any meeting held by the Council of Ministers shall not be considered valid without the attendance of at least two-thirds of its members. Resolutions shall not be considered legal without majority approval. In case of a tie, the President of the Council of Ministers shall cast the deciding vote. In exceptional cases, meetings of the Council of Ministers may be considered valid with half of the members in attendance. In such cases, resolutions shall not be considered legal without the approval of at least two-thirds of the members in attendance. Such exceptional cases are determined by the President of the Council of Ministers.”<sup>57</sup>*

Regarding the powers and duties of the Council of Ministers, article 19 states that

*“The Council of Ministers shall draw up the internal, external, financial, economic, educational and defence policies as well as the general affairs of the State and shall supervise their implementation. It shall also review the resolutions of the Shura Council. It shall have the executive authority and be the final authority in financial and administrative affairs of all ministries and other government agencies, Subject to provisions of the Basic Law of Governance and the Shura Council Law.”<sup>58</sup>*

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<sup>52</sup> *ibid.* art 29.

<sup>53</sup> *ibid.* art 12.

<sup>54</sup> *ibid.* art 8.

<sup>55</sup> *ibid.* art 7.

<sup>56</sup> *ibid.* art 9.

<sup>57</sup> *ibid.* art 14.

<sup>58</sup> *ibid.* art 19



Also, the following articles are relevant here: “Subject to provisions of the Shura Council Law, laws, treaties, international agreements and concessions shall be issued and amended by Royal Decrees after being reviewed by the Council of Ministers”,<sup>59</sup> and “The Council of Ministers shall review draft laws and regulations before it and vote on them article by article and then as a whole in accordance with the procedures set forth in the Internal Regulations of the Council”.<sup>60</sup>

Finally, with regard to the council’s Executive Affairs:

*“The Council, being the direct executive authority, [it has] full power over all executive and administrative affairs [including] Monitoring the implementation of laws, regulations and resolutions, establishing and organizing public institutions, following up on the implementation of the general development plan and setting up committees for the review of the ministries’ and other governmental agencies’ conduct of business.”*<sup>61</sup>

## **2.8. History of Arbitration in Saudi Arabia**

Arbitration has a long history in the Arab Peninsula. It was a method known for resolving disputes even before Islam. One of the most famous incidences where arbitration was used was in Mecca when the clans of the Quraysh tribe during the renovation of the Ka'ba were involved in a dispute regarding which clan should have the honour of putting the black stone in its place. No clan chief wanted to relinquish this great honour to any other clan so they resolved their dispute by arbitration when Abu Ummayah Ibn Almughira suggested they appoint the first person to enter the mosque as an arbitrator between them in resolving their dispute. It was the prophet Muhammed (PBUH) who entered. This occurred before he became a prophet. They said when they saw him “this is the honest and fair, we accept him” when he approached them they asked him to resolve their dispute. He asked for a piece of cloth to be brought, he then put the stone in the middle of it and asked each clan to hold a corner of the cloth and raise it to its position. When the stone was at its position the prophet pushed it in place.<sup>62</sup> Through his successful arbitration of that

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<sup>59</sup> *ibid.* art 20.

<sup>60</sup> *ibid.* art 21.

<sup>61</sup> *ibid.* art 24.

<sup>62</sup> Abd Al-Malik Ibn Hisham, *Assirah Alnabawiyah (Biography of Prophet Muhammad)* (Dar Alkitab AlArabi 1990). 223



dispute, the Prophet Muhammad prevented potential war among the Quraysh tribes. This was an example of one of the famous incidents where arbitration was practised before Islam.

When Islam started, the Quran approved this method of settlement and advised for its use in disputes. An example of that is in Surah An-nisa (the women) verse 35:

*“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her family; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things”.*<sup>63</sup>

Throughout Islamic history there have been records in Hadeeth, incidents by the prophet companions, the generation after them (known in Islamic literature as Tabieen<sup>64</sup> and the nations afterwards where arbitration was used as a method of settling disputes between parties either in war situations or in normal daily life situations.<sup>65</sup> The Treaty of Medina was the first treaty to be signed by the Muslim community in AD 622, providing for arbitration to resolve disputes.<sup>66</sup>

From the discovery of oil and King Abdulaziz granting Standard Oil of California (Socal), later renamed Chevron, the right to prospect for oil in the new Kingdom,<sup>67</sup> all the way to the 1950's, dispute resolution between Saudi and foreign companies was through arbitration. However, the Saudi government's attitude toward arbitration changed dramatically after the famous ARAMCO arbitration case in 1958. The Saudi government lost the case with the Oil Company ARAMCO and as a result was dissatisfied with the results of the case. Despite its disappointment, the Saudi government accepted the tribunal's decision and continued to honour the contract. However, in 1963 the Saudi Council of Ministers enacted Resolution No. 58 which

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<sup>63</sup> The Holy Quran. 4 (35)

<sup>64</sup> Tabieen are the people who met the prophet's companions while being Muslims but did not meet the prophet peace be upon him.

<sup>65</sup> Qahtan Addori, *Arbitration contract in Islamic Fiqh and positive Law* (Dar Alfurqan 2002) 52–75

<sup>66</sup> S. Al-Ammari and A. Timothy Martin, 'Arbitration in the kingdom of Saudi Arabia' (2014) 30(2) *Arbitration International* 387–408

<sup>67</sup> 'Oil', <<https://www.saudiembassy.net/about/country-information/energy/oil.aspx>> accessed 15 February 2016



forbade all government agencies from resorting to arbitration without prior approval from the Council of Ministers. This was then later stated in the Arbitration Regulations of 1983 and still exists in the Arbitration Regulations of 2012, as will be discussed later when talking about the capacity of a state and its agencies<sup>68</sup>.

The Kingdom of Saudi Arabia is party to a number of international arbitration conventions. In 1952, the kingdom became a party to the Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards. The convention was signed in Cairo on 14 September 1952. The scope of this convention is limited to dealing with awards issued in Saudi Arabia and the Member States of the Arab League who ratified the Convention, namely Egypt, Iraq, Jordan, Kuwait, Libya, Syria and the United Arab Emirates. In April 1983, the kingdom signed the Riyadh Convention on Judicial Cooperation between States of the Arab League. Ratified on the 11<sup>th</sup> of May 2000, the Convention replaced the 1952 Convention. After that in 1980, the kingdom of Saudi Arabia joined the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention'), and in 1987 the kingdom signed the the Amman Convention on Commercial Arbitration, but to date it has not ratified this convention.

Importantly, on the 30<sup>th</sup> of December 1993, a Royal Decree was issued for the kingdom to join the New York Convention. In 1994, the kingdom of Saudi Arabia became a member of the convention. However Saudi Arabia has been criticized for not enforcing foreign arbitral awards after joining the convention on the grounds that the awards were subject to review and were contradicting Sharia rules.<sup>69</sup> It is important to note here that the kingdom of Saudi Arabia, by not enforcing awards contradicting Sharia rules, does not violate the grounds of refusal provided in the New York Convention as the convention provides that:

*“2. 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: (b) The recognition or enforcement of the award would be*

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<sup>68</sup> See Ch3.3.3.1.2.

<sup>69</sup> Abdulrahman Mamdoh Saleem, 'A critical study on how the Saudi arbitration code could be improved and on overcoming the issues of enforcing foreign awards in the country as a signatory state to the New York convention' (2013) 16 CEPMLP Annual Review. And Jean-Benoît Zegers and Omar Elzorkany, 'KINGDOM OF SAUDI ARABIA' [2014] Arbitration Guide IBA Arbitration Committee



*contrary to the public policy of that country”*.<sup>70</sup>

The Kingdom of Saudi Arabia has the right to refuse enforcement of awards contradicting Sharia rules and Saudi public policy; however, this study will show later a very important improvement in Saudi Arbitration Regulations, namely the recognition of partial enforcement of arbitral awards. This fits with what the New York Convention asks for when an award has provisions that may be separated to enforce the parts where there are no contradictions then these parts should be enforced. The convention states:

*“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced”*.<sup>71</sup>

This will be discussed in chapter six on arbitral awards when discussing the challenge of arbitral awards.<sup>72</sup>

In the private sector in the Kingdom, arbitration followed the rules set by the Commercial Court Act<sup>73</sup> and institutional arbitration was developed through the application of the Rules of the Chamber of Commerce.<sup>74</sup> Later, implementation rules for the Chamber of Commerce and Industry Act were issued<sup>75</sup> which regulated arbitrations held under its provisions.

In 1983, an Arbitration Regulation was issued followed by its implementation rules in 1985. This regulation and its implementation rules were subject to a lot of criticism by commentators as they were difficult and inefficient, provided a lot of complications and procedural requirements and more importantly gave little authority to the arbitral tribunal. At the same time it allowed courts to intervene

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<sup>70</sup> The New York convention 1958. art 5, (2b)

<sup>71</sup> The New York convention 1958. art 5, (1c)

<sup>72</sup> See Ch 6.9.1.

<sup>73</sup> The Commercial Court Act 1931.

<sup>74</sup> Law of Chambers of Commerce And Industry 1980.

<sup>75</sup> Implementing Regulation of the Chambers Of Commerce And Industry.



throughout the arbitration process which resulted in arbitrations proceedings being impeded and arbitration awards not being enforced.<sup>76</sup> All this will be addressed in detail throughout this study.

In late 2007, King Abdullah bin Abdulaziz allocated 7 billion Saudi Riyals (nearly \$2 billion) to develop the Kingdom's judicial system and upgrade its court facilities.<sup>77</sup> The program included the development of governmental, judicial and financial sectors including the Ministry of Justice, the Board of Grievances, the Ministry of Finance, and the Ministry of Civil Service, and the Bureau of Experts at the Council of Ministers, the Supreme Committee for Administrative Organization, and others. As a result of this program there has been an increase of 90 per cent in some courts' proceedings, alongside the introduction of 48 e-services on the Ministry of Justice portal and the publication of tens of regulations<sup>78</sup> one of which is the new Arbitration Regulations of 2012.

Although not stated in the new Saudi Arbitration Regulations of 2012, it is important to note that the Saudi legislator has consulted the United Nations Commission on International Trade Law 1985 (UNCITRAL) Model Law on International Commercial Arbitration (and its amendments) as a starting point but then made significant changes to it primarily to address issues of concern such as mentioning that the violation of Sharia law is not allowed.<sup>79</sup>

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<sup>76</sup> S. Al-Ammari and A. Timothy Martin, 'Arbitration in the kingdom of Saudi Arabia' (2014) 30(2) *Arbitration International* 387–408

<sup>77</sup> 'The Board of Grievances',

<<http://www.bog.gov.sa/KingAbdullahProject/Pages/AboutProject.aspx>> accessed 15 February 2016

<sup>78</sup> 'The Bureau of Experts at the Council of Ministers',

<<https://boe.gov.sa/MainDefault.aspx?lang=en>> accessed 15 February 2016. Also see, Ahmen Alhilali, 'King Abdullah's project for the development of the judiciary system, a 7 billion Saudi Riyal vision of modernizing' (25 January 2015) <<http://www.alhayat.com/Articles/7008941>> accessed 15 February 2016.

<sup>79</sup> Jean-Benoît Zegers and Omar Elzorkany, 'KINGDOM OF SAUDI ARABIA' [2014] *Arbitration Guide IBA Arbitration Committee* (p4). Mohammed Al-Ghamdi and John C. Boehm, 'New Saudi Arbitration Law: A Positive Step, but Practical Questions Remain' [2012] *Norton Rose Fulbright* <http://www.nortonrosefulbright.com/knowledge/publications/94353/new-saudi-arbitration-law-a-positive-step-but-practical-questions-remain>. S. Al-Ammari and A. Timothy Martin, 'Arbitration in the kingdom of Saudi Arabia' (2014) 30(2) *Arbitration International* 387–408. Jean-Pierre Harb, Fahad Habib, and Sheila Shadmand, 'The new Saudi arbitration law' (*Jones Day Publications*,



## 2.9. Sharia Law and Public policy in Saudi Arabia

The implementation rules of 1985 and the Arbitration Regulation of 2012 state that Sharia law should be followed and shall not be contradicted<sup>80</sup>. To understand sharia law and public policy in Saudi Arabia, this section will provide a brief explanation of the sources of the legal system in Saudi Arabia.

The Saudi Arabian legal system is based on the religion of Islam. Islamic law is referred to amongst Muslims as Sharia law. This law is taken from two main sources: the Quran and the Sunnah. The Quran is the Book of Allah, his words and his commands revealed to the Prophet Muhammad Peace and blessings be upon him through the angel of revelation Jibreel. The Sunnah, are the words and practices of the prophet Muhammad Peace and blessings be upon him. The Quran is written in one book, but the Sunnah is narrated in a few books dedicated to gathering the words and practices of the prophet as it was narrated by his companions. Throughout Islamic history, many Muslim scholars dedicated their time revising these narrations to ensure that the authentic narrations are kept separate from those that are not authentic, weak or lies. The Muslim Sinners have a number of books where these narrations (also called Hadeeth) are gathered together, mainly in the six books known as: Albukhari, Muslim, Abu Dawood, AlTirmithi, Alnasai, Ibn Majah, as well as Muwata Malik and Musnad Ahmad, among other books. The Quran and the Sunnah are the two main sources of Islamic Sharia law. There are two secondary sources, Ijma and Qiyas. Ijma is the unanimous consensus of Muslim scholars that must not and cannot contradict the teachings of the Quran and Sunnah. Qiyas is the method of legal reasoning by analogy which is used as a source when there is a situation for which there is no answer for it in the Quran, Sunnah or Ijma.

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September 2012) <[http://www.jonesday.com/new\\_saudi\\_arbitration\\_law/](http://www.jonesday.com/new_saudi_arbitration_law/)> accessed 15 February 2016. Essam AlTamimi, 'Saudi Arabia introduces draft arbitration law in line with the UNCITRAL model law - Al Tamimi & company' (2012) <<http://www.tamimi.com/en/magazine/law-update/section-6/june-4/saudi-arabia-introduces-draft-arbitration-law-in-line-with-the-uncitral-model-law.html>> accessed 15 February 2016. John Balouziyeh, 'Kluwer arbitration Blog' (*Saudi Arabia's New Arbitration Law Sees More Investors Opting for Arbitration in Saudi Arabia*, 29 May 2013) <<http://kluwerarbitrationblog.com/2013/05/29/saudi-arabias-new-arbitration-law-sees-more-investors-opting-for-arbitration-in-saudi-arabia/>> accessed 15 February 2016

<sup>80</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 39, Saudi Arabian Arbitration Regulation 2012. art 2. 5. 25(1-2). 38(1). 50(2). 55(2,b).



In 1343 H.D. (1924 A.D.) King AbdulAziz announced his strategy in ruling the county. He stated: “The source for legislations and judgments can only be from the Book of Allah (Quran), what was narrated from his messenger peace and blessings be upon him, what was agreed on by Muslim scholars by Qiyas and what they unanimously agreed on (Ijma) from what is not mentioned in the Quran nor the Sunnah. Nothing is permitted in this land but what Allah has permitted and nothing is forbidden but what he forbade.”<sup>81</sup> With the understandings of the teachings of the Quran and Sunnah being interpreted by four schools of understanding namely; Hanafi, Maliki, Shafi’I and Hanbali, in 1345 H.D. (1926 A.D), he ordered that the Hanafi understanding of Sharia rules (which was the law of the Ottoman Empire at the time) shall remain the school of practice in Alhijaz (the western side of the kingdom of Saudi Arabia including the holy city of Mecca). He stated: “the provisions of the Utiman law remain active as we have not issued our intention to abandon it and replace it with other laws, therefore we accept the suggestions regarding the continuity of practice with that law”.<sup>82</sup> In 1346 H.D. (1927 A.D.), the first administrative regulation for the Saudi judicial system in Alhijaz was issued named Conditions of Sharia courts and its formations. The king compelled the courts to judge according to Islamic laws without being restricted to any school of understanding.<sup>83</sup> In the same year a Royal Decree was issued, complying judges to order according to the Hanbali School’s understandings of Sharia in general and in matters where a judge wishes to judge according to a different School they shall reason their judgment and support it (i.e. from the Quran, Sunnah, Ijma or Qiyas). King Abdulaziz named the main books in the Hanbali School as the main sources for the teachings of the Hanbali school in the Kingdom: (Sharh Almuntaḥa, Sharh Aliqna, Alrawd Almurbi, and Manar Alsabeel, Almughni, Alsharh Alkabeer). These are the resources for the Saudi legal system and this is how Sharia is practiced and understood in the Saudi legal system to date.

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<sup>81</sup> 'Shura announcement',

<<https://www.shura.gov.sa/wps/wcm/connect/ShuraArabic/internet/Royal+Speeches/Announcement+of+Shura/>> accessed 24 February 2016

<sup>82</sup> 'Saudi Supreme Judicial Council', <<https://www.scj.gov.sa/About>> accessed 15 February 2016

<sup>83</sup> ibid



### 2.9.1. Saudi Public Policy, Sharia Law and Arbitration Regulations

The question that arises now is what areas of arbitration can be impacted by the application of Sharia law and Saudi public policy?

The first principle that sharia law has an effect on with regard to arbitration is the concept of usurious interest (Riba). The prohibition of Riba in Shara law is stated in the Quran in 7 verses <sup>84</sup>, where it states: “whereas Allah has permitted trading and forbidden Riba”.<sup>85</sup> Also, in the Hadeeth narrated by Muslim, Abdullah bin Mas`ud (May Allah be pleased with him) the following is reported: The Messenger of Allah (Peace be upon him) cursed the one who accepts Riba and the one who pays it. The narration in At-Tirmidhi adds: and the one who records it, and the two persons who stand witness to it.<sup>86</sup> Based on this, any contract that includes the concept of Riba would be contradicting Sharia law and Saudi public policy in relation to arbitration.

Another contracting concept that differs from Western contract law is the concept of ambiguity or risk (Gharar). This concept is forbidden in the Haddeth Abu Hurayrah (may Allaah be pleased with him) which narrated that the Prophet (peace and blessings of Allaah be upon him) forbade Gharar (ambiguous) transactions.

Gharar in Arabic means a risk<sup>87</sup> which is not certain; where something may or may not happen. This concept is clear in gambling. Gambling is forbidden under Sharia law. In the Quran “O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, al-Ansaab [sacrifices for idols, etc.] and al-Azlaam [arrows for seeking luck or decision] are an abomination of Shaytaan’s handiwork. So avoid (strictly all) that (abomination) in order that you may be successful.”<sup>88</sup> This prohibition can also be extended to some types of insurance contracts. This means that a contract containing uncertainty in financial transactions between parties where a party might be at risk of not getting what they paid for or a gambling contract is classed as a contract contradicting Sharia rules.

It is worth mentioning also that Alcohol,<sup>89</sup> products from pigs or any other prohibited

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<sup>84</sup> Quran, 1 (275-276), 1 (278), 2 (130), 3 (159-160), 30 (39)

<sup>85</sup> Quran, 1 (275)

<sup>86</sup> Muslim, *Shah Muslim* (1st edn, Dar Taylah 2006) 1597. Altirmithi, *Susan Altirmithi* (1st edn, Dar Algharb Alislami 1996) 1206.

<sup>87</sup> Ibn Manzur, *Lisan Al-Arab*, vol 5 (dar sader Beirut) 13–14

<sup>88</sup> Quran 5 (90)

<sup>89</sup> Quran 5 (90)



meat are prohibited under Sharia rules:

*“Say: "I find not in the Message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine—for it is an abomination or what is impious, (meat) on which a name has been invoked, other than Allah's." But (even so) if a person is forced by necessity, without wilful disobedience nor transgressing due limits— thy Lord is Oft-Forgiving, Most Merciful”*<sup>90</sup>

Accordingly, any contract containing the principle of Riba, Gharar or dealing with prohibited goods is seen as a contract contradicting the rules of Sharia and therefore Saudi public policy which would consequently affect the validity of the arbitration agreement or the arbitral award.

The question that arises here is whether this means that the whole contract would be treated as null and void under Saudi regulations. It will be discussed later on in this thesis that the Saudi Arbitration Regulations recognises the concept of separability of the arbitral agreement and the concept of partial enforcement<sup>91</sup>, meaning that if it is possible to separate the arbitral agreement and the arbitral award into parts so the parts contradicting public policy or Sharia law will not be accepted and enforced and the parts that do not contradict may be accepted then this will happen.

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<sup>90</sup> Quran 6 (145)

<sup>91</sup> See Ch 3.2. , Ch 6.9.1.



### **3. Chapter Three: The agreement to arbitrate**

#### **3.1. Introduction**

The arbitration agreement is an essential foundation of an arbitration contract. It contains the consent of the parties to submit to arbitration in dispute matters. It should contain the provisions needed to establish the arbitration process, such as the constitution of the arbitral tribunal, the place where the arbitration process would take place and the applicable law governing the arbitration process as well as other essential elements for an arbitration process to be established.

This chapter is concerned with the arbitration agreement. It will cover two main features of the arbitration agreement. As such, this chapter will contain two sections as follows:

- Forms and contents of the arbitration agreement.
- Requirements for the validity of the arbitration agreement.

This chapter will commence with an examination and explanation of the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985 then the new arbitration law of 2012 will be addressed in order to highlight what the new changes in the new regulation are and to discuss whether these changes are to an advantage or not and if they are enough to resolve any issues that might have been in the old regulations. After that, the English Arbitration Act of 1996 and the Scottish Arbitration 2010 Act will be addressed to compare them to the Saudi regulations to determine what the differences are, and if there is anything the Saudi regulations can benefit from these changes. Finally, subtitle will be addressed to highlight the recommendation and findings of the chapter.



### 3.2. Forms and contents of the arbitration agreement.

Before talking about the forms of an arbitration agreement and its content, it is important to address the definition of an arbitration agreement as it is mentioned in the legislation under consideration.

The Saudi Arbitration Regulation of 1983 and its implementation rules of 1985 do not provide a straight definition for the arbitration agreement but instead goes straight ahead to address its forms and content. In contrast, the new Arbitration Regulations of 2012 provide a definition for the arbitration agreement in the first article. It states

*“The terms herein used shall have the meanings that are shown opposite to them, unless the context requires otherwise: (1) “Arbitration Agreement”: An agreement between two or more parties to refer to arbitration all or some of the disputes that have arisen or may arise between them with respect to a particular legal relationship, whether contractual or otherwise, and whether the arbitration agreement is in the form of an arbitration clause included in the contract, or in the form of a separate arbitration agreement.”<sup>92</sup>*

The English Arbitration Act also provides a definition for the arbitration agreement in section 6 where it states:

*"6. Definition of arbitration agreement.*

*(1) In this Part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).*

*(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.”<sup>93</sup>*

Similarly, the Scottish Act states in section 4 the following: "4. Arbitration agreement: An “arbitration agreement” is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document)."<sup>94</sup>

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<sup>92</sup> Saudi Arabian Arbitration Regulation 2012. art 1 (1).

<sup>93</sup> The Arbitration Act 1996. art 6.

<sup>94</sup> Arbitration (Scotland) Act 2010. sec 4.



That is what these laws and regulations state with regard to defining an arbitration agreement. In an arbitration agreement the parties show that in a dispute matter they all agree to submit to an arbitration settlement. This agreement to arbitrate usually comes in one of two forms. The first form is when the arbitration agreement forms a part of the original contract between the parties in which they mention that they would submit future disputes between them to arbitration. This form is called an arbitration clause. The second form of arbitration agreements is separate from the original contract in which the parties refer specific existing disputes to arbitration. This form of arbitration agreements is called a submission agreement.<sup>95</sup>

As seen here, the main difference between these two forms of arbitration agreements is that one of them, the arbitration clause, is on future disputes that have not yet arisen. This makes this form of agreement usually short in its text and does not usually contain most of the elements necessary to establish an arbitration process. On the other hand, the other form of arbitration agreement, the submission agreement, is on a dispute that exists between the parties; thus, it would be formed in a way that would suite the case in hand and would include all elements necessary to form an arbitration process.

Another type of arbitration agreement that is mentioned by AlMahidib is when two or more parties enter into a general contract that contains several subcontracts in which this general contract includes a statement that refers any future disputes arising out of these subcontracts to be resolved by arbitration then a specific submission agreement would be submitted to regulate a dispute when arising.<sup>96</sup>

One issue related to the forms of arbitration agreement is the concept of separability. Separability was not mentioned or addressed in the previous Saudi Arbitration Regulation of 1983, nor in the implementation rules of 1985. In contrast, this matter is addressed in the new Arbitration Regulation of 2012 in article 21. It states:

*“The arbitral clause incorporated in any contract is deemed to constitute a separate agreement, distinct from the other terms of the contract. The*

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<sup>95</sup> Mhaidib AlMhaidib, ‘Arbitration as a Means of Settling Commercial Disputes (national and International) with Special Reference to the Kingdom of Saudi Arabia’ (1997). 86

<sup>96</sup> *ibid* 87



*annulment or rescission or termination of the contract incorporating the arbitral clause shall not constitute an annulment of the arbitral clause incorporated in that contract provided that such clause is valid.”*<sup>97</sup>

This is a very important addition in the new Arbitration Regulations of 2012. Classing the arbitration agreement as a separate contract from the original business contract is important for the arbitration process. It means that if for any reason the business contract between the parties is annulled, rescinded or terminated, the arbitration agreement remains valid. This will enable the arbitration process to remain ongoing and will not terminate it.

The English act states in section 7 the following with regard to separability of an arbitration agreement from a contract:

*"7. Separability of arbitration agreement.*

*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”*<sup>98</sup>

This is only applied “where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.”<sup>99</sup>

The Scottish Arbitration Act of 2010 also states in this regard in section 5:

*"5. Separability*

*(1) An arbitration agreement which forms (or was intended to form) part only of an agreement is to be treated as a distinct agreement.*

*(2) An arbitration agreement is not void, voidable or otherwise unenforceable only because the agreement of which it forms part is void, voidable or otherwise unenforceable.*

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<sup>97</sup> Saudi Arabian Arbitration Regulation 2012. art 21

<sup>98</sup> The Arbitration Act 1996. art 7.

<sup>99</sup> *ibid.* art 2.



*(3) A dispute about the validity of an agreement which includes an arbitration agreement may be arbitrated in accordance with that arbitration agreement.*"<sup>100</sup>

As seen here, the new Saudi regulation, in contrast to the previous regulations, adopts and mentions the separability of an arbitration agreement from a contract it may be included in. This means that, if the contract it was a part of becomes invalid this does not on its own affect the validity of the arbitration agreement. This addition in the new Saudi Arbitration Regulations brings this regulation a step forward in line with international Arbitration Regulations. The lack of the concept of separability in the old Arbitration Regulations and the implementation rules meant that this area was vague and unclear, and left the issue for the parties or the court to decide whether the arbitration agreement remained valid or not if the main contract became invalid for any reason. Therefore, this uncertainty has been made clear by stating in the new regulations that the arbitration agreement is separate from the contract it is included in.

This sub-section will focus on both arbitration clauses and submission agreements explaining the regulations regarding them and the implementation rules required for them to be implemented and recognised in the Kingdom of Saudi Arabia.

This section of the chapter will be divided into two subsections: the first subsection will look at arbitration clauses, and the second subsection will focus on the submission agreement.

### **3.2.1. The position in Saudi Arabia**

The Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985 accept and recognise both arbitration clauses and submission agreements. This means that parties to a contract can establish a contract with an arbitration clause that states their agreement to resolve their future disputes to arbitration as well as submitting a submission agreement to arbitrate their existing disputes. The Arbitration Regulation of 1983 states that: "The parties may agree to arbitrate a specific existing dispute; a

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<sup>100</sup> Arbitration (Scotland) Act 2010. sec 5.



prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract."<sup>101</sup>

Moreover, the Implementation Rules of 1985 state that: "An agreement to arbitrate may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract."<sup>102</sup>

The new Saudi Arbitration Regulation of 2012 also accepts both forms of arbitration agreement, the arbitration clause and the submission agreement. It states this clearly in article one where it defines the arbitration agreement and mentions what forms it comes in:

*"1- The Arbitration Agreement: is an agreement between more than one party to submit to arbitration all or part of the disputes which have arisen or may arise between them regarding a defined legal relationship, whether contractual or not. The arbitration agreement may be in the form of an arbitration clause within a contract or in the form of an independent arbitration agreement"*<sup>103</sup>

### **3.2.1.1. Arbitration clause**

An arbitration clause is usually contained in a general contract between parties. This clause is an agreement to submit *future* disputes to arbitration.<sup>104</sup> The extent of this arbitration clause is up to the parties to decide how wide or narrow they would like it to be. They can include the matters they like to cover under the clause as long as what is covered by this clause is all arbitrable under the law governing the clause and the contract that includes it. For example, some might only want technical disputes to be resolved by arbitration and so the arbitration clause would be narrowed to cover only that. In other cases, the parties might choose something else.<sup>105</sup> Usually the arbitration clause is short and does not contain all the elements required to start an arbitration process as it deals with future disputes that have not yet arisen and it is

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<sup>101</sup> Saudi Arabian Arbitration Regulation 1983. art 1.

<sup>102</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 6.

<sup>103</sup> Saudi Arabian Arbitration Regulation 2012. art 1 (1).

<sup>104</sup> Martin Hunter and Alan Redfern, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004).

<sup>105</sup> AlMhaidib (n 71) 88.



not clear what best way to deal with them. However, there is a minimum amount of information that should be included in the arbitration clause such as the place of arbitration and the applicable law of the contract. It is important to mention here that because of the limited amount of information mentioned in the arbitration clause, when a dispute arises, the parties need to enter into a submission agreement.<sup>106</sup>

When talking about the arbitration clause in the Saudi arbitration legal system, the establishment of the Arbitration Regulations of 1983 came as a turning point that needs further consideration. In other words, the situation in Saudi Arabia has drastically changed with the establishment of these regulations. This section will discuss the situation in Saudi Arabia in the following two subsections. The first subsections will consider the situation prior to the establishment of the Arbitration Regulations of 1983 and the second subsection will focus on the situation after the establishment of these regulations. Subsequently, the new Saudi Regulations of 2012 will be discussed.

#### **3.2.1.1.1. The arbitration clause in Saudi Arabian legal system before the Arbitration Regulations of 1983**

The arbitration clause concept was unknown in the Saudi legal system before the formation of the Arbitration Regulation of 1983. At that time the law governing arbitration was contained in the Commercial Court Regulation of 1931, the Labour and Workmen Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980 and the associated Implementation Rules of 1981. But even though the concept of arbitration clauses was not available or mentioned in those regulations it was, in practice, a common thing to include an arbitration clause in contracts.<sup>107</sup> The question that arises here is what was the legality of this practice and was it binding at that time as it was not mentioned in the legal regulations governing arbitration? Some researchers think that inserting an arbitration clause at that time was generally legal but not considered as binding on the judicial and enforcement authorities. The judicial and enforcement authorities would either take jurisdiction,

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<sup>106</sup> *ibid* 88.

<sup>107</sup> Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law* (Graham & Trotman 1984). 304.



even if there was an arbitration clause in the contract between the parties, or they could refer them to resolve their dispute by arbitration.<sup>108</sup>

In practice though it seems that the Saudi government used to enforce and accept the concept of an arbitration clause and enforce the arbitration awards issued for the disputes arising out of several contracts that included arbitration clauses such as in the concession contracts regarding the extraction, refining, marketing and transport of oil which were concluded between the Saudi government and foreign oil companies.<sup>109</sup>

#### **3.2.1.1.2. The arbitration clause in Saudi Arabian legal system after the Arbitration Regulations of 1983**

It was a drastic change in the Saudi regulation regarding the recognition of arbitration clauses when the Saudi Arbitration Regulation was issued in 1983. The legislators took in consideration when establishing the regulation the recognition of arbitration clauses and so they stated that: "The parties may agree to arbitrate a specific existing dispute; *a prior agreement* to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract."<sup>110</sup> This was the starting point of recognising arbitration clauses in contracts in the Saudi regulations regarding arbitration agreements.

#### **3.2.1.1.3. What needs to be provided in an arbitration clause?**

The question now is what are the things that need to be provided in the arbitration clause? In this matter, some researchers highlight some basic requirements that need to be included in the arbitration clause, such as the number of arbitrators and how they are appointed as well as the city where the arbitration process will take place plus the time limits on when an arbitration award should be issued. They add that the

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<sup>108</sup> AlMhaidib (n 71) 95.

<sup>109</sup> *ibid* 95.

<sup>110</sup> Saudi Arabian Arbitration Regulation 1983. art 1.



arbitration clause should be in writing and in Arabic and that it should be signed by all parties with the attendance of two witnesses for each signature.<sup>111</sup>

#### **3.2.1.1.4. The arbitration instrument**

Returning to the original text of the Arbitration Regulations of 1983 and its Implementation Rules of 1985, we find that none of these requirements are mentioned as a requirement to be included in the arbitration clause. Instead, the Arbitration Regulations and its implementation rules require the parties to a dispute to fill in an arbitration instrument and have it approved by the authority originally having jurisdiction over the dispute, which may be one of the Sharia courts, the Board of Grievances, the Committee for the Settlement of Banking Disputes, the Committee for the Settlement of Labour Disputes, or any other judicial committee having competence to decide some cases.<sup>112</sup> The requirements mentioned above are asked to be provided in this instrument. In case No.43/D/TG/1 in 1421H-2000AD, The Board of Grievances approved the arbitration instrument that fulfilled the requirements. It stated:

*“It appears that the arbitration instrument had completed the formal and statutory procedures; it included the names of the parties of the dispute, the arbitration tribunal, the subject matter of arbitration and the requests and proceedings before the arbitration tribunal... the department ruled the approval of the arbitration document”<sup>113</sup>*

It could be assumed that failure to fulfil these requirements in the arbitration instrument results in it being rejected by the authority originally having jurisdiction over the dispute. But in case No. 57/D/TG/3 in 1423H – 2002 AD, the arbitration instrument was approved even though it did not fulfil all the requirements mentioned in the Arbitration Regulations and its Implementation Rules. Thus, it is seen that the

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<sup>111</sup> Saleh (n 83) 306. AlMhaidib (n 71) 96.

<sup>112</sup> AlMhaidib (n 71) 92-93.

<sup>113</sup> Case No. 43/D/TG/1 in 1421H –2000 A.D.



requirements are complimentary to the instrument and in case of conflict they have priority over it.<sup>114</sup>

It is worth noting here the procedure of how the approval of an arbitration instrument works. When parties to a dispute agree to submit to arbitration they appoint arbitrators and agree with them. The parties then prepare the arbitration instrument according to the formality addressed in the Arbitration Regulations. The instrument shall be signed by the parties or their authorised attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute.

The instrument is then submitted with copies of the documents relating to the dispute to the Authority originally competent to hear the dispute which will record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument within 15 days. What is not mentioned in the Arbitration Regulation or in the Implementation Rules is what happens if the competent authority fails to issue a decision of approval within 15 days. Arbitration as means of resolving disputes will then lose one of its essential advantages, which is to save time. According to Almhidib, this issue in practice seems not to be very serious because, although the judicial authorities has a large number of cases, they do in practice approve submission agreements within legal time limits or within reasonable time limits which do not exceed thirty days from the presentation of the submission agreement to them.<sup>115</sup>

#### **3.2.1.1.5. Validity of an arbitration clause without an arbitration instrument**

This section will examine an important point of discussion among those interested in the Saudi arbitration system. Is an arbitration clause valid and would it be binding on the parties without preparing an arbitration instrument, which then needs to be approved by the authority originally having jurisdiction over the dispute? It seems to

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<sup>114</sup> Abdulaziz AlFrian, *National and Foreign Arbitration and Methods of It's Implementation in Saudi Arabia* (Almiman 2007). 127.

<sup>115</sup> AlMhaidib (n 71) 94.



the reader of the Arbitration Regulations of 1983 that the constraints mentioned in its articles are not applied to the arbitration clause but to the arbitration instrument that must be submitted and approved by the authority originally having jurisdiction over the dispute. Abdul Hamid El-Ahdab and Jalal El-Ahdab hold the view that an arbitration clause is, on its own, binding and valid according to the new Arbitration Regulations and its implementation rules without the need to prepare an arbitration instrument: "Indeed, the new law has recognized arbitration based on an arbitration clause and did neither require a procedure of registration thereof nor to confirmation by the authority originally having jurisdiction."<sup>116</sup>

He supports his argument by reference to the text of the Arbitration Regulation of 1983 that states:

*"If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation."*<sup>117</sup>

By using the word "or," the Saudi legislator distinguished between an arbitration clause and an arbitration instrument that is approved by the authority originally having jurisdiction over the dispute. Therefore, the Saudi legislator recognised arbitration clauses and released them from all formalities.<sup>118</sup>

He also adds to his argument that to strengthen the validity of arbitration agreements, article 12 of the Arbitration Regulation of 1983 prescribed a rather short period of time to challenge the appointed arbitrator. It states that:

*"The request for challenge shall be submitted to the Authority originally competent to hear the dispute within 5 days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred."*<sup>119</sup>

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<sup>116</sup> Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (© Kluwer Law International; Kluwer Law International 2011). 629.

<sup>117</sup> Saudi Arabian Arbitration Regulation 1983. art 7.

<sup>118</sup> El-Ahdab (n 92) 630.

<sup>119</sup> Saudi Arabian Arbitration Regulation 1983. art 12.



This means that in order for a party to challenge an arbitrator this challenge should be submitted within five days from when the party was notified of the appointment of this arbitrator or the day when reasons for the challenge appeared. This can only be applied on a challenge occurring from an arbitration clause as in this matter parties notify each other of the appointment of an arbitrator and one of them might not agree on the arbitrator appointed by the other and would like to challenge this decision. This cannot happen when the arbitration agreement is in a submission agreement form where the appointment of the arbitrators must be written and agreed upon beforehand from both the parties and the authority originally having jurisdiction over the dispute. This shows that the regulators of the Arbitration Regulation approve arbitration clause, distinguish it from the submission agreement and that there is no need in this case to submit an arbitration instrument.<sup>120</sup> In other words, what El Ahdab mean here is that this form of arbitration agreement “arbitration clause” does not need to be approved by the authority in the same way that the arbitration instrument does, resulting in the position that an arbitration clause is enough and binding without the need for a submission agreement or an arbitration instrument.

Moreover, he adds that article 10 of the regulation gives the authority originally having jurisdiction over the power to appoint an arbitrator or arbitrators if the parties or one of them fail to agree on appointing them. This matter can only be applied on the arbitration clause as in the arbitration instrument the parties must name the arbitrators in the agreement before having it approved by the competent authority.<sup>121</sup>

However, it is worth noting that this view is not shared by all critics. Whilst some legal writers think that even though the Saudi Arbitration Regulation recognises arbitration clauses, it still requires the parties to a contract to submit an arbitration instrument to be approved by the authority originally having jurisdiction over the dispute otherwise the arbitration process would be deemed insufficient.<sup>122</sup>

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<sup>120</sup> El-Ahdab (n 92) 630.

<sup>121</sup> *ibid* 630.

