

4-AD35-4415

## **ARBITRAL AWARDS UNDER THE SAUDI LAWS: CHALLENGES AND POSSIBLE IMPROVEMENTS**

DR. AHMED A ALTAWYAN<sup>1</sup>

### **ABSTRACT**

Arbitrating parties expect that the arbitration process will result in final and binding awards. The Kingdom signed the New York Convention in 1994 to reassure foreign investors to invest in the country. Despite such acceding to a stated convention, Saudi Arabia has been described as hostile toward the recognition of arbitration agreements and enforcing foreign awards, and many international awards have been rejected (Saleem, 2012). The Kingdom has thus tried to reform its arbitration regime. A new Enforcement Law came into effect in 2012 by Royal Decree No. M/53. The new law replaced relevant provisions, and its possible impact on the enforcement of arbitral awards should be examined in the context of domestic and international arbitration. How will the new enforcement law and the new arbitration law impact arbitral awards and avoid the flaws of the previous legislation in practice? This study will address the arbitral award under Saudi law by comparing it with the modern trends in international commercial arbitration practice.

**Key Words:** enforcement law, arbitral award, Saudi court, enforcement, public policy

### **INTRODUCTION**

The Saudi ruler tried to change the past enforcement practice in the Kingdom by reassuring investors through Article 52 of the new Arbitration Law (2012) that the arbitration award issued in accordance with the new law will be authentic, authoritative, and enforceable. The legislation confirmed that arbitral awards would be enforced if they comply with the new Saudi law. In addition, the new law stated that the competent court does not have the authority to examine the facts and subject of dispute, unlike the old law, which was a major obstacle to arbitration in the Kingdom (Saudi Arbitration Law, 2012, Article 50(4)).

### **SUBMISSION TO THE COMPETENT COURT**

The new Arbitration Law requires that, to be executed, the arbitral award be submitted to the competent court after the expiration of the time permitted to challenge the validity of the award (Arbitration Law, 2012, Article 55(1)), with some attachments such as a translation of the arbitration award into Arabic certified by an accredited authority if it was issued in another language (Arbitration Law, 2012, Articles 43, 44, 53). After satisfying these legal requirements, the competent court must verify the following points:

1. The arbitral award does not conflict with an award or decision issued by a court, committee or authority that has jurisdiction over the subject of the dispute in Saudi Arabia (Arbitration Law, 2012, Article 55(2)). This requirement is logical, because it is impossible to enforce an award that conflicts with another award already issued by other judicial bodies in the kingdom.
2. The arbitral award does not include anything that contradicts the provisions of Islamic Sharia and public order in the Kingdom. The law provides more flexibility on this point, because it allows the competent court to enforce those portions of the award that do not violate Islamic Sharia and to dismiss those portions that do violate Islamic Sharia (Arbitration Law, 2012).

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<sup>1</sup> Lecturer, Al-Imam Muhammad Ibn Saud Islamic University, Saudi Arabia.

3. The arbitral award as been well and truly notified to the convicted (Arbitration Law, 2012).

These conditions set up by Saudi law to allow enforcement of an arbitral award, whether domestic or international, are similar to those required by the New York Convention, so that they will be explained extensively later in this section. Saudi law does not allow appeal against the order issued to execute the arbitration award, but the order rejecting the execution may be appealed to the competent court within thirty days of the date of issuance of the award (Arbitration Law, 2012, Article 55(3)).

### **SUBMISSION TO THE ENFORCEMENT COURT**

If an arbitral award meets the requirement of the new Arbitration Law as stated above, the arbitral award will be enforced by the competent court, which completes the first stage of enforcing the award in the Kingdom. The second step needs to follow the rules set up in the new enforcement law for taking enforcement to the award.

According to the Royal Decree No M/53, 2012, the Saudi judiciary authority must customize enforcement circuits in the public courts in the main cities and provinces (Saudi Enforcement Law, 2012). These circuits undertake the implementation of decisions or orders of the competent quasi-judicial committee, such as banking dispute committees, according to the system of implementation (Roy, 1994). In addition to judgments, decisions, and orders issued by the courts, the enforcement court is responsible for executing arbitral awards that have obtained an executive order from the competent court in accordance with the arbitration (Enforcement Law, 2012, Article 9(2)).

An arbitral award in the implementation law stage is also at risk if the implementing court reviews the award to ensure that it is not contrary to the provisions of the public order in the Kingdom (Enforcement Law, 2012, Article 11). The arbitral award will therefore be reviewed to make sure that it complies with Islamic Sharia and public order twice, at the competent court level and again at the implementing court level. The enforcement law could be a significant step to ensure that the arbitral award is executed. However, the absence of specifying the meaning of Islamic Sharia as applied in the state and public order of in the Kingdom could make the enforcement of such awards less certain in the country and could subject their enforcement to past practice. Although all decisions of an enforcement judge are final, decisions regarding enforcement disputes and claims of insolvency are subject to appeal, and the determination of the appellate court shall be final (Enforcement Law, 2012, Article 6). This is the last stage of implementing the domestic arbitral award.

The enforcement law requires that international arbitration comply with all previous requirements in arbitration and implementation law, with additional requirements (Enforcement Law, 2012, Article 11, 12). The law also states that the application of this system must not conflict with any international treaties or conventions associated with states, bodies, and organizations (Enforcement Law, 2012, Article 94). As a result, the study should customize a separate section to analyse such requirements through such international conventions and treaties and their practice in the Kingdom.

## **INTERNATIONAL ARBITRATION AND ENFORCEMENT IN THE KINGDOM**

### **Background**

During the 1950s, Saudi courts refused to enforce many international arbitral awards, because they thought that the awards were degrading and disrespectful to Islamic Sharia (the primary system of law in the Kingdom) (Roy, 1994, p. 920–924). However, the Kingdom of Saudi Arabia entered into the New York Convention on 19 April 1994.<sup>2</sup> Upon adoption, Saudi Arabia

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<sup>2</sup> See the list of contracting states at New York Arbitration Convention at <http://www.newyorkconvention.org/list+of+contracting+states>.

became the 94th party to the Convention, which requires all signatories to recognize the arbitration agreements and awards issued by other member nations. As a result, it was supposed that the Kingdom would become more attractive to investment in the modern global community. This study will examine whether the Kingdom's adoption of the New York Convention has advanced the successful application of international commercial arbitration by foreign investors in the state by analysing the following points.

### **Principles Governing Recognition and Enforcement**

According to Article III of the New York Convention, each contracting state must recognize international arbitral awards as binding and enforce them by the rules of procedure of the