<sup>122</sup> Saleh (n 83) 305.



### **3.2.1.2. Submission agreement**

A submission agreement is when parties of a contract set out an agreement for their existing dispute or disputes to be resolved by arbitration. It is not necessary for the submission agreement to be related to an arbitration clause, as the parties may not have included one in the main contract at the start of their legal relationship. This could happen sometimes as the parties usually enter into a contract hoping for no disputes to arise and the thought of resolving future disputes may have not come to mind at that stage. In fact, even when an arbitration clause does exist in a contract between parties, in a case of dispute a submission agreement would, sometimes, have to be made as the arbitration clause usually does not contain most necessary elements to start an arbitration process.

However, the submission agreement is different than the arbitration clause in which the submission agreement is formed after the dispute has arisen. At this stage the type of dispute is known so the agreement would be more specific and formed to suit exactly what is needed in this matter. In a submission agreement all matters necessary to form and start an arbitration process would be mentioned. Usually, issues such as the number of the tribunal members and their names, the place of arbitration, the determination of the applicable law, the matter resolved by arbitration, the kind of disputes submitted to arbitration, the method of the constitution of the arbitral tribunal, the expenses of arbitration, the production of documents, the appointment of experts and the methods of enforcement of the arbitral award are mentioned in a submission agreement. In addition, it can include more details relevant to the efficiency of the arbitration than an arbitration clause because the parties can specifically decide the procedures which fit the nature of the existing dispute.<sup>123</sup> These issues will be discussed later on in detail in order to see what is necessary to therefore needs to be mentioned or not.

A submission agreement to arbitrate was recognised in the Saudi Arabian legal system even before the Arbitration Regulations of 1983 and the Implementation Rules of 1985. There is no set form for how the submission agreement should follow when being issued by the parties of a dispute. The regulation and its implementation

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<sup>123</sup> AlMhaidib (n 71) 87-88.



rules though, require the parties to submit an arbitration instrument when they agree on an arbitration agreement to resolve their dispute by arbitration as mentioned above.

As discussed in the previous section, this issue was addressed in the new Saudi Arbitration Regulations of 2012. After all the debate around the arbitration instrument and whether it is an important step in the process of arbitration in Saudi Arabia, the new Arbitration Regulations in 2012 came into force. One of the new things that clearly appear in this regulation is that there is no mention of the arbitration instrument at all. This step in the arbitration process in Saudi Arabia is no longer needed or wanted, as it appears from an examination of the regulation.

It was debated before this that the instrument was considered as a waste of time in the arbitration process. It even removed some of the authority usually given to the arbitral tribunal and gave it to the authority originally having jurisdiction over the case. Now there is more authority given to the tribunal over the parties with regard to setting what is needed for the arbitration process to move forward without the need for approval from a court authority and the time that might take to obtain this approval. This is a step forward from the Saudi legislator in modernising the Saudi Arbitration Regulations and bringing them up to level with the international regulations. Providing such authority to the parties and the arbitral tribunal by not needing to have approval on the agreement to arbitrate from another authority, the arbitration proceedings can start immediately and without any delay.

### **3.2.2. The position in England and Scotland**

Both forms of the arbitration agreement are accepted by the English Arbitration Act of 1996 and the Scottish Arbitration Act of 2010. The English Act of 1996 accepts arbitration agreements when they are included in a contract as an arbitration clause. The act states that: “An “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”<sup>124</sup>

In addition, the Scotland Act 2010 states:

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<sup>124</sup> The Arbitration Act 1996. art 6 (1).



*“An “arbitration agreement” is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document)”*<sup>125</sup>

In this subsection, both the arbitration clause and the submission agreement will be addressed according to how commentators and academics discuss the laws under consideration.

### **3.2.2.1. Arbitration clause**

An arbitration clause is known as general submissions or ancillary submissions and it covers all matters of dispute arising between parties. They fall into two broad categories: “executorial” submissions and universal submissions. Lord Dunedin explains the matter thus in *Sanderson & Son v. Armour & Co. Ltd*,

*“By the law of Scotland, it has always been possible for the parties in framing the original contract to insert a clause binding themselves to refer future possible disputes to arbitration. This clause may be of two characters. It may be of a limited character, generally known as executory arbitration, providing for the adjustment of disputes concerned with the working out of the contract. But it may also be of a universal character, submitting all disputes which may arise either in the carrying out of the contract or in respect of breach of the contract after the actual execution has been finished ”*<sup>126</sup>

The 1996 Act make it clear that the disputes do not need to be contractual for them to be referred to arbitration.<sup>127</sup> On the other hand, the 2010 Act says little regarding arbitration agreements and mentions nothing regarding whether the dispute should or should not be contractual but the omission of such a statement should not be seen as significant.<sup>128</sup> One of the issues mentioned regarding the arbitration clause is that both English and Canadian authorities

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<sup>125</sup> Arbitration (Scotland) Act 2010. sec 4.

<sup>126</sup> Fraser Davidson, *Arbitration (Scotland) Act 2010* (Thomson/W Green 2010). 22-23.

<sup>127</sup> Bruce Harris and others, *The Arbitration Act, 1996: A Commentary* (Blackwell Science 1996). 64.

<sup>128</sup> Davidson (n 102) 4.



suggests that a clause which provides that either party ‘may’ refer a dispute to arbitration is classed as a binding arbitration clause.<sup>129</sup>

#### **3.2.2.2. Submission agreement**

A submission agreement is a submission of a specific issue or issues. Lord Justice-Clerk Inglis says of such a submission in *McEwan v. Middleton*, “[an arbiter’s] jurisdiction flows from consent of the parties, and the consent is only that he shall determine a particular claim.” A special submission is also known as an *ad hoc* submission, and generally arises when parties decide to submit an existing dispute to arbitration.<sup>130</sup>

The submission agreement is also accepted and recognised by the laws under consideration as mentioned above.

#### **3.2.3. Comparison and conclusions**

It appears then that there is not much difference between the systems regarding the definition of an arbitration agreement and the approval of arbitration clauses. Even though the Saudi Arbitration Regulation did not define the arbitration agreement in the old Arbitration Regulations of 1983 and the implementation rules of 1985, it accepted and approved both of its forms, the submission agreement and the arbitration clause. The new Arbitration Regulations of 2012 on the other hand provide a definition for the arbitration agreement. Even though this might not be considered as a significant change in the Arbitration Regulation, it still shows that the Saudi regulator is modernising the Arbitration Regulations to bring them up to a level with the international Arbitration Regulations and the regulations of developed countries such as England and Scotland in this matter.

With regard to the separability of an arbitration agreement from a contract, the old Arbitration Regulation and its implementation rules did not mention this. However,

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<sup>129</sup> *ibid* 4.

<sup>130</sup> *ibid* 22.



the new Arbitration Regulations of 2012 state clearly in article 21 that the arbitration agreements are separate from the original contract or contracts they might be a part of. This is inline with the English and Scottish acts and brings the Saudi Arbitration Regulations a step forward in modernising its Arbitration Regulations.

The previous Saudi regulations of 1983 require parties to submit a formal instrument where the parties provide information about the dispute matter, the arbitrators and their agreement to hear the case. This is seen as a good step when there are some elements missing in the arbitration clause or the submission agreement. However, when all elements are already mentioned in the arbitration clause and/or the submission agreement, then there is no need for this instrument as it will only be a procedural requirement that repeats what the parties have already agreed on and would take some time to approve from the authorities.

Moreover, the Saudi regulations did not mention what happens if the authorities do not approve the arbitration instrument within the time limit of 15 days. Although in practice the authorities usually meet the time limit or approve within reasonable time, the regulations should clarify the situation when the time limit is not met. Therefore, the new regulations of 2012 no longer require this instrument, which gives the arbitral tribunal more authority to agree with the parties in dispute on what approval is needed from the authority before the new law was issued. Again, this is a huge step forward in modernising the Saudi Arbitration Regulations and making them more efficient. The requirement to submit an arbitration instrument and have it approved from an authority was seen as a barrier to speeding up the arbitration process. In other words, it was an unnecessary step in the arbitration process that offered nothing more than to be time consuming. Removing this step from the regulations provides this authority to the parties and the arbitral tribunal which is where this authority belongs.

The English Act suggests that when a party may refer to an arbitration clause it is then suggested that that becomes a binding arbitration agreement. The Saudi regulation does not mention any details regarding this matter. This could be one of the points that the Saudi regulator might want to consider stating or making clear in the Saudi regulations or perhaps in the new implementation rules that are still to be published.



With regard to the separability of an arbitration agreement from a contract, the previous Arbitration Regulation and implementation rules mentioned nothing in this regard. However, the new Arbitration Regulations of 2012 stated clearly in article 21 that arbitration agreements are separate from the original contract or contracts they might be a part of. This falls inline with what is stated in the English and the Scottish acts and brings the Saudi position a step forward in modernising its Arbitration Regulations.

### **3.3. Validity of the arbitration agreement**

This section will discuss the provisions to the validity of arbitration agreements that are mentioned in the Saudi law, and the English and the Scottish law. This section will be divided into three subsections that will discuss the following matters: the agreement in writing, capacity and arbitrability.

#### **3.3.1. The agreement in writing:**

##### **3.3.1.1. The position in Saudi Arabia**

The Saudi Arbitration Regulation of 1983 does not state the term “agreement in writing”. Instead it mentions what the parties to the agreement need to do with the arbitration agreement and the arbitration instrument. It states that:

*"The parties to the dispute shall file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorised attorneys, and by the arbitrators, and it must state the subject-matter of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached."*<sup>131</sup>

In this statement there are some requirements that the regulation requires for the arbitration instrument to be finalised. Having the instrument signed by the parties and the arbitrators, the instrument must state the subject-matter of the dispute, the names

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<sup>131</sup> Saudi Arabian Arbitration Regulation 1983. art 5



of the arbitrators and their acceptance to hear the dispute. Do all these requirements mean that the arbitration agreement must be in writing?

This text has led to different opinions among commentators on Saudi arbitration law. The first opinion is that this text of the regulation requires all arbitration agreements to be in writing and signed by parties otherwise the agreement will not be binding.<sup>132</sup> (Saleh, 1984). The second opinion is that these requirements are only required for a submission agreement and not an agreement clause. In other words, agreements that have been made for future disputes do not have to be bound by these requirements.<sup>133</sup> Finally, the most important opinion is that all types of arbitration agreements are valid and binding without any need for the agreement to be in writing or signed.<sup>134</sup> This is because all the requirements in the text of this article of the Arbitration Regulation is for the *arbitration instrument* to start an arbitration process not for the arbitration agreement itself which is between the parties and accordingly can be in any form. The support for this opinion can be found in article 7 of the Saudi Arbitration Regulation of 1983 which states:

*“If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation.”*<sup>135</sup>

Clearly, this article indicates that the agreement can be valid and binding without the approval of the competent court authority. In a case where the Appeal Court in Saudi Arabia, when dealing with a question of a party refusing to submit to arbitration even though there was a previous arbitration agreement, the Court stated that in such case it is acceptable for the other party to submit the arbitration agreement to the court and if the party refusing arbitration refuses to sign the instrument the court has the right to approve the submission to arbitrate (The 4<sup>th</sup> Review Committee, Decision No. 150/T/4 date 1413H (1992)). Consequently, it can be interpreted that the requirements

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<sup>132</sup> Saleh (n 83) 304.

<sup>133</sup> El-Ahdab (n 92)

<sup>134</sup> Waleed AlTuwaigri, ‘Grounds for Refusal of Enforcement of for Foreign Arbitral Awards under the New York Convention of 1958 with Special Reference to the Kingdom of Saudi Arabia’ (2006). 122-123.

<sup>135</sup> Saudi Arabian Arbitration Regulation 1983. art 7.



mentioned in article 5 of the regulations does not affect the validity of the arbitration agreement.<sup>136</sup>

The new Saudi Arbitration Regulations of 2012, on the other hand, makes it clear and leaves no doubt or space for argument in this matter, as it states that in article 9 of the new Arbitration Regulations of 2012: “2-The arbitration agreement shall be made in writing, otherwise it is deemed to be null”<sup>137</sup>

The use of “writing” clearly indicates that the Saudi regulations now require the parties to have the agreement to arbitrate in writing. In failing to do so, the arbitration agreement would be deemed null and void. This is seen as a step forward for the Saudi regulations in the way that it is clear in stating matters where the old regulations regulations of 1993 and the implementation rules of 1985 were either silent or were unclear, leading to different opinions when trying to interpret the meaning of the text of the regulations. Having clear statements on issues in the new regulations makes the regulation easier to understand, clears confusion on the matter so there is no need for different interpretations. This makes the regulation more efficient.

### **3.3.2. Modern means of communication**

We live in a world now where communication between people can be in many different forms. In the past writing may have only referred to a written document. But time has passed and new means of communication such as fax, email and voice recording are now used for communication even more than hand written documents and contracts. From this opinion and explanation it is apparent that the Saudi Arbitration Regulation of 1983 demands the writing requirement for the arbitration agreement between parties. This then raises the question of whether the Saudi Regulations accept arbitration agreements made by modern means of communication. The answer to this question based on the above explanation is a positive one. This can be seen by the view held by the Islamic Fiqh Academy which

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<sup>136</sup> AlTuwaigri (n 110) 122-123.

<sup>137</sup> Saudi Arabian Arbitration Regulation 2012. art 9 (2).



convenes some of the highest contemporary Muslim scholars from all around the world and is highly respected and recognised by the Saudi courts:

*“First, if the agreement is made between parties who are not present in one place, and one cannot directly see and hear another, and the communication means between them is the writing, letter, message, telegram, telex, fax or computer (i.e. e-contract), in such case the agreement would be validly concluded once the offer is accepted by the offeree after it arrives to him. Second, if the agreement is made in one time between parties who are not present in one place, but can hear one another in the same time, such as by telephone and wireless, in such case it is just like concluding the agreement between attending parties and thus it takes the general rule concluding a normal contract”*<sup>138</sup>

Apart from the scholastic view mentioned above, the practitioners also point out that, in practice, the Saudi courts accept that if a fax message is sent containing the sender’s name and fax number, it is then sufficient and acceptable without the need of the sender’s signature.<sup>139</sup>

This ambiguity is finally resolved by the introduction of the new Saudi Arbitration Regulations of 2012. Article 9 states clearly what is accepted in terms of an arbitration agreement and how it can be communicated between parties using new forms of communication since it now requires the agreement to be in writing. Article 9 of the new regulations states: “3 An arbitration agreement is considered to be writing if it is contained in an instrument issued by both parties, or in an exchange of documented letters or faxes, or any other means of electronic or written communication.”<sup>140</sup>

Therefore, it is clear that any form of writing communication between parties, whether by electronic or hard copy means, is accepted by this new regulation as long as it is in writing. Again, this is a step forward for the Saudi regulations by providing more clarity on issues that were not mentioned or left unclear in the old regulations of 1983 and the implementation rules of 1985. The clarity that the new regulations

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<sup>138</sup> The Islamic Fiqh Academy Decision No. 52 (3/6) about concluding contracts by modern means of communications 1990.

<sup>139</sup> AlTuwaigri (n 110) 127.

<sup>140</sup> Saudi Arabian Arbitration Regulation 2012. art 9 (2) (3).



bring makes the regulations more efficient and on a par with international Arbitration Regulations.

### **3.3.2.1. The position in England and Scotland**

After examining what is defined as in writing in Saudi arbitration law, the next thing to highlight is whether the arbitration agreement needs to be in writing according to English and Scottish law. The English Arbitration Act of 1996 makes it clear that writing means any form of record of the agreement between the parties shows the parties have an arbitration agreement.<sup>141</sup> Section 5 of the English act of 1996 states:

*“5. Agreements to be in writing.*

*(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions “agreement”, “agree” and “agreed” shall be construed accordingly. (2) There is an agreement in writing; (a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing. (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing. (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement. (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged. (6) References in this Part to anything being written or in writing include its being recorded by any means”<sup>142</sup>*

It seems that as long as the agreement is recorded and accessible whether it is an oral agreement or any other form, then it is classified as in writing. The main issue is that it can be accessed in the future if needed.

The English Arbitration Act of 1996 accepts an oral arbitration agreement. The judge of the competent court decides whether an oral arbitration agreement is or is not existent on the basis of the statements of the parties to the dispute.<sup>143</sup> In fact,

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<sup>141</sup> Davidson (n 102) 21.

<sup>142</sup> The Arbitration Act 1996. art 5.

<sup>143</sup> AlMhaidib (n 71) 104.



according to the English Arbitration Act of 1996, if a party wishes to submit a dispute to arbitration on the basis of an existing arbitration agreement and the other party does not deny that, the arbitration will be valid.<sup>144</sup>

On the other hand, the Scottish Act is silent in this regard. It does not mention if the arbitration agreement should be in writing and what forms of writing are recognised as writing. It contains a section on the arbitration agreement (section 4), which only states the following: “An ‘arbitration agreement’ is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document)”<sup>145</sup>

### **3.3.2.2. Comparison and conclusions**

With regard to the requirement for the arbitration agreement to be in writing, the previous Saudi regulations left the matter for debate amongst commentators by not mentioning whether it does or does not require the agreement to be in writing and if it did what were the means of writing and communication that would be classed as in writing. In contrast, the new regulations of 2012 have provided clarity on this matter. The new regulations state clearly that the agreement to arbitrate must be in writing otherwise it is null. Furthermore, the new regulations also mention what means of communication are classed as writing and it states that all sorts and means of communication whether electronic or not, as long as they are in writing, are accepted.

The English law also requires the agreement to be in writing and explains in detail what is classed as writing. It seems that as long as the agreement is recorded in any form, even via oral communication, as long as it is recorded and can be accessed then it is classed as in writing. The Scottish Act, in contrast, is quiet in this regard. However, the admission of oral arbitration agreements may cause difficulties at the stage of recognition and enforcement of awards where the authentic copies of arbitration agreement would be required.

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<sup>144</sup> *ibid* 104

<sup>145</sup> Arbitration (Scotland) Act 2010. sec 4.



### **3.3.3. Capacity**

With regard to the capacity of the parties to an arbitration agreement there are two areas that are taken under consideration: the capacity of the private parties, and the capacity of the state and its agencies.

#### **3.3.3.1. The position in Saudi Arabia**

##### **3.3.3.1.1. Capacity of the private parties**

The Saudi Arbitration Regulation of 1983 clearly states that:

*“An agreement to arbitrate cannot be made except by those who have capacity to act”*<sup>146</sup>

Also the Implementation Rules of 1985 state that:

*“The agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorised to do so by the competent court”*<sup>147</sup>

The new regulations of 2012 are not silent on this issue either. It states in article 10:

*“(1) An agreement to arbitrate shall not be valid unless it is made by he who is empowered to dispose of his rights, whether he be a natural person – or his representative – or a juristic person”*<sup>148</sup>

The question now is who is defined as a person with legal capacity in the Saudi legal system? The Saudi law does not set a legal age for a party to be capable of being involved in contracts. According to Sharia law there is no certain age for a person's capability because it differs from person to person. For example, it is possible for a young person to reach a stage of mental and physical adult character before reaching the age of 18. That is why standards for general capacity are set out instead of setting

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<sup>146</sup> Saudi Arabian Arbitration Regulation 1983. art 2.

<sup>147</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 2.

<sup>148</sup> Saudi Arabian Arbitration Regulation 2012. art 10 (1).



a certain age. These standards are: (1) attaining physical puberty; (2) giving sound judgments; and (c) the person are not sequestrated or interdicted.<sup>149</sup>

It is necessary to mention here that a guardian for a minor or a person whose capacity has been affected by mental illness or bankruptcy cannot refer disputes to arbitration unless he is empowered to do so by the court. The Implementation Rules of 1985 states: “A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court”<sup>150</sup>

### **3.3.3.1.2. Capacity of the state and its agencies**

With regard to the capacity of a state and its agencies, following on from the famous ARAMCO case of 1958, the Council of Ministers’ resolution No. 58 issued in 1963 prohibited the Saudi government and its agencies from interfering into a contract that contains a clause that refers any disputes to arbitration.<sup>151</sup> The Arbitration Regulation of 1983 gives only the President of the Council of Ministers the right to permit the government or its agencies to refer to arbitration. The regulation states:

*“Government Agencies are not allowed to resort to arbitration for the settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This provision may however be amended by resolution of the Council of Ministers”*<sup>152</sup>

Moreover the Implementation Rules of 1985 states:

*“In disputes where a Government Authority is party with others and decides to arbitrate, such Authority shall prepare a memorandum with respect to arbitration in the dispute, stating the subject-matter, the reasons for arbitration and the names of the parties to be submitted to the Council of Ministers for the approval of the arbitration. The President of the Council of Ministers may, by a prior resolution, authorise a Government Authority to settle disputes arising from a particular contract, through arbitration. In all cases, the Council of Ministers shall be notified of the arbitration awards adopted”*<sup>153</sup>

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<sup>149</sup> AlTuwaigri (n 110) 56.

<sup>150</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 2.

<sup>151</sup> AlTuwaigri (n 110) 58.

<sup>152</sup> Saudi Arabian Arbitration Regulation 1983. art 3.

<sup>153</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 8.



This regulation is still carried out in the new regulations of 2012 as well. It states in article 10 that: “(2) Government agencies shall not agree to arbitrate except after obtaining the consent of the President of the Council of Ministers, unless otherwise permitted by a legal enactment.”<sup>154</sup>

The difference that is noticed here between the old and the new regulations appear in the last part of the article. In the regulations of 1983, “This provision may however be amended by resolution of the Council of Ministers”,<sup>155</sup> in the new regulations of 2012 it is stated: “unless otherwise permitted by a legal enactment”<sup>156</sup>

The text of the old Saudi Arbitration Regulations gives the authority the right to give permission for a government body to enter into an arbitration agreement to the president of the council of ministers and the “provision” may be amended by the council of ministers. The new provision, however, appears to give this power to a wider range of authorised bodies by saying “unless otherwise permitted by a legal enactment”. There are two questions that need to be addressed with care here. The first question is related to the old text: what did the legislator mean by saying “the provision may be amended”? Did the legislator mean that this provision in the legislation can be changed by the council of ministers so that government bodies do not need permission anymore to enter into an arbitration agreement? Or does it mean that it may be changed depending on the case in hand at the time, which would mean that it is just giving permission for a government body on a given case the permission to submit to arbitration? The second question is on the new text: who can pass ‘a legal enactment’? It could mean that any other legal authority in the country other than the Council of Ministers. The question that arises here is as follows: does the Saudi legislator intend to give such power to other authorities in the country such as the courts or the Board of Grievances?

This is a part of the legislation that would have been better for the legislator to clarify, namely, mentioning what bodies have the authority in this matter to change

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<sup>154</sup> Saudi Arabian Arbitration Regulation 2012. art 10 (2).

<sup>155</sup> Saudi Arabian Arbitration Regulation 1983. art 3.

<sup>156</sup> Saudi Arabian Arbitration Regulation 2012. art 10 (2).



or pass a legal enactment for such matter. Whatever the meaning of the text is, it is clear that the legislator has given a wider range of authorised bodies for giving permission to government bodies to enter into an arbitration agreement than just from the president of the Council of Ministers or the Counsel of Ministers to permit it if there is a legal enactment.

This is another area where the Saudi Arbitration Regulations are becoming more efficient. By giving different bodies the authority to allow government bodies to submit to arbitration, it is making the process of resorting to arbitration a lot easier and faster in terms of seeking permission. However, the issue of which the authorised bodies may give this permission remains to be clarified by the Saudi legislator. One opportunity to resolve this are the new implementation rules that are still to be published.

These statements give the idea that the Saudi legislator intends to repeal the prohibition in the future. The rule on the Saudi government and its agencies and arbitration is an exception when it comes to national arbitration whereas the contrary may be true regarding international arbitration.<sup>157</sup>

### **3.3.3.2. The position in England and Scotland**

In England there are no restrictions on the capacity of states and its agencies, meaning they can all submit their disputes to arbitration if wanted. This seems to be the case in the Scottish Act of 2010. However, the issue of state immunity may arise from the proceedings ascertaining the tribunal's jurisdiction during both arbitration and courts as well as at the stage of recognition and enforcement of arbitral awards.

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<sup>157</sup> AlTuwaigri (n 110) 64.



### 3.3.4. Arbitrability

#### 3.3.4.1. The position in Saudi Arabia

The Saudi Arbitration Regulation of 1983 sets out a rule for what is arbitrable. It states: “Arbitration shall not be permitted in cases where conciliation is not allowed”<sup>158</sup>

The question now is what are the cases where conciliation is not allowed? To answer this question, art. 1 of the Interpretation Rules of 1985 sets forth the types of cases that cannot be settled by arbitration. It states: “Arbitration in matters wherein conciliation is not permitted, such as *Hudud* and *Lia’n* between spouses, and all matters relating to the public order, shall not be accepted”<sup>159</sup>

*Hudud* means the fixed punishments for some crimes such as theft, adultery, murder and alcohol drinking. *Lia’n* is divorce because of adultery. These matters are all resolved in jurisdiction courts. Further, matters related to public order, such as disputes relating to the government authorities or agencies cannot be resolved by arbitration but instead are taken to the Board of Grievance unless the permission of the Council of Ministers is granted. In contrast, all other matters such as commercial, civil and labour disputes can be submitted to arbitration as they can all be resolved by conciliation.<sup>160</sup>

The new regulations however state in article 2 the following: “The provisions hereof shall not apply to disputes related to personal status and to matters in respect of which no conciliation is permitted.”<sup>161</sup> The new regulation prohibits personal status cases from submitting to arbitration. Could this be a restriction in practice? We do not think so as usually personal status cases are dealt with in court and would not usually be submitted to arbitration.

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<sup>158</sup> Saudi Arabian Arbitration Regulation 1983. art 2.

<sup>159</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 1.

<sup>160</sup> AlTuwaigri (n 110) 261.

<sup>161</sup> Saudi Arabian Arbitration Regulation 2012. art 2.



#### **3.3.4.2. The position England and Scotland**

Neither the Scottish law nor the English law mention what disputes can or cannot be submitted to arbitration. Nevertheless, the idea of what can be settled by agreement lies at the heart of the Scots law of Arbitrability according to Professor Davidson. For example, domestic arbitration can be settled by arbitration. Lord Bankton (Institute I, 23, 17) stated that "... whatever can be transacted may be determined by arbitrament". However, matters of status, criminal liability or employment disputes cannot be settled by arbitration.<sup>162</sup>

### **3.4. Conclusion**

In conclusion, this chapter has discussed the arbitration agreement by looking at the Saudi Arbitration Regulations of 1983 and the implementation rules of 1985, followed by an examination of the new regulations of 2012 in terms of what has been added, changed or fixed. This chapter then compared the regulations to the English Arbitration Act of 1996 and the Scottish Arbitration Act of 2010 to see if the Saudi regulations are any different and if so, to see if there can be any improvements or benefits the Saudi regulator can take the English and Scottish law and add to the new implementation rules for the existing Arbitration Regulations of 2012.

The chapter discussed the arbitration agreement in detail, by examining in the subsequent subsections the following issues: forms and contents of the arbitration agreement, and the requirements for the validity of the arbitration agreement.

In the subsection on form and content of the arbitration agreement, the definition of an arbitration agreement was first discussed followed by the separability of the arbitration agreement from the original contract before discussing the two types of the arbitration agreement: the arbitration clause and the submission agreement. When talking about the two types of the arbitration agreement, an important issue was discussed about the arbitration instrument that was required by the Saudi Arbitration Regulations of 1983 and its implementation rules of 1985 but no longer required by the new regulations of 2012.

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<sup>162</sup> Davidson (n 102) 93.



In the subsection on the requirements for the validity of the arbitration agreement, the issue of whether the arbitration agreement needed to be in writing or not was discussed, and whether or not modern means of communication are accepted as to be an agreement in writing. The capacity of the private parties and the capacity of the state and its agencies were also discussed. Finally, the issue of what cases are classed as arbitrable according to the law and regulations under consideration was tackled.

#### **3.4.1. Findings of the chapter:**

In the subsection on the forms and content of the arbitration agreement, it is seen that the new Saudi Arbitration Regulations of 2012 have improved the arbitration law and made it clearer and more efficient. The new Arbitration Regulations now provide a definition of the arbitration agreement. But most importantly here is that the new regulations now state and recognise the separability of an arbitration agreement from the original contract it may be a part of; if for any reason the main contract becomes invalid, the arbitration agreement will not be affected for this reason.

This chapter then examined the arbitration instrument. This area is viewed as one of the key substantial improvements in the Saudi Arbitration Regulations. The arbitration instrument was seen as a step that is not needed for the reason that it was time consuming and did not add anything by having what the parties and the arbitral tribunal agree to on be authorised by an authority before starting the arbitration process. This instrument is no longer required by the new Arbitration Regulations of 2012, and this is seen as a huge step forward in making the arbitration process in the Kingdom of Saudi Arabia more efficient, quick and with less restrictions and requirements. The authority is now given to the parties and the arbitral tribunal to approve that the arbitration agreement fulfils all the requirements needed for the arbitration process to run smoothly and efficiently.

When talking about the issue of what is required for an arbitration agreement to be valid, three requirements were discussed: the agreement in writing, the capacity of the parties and the arbitrability of the case. The new Arbitration Regulations of 2012 have improved this area by making it clear now that the arbitration agreement must



be in writing where it was silent on this matter in the old regulations and the implantation rules. By stating that the agreement has to be in writing it leaves no place for interpretations as happened in the past with the old regulations. Furthermore, the new regulations are clear on modern means of communications. As long as the agreement is in writing, whether in an electronic form or hard copy, it is now clear that these are seen as being agreements in writing. There is not much change between the 2012 regulations and the old one with regard to stating the capacity of a private person. On the other hand, there is a good improvement in the capacity of the state and its agencies. Although the new regulations still do not allow any government bodies from entering into arbitration without permission, it now gives the authority of providing this permission to other legal authorities instead of restricting it to just the President of the Council of Ministers. However, it is important to mention that this area still remains vague and unclear in terms of which specific may give this permission. It is suggested here that the Saudi legislator should clarify this area in the new implementation rules.



## **4. Chapter Four: The Arbitrators**

### **4.1. Introduction**

The arbitrators and the arbitral tribunal is one of the main aspects of the arbitration process. The arbitration process cannot start or proceed without the appointment and establishment of the arbitral tribunal. That is because the arbitral tribunal is responsible for all the proceedings once their appointment is confirmed, such as examining documents and evidence related to the case, listening to witnesses, appointing experts to examine or visiting sights related to the case. All these aspects and steps of the arbitration process cannot be done without the appointment and establishment of the arbitral tribunal. Therefore, the sooner the establishment and appointment of the arbitrators and the arbitral tribunal is settled the sooner the process of arbitration can start and proceed.

Due to the important role played by the arbitrators, this chapter will focus on the issues which may arise from their appointment and the appointment of the arbitral tribunal. As such, this chapter will discuss the conditions required for an arbitrator, how an arbitrator is appointed and the number of arbitrators required. Removal of arbitrators, challenge of arbitrators and resignation of arbitrators. Arbitrators' authorities as well as their duties and responsibilities will also be examined. Finally, the issues related to post-arbitration will be addressed.

### **4.2. Conditions that must be met for an arbitrator**

The old and new Saudi Arbitration Regulation as well as the Rules for the Implementation of the Saudi Arabian Arbitration Regulation of 1985 has set a number of conditions to be met for a person to be an arbitrator. In this section, the legal text of both regulations will be compared and discussed before comparison with both the Scottish and English laws with regard to this matter.



Legal texts:

Art. 4 of the previous Saudi Arbitration Regulation of 1983 states that “The arbitrator shall have expertise and be of good conduct and behaviour, and shall have full legal capacity. If there are several arbitrators, their number shall be uneven”<sup>163</sup>

Article 3 of the Rules for the Implementation of the Saudi Arabian Arbitration Regulation of 1985 states that:

*“The arbitrator shall be a Saudi national or Muslim expatriate, from the free profession section, or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have knowledge of Sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia”*<sup>164</sup>

And Article 4 of the same rule also states the following:

*“Any person having an interest in the dispute or having been sentenced to a “hud” or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator”*<sup>165</sup>

The new Arbitration Rules of 2012 state the following with regard to the conditions required for an arbitrator:

*“Article 13*

*The arbitral tribunal shall be composed of one or more arbitrators and the number of arbitrators should be odd, otherwise the arbitration is deemed to be null”*<sup>166</sup>

*“Article 14*

*The arbitrator is required:*

- 1- To have full capacity;*
- 2- To be of good reputation and conduct;*

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<sup>163</sup> Saudi Arabian Arbitration Regulation 1983. art 4.

<sup>164</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 3.

<sup>165</sup> *ibid.* art 4.

<sup>166</sup> Saudi Arabian Arbitration Regulation 2012. art 13.



*3- To hold at the least, a degree in legal or Sharia Sciences; if the arbitral tribunal is composed of more than one arbitrator then it is sufficient if the chairman fulfils the abovementioned requirement”<sup>167</sup>*

*“Article 16*

*1- The arbitrator shall not have any interest in the dispute and must - from the date of his appointment and throughout the arbitral proceedings - disclose in writing to both parties to arbitration all the circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already so informed them”<sup>168</sup>*

These conditions raise several questions. What does expertise mean and how is it judged? Equally, does good conduct and behaviour refer to the performance of the role of the arbitrator or more generally? And how is it judged? Which system determines legal capacity? If there is more than one arbitrator, need they all be Saudi nationals or Muslim expatriates? What is the free profession section? These questions will be examined in the section below and attempts will be made to highlight the requirements that need to be fulfilled for a person to be an arbitrator.

#### **4.2.1. Capacity**

##### **4.2.1.1. The position in Saudi Arabia**

Since the general law in Saudi Arabia is Sharia law, this means that the system that determines the legal capacity of a person is Sharia law. It is mostly common in Sharia texts that a person of full capacity is usually a person who is not a minor, mentally disordered, under custody, foolish or bankrupt. The Saudi legal system requires full capacity in an arbitrator. This is because a person without full capacity cannot act for themselves, therefore it is unacceptable for that person to act on behalf of others. In addition, not having full capacity could affect the ability to think properly, understand things and make judgments. The presence of these attributes in an arbitrator is the reason why parties choose them to take their cases.

In order to minimise the chances of parties choosing an arbitrator who does not fulfil the requirements, the Implementation Rules prescribes a list of arbitrators who are

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<sup>167</sup> *ibid.* art 14.

<sup>168</sup> *ibid.* art 16.



allowed to be appointed. Although the parties are not bound to choosing an arbitrator from this list, it is there to help them find arbitrators who are already accepted by the authority. Article 5 of the implementation rules states:

*“A list of arbitrators is established by agreement between the Minister of Justice, the Minister of Commerce and the President of the Board of Grievances. This list is notified to the Courts and judicial authorities as well as the Chambers of Commerce and Industry. The parties may choose the arbitrators amongst the names on this list, or others”*<sup>169</sup>

However, as seen from the last sentence of this quotation, “or others” mean that parties are not bound to only choose an arbitrator from this list but they are also allowed to appoint an arbitrator of their own choice even if they are not mentioned in the list. As long as the appointed arbitrator meets the other requirements mentioned in the regulation, namely that he is experienced, of good conduct and behaviour and having full legal capacity plus the requirements mentioned in the Implementation Rules, as well as,

*“The arbitrator must be a Saudi national or Muslim foreigner, chosen amongst the members of the liberal professions, or other persons. He may also be chosen amongst state officials after authorisation of the supervising authority that he belongs to. Should there be several arbitrators, then the Chairman must know the rules of the Sharia, commercial law and the customs in force in the Kingdom”*<sup>170</sup>

These provisions prompt concerns from some commentators who question whether these conditions are sufficient or whether the arbitrator must also fulfil the conditions required by Sharia law to be fulfilled by a judge and an arbitrator, namely that he must be a male, Muslim, intelligent, free, fair, neither blind nor deaf nor mute and knowledgeable in Sharia Law.<sup>171</sup> Although this question is raised between commentators, others see that adding more requirements to what is mentioned in the text of the regulation would add additional rules and limits to who may be an arbitrator. These requirements will be discussed in detail below.

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<sup>169</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 5.

<sup>170</sup> *ibid.* art 3.

<sup>171</sup> Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (© Kluwer Law International; Kluwer Law International 2011). 640.



#### 4.2.1.2. The position in England and Scotland

The Arbitration Scotland Act 2010 sets out a number of mandatory rules or conditions that must be satisfied for one to be an arbitrator. These are mentioned in rules 3 and 4. It states in rule 3 that: “3 Only an individual may act as an arbitrator.”<sup>172</sup> In rule 4 it states who is ineligible to act as an arbitrator:

*“An individual is ineligible to act as an arbitrator if the individual is—  
(a) aged under 16, or  
(b) an incapable adult (within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)).”*<sup>173</sup>

*By referring to the Adults with Incapacity (Scotland) Act 2000 (asp 4) we find that it states the following: ““incapable” means incapable of—  
(a) acting; or  
(b) making decisions; or  
(c) communicating decisions; or  
(d) understanding decisions; or  
(e) retaining the memory of decisions”*<sup>174</sup>

The Scottish Arbitration rules require an individual only to act as an arbitrator, meaning a legal body cannot act as an arbitrator. This is to eliminate the difficulties that arose from old Scottish case law which permitted an unincorporated body such as in the case of a firm (*Wm Dixon Ltd v. Jones, Heard & Ingram* (1884) 11 R.739) or an association with a changing membership such as in the case of (*Bremner v. Elder* (1875) 2 R.(H.L.) 136)) to be an arbitrator.<sup>175</sup>

On the other hand, the English Arbitration Act of 1996 is not clear on this matter. However, a similar conclusion can be drawn from section 26 (1) which states that “the authority of an arbitrator is personal and ceases on his death.”<sup>176</sup> As death can only happen to a natural person and only a legal person can cease to exist, this can be interpreted to give the same meaning as rule 3 in the Scottish act that only an

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<sup>172</sup> Arbitration (Scotland) Act 2010. rule 3.

<sup>173</sup> *ibid.* rule 4.

<sup>174</sup> Adults with Incapacity (Scotland) Act 2000 asp 4. 1 (6).

<sup>175</sup> Hew Rsurname: AUTH\_1719 Dundas, Chapter 27: Arbitration in Scotland in Julian D. M. Lew , Harris Bor , et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (© Kluwer Law International; Kluwer Law International 2013) 603.

<sup>176</sup> The Arbitration Act 1996. art 26 (1).



individual can be an arbitrator. In contrast, the Saudi regulations are silent on this matter and do not mention anything in this regard.

Whereas the Scottish rules do not allow an individual under 16 or an incapable adult to be an arbitrator, the Saudi regulations do not set any age specifications for a person to be an arbitrator. The Saudi law is silent in this regard, however the other requirements listed show that we understand that a minor cannot act as an arbitrator especially under the requirement list that an arbitrator shall hold a degree in Sharia science or legal systems. It is very unlikely for a minor to hold a degree in such subjects therefore a minor could not act as an arbitrator. However, if a person fulfils the requirements then they can be an arbitrator no matter what age they are. Furthermore, in the case of the incapability of a person, the Saudi regulations and laws adopt the same approach as the English and the Scottish law and even mention that an arbitrator should be capable of being appointed as an arbitrator.

#### **4.2.1.3. Conclusion**

This section has shown that the Saudi, the English and the Scottish arbitration laws require full capacity in the arbitrator. Though both laws do not explain the exact meaning of what full capacity means in detail in the Arbitration Regulations, the Scottish Arbitration Rules refer to a further explanation in the Adults with Incapacity (Scotland) Act 2000 asp 4, and the Saudi legislation can be supported by the explanations of what is meant by a capable person from the Sharia rules. Further explanations will be mentioned in the following sections with regard to what is meant by a capable person in Sharia law and whether all the requirements are required for an arbitrator or not.

#### **4.2.2. Gender of the arbitrator**

From a legal point of view, there is nothing in the Saudi Arbitration Regulations to forbid the appointment of a woman as arbitrator. However, this point has been debated widely since Saudi Arabia follows Sharia law, this section will look at the issue of the gender of an arbitrator under Sharia law and review what Sharia scholars have said in this regard.



It appears that the majority of Sharia law scholars hold the view that it is not acceptable for a female to be an arbitrator. This is the same as the rule stating that a female is not allowed to be a judge, even in cases where she is allowed to be a witness. On the other hand, Ibn Jarir Altabari and Ibn Hazm Althahiri state that a female is allowed to be an arbitrator in any same way as males. This view is supported by the argument that the second Khalif (ruler) of Muslims, Umar bin Alkhattab appointed a woman called Alshifa to decide the accountability of the market. They also say that the femininity of a woman does not stop her from understanding the subject matter of a case, the parties' arguments and knowing where the truth lies. Therefore, whoever has these attributes should be allowed to become a judge and therefore can become an arbitrator.<sup>177</sup> The scholars of the Hanafi school hold the view that it is acceptable for a female to be an arbitrator in matters where she is allowed to be a witness and that they are allowed to be judges as well, whereas some of the Maliki scholars allow a female to be an arbitrator but not a judge.<sup>178</sup>

The Saudi Arbitration Regulations, including the 1983 and the 2012 versions as well as the Implementation Rules of 1985, do not mention that a female is not allowed to be an arbitrator even though a female is not allowed to be appointed as a judge.<sup>179</sup> Therefore, if a female fulfils the rest of the requirements and becomes an arbitrator, she is legally allowed to act as one within her rights. Furthermore, the Ministry of Justice started issuing lawyer licenses to females who apply and fulfil the same rules required for males. This clearly demonstrates that the system is issuing licenses when the requirements are fulfilled regardless of the individual's gender.

#### **4.2.3. Nationality of the arbitrator**

The Arbitration Regulations of 1983 required an arbitrator to be a Saudi national or a Muslim expatriate. In contrast, the new regulations appear to abandon this approach.

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<sup>177</sup> Hani AlQurashi, Ghada kilani and Anas Kilani, *Everything on Arbitration in Saudi Arabia and Syria in Theory and Practice* (2007). 151.

<sup>178</sup> *ibid*

<sup>179</sup> *ibid* 152



In fact, the Arbitration Regulations of 2012 go further when explaining what is classed as international arbitration. It states that “If the parties to arbitration agreed to resort to an organisation or permanent arbitration committee, or arbitration centre which offices are located outside the Kingdom.”<sup>180</sup> Thus, it is clear that in an arbitration involving international elements, the arbitrator appointed may be a non Saudi citizen. However, it is necessary for the chairman of the arbitral tribunal to fulfil the requirements of the regulations mentioned in article 14 of the new regulations of 2012. This is a good step forward for the Saudi Arbitration Regulations to be more open to international businesses and investors as it is now more inviting. Foreign parties who wish to resolve their disputes by arbitration can now appoint arbitrators from any nationality which is a lot more comforting than restricting the matter to only be resolved by Saudi arbitrators.

#### **4.2.4. Physical disability**

The Saudi regulations do not mention anything about disabilities being a barrier for one to be an arbitrator. However, there is a difference between a disability that affects hearing and sight and a disability which affects one’s mind and judgment as discussed above. If the disability affects a person’s hearing or sights then that would affect their ability to recognise and grasp what is going on around them during the arbitration period. Such disabilities affect the ability to review the documents handed by the parties or visit a location to view it if that location is part of the dispute. Sometimes it is not enough for such things to be relied on from a different expert to review and report the information back to the arbitrator, especially in cases requiring the arbitrator to be able to analyse and review all these elements himself to be able to give a fair and just judgment.

However, such a view is not shared by all commentators. Ahmad Abu-Alwafa says that disabilities that affect hearing and vision do not prevent a person from being an arbitrator because there is no law preventing that as long as the parties agree on it.<sup>181</sup>

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<sup>180</sup> Saudi Arabian Arbitration Regulation 2012. art 3 (3).

<sup>181</sup> AlQurashi (n153) 152.



Other types of disabilities, such as disabilities that affect a person's mobility does not affect the ability to review documents or even visit locations and make judgments and therefore it does not prevent a person from becoming an arbitrator as long as the parties in dispute agree or want that person to be their arbitrator.

The Scottish Arbitration Rules state in rule 4 that:

*“(b) an incapable adult (within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)).”<sup>182</sup> cannot be an arbitrator and when referring to the mentioned act we find it explaining the meaning of incapable. it states: ““incapable” means incapable of—*

*(a) acting; or*

*(b) making decisions; or*

*(c) communicating decisions; or*

*(d) understanding decisions; or*

*(e) retaining the memory of decisions.”<sup>183</sup>*

This leaves no doubt as to what is classed as incapable or what is not in the Scottish Act unlike the Saudi regulation which needs to state the exact meaning so there is no place for debate whether the existence of some types of disabilities should prevent a person from being an arbitrator or not.

#### **4.2.5. Qualification**

The old Saudi legal system does not require that an arbitrator should have a certain form of qualification. However, art. 4 of the 1983 regulations require that an arbitrator should be of sufficient expertise required to settle disputes. On the other hand, the new regulations now require that an arbitrator should hold at least a degree in legal or Sharia Sciences.<sup>184</sup>

The rules of implementation as well as the new regulations add that the chairman of the arbitration tribunal should have knowledge of Sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia.<sup>185</sup>

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<sup>182</sup> Arbitration (Scotland) Act 2010. rule 4.

<sup>183</sup> Adults with Incapacity (Scotland) Act 2000 asp 4. 1 (6).

<sup>184</sup> Saudi Arabian Arbitration Regulation 2012. art 4 (3).

<sup>185</sup> *ibid.* art 4 (3). Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 3.



In practice, however, it is very difficult to verify that arbitrators fulfil these requirements. If none of the parties challenge such matters in an arbitrator, it is then assumed that the arbitrators appointed fulfil the requirements<sup>186</sup>

#### **4.2.6. Religion**

The Saudi regulations of 1983 require that an arbitrator must be a Muslim person whether the person is a Saudi national or a foreigner. Based on the fact that a non-Muslim cannot be a judge in Saudi Arabia according to one of the principles of Sharia law, “A judge may only be appointed if he is of age, mentally sound, Muslim, free (not a slave), fair, educated in matters of Sharia law.”<sup>187</sup> also states that “This condition should not be interpreted as being the expression of religious secularism, as the appointed arbitrator should know the applicable law, that is, the Sharia, and a Muslim knows the Sharia better. According to the 1983 regulations, then, this result of this is that if an award was given by a non-Muslim arbitrator and the case was to be implemented in the Kingdom that award would be invalid<sup>188</sup> In contrast, the new regulations of 2012 give the parties the right to arbitrate and refer the arbitration case to an organisation or a permanent arbitration tribunal or an arbitration centre located outside the Kingdom.<sup>189</sup> Consequently, the regulations of 2012 do not require that the organisation must be a Muslim organisation or the arbitrators to be Muslims. It classes this as international arbitration and eliminates the restriction of the arbitrator needing to be a Muslim. This is a step forward for the Saudi Arbitration Regulations in making the regulations more efficient and more attractive to international investors. Nevertheless, a further question needing an answer is whether this is also applicable to domestic arbitration as well as international arbitration. This is not mentioned in the regulations nor in the implementation rules. It is necessary for the Saudi legislator to address this point in the new implantation rules.

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<sup>186</sup> AlQurashi (n 153) 154.

<sup>187</sup> El-Ahdab (n 147) 643.

<sup>188</sup> AlQurashi (n 153) 155.

<sup>189</sup> Saudi Arabian Arbitration Regulation 2012. art 3 (3).



#### **4.2.7. Profession**

The Saudi Arbitration Regulation of 1983 does not require an arbitrator to be of a certain profession. Therefore, any type of professional can be an arbitrator. Lawyers, doctors, engineers and even carpenters and blacksmiths can be arbitrators. Also, if a person is a judge or works in the public service, however, in such cases this person needs to have an authorisation from their work place according to Art 3 of the Implementation Rules of 1985. The main reason for this is to prevent a clash between the person's normal day work and his job acting as an arbitrator so his mandate does not contradict with the person's place of work's interests. However, not having authorisation from the person's workplace does not make the award invalid.

It is important to note that even though the system provides the freedom to choose an arbitrator of any profession to benefit from their expertise in their field, it is important for the parties to make sure that the person does have enough knowledge of arbitration rules and proceedings otherwise that might result in the award not being valid.<sup>190</sup>

In practice, the competent authority approved the arbitral award made in the case of S. T. Co. (construction company) v. Mr. A. A. A. (Saudi natural person) where all the members of the arbitral tribunal were engineers.<sup>191</sup> That being said, the new Arbitration Regulations of 2012 state that an arbitrator shall hold a degree in Sharia or legal science. However, if the arbitral tribunal consists of more than one arbitrator, it would be sufficient if the chairman of such a tribunal satisfies this condition.<sup>192</sup>

#### **4.2.8. The arbitrator must not have any interest in the case**

An arbitrator must be impartial and independent so none of the parties can influence him. These two requirements are required by Sharia law and state laws because it is required for an arbitrator to be as a judge in the matter of achieving justice. It is not accepted for a person to be an arbitrator in a case where he is one of the parties in

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<sup>190</sup> AlQurashi (n 153) 155.

<sup>191</sup> The Arbitral Award No 10/1409, dated 07/03/1411 A.H. 1991 A.D.

<sup>192</sup> Saudi Arabian Arbitration Regulation 2012. art 14 (3).



dispute. And for an arbitrator to be just and fair in his judgments it is required that the arbitrator is not related to any of the parties in dispute, such as a wife or a son as that could result that the judgment might be in favour to them.

Art. 4 of the Saudi implementation rules state that a person who has an interest in a dispute shall not be an arbitrator in that case. To achieve the matter of independence and impartiality in an arbitrator, art. 12 of the Arbitration Regulation states that an arbitrator shall be revoked by the same reasons a judge is revoked. An examination of the Saudi procedures law shows that art. 90 state the reason where a judge is revoked even if none of the parties appealed against him. These reasons are as follows: If the judge is married to one of the parties in dispute or has a kinship up to the fourth degree, if there is a dispute between the judge or his wife and one of the parties or the wife or husband, also the issue of independence and impartiality can arise if the judge is a representative, a guardian, or a husband to a guardian or has a kinship with a guardian up to the fourth degree, or if the judge or his wife or one of their relatives or one of whom one of them is a guardian on has an interest in the case. In the cases breaching these rules, art. 91 of the proceedings law states that if a judgment is made in such matters, that judgment shall be invalid.<sup>193</sup>

#### **4.2.9. Good Conduct and Behaviour**

The Implementation Rules of 1985 sets out those people who cannot be chosen as arbitrators:

*“One may not appoint as arbitrator any person having an interest in the case, a person having been convicted of a heinous crime, any person subject to a disciplinary sanction by which it was dismissed from a public office nor any non-rehabilitated bankrupts”*<sup>194</sup>

This shows that the term “good conduct and behaviour” refers to a more general matter than just to the role of arbitration. It refers to a person’s personal life and how they lead it according to Islamic law. If a person is known for drinking alcohol or committing adultery, although these are acts of a person in his personal life, it is seen as attributes that would affect a person’s professional conduct. It seems that Sharia,

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<sup>193</sup> The law of procedure before Sharia courts 2000. art 90-91.

<sup>194</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 4.



to this researcher's understanding, takes into consideration a person's behaviour whether it is in their personal or professional life as both are practiced by the same individual. In other words, if one is not a person of good conduct and behaviour in his or her personal life, then this might affect their professional behaviour. Courts tend to assume that the arbitrator is of good conduct and behaviour until proven otherwise.<sup>195</sup>

#### **4.2.10. Number of arbitrators**

The Saudi arbitration law allows more than one arbitrator to take on a case. In such a case where there is more than one arbitrator, art. 4 of the 1983 Regulations state that the number of arbitrators must be an odd number. Some see that it is acceptable to have two arbitrators in a tribunal and if they disagree a third arbitrator's opinion is added. This matter is still practiced in Saudi courts but not in arbitration matters. With the introduction of the new law, an arbitral tribunal composed of an even number is unacceptable in an arbitral matter. Article 13 of the 2012 Regulations makes it clear that the composition of an arbitral tribunal is deemed to be null if the number of arbitrators is not an uneven number. Art 13 states: "The arbitral tribunal shall be composed of one or more arbitrators and the number of arbitrators should be odd, otherwise the arbitration is deemed to be null."<sup>196</sup>

##### **4.2.10.1. The position in England and Scotland**

Scottish law seems to permit the freedom for the parties to a dispute to choose the number of their arbitrators and in a matter where there is no agreement to that, it states that "the tribunal is to consist of a sole arbitrator"<sup>197</sup>

The English Arbitration Act, on the other hand, states in more detail that the "parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire."<sup>198</sup> It also explains what should happen in a matter

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<sup>195</sup> El-Ahdab (n 147) 641.

<sup>196</sup> Saudi Arabian Arbitration Regulation 2012. art 13.

<sup>197</sup> Arbitration (Scotland) Act 2010. rule 5.

<sup>198</sup> The Arbitration Act 1996. art 15 (1).



where the number of arbitrators agreed on is two or any even number. It states that in such a matter, the situation is understood as requiring the appointment of an additional arbitrator as chairman of the tribunal, unless the parties agree otherwise.<sup>199</sup> When there is no agreement to the number of arbitrators then it is similar to the Scottish law where it states that the tribunal shall consist of a sole arbitrator.<sup>200</sup>

#### **4.2.11. Conclusion**

From the above we find that the old and new Saudi Arbitration Regulations as well as the rules of implementation of the Arbitration Regulation of 1985 all lack detailed explanation in matters where there is no agreement on the number of arbitrators. The law does mention in the new regulation that arbitration is null if the number of arbitrators is not an odd number. We find that this is enough to make it clear of what is required for a valid arbitration tribunal. It has to be composed of an uneven number and where there is no agreement on the number of arbitrators then it is obvious that the tribunal shall be composed of a sole arbitrator as this would be the easiest and cheapest option and would serve the main purposes of choosing the path of arbitration in solving a dispute.

In practice, the parties to the dispute usually appoint an arbitral tribunal of three arbitrators to decide their dispute, such as in the case of A. Co. (Contracting company) v. Sh. J. Co. for Ins. (Insurance company)<sup>201</sup> and the case of R. R. Co. (Subcontracting company) v. A. C. C. Co. for Con. Ltd (South Korean construction company).<sup>202</sup> Nevertheless, there are cases which were decided by a sole arbitrator, such as the case of Mr. S. A. S. (Sudanese natural person) v. A. Co. Ltd (Insurance company) & H. Co. for H. C. (Hire cars company)<sup>203</sup> and the case of M. Co. for Con. (Construction company) v. S. Ins. C. & Comm. Co. Ltd (Insurance company).<sup>204</sup>

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<sup>199</sup> *ibid.* art 15 (2).

<sup>200</sup> *ibid.* art 15 (3).

<sup>201</sup> The Arbitral Award No. 5/1407, dated 11/04/1410 A. H. 1990 A. D.

<sup>202</sup> The Arbitral Award No. 4/1408, dated 13/08/1408 A. H. 1988 A. D.

<sup>203</sup> The Arbitral Award issued on 16/09/1406 A. H. 1986 A. D.

<sup>204</sup> The Arbitral Award No. 8/1408, dated 29/08/1408 A. H. 1988 A. D.



### **4.3. Appointing the arbitrator**

Initially the appointment of the arbitrator or arbitrators is made by the parties in dispute. Article 6 of the implementation rules of 1985 states “The arbitrator(s) is appointed by agreement of the parties in an arbitration agreement”<sup>205</sup> If this is not the case the arbitration proceedings are not necessarily delayed. In such cases the court that has jurisdiction over the case appoints the arbitrator.<sup>206</sup> This will be discussed in more detail below.

It is necessary for the arbitrators appointed to agree to look at the case otherwise the arbitration agreement cannot proceed as it is not possible to force an arbitrator to do what he does not wish to do. It is necessary to point out that the question of the appointment of arbitrators does not usually arise in arbitration matters that are based on an arbitration submission as the arbitrators would be already named there and in some cases they would have already signed and agreed on the appointment. The issue usually arise in the matter where the arbitration is based on an arbitration clause.<sup>207</sup>

#### **4.3.1. Appointing the arbitrator by the parties in dispute:**

##### **4.3.1.1. The position in Saudi Arabia**

No problem would arise if the parties of dispute agree to have one arbitrator. The name of the arbitrator they chose would be included in the arbitration agreement regardless of whether it is a submission agreement or an arbitration clause or in the arbitration instrument that is necessary to provided in Saudi according to the old Arbitration Regulations of 1983 to have the arbitration instrument authorised. The parties can delegate the appointment to a third party to appoint the arbitrator on their behalf. In all cases the parties of dispute must agree on appointing an arbitrator or appointing a third party to do so on their behalf. It is not necessary to appoint an arbitrator by name as it is enough to describe an arbitrator they agree on and if the

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<sup>205</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 6.

<sup>206</sup> Saudi Arabian Arbitration Regulation 1983. art 10. Saudi Arabian Arbitration Regulation 2012. art 15 (1).

<sup>207</sup> El-Ahdab (n 147) 638.



description is met the arbitrator is accepted by the parties. For example, they could appoint the head of the chamber of commerce, whoever that might be, to be the arbitrator. As such, when a dispute arises and arbitration proceeding is required, the person in that position would be asked to be the arbitrator<sup>208</sup> However, this method in appointing an arbitrator is risky because it is not known at the time of signing the agreement that will be the head of the organisation when a dispute arises.

If the parties agree on having more than one arbitrator, then the number of arbitrators must be uneven. The Saudi Arbitration Regulation of 1983 failed to mention a method of how the arbitrators are appointed in case there is more than one arbitrator. Therefore, some see that as an opportunity for the parties to appoint all arbitrators, otherwise the arbitration would be invalid. Others say that if there are three parties then it is enough for each party to appoint an arbitrator and in the case of two parties then they either have to agree on the third arbitrator, or the court that has jurisdiction on the case will appoint the third arbitrator. Another opinion says that the parties can ask the arbitrators they appointed to appoint the third arbitrator. However, some say it is not acceptable because the third arbitrator is not appointed by the parties themselves.<sup>209</sup> Saudi courts do allow the arbitrators appointed by the parties to appoint the third arbitrator, such as in Decree 252/D/TG/10 issued by the Board of Grievances in 1427/2007.

This is no longer a problem as the new Arbitration Regulations of 2012 states what should happen in matters where more than one arbitrator has to be named. Art. 15, 1 b, states that “If the tribunal is to consist of three arbitrators, each party shall appoint one arbitrator and the two so appointed shall agree on a third arbitrator.”<sup>210</sup> This appointment by the parties should not exceed 15 days from the day when a party receives a letter from his opponent asking for the appointment. If this fails to happen then the court would have to rule in appointing the tribunal, as will be discussed below.

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<sup>208</sup> AlQurashi (n 153) 163.

<sup>209</sup> *ibid*

<sup>210</sup> Saudi Arabian Arbitration Regulation 2012. art 15 (1)(b).



What is important to note here is the new addition that the new Saudi Arbitration Regulations provide. The Arbitration Regulations of 1983 and the Implementation Rules of 1985 did not set a time limit for the parties to appoint the arbitrators. This could result in one of the parties taking a long time in appointing their arbitrator without any power for the other party to speed up the process. The new Arbitration Regulations of 2012 sets 15 days as a time limit for the parties to appoint the arbitrators. Article 15, 1, b states

*“If a party does not appoint an arbitrator within 15 days following receipt by the latter of a request from the other party in this respect, or if the two so appointed arbitrators fail to agree on a third arbitrator within 15 days following the date of the last appointment, the competent court shall, at the request of standing party, appoint said arbitrator within 15 days from the date of the submission of the request”*<sup>211</sup>

#### **4.3.1.2. The position in England and Scotland**

The Scottish law provides the parties some guidance. Rule 2 of the Scottish Arbitration Rules states that if the arbitration agreement appoints or provides for the appointment of the tribunal it may consider the following:

*“(a) specify who is to form the tribunal,  
(b) require the parties to appoint the tribunal,  
(c) permit another person to appoint the tribunal, or  
(d) provide for the tribunal to be appointed in any other way.”*<sup>212</sup>

Furthermore, the Scottish Rules provides the method of appointing the tribunal in default rule 6 whether it consist of a sole arbitrator or more. It states:

*“(a) where there is to be a sole arbitrator, the parties must appoint an eligible individual jointly (and must do so within 28 days of either party requesting the other to do so),  
(b) Where there is to be a tribunal consisting of two or more arbitrators—  
(i) Each party must appoint an eligible individual as an arbitrator (and must do so within 28 days of the other party requesting it to do so), and  
(ii) Where more arbitrators are to be appointed, the arbitrators appointed by the parties must appoint eligible individuals as the remaining arbitrators.”*<sup>213</sup>

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<sup>211</sup> *ibid.* art 15 (1)(b).

<sup>212</sup> Arbitration (Scotland) Act 2010. rule 2.

<sup>213</sup> Arbitration (Scotland) Act 2010. rule 6.



Providing some guidance for the parties in situations where they wish to appoint the arbitrators in the arbitration agreement is something the Saudi legislator may want to consider. However, we do not see it as a major thing to add to the Saudi legislations. After all, it is a default rule in the Scottish act.

Similarly, the English Act states in art. 16 what should happen in a situation where there is no method agreed between the parties in terms of the appointment of the arbitrators. In a case where the tribunal consist of a sole arbitrator the parties shall jointly appoint him no later than 28 days after service of a request in writing by either party to do so.<sup>214</sup> If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.<sup>215</sup> Finally If the tribunal is to consist of three arbitrators:

*“(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and  
(b) The two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.”*<sup>216</sup>

The article also adds a situation where the tribunal is to consist of two arbitrators and an umpire. In such a situation it states that

*“(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and  
(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration”*<sup>217</sup>

This is something the Saudi regulations fail to mention, the case where there is more than one arbitrator and one of them is an umpire or a chairman. The Saudi system always made an assumption that the choice is left for the parties to appoint him otherwise he would be appointed by a court.

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<sup>214</sup> The Arbitration Act 1996. art 16 (3).

<sup>215</sup> *ibid.* art 16 (4).

<sup>216</sup> *ibid.* art 16 (5).

<sup>217</sup> *ibid.* art 16 (6).



### 4.3.2. Appointing the arbitrators by court

#### 4.3.2.1. The position in Saudi Arabia

According to the previous Saudi Arbitration Regulations, if the parties do not agree on the appointment of the arbitrators or one of them refuses to appoint his arbitrator or if they did not agree on the method of how to appoint the arbitrators then it is up to the court originally having jurisdiction over the dispute to appoint the arbitrators.

This could happen when the party that is most urgent to start the proceedings asks the court to appoint an arbitrator. The arbitrator is then named by the court in the presence of the ‘urgent’ party. However, although the other party is invited to attend it is up to them whether they attend or not.<sup>218</sup> In the case of Mr R. M. R (Saudi national person) v. Comm. S. A. R Co. (Contracting company) and R. H. for Cont. (Subcontracting company), the Board of Grievances, the authority having jurisdiction on the case, appointed the third arbitrator when the two arbitrators chosen by the parties could not agree on a third arbitrator.<sup>219</sup>

The new Saudi Arbitration Regulations compliment this approach, and adds further detail, stating that in a situation where parties fail to appoint the arbitrators the following should apply: “a- If the tribunal is to consist of a sole arbitrator, the latter shall be appointed by the competent court.”<sup>220</sup> if the tribunal is to consist of three arbitrators or more and the parties or one of them

*“... fail to appoint their arbitrator within 15 days following receipt by the latter of a request from the other party in this respect, or if the two so appointed arbitrators fail to agree on a third arbitrator within 15 days following the date of the last appointment, the competent court shall, at the request of standing party, appoint said arbitrator within 15 days from the date of the submission of the request”<sup>221</sup>*

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<sup>218</sup> Saudi Arabian Arbitration Regulation 1983. art 10.

<sup>219</sup> Arbitral award N0. 1733/1/K 1411, dated 25/09/1412 A.H. - 1992 A.D.

<sup>220</sup> Saudi Arabian Arbitration Regulation 2012. art 15 (1).

<sup>221</sup> *ibid.* art 15 (1)(b).



The new Saudi regulations also add that this “Arbitrator chosen by the so appointed arbitrators or appointed by the competent court shall sit as Chairman of the arbitral tribunal”<sup>222</sup>

In the old Arbitration Regulations of 1983, when the court appoints the arbitrators it has to take into account that the number of arbitrators appointed has to match the number of arbitrators the parties mentioned in the arbitration agreement. This is complimented by the new Arbitration Regulations of 2012 in art. 15 add that the decision of appointing the arbitrator shall be issued within 30 days from the date of the submission of the request by the party seeking the fast decision.<sup>223</sup> This appointment of an arbitrator by the court is final and is not subject to challenge independently by any means of recourse, according to Art. 10 of the old Arbitration Regulations and Art. 15. 4 of the new regulations.

In matters of labour arbitrations governed by the Labour and Workmen Act 1969, the President of the Labour Court appoints the third arbitrator if the arbitrators appointed by the parties cannot agree on appointing one.

When an arbitrator accepts his mission, he is then subject to the obligations of the arbitration agreement. Accordingly, the arbitrator has a contractual obligation to make the arbitral award within the time limit set out in the arbitration agreement.<sup>224</sup>

#### **4.3.2.2. The position in England and Scotland**

The Scottish Rules provide a mandatory rule that in a matter where a tribunal (or any arbitrator who is to form part of a tribunal) is not, or cannot be, appointed then unless otherwise the parties agree either party may refer the matter to an arbitral appointments referee. The referring party must give notice of the reference to the other party. The other party may object to the reference within 7 days of the notice of reference being provided by making an objection to the referring party, and the arbitral appointments referee. If they do not object within the 7 days or the other

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<sup>222</sup> *ibid.* art 15 (1)(b).

<sup>223</sup> *ibid.* art 15 (3).

<sup>224</sup> El-Ahdab (n 147) 639.



party waives the right to object before the end of that period, the arbitral appointments referee may make the necessary appointment.<sup>225</sup>

In the matter where a party objects to the arbitral appointments referee making an appointment, the arbitral appointments referee fails to make an appointment within 21 days of the matter being referred, or if the parties agree not to refer the matter to an arbitral appointments referee, then any party may apply to the court to make the necessary appointment and this decision made by court is final. When the arbitral appointments referee or the court is making decisions it must have regard to the nature and subject matter of the dispute, the terms of the arbitration agreement (including, in particular, any terms relating to appointment of arbitrators), and the skills, qualifications, knowledge and experience which would make an individual suitable to determine the dispute.<sup>226</sup>

This is different from the Saudi Arbitration Regulations in the way that this rule gives the parties the choice to appoint a third party to appoint the arbitrator or the arbitral tribunal whereas, according to the Saudi regulations, if the parties fail to appoint the arbitrators the decision then goes to court on application from a party of the dispute. The incorporation of this step in the Scottish rules may be seen as an unnecessary step as the dispute between the parties in appointing the arbitrator might extend to a dispute between them in appointing a referee. However, taking the case to a higher authority such as the court appears to save time in this matter.

The English Act states that in a matter where a sole arbitrator is to be appointed and a party fails to appoint their arbitrator within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator. If the party in default does not respond within 7 clear days of that notice being given to make the required appointment, the other party may appoint his arbitrator as sole arbitrator whose

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<sup>225</sup> Arbitration (Scotland) Act 2010. rule 7 (2)-(5).

<sup>226</sup> *ibid* 7 (6)-(8).



award shall be binding on both parties as if he had been so appointed by agreement.<sup>227</sup>

The English Act also provides that the parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.<sup>228</sup> This seems similar to the choice provided by the Scottish Act to the parties to agree on a third party to appoint the arbitrators. If there is no agreement on the proceedings on how to appoint an arbitrator then a party may serve notice to the other parties apply to the court to exercise its powers.<sup>229</sup> These powers are:

*“(a) to give directions as to the making of any necessary appointments;  
(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;  
(c) to revoke any appointments already made;  
(d) to make any necessary appointments itself”*<sup>230</sup>

It also states that “an appointment made by the court under this section has effect as if made with the agreement of the parties.”<sup>231</sup> When the court is exercising its powers, “the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.”<sup>232</sup>

From the above, it can be seen that the English Act as well as the Scottish Arbitration Rules provide the parties the freedom to choose what way they want with regard to appointing the arbitral tribunal. It does not restrict them to either appoint the arbitrators themselves or refer to court to do so. In fact it gives them the freedom to choose another party to appoint the arbitral tribunal for them and if any complications occur, then, whether there is no such agreement or the arbitral referee does not appoint the arbitrators, a party may apply to the court for it to take over the matter.

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<sup>227</sup> The Arbitration Act 1996. art 17 (1)(2).

<sup>228</sup> The Arbitration Act 1996. art 18 (1).

<sup>229</sup> *ibid.* art 18 (2).

<sup>230</sup> *ibid.* art 18 (3).

<sup>231</sup> *ibid.* art 18 (4).

<sup>232</sup> *ibid.* art 19.



This is one of the differences between the Saudi Arbitration Regulations and the English and Scottish laws of arbitration. The Saudi regulations immediately refer the parties to court in the case of failing to appoint an arbitrator and/or an arbitral tribunal. The English and Scottish laws, on the other hand, offer the parties to appoint a third party to appoint the arbitrator. This is seen as time consuming, especially if the parties disagree on appointing the referee just like they disagreed on appointing the arbitrators. One of the main reasons why parties refer to arbitration is to save time and it is seen that by referring the matter to court to appoint the arbitrators immediately after the time limit given to the parties to appoint them expires saves more time than giving the parties the choice to refer to a third party to appoint the arbitrators.

#### **4.4. Arbitrator's acceptance to their mission**

It is not enough for the parties to appoint the arbitrators or for the court to appoint them. Arbitrator's appointment in fact should be viewed as a mutual acceptance. The mutual acceptance allows the arbitrators to review their mandate before accepting the appointment as they cannot be forced to take on something against their own will.

The law does not prescribe a specific way for the arbitrators to show their acceptance. They could send a letter to the parties mentioning their acceptance or by their signature on the arbitration bill. In all matters their acceptance has to be in writing. The law does not mention a time for the acceptance to be given. It can be expressed before or even after the dispute has started.

#### **4.5. Arbitrators' mission accomplished**

In this subsection the reasons when an arbitrator's work and the arbitration proceedings end will be addressed and discussed.

Legal texts:

Art. 11 of the Arbitration Regulation of 1983 states that:



*“The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument.”*<sup>233</sup>

Art. 12 of the same regulation states:

*“The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The decision on the request for challenge shall be taken in a meeting to be held for this purpose and attended by the parties and the arbitrator whose challenge is requested.”*<sup>234</sup>

Art 13 states: “The arbitration shall not terminate because of the death of one of the parties, but the time fixed for award shall be extended by thirty days unless the arbitrators decide on a further extension.”<sup>235</sup>

And Art 14 states: “If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.”<sup>236</sup>

These articles address the main issues regarding how an arbitrator’s job is finished or ended. These issues will be discussed in the following sections.

#### **4.5.1. Reasons why an arbitrators mission ends**

There are several reasons where the arbitrator’s mission or the arbitration process ends. These reasons are as follows:

An award given on the dispute matter unless the arbitration agreement states that the arbitration proceedings are returned to the same arbitrators if the award was invalid, if the arbitrator was removed, if the arbitrator steps down, if the arbitrator was

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<sup>233</sup> Saudi Arabian Arbitration Regulation 1983. art 11.

<sup>234</sup> *ibid.* art 12.

<sup>235</sup> *ibid.* art 13.

<sup>236</sup> *ibid.* art 14.



rejected, if the arbitrator's civil rights were removed or in the matter where an arbitrator is sentenced, if the arbitrator's capacity is decreased or lost, arbitrators death, or the arbitration is ended by the parties in dispute.

In this thesis, the arbitrator stepping down, the removal of the arbitrator, and the challenging of the arbitrator will be discussed. The rest of the reasons are obvious, therefore they will not be discussed in this study.

#### **4.5.1.1. Arbitrator stepping down**

##### **4.5.1.1.1. The position in Saudi Arabia**

An arbitrator has the right to accept or reject the mandate. The rejection can either be before starting or even after accepting the case. This can be seen from the text of art 10 of the Saudi Arbitration Regulations of 1983. The regulations do not put any responsibility on the arbitrator in the matter of rejecting the case after accepting to look at it or after the process has started. The arbitrator is not asked for reasons for not accepting the case if the case was rejected from start<sup>237</sup>

In the matter of when an arbitrator has rejected a case, another arbitrator will be appointed by the authority having jurisdiction on the case unless otherwise agreed by the parties. Article 10 of the 1983 regulations states:

*“If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to assume his task or withdraws, or something prevents him from carrying out his tasks, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final”<sup>238</sup>*

It appears that the new regulation is silent with regard to an arbitrator rejecting his mission. Although the new regulations do mention in article 18 the situations where

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<sup>237</sup> AlQurashi (n 153) 171.

<sup>238</sup> Saudi Arabian Arbitration Regulation 1983. art 10.



the arbitrator is unable to perform his mission, or fails to commence the mission, or interrupts it in a way that causes undue delay in the arbitral proceedings, this is a different matter from the arbitrator rejecting his mission. The Saudi legislator should address this issue in the new implementation rules. The most important thing to take under consideration is the process of appointing another arbitrator or arbitrators if the arbitrator steps down from the case.

#### **4.5.1.1.2. The position in England and Scotland**

The mandatory rule 15 of the Scottish Arbitration Rules sets out a list of situations where an arbitrator may resign by giving notice of resignation to the parties and any other arbitrators. An arbitrator may resign if:

*“(a) the parties consent to the resignation,  
(b) the arbitrator has a contractual right to resign in the circumstances,  
(c) the arbitrator’s appointment is challenged under rule 10 or 12,  
(d) the parties disapply or modify rule 34(1) (expert opinions) after the arbitrator is appointed, or  
(e) the Outer House has authorised the resignation”*<sup>239</sup>

The Outer House may authorise the resignation only if satisfied, on an application by the arbitrator, that it is reasonable for the arbitrator to resign. Finally, the Outer House’s determination of an application for resignation is final.<sup>240</sup>

In contrast, the English Act provides that the parties are free to agree with the replacement following the appointed arbitrators’ resignation. For the resigned arbitrator, it states what they may agree on with regard to fees or expenses and any other liabilities incurred by the arbitrator.<sup>241</sup> If there is no agreement between the parties and the arbitrator on the consequences of resignation, the arbitrator may then apply (upon notice to the parties) to the court to grant him relief from any liability thereby incurred by him, and to make an order as it thinks fit with respect to his

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<sup>239</sup> *ibid.* rule 15 (1).

<sup>240</sup> *ibid.* rule 15 (2)(3).

<sup>241</sup> The Arbitration Act 1996. art 25 (1).



entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.<sup>242</sup>

The Scottish rules address the matter when the arbitrator has the right to resign from the mission. This is something the Saudi legislator could benefit from and should consider adding to the implementation rules when addressing the matter of when the arbitrator steps down from the mission. Moreover, the English Act mentions a few important points of relevance here. First, it gives the parties the right on the replacement of the arbitrator. This is something different than the old Saudi regulations as the Saudi regulations referred the case to the court to appoint the new arbitrator or arbitrators. Secondly, it states an important issue where there is a disagreement between the parties and the arbitrator on his resignation. It gives the arbitrator the right to apply to the court to grant him relief from any liabilities and makes an order to his entitlement of fees or expenses or if he needs to pay any fees or expenses. These are important issues the Saudi legislator should benefit from addressing this in the implementation rules and not leave the matter without consideration.

#### **4.5.1.2. Removal of an arbitrator**

##### **4.5.1.2.1. The position in Saudi Arabia**

Art 11 of the Saudi Arbitration Regulations of 1983 states that

*“The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument”*<sup>243</sup>

This shows that the arbitrator can be removed whether they were appointed by the parties having a dispute or by the authority originally competent to hear the dispute

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<sup>242</sup> *ibid.* art 25 (2)-(4).

<sup>243</sup> Saudi Arabian Arbitration Regulation 1983. art 11.



because the text is unrestrained. However, it is necessary for all parties to agree on the removal of an arbitrator even if the arbitrator was appointed by one of the parties. According to the new regulations, the agreement from all parties to remove an arbitrator is necessary but on the other hand it prevents the removal of an arbitrator appointed by the competent court. Art 18, 2 of the new regulations states “Unless appointed by the Competent Court, the arbitrator may only be removed upon the agreement of the parties to arbitration without prejudice to the provisions of paragraph 1 of this Article.”<sup>244</sup>

The reason behind this is to protect the arbitral process from being delayed,<sup>245</sup> as well as the parties’ equal right to keep the arbitrator appointed. If one of the parties wishes to remove an arbitrator, they would have to seek an agreement from the other parties in dispute.<sup>246</sup> This issue could arise in a situation where an arbitrator appointed by a party starts to go in favour of the other party. In this case, this other party would now want to keep the arbitrator unless they are convinced that it is for the benefit of the arbitration process that this arbitrator is removed. If they are not convinced then the only way for the party seeking the removal of the arbitrator is to go through the process of challenging the arbitrator which will be discussed later on. It is important to note that the removal of an arbitrator cannot happen without the agreement of the parties even if the arbitrator was appointed by the authority originally competent to hear the dispute.

However, the text of the article does not mention the procedure to be followed when an arbitrator is removed. Therefore, it is reasonable to assume that the removal of the arbitrator, when agreed on by all parties, can take any form, whether in writing or orally or in arbitration session.<sup>247</sup> This remains an issue that the Saudi legislator should not leave for interpreters to guess. As such, it is better for this issue to be addressed in the new implementation rules.

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<sup>244</sup> Saudi Arabian Arbitration Regulation 2012. art 18 (2).

<sup>245</sup> Mhaidib AlMhaidib, ‘Arbitration as a Means of Settling Commercial Disputes (national and International) with Special Reference to the Kingdom of Saudi Arabia’ (1997). 176.

<sup>246</sup> AlQurashi (n 153) 172.

<sup>247</sup> *ibid* 173.



The question that arises here is what happens to the process of the arbitration if the parties agreed on a removal of an arbitrator? It is accepted that the arbitration process is not affected in this case particularly when another arbitrator is appointed. The only dispute that would arise between the parties and the removed arbitrator is related to the arbitrator's expenses, which is a different matter than the arbitration case. The new regulations state that a "removed arbitrator may claim compensation unless the cause of removal was imputed to him"<sup>248</sup> However, this is again a different matter from removing the arbitrator that should not affect the arbitration process in any way. This is clear because the parties in dispute can stop the arbitration process all together if they all agree on solving the case in a different matter or with a different method. Therefore, if they can stop the whole process when agreed on, having an arbitrator removed, which is a part of the process, should not affect the case or slow the process down.<sup>249</sup>

When the arbitrator is removed he can no longer be involved in any related proceedings. All the awards or decisions made before the removal remain valid.<sup>250</sup> It is worth noting that the arbitrator does not have to agree to his removal as it is the parties' choice. As soon as he is informed of the removal, all his actions in relation to the case shall therefore cease. That is why it is preferred that the arbitrator is informed of the removal in writing.<sup>251</sup> After the arbitrator is removed he can then request his expenses or compensation to be reimbursed if he worked on the case or if the removal affected him.<sup>252</sup> This issue shall be dealt with according to the regulations and proceedings in court against the parties who appointed him.<sup>253</sup>

The new Arbitration Regulation of 2012 address this issue further with more detail. Whereas the old regulations stopped at mentioning that an arbitrator cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument, the new regulations provide a list of these reasons. It states in art 18 that:" - If the arbitrator is unable to perform his mission, or fails to commence the

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<sup>248</sup> Saudi Arabian Arbitration Regulation 2012. art 18 (2).

<sup>249</sup> AlQurashi (n 153) 173.

<sup>250</sup> *ibid*

<sup>251</sup> *ibid*

<sup>252</sup> Saudi Arabian Arbitration Regulation 2012. art 18 (2).

<sup>253</sup> AlQurashi (n 153) 174.



mission, or interrupts it in a way that causes undue delay in the arbitral proceedings.”<sup>254</sup>

The new regulations also address the issue of the removal of an arbitrator by the court. It states in the same article that “if he does not withdraw from his office or if the parties do not agree to remove him, the competent court may order the termination of his mission on the request of either party according to a decision which is not subject to challenge by any means of recourse.”<sup>255</sup>

In contrast, the new regulations provide more detail in this regard. It lists the cases where an arbitrator can be removed, something that the old regulations did not do. This detail provides clarity on the matter, again which is something the old Saudi Arbitration Regulations were sometimes criticised about. Importantly, this lack of clarity in its text led to interpreters trying to guess what the text meant or assume how the process should work. Addressing this issue and listing reasons for when an arbitrator can be removed results in clarifying the process. Furthermore, the new regulations address the issue of if the arbitrator refuses to leave or if one of the parties refuses to remove an arbitrator. Again, this is also an addition that was not present in the old regulations with the result of making the issue clearer and leaving no space for interpretation or guessing.

#### **4.5.1.2.2. The position in England and Scotland**

The Scotland Arbitration Rules in this regard provide more detail than the Saudi regulations with regard to what reasons the parties may remove an arbitrator if they have not agreed on a removal proceeding in the first place. First, the Scotland Arbitration Rules provides a default rule where it mentions that removal of an arbitrator may be made by the parties acting jointly or by any third party to whom the parties give the necessary power to remove an arbitrator. It also adds in the same rule that the removal is affected by notifying the arbitrator, but as with the Saudi regulations it does not name a method of notification.<sup>256</sup>

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<sup>254</sup> Saudi Arabian Arbitration Regulation 2012. art 18 (1).

<sup>255</sup> *ibid.* art 18 (1).

<sup>256</sup> Arbitration (Scotland) Act 2010. rule 11.



Following this, rule 12, a mandatory rule, states when an arbitrator may be removed the by court. It states that the Outer House may remove an arbitrator on the application of a party when satisfied with the followings

*“(a) that the arbitrator is not impartial and independent,  
(b) that the arbitrator has not treated the parties fairly,  
(c) that the arbitrator is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the arbitrator’s ability to so act),  
(d) that the arbitrator does not have a qualification which the parties agreed (before the arbitrator’s appointment) that the arbitrator must have,  
(e) that substantial injustice has been or will be caused to that party because the arbitrator has failed to conduct the arbitration in accordance with—  
(i) the arbitration agreement,  
(ii) these rules (in so far as they apply), or  
(iii) any other agreement by the parties relating to conduct of the arbitration.”*<sup>257</sup>

Furthermore, the Rules provide a mandatory rule to explain the circumstances where a tribunal may be dismissed by court. It states that

*“the Outer House may dismiss the tribunal if satisfied on the application by a party that substantial injustice has been or will be caused to that party because the tribunal has failed to conduct the arbitration in accordance with  
(a) the arbitration agreement,  
(b) these rules (in so far as they apply), or  
(c) any other agreement by the parties relating to conduct of the arbitration.”*<sup>258</sup>

The Scotland Act also adds a supplementary mandatory rule for removal and dismissal by court. It states in rule 14 that:

*“The Outer House may remove an arbitrator, or dismiss the tribunal, only if—  
(a) the arbitrator or, as the case may be, tribunal has been—  
(i) notified of the application for removal or dismissal, and  
(ii) given the opportunity to make representations, and  
(b) the Outer House is satisfied—  
(i) that any recourse available under rule 10 has been exhausted, and*

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<sup>257</sup> *ibid.* rule 12.

<sup>258</sup> *ibid.* rule 12.



- (ii) that any available recourse to a third party who the parties have agreed is to have power to remove an arbitrator (or dismiss the tribunal) has been exhausted.*
- (2) A decision of the Outer House under rule 12 or 13 is final.*
- (3) The tribunal may continue with the arbitration pending the Outer House's decision under rule 12 or 13.”<sup>259</sup>*

The Scotland Act sets out in great detail when an arbitrator may be removed, who may remove them and when a tribunal may be removed.

The question is whether or not the Saudi regulator needs to mention all this in great detail like the Scotland act. It is important for the Saudi regulator to address matters in detail, particularly where the old regulations were criticised for lacking sufficient detail. Clearly listing the reasons for when an arbitrator may be removed and when the authority can enter the process by ordering the removal of an arbitrator and what happens after the removal is enough for the process to be clear and to run smoothly.

#### **4.5.1.3. Conclusion**

As seen above, one of the differences between the Saudi regulations and the Scotland Arbitration Rules is that the Scotland Arbitration Rules stipulate the persons or the institutions which have the right to remove the arbitrators and provide details in how that may happen. The Saudi regulations mention when an arbitrator may be removed but do not set out who has the authority to do so at the level of detail set out in the Scotland Act.

Similar to the Scottish Arbitration Rules, the English Act provides the freedom for parties to agree on what circumstances they wish to revoke the authority of an arbitrator.<sup>260</sup> Failing to reach such agreement between parties in this regard, art 23 states what the parties or the institutions vested with power have the right to revoke the arbitrator. The act states in art 23 that an arbitrator may not be revoked except “(a) by the parties acting jointly, or (b) by an arbitral or other institution or person vested by the parties with powers in that regard”<sup>261</sup> When the revocation is agreed on

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<sup>259</sup> *ibid.* rule 14.

<sup>260</sup> The Arbitration Act 1996. art 23 (1).

<sup>261</sup> *ibid.* art 23 (2)(3).



by all parties, the parties decide whether or not this should be in writing to terminate the arbitration agreement.<sup>262</sup>

Furthermore, art 24 of the English Arbitration Act empowers the court to remove an arbitrator in the case of a challenge. However, due to the apparent similarities in the Saudi Arbitration Regulations and Scottish Arbitration Rules in regards to challenging the arbitrators, this will be discussed in the following section.

#### **4.6. Challenging the arbitrator**

##### **4.6.1. The position in Saudi Arabia**

Article 12 of the Saudi Arbitration Regulations of 1983 states that

*“The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The decision on the request for challenge shall be taken in a meeting to be held for this purpose and attended by the parties and the arbitrator whose challenge is requested.”*<sup>263</sup>

Furthermore, the Implementation Rules of the Arbitration Act of 1985 add some other reasons. It states in section 4: “Any person having an interest in the dispute or having been sentenced to a hud or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.”<sup>264</sup> Consequently, it is essential to examine the grounds of challenging in the Commercial Court Regulations of 1931.

The Commercial Court Regulation of 1931 contains an express provision which specifies the reasons for challenge of judges. It provides that: If a lawsuit has been started against the president or another member of the Court, if one of them has any

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<sup>262</sup> *ibid.* art 23 (4).

<sup>263</sup> Saudi Arabian Arbitration Regulation 1983. art 12.

<sup>264</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 4.



financial interest in the case, if he is a partner of one of the parties, if he has given witness statements in his favour, if there is a hostility between a judge and any party, or if he is a parent of any party, up to the degree to which a witness statement would be inadmissible. It is sufficient that any of these reasons be established in order not to admit a judge in the case.<sup>265</sup>

The Sharia Courts Act adds the following:

*“If the judgment subject to examination relates to one of the Court's members, or to his ascendants, descendants or spouse, or if a judgment could bring any of the persons aforementioned a certain profit such as granting a profit of a Wakf or any other similar profit, the judge concerned may not participate in the consultations, nor the hearings and he may not review what would be decided in this respect”*<sup>266</sup>

The reasons for which a judge is challenged in the Saudi legal system is also mentioned in the Law of Procedure before Sharia Courts 2000. Article 92 of this law states the following:

*“Article 92: A judge may be disqualified for any of the following reasons:*  
*(a) If either he or his wife has a case similar to the case before him.*  
*(b) If he, or his wife, has a dispute with a litigant or his wife after the lawsuit was filed and pending with the judge, unless that [latter] lawsuit was filed with the intention of disqualifying him from considering the case before him.*  
*(c) If his divorcee with whom he has a child or one of his relatives or in-laws up to the fourth degree has a dispute before the judiciary with a litigant in the case, or with his wife, unless the case was brought with the intention of disqualifying him.*  
*(d) If a litigant is his servant or the judge had habitually dined or lived with him, or if he had received a gift from him shortly before the lawsuit was filed or thereafter.*  
*(e) If enmity or friendship exists between him and a litigant such that it is likely he would not be able to judge impartially”*<sup>267</sup>

From the above texts we find that an arbitrator may be challenged and the arbitral award may be set aside in the following ten cases:<sup>268</sup>

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<sup>265</sup> The Commercial Court Act 1931. art 438.

<sup>266</sup> The Sharia Courts Act 1952 art 31.

<sup>267</sup> The law of procedure before Sharia courts 2000 art 92.

<sup>268</sup> El-Ahdab (n 147) 645-646.



- (1) if a dispute between the arbitrator and one of the parties has been brought before the courts;
- (2) if the arbitrator obtains any profit or has any interest in the case before him;
- (3) if he has any partnership relation with one of the parties;
- (4) if he has already given testimony concerning the dispute before an arbitral tribunal or a court;
- (5) if there is any hostility between him and one of the parties or if he is a parent of one of the parties, which shall then make his testimony inadmissible;
- (6) if he is a relative of one of the parties (the parties being his ascendants, descendants or spouse);
- (7) if the arbitral award gives him any profit;
- (8) if he has been sentenced for a serious crime for breaching honour and good morals;
- (9) if he was subject to disciplinary action as a result of which he was removed from a public office;
- (10) if he is bankrupt and has not been rehabilitated.

The Saudi Arbitration Regulations of 1983 allow the parties in dispute to challenge or disqualify an arbitrator but that is not left to their wishes. There is a set of rules to be followed in the case of challenging the arbitrator. This challenge shall be submitted to the authority originally competent to hear the dispute.<sup>269</sup> The arbitral tribunal itself does not have the power to decide the request to challenge one of its members.<sup>270</sup>

It is permitted for a party to challenge any arbitrator if a reason is present, whether the arbitrator was appointed by them, their litigant or the authority originally competent to hear the dispute. It is also permitted to challenge one arbitrator or all arbitrators appointed.<sup>271</sup>

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<sup>269</sup> AlQurashi (n 153) 176.

<sup>270</sup> AlMhaidib (n 221) 179.

<sup>271</sup> AlQurashi (n 153) 176.



The Arbitration Regulations state that the challenge must be submitted within five days from the date when the party was notified of the appointment of the arbitrator or from when a reason to challenge the arbitrator rises. It is not enough for the party to just hear of the appointment of the arbitrator, the party must be informed formally of the appointment.

It is important to note that for a challenge to be valid, the reason for challenging the arbitrator must actually occur without the parties' prior knowledge after the parties have agreed to arbitrate and written the arbitration agreement. If the reason occurred with the parties' prior knowledge but the arbitrator was appointed anyway, then it is not permitted for the parties to challenge what he agreed on in the first place.

When a challenge is put forward, the arbitrator must be called for a meeting so that he can be heard. From that date the arbitrator must stop his work on the case, whatever stage he is at in the arbitration process, and any actions carried out by the arbitrator after that date is invalid. An alternative arbitrator shall be appointed and shall carry on the process in the case from where it was left by the challenged arbitrator after providing the replacement arbitrator enough time to study and review the written statements presented by the parties to the dispute and any documents relating to the dispute. Any delays in this process would be deducted from the duration of the arbitration process and therefore additional days would be added to the process.

If on the other hand the challenge was not successful, then the arbitrator carries on with his work on the case from where he left off, and any lost days in the process would be deducted and additional days would be added to the arbitration process<sup>272</sup>

What the new Saudi regulations add here is that it stops the arbitrator from examining or hearing the case under the same circumstances as those that preclude a judge from the same, even if none of the parties to arbitration so requested.<sup>273</sup>

Further, the new regulations state the circumstances where an arbitrator may be challenged. It states in art 16, 3: "An arbitrator may not be revoked unless

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<sup>272</sup> AlQurashi (n 153) 177. AlMhaidib (n 221) 179.

<sup>273</sup> Saudi Arabian Arbitration Regulation 2012. art 16 (2).



circumstances giving rise to serious doubts as to his impartiality or independence have arisen or if he is not endowed with the qualifications agreed upon by the parties to arbitration.”<sup>274</sup>

As with the old regulations, the new regulations state that the reasons must appear after the appointment of the arbitrator and provide the right to the party to challenge an arbitrator even if they appointed him themselves if the reasons appear as stated in art 16, 4.

Article 17 of the 2012 Regulation provides rules to follow in the case where parties wish to revoke an arbitrator’s mandate. It states:

*“In the event there is no agreement between the parties to arbitration as to the procedure for an arbitrator’s revocation, the request for revocation, which should state the reasons thereof, shall be submitted in writing to the arbitral tribunal within five days from the date of the applicant to revocation’s knowledge of the tribunal’s constitution, or of the circumstances justifying revocation.”*<sup>275</sup>

It also sets out when the tribunal shall rule on this application, stating: “In case the arbitrator whose revocation is requested does not withdraw from his office or if the other party does not consent to the request for revocation, the arbitral tribunal shall rule on the request”<sup>276</sup> This ruling should be within 15 days from the date of its receipt and its decision in this respect is not subject to challenge by any means of recourse.<sup>277</sup>

Furthermore, “The applicant to revocation may challenge the decision dismissing his request within 30 days from the date of his notification, before the Competent Court, which decision in this respect is not subject to challenge by any means.”<sup>278</sup>

Following this, the article states when a party is not permitted to challenge an arbitrator: “The request for revocation shall not be accepted from a party which has

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<sup>274</sup> *ibid.* art 16 (3).

<sup>275</sup> *ibid.* art 17.

<sup>276</sup> *ibid.* art 17.

<sup>277</sup> *ibid.* art 17.

<sup>278</sup> *ibid.* art 17.



already submitted such a request against the same arbitrator during the same arbitration.”<sup>279</sup>

The new Arbitration Regulations of 2012 follow the 1983 Regulations in regard to the arbitrator’s right to look at the case when he is being challenged. The article states that the arbitration proceedings shall stop when an arbitrator is challenged. The article states:

*“3-The submission of a request for revocation shall stay the arbitral proceedings. The challenge of the arbitral tribunal's decision to dismiss the request for revocation shall not stay the proceedings.*

*4- If the revocation of the arbitrator was decided whether by the arbitral tribunal or the competent court when ruling on the challenge, the arbitration proceedings conducted so far, including the arbitral award shall be considered as inexistent”*<sup>280</sup>

#### **4.6.2. The position in England and Scotland**

The Scotland Arbitration Rules of 2010 states in default rule 10 when a party’s objection to the tribunal about the appointment of an arbitrator is competent:

*“(2) An objection is competent only if—  
(a) it is made on the ground that the arbitrator—  
(i) is not impartial and independent,  
(ii) has not treated the parties fairly, or  
(iii) does not have a qualification which the parties agreed (before the arbitrator’s appointment) that the arbitrator must have,  
(b) it states the facts on which it is based,  
(c) it is made within 14 days of the objector becoming aware of those facts,  
and  
(d) notice of it is given to the other party”*<sup>281</sup>

The difference here between the Scotland Arbitration Rules and the Saudi regulations is the time period given for the party to object on the appointment after the reasons occur. The Scotland Arbitration Rules provide 14 days, whereas the Saudi Regulations only provide 5 days. The Scotland Arbitration Rules also asks the party to state the reasons for objection and to inform the other party in writing. This is not

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<sup>279</sup> *ibid.* art 17 (2).

<sup>280</sup> *ibid.* art 17 (3)(4).

<sup>281</sup> Arbitration (Scotland) Act 2010. rule 10 (2).



mentioned in the Saudi regulations, although it is assumed that it would be necessary to do the same when objecting.

The Scotland Arbitration Rules also add that the tribunal may deal with an objection by confirming or revoking the appointment and if the tribunal fails to make a decision within 14 days of a competent objection being made, the appointment is revoked.<sup>282</sup>

What is also different in the Scotland Arbitration Rules is that it states in rule 20, a mandatory rule, the provision for objecting to a tribunal's jurisdiction. It sets out that a party may object to the tribunal if the tribunal does not have, or has exceeded, its jurisdiction in relation to any matter.<sup>283</sup> Following this, it also states the provisions for this objection which must be made

*“(a) before, or as soon as is reasonably practicable after, the matter to which the objection relates is first raised in the arbitration, or (b) where the tribunal considers that circumstances justify a later objection, by such later time as it may allow, but, in any case, an objection may not be made after the tribunal makes its last award.”*<sup>284</sup>

This here is a difference between the Saudi regulations and the Scotland Act. The Saudi regulations first of all do not provide different rules for objection on the tribunal other than the rules provided in challenging an arbitrator. In addition, the Scotland act does not set out a specific amount of time for when the objection should be made after the reasons for objection arise or occur. The Saudi regulations give only 5 days in this matter. Finally, the Scotland Act does not allow objections after the final awards have been made whereas in the Saudi regulations there is no mentioning of anything in this regards.

Similar to the Saudi regulations, the Scotland Arbitration Rules asks the tribunal when upholding an objection to

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<sup>282</sup> *ibid.* rule 10 (3)(4).

<sup>283</sup> *ibid.* rule 20 (1).

<sup>284</sup> *ibid.* rule 20 (2).



*“(a) end the arbitration in so far as it relates to a matter over which the tribunal has ruled it does not have jurisdiction, and (b) set aside any provisional or part award already made in so far as the award relates to such a matter”*<sup>285</sup>

On the other hand, one of the differences between the Saudi regulations and the Scottish rules is that the Scottish rules

*“gives the tribunal the choice to either “(a) rule on an objection independently from dealing with the subject-matter of the dispute, or (b) delay ruling on an objection until it makes its award on the merits of the dispute (and include its ruling in that award), but, where the parties agree which of these courses the tribunal should take, the tribunal must proceed accordingly”*<sup>286</sup>

Another difference is that the Scotland Arbitration Rules gives the right to appeal against tribunal’s ruling on jurisdictional objection in mandatory rule 21. It states that “a party may, no later than 14 days after the tribunal’s decision on an objection under rule 20, appeal to the Outer House against the decision.”<sup>287</sup> The Saudi regulations, on the other hand, stop the arbitral tribunal’s work on the case till the matter is resolved.<sup>288</sup>

In this matter the tribunal may continue with the arbitration pending determination of the appeal and the Outer House’s decision on the appeal is final.<sup>289</sup>

On the other hand, the English Act provides that any party of the arbitration proceedings may apply, upon notice to the other parties and to any other arbitrator, to the court to remove an arbitrator.<sup>290</sup> It states the grounds for the challenge as follows:

*“(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;  
(b) that he does not possess the qualifications required by the arbitration*

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<sup>285</sup> *ibid.* rule 20 (3).

<sup>286</sup> Arbitration (Scotland) Act 2010. rule 20 (4).

<sup>287</sup> *ibid.* rule 21 (1).

<sup>288</sup> Saudi Arabian Arbitration Regulation 2012. art 17 (3)(4).

<sup>289</sup> Arbitration (Scotland) Act 2010. rule 21 (2)(3).

<sup>290</sup> The Arbitration Act 1996. art 24 (1).



*agreement;*  
*(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*  
*(d) that he has refused or failed—*  
*(i) properly to conduct the proceedings, or*  
*(ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant”<sup>291</sup>*

These powers should not be practiced by a court if there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator unless the court is satisfied that the applicant has first exhausted any available recourse to that institution or person.<sup>292</sup>

One difference between the Saudi regulations and the English Act is that the latter allows the arbitral tribunal to continue the arbitral proceedings and make an award while an application to the court under this section is pending.<sup>293</sup> In contrast, the Saudi regulations ask all proceedings to stop and any awards made are invalid.

Similar to the Saudi regulations, the English Act asks the court when removing an arbitrator to consider the arbitrators entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.<sup>294</sup>

Moreover, the English Act gives the arbitrator the right to appear and be heard by the court before it makes any order<sup>295</sup> this is similar to what is stated in the Saudi regulations.

Overall, the main difference here between the Saudi regulations and the English and the Scottish laws is that the Saudi regulations stop an arbitrator or an arbitral tribunal from proceeding in the the arbitration case when there is a challenge against an arbitrator or the arbitral tribunal. It even makes all awards or decisions made by the tribunal or the arbitrators null and void. On the other hand, the English and Scottish

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<sup>291</sup> *ibid.* art 24 (1).

<sup>292</sup> *ibid.* art 24 (2).

<sup>293</sup> *ibid.* art 24 (3).

<sup>294</sup> *ibid.* art 24 (4).

<sup>295</sup> *ibid.* art 24 (5).



laws allow the arbitrator or arbitral tribunal to carry on their job in dealing with the arbitration case while the challenge against them is ongoing. The Saudi regulations provide extra time for the arbitration proceedings after the challenge is dealt with to make up for the time lost while awaiting a court's decision on the challenge. This is avoided when taking the English and the Scottish approach if the challenge was unsuccessful. However, if the challenge was successful then the arbitrators work on the case while the challenge proceeded is wasted and the arbitrators might ask for fees and costs for the work carried out during that time.

#### **4.7. Arbitrators' authority**

##### **4.7.1. The position in Saudi Arabia**

Arbitrators derive their authority from the parties in dispute when the arbitration instrument is authorised and approved by the authority originally competent to hear the dispute. With this authority given to the arbitrator we should note that it is a limited authority in some ways. The arbitrators' authority is limited to solving the dispute mentioned in the arbitration agreement without looking at any other disputes even if they are related to the case in hand. Also, the arbitrator only has authority over the parties who signed the arbitration agreement and not any other parties. In other words, the arbitrator is not permitted to involve any other parties in the arbitration process as can be done before a judge in court.

The arbitrator also does not have the authority to interpret the arbitration agreement. That is the court's job to do. This does not mean that the arbitrator can look through the agreement to try and analyse it in a way to help him know the limitations of his authority in regard to the extent of the case and the parties involved so that he can make a valid judgment to avoid having the award set aside on the ground of exceeding the mandate mentioned in the arbitration agreement. The arbitrator is also allowed to look if the case under arbitration is actually arbitrable, and does not violate public policy. This is because the arbitrator is obliged to work according to Sharia law in Saudi Arabia and abide by the laws of the country.



The arbitrator can not involve others to help him with his mandate. However, he can appoint specialists to assist him in matters that are not related to law that would help the arbitrator to make a fair judgment.

The arbitrator does not have the authority to decide criminal matters related to the case. In such matters the arbitrator shall stop the arbitration process and wait for judgments to be made by the court regarding the criminal matters. As such, the arbitrator cannot extend the arbitration period that has been agreed on by the parties unless it is according to the law in which an extension is required, such as in the matter mentioned where there is a criminal case related to the arbitration case and needs to wait for a judgment made by court.

The arbitrator's authority does not cease on the rendering of the award. According to art. 43 of the rules of the implementation of the Saudi Arbitration Regulations, the arbitrator has the authority to interpret the award made by him if it appears not to be clear to the court or to the parties in dispute. Article 43 states: "The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection."<sup>296</sup>

Furthermore, the parties to the dispute may confer powers upon the arbitral tribunal unless these powers conflict with the Arbitration Regulation or its Implementation Rules or Saudi public policy. The Arbitration Regulation of 1983 and its Implementation Rules of 1985 set out some powers upon the arbitral tribunal. For example, the arbitral tribunal has the following powers during the course of the arbitration proceedings: power to extend the period fixed for making the award on account of circumstances pertaining to the subject-matter of the dispute,<sup>297</sup> power to require the personal appearance of the parties to the dispute if the circumstances require so,<sup>298</sup> power to hold the hearing in camera by its own motion,<sup>299</sup> power to require from one of the parties to the dispute to produce any relevant document

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<sup>296</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 43.

<sup>297</sup> Saudi Arabian Arbitration Regulation 1983. art 15.

<sup>298</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 17.

<sup>299</sup> *ibid.* art 20.



regarding the case by its own motion, or at the request of the other party,<sup>300</sup> power to appoint one or more experts if necessary to provide a special report concerning some matters in the case<sup>301</sup> and power to decide to move, on its own motion or at the request of one of the parties to the dispute, for inspection of something relevant to the case.<sup>302</sup>

The new regulations of 2012 state in article 22, 3 the following:

*“3- The arbitral tribunal may solicit the concerned authority's assistance in the arbitration proceedings as the tribunal deems appropriate for the proper conduct of the arbitration, for instance: summoning a witness or expert, or ordering the disclosure of a document or a copy thereof, or others; This being without prejudice to the arbitral tribunal's authority to order such measures independently”<sup>303</sup>*

In article 23, it states:

*“1- The parties to arbitration may agree that the arbitral tribunal shall - on the application of any one of them- have power to order against any of them, interim or conservatory measures, as appropriate, with regard to the nature of the dispute. The arbitral tribunal shall have the power to request the applicant for these measures to submit the appropriate monetary security in order to execute such a measure.*

*2- If the party against whom an order was taken failed to comply with it, the arbitral tribunal may - on the application of the other party - authorize this party to take the necessary steps in order to execute it, this being without prejudice to the tribunal's power or the other party's right to request the president of the Competent Authority to order the party against whom the order was taken to execute it”<sup>304</sup>*

#### **4.7.2. The position in England and Scotland**

The Scotland Act sets out in rule 19 the power of the tribunal to rule on own jurisdiction. This rule is mandatory. It states that

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<sup>300</sup> *ibid.* art 28.

<sup>301</sup> *ibid.* art 33.

<sup>302</sup> *ibid.* art 35. see also AlMhaidib (n 221) 158-159.

<sup>303</sup> Saudi Arabian Arbitration Regulation 2012. art 22 (3).

<sup>304</sup> *ibid.* art 23.



*“The tribunal may rule on:*

- (a) whether there is a valid arbitration agreement (or, in the case of a statutory arbitration, whether the enactment providing for arbitration applies to the dispute),*
- (b) whether the tribunal is properly constituted, and*
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement”<sup>305</sup>*

#### **4.8. The duties and responsibilities of an arbitrator and their rights:**

##### **4.8.1. The position in Saudi Arabia**

The fundamental duty of an arbitrator is to be neutral with the parties of a dispute. The arbitrator does not take or work to one party's favour, not even the party who appointed him to be an arbitrator. The arbitrator is to act with integrity, honour and honesty. This means that the arbitrator should follow due process, remain independent and impartial. Furthermore, the arbitrator must set awards that are reasoned and should be able to explain how he reached these judgments. When the judgments are explained, the intentions of the arbitrator must be clear to the parties. If they cannot be explained, this could give rise to suspicion leading to concerns whether the arbitrator has given fair decisions or not. The arbitrator has a duty to meet the time limits provided by the parties of dispute in the arbitration agreement. One of the responsibilities of an arbitrator is that the parties can be asked for the damages or mistakes caused by delay.

On the other hand, as the law demands the arbitrator to meet these duties and responsibilities, the law also offers the arbitrator rights, such as their right to ask for expenses or to ask for compensation if he was removed from the process and damage was caused to him by that decision as mentioned above. The arbitrator can also ask for costs that he might have paid during his work as an arbitrator such as travelling expenses and accommodation if his mission involved travelling.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain provisions which set out a number of duties upon the arbitrators. The most important duties mentioned are as follows:

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<sup>305</sup> Arbitration (Scotland) Act 2010, rule 19.



The duty of the arbitral tribunal is to provide each party to the dispute a full opportunity to present his case before the tribunal, and to treat the parties equally during the course of the arbitration proceedings.<sup>306</sup>

If a document has been claimed to have been forged or if criminal proceedings have been instituted for forgery or for any other criminal act, the arbitral tribunal must suspend the arbitration proceedings and the date fixed for the award until a final decision is rendered from the competent authority on the incident which had arisen.<sup>307</sup>

The duty of the arbitrators to sign an award: where one or more arbitrators refuse to sign the award, this should be mentioned in the arbitral award.<sup>308</sup>

Moreover, the Arbitration Regulation of 1983 requires that the arbitral tribunal delivers its decision within the specified time limits. However, if the arbitral tribunal fails to fulfil this duty, the Regulation deals with the problem by setting out that:

*“The arbitrators’ decision shall be taken within the time limit specified in the arbitration instrument, unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within 90 days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject matter or extending the time limit for another period”*<sup>309</sup>

On the other hand, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not contain any provision concerning the immunity or liability of arbitrators. However, according to the general principles of Sharia, “an arbitrator may be liable for his gross negligence, such as when he ignores a very vital document presented by one of the parties to the dispute which affects the arbitral award.”<sup>310</sup>

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<sup>306</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 36.

<sup>307</sup> *ibid.* art 37.

<sup>308</sup> Saudi Arabian Arbitration Regulation 1983. art 9.

<sup>309</sup> *ibid.* art 9.

<sup>310</sup> AlMhaidib (n 221) 166.



If an arbitrator breaches his duties that were given to him by the parties to the dispute or by the law applied to the arbitration, for example if he does not issue an arbitral award or delivers it after the expiry of the time limit of arbitration, or if he withdraws from the arbitration process at a late stage in the proceedings or at the stage of deliberation, or if he discloses the content of his deliberation to third parties, the competent authority to hear the dispute has the power to decide whether or not he is liable according to the circumstances of each case.<sup>311</sup>

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 did not deal with the liability of an arbitrator. However, Almehadib is of the opinion that an arbitrator should be liable to the parties to the dispute for loss caused by his intentional wrongful behaviour or if he has made a serious lapse, such as accepting a bribe according to the general principles of the Sharia<sup>312</sup>

#### **4.8.2. The position in England and Scotland**

The Scotland Arbitration Rules set out the rights and duties of an arbitrator in several rules. Mandatory rule 8 states the duty to disclose any conflict of interests. This rule applies to arbitrators and individuals who have been asked to be an arbitrator but who have not yet been appointed.<sup>313</sup>

Rule 8.2 states that whoever this rule applies to they must

*“without delay disclose to the parties, and to any arbitral appointments referee, other third party or court considering whether to appoint the individual as an arbitrator, any circumstances known to them or which become known before the arbitration ends which might reasonably be considered relevant when considering whether they are impartial and independent”*<sup>314</sup>

This is similar to the new Saudi regulation which states in article 16 that the arbitrator shall not have any interest in the dispute and must from the date of his appointment and throughout the arbitral proceedings - disclose in writing to both

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<sup>311</sup> *ibid*

<sup>312</sup> *ibid*

<sup>313</sup> Arbitration (Scotland) Act 2010. rule 8 (1).

<sup>314</sup> *ibid*. rule 8 (2).



parties to arbitration all the circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already so informed them.<sup>315</sup>

The Scotland Arbitration Rules of 2010 also add some general duties in mandatory rule 24. It states that the “tribunal must (a) be impartial and independent, (b) treat the parties fairly, and (c) conduct the arbitration; (i) without unnecessary delay, and (ii) without incurring unnecessary expense [and] treating the parties fairly includes giving each party a reasonable opportunity to put its case and to deal with the other party’s case.”<sup>316</sup> The 2010 Scotland Arbitration Rules also added some rules for the parties in rule 25 (a mandatory rule) stating: “The parties must ensure that the arbitration is conducted (a) without unnecessary delay, and (b) without incurring unnecessary expense.”<sup>317</sup>

This is one of the things the Saudi regulations omitted, though it could be considered as general good manners that should be there in any case.

However, one of the most important rules that the Scotland Arbitration Rules sets out that is not included in the Saudi regulations is rule 26, a default rule on confidentiality. The rule states that:

*“26 (1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure (a) is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised), (b) is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration, (c) is required (i) in order to comply with any enactment or rule of law, (ii) for the proper performance of the discloser’s public functions, or (iii) in order to enable any public body or office-holder to perform public functions properly, (d) can reasonably be considered as being needed to protect a party’s lawful interests, (e) is in the public interest, (f) is necessary in the interests of justice, or (g) is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory. (2) The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration. (3) The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them. (4) “Confidential information”,*

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<sup>315</sup> Saudi Arabian Arbitration Regulation 2012. art 16 (1).

<sup>316</sup> Arbitration (Scotland) Act 2010. rule 24.

<sup>317</sup> *ibid.* rule 25.



*in relation to an arbitration, means any information relating to; (a) the dispute, (b) the arbitral proceedings, (c) the award, or (d) any civil proceedings relating to the arbitration in respect of which an order has been granted under section 15 of this Act, which is not, and has never been, in the public domain”<sup>318</sup>*

#### **4.9. Conclusion**

This chapter has tackled the issue of arbitrators and the arbitration tribunal by examining the Saudi Arbitration Regulations of 1983 and the implementation rules of 1985 and the new regulations of 2012, in terms of what has been added, changed or fixed. Subsequently, these findings were then compared with the English Arbitration Act of 1996 and the Scottish Arbitration Rules of 2010 to see if the Saudi regulations are any different and if so, to see if there can be any improvements or benefits that the Saudi regulator can add to the new implementation rules for the existing Arbitration Regulations of 2012.

The chapter was divided into the following subsections in order to discuss the following matters in more detail: the conditions required for an arbitrator, how an arbitrator is appointed, arbitrators accepting their mission, when their mission is accomplished, and the arbitrators' authority as well as their duties and responsibilities.

When discussing the conditions that must be met for an arbitrator, the following matters were addressed: the capacity of an arbitrator, their gender, their nationality, whether physical disabilities would prevent one from being an arbitrator, the qualifications required, the arbitrators' religion, their profession, them not having an interest in the case, the requirement of good conduct and behaviour, and finally the number of arbitrators.

When discussing the appointment of the arbitrators, their appointment by parties and their appointment by court were addressed.

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<sup>318</sup> *ibid.* rule 26.



Finally, when discussing the reasons why an arbitrator's mission is accomplished the following reasons were addressed: the arbitrator stepping down, the removal of an arbitrator, and challenging an arbitrator.

The following sections will now highlight the findings and recommendations that were addressed in this chapter

#### **4.9.1. Findings and recommendations**

##### **4.9.1.1. Capacity**

The Saudi regulations set rules for who is deemed a capable person to be an arbitrator. The old regulations even refer to a list of recommended arbitrators who fulfil the requirements needed for a person to be an arbitrator for the parties to refer to when choosing arbitrators. The Saudi regulations do not mention that an arbitrator should be of a certain age as is set out in Scottish law, but instead it sets requirements for a person to meet. These requirements are hard for a minor to meet which inevitably means that a minor cannot act as an arbitrator. The other difference here between the Saudi regulations and the Scottish rules is that the Scottish rules state that only an individual can act as an arbitrator, meaning a legal body cannot act as an arbitrator. The Saudi regulations are silent in this matter. It is recommended for the Saudi legislator to address this point in the new implementation rules.

##### **4.9.1.2. The gender of the arbitrator**

There has been a lot of debate amongst commentators and academics on whether a female can or cannot be an arbitrator, according to the Saudi regulations. It is clear that a female, when fulfilling the requirements needed for one to be an arbitrator, can act as one with no difference between her and a male arbitrator. In order to make this matter clear, the Ministry of Justice started issuing lawyer licenses which leaves no doubt that a female may act as an arbitrator.



#### **4.9.1.3. Nationality**

The old regulations required an arbitrator to be a Saudi citizen but this is no longer a case according to the new Arbitration Regulations of 2012 as it allows parties to resort to an organisation or permanent arbitration committee, or arbitration centre with offices located outside the Kingdom. Therefore, it is clear that an arbitrator does not need to be a Saudi citizen. This is seen as a step forward in the Saudi regulations in making arbitration more open internationally. Restricting arbitrators to be Saudi citizens might be seen as a put off for foreign parties who wish to invest in the Kingdom of Saudi Arabia but at the same time would like to have arbitrators who are not Saudi citizens. It is now more inviting for foreign investor to seek businesses in the kingdom: when referring a dispute to arbitration, they can now appoint arbitrators from different nationalities as they wish. This makes the Saudi regulations a step closer to being on a par with international Arbitration Regulations and the regulations of modern developed countries.

#### **4.9.1.4. Physical ability**

The Saudi regulations are silent on this matter. There is no mention of whether an arbitrator should be physically fit or what disabilities would prevent a person from being an arbitrator. This leaves the matter for the parties to choose. In contrast, the Scottish rules refer this issue to the Adults with Incapacity (Scotland) Act 2000, which states clearly what an incapable person is. It is recommended that the Saudi regulator take this into consideration in the new Arbitration Regulations.

#### **4.9.1.5. Qualifications**

Whilst the old Saudi regulations did not require that an arbitrator should have a certain qualification, it did require that they should have the necessary knowledge and expertise in order to have the capacity to settle disputes. The new regulations, in contrast, require that the arbitrator should have a degree in legal or Sharia Sciences. This may restrict and narrow the range of people permitted to act as arbitrators, but it



is not seen as a major issue as in practice parties usually seek a person who has a degree in legal science as they would be more trusted in knowing the relevant law.

#### **4.9.1.6. Religion**

The old regulations required that an arbitrator must be a Muslim. This has changed in the new Arbitration Regulations of 2012 where the parties to a dispute are now allowed to refer the arbitration case to an organisation or a permanent arbitration tribunal or an arbitration centre located outside the Kingdom. It does not require that the organisation or the arbitrators must be Muslim. This is another step forward for the new Arbitration Regulations in becoming more attractive to international investors and to make the regulations more efficient and easier for parties when appointing their arbitrators.

#### **4.9.1.7. Profession**

The old regulations did not restrict a person from any profession from being an arbitrator. However, the new regulations require that an arbitrator shall hold a degree in legal or Sharia science. This could be seen as a restriction, but again it is not seen as something serious as in it can be permissible to have a person of a different profession if the requirements are met in the chairman of the arbitral tribunal.

#### **4.9.1.8. Number of arbitrators**

Although it was mentioned in the old regulations that the number of arbitrators (if more than one) should be an uneven number, the new regulations are clearer on this issue by stating that if this requirement is not met then the arbitration is deemed to be null. This is a new addition that makes the new regulations clearer and does not leave a gap in law where it is not known what happens if a certain requirement is not met.



#### **4.9.1.9. Appointing arbitrators**

Where the old Arbitration Regulations of 1983 and the implementation rules of 1985 failed to mention a method of appointing the arbitrators, the new regulations of 2012 are clear on this issue. The new regulations now ask the parties when appointing their arbitrators that each party appoints an arbitrator; these two appointed arbitrators appoint the third arbitrator. The new regulations go further by providing more detail by setting a time limit for the parties to appoint their arbitrators. It sets 15 days for the appointment of the arbitrator; if this condition is not met then the court will have a role in appointing the arbitrators. The new Arbitration Regulations in this matter are a lot clearer than the old regulations. The detailed and clear requirements make the process easier and more efficient and by setting time limits allows the process to go faster than if it was left for parties to delay the appointments. The difference here between the Saudi regulations and the Scottish rules is that the Saudi regulations refer the parties to court to appoint the arbitrator or arbitrators when they cannot be appointed by the parties. The Scottish rules, on the other hand, provide the parties the option to appoint a referee or a third party to appoint the arbitrators. This is seen as an unnecessary step as the parties might extend their disagreement on appointing the arbitrators to disagreeing on appointing a referee. It is faster to take the case to a higher authority such as the court to appoint the arbitrators immediately after the time limit for the parties to appointing them has expired.

#### **4.9.1.10. Arbitrator stepping down**

The new regulations are silent in this regard whereas the Scottish rules address the matter of when the arbitrator has the right to resign from the mission. This is something the Saudi legislator could benefit from and add to the implementation rules when addressing the matter of when the arbitrator steps down from the mission. Moreover, the English Act mentions a few important points. First, it gives the parties the right on the replacement of the arbitrator. This is different from the old Saudi regulations as the Saudi regulations referred the case to court to appoint the new arbitrator or arbitrators. Secondly, it states an important issue where there is a disagreement between the parties and the arbitrator on his resignation. It gives the



arbitrator the right to apply to the court to grant him relief from any liabilities and makes an order to his entitlement of fees or expenses or if he needs to pay any fees or expenses. These are important issues the Saudi legislator should benefit from in addressing this issue in the implementation rules and not leave the matter without consideration.

#### **4.9.1.11. Removal of the arbitrator**

The Saudi regulations do not mention the method of removal whether it is in writing or orally or in arbitration session. It is necessary for the Saudi legislator to address this issue in the implementation rules. However, the new regulations do address the matter of when an arbitrator can be removed and what happens if the arbitrator or one of the parties disagrees with the proposed removal. This detail makes the matter clearer which is something the old Saudi Arbitration Regulations were sometimes criticised about, primarily because a lack of clarity in its text led to interpreters trying to guess what the text meant or try to assume how the process should work.

#### **4.9.1.12. Challenging the arbitrator**

The main difference here between the Saudi regulations and the English and the Scottish laws is that the Saudi regulations stop an arbitrator or an arbitral tribunal from proceeding in looking at the arbitration case when there is a challenge against an arbitrator or the arbitral tribunal. It even makes all awards or decisions made by the tribunal or the arbitrators null and void. On the other hand, the English and Scottish laws allow the arbitrator or arbitral tribunal to carry on with their job in dealing with the arbitration case while the challenge against them is ongoing. The Saudi regulations provide extra time for the arbitration proceedings after the challenge is dealt with to make up for the time lost while awaiting a court's decision on the challenge. This is avoided when taking the English and the Scottish approach if the challenge was unsuccessful. However, if the challenge was successful then the arbitrators work on the case while the challenge was ongoing is wasted and the



arbitrators might ask for fees and costs for the work that has been carried out during that time.



## **5. Chapter Five: The Proceedings**

### **5.1. Introduction**

This chapter will focus on one of the most important steps of arbitration, the arbitration proceedings. In this chapter the following points will be discussed: law applicable to the procedure, place of arbitration, language of arbitration, time-periods, experts, witnesses, statements of claim and defence, the sessions; administration and record, presence and absence of the parties, stay and interruption of the proceedings, and finally the end of the proceedings.

Each issue will address the Saudi law, starting with the old regulations of 1983 and the implementation rules of 1985 in order to determine what the original law was like. Then the new regulations of 2012 will be addressed to see what has changed, and to determine if the new regulations bring any improvements into the Saudi practice. This will be followed by a comparison with the Scottish and English laws to see if there are any differences with the Saudi regulations, and if so, how might the Saudi arbitration implementation rules benefit from this understanding. This last point is important as they are still under preparation by the Saudi legislator.

### **5.2. Law Applicable to the Procedure**

#### **5.2.1. The position in Saudi Arabia**

Essentially the law applicable to the proceedings of arbitration is the Arbitration Regulation and the implementation rules. The new arbitration implementation rules are yet to be published and enforced. These rules are complimented by other Saudi legal rules depending on what matter is resolved by arbitration. This is for the arbitral tribunal to take into account when making an award and through the arbitration process so that the awards do not contradict with these rules, the rules of Sharia or the law of the state. The general rules that supplement the rules of arbitration and the implementation rules are subject to the matter resolved by arbitration and fall under the following categories:



- 1) If the arbitration is on civil or real estate matters, the rules in the Arbitration Act must be supported by the rules relating to the procedures before the Sharia Court.<sup>319</sup>
- 2) If the arbitration is on a commercial dispute, the provisions of the Arbitration Act must be supported by the provisions of the Commercial Court Regulations of 1931.<sup>320</sup>
- 3) If it is a labour dispute, the procedures provided for in the Labor Courts Act support those in the Arbitration Act.<sup>321</sup>
- 4) If the arbitration is related to an administrative dispute between a private individual and the government or one of its agencies, the rules of procedure before the Board for Grievances as well as the rules of the law on the Administrative Judicial Commissions shall support the procedural rules of the Arbitration Act.<sup>322</sup>
- 5) If the arbitration is submitted to a permanent institutional arbitration, for example under the rules of a Chamber of Commerce, such rules complement those of the new Act.<sup>323</sup>

The question that arises here is whether the parties are permitted to apply a procedural law other than the Saudi procedural law in resolving their dispute by arbitration or not. Commentators have different views on this issue since the old regulations of 1983 do not mention anything about the matter. Some hold the view that it depends on the matter resolved by arbitration. If it is a domestic matter, i.e. not an international dispute, then it is not permissible to apply foreign procedural law. In the case where another procedural law is applied the arbitration proceedings are null and void because it is necessary to apply the Saudi Arbitration Regulations and the other Saudi regulations as mentioned above.<sup>324</sup> On the other hand, others see it as

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<sup>319</sup> Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (© Kluwer Law International; Kluwer Law International 2011). 648.

<sup>320</sup> Mhaidib AlMhaidib, 'Arbitration as a Means of Settling Commercial Disputes (national and International) with Special Reference to the Kingdom of Saudi Arabia' (1997). 198.

<sup>321</sup> El-Ahdab (n 296) 648.

<sup>322</sup> AlMhaidib (n 296) 198. El-Ahdab (n 296) 648.

<sup>323</sup> El-Ahdab (n 296) 648.

<sup>324</sup> AlMhaidib (n 296) 199.



acceptable to apply any other procedural law regardless of whether the arbitration is on a domestic dispute or an international dispute.<sup>325</sup>

The new Arbitration Regulations of 2012 make this issue clear. The parties of a dispute are free to agree on what proceedings they want to be applied by the tribunal in the arbitration process. These rules can be rules of an organisation, institution or arbitration centre regardless if they are within or outside the Kingdom. One guidance rule that must be adhered to, however, is that the chosen rules do not contradict with the rules of Islamic Sharia. If the parties have no agreement in this regard, then the tribunal has the right to choose what rules are appropriate to be implemented. Parties of a domestic dispute may choose to apply different rules than the Saudi rules if they wish to add some conditions that are not present in the Saudi regulations. For example, if they wish to have the statements in writing where the regulations allowed them to be orally presented in front of the tribunal or if they wish to add extra requirements in the hearing such as requiring the party to attend a hearing and not sending a representative. This can be seen in art 25 of the Arbitration Regulations of 2012 which state the following:

*“(1) The two parties to arbitration may agree on the procedure to be followed by the arbitral tribunal including inter alia their right to cause these proceedings to be governed by the rules that are applicable by any organisation, institution or arbitration centre within or outside the Kingdom, provided that they do not contradict the rules of Islamic Sharia.*

*(2) If no such agreement exists, the arbitral tribunal may, subject to the rules of Islamic Sharia and the provisions hereof, choose the arbitral proceedings that it may deem appropriate”<sup>326</sup>*

Such a text that allows any regulations to be implemented is seen as a huge step forward in the Saudi judicial attitude towards arbitration where a legal text allows the implementation of any regulations or rules to be applied. Some commentators state that this is something that was not predictable or imagined to happen<sup>327</sup>

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<sup>325</sup> AlMhaidib (n 296) 199.

<sup>326</sup> Saudi Arabian Arbitration Regulation 2012. art 25.

<sup>327</sup> Muhammed AlHoshan, ‘The New Arbitration Regulation; a Review and Commentary (1-2)’ (2012) 14519 *Aljazeera* <<http://www.al-jazirah.com.sa/2012/20120629/fe6.htm>>.



### 5.2.2. The position in England and Scotland

When examining the Scottish Arbitration Rules and the English Act, we find a similarity approach with regard to providing the freedom to choose the proceedings. Rule 28 of the Scottish Arbitration Rules states that: “It is for the tribunal to determine, (a) the procedure to be followed in the arbitration.”<sup>328</sup> However, the Scotland Arbitration Rules provide the parties the power to modify or display the non-mandatory rules of the Scotland Arbitration Rules when choosing the procedural law to apply by the tribunal. This power is based on rule 9 of the Scotland Arbitration Rules which states:

*“(1) The non-mandatory rules are called the “default rules, (2) A default rule applies in relation to an arbitration seated in Scotland only in so far as the parties have not agreed to modify or disapply that rule (or any part of it) in relation to that arbitration. (3) Parties may so agree; (a) in the arbitration agreement, or (b) by any other means at any time before or after the arbitration begins. (4) Parties are to be treated as having agreed to modify or disapply a default rule; (a) if or to the extent that the rule is inconsistent with or disapplied by; (i) the arbitration agreement, (ii) any arbitration rules or other document (for example, the UNCITRAL Model Law, the UNCITRAL Arbitration Rules or other institutional rules) which the parties agree are to govern the arbitration, or (iii) anything done with the agreement of the parties, or (b) if they choose a law other than Scots law as the applicable law in respect of the rule's subject matter. This subsection does not affect the generality of subsections (2) and (3)”*<sup>329</sup>

In a similar way, the English Act of 1996 states that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.<sup>330</sup>

Similar to the Scotland Arbitration Rules, the English Arbitration Act of 1996 states in section 4 the following:

*“4 Mandatory and non-mandatory provisions. (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary. (2) The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by*

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<sup>328</sup> Arbitration (Scotland) Act 2010. rule 28.

<sup>329</sup> *ibid.* rule 9.

<sup>330</sup> The Arbitration Act 1996. art 34.



*agreement but provide rules which apply in the absence of such agreement. (3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided. (4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland. (5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose, an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties"*<sup>331</sup>

### **5.2.3. Conclusion**

The difference between the Saudi regulations and the Scotland Arbitration Rules and the English Act is that the Saudi regulations do not contain any statement that this rule is mandatory or non-mandatory. However, this does not mean all provisions in the Saudi regulations are mandatory. This is because some rules state "unless the parties agree otherwise." Thus, there is no rule in the Saudi regulation allowing parties to modify or disapply some of the rules in the regulation or the implementation rules. If the parties to a dispute wish to have the Saudi regulations implemented as procedural rules for their arbitration process, they may only agree other than what the rule states when the rule allows that. Otherwise, the articles would be classed as "mandatory" and the parties may not modify them or disarray them.

## **5.3. Place of Arbitration**

### **5.3.1. The position in Saudi Arabia**

The previous Saudi regulations do not state anything with regard to the place of arbitration, meaning that the parties are free to agree with the appointed arbitrators on where they wish to have the arbitration proceedings. In terms of the question of whether arbitration can take place outside Saudi Arabia, some see that the arbitration proceedings must take place in Saudi Arabia and not outside of the country otherwise the proceedings of foreign arbitration rules must be applied. That being said, others

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<sup>331</sup> The Arbitration Act 1996. art 4.



do not see a problem in having some of the hearings outside the country if the award is given in the country. This is because there is no statement in the Saudi regulations that prevents the parties from choosing to have the arbitration proceedings outside Saudi Arabia.

When the parties and arbitrators agree on a seat for the arbitration proceedings, this agreement becomes obligatory unless the tribunal finds that having the proceedings in another place is more convenient.<sup>332</sup> It is common that the arbitration proceedings and hearings take place in the arbitrators' offices.

The new Arbitration Regulations of 2012 provide more information and freedom in this regard. The new regulations provide the parties the freedom to agree on where they wish to have the arbitration proceedings to take place, whether it is within or outside the Kingdom. Saudi law would still be the governing law if the parties agree to this for the proceedings as explained above. In the event that the parties fail to reach an agreement, the tribunal has the right to choose a suitable place for the proceedings. Article 28 of the new regulations states in this regard:

*“The two parties to the arbitration may agree to a forum for conducting arbitration within or outside the Kingdom, failing which the arbitral tribunal shall determine such forum with due regard to the circumstances of the case and the suitability of that forum to both parties; this shall not prejudice the powers of the arbitral tribunal to hold its meetings at any place it may deem appropriate for the deliberations of its members, the hearing of witnesses, experts, the parties to the dispute or for examining the subject matter of the dispute or for perusal or inspection of the documentation”<sup>333</sup>*

This is one of the improvements in the Saudi regulations. The previous regulations ignored the significance of the place of arbitration. The new regulations now provide the parties the right to choose where the place of arbitration will be, and further provides the arbitral tribunal the right to meet wherever it sees appropriate for the process.

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<sup>332</sup> Hani AlQurashi, Ghada Kilani and Anas Kilani, *Everything on Arbitration in Saudi Arabia and Syria in Theory and Practice* (2007). 213.

<sup>333</sup> Saudi Arabian Arbitration Regulation 2012. art 28.



### 5.3.2. The position in England and Scotland

The Scottish Arbitration rules and the English Act give equal freedom to the parties to choose the place of arbitration. Again, the arbitral tribunal is empowered to decide the place of arbitration in the absence of parties' agreement on this matter. Rule 28 of the Scotland Arbitration Rules reads:

*“(1) It is for the tribunal to determine; (a) the procedure to be followed in the arbitration, and (b) the admissibility, relevance, materiality and weight of any evidence. (2) In particular, the tribunal may determine. When and where the arbitration is to be conducted,” (Scotland Arbitration Rules, Rule 28) The English act states in this regard: “34. Procedural and evidential matters: (1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. (2) Procedural and evidential matters include; (a) when and where any part of the proceedings is to be held”<sup>334</sup>*

### 5.4. Language of Arbitration

#### 5.4.1. The position in Saudi Arabia

The official language in Saudi Arabia is Arabic hence the Rules for the Implementation of the Saudi Arabian Arbitration Regulation (1985) state in article 25:

*“The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussions or in correspondence. The arbitration panel and the parties may not speak other than the Arabic language and any party who does not speak Arabic shall be accompanied by an accredited translator, who shall sign with him the minutes of the hearing, approving the statements made”<sup>335</sup>*

The new Arbitration Regulations of 2012 have changed this rule. It gives the parties the freedom to choose any language they want for their arbitration proceedings. It states in art. 29:

*“(1) Arbitration shall be conducted in the Arabic language unless the arbitral tribunal or both parties agree on any other language or languages; such*

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<sup>334</sup> The Arbitration Act 1996. art 34.

<sup>335</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 25.



*decision or agreement shall apply to the language of the data, written memoranda, verbal pleadings and to any decision that may be adopted by the arbitral tribunal, or any message or decision it may issue, unless the agreement of the parties or the decision issued by the arbitral tribunal provide otherwise.*

*(2) The arbitral tribunal may decide that all or any written instrument produced in relation to this case shall be accompanied by a translation to the language or the languages used in the arbitration. In case more than one language is used, the tribunal may restrict the translation to some of these languages”<sup>336</sup>*

This provides a clear difference between the implementation rules of 1985 and the new Arbitration Regulations of 2012: whereas the previous rules insisted that all documents should be in Arabic (and if not, then they should also be translated), the new regulations give the freedom for parties to choose what language or languages they wish their documents and proceedings to be in. This here shows the urgent need for new implementation rules to be issued soon to prevent such conflict in legal texts. Of course, until the new regulations take place, the parties are free to agree on what language or languages they wish to use as the new rules are currently implemented.

This is also seen as yet another big step forward in the Saudi legal system with respect to arbitration rules. Commentators did not dream that such changes in the legal system with regard to arbitration would happen. Providing the freedom to choose the place of arbitration, the procedures law and the language of arbitration were seen as things that would not be changed in the new regulations yet there they are changed.

#### **5.4.2. The position in England and Scotland**

The Scottish rules and the English Act in this regard also give the tribunal the right to choose the language or languages they find necessary or suitable for the proceedings.

The Scottish rules state in the same rule 28: “(2) In particular, the tribunal may determine— (g) the language to be used in the arbitration (and whether a party is to supply translations of any document or other evidence)”<sup>337</sup>

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<sup>336</sup> Saudi Arabian Arbitration Regulation 2012. art 29.

<sup>337</sup> Arbitration (Scotland) Act 2010. rule 28.



The English Act states:

*“(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter... (2) Procedural and evidential matters include- ... (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied”*<sup>338</sup>

## **5.5. Time-Periods**

### **5.5.1. The position in Saudi Arabia**

In order to accelerate the arbitration proceedings, the Implementation Rules require that the arbitral tribunal decides the date of the first hearing within five days from receiving notice of the decision confirming the arbitration agreement. However, since the new regulations no longer require an arbitration instrument or bill to be approved by the authority originally having jurisdiction over the case, this rule no longer applies. What the new regulations provide now as guidance in this matter is that arbitration proceedings start on the day of which one of the parties receives an arbitration request from another party unless otherwise was agreed. Article 26 of the new Arbitration Regulations states: “Unless otherwise agreed, the arbitral proceedings shall commence on the day on which one of the parties to the arbitration shall have received from the other party a request for arbitration”<sup>339</sup>

According to the old regulations the arbitral tribunal then notifies the parties of the date of the first hearing through the secretary of the authority originally having jurisdiction. Similarly, the new regulations do not require any communications to happen through the secretary of the authority originally having jurisdiction. Instead, the tribunal may have its own secretary or immediately contact the parties on the addresses that are provided by them in the arbitration agreement.

The changes in the new Arbitration Regulations have made the arbitration proceedings smoother than before. Previously, too much authority was given to the

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<sup>338</sup> The Arbitration Act 1996. art 34.

<sup>339</sup> Saudi Arabian Arbitration Regulation 2012. art 26.



court of the authority originally having jurisdiction which in many cases seemed to be time consuming to get the arbitration proceedings started. With most powers now in the hands of the parties, the arbitration proceedings can move faster and smoother which is the main reason and benefit behind arbitration to avoid the time that could be wasted waiting on court proceedings.

The Arbitration Act provides that in matters where an arbitrator is appointed in place of a dismissed or withdrawing arbitrator, the date agreed on for giving an award shall be extended by 30 days. Article 14 of the Arbitration Regulations of 1983 states: “If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.”<sup>340</sup> This is also complimented by the new regulations: article 40 states that: “(4) If an arbitrator has been replaced by another arbitrator pursuant to the provisions hereof, the time that has been set for issuing the award shall be extended by thirty days.”<sup>341</sup>

Some questions arise with regard to the time-limit for issuing the award, the conditions for its extension and who is entitled to seek such an extension. Essentially, the time-limits are contractual. The law gives the parties the freedom to decide what time limits they wish to have for the proceedings and to issue the award. The law only applies when the parties fail to agree on such a matter. Article 9 of the Arbitration Act sets a 90-day time-limit to issue the award starting from the day of the decision confirming the arbitration agreement. This applies if the parties have not agreed or mentioned any other time limit in the arbitration agreement.

Article 9 further states:

*“The arbitrators’ decision shall be taken within the time limit specified in the arbitration instrument, unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within ninety days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject matter or extending the time limit for another period”*<sup>342</sup>

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<sup>340</sup> Saudi Arabian Arbitration Regulation 1983. art 14.

<sup>341</sup> Saudi Arabian Arbitration Regulation 2012. art 40 (4).

<sup>342</sup> Saudi Arabian Arbitration Regulation 1983. art 9.



Elahdab (658) states that “this article must be considered in light of the provisions of Articles 50 and 53 of the Implementation Rules of the Saudi Chambers of Commerce Act. These have fixed a legal time-limit of “three months” (3 Hegira months are less than 90 days). However, we see that since ninety days was mentioned then one should stick to the ninety days without any interpretations. For example, if the legislator wanted to mention 3 months he could have done so. Further, the likely reason may be that the Hegira months are sometimes 30 days and sometimes less. Consequently, it will be difficult to tell in advance as they follow the moon. By setting 90 days, it actually means exactly 90 days without the space for ambiguity.

The new regulations, on the other hand, provide different time limits in this regard; it sets twelve months from the day the arbitration proceedings started to issue an award unless otherwise agreed by the parties. Article 40 of the new regulations of 2012 states: “(1) The arbitral tribunal shall issue a final award on the dispute within the time that has been agreed by the two parties, failing which the award shall be issued within twelve months from the date of commencement of the arbitral proceedings”<sup>343</sup> However, it is questionable here as to why the new regulations give more time than the old regulations? Who may extend the time-limits?

The parties, the arbitral tribunal and then the authority originally having jurisdiction may extend the time limit. However, this is only possible under certain circumstances which are as follows:

- a) The parties must decide on extending the time limit before the original time limit expires. If they do not do so then the arbitration is terminated and the arbitration gives rise to a new arbitration.<sup>344</sup>
- b) The arbitral tribunal can extend the time limit, but only under two conditions: firstly, their decision to extend the time limit must be reasoned and, secondly, their decision must be made before the original time limit has expired because once the time limit expires the arbitral tribunal no longer has any jurisdiction. This is contained in article 15 of the Arbitration Regulations of

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<sup>343</sup> Saudi Arabian Arbitration Regulation 2012. art 40 (1).

<sup>344</sup> El-Ahdab (n 296) 657.



1983: “The arbitrators, by the majority by which the award shall be made, may, through a justified decision, extend the periods fixed for the award on account of circumstances pertaining to the subject matter of the dispute”<sup>345</sup>

- c) The new Arbitration Regulations of 2012 attempts to improve this issue by setting a period of time, six months, that the extension shall not exceed unless agreed by the parties. It states in article 40: “(2) The arbitral tribunal shall, in all cases, decide to extend the time that has been set for issuing the arbitral award, provided that such extension shall not exceed six months, unless the two parties agree on a longer period”<sup>346</sup>
- d) If the parties fail to agree on an extension then either of them may request to the authority originally having jurisdiction over the dispute to extend the time limit. This authority may extend the time limit even after the original period has expired. Elahdab states that “the new law has given to such authority not only the simple power of extension but also the power to re-instate the arbitration. Neither the parties nor the arbitrators have this power.”<sup>347</sup>

It is also worth noting that the authority originally having jurisdiction over the dispute can either look at the dispute itself or extend the time limit, because when the original time limit expires this authority has the jurisdiction over the case after the arbitral tribunal loses its jurisdiction.<sup>348</sup>

The new regulations state: “(3) If the arbitral award is not issued within the time referred to in the preceding paragraph, any of the parties to the dispute may request the competent court to issue an order extending that period, or closing the arbitral proceedings, whereupon either party may file its claim with the competent court”<sup>349</sup>

The question that arises now is what is the fate of the arbitration once the time limit that has been agreed on expires without the arbitrators issuing an award? In this matter the parties either agree to request an extension from the authority originally

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<sup>345</sup> Saudi Arabian Arbitration Regulation 1983. art 15.

<sup>346</sup> Saudi Arabian Arbitration Regulation 2012. art 40 (2).

<sup>347</sup> El-Ahdab (n 296) 657.

<sup>348</sup> Saudi Arabian Arbitration Regulation 1983. art 9.

<sup>349</sup> Saudi Arabian Arbitration Regulation 2012. art 40 (3).



having jurisdiction or one of them could request an extension. This authority then may extend the time limit even after it has expired or takeover the case itself. Between the date of expiry of the original time limit and the date of the extension the arbitration will be terminated.

It is important to note that between the dates of the request for an extension and the date it is given, the parties cannot take any action. There is no legal text stating a time limit for the authority to make a decision on whether it will grant an extension or refuse it and this leaves the parties in an uncertain situation.<sup>350</sup>

The reason why the new regulations set longer periods of time for the award to be issued and for an extension to be added if the award was not issued on the time set for is to ensure that the time is not to be wasted on seeking more time extensions for the award before it reaches the deadline without the award being issued. For example, it gives a longer period of time, 12 months instead of 90 days for the award to be issued if not agreed otherwise by the parties so the parties or the tribunal do not need to seek further extensions every three months if needed and if not agreed on from the start.

### **5.5.2. The position in England and Scotland**

The Scottish Arbitration Rules deals with time limits in rules 43, 44 and 84. Rule 43 (a default rule) states: “Variation of time limits set by parties: The court may, on an application by the tribunal or any party, vary any time limit relating to the arbitration which is imposed, (a) in the arbitration agreement, or (b) by virtue of any other agreement between the parties.”<sup>351</sup> This is similar to the Saudi Arbitration Regulations where the parties or the arbitral tribunal seeks the extension from the authority having jurisdiction on the case.

If an extension or variation to the time limit is exceeded, then rule 44 of the act is mandatory. Rule 44 of the act states:

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<sup>350</sup> El-Ahdab (n 296) 658.

<sup>351</sup> Arbitration (Scotland) Act 2010, rule 43.



*“Time limit variation: procedure etc. (M) (1) This rule applies only where an application for variation of time limit is made under rule 43. (2) Such a variation may be made only if the court is satisfied; (a) that no arbitral process for varying the time limit is available, and (b) that someone would suffer a substantial injustice if no variation was made. (3) It is for the court to determine the extent of any variation. (4) The tribunal may continue with the arbitration pending determination of an application. (5) The court's decision on whether to make a variation (and, if so, on the extent of the variation) is final”<sup>352</sup>*

The difference between this rule and the Saudi regulations is that here the court decides if an extension is to be granted and to what extent it will be. In contrast, there is no mention in the Saudi regulations regarding if the parties and arbitral tribunal ask for a specified time or if it is the authority that divides the time period to be granted.

Another point which is omitted in the Saudi regulations is how time periods are calculated. Rule 84 of the Scottish Arbitration Rules states:

*“Periods of time are to be calculated for the purposes of an arbitration as follows; (a) where any act requires to be done within a specified period after or from a specified date or event, the period begins immediately after that date or, as the case may be, the date of that event, and (b) where the period is a period of 7 days or less, the following days are to be ignored; (i) Saturdays and Sundays, and (ii) any public holidays in the place where the act concerned is to be done”<sup>353</sup>*

This is something the Saudi legislator may want to consider incorporating into the new implementation rules.

The English act deals with time limits in the following sections. Section 12 sets out the power of court to extend the time for beginning arbitral proceedings:

*“(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step; (a) to begin arbitral proceedings, or (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, The court may by order extend the time for taking that step. (2) Any*

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<sup>352</sup> *ibid.* rule 44.

<sup>353</sup> *ibid.* rule 84.



*party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time. (3) The court shall make an order only if satisfied; (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question. (4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired. (5) An order under this section does not affect the operation of the Limitation Acts (see section 13). (6) The leave of the court is required for any appeal from a decision of the court under this section”<sup>354</sup>*

This section ensures that the extensions are left to the court’s discretion if it is satisfied that other means have been exhausted and that failing to give an extension might cause some harm to a party. This appears stricter than the Saudi regulations in giving an extension but it seems that it is necessary in order to ensure that the arbitration process does not result in the demand for extensions unless there is a serious need for that.

Furthermore, article 50 states the rules for extension of time for making award:

*“(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time. (2) An application for an order under this section may be made; (a) by the tribunal (upon notice to the parties), or (b) by any party to the proceedings (upon notice to the tribunal and the other parties), But only after exhausting any available arbitral process for obtaining an extension of time. (3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done. (4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired. (5) The leave of the court is required for any appeal from a decision of the court under this section”<sup>355</sup>*

This is almost identical to the Scottish Arbitration Rules.

In a similar way to the Scottish Arbitration Rules, the English Act sets out how the time periods are calculated. For example, section 78 states that:

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<sup>354</sup> The Arbitration Act 1996, art 12.

<sup>355</sup> *ibid.* art 50.



*“Reckoning periods of time. (1) The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement. (2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions. (3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date. (4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date. (5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded. In relation to England and Wales or Northern Ireland, a “public holiday” means Christmas Day, Good Friday or a day which under the MIBanking and Financial Dealings Act 1971 is a bank holiday”<sup>356</sup>*

Furthermore, section 79 the act sets out the power of court to extend time limits relating to arbitral proceedings:

*“(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement. This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.). (2) An application for an order may be made; (a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or (b) by the arbitral tribunal (upon notice to the parties). (3) The court shall not exercise its power to extend a time limit unless it is satisfied; (a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and (b) that a substantial injustice would otherwise be done. (4) The court’s power under this section may be exercised whether or not the time has already expired. (5) An order under this section may be made on such terms as the court thinks fit. (6) The leave of the court is required for any appeal from a decision of the court under this section”<sup>357</sup>*

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<sup>356</sup> *ibid.* art 78.

<sup>357</sup> *ibid.* art 79.



## 5.6. Experts

### 5.6.1. The position in Saudi Arabia

In the situation where technical matters in a dispute of which the arbitral tribunal has either limited or no expertise, the tribunal is free to appoint experts in the field. Such experts can provide help in clarifying issues and providing clear statements to both the tribunal and the parties. When such experts are appointed, the tribunal should specify the expert's mission and to what extent his expertise is needed on the case, his fees and who pays them as in some cases one of the parties could be appointed to pay the expert's fees such as in the case of S. B. Co. (Industrial Company) v. 1. A. Serv. Co. for Ins. (Insurance Company).<sup>358</sup> Alternatively, the fees could be split equally between the parties, such as occurred in the case of H. B. Co. for Comm. (Commercial Company) v. L Co. for Comm. (Insurance Company).<sup>359</sup> This should all be mentioned in the award given by the tribunal at the end of the process.

Article 33 of the implementation rules provides more detail with regard to inviting an expert to look into a relevant matter:

*“The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit to be made to the account of the expert. In case such deposit is not made by the party required to do so, or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance, whether severally or collectively”*<sup>360</sup>

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<sup>358</sup> The Arbitral Award issued on 1990 A.D.

<sup>359</sup> The Arbitral Award No. 14/1409, 1990 A.D.

<sup>360</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 33.



The experts start work on the case with immediate effect and all parties should provide them with all necessary help for them to carry out their mission. When finished, the experts shall issue a report with their findings and present it to the tribunal and all parties. Following this, the tribunal may hold a hearing to discuss the report with the experts and all parties and to allow the parties to ask further questions of the experts. Further, the parties may wish to appoint their own experts whose findings might contradict with the findings of the experts appointed by the tribunal. If this situation occurs, the experts appointed by the tribunal may issue a final report on the matter. In all cases the tribunal is not bound by the expert's opinion. It is also necessary to mention that the experts must work within the time limits set out by the tribunal.

Article 34 of the implementation rules states: "The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions."<sup>361</sup>

Further, the new Arbitration Regulations of 2012 add more emphasis on the issue of providing the experts with information. If a disagreement arises between the expert and a party with regard to providing information, the arbitral tribunal shall issue an award. This is one of the new procedures added to the new regulations. For example, article 36 of the new regulations states:

*"(1) The arbitral tribunal may appoint one or more experts in order to submit a written or verbal report to be entered into the file of the case on certain issues to be specified pursuant to a decision, which decision shall be communicated to each of the parties unless it is agreed otherwise.*

*(2) Each of the parties shall provide the expert with the information related to the dispute and shall enable the expert to examine whatever documents, goods, or any other property related to the dispute, as may be required. The arbitral tribunal shall issue an award on any disagreement that may arise between the expert and one of the parties with respect to this matter, pursuant to a decision, which decision shall not be appealable in any manner.*

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<sup>361</sup> *ibid.* art 34.



*(3) Promptly after the expert report has been filed with the arbitral tribunal, a copy thereof shall be sent to each of the parties for their respective comments thereon. Both parties shall be entitled to peruse and examine the documents on which the expert has based his report. The expert shall issue his final report after he has perused the comments of the two parties.*

*(4) The arbitral tribunal shall, following submission of the expert report, decide either on its own initiative, or pursuant to a request by any of the parties, that a session be convened for hearing the expert; the two parties shall be afforded the opportunity to examine the expert with respect to the contents of his report”<sup>362</sup>*

### **5.6.2. The position in England and Scotland**

An examination of the Scottish Arbitration Rules reveals similar rules with regard to experts and the powers relating to examining a property. Rule 34 on experts states that

*“34. (1) The tribunal may obtain an expert opinion on any matter arising in the arbitration.” Then it emphasises on the parties rights when an expert is involved. It states: “(2) The parties must be given a reasonable opportunity; (a) to make representations about any written expert opinion, and (b) to hear any oral expert opinion and to ask questions of the expert giving it.” (Scottish Arbitration Rules 2010, rule 34) then in rule 35 it states the powers the tribunal may use to allow experts to fulfil their mission. It states: “35. The tribunal may direct a party; (a) to allow the tribunal, an expert or another party; (i) to inspect, photograph, preserve or take custody of any property which that party owns or possesses which is the subject of the arbitration (or as to which any question arises in the arbitration), or (ii) to take samples from, or conduct an experiment on, any such property, or (b) to preserve any document or other evidence which the party possesses or controls.”<sup>363</sup>*

The English act contains a similar statement. Article 38 states:

*“(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings- (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property”<sup>364</sup>*

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<sup>362</sup> Saudi Arabian Arbitration Regulation 2012. art 36.

<sup>363</sup> Arbitration (Scotland) Act 2010. rule 35.

<sup>364</sup> The Arbitration Act 1996. art 38.



## 5.7. Witnesses

### 5.7.1. The position in Saudi Arabia

If a party wishes to request that a witness should be heard then they must indicate, either orally during a hearing or in writing, the facts they want to be proven by such testimony. The party must be accompanied by the witnesses they wish to request to be heard at the hearing held for that. The hearing of the witnesses occurs before the arbitral tribunal. The other party is free to deny these testimonies according to the same proceedings.

Article 31 of the implementation rules states:

*“The party requesting testimony of witnesses shall specify the facts to be proved in the testimony, either orally or in writing, and shall accompany his witnesses in the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to the Sharia rules, and the other party may refute such testimony in the same manner”*<sup>365</sup>

What the new regulations mention in regards to witnesses is included in the articles where it talks about place of arbitration and documenting the arbitration sessions. It states in article 28 that when the arbitral tribunal sets a place for arbitration it may hear from witnesses, experts and the parties to the dispute.<sup>366</sup> Moreover, in article 33 it mentions that when the tribunal is recording the hearings these documents “shall be signed by witnesses or experts as well as by the parties attending that hearing or by their duly authorised representatives as well as the members of the arbitral tribunal”<sup>367</sup>

More importantly, however, the arbitral tribunal may seek the authorities help if it is necessary to call a witness to present their testimony if the witness refuses to attend a hearing. Article 22 of the Arbitration Regulations of 2012 state:

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<sup>365</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 31.

<sup>366</sup> Saudi Arabian Arbitration Regulation 2012. art 28.

<sup>367</sup> *ibid.* art 33 (3).



*“3- The arbitral tribunal may solicit the concerned authority's assistance in the arbitration proceedings as the tribunal deems appropriate for the proper conduct of the arbitration, for instance: summoning a witness or expert, or ordering the disclosure of a document or a copy thereof, or others; this being without prejudice to the arbitral tribunal's authority to order such measures independently”<sup>368</sup>*

### **5.7.2. The position in England and Scotland**

The Scottish rules mention witnesses in two places. Rule 36, where it states that the tribunal may “direct that a party or witness is to be examined on oath or affirmation” (Scottish Arbitration Rules 2010, rule 36 (a)). The Scottish rules also mention witnesses in rule 45 in the matter of the courts powers to order attendance of witnesses and disclosure of evidence. It states there that “(1) The court may, on an application by the tribunal or any party, order any person; to attend a hearing for the purposes of giving evidence to the tribunal, or to disclose documents or other material evidence to the tribunal.”<sup>369</sup> The Scottish Arbitration Rules add another point with regard to witnesses that is not stipulated in the Saudi regulations. Rule 45 (2) states that the court “may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in civil proceedings”<sup>370</sup>

In contrast, the English law gives the power of directing that a witness shall be examined on oath or affirmation. The tribunal may, for that purpose, administer any necessary oath or take any necessary affirmation.<sup>371</sup> Examining the witnesses on oath or affirmation is mentioned in both the Scottish and the English law but is not mentioned in the Saudi regulations.

Article 43 in the English act is concerned with securing the attendance of witnesses:

*“(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce*

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<sup>368</sup> *ibid.* art 22 (3).

<sup>369</sup> Arbitration (Scotland) Act 2010. rule 45 (1).

<sup>370</sup> *ibid.* rule 45 (2).

<sup>371</sup> The Arbitration Act 1996. art 38 (5).



*documents or other material evidence. (2) This may only be done with the permission of the tribunal or the agreement of the other parties. (3) The court procedures may only be used if; a) the witness is in the United Kingdom, and b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland. (4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings”<sup>372</sup>*

This article addresses an important matter which the Saudi regulation does not address, namely the matter where the witness is not located within the jurisdiction. English law provides that the court procedures may only be used when the witness is in the United Kingdom and when the arbitral proceedings are conducted in England and Wales or Northern Ireland.

Finally, article 44 states that unless otherwise agreed by the parties, the court has for the purposes of, and in relation to arbitral proceedings, the same power of making orders about taking evidence of witnesses as it has for the purposes of and in relation to legal proceedings.<sup>373</sup>

## **5.8. Statements of Claim and Defence**

### **5.8.1. The position in Saudi Arabia**

One of the many things in an arbitration process is the need to obtain a statement of claim from a party and a statement of defence from the other parties. If this does not exist, then an arbitration process cannot be completed as there would be nothing to base the arbitration on. In other words, there is no case presented. To avoid this happening, the arbitral tribunal must set a day for the parties to attend to present their claims and evidence and defence, either orally or in writing. The defendant party must be the last to present their defence and after that the arbitral tribunal completes what it needs to do with regard to the investigation of the case before making a decision. This is contained in art 22 of the Implementation Rules of 1985 which states that “The arbitration panel shall reasonably allow each party to make his remarks and defences either orally or in writing in the times specified by the

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<sup>372</sup> *ibid.* art 43.

<sup>373</sup> *ibid.* art 44.



arbitration panel. The defendant party shall be the last to make submission and the panel shall complete the case and prepare the award.”<sup>374</sup>

The implantation rules further stipulates that: “The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing and to record them in the minutes”<sup>375</sup>

The rules also provide for when the arbitral tribunal wishes or if one of the parties requests to ask for further documents to be presented by a party. For this to happen there are a number of guidelines on what sort of documents may be requested. The main guideline is that this material must be relevant to the case in hand and that this document may have an affect on the proceedings of the arbitration. According to article 28 of the Implementation Rules, this can arise in the following cases: “a) If such document is a joint document between the parties. Such document will be deemed joint if, in particular, it is in favour of both parties or if it proves their mutual rights and obligations. b) If one of the parties invoked such a document in any phase of the claim. c) If the regulations permit demand for delivery or release of such a document”<sup>376</sup>

If this is the case, then the application presented by the party requesting such material to be presented must state the following: “a) description of the document requested, b) contents of the document, with as much detail as possible c) the fact in issue for which such document is called, d) the evidence and circumstances proving that the document is under the possession of the other party, e) the reason for obligating the other party to present the said document”<sup>377</sup>

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<sup>374</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 22.

<sup>375</sup> *ibid.* art 36.

<sup>376</sup> *ibid.* art 28 (1).

<sup>377</sup> *ibid.* art 28 (2).



The new Arbitration Regulations of 2012 present something new in this matter. It states that the claimant party shall, within the time agreed by the parties or the time limit that may be set by the arbitral tribunal, provide the respondent and each arbitrator with a written statement of his claim. This statement shall specify the name and address of the claimant, the name and address of the respondent, a summary of the facts of the claim, the relief claimed and the substantiating documents, in addition to any other matter that must, pursuant to the agreement of the parties, be mentioned in this statement. Following this, within the time agreed upon by the parties, or within the time prescribed by the arbitral tribunal, the defendant party is required to provide the claimant and each arbitrator with a written reply to the statement of claim. The reply may include any request related to the subject matter of the dispute. Finally, a party may include copies of the substantiating documents with the statement of claim or to the reply, and may refer to all or any part of these documents and to the evidence that it intends to produce. The arbitral tribunal may at any stage of the process request original copies of these documents.<sup>378</sup>

Article 30 of the new regulations state the following:

*“(1) The claimant shall, within the time agreed by both parties, or the time that may be prescribed by the arbitral tribunal provide the respondent and each arbitrator, with a written statement of his claim, specifying his name and address, the name and address of the respondent, summary of the facts of the claim, the relief claimed and the substantiating documents, in addition to any other matter that must, pursuant to agreement of the parties, be mentioned in this statement.*

*(2) The respondent shall, within the time agreed upon by the parties, or within the time prescribed by the arbitral tribunal, provide the claimant and each arbitrator with a written reply to the statement of claim. His reply may include any request related to the subject matter of the dispute or he may invoke any other right related to set off; he may raise such defence even at a later stage of the proceedings if the arbitral tribunal elects that there are reasons for the delay.*

*(3) Either party may enclose to the statement of claim or to his reply thereto, as the case may be, copies of the substantiating documents, and may refer to all or any part of these documents and to the evidence that it intends to produce. This shall not prejudice the right of the arbitral tribunal to order, at*

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<sup>378</sup> Saudi Arabian Arbitration Regulation 2012. art 30.



*any stage of the proceedings, the submission of the originals or copies of the documentation on which the case of either party is based*<sup>379</sup>

What is new here is that the claimant party sends his claim to the other parties and the arbitral tribunal in advance to the hearing date agreed on. The defendant then replies to the claim in writing as well and sends their reply to the claimant and the tribunal. This has to be carried out prior to the date set for the hearing where the parties come to present their claims, arguments and defence. This appears to make the process more convenient for all involved in the arbitration: the defendants would have time to read the claim and prepare for their defence, the claimant would see what defence has been presented in order to counter it if possible, and the tribunal will have the opportunity to look at the case beforehand instead of meeting on a set day to hear the claim. This also avoids the situation where the defendant would either be forced to defend without preparation or request another hearing to present their defence.

Furthermore, the new regulations states that the parties may review or add to their statements during the arbitral process unless the tribunal decides not to accept any further reviews in order to avoid any delay in the arbitration process. In this regard, Article 32 states that “Either party shall be entitled to review or compliment the relief it has claimed within the course of the arbitral proceedings, unless the arbitral tribunal decides not to accept the same so as to avoid any delay in deciding the dispute.”<sup>380</sup>

The documents which the parties have power to review include copies of any document presented to the tribunal by a party which shall be sent to all other parties. Article 31 of the new regulations states: “Copies of the memoranda, instruments or any other document that may be filed by either party with the arbitral tribunal shall be sent to the other party; similarly, copies of the expert reports, the substantiating documents and of any other evidence on which the arbitral tribunal may rely in the issuance of its award shall be sent to each party”<sup>381</sup>

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<sup>379</sup> *ibid.* art 30.

<sup>380</sup> *ibid.* art 32.

<sup>381</sup> *ibid.* art 31.



In matters where the claimant or the defendant delays to submit their statement of claim or defence, the new regulations state that:

*“(1) If the claimant fails – without cause – to file a written statement of claim in accordance with Art. 30(1) hereof, the arbitral tribunal shall, unless otherwise agreed by the two parties to the arbitration, terminate the arbitral proceedings.*

*(2) If the respondent fails to submit a written statement of his defence pursuant to Art. 30(2) hereof, the arbitral tribunal shall, unless otherwise agreed by the parties to the arbitration, continue with the arbitral proceedings”<sup>382</sup>*

### **5.8.2. The position in England and Scotland**

The Scottish rules provide the power to the tribunal to determine whether or not parties are to submit claims or defence, and if they present such documents to what extent they may be amended. The Saudi regulations are quiet in this regard as it seems likely that the regulator assumes that a party to arbitration would present a claim and the other party would present a defence.

Furthermore, the Scottish Arbitration Rules provide something totally different than what is contained in the Saudi regulations concerning the issue of giving copies of all claims, defences and evidence or any other related documents to all parties as well as to the arbitral tribunal. The Scottish rules state that it is for the tribunal to decide what documents are to be presented and to who and what shall be disclosed. Further, the rules give the tribunal the power to decide what, if any, questions are to be put forward and what shall be answered by the parties. It also gives the power to the tribunal to decide how the arbitration is to proceed with regard to the hearings of the questioning, written or oral arguments, presentation or inspection of documents or other evidence, and submission of documents or other evidence.<sup>383</sup>

Rule 28 of the Scottish Arbitration Rules states:

*“The tribunal may determine— b) whether parties are to submit claims or defences and, if so, when they should do so and the extent to which claims or defences may be amended, c) whether any documents or other evidence*

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<sup>382</sup> *ibid.* art 34.

<sup>383</sup> Arbitration (Scotland) Act 2010. rule 28 (2).



*should be disclosed by or to any party and, if so, when such disclosures are to be made and to whom copies of disclosed documents and information are to be given, d) whether any and, if so, what questions are to be put to and answered by the parties, f) the extent to which the arbitration is to proceed by way of; i) hearings for the questioning of parties, ii) written or oral argument, iii) presentation or inspection of documents or other evidence, or iv) submission of documents or other evidence”<sup>384</sup>*

The Scottish Arbitration Rules also sets rules for the failure to submit a claim or defence in a timely manner. It gives the arbitral tribunal the right to consider when a party unnecessarily delays in submitting a claim if there is a good reason for this delay or not. If the tribunal finds that the delay is with no good reason and may harm the case or the other party then the tribunal must end the arbitration and may make an award. The same goes for when the defendant delays in submitting a defence, although the delay in this regard is not treated as an admission of anything.

Rule 37 of the Scottish Arbitration Rules 2010 states:

*“(1) Where; a) a party unnecessarily delays in submitting or in otherwise pursuing a claim, b) the tribunal considers that there is no good reason for the delay, and c) the tribunal is satisfied that the delay; i) gives, or is likely to give, rise to a substantial risk that it will not be possible to resolve the issues in that claim fairly, or ii) has caused, or is likely to cause, serious prejudice to the other party, the tribunal must end the arbitration in so far as it relates to the subject-matter of the claim and may make such award (including an award on expenses) as it considers appropriate in consequence of the claim. (2) Where; a) a party unnecessarily delays in submitting a defence to the tribunal, and b) the tribunal considers that there is no good reason for the delay, the tribunal must proceed with the arbitration (but the delay is not, in itself, to be treated as an admission of anything)<sup>385</sup>*

This is not mentioned in the Saudi regulations or implementation rules in this level of detail.

The English Act is similar to the Scottish Arbitration Rules with regard to providing the tribunal the power to decide on what form of written statements of claim and defence are to be used and when these materials should be submitted and the extent

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<sup>384</sup> *ibid.* rule 28 (2).

<sup>385</sup> *ibid.* rule 37.



to which such statements can be later amended. Article 34 of the English act of 1996 states:

*“(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. (2) Procedural and evidential matters include; c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended”<sup>386</sup>*

Regarding the issue of delays in submitting a statement of claim from a party, it is almost identical to the Scottish Act. Article 41 of the English Act states:

*“(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay; a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim”<sup>387</sup>*

### **5.8.3. Conclusion**

From the above it seems that the approach the Saudi legislator adopted by asking parties to submit a claim and defence is reasonable for the arbitration process to start on clear grounds. What the Scottish and English regulations add here is that they give the arbitral tribunal the right to decide what is to be mentioned and handed in when submitting a claim or defence, if any. Giving the arbitral tribunal such a right is good for the arbitration process as the tribunal would ask for what is necessary in order for the process to be speeded up. The tribunal would guide the parties in only submitting what is relevant to the case in order to ensure that no time will be wasted on other matters that might not be related to the actual dispute.

What the Scottish and the English regulations also add is that they mention what happened if one of the parties fails to submit their statement of claim and defence. This is something that is not mentioned in the Saudi regulations and will wait to see

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<sup>386</sup> The Arbitration Act 1996. art 34 (1)-(2) (c).

<sup>387</sup> *ibid.* art 41 (3).



something in this regard being mentioned in the implementation rules. This is seen as a gap in the regulations that needs to be filled.

## **5.9. The sessions; administration and record**

### **5.9.1. The position in Saudi Arabia**

In cases where the arbitral tribunal is consisting of a sole arbitrator then this arbitrator shall control the hearings. In matters where the tribunal consists of more than one arbitrator then the umpire controls and manages the hearings. He is the one to direct questions to the parties and the witnesses as well as telling the writer exactly what to write in recording the hearing. If a party wishes to ask a question to another party then it should be through the umpire or with his permission.

Article 23 of the implementation rules states that

*“The umpire shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing anyone in contempt of the hearing. However, if anyone present commits a violation, the umpire shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the umpire”<sup>388</sup>*

The arbitral tribunal does not have the right to enforce or punish the parties if a party is in contempt of the hearing or commits a crime. In such matters, they shall record the incident and transfer it to the relevant authority. This is presented in art 37 of the Arbitration Regulations of 2012. The provision reads:

*“If, during the arbitral proceedings, an issue beyond the scope of jurisdiction of the tribunal arises, or if it is alleged that one of the documents is forged, or that criminal proceedings have been initiated with respect to the alleged forgery, or with respect to any other criminal act, the arbitral tribunal may continue the hearing of the dispute if it elects that a decision on that issue, or on the alleged forgery or on the other criminal act is not necessary for issuing the award on the subject matter of the dispute; otherwise, it may suspend the proceedings until a final decision has been issued in this respect.*

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<sup>388</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 23.



*Hence, the running of the time which has been fixed for issuing the arbitral award shall be suspended*<sup>389</sup>

According to the implementation rules of 1985, the arbitral tribunal should determine the date of the first session within five days of the date on which it receives the notification of the decision approving the arbitration instrument by the competent authority.<sup>390</sup> This is not the case with the new regulations, however, as there is no need for the arbitration instrument anymore. Instead, the arbitration process starts on the day that a party reserves the arbitration request from another party unless otherwise agreed between them. Article 26 of the new regulations states: “Unless otherwise agreed, the arbitral proceedings shall commence on the day on which one of the parties to the arbitration shall have received from the other party a request for arbitration”<sup>391</sup>

The implementation rules of 1985 state that the sessions of the arbitration proceedings should be held in public by the arbitral tribunal, unless the tribunal decides by its own motion or at the request of either of the parties to the dispute that the sessions should be heard in private for reasons accepted by the arbitral tribunal, for example, the protection of the commercial reputation of the parties to the dispute.<sup>392</sup> The new regulations also compliment this by stating the following in article 43 (2): “(2) The arbitral award, or any part thereof, shall not be published except with the written consent of both parties”<sup>393</sup>

If the parties agree on having the arbitration hearings in private then none of the documents or decisions that are given in those sessions shall be announced or published. Publication of the hearings means publishing the whole arbitral proceedings and the awards given. In this case, this shall not happen. Instead, the

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<sup>389</sup> Saudi Arabian Arbitration Regulation 2012. art 37.

<sup>390</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 10.

<sup>391</sup> Saudi Arabian Arbitration Regulation 2012. art 26.

<sup>392</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 20

<sup>393</sup> Saudi Arabian Arbitration Regulation 2012. art 43 (2).



publication of parts of the award without naming the parties for reference purposes can occur. Similarly, the tribunal's deliberation shall be conducted in private<sup>394</sup>

The arbitral tribunal is asked to hand in a copy of any decision or award it makes to the authority originally having jurisdiction over the dispute within five days from the date it was issued, such as the Board of Grievances. It is important to note that failure in handing in these documents within the time limit to the authority does not lead to the invalidity of the decision or the award.<sup>395</sup>

In this regard, the new regulations provide a longer time limit. Fifteen days is set for the tribunal to send a copy of its award to the parties. The original copy of the award or a signed copy in the original language it was issued in shall be submitted to the competent court within the same time limit, fifteen days. Articles 43 and 44 state the following: "(1) The arbitral tribunal shall deliver a copy of the arbitral award to each of the parties within fifteen days from the date on which it has been issued."<sup>396</sup>

In addition, Article 44 states: "The arbitral tribunal shall deposit the original or a signed copy of that original, in the language in which it has been issued, with the competent court within the time provided for in Art. 43(1) hereof, coupled with a certified Arabic translation if it was issued in a foreign language"<sup>397</sup>

If the arbitral tribunal consist of more than one arbitrator, all arbitrators must attend the hearings otherwise all decisions made in that hearing are invalid. Regarding the recording of the arbitration process, article 27 of the implementation rules states:

*"The arbitration panel shall record the facts and proceedings which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of*

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<sup>394</sup> Hani AlQurashi, Ghada kilani and Anas Kilani, Everything on Arbitration in Saudi Arabia and Syria in Theory and Practice (2007). 262.

<sup>395</sup> *ibid*

<sup>396</sup> Saudi Arabian Arbitration Regulation 2012. art 43 (1).

<sup>397</sup> *ibid*. art 44.



*the respective parties, the minutes shall be signed by the umpire, arbitrators and the secretary*<sup>398</sup>

## **5.10. Presence and absence of the parties**

### **5.10.1. The position in Saudi Arabia**

The arbitral tribunal should notify the parties with the date of the hearing via the secretary. The parties attend the hearing having their written statements, documents and evidence with them. The arbitral tribunal then examines these documents and hears the oral statements and witnesses of each party<sup>399</sup>

There is a stage where the arbitration process might be affected and be paralysed: if one of the parties does not attend a hearing. In such a matter, if all parties were notified with the date and time of the hearing by the arbitral secretary then the arbitral tribunal may hear from the party who attended, especially when all parties have submitted their claims, defences and documents to the tribunal before the hearing. However, if the absent party was not notified with the date and time of the hearing by the secretary of the arbitration the arbitral tribunal should postpone the hearing and notify the party with a new day and time for another hearing. This is to take the issue of due process into consideration. Art 18 of the implementation rules states:

*“1. In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defences and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties. However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the*

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<sup>398</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 27.

<sup>399</sup> Mhaidib AlMhaidib, ‘Arbitration as a Means of Settling Commercial Disputes (national and International) with Special Reference to the Kingdom of Saudi Arabia’ (1997). 219.



*award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.”<sup>400</sup>*

Article 35 of the new Arbitration Regulations of 2012 compliments this and states:

*“If either party fails, after having been duly notified, to attend one of the hearings or to submit the required documentation, the arbitral tribunal may continue with the arbitral proceedings and issue an award on the dispute on the basis of the evidence that has been produced”<sup>401</sup>*

An arbitral award shall be delivered in the presence of all parties. If a party is absent after being notified with the date and time, the award may be made in their absence if the statements, defences and documents were handed in to the tribunal beforehand.<sup>402</sup>

This practise has been followed in a couple of cases. For example, H. M. R. H. Co. for Trans. & Comm. (Commercial company) v. A. Co. for C. C. Ltd (Commercial company). In this case, the arbitral award was issued in the presence of all parties to the dispute, in spite of the refusal of one of the parties to participate in the hearings after the expiry of the time limits of the arbitration. The competent authority refused the request of this party to hear the case instead of the arbitral tribunal and this authority approved the decision of the arbitral tribunal which extended the time limits.<sup>403</sup> Also, in the case of H. Co. for Comm. (Commercial & Contracting company) v. I. D. Co. (Contracting company), the arbitral tribunal adjourned one of the sessions to another date because one of the parties to the dispute did not attend a session because he was ill.<sup>404</sup>

### **5.10.2. The position in England and Scotland**

In this regard, the Scottish Arbitration Rules as well as the English act are almost identical to the Saudi regulations. They all give the right for the tribunal to go forward with issuing an award if a party fails to attend a hearing with no good reason for their absence. The Scottish Act states under rule 38 (failure to attend a hearing or provide evidence):

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<sup>400</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 18 (1).

<sup>401</sup> Saudi Arabian Arbitration Regulation 2012. art 35.

<sup>402</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 18.

<sup>403</sup> The Arbitral Award issued on 19/05/1411 A. H. 1991 A.D.

<sup>404</sup> The Arbitral Award issued on 02/06/1414A. H. 1994 A.D.



*“Where; a) a party fails; i) to attend a hearing which the tribunal requested the party to attend a reasonable period in advance of the hearing, [and] b) the tribunal considers that there is no good reason for the failure, the tribunal may proceed with the arbitration, and make its award, on the basis of the evidence (if any) before it”*<sup>405</sup>

The English Act states under article 41 of powers of tribunal in the case of a party's default:

*“4) If without showing sufficient cause a party; (a) fails to attend or be represented at an oral hearing of which due notice was given ... the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it”*<sup>406</sup>

## **5.11. Stay and Interruption of the Proceedings**

### **5.11.1. The position in Saudi Arabia**

If, during the arbitration process, a matter arises which is not within the jurisdiction of the arbitrators, or if there is any evidence of forgery, or if forgery proceedings are started against a party, or if there is a criminal incident, the arbitral tribunal suspends its work, according to the implementation rules of 1985, and the time-limit for rendering the award shall also be stayed until a final judgment is given on this matter by the relevant authority. Article 37 of the implementation rules states:

*“If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged, or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen”*<sup>407</sup>

In contrast, the new regulations say otherwise. The new regulations give the tribunal the right to carry on the arbitration process if it elects that a decision on that issue, or

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<sup>405</sup> Arbitration (Scotland) Act 2010. rule 38.

<sup>406</sup> The Arbitration Act 1996. art 41 (4).

<sup>407</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 37.



on the alleged forgery or on the other criminal act is not necessary for issuing the award on the subject matter of the dispute. Article 37 of the new regulations of 2012 state:

*“If, during the arbitral proceedings, an issue beyond the scope of jurisdiction of the tribunal arises, or if it is alleged that one of the documents is forged, or that criminal proceedings have been initiated with respect to the alleged forgery, or with respect to any other criminal act, the arbitral tribunal may continue the hearing of the dispute if it elects that a decision on that issue, or on the alleged forgery or on the other criminal act is not necessary for issuing the award on the subject matter of the dispute; otherwise, it may suspend the proceedings until a final decision has been issued in this respect. Hence, the running of the time which has been fixed for issuing the arbitral award shall be suspended”*<sup>408</sup>

## **5.12. The End of the Proceedings**

### **5.12.1. The position in Saudi Arabia**

The Saudi legislator has provided that arbitration is not terminated by the death of one of the parties and that the time-limit for such arbitration is extended by 30 days. Article 30 of the Arbitration Regulations of 1983 states that: “The arbitration shall not terminate because of the death of one of the parties, but the time fixed for award shall be extended by thirty days unless the arbitrators decide on a further extension”<sup>409</sup> The arbitration procedure does not stop and the arbitral award takes effect on the assets of the deceased before they are transferred to his successors, thus implementing the rule of Islamic Law under which there can be “no inheritance before reimbursement of debts.”

Once all investigations are done, and the parties have been heard, the arbitral tribunal closes the hearings and fixes a date for delivering the award. The deliberation then takes place in the presence of the members of the arbitral tribunal only. Article 38 of the implementation rules of 1985 states:

*“When the arbitration panel is ready to render a decision, the panel shall close the case for review and deliberations. Deliberations shall be held in privet and shall only be attended collectively by the arbitration panel who*

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<sup>408</sup> Saudi Arabian Arbitration Regulation 2012. art 37.

<sup>409</sup> Saudi Arabian Arbitration Regulation 1983. art 13.



*attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award, subject to the provisions of articles 9, 13, 14 and 15 of the arbitration regulations”*<sup>410</sup>

The award is read out by the arbitrators who are only bound to comply with the rules of procedure contained in the Arbitration Act and its Implementation Rules. The award must comply with the provisions of the Sharia and the laws in force in the Kingdom. Article 39 of the implementation rules states: “The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the Arbitration Regulations and its rules of implementation. Awards shall follow the provisions of Islamic Sharia and the applicable regulations”<sup>411</sup>

Once the hearing is closed, the arbitral tribunal may not receive any comment from either of the parties unless this is made in presence of the other party. In addition, the arbitral tribunal may not accept any submissions or documents from one of the parties unless these are also sent to the other party. If these documents are useful for the case, the arbitral tribunal must extend the period for delivering its award and reopen the hearing by providing the reasons for this decision. It must also notify the parties of the date set for further consideration of the case. Article 40 of the implementation rules of 1985 states:

*“When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memorandum or document without the document being reviewed by the other party; if such explanation, memorandum or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefore, and shall notify the parties of the date fixed for continuation of the proceedings”*<sup>412</sup>

The new regulations, on the other hand, set out a list of guidelines with regard to the finishing of the arbitration process. The arbitration process ends either when an award is issued by the arbitral tribunal or if a dissension is made by the tribunal to

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<sup>410</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 38.

<sup>411</sup> *ibid.* art 39.

<sup>412</sup> *ibid.* art 40.



put an end to the process. This happened in the following cases stated in article 41 of the new regulations of 2012:

*“(1) The arbitral proceedings shall cease upon the issuance of the award or upon the issuance of a decision by the arbitral tribunal putting an end to these proceedings, in the following cases: a) If the two parties have agreed to put an end to the arbitration. b) If the claimant abandons the arbitration, unless the arbitral tribunal decides, pursuant to an assertion by the respondent, that he has a genuine interest, to continue the proceedings until an award has been issued. c) If the arbitral tribunal considers, for any reason, that it would be useless to continue the arbitral proceedings or that it would be impossible to proceed.*

*d) Upon the issuance of an order putting an end to the arbitral proceedings pursuant to the provisions of Art. 34(1) hereof. (2) The arbitral proceedings shall not be terminated by reason of the death or incapacity of one of the parties, unless an interested party agrees with the other party to putting an end to these proceedings. However, the time that has been set for issuing the award shall be extended by thirty days, unless the arbitral tribunal decides to extend that period for a similar period, or unless agreed otherwise. (3) Subject to the provisions of Arts. 49, 50 and 51 hereof, the assignment of the arbitral tribunal shall terminate on termination of the arbitral proceedings”<sup>413</sup>*

When ending the arbitral process, the regulations set out that if an award is not issued the proceedings cannot end if there are justified reasons for one of the parties in not ending the proceedings. Both parties must be satisfied and agree to end the proceedings if an award is not issued. Even in the matter of the death of one of the parties the other party does not lose his right in the process carrying on unless they agree to stop it.

### **5.12.2. The position in England and Scotland**

The Scottish Arbitration Rules states when the arbitration process ends in rule 57: “(1) arbitration ends when the last award to be made in the arbitration is made (and no claim, including any claim for expenses or interest, is outstanding)”<sup>414</sup> The Saudi regulation does not contain this provision to ensure that there are no standing issues which remain to be dealt with by the arbitral tribunal.

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<sup>413</sup> Saudi Arabian Arbitration Regulation 2012. art 40.

<sup>414</sup> Arbitration (Scotland) Act 2010. rule 57 (1).



The rule then states that ending a process by an award does not mean the tribunal cannot end it before that under other rules of the Act. The rule states: “(2) But this does not prevent the tribunal from ending the arbitration before then under rule 20(3) or 37(1). (3) of the act states the following: “If the tribunal upholds an objection it must; (a) end the arbitration in so far as it relates to a matter over which the tribunal has ruled it does not have jurisdiction, and (b) set aside any provisional or part award already made in so far as the award relates to such a matter”<sup>415</sup> In other words, the tribunal ends the process of arbitration when it finds that the subject of it does not fall under its jurisdiction.

Although this is not mentioned in the Saudi regulations in this way, the Saudi regulations do not allow the tribunal to look at cases that do not fall under their jurisdiction. The regulations as mentioned previously in previous chapters, set out which matters may be resolved by arbitration. Rule 37 (1) of the Scottish Arbitration Rules of 2010 has been discussed above.

Rule 57 also states:

*“(3) The parties may end the arbitration at any time by notifying the tribunal that they have settled the dispute. (4) On the request of the parties, the tribunal may make an award reflecting the terms of the settlement and these rules (except for rule 51(2)(c) and Part 8) apply to such an award as they apply to any other award. (5) The fact that the arbitration has ended does not affect the operation of these rules (in so far as they apply) in relation to matters connected with the arbitration”<sup>416</sup>*

This is to show that the arbitration process may end if a settlement between the parties has been made. This is similar to the Saudi regulations where it allows the process to end if a settlement is made, and for the tribunal to issue an award mentioning that in it.

Furthermore, rule 80 of the Scotland act states what will happen in the matter where one of the parties dies: “(1) An arbitration agreement is not discharged by the death of a party and may be enforced by or against the executor or other representative of

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<sup>415</sup> *ibid.* rule 20 (3).

<sup>416</sup> *ibid.* rule 57 (3)-(5).



that party. (2) This rule does not affect the operation of any law by virtue of which a substantive right or obligation is extinguished by death”<sup>417</sup>

This is similar to the Saudi Arbitration Regulations in not ending the arbitration process by the death of a party, although the Saudi regulations state that an extension to the date set for the issuing of the award will be made by 30 days unless the parties agree to extend it to a further date.

The English Act is also similar in ending an arbitration process if an award is issued otherwise if another form of settlement takes places. Where the English law differs is that if the case is settled by another form of settlement, an award must be issued and the award is treated like an arbitration award. Section 51 of the English Arbitration Act states:

“(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties. (2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award. (3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case. (4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award”<sup>418</sup>

Sections 52 state:

*“52 Form of award: (1) The parties are free to agree on the form of an award. (2) If or to the extent that there is no such agreement, the following provisions apply. (3) The award shall be in writing signed by all the arbitrators or all those assenting to the award. (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. (5) The award shall state the seat of the arbitration and the date when the award is made”*<sup>419</sup>

In addition, section 58 states:

*“58 Effect of award. (1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and*

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<sup>417</sup> *ibid.* rule 80.

<sup>418</sup> The Arbitration Act 1996. sec 51 (1)-(4).

<sup>419</sup> *ibid.* sec 52.



*binding both on the parties and on any persons claiming through or under them. (2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part*<sup>420</sup>

Finally, and similar to the Scottish Arbitration Rules, the English act addresses the issue of cost when ending the arbitration process even if by other means of settlement, for example in the final subsection of section 51: “(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply”<sup>421</sup>

Finally, the English Act also addresses the matter of when one of the parties dies during the process of arbitration. Section 8 of the Arbitration Act of 1996 states:

*“Whether agreement discharged by death of a party. (1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.*

*(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death*”<sup>422</sup>

This is similar to the Saudi and the Scottish regulations in not ending the arbitration process simply due to the death of one of the parties unless the other party wishes to do so.

### **5.13. Conclusion**

To conclude, this chapter focused on the arbitration proceedings. This chapter examined the following points: law applicable to the procedure, place of arbitration, language of arbitration, time-periods, experts, witnesses, statements of claim and defence, the sessions; administration and record, presence and absence of the parties, stay and interruption of the proceedings, and the end of the proceedings.

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<sup>420</sup> *ibid.* sec 58.

<sup>421</sup> *ibid.* sec 51 (5).

<sup>422</sup> *ibid.* sec 8.



When discussing each issue, the Saudi law was first addressed, starting with the old regulations of 1983 and the implementation rules of 1985 to see what the original law was like. After that the new regulations of 2012 were addressed to determine what has changed in the Saudi regulations and if the new regulations bring any improvements. Following this, the Scottish and the English laws were examined in order to determine if they are any different than the Saudi regulations, with the aim to highlight any (areas of difference) to see if they could add anything that the Saudi regulations might benefit from. The following section addresses the findings and recommendations discussed in this chapter,

### **5.13.1. Findings and recommendations**

#### **5.13.1.1. Applicable law:**

When discussing the applicable law to the arbitral proceedings it was found that where the old regulations of 1983 and the implementation rules of 1985 restricted parties to only apply Saudi regulations when referring a case to arbitration, the new Arbitration Regulations of 2012 has changed this completely. The parties of a dispute are now free to agree on what proceedings they want to be applied by the tribunal in the arbitration process. These rules can be the rules of an organisation, institution or arbitration centre, regardless of whether or not they are located within or outside the Kingdom. One guidance rule that must be adhered to, however, is that these choices do not contradict with the rules of Islamic Sharia. This is a huge and unexpected step change from the Saudi legislator and is viewed as the most inviting change in the Saudi Arbitration Regulations that would encourage foreign investors to invest and do business in the Kingdom of Saudi Arabia as they are no longer restricted to refer to the Saudi regulations. This is seen as being very open internationally by the Saudi legislator, and is a further example of the effort to bring Saudi legislations in line with international and modern Arbitration Regulations.

On the other hand, this difference between the Saudi Arbitration Regulations and the English Arbitration Act and the Scottish Arbitration Rules is that in the English act and Scottish rules there are mandatory and non-mandatory rules and acts whereas in



the Saudi regulations there is no such thing. Although this might seem to imply that all Saudi provisions are mandatory this is not the case. Some rules and articles in the Saudi Arbitration Regulations and the implementation rules state that “unless the parties agree otherwise”, meaning that the provision given in that rule or article can be used or may be dismissed.

#### **5.13.1.2. Place of arbitration:**

Another change in the Saudi attitude towards arbitration can be seen in this section. The new Saudi Arbitration Regulations now allow the parties and the arbitral tribunal to choose the place of arbitration whether located inside or outside the kingdom. This is another change in the Saudi regulations where it makes the regulations more attractive to foreign investors. This is now similar to the English Arbitration Act and Scottish Arbitration Rules in providing the freedom for the parties and the tribunal to decide the most suitable place for the arbitration process to be situated.

#### **5.13.1.3. Language:**

Another significant and very positive change in the Arbitration Regulations is present in this section. The new Arbitration Regulations of 2012 now permit parties and the arbitral tribunal to choose any language for the arbitration proceedings and documents. The old regulations restricted the choice of language to Arabic and set out that if a party did not speak Arabic they should be accompanied by a translator. With the 2012 regulations, this is no longer an issue as the parties are free to choose any language they find suitable for their proceedings.

#### **5.13.1.4. Time periods:**

One of the changes that can be seen here is that according to the old Arbitration Regulations of 1983 and the implementation rules of 1985 where there was an arbitration instrument that had to be filed and approved by the authority, arbitration proceedings would start within 5 days from the date of approval. Now that there is no



arbitration instrument needed to be approved the arbitration proceedings can start on the day a party receives a request to refer to arbitration from the other party. The key point here is that lifting the requirement of an arbitration instrument has resulted in making the arbitration process more efficient and quick.

Previously, communication under the old regulations had to be between the arbitral tribunal and the parties via the secretary of the authority originally having jurisdiction over the case. This is no longer the case. Under the new regulations and implementation rules, as communication between the arbitral tribunal and the parties now takes place directly. This is the normal way of communicating and there was no need for this communication to be through a third party. It is a step forward for the Saudi regulations in modernising the process and removing unnecessary or time consuming requirements.

One of the changes that the new Arbitration Regulations present now is that it provides a longer time limit for issuing the arbitral award when the parties have not agreed on a time limit. The old regulations set 90 days for issuing the award, but now the new regulations have extended this to 12 months as a time limit. This could be seen as giving more time for the proceedings of arbitration instead of giving a shorter time limit which could result in the parties or the arbitral tribunal needing to seek an extension for this time which would result in stopping the proceedings till an extension is granted as no arbitral proceedings should be continued if the original time limit expires without an award being issued. Furthermore, it sets a time limit for the extension if it is needed. This extension should not exceed six months unless otherwise agreed by the parties. The downside here is that neither the new regulations nor the old regulations mention or set a time limit for the authority to grant this extension so the parties may need to wait for an unknown period of time whilst awaiting the approval for the extension. What is even worse is that no procedures can be carried out on the case while awaiting for the extension to be granted.

Another difference between the Saudi regulations and the Scottish rules is that the Scottish rules set out a way of calculating time periods. This is something the Saudi



regulations do not mention. One of the issues that arises from this is as follows: if a 7-day period is given as a time period, would the weekends be included in these 7 days or not? This is something the Saudi regulations fail to mention in the new regulations and might be worthwhile to address in the new implementation rules.

#### **5.13.1.5. Experts:**

One of the new additions that the new regulations add regards the issue of experts and providing them with the information they require. If a dispute happens between an expert and a party in providing some information, then the arbitral tribunal should issue an award in this regard. This was not mentioned in the old regulations of 1983 nor in the implementation rules of 1985.

#### **5.13.1.6. Witnesses:**

The new Arbitration Regulation provides the arbitral tribunal the right to seek the authority's assistance in ordering the presence of a witness if the witness refuses to attend a hearing or give a statement. This is something that the old regulation of 1983 and the implementation rules of 1985 do not address. It is important to address such matters in order to clarify what authority the arbitral tribunal has and when it can seek assistance from other authorities. This is seen as a step forward for the Saudi regulations.

What is different in this regards between the Saudi regulations and the Scottish rules is that the Scottish rules stop the court from ordering the witness to give information in the same way that the witness would be entitled to refuse in civil proceedings. This is something the Saudi regulations do not mention. It is not clear whether such information could be asked accreting to the Saudi regulations or not, and it would be important for the Saudi legislator to address this issue in the new implementation rules. Examining the witnesses on oath or affirmation is mentioned in both Scottish and the English law but is not mentioned in the Saudi regulations. Again this is something that the Saudi legislator might want to consider adding to the new implementation rules. Finally, this also gives rise to the following relevant question:



if the witness was located out-with the jurisdiction, would the Saudi authority be able to order their attendance or not? Currently, this is something that the Saudi regulations also fail to mention.

#### **5.13.1.7. Statement of claim and defence:**

In this regard, the new regulations of 2012 presents a better and more efficient approach on how the claim and defence document may be presented. The new regulations requires that the claimant party sends a written document of their claim to the arbitral tribunal and to the other parties of the dispute. After that and within the time limit agreed on between the parties and the arbitral tribunal the defendant party is required to write their defence and send it to the arbitral tribunal and the other parties. Following this, a date for hearing would be set for the hearing. This is a far better approach as the defendants would have sufficient time to read the claim and prepare for their defence and the claimant would be able to see what defence has been presented in order to counter it if possible and for the tribunal to have a better look at the case beforehand.

What is different between the Saudi regulations and the Scottish and the English regulations is that the Scottish and English laws give the arbitral tribunal the right to decide what is to be mentioned and handed in when submitting a claim or defence if any. Giving the arbitral tribunal such a right is good for the arbitration process as the tribunal would ask for what is necessary for the process in order to speed up the process. The tribunal would guide the parties to only submit what is relevant to the case so that no time would be wasted on other matters that might not be related to the actual dispute. Furthermore, the Scottish and English regulations mention what happens if one of the parties fails to submit their statement of claim and defence. This is something that is not mentioned in the Saudi regulations. It is very important to address this issue in the new implementation rules as this matter could determine whether the arbitration process would take place or not.



#### **5.13.1.8. Stay and interrupt of the proceedings:**

The new Arbitration Regulations of 2012 completely changes the way the old Arbitration Regulations of 1983 dealt with this matter. According to the old regulations, if during the arbitral proceedings an issue beyond the scope of jurisdiction of the tribunal arises, or if one of the documents is forged, or that criminal proceedings have been initiated, the arbitral tribunal was asked to stop the arbitral process and wait for the matter to be dealt with under the competent authority. In stark contrast, under the new regulations, the arbitral tribunal may continue the hearing of the dispute if it elects that a decision on that issue is not necessary for issuing the award on the subject matter of the dispute otherwise it may stop the proceedings till the competent court issues a decision in this respect. This is a positive change as it no longer stops the arbitration proceedings if the criminal matters are not related to the case and will not affect it. This means that the new regulations give the arbitral tribunal the authority to judge whether this issue can or cannot affect the arbitral process. Giving such authority to the arbitral tribunal makes the process more efficient and speeds up the process if such a matter occurs.



## **6. Chapter Six: Arbitration Awards**

### **6.1. Introduction**

The arbitration award is one of the final steps of an arbitration process. The arbitration award is the discussion made by the arbitral tribunal after looking through the case and examining all the evidence and materials submitted by the parties of a dispute.

This chapter will look at the main issues related to the arbitral award as follows: law applicable, majority vote, types of the arbitral award, form and contents of the award, registration and notification of the award, notification of the award, correction and interpretation of the award, and the correction and interpretation of the award.

### **6.2. Law Applicable**

#### **6.2.1. The position in Saudi Arabia**

According to the old Saudi arbitration law, the law applicable to any arbitration taking place in the Kingdom is the Saudi law. This has changed with the new arbitration law of 2012 as mentioned previously. Since this is the case for domestic arbitration it is with no doubt that when dealing with an international arbitration agreement any law can be applied as long as it fits the general rule set in the new arbitration law of 2012 which is not to be contradictable with Sharia rules.

When looking at the position of the Board of Grievances on this matter, Saudi law is applicable if the contract is performed in Saudi Arabia.<sup>423</sup> It seems from this that the Saudi legislator does not trust foreign laws in this matter. ElAhdab sets out the reasons why the Saudi courts insisted on applying Saudi law even when the cases were international. First of all, he points out that the fact that many arbitral tribunals have declined to apply Saudi law in the past. For example, between 1975 and 1979, Saudi law was not applied in any international arbitration referred to the International

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<sup>423</sup> Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (© Kluwer Law International; Kluwer Law International 2011). 660.



Chamber of Commerce. For instance, in arbitration in London between an American company and a Saudi governmental agency, the arbitral tribunal decided that the language of arbitration and the applicable law would be in English. In another international arbitration that was held in Paris between a Saudi party and a non-Saudi party, the arbitral tribunal composed of three European arbitrators rejected the Saudi party's request to apply Saudi law even though the Saudi party alleged that *“this law has been chosen by both parties in the contract, and even more, the contract has been performed in Saudi Arabia.”* However, the arbitral tribunal rejected this argument and stated that its award was the “fair solution.” Moreover, the French courts have held that *“Saudi law is not appropriate to the financial aspect of the agreement”* and therefore deduced that *“by construing the common intention of the parties as to the localisation of their contract, French law would be applicable.”*<sup>424</sup> It seems that such cases have affected the attitude of the Saudi legislator and thus implementing Saudi law in arbitration became compulsory.

On the other hand, the arbitration law of 2012 opens the choice for the parties to choose what law they wish to apply. Article 38 of the new law states:

*“1- Without prejudice to the provisions of the Sharia Law and the Kingdom's public policy, the arbitral tribunal shall proceed during the arbitration proceedings as follows: a) It shall apply the rules agreed upon by the parties to the subject matter of the dispute. If the parties agree to apply the statutes of a certain state, then the substantive rules therein shall apply without the rules pertaining to the conflict of laws, unless otherwise agreed by the parties, b) If the parties did not agree to the statutory rules that should apply to the subject matter of the dispute, the arbitral tribunal shall apply the substantive rules of the statutes that it considers to be most closely connected to the subject matter of the dispute, c) The arbitral tribunal shall take into consideration, when settling the subject matter of the dispute, the terms of the contract in dispute, the trade usages applicable to the transaction, the customs and the common practice between the parties”*<sup>425</sup>

### **6.2.2. The position in England and Scotland**

This is similar to what is stated in Article 46 of the English Act:

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<sup>424</sup> *ibid* 661.

<sup>425</sup> Saudi Arabian Arbitration Regulation 2012. art 38.



*“(1) The arbitral tribunal shall decide the dispute; (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules. (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable”<sup>426</sup>*

The Scottish Arbitration Rules also state the same. It states in rule 47 that “The tribunal must decide the dispute in accordance with, (a) The law chosen by the parties as applicable to the substance of the dispute, or (b) If no such choice is made (or where a purported choice is unlawful), the law determined by the conflict of law rules which the tribunal considers applicable”<sup>427</sup>

### **6.3. Majority vote**

#### **6.3.1. The position in Saudi Arabia**

The arbitral award is either made by a unanimous decision of the arbitrators or by a majority vote if the members of the arbitral tribunal do not reach the same decision. The Arbitration Regulation of 1983 and the Implementation Rules of 1985 expressly confirm this rule, although the regulation requires the unanimity of all the arbitrators when they are empowered to reach a settlement. Article 16 of the Arbitration Regulation of 1983 states that: “The decision of the arbitrators shall be taken by a majority vote but if they are authorised to reach a compromise solution, their decision shall be made unanimously”<sup>428</sup> This rule applies to both domestic and international arbitration cases. It is for the authority originally having jurisdiction over the dispute such as the Board of Grievances to make sure when it renders an order to enforce the arbitral award that the members of the arbitral tribunal have respected the provisions of the Arbitration Regulation and its Implementation Rules in this respect.

The new regulations of 2012 are the same in this respect. It adds that the award is

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<sup>426</sup> The Arbitration Act 1996. art 46.

<sup>427</sup> Arbitration (Scotland) Act 2010. rule 47 (1).

<sup>428</sup> Saudi Arabian Arbitration Regulation 1983. art 16.



issued after a private deliberation. It states in article 39: “1- Where the tribunal is composed of more than one arbitrator, the arbitral award shall be rendered by a majority of its members after secret deliberation”<sup>429</sup>

The Arbitration Regulation of 1983 and the Implementation Rules of 1985 are silent about the matter when there is no majority vote. One legal writer suggests that the deliberations should continue between the arbitrators until they or their majority reach a decision<sup>430</sup>

This is no longer a debatable issue as the new regulations of 2012 state that “2- If the arbitral tribunal's views diverge in a way that made it impossible to ensure majority, the arbitral tribunal may appoint an umpire within 15 days from its decision that there is no possibility to ensure majority. Otherwise, the Competent Court shall appoint an umpire.”<sup>431</sup> Moreover, the article adds what rights and to what extent the tribunal or its chairman can make decisions: “3- Decisions with respect to procedural matters may be issued by the chairman of the tribunal if the parties authorised so in writing, or if all the members of the arbitral tribunal authorised so, unless otherwise agreed by the parties to arbitration.”<sup>432</sup>

The only matter where a unanimous decision is required is if the parties authorise the tribunal to act as amiable compositor. Article 39 states: “4- If the arbitral tribunal is authorised to act as amiable compositor, the decision in this respect shall be rendered unanimously”<sup>433</sup>

In practice, it seems to be rare for the arbitrators not to reach a majority vote to make the arbitral award or even a unanimous decision. Examples for cases that were resolved by majority vote are the case of R. R. Co. (Subcontracting company) v. A. C. C. Co. for Ltd Cont. (Korean construction company)<sup>434</sup> and the case of H. M. R.

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<sup>429</sup> Saudi Arabian Arbitration Regulation 2012. art 39.

<sup>430</sup> Mhaidib AlMhaidib, ‘Arbitration as a Means of Settling Commercial Disputes (national and International) with Special Reference to the Kingdom of Saudi Arabia’ (1997). 271.

<sup>431</sup> Saudi Arabian Arbitration Regulation 2012. art 39 (2).

<sup>432</sup> *ibid.* art 39 (3).

<sup>433</sup> *ibid.* art 39 (4).

<sup>434</sup> Arbitration award No. 4/1408, dated 13/08/1408 A.H. 1988 A.D.



H. Co. for Trans. & Comm. (Commercial company) v. A. Co. for Ltd Cem. & Comm. (Commercial company)<sup>435</sup> In contrast, in the case of A. Co. for Dev. (Construction company) v. Mr. S. A. H. (Saudi natural person) that contained several disputed issues, the arbitrators resolved some of such issues unanimously, whereas the other issues were decided by a majority vote. The arbitral award of this Case was considered to be made by majority vote.<sup>436</sup>

## **6.4. Types of the arbitral award**

### **6.4.1. The position in Saudi Arabia**

Before issuing the Arbitration Regulation of 1983 it was unclear whether the arbitral tribunal could make interim and partial awards on a dispute case or parts of it during the course of the arbitration. However, the Arbitration Regulation of 1983 distinguishes between the different types of arbitral awards. It states that: “All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them”<sup>437</sup>

This article shows that the arbitral tribunal may make interim and partial awards to decide one or more issues of the dispute that may arise during the arbitration process. Then the tribunal issues a final award that includes all issues and awards of the dispute at the end of the arbitral process. However, it is important to note that the Saudi legislator explicitly gives the arbitral tribunal the right to issue interim, partial and additional awards during the arbitral process and not after it has finished.<sup>438</sup>

The new regulations complement this by stating: “5- The arbitral tribunal may render interim or partial awards prior to rendering the final award, unless otherwise agreed

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<sup>435</sup> Arbitral award issued 19/05/1411 A.H. 1991 A.D.

<sup>436</sup> Arbitral Award, issued 27/05/1414 A. H. 1994 A.D.

<sup>437</sup> Saudi Arabian Arbitration Regulation 1983. art 18.

<sup>438</sup> AlMhaidib (n 406) 289.



by the parties to arbitration”<sup>439</sup>

Regarding the issue of time limits, the regulation states in article 48 that:

*“1) Either party to arbitration may, even after the expiration of the arbitration deadlines, request the arbitral tribunal, within 30 days following receipt of the arbitral award, to issue an additional arbitral award as to the claims submitted during the proceedings and which were omitted from the award. The other party shall be notified, at the address mentioned in the arbitral award, of such request prior to submission to the arbitral tribunal. 2) The arbitral tribunal shall issue its award within 60 days from the date of submission of the request and may extend this deadline for another 30 days if deemed necessary”*<sup>440</sup>

If a party wishes to object on one or more of the awards given by the tribunal then they have the right and power to do so within fifteen days from the date on which such party has been notified with the awards given otherwise the awards will be final. Article 18 states: “The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final”<sup>441</sup> The objection is usually brought to the authority originally having jurisdiction over the dispute which will decide it.

In practice, there are certain cases in which the arbitral tribunal made interim awards, such as the Case of A. Co. for M. Ind. (Industrial company) v. E. Co. (French industrial company)<sup>442</sup> where the arbitral tribunal issued an interim award that decided that the request presented by one of the parties that the arbitral tribunal did not have the jurisdiction to determine the subject matter of the dispute where it decided that it had the jurisdiction according to the arbitration agreement.

#### **6.4.2. The position in England and Scotland**

Article 47 of the English Act on awards on different issues states the following:

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<sup>439</sup> Saudi Arabian Arbitration Regulation 2012. art 39 (5).

<sup>440</sup> *ibid.* art 48.

<sup>441</sup> Saudi Arabian Arbitration Regulation 1983. art 18.

<sup>442</sup> Arbitral award No. 4/1411, dated 29/12/1412 A.H. 1992 A.D.



*“(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined. (2) The tribunal may, in particular, make an award relating; (a) to an issue affecting the whole claim, or (b) to a part only of the claims or cross-claims submitted to it for decision. (3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award”<sup>443</sup>*

On the other hand, the Scottish Arbitration Rules states the same but with some additional definitions of what a part award means. It states in rule 54: “(1) The tribunal may make more than one award at different times on different aspects of the matters to be determined. 2) A “part award” is an award which decides some (but not all) of the matters which the tribunal is to decide in the arbitration. 3) A part award must specify the matters to which it relates.”<sup>444</sup> Moreover, the Scottish rules state that: “The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently.”<sup>445</sup> What is interesting here is that the Scottish Act defines the meaning of a partial award whereas in the Saudi regulations and the English Act, there is no such definition.

## **6.5. Form and contents of the award**

### **6.5.1. The position in Saudi Arabia**

The Arbitration Regulation of 1983 and the Implementation Rules of 1985 require that the arbitral tribunal has to respect some particular formalities when it makes the arbitral award. The arbitral award should, according to Article 17 of the Arbitration Regulation and Article 41 of the Implementation Rules, contain the following requirements: a copy of the arbitration instrument, the names of the arbitrators, the names of the parties, their occupations and domicile, and their appearance and absence during the arbitration proceedings, the date and place of the award, a summary of the parties' contention and a general review of the facts, a summary of the parties' pleas and defences, the reasons for rendering the award, the text of the award, the signatures of the arbitrators and the secretary of arbitration, as well, the arbitral award which should be in the Arabic language and should be submitted

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<sup>443</sup> The Arbitration Act 1996. art 47.

<sup>444</sup> Arbitration (Scotland) Act 2010. rule 54.

<sup>445</sup> *ibid.* rule 53.



within five days of its making to the authority originally having jurisdiction over the dispute for its approval.

Article 17 of the Arbitration Regulations of 1983 states: “The award document shall especially include the arbitration instrument, a resume of the depositions of the parties and their documents, reasons for the award and its text and date, and the signatures of the arbitrators. If one or more of them refuse to sign the award, such refusal shall be stated in the award document”<sup>446</sup>

The implementation rules of 1985 state:

*“Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the umpire in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim”<sup>447</sup>*

AlMhaidib points out that these requirements are laid out by the Saudi legislator to speed up enforcement of the arbitral award in issuing an order by the competent authority. Such formalities are meant to help the competent authority to make sure that the arbitral tribunal followed and respected the general principles of equity and the provisions of the applicable law of the arbitration.<sup>448</sup>

The new Arbitration Regulations of 2012 also set out rules for what should be included in the arbitration award. Some of these requirements are the same as that required in the old regulations and some are new. Article 42 of the new regulations states:

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<sup>446</sup> Saudi Arabian Arbitration Regulation 1983. art 17.

<sup>447</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 41.

<sup>448</sup> AlMhaidib (n 406) 299.



*“1- The arbitral award shall be rendered in writing and shall be reasoned and signed by the arbitrators. In an arbitral tribunal with more than one arbitrator, the signature of the majority of the members is sufficient provided that the reasons for the non-signature of the minority are substantiated in the minutes of the case; 2) The arbitral award shall state the date and place of issuance, the names and addresses of the parties in dispute, the names of the arbitrators, their addresses, their nationality and their positions, a summary of the arbitration agreement, a summary of the statements, the claims, the pleadings and the documents of the parties to arbitration, the findings of the award, the arbitrator's fees and the arbitration's costs and their distribution between the parties; this being without prejudice to the provisions of Article 24 of this Act.”<sup>449</sup>*

As seen here in the new regulations there is no requirement to submit an arbitration instrument. Further, the signature of the secretary of arbitration is also not required as there is not as much supervision from the authority having jurisdiction over the arbitration and its process. On the other hand, we see new requirements such as the addresses, nationalities and positions of the arbitrators. This is possibly because the new regulations permit arbitrators from other nationalities to join the tribunal in contrast to the old regulations. The new regulations also require the mentioning of the arbitrator's fees and the arbitration's costs and their distribution between the parties. Furthermore, and more importantly, there is no requirement for any of this to be in the Arabic language as the new regulations allow parties to choose any other language for the process of arbitration and its award, as discussed previously.

The question that may arise from this is what are the effects if the arbitral tribunal does not respect one or more of the formalities during the issue of the award? In this case the competent authority has two alternatives. It may remit the award to the arbitral tribunal to fulfil all requirements imposed by the Arbitration Regulation and the Implementation Rules or it may set aside the award and decide the case.<sup>450</sup>

In practice, the arbitrators usually make sure when they issue the arbitral award that the award satisfies all formalities required by the Arbitration Regulation and the Implementation Rules. However, if they do not satisfy one of the formalities, the authority would choose one of the above alternatives according to the importance of the requirements that were not satisfied. For example, if the arbitrators did not set

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<sup>449</sup> Saudi Arabian Arbitration Regulation 2012. art 42.

<sup>450</sup> AlMhaidib (n 406) 299.



forth the reasons for the award and did not sign the award, then the competent authority would set aside the award and decide the dispute. However, if the arbitral award did not contain, for instance, a name or address of one of the arbitrators, the competent authority would return the award to the arbitrators and request the tribunal to fulfil the requirements.<sup>451</sup>

### **6.5.2. The position in England and Scotland**

When looking at the English regulations, it can be seen that the English Act of 1996 ensures that the parties agree on the form of the award and if there is no such agreement then a set of requirements are laid out in the act. Article 52 states:

*“(1) The parties are free to agree on the form of an award, (2) If or to the extent that there is no such agreement, the following provisions apply. (3) The award shall be in writing signed by all the arbitrators or all those assenting to the award. (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. (5) The award shall state the seat of the arbitration and the date when the award is made.”*<sup>452</sup>

On the other hand, the Scottish Arbitration Rules require that the award must be signed by all arbitrators or all those assenting to the award:

*“(2) The tribunal’s award must state; (a) the seat of the arbitration, (b) when the award is made and when it takes effect, (c) the tribunal’s reasons for the award, and (d) whether any previous provisional or part award has been made (and the extent to which any previous provisional award is superseded or confirmed). 3) The tribunal’s award is made by delivering it to each of the parties in accordance with rule 83”*<sup>453</sup>

## **6.6. Registration and notification of the award**

### **6.6.1. The position in Saudi Arabia**

The Arbitration Regulation of 1983 requires that all awards made by the arbitral tribunal should be deposited within five days of their making to the authority originally having jurisdiction over the dispute, such as the Board of Grievances.

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<sup>451</sup> *ibid*

<sup>452</sup> The Arbitration Act 1996. art 52.

<sup>453</sup> Arbitration (Scotland) Act 2010. rule 51.



Article 18 of the Arbitration Regulations of 1983 states “All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them”<sup>454</sup>

Moreover, in arbitrations conducted according to the Labour and Workmen Regulation of 1969, it is an essential requirement that the arbitral awards should be registered with the Committee for the Settlement of Labour Disputes in whose district such awards are made within one week after their issue.<sup>455</sup>

The question that may arise here is what happens if the submission did not happen within five days? The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent on this issue. Almedhieb suggests that if the arbitral tribunal submitted the award to the competent authority after the five days time limit, the competent authority would consider the reasons which led to such delay and it would decide whether or not such reasons are justifiable. Accordingly, the competent authority might refuse to accept such reasons, and abrogate the arbitral award and decide the dispute again by itself or by a new arbitral tribunal, or it might accept such reasons and issue an order to enforce the arbitral award.<sup>456</sup> This seems to be unpractical for the award to be rejected simply because of a delay in submitting it to the authority and having to start the arbitration process all over again just for that reason. Therefore, in practice it seems that the competent authority will take into consideration the consumed time and the expenses of the arbitration before issuing its decision. It does not often revoke the arbitral award solely on the basis of this reason because the time limit of the registration of the award is a formal requirement and its infringement usually does not have serious consequences. This makes more sense as the legislator aims to speed up the process by setting such a short time limit for the award to be submitted.<sup>457</sup>

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<sup>454</sup> Saudi Arabian Arbitration Regulation 1983. art 18.

<sup>455</sup> AlMedhieb (n 406) 319.

<sup>456</sup> *ibid* 320.

<sup>457</sup> *ibid*.



What is worth noting here is that there is no set time limit for the authority to file the award and accept or reject it. In practice, the competent authority usually files the awards within thirty days from their submission.<sup>458</sup> For example, in the case of R. Co. for Comm. (Commercial company) v. J. Ins. Co. Ltd (Jordanian insurance company) where the competent authority filed the arbitral award within three weeks from its submission. In addition, in the case of S. T. Co. (Construction company) v. Mr. A. A. A. (Saudi natural person) where the award was filed after thirty four days from its submission to the competent authority<sup>459</sup>

In this regard, the new Arbitration Regulations of 2012 set out a different time limit. It sets a period of fifteen days for the arbitral tribunal to submit the award or copies of it to the authority. Article 44 states “The arbitral tribunal shall deposit, with the Competent Court, the original of the award or a signed copy thereof in the language in which it was issued within the time-limit provided for in Section 43 (1) of this Act [fifteen days], along with an Arabic translation certified from the accredited authority if the award was issued in a foreign language”<sup>460</sup> This therefore provides more time for the tribunal to submit the award to the authority having jurisdiction over the case and fifteen days seems more practical for the submission. Yet again, however, there is no mention of what would happen if the arbitral tribunal fails to submit the award to the authority within the time limit given.

## **6.7. Notification of the award**

### **6.7.1. The position in Saudi Arabia**

With regard to notifying the parties with the award, when the arbitrators reach a specific decision they will draw up the award and sign it. After that, the arbitrators shall hold a specific session in which the arbitral award is read in the presence of the parties to the dispute and their representatives.<sup>461</sup>

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<sup>458</sup> *ibid*

<sup>459</sup> Arbitral Award No. 10/1409, dated 07/03/1411 A.H. 1991 A.D.

<sup>460</sup> Saudi Arabian Arbitration Regulation 2012. art 44.

<sup>461</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 41.



If the competent authority refuses to register the arbitral award it should set forth the reasons for such refusal, and return the arbitral award to the arbitrators who will amend it, or the competent authority may submit the dispute to a new arbitral tribunal or it may decide the dispute by itself. The parties to the dispute may object the arbitral award within fifteen days from the date on which they were notified of the arbitral award. Article 18 of the regulations states “The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final” (Arbitration Regulations of 1983, art. 18).

On the issue of notifying the parties with the award by the arbitral tribunal, the new regulations of 2012 state that:

*“1- The arbitral tribunal shall communicate to both parties to arbitration a true copy of the arbitral award within 15 days from the date of its issuance.*

*2- The arbitral award, or part of it, may only be published upon the written consent of both parties to arbitration”<sup>462</sup>*

### **6.7.2. The position in England and Scotland**

On the other hand, the English Act provides the parties the freedom to agree on the requirements as to the notification of the award to the parties. If there is no such agreement then “the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.”<sup>463</sup> The act does not set a time limit unlike the Saudi regulation; instead it just mentions that this should be done without delay.

## **6.8. Correction and interpretation of the award**

### **6.8.1. The position in Saudi Arabia**

According to the implementation rules of 1985, the arbitral tribunal is allowed and

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<sup>462</sup> Saudi Arabian Arbitration Regulation 2012. art 43.

<sup>463</sup> The Arbitration Act 1996. art 55.



responsible for correcting the award if there are any material typing or arithmetical errors that need correction. The corrections could be made due to a request by a party or the tribunal may do so on its own accord. The tribunal may look at the request for rectification and either accept or reject it. If the request was accepted and rectifications are made then these rectifications are subject to objection by any of the parties if the arbitral tribunal exceeded its mandate in rectifying the award. On the other hand, if the tribunal decides to reject the request for rectification then the parties may object to the authority originally having jurisdiction over the case. This can be seen in art 42 which reads:

*“The arbitration panel shall rectify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such rectification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently”*<sup>464</sup>

It is important to note here that the implementation rules do not set a time limit for when the parties are allowed to request for rectifications or corrections on the award. This may suggest that they are free to request for corrections at any time during or after the final award is issued. However, if the award is issued and filed by the authority and the arbitration process is over and the arbitral tribunal no longer has any jurisdiction over the case then it is too late for a correction request to be submitted by the parties. In such case, the arbitral tribunal would refuse the request for correction and the parties would be referred to the authority originally having jurisdiction over the case for them to look at the request. In practice, in the case of Civ. W. Co. (Construction company) v. I. G. Ins. Co. (Insurance company), the arbitral tribunal corrected, on its own accord, some mathematical errors in the arbitral award on the original copy of such award.<sup>465</sup>

The same applies for requesting an interpretation of the award or parts of it. The parties may request such an interpretation and the interpretation would be an addition to the existing award not a new award. The interpretations are then subject to the

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<sup>464</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 42.

<sup>465</sup> Arbitral award No. 9/1407, dated 06/03/1408 A.H. 1988 A.D.



rules relating to the means of objection. Article 43 of the implementation rules state: “The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection”<sup>466</sup>

On the other hand, the new Arbitration Regulations of 2012 state what was not stated in the old regulations, time limits. It sets a limit of thirty days for a party to submit a request for interpretation from the date the party was notified with the award. Furthermore, the regulations set a time limit for the tribunal to submit the interpretation requested by a party. That is thirty days from the date the request for interpretation was submitted to the arbitral tribunal. The interpretation shall be considered as an integral part of the arbitral award and shall be subjected to its provisions. Article 46 of the Arbitration Regulations of 2012 states:

*“1) A party to arbitration may request the arbitral tribunal, within 30 days following the date of receipt of the arbitral award, to interpret the ambiguity in the findings thereof. The applicant for interpretation shall notify the other party, at the latter's address as mentioned in the arbitral award, of such request prior to its submission to the arbitral tribunal. 2) The interpretation shall be given in writing within 30 days following the date of the submission of the request to the arbitral tribunal. 3) The award on interpretation shall be considered as an integral part of the arbitral award it interprets and shall be subjected to its provisions”<sup>467</sup>*

On the other hand, on the issue of correction, the regulations set a different time limit. The time limit to request a correction on the award is fifteen days. Article 47 of the new regulations of 2012 states:

*“1) The arbitral tribunal may correct any material errors, whether typographical or errors in computation by virtue of an award rendered ex officio or upon a party's request. The arbitral tribunal shall undertake the correction without pleadings within 15 days following the date of issuance of the award or the deposit of the request for correction as the case may be. 2) The award pertaining to the correction shall be rendered by the arbitral tribunal in writing and shall be notified to both parties within 15 days from the date of issuance. If the arbitral tribunal exceeds its powers with respect to the correction, the nullity of such decision may be invoked through recourse*

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<sup>466</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 43.

<sup>467</sup> Saudi Arabian Arbitration Regulation 2012. art 46.



*to annulment subject to the provisions of Articles 50 and 51 of this Act*<sup>468</sup>

### **6.8.2. The position in England and Scotland**

The English Act gives the parties the right to agree on what powers are given to the tribunal to correct an award or make an additional award. If there is no such agreement then the following provisions apply:

*“(3) The tribunal may on its own initiative or on the application of a party; (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.”*<sup>469</sup>

With respect to the time limits for such applications to be made, the English Act gives a limit of 28 days from the date of the award or if the parties agree they could give a longer period. Furthermore, the tribunal has a limit of 28 days for it to make the required corrections from the date the tribunal receive the application or from the date of the award where the corrections are made by the tribunal from its own initiative. Again, the parties may agree on a longer period of time.<sup>470</sup> The article adds: “(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree. (7) Any correction of an award shall form part of the award”<sup>471</sup>

The Scottish Arbitration Rules state what types of correction the tribunal may make on its own accord or by a request from a party.<sup>472</sup> Rule 58 states: “The tribunal may correct an award so as to; (a) correct a clerical, typographical or other error in the award arising by virtue of accident or omission, or (b) clarify or remove any ambiguity in the award”<sup>473</sup>

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<sup>468</sup> *ibid.* art 47.

<sup>469</sup> The Arbitration Act 1996. art 57 (1)-(3).

<sup>470</sup> *ibid.* art 57 (4) (5).

<sup>471</sup> The Arbitration Act 1996. art 57 (6) (7).

<sup>472</sup> Arbitration (Scotland) Act 2010. rule 58 (2).

<sup>473</sup> *ibid.* rule 58 (1).



When making such an application, the party making it must send a copy of the application to the other party at the same time that the application is made.<sup>474</sup> With regard to time limits, the rule states:

*“Such an application is valid only if made; (a) within 28 days of the award concerned, or (b) by such later date as the Outer House or the sheriff may, on an application by the party, specify (with any determination by the Outer House or the sheriff being final). 5) The tribunal must, before deciding whether to correct an award, give; (a) where the tribunal proposed the correction, each of the parties, (b) where a party application is made, the other party, a reasonable opportunity to make representations about the proposed correction.”*<sup>475</sup>

If the corrected part of the award affects another part then the other part may be corrected. The rule states in this regard the following:

*“Where a correction affects; (a) another part of the corrected award, or (b) any other award made by the tribunal (relating to the substance of the dispute, expenses, interest or any other matter), the tribunal may make such consequential correction of that other part or award as it considers appropriate. A corrected award is to be treated as if it was made in its corrected form on the day the award was made”*<sup>476</sup>

## **6.9. Challenging the Award**

Once an arbitral award is issued by the arbitral tribunal, the issue of challenging and enforcing the award may have to be considered by the courts upon the parties' request. The brief provisions regulating the challenging of awards under the Arbitration Regulations of 1983 and its implementation rules of 1985 not only caused confusions among the academics and practitioners but also attracted severe criticisms. Viewing this deficiency as the major hurdle in modernising arbitration in Saudi Arabia, the Arbitration Regulations of 2012 sets out to provide detailed provisions regulating the challenging process which will be examined below.

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<sup>474</sup> *ibid.* rule 58 (3).

<sup>475</sup> *ibid.* rule 58 (4)(5).

<sup>476</sup> *ibid.* rule 58 (7)(8).



### **6.9.1. The Position in Saudi Arabia**

The Arbitration Regulations of 1983 do not use the word challenge in its articles. Instead it uses the word objection. It gives a limit of 15 days for the parties to submit an objection against the arbitral award to the authority where the award is filed from the date they are notified of the award, otherwise the award is final.<sup>477</sup> Article 19 of the Regulations stated that “If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the Authority originally competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for execution of the award, or accept the objection and decide the case.”<sup>478</sup>. This provision gave no explanation or detail of what the outcome of the court’s decision on the case would be.

According to the provision, when an objection is submitted by a party to the authority originally competent to hear the dispute, the authority shall hear the objection. If the authority decides to dismiss the objection, an order for the execution of the award would be issued. However, on the other hand, if the objection is accepted, the Arbitration Regulation of 1983 provides little guidance on the legal effects on what should happens afterwards. Does it mean that the authority returns the case to the arbitration tribunal to look at the case again and issue another award or does the authority look at the case itself and issue an award? There is no answer to that in the Arbitration Regulations of 1983 nor in the implementation rules of 1985. Furthermore, neither the Arbitration Regulations of 1983 nor the implementation rules of 1985 mention anything about in what circumstances may the parties submit an objection. Do they submit an objection simply because they are displeased with the award? Nothing is mentioned.

The award becomes enforceable when the authority originally competent to hear the dispute issues an order that the award is final. This happens after the authority is certain that there is nothing that prevents its enforcement in the Sharia<sup>479</sup> and the award then has the same force as a judgment made by the authority which issued the

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<sup>477</sup> Saudi Arabian Arbitration Regulation 1983. art 18.

<sup>478</sup> *ibid.* art 19.

<sup>479</sup> *ibid.* art 20.



execution order.<sup>480</sup> A copy of the order issued by the authority originally competent to hear the case gives the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase: “All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution required application of force by the police.”<sup>481</sup>

The regulations of 1983 and the implementation rules of 1985 do not mention anything in regard of a partial enforcement if parts of the award were contradictory to Sharia rules and parts of it were not. This issue caused the Kingdom of Saudi Arabia to face a lot of criticism after it joined the New York Convention of 1958 because the kingdom did not allow the enforcement of any arbitral awards that contradict Sharia rules. This shows the need for new regulations to fill in the big gaps that existed in the old regulations.

The new Saudi Arbitration Regulations of 2012 present a lot more detailed regulations with regard to the challenging of the arbitral award. The regulations relating to the challenging of the award are under the section called “The invalidity of the arbitration award” It starts off by stating in article 49 that: “The arbitration awards delivered in accordance with the provisions of this law are not subject to appealing in any way of appeal, except suing for the invalidity of the arbitration award in accordance with the provisions set forth in this law.”<sup>482</sup> This states that there are provisions that will be set forth to guide the process of applying for an appeal unlike the old regulations where no provisions were mentioned.

Article 50 of the Arbitration Regulations of 2012 states these provisions. It states that the claim of the invalidity of the arbitration award is rejected, except in the following cases: A- If there is no arbitration agreement or the agreement is null and void, or revocable, or has become null due to expiry; B- If one of the parties of the arbitration agreement, at the time of conducting, is incompetent, or not completely competent in accordance with the rules governing his competence; C- If one of the parties of the arbitration is unable to present his defense because of not being truly notified of

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<sup>480</sup> *ibid.* art 21.

<sup>481</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985. art 44.

<sup>482</sup> Saudi Arabian Arbitration Regulation 2012. art 49.



appointing an arbitrator or of the arbitral proceedings, or any other reason beyond his control; D- If the arbitration award excludes any application of the statutory rules that the parties of the arbitration agree to apply to the subject of the dispute; E- If the arbitral tribunal is constituted or the arbitrators are appointed in a way violating this law or the agreement of the parties; F- If the arbitration award judges matters that are not covered by the arbitration agreement, however, if it is possible to separate the parts of the award on the matters that are subject to the arbitration from the parts on the matters that are not subject to it, the nullification shall occur to the parts that are not subject to the arbitration only; and G- If the arbitral tribunal does not take into consideration the conditions that shall be met in the award to the extent that affects its content, or the award is based on false arbitration proceedings that have affected it.<sup>483</sup>

These provisions were discussed previously however, it is important here to highlight that the new Arbitration Regulations of 2012 has taken a step further to have recognizes the concept of separability and partial enforcement of the award. Accordingly, the parts that fulfill the requirements will be given an order for enforcement, whereas the other parts of the award deemed as violation of the Shaira law would be subject to the appeal and rejection. With this concept now recognized in the new regulations it is assumed that the enforcement of international arbitral awards in the kingdom will increase, compared to the framework under the Arbitration Regulations of 1983 and the implementation rules of 1985. this development will also eliminate the criticism faced by the Saudi judiciary in terms of its obligations under the New York convention.

Furthermore, the new Arbitration Regulations of 2012 provides a definite list on the matters where an award can be deemed as invalid and may not be enforced. It states:

*“The competent court that hears the claim of invalidity delivers an award of its own with the invalidity of the arbitration award if it contains what is contrary to the provisions of the Islamic Sharia and public order in the kingdom, or what is agreed upon by the parties of the arbitration, or it finds that the subject of the dispute is of the matters that may not be arbitrated under this law”.*<sup>484</sup>

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<sup>483</sup> Saudi Arabian Arbitration Regulation 2012. art 50 (1).

<sup>484</sup> *ibid.* art 50 (2).



This is again a new addition that the old Arbitration Regulations did not mention. More importantly, article 50 (4) also states that the competent court does not have the right to examine the facts and subject of the dispute. The article states; “The competent court hears the suit of the invalidity in the cases referred to in this article, without having the right to examine the facts and subject of the dispute.”<sup>485</sup>

If the competent court delivers its award of invalidating the arbitration award the arbitration agreement remains valid unless the parties agreed otherwise, or an award is delivered invalidating the arbitration agreement.<sup>486</sup>

The new Arbitration Regulations of 2012 give the parties a time limit of sixty days following the date when they were notified with the award to submit an invalidity claim of the arbitration award. It also states that “the waiver of the invalidity prosecutor of his right to bring the claim before delivering the award of the arbitration does not preclude from accepting the claim.”<sup>487</sup> In other words, a party may still submit an invalidity claim and it will be accepted even if they waived their right to submit such claim before the arbitration award was issued. It has to be noted here that the Arabic text of this article can be simplified and made easier for the reader to understand. Nevertheless, this is something new that the new regulations present that was not mentioned in the old regulations. It gives the parties a right to submit an invalidity claim even if they stated before that they waived their right to submit such a claim. This is to increase fairness to the parties as they might waive their right before hand not knowing that there might be injustice in that for them so they are given a chance to submit a claim of invalidity if they find themselves in a situation where they have the right to do so.

When the claim of invalidity is submitted to the competent court the outcome of that

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<sup>485</sup> *ibid.* art 50 (4).

<sup>486</sup> *ibid.* 50 (3). There seems to be a mistake in translating the Arabic text of the regulations on the official webpage of the ministry of commerce and industry. The text of the article there is: “The arbitration agreement is not valid after the competent court delivers its award of invalidating the arbitration award; unless the parties of the arbitration have agreed on that, or an award is delivered with invalidating the arbitration agreement.” I believe the translation should have been “The arbitration agreement is not [in]valid” as the Arabic text clearly states that the arbitration agreement remains valid if the court issued an order of the invalidity of the arbitral award unless the parties agreed otherwise or unless the court order states the invalidity of the arbitration agreement.

<sup>487</sup> Saudi Arabian Arbitration Regulation 2012. art 51 (1).



is one of two, according to article 51 of the new Arbitration Regulations:

*“If the competent court delivers an award that supports the arbitration award, it shall order it to be executed, and this award is not subject to appealing in any way of appeal. But if it delivered an award with the invalidity of the arbitration award, this award may be appealed against within thirty days from the day following the notification”*.<sup>488</sup>

This is also something new that the new regulations present, giving the parties the right to appeal against the order of invalidity of the arbitral award. Where the old regulations were silent on this matter, one sees that the new regulations tries to bring the Saudi Arbitration Regulations in line with international trends, as well as taking fairness into consideration..

Once the setting aside request is dismissed, the Saudi court will grant the awards with res judicata status. Regarding the enforcement of the arbitral award, the new Arbitration Regulations state the following: “Subject to the provisions set forth in this law, the arbitration award delivered in accordance with this law will be authentic and authoritative, and it is enforceable.”<sup>489</sup>

In order to apply for an enforcement order, the parties must attach the following requirements with the enforcement request:

*“1- The original of the award or a certified copy of it;2- A true copy of the arbitration agreement;3- A translation of the arbitration award into Arabic certified by an accredited authority if it was issued in another language; and4- The proof of depositing the award with the competent court and in accordance with the 44th Article of this law.”*<sup>490</sup>

What is new in this regulation is that it states that “The competent court or its representative issues an order with the execution of the arbitrators' award”.<sup>491</sup> Now the court can have a representative, whereas in the past, all matters were under the competent court's authority. This is something new in the new regulations alongside all the new additions in the matter of challenging the award and enforcing it. For the enforcement order to be issued by a court representative is something good as it helps in preventing time wasted in waiting for appointments at the court if it was busy; instead of waiting for an appointment the court may appoint a representative to

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<sup>488</sup> *ibid.* art 51 (2).

<sup>489</sup> *ibid.* art 52.

<sup>490</sup> *ibid.* art 53.

<sup>491</sup> *ibid.* art 53.



issue the order.

The Arbitration Regulations of 2012 address an additional important issue as well. If the arbitration was given an enforcement order but there is a claim of invalidity pending, does this pending claim affect the enforcement of the award? Article 54 answers this clearly by stating that

*“Bringing the claim of invalidity shall not result in a stay of execution of the arbitration award. However, the competent court may order a stay of execution if requested by the invalidity prosecutor in the declaration of his claim and the request is based on serious reasons. The competent court shall judge in the request for a stay of execution within fifteen days from the date of submitting the request. If the court orders a stay of execution, it may order to provide a financial guarantee or warranty, and if it orders a stay of execution, it shall judge in the invalidity claim within one hundred and eighty days from the date of the issuing this order”*.<sup>492</sup>

This article addresses some important issues. It states that a claim of invalidity of an award does not affect the enforcement of the award, unless the claim of invalidity states that it requests a stay of enforcement. The article requires that the request for stay of enforcement should be for serious reasons. This limits the parties from requesting the stay of enforcement just to prevent the other party from benefitting from the enforcement. For the process also to be fair to both parties, the court is required to judge in this request of stay of enforcement within fifteen days to avoid having the winning party's rights to be compromised. The court may order the challenging party to provide a financial guarantee or warranty in this case to ensure that no party loses any rights in the process. Finally, if the court orders a stay of enforcement then it shall issue a judgement within one hundred and eighty days from the date of the issuing of the order of stay of enforcement. This is also to prevent any delays in the process and any delays that might harm any party of the dispute. This level of detail was absent in the Arbitration Regulations of 1983 which sets the new regulations at an advanced level of giving attention to detail.

Article 55 of the Arbitration Regulations of 2012 has its own importance in conjunction with the reading of Article 54.. It states: “1- The request for the execution of the arbitration award shall not be accepted unless the deadline of suing

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<sup>492</sup> *ibid.* art 54.



the invalidity of the award has passed.”<sup>493</sup> This could be seen as contradictory to the previous article because the previous article states that a claim of invalidity does not affect enforcement whereas in this article it states that the request for enforcement is not accepted before the time limit for raising a claim of invalidity has expired. The two articles do not contradict each other but it is seen that the latter article gives the right to raise a claim for invalidity even after the time limit if there is a serious reason.

The article states after that the requirements that need to be checked before the court issues the order of enforcement:

*“2- The order to execute the arbitration award in accordance with this law shall be done only after verifying the following:*

*A- It does not conflict with an award or decision issued by a court or committee or authority that has the jurisdiction on the subject of the dispute in the Kingdom of Saudi Arabia.*

*B- It does not include what is contrary to the provisions of the Islamic Sharia and public order in the Kingdom, and if it is possible to fragment the award of the violation part, it is possible to execute the remaining part which is not violating.*

*C- It has been well and truly notified to the convicted.*

*3- It is not permissible to appeal against the order issued to execute the arbitration award. The order of rejecting the execution may be appealed against before the competent authority within thirty days from the date of issuance”*.<sup>494</sup>

What is worth highlighting here is that the Saudi regulations now recognize the separability and partial enforcement of the arbitral award. Thus, if parts of the award may be enforced and others may not because they contradict Sharia law or public policy, then the parts that do not contradict may be enforced and the parts that contradict may not.

### **6.9.2. The Position in England and Scotland**

When looking at the English Act and the Scottish rules with regard to challenging an arbitral award we find that the Saudi regulations have indeed taken a step forward in regulating arbitration laws. Although there are differences between the systems, the

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<sup>493</sup> *ibid.* art 55 (1).

<sup>494</sup> *ibid.* art 55 (2-3).



main important points in regulating the challenge of the arbitral award are indeed similar.

The main differences between the systems are as follows; the English Act sets the court for the parties to appeal to, whereas the Scottish rules state the outer house as the place where the parties appeal. The Scottish rules, in contrast to the English Act and the Saudi regulations set another step of appealing after appealing to the outer house. The parties may appeal to the inner house against the decision of the outer house.<sup>495</sup>

Both the English Act as well as the Scottish rules set out three main different grounds on which an award may be challenged: challenging an award for substantive jurisdiction, challenging the award for serious irregularity and challenging the award on a point of law or as the Scottish rules name it legal error.<sup>496</sup>

The difference between challenging an award under each ground is that if an award is challenged for substantive jurisdiction the competent authority decides to

- (a) confirm the award,
- (b) vary the award, or
- (c) set aside the award in whole or in part.

If the award is challenging for serious irregularity the court under the English Act decides to

*“(a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part.”*<sup>497</sup>  
*Where under the Scottish rules if the award is challenged for serious irregularity or for legal errors the outer house may decide to “(a) confirming the award, (b) ordering the tribunal to reconsider the award (or part of it), or (c) if it considers reconsideration inappropriate, setting aside the award (or part of it)”*.<sup>498</sup>

If the award is challenged for point of law or legal errors the court under the English

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<sup>495</sup> Arbitration (Scotland) Act 2010. rule 67 (4), 68 (5), 70 (9). This point could be a subject worthy of looking at in a publication namely the affect of different juridical systems on the proceedings of arbitration.

<sup>496</sup> The Arbitration Act 1996. art 67, 68, 69. Arbitration (Scotland) Act 2010. rule 67,68, 69.

<sup>497</sup> The Arbitration Act 1996. art 68 (3).

<sup>498</sup> Scottish 68 (3), 70 (8).



act may order to

- “(a) confirm the award,*
- (b) vary the award,*
- (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or*
- (d) set aside the award in whole or in part”*.<sup>499</sup>

No such detailed grounds were seen in the Saudi Arbitration Act 2012. The Saudi regulations fail to mention what happens if the competent authority refuses the award, whether the award shall be referred back to the original or different tribunal for re-consideration or whether the court may vary the award or any other decision that may be made. This is something important that should be addressed in the new implementation rules because depending on the court’s order there would be different consequences. If the award is referred to the same tribunal then what time limits do they have to issue a new award? If the award is referred to a different tribunal, who forms this new tribunal and to what extend do they look through the case?.

Furthermore, the English Act sets a time limit for the arbitral tribunal when the award is returned to it to issue another award. It states “(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct”.<sup>500</sup> This is something important for the Saudi regulator to consider addressing in the new implementation rules.

Another difference is that the English Act and the Scottish rules require that the parties must first exhaust “(a) any available arbitral process of appeal or review, and any available recourse such as correction of award or additional award”.<sup>501</sup> The Saudi regulations do not require this step. The exhaustion of arbitration process has its benefits in time management and avoids wasting court resources. This is an advantage for the English Arbitration Regulations that the Saudi regulator should follow

In conclusion, it is obvious that the Saudi Arbitration Regulations of 2012 have improved a lot in regard to regulating the requirements of challenging the arbitral

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<sup>499</sup> The Arbitration Act 1996. art 69 (7).

<sup>500</sup> The Arbitration Act 1996. art, 70 (3).

<sup>501</sup> The Arbitration Act 1996. art 70 (2), Arbitration (Scotland) Act 2010. rule 71 (2).



award and enforcing it. The main improvement here is that the new regulations now recognise the concept of separability and partial enforcement of arbitral awards when parts of it contradict with Sharia rules. This was a major issue in the past, preventing Saudi Arabia from recognising and enforcing arbitral awards that contained a contradiction to Sharia rules. With this new regulation it is now assumed that Saudi courts will recognise the parts of arbitral awards that do not contradict with Sharia rules instead of refusing the whole award as it used to do in the past.

## **6.10. Conclusion**

To conclude, this chapter focused on the arbitration award. This chapter was divided into a number of sections to tackle the issues related to the arbitral award in detail. The main issues related to the arbitral award discussed here included the following: the law applicable, majority vote, types of the arbitral award, form and contents of the award, registration and notification of the award, notification of the award, correction and interpretation of the award, and the correction and interpretation of the award.

When discussing each of these issues the Saudi law was first addressed, starting with the old regulations of 1983 and the implementation rules of 1985 to see what the original law was like followed by an examination of the new regulations of 2012 in order to determine what had been added, changed or fixed. Following this, the Scottish and English laws were presented to see if they are any different than the Saudi regulations and when they are different to see if they could add anything that the Saudi regulations might benefit from. Throughout the discussion of these points in this chapter, number of important findings and recommendations were made. These findings and recommendations are discussed in the subsections below.

### **6.10.1. Findings and recommendations**

#### **6.10.1.1. Majority vote:**

Regarding the issue to having a majority vote when issuing an award, the Saudi regulations of 1983 as well as the new regulations of 2012 required that the award



must be issued by a majority vote. What the old regulations failed to mention is what happens if it was not possible to reach a majority vote on issuing an award. This left the matter for interpreters to try to guess what the issue would be. The new regulations of 2012 rectified this issue, stating that if a majority was not possible to decide on an award the arbitral tribunal may appoint an umpire within 15 days from its decision that there is no possibility to ensure a majority. This umpire would decide the case. This is a positive step provided by the Saudi legislator. The new regulations did not just mention the solution for resolving this matter, but also set a time limit for it. This is beneficial in two particular ways. First, it resolves the matter where, in contrast to the old regulations, it addressed the issue, and secondly, it sets a time limit so the matter does not add to a delay in the arbitration proceedings. This makes the new regulations more efficient and clear on such matters and insures that the arbitration process does not get unnecessarily stopped or delayed. This brings the Saudi regulations again a step closer to a level with the international community in Arbitration Regulations. In addition, if the arbitral tribunal cannot or does not appoint an umpire to decide the case within the time limit then the competent court has the power to do so. This is a huge step forward for the Saudi Arbitration Regulations.

#### **6.10.1.2. Types of an award:**

With regard to the types of arbitral award, the Saudi regulations permit the arbitral tribunal to issue partial awards. What is new here is that in the old regulations the arbitral tribunal was not permitted to issue partial awards after the main award of the case is submitted. In contrast, the new regulations enable this to happen. It goes further than the previous regulations by setting time limits for the parties wishing to seek a partial award – this should occur within 30 days of issuing the original award. Furthermore, it sets a time limit of 60 days for the arbitral tribunal to issue the additional partial award. The new Arbitration Regulations again are a step forward in modernising and making the arbitration process more efficient and easy for the parties to seek the justice they need. The regulations go further. They do not just stop at allowing the arbitral tribunal to issue additional awards after the final award is submitted but also set time limits for both the parties seeking an additional award and



for the tribunal to issue it, which is very important for the speed of the process of arbitration.

#### **6.10.1.3. Form and content of an award:**

The new Arbitration Regulations of 2012 require some new requirements to be presented in the arbitral award. These new requirements fit with the changes that the new regulations present. New requirements such as the addresses, nationalities and positions of the arbitrators are now required because the new regulations open up the process and allow arbitrators from other nationalities to join the tribunal and not just Saudi nationals as was the case under the old regulations where the arbitrators had to be Saudi nationals. One of the new and very important requirements that the new regulations add is clarification concerning the issue of the arbitrator's fees and the arbitration's costs and their distribution between the parties. These requirements were not present in the old regulations. Their addition here brings clarity to this issue as conflict and disagreement on such matters might arise when the fees and costs are not mentioned. Furthermore, and more importantly, there is no requirement for any of this to be in the Arabic language as the new regulations allow parties to choose any other language for the process of arbitration and its award as discussed previously. All these new additions enhance the Saudi regulations by making them clearer and more efficient. This results in the arbitration process being a lot easier and smoother. The downside to this, however, is that the new regulations do not mention what happens if the arbitral tribunal does not fulfil these requirements. Whether the combatant court would set the award aside and decided it on its own, which is unlikely, or if the court would return the award to the arbitral tribunal to fulfil the rest of the requirements, which is more likely to happen, still remains an issue that needs to be considered. It is important for the Saudi legislator to address and clarify this issue in the new implementation rules.

#### **6.10.1.4. Registration and notification of the award:**

Of relevance to this issue, the Saudi regulations do not mention what happens if the



award is not submitted to the competent authority within the set time limit. This is an issue that has been mentioned before and the Saudi legislator should address this issue in the new Arbitration Regulations.

#### **6.10.1.5. Corrections and interpretation of the award:**

The old Saudi regulations of 1983 and the implementation rules of 1985 did not set a time limit for when the parties are allowed to seek corrections or interpretations to the award from the arbitral tribunal after they have been notified of the award. This is no longer an issue as the new regulations of 2012 set a time limit of thirty days for a party to submit a request for interpretation from the date the party was notified of the award. Furthermore, the regulations set a time limit for the tribunal to submit the interpretation requested by a party. This is also thirty days from the date the request for interpretation was submitted to the arbitral tribunal. On the other hand, regarding the correction, the regulations set a different time limit for the arbitral tribunal to make the corrections. The time limit to request a correction on the award is fifteen days. All these new additions and the time limits were absent from the old regulations and implementation rules. Now that they have been included in the 2012 regulation, this should result in the process of issuing an award and finalising it becoming faster and more efficient.

#### **6.10.1.6. Challenging the Award**

The Arbitration Regulations of 1983 and its implementation rules of 1985 had brief provisions regulating the challenging of awards which not only caused confusions among the academics and practitioners but also attracted severe criticisms. To deal with this issue, the Arbitration Regulations of 2012 provides detailed provisions regulating the challenging process. It is obvious that the Saudi Arbitration Regulations of 2012 have improved a lot in regard to regulating the requirements of challenging the arbitral award and enforcing it. The main improvement here is that the new regulations now recognise the concept of separability and partial enforcement of arbitral awards when parts of it contradict with Sharia rules. This was a major issue in the past, preventing Saudi Arabia from recognising and enforcing arbitral awards that contained a contradiction to Sharia rules. With this new



regulation it is now assumed that Saudi courts will recognise the parts of arbitral awards that do not contradict with Sharia rules instead of refusing the whole award as it used to do in the past.



## **7. Chapter Seven: Conclusion**

To conclude this study, this thesis examined, analysed and criticised the Saudi Arbitration Regulation of 1983, the implementation rules of 1985 and the Arbitration Regulations of 2012 and compare them to the English arbitration act of 1996 and the Scottish arbitration rules of 2010. Throughout this study, the Saudi Arbitration Regulations of 1983 and the implementation rules of 1985 were examined in order to determine how the rule of arbitration worked in the country. Following that, the new regulations of 2012 were presented to see what has changed. When the new regulations were presented, they were examined to see if there is any improvement in the regulations and if they have addressed the problems that appeared in the previous regulations and implantation rules. All that was subsequently followed by a discussion on the scale of the improvement and whether further improvements are required in Saudi Arabia in regards to Arbitration Regulations. This thesis also carried out a comparison with the English Act of 1996 and the Arbitration Scotland Act of 2010 to see what similarities and differences are there between these laws and when there are differences it was examined to see whether the Saudi legislator could benefit from these differences to improve the Saudi regulations or if the Saudi regulations were already improved and advanced in that particular aria.

The methodological approach that was adopted in this study was a descriptive, analytical and comparative methodology.

This type of methodology was used to highlight similarities and differences between the observed laws and regulations. It led to gaining a better understanding and knowledge of the laws and the reasons why they are similar or different. Comparing these laws with one another showed that there could be some beneficial information that could be learnt from different jurisdictions and approaches to promote national law development.

The main questions that this thesis aimed to answer were; whether the new Saudi regulations addressed the areas that were criticised in the past about the old Arbitration Regulations or not?



It was clear that yes the Saudi legislator did address a lot of the issues that were criticised and improved them in ways that commentators and academics were surprised as improvements were presented in arias no one predicted the Saudi legislator would change. Arias such as allowing the parties to choose any procedural law to be applied other than the Saudi regulations, not requiring the arbitrator to be a Saudi national or a Muslim, not requiring the Arabic language to be the language of arbitration, not requiring an arbitration instrument to be approved by authority before the arbitration process starts as well as giving a lot more authority to the arbitral tribunal in different arias of the process.

The other main question that this thesis aimed to answer was, where there were areas where the Saudi regulations have changed, does these changes make the regulations more efficient than the previous regulations or not?

It appeared that yes, most of the changes in the new regulations happened to improve the process and to make it more efficient than before. This will be highlighted in the following section where a list of the improvements would be presented.

The third question that was aimed to be answered in this thesis was, what can the Saudi regulations benefit from the English and the Scottish Arbitration Acts?

This was highlighted throughout the thesis and mentioned in the conclusions of each chapter and will be briefly listed below.

And finally, are the Saudi Arbitration Regulations modern enough to be on a level with international Arbitration Regulations?

The Saudi regulations have improved a lot and has adopted a lot of changes in its new regulations of 2012. Though, to give a positive answer to this question the Saudi legislator must look at the arias that still need to be improved. We take under consideration that the Saudi implementation rules are not yet published. If when these rules are published and we find that they have addressed all the arias that are still criticised, then the answer to this question would be a positive one. But till then the Saudi arbitration system still needs some tweaks to it to be of a very high level. This being said, we do not dismiss all the great improvements and modernisation that the new Saudi regulations present.



## **7.1. Main findings and recommendations**

In this subsection all the main findings and recommendations that were concluded from this study will be listed and addressed briefly as they were already mentioned in detail in throughout the study.

### **7.1.1. Forms and content of the arbitration agreement and the reparability of the arbitration agreement**

It is seen that the new Saudi Arbitration Regulations of 2012 have improved the arbitration law and made it clearer and more efficient. The new Arbitration Regulations now provide a definition of the arbitration agreement. But most importantly here is that the new regulations now state and recognise the reparability of an arbitration agreement from the original contract it may be a part of; if for any reason the main contract becomes invalid, the arbitration agreement will not be affected for this reason.

### **7.1.2. Arbitration instrument**

This area is viewed as one of the key substantial improvements in the Saudi Arbitration Regulations. The arbitration instrument was seen as a step that is not needed for the reason that it was time consuming and did not add anything by having what the parties and the arbitral tribunal agree to on be authorised by an authority before starting the arbitration process. This instrument is no longer required by the new Arbitration Regulations of 2012, and this is seen as a huge step forward in making the arbitration process in the Kingdom of Saudi Arabia more efficient, quick and with less restrictions and requirements. The authority is now given to the parties and the arbitral tribunal to approve that the arbitration agreement fulfils all the requirements needed for the arbitration process to run smoothly and efficiently.

### **7.1.3. Requirements for an arbitration agreement to be valid**

Three requirements were discussed: the agreement in writing, the capacity of the parties and the arbitrability of the case. The new Arbitration Regulations of 2012



have improved this area by making it clear now that the arbitration agreement must be in writing where it was silent on this matter in the old regulations and the implementation rules. By stating that the agreement has to be in writing it leaves no place for interpretations as happened in the past with the old regulations. Furthermore, the new regulations are clear on modern means of communications. As long as the agreement is in writing, whether in an electronic form or hard copy, it is now clear that these are seen as being agreements in writing. There is not much change between the 2012 regulations and the old one with regard to stating the capacity of a private person. On the other hand, there is a good improvement in the capacity of the state and its agencies. Although the new regulations still do not allow any government bodies from entering into arbitration without permission, it now gives the authority of providing this permission to other legal authorities instead of restricting it to just the President of the Council of Ministers. However, it is important to mention that this area still remains vague and unclear in terms of which specific may give this permission. It is suggested here that the Saudi legislator should clarify this area in the new implementation rules.

#### **7.1.4. Capacity**

The Saudi regulations set rules for who is deemed a capable person to be an arbitrator. The old regulations even refer to a list of recommended arbitrators who fulfil the requirements needed for a person to be an arbitrator for the parties to refer to when choosing arbitrators. The Saudi regulations do not mention that an arbitrator should be of a certain age as is set out in Scottish law, but instead it sets requirements for a person to meet. These requirements are hard for a minor to meet which inevitably means that a minor cannot act as an arbitrator. The other difference here between the Saudi regulations and the Scottish rules is that the Scottish rules state that only an individual can act as an arbitrator, meaning a legal body cannot act as an arbitrator. The Saudi regulations are silent in this matter. It is recommended for the Saudi legislator to address this point in the new implementation rules.



#### **7.1.5. The gender of the arbitrator**

There has been a lot of debate amongst commentators and academics on whether a female can or cannot be an arbitrator, according to the Saudi regulations. It is clear that a female, when fulfilling the requirements needed for one to be an arbitrator, can act as one with no difference between her and a male arbitrator. In order to make this matter clear, the Ministry of Justice started issuing lawyer licenses which leaves no doubt that a female may act as an arbitrator.

#### **7.1.6. Nationality**

The old regulations required an arbitrator to be a Saudi citizen but this is no longer a case according to the new Arbitration Regulations of 2012 as it allows parties to resort to an organisation or permanent arbitration committee, or arbitration centre with offices located outside the Kingdom. Therefore, it is clear that an arbitrator does not need to be a Saudi citizen. This is seen as a step forward in the Saudi regulations in making arbitration more open internationally. Restricting arbitrators to be Saudi citizens might be seen as a put off for foreign parties who wish to invest in the Kingdom of Saudi Arabia but at the same time would like to have arbitrators who are not Saudi citizens. It is now more inviting for foreign investor to seek businesses in the kingdom: when referring a dispute to arbitration, they can now appoint arbitrators from different nationalities as they wish. This makes the Saudi regulations a step closer to being on a par with international Arbitration Regulations and the regulations of modern developed countries.

#### **7.1.7. Physical ability**

The Saudi regulations are silent on this matter. There is no mention of whether an arbitrator should be physically fit or what disabilities would prevent a person from being an arbitrator. This leaves the matter for the parties to choose. In contrast, the Scottish rules refer this issue to the Adults with Incapacity (Scotland) Act 2000, which states clearly what an incapable person is. It is recommended that the Saudi regulator take this into consideration in the new Arbitration Regulations.



#### **7.1.8. Qualifications**

Whilst the old Saudi regulations did not require that an arbitrator should have a certain qualification, it did require that they should have the necessary knowledge and expertise in order to have the capacity to settle disputes. The new regulations, in contrast, require that the arbitrator should have a degree in legal or Sharia Sciences. This may restrict and narrow the range of people permitted to act as arbitrators, but it is not seen as a major issue as in practice parties usually seek a person who has a degree in legal science as they would be more trusted in knowing the relevant law.

#### **7.1.9. Religion**

The old regulations required that an arbitrator must be a Muslim. This has changed in the new Arbitration Regulations of 2012 where the parties to a dispute are now allowed to refer the arbitration case to an organisation or a permanent arbitration tribunal or an arbitration centre located outside the Kingdom. It does not require that the organisation or the arbitrators must be Muslim. This is another step forward for the new Arbitration Regulations in becoming more attractive to international investors and to make the regulations more efficient and easier for parties when appointing their arbitrators.

#### **7.1.10. Profession**

The old regulations did not restrict a person from any profession from being an arbitrator. However, the new regulations require that an arbitrator shall hold a degree in legal or Sharia science. This could be seen as a restriction, but again it is not seen as something serious as in it can be permissible to have a person of a different profession if the requirements are met in the chairman of the arbitral tribunal.



#### **7.1.11. Number of arbitrators**

Although it was mentioned in the old regulations that the number of arbitrators (if more than one) should be an uneven number, the new regulations are clearer on this issue by stating that if this requirement is not met then the arbitration is deemed to be null. This is a new addition that makes the new regulations clearer and does not leave a gap in law where it is not known what happens if a certain requirement is not met.

#### **7.1.12. Appointing arbitrators**

Where the old Arbitration Regulations of 1983 and the implementation rules of 1985 failed to mention a method of appointing the arbitrators, the new regulations of 2012 are clear on this issue. The new regulations now ask the parties when appointing their arbitrators that each party appoints an arbitrator; these two appointed arbitrators appoint the third arbitrator. The new regulations go further by providing more detail by setting a time limit for the parties to appoint their arbitrators. It sets 15 days for the appointment of the arbitrator; if this condition is not met then the court will have a role in appointing the arbitrators. The new Arbitration Regulations in this matter are a lot clearer than the old regulations. The detailed and clear requirements make the process easier and more efficient and by setting time limits allows the process to go faster than if it was left for parties to delay the appointments. The difference here between the Saudi regulations and the Scottish rules is that the Saudi regulations refer the parties to court to appoint the arbitrator or arbitrators when they cannot be appointed by the parties. The Scottish rules, on the other hand, provide the parties the option to appoint a referee or a third party to appoint the arbitrators. This is seen as an unnecessary step as the parties might extend their disagreement on appointing the arbitrators to disagreeing on appointing a referee. It is faster to take the case to a higher authority such as the court to appoint the arbitrators immediately after the time limit for the parties to appointing them has expired.



#### **7.1.13. Arbitrator stepping down**

The new regulations are silent in this regard whereas the Scottish rules address the matter of when the arbitrator has the right to resign from the mission. This is something the Saudi legislator could benefit from and add to the implementation rules when addressing the matter of when the arbitrator steps down from the mission. Moreover, the English Act mentions a few important points. First, it gives the parties the right on the replacement of the arbitrator. This is different from the old Saudi regulations as the Saudi regulations referred the case to court to appoint the new arbitrator or arbitrators. Secondly, it states an important issue where there is a disagreement between the parties and the arbitrator on his resignation. It gives the arbitrator the right to apply to the court to grant him relief from any liabilities and makes an order to his entitlement of fees or expenses or if he needs to pay any fees or expenses. These are important issues the Saudi legislator should benefit from in addressing this issue in the implementation rules and not leave the matter without consideration.

#### **7.1.14. Removal of the arbitrator**

The Saudi regulations do not mention the method of removal whether it is in writing or orally or in arbitration session. It is necessary for the Saudi legislator to address this issue in the implementation rules. However, the new regulations do address the matter of when an arbitrator can be removed and what happens if the arbitrator or one of the parties disagrees with the proposed removal. This detail makes the matter clearer which is something the old Saudi Arbitration Regulations were sometimes criticised about, primarily because a lack of clarity in its text led to interpreters trying to guess what the text meant or try to assume how the process should work.

#### **7.1.15. Challenging the arbitrator**

The main difference here between the Saudi regulations and the English and the Scottish laws is that the Saudi regulations stop an arbitrator or an arbitral tribunal from proceeding in looking at the arbitration case when there is a challenge against



an arbitrator or the arbitral tribunal. It even makes all awards or decisions made by the tribunal or the arbitrators null and void. On the other hand, the English and Scottish laws allow the arbitrator or arbitral tribunal to carry on with their job in dealing with the arbitration case while the challenge against them is ongoing. The Saudi regulations provide extra time for the arbitration proceedings after the challenge is dealt with to make up for the time lost while awaiting a court's decision on the challenge. This is avoided when taking the English and the Scottish approach if the challenge was unsuccessful. However, if the challenge was successful then the arbitrators work on the case while the challenge was ongoing is wasted and the arbitrators might ask for fees and costs for the work that has been carried out during that time.

#### **7.1.16. Applicable law:**

When discussing the applicable law to the arbitral proceedings it was found that where the old regulations of 1983 and the implementation rules of 1985 restricted parties to only apply Saudi regulations when referring a case to arbitration, the new Arbitration Regulations of 2012 has changed this completely. The parties of a dispute are now free to agree on what proceedings they want to be applied by the tribunal in the arbitration process. These rules can be the rules of an organisation, institution or arbitration centre, regardless of whether or not they are located within or outside the Kingdom. One guidance rule that must be adhered to, however, is that these choices do not contradict with the rules of Islamic Sharia. This is a huge and unexpected step change from the Saudi legislator and is viewed as the most inviting change in the Saudi Arbitration Regulations that would encourage foreign investors to invest and do business in the Kingdom of Saudi Arabia as they are no longer restricted to refer to the Saudi regulations. This is seen as being very open internationally by the Saudi legislator, and is a further example of the effort to bring Saudi legislations in line with international and modern Arbitration Regulations.

On the other hand, this difference between the Saudi Arbitration Regulations and the English Arbitration Act and the Scottish Arbitration Rules is that in the English act and Scottish rules there are mandatory and non-mandatory rules and acts whereas in



the Saudi regulations there is no such thing. Although this might seem to imply that all Saudi provisions are mandatory this is not the case. Some rules and articles in the Saudi Arbitration Regulations and the implementation rules state that “unless the parties agree otherwise”, meaning that the provision given in that rule or article can be used or may be dismissed.

#### **7.1.17. Place of arbitration:**

Another change in the Saudi attitude towards arbitration can be seen in this section. The new Saudi Arbitration Regulations now allow the parties and the arbitral tribunal to choose the place of arbitration whether located inside or outside the kingdom. This is another change in the Saudi regulations where it makes the regulations more attractive to foreign investors. This is now similar to the English Arbitration Act and Scottish Arbitration Rules in providing the freedom for the parties and the tribunal to decide the most suitable place for the arbitration process to be situated.

#### **7.1.18. Language:**

Another significant and very positive change in the Arbitration Regulations is present in this section. The new Arbitration Regulations of 2012 now permit parties and the arbitral tribunal to choose any language for the arbitration proceedings and documents. The old regulations restricted the choice of language to Arabic and set out that if a party did not speak Arabic they should be accompanied by a translator. With the 2012 regulations, this is no longer an issue as the parties are free to choose any language they find suitable for their proceedings.

#### **7.1.19. Time periods:**

One of the changes that can be seen here is that according to the old Arbitration Regulations of 1983 and the implementation rules of 1985 where there was an arbitration instrument that had to be filed and approved by the authority, arbitration proceedings would start within 5 days from the date of approval. Now that there is no



arbitration instrument needed to be approved the arbitration proceedings can start on the day a party receives a request to refer to arbitration from the other party. The key point here is that lifting the requirement of an arbitration instrument has resulted in making the arbitration process more efficient and quick.

Previously, communication under the old regulations had to be between the arbitral tribunal and the parties via the secretary of the authority originally having jurisdiction over the case. This is no longer the case. Under the new regulations and implementation rules, as communication between the arbitral tribunal and the parties now takes place directly. This is the normal way of communicating and there was no need for this communication to be through a third party. It is a step forward for the Saudi regulations in modernising the process and removing unnecessary or time consuming requirements.

One of the changes that the new Arbitration Regulations present now is that it provides a longer time limit for issuing the arbitral award when the parties have not agreed on a time limit. The old regulations set 90 days for issuing the award, but now the new regulations have extended this to 12 months as a time limit. This could be seen as giving more time for the proceedings of arbitration instead of giving a shorter time limit which could result in the parties or the arbitral tribunal needing to seek an extension for this time which would result in stopping the proceedings till an extension is granted as no arbitral proceedings should be continued if the original time limit expires without an award being issued. Furthermore, it sets a time limit for the extension if it is needed. This extension should not exceed six months unless otherwise agreed by the parties. The downside here is that neither the new regulations nor the old regulations mention or set a time limit for the authority to grant this extension so the parties may need to wait for an unknown period of time whilst awaiting the approval for the extension. What is even worse is that no procedures can be carried out on the case while awaiting for the extension to be granted.

Another difference between the Saudi regulations and the Scottish rules is that the Scottish rules set out a way of calculating time periods. This is something the Saudi regulations do not mention. One of the issues that arises from this is as follows: if a



7-day period is given as a time period, would the weekends be included in these 7 days or not? This is something the Saudi regulations fail to mention in the new regulations and might be worthwhile to address in the new implementation rules.

#### **7.1.20. Experts:**

One of the new additions that the new regulations add regards the issue of experts and providing them with the information they require. If a dispute happens between an expert and a party in providing some information, then the arbitral tribunal should issue an award in this regard. This was not mentioned in the old regulations of 1983 nor in the implementation rules of 1985.

#### **7.1.21. Witnesses:**

The new Arbitration Regulation provides the arbitral tribunal the right to seek the authority's assistance in ordering the presence of a witness if the witness refuses to attend a hearing or give a statement. This is something that the old regulation of 1983 and the implementation rules of 1985 do not address. It is important to address such matters in order to clarify what authority the arbitral tribunal has and when it can seek assistance from other authorities. This is seen as a step forward for the Saudi regulations.

What is different in this regards between the Saudi regulations and the Scottish rules is that the Scottish rules stop the court from ordering the witness to give information in the same way that the witness would be entitled to refuse in civil proceedings. This is something the Saudi regulations do not mention. It is not clear whether such information could be asked according to the Saudi regulations or not, and it would be important for the Saudi legislator to address this issue in the new implementation rules. Examining the witnesses on oath or affirmation is mentioned in both Scottish and the English law but is not mentioned in the Saudi regulations. Again this is something that the Saudi legislator might want to consider adding to the new implementation rules. Finally, this also gives rise to the following relevant question:



if the witness was located out-with the jurisdiction, would the Saudi authority be able to order their attendance or not? Currently, this is something that the Saudi regulations also fail to mention.

#### **7.1.22. Statement of claim and defence:**

In this regard, the new regulations of 2012 presents a better and more efficient approach on how the claim and defence document may be presented. The new regulations requires that the claimant party sends a written document of their claim to the arbitral tribunal and to the other parties of the dispute. After that and within the time limit agreed on between the parties and the arbitral tribunal the defendant party is required to write their defence and send it to the arbitral tribunal and the other parties. Following this, a date for hearing would be set for the hearing. This is a far better approach as the defendants would have sufficient time to read the claim and prepare for their defence and the claimant would be able to see what defence has been presented in order to counter it if possible and for the tribunal to have a better look at the case beforehand.

What is different between the Saudi regulations and the Scottish and the English regulations is that the Scottish and English laws give the arbitral tribunal the right to decide what is to be mentioned and handed in when submitting a claim or defence if any. Giving the arbitral tribunal such a right is good for the arbitration process as the tribunal would ask for what is necessary for the process in order to speed up the process. The tribunal would guide the parties to only submit what is relevant to the case so that no time would be wasted on other matters that might not be related to the actual dispute. Furthermore, the Scottish and English regulations mention what happens if one of the parties fails to submit their statement of claim and defence. This is something that is not mentioned in the Saudi regulations. It is very important to address this issue in the new implementation rules as this matter could determine whether the arbitration process would take place or not.



#### **7.1.23. Stay and interrupt of the proceedings:**

The new Arbitration Regulations of 2012 completely changes the way the old Arbitration Regulations of 1983 dealt with this matter. According to the old regulations, if during the arbitral proceedings an issue beyond the scope of jurisdiction of the tribunal arises, or if one of the documents is forged, or that criminal proceedings have been initiated, the arbitral tribunal was asked to stop the arbitral process and wait for the matter to be dealt with under the competent authority. In stark contrast, under the new regulations, the arbitral tribunal may continue the hearing of the dispute if it elects that a decision on that issue is not necessary for issuing the award on the subject matter of the dispute otherwise it may stop the proceedings till the competent court issues a decision in this respect. This is a positive change as it no longer stops the arbitration proceedings if the criminal matters are not related to the case and will not affect it. This means that the new regulations give the arbitral tribunal the authority to judge whether this issue can or cannot affect the arbitral process. Giving such authority to the arbitral tribunal makes the process more efficient and speeds up the process if such a matter occurs.

#### **7.1.24. Majority vote:**

Regarding the issue to having a majority vote when issuing an award, the Saudi regulations of 1983 as well as the new regulations of 2012 required that the award must be issued by a majority vote. What the old regulations failed to mention is what happens if it was not possible to reach a majority vote on issuing an award. This left the matter for interpreters to try to guess what the issue would be. The new regulations of 2012 rectified this issue, stating that if a majority was not possible to decide on an award the arbitral tribunal may appoint an umpire within 15 days from its decision that there is no possibility to ensure a majority. This umpire would decide the case. This is a positive step provided by the Saudi legislator. The new regulations did not just mention the solution for resolving this matter, but also set a time limit for it. This is beneficial in two particular ways. First, it resolves the matter where, in contrast to the old regulations, it addressed the issue, and secondly, it sets a time limit so the matter does not add to a delay in the arbitration proceedings. This



makes the new regulations more efficient and clear on such matters and insures that the arbitration process does not get unnecessarily stopped or delayed. This brings the Saudi regulations again a step closer to a level with the international community in Arbitration Regulations. In addition, if the arbitral tribunal cannot or does not appoint an umpire to decide the case within the time limit then the competent court has the power to do so. This is a huge step forward for the Saudi Arbitration Regulations.

#### **7.1.25. Types of an award:**

With regard to the types of arbitral award, the Saudi regulations permit the arbitral tribunal to issue partial awards. What is new here is that in the old regulations the arbitral tribunal was not permitted to issue partial awards after the main award of the case is submitted. In contrast, the new regulations enable this to happen. It goes further than the previous regulations by setting time limits for the parties wishing to seek a partial award – this should occur within 30 days of issuing the original award. Furthermore, it sets a time limit of 60 days for the arbitral tribunal to issue the additional partial award. The new Arbitration Regulations again are a step forward in modernising and making the arbitration process more efficient and easy for the parties to seek the justice they need. The regulations go further. They do not just stop at allowing the arbitral tribunal to issue additional awards after the final award is submitted but also set time limits for both the parties seeking an additional award and for the tribunal to issue it, which is very important for the speed of the process of arbitration.

#### **7.1.26. Form and content of an award:**

The new Arbitration Regulations of 2012 require some new requirements to be presented in the arbitral award. These new requirements fit with the changes that the new regulations present. New requirements such as the addresses, nationalities and positions of the arbitrators are now required because the new regulations open up the process and allow arbitrators from other nationalities to join the tribunal and not just Saudi nationals as was the case under the old regulations where the arbitrators had to



be Saudi nationals. One of the new and very important requirements that the new regulations add is clarification concerning the issue of the arbitrator's fees and the arbitration's costs and their distribution between the parties. These requirements were not present in the old regulations. Their addition here brings clarity to this issue as conflict and disagreement on such matters might arise when the fees and costs are not mentioned. Furthermore, and more importantly, there is no requirement for any of this to be in the Arabic language as the new regulations allow parties to choose any other language for the process of arbitration and its award as discussed previously. All these new additions enhance the Saudi regulations by making them clearer and more efficient. This results in the arbitration process being a lot easier and smoother. The downside to this, however, is that the new regulations do not mention what happens if the arbitral tribunal does not fulfil these requirements. Whether the combatant court would set the award aside and decided it on its own, which is unlikely, or if the court would return the award to the arbitral tribunal to fulfil the rest of the requirements, which is more likely to happen, still remains an issue that needs to be considered. It is important for the Saudi legislator to address and clarify this issue in the new implementation rules.

#### **7.1.27. Registration and notification of the award:**

Of relevance to this issue, the Saudi regulations do not mention what happens if the award is not submitted to the competent authority within the set time limit. This is an issue that has been mentioned before and the Saudi legislator should address this issue in the new Arbitration Regulations.

#### **7.1.28. Corrections and interpretation of the award:**

The old Saudi regulations of 1983 and the implementation rules of 1985 did not set a time limit for when the parties are allowed to seek corrections or interpretations to the award from the arbitral tribunal after they have been notified of the award. This is no longer an issue as the new regulations of 2012 sets a time limit of thirty days for a party to submit a request for interpretation from the date the party was notified of the award. Furthermore, the regulations set a time limit for the tribunal to submit the



interpretation requested by a party. This is also thirty days from the date the request for interpretation was submitted to the arbitral tribunal. On the other hand, regarding the correction, the regulations set a different time limit for the arbitral tribunal to make the corrections. The time limit to request a correction on the award is fifteen days. All these new additions and the time limits were absent from the old regulations and implementation rules. Now that they have been included in the 2012 regulation, this should result in the process of issuing an award and finalising it becoming faster and more efficient.

#### **7.1.29. Challenging the Award**

The Arbitration Regulations of 1983 and its implementation rules of 1985 had brief provisions regulating the challenging of awards which not only caused confusions among the academics and practitioners but also attracted severe criticisms. To deal with this issue, the Arbitration Regulations of 2012 provides detailed provisions regulating the challenging process. It is obvious that the Saudi Arbitration Regulations of 2012 have improved a lot in regard to regulating the requirements of challenging the arbitral award and enforcing it. The main improvement here is that the new regulations now recognise the concept of reparability and partial enforcement of arbitral awards when parts of it contradict with Sharia rules. This was a major issue in the past, preventing Saudi Arabia from recognising and enforcing arbitral awards that contained a contradiction to Sharia rules. With this new regulation it is now assumed that Saudi courts will recognise the parts of arbitral awards that do not contradict with Sharia rules instead of refusing the whole award as it used to do in the past.



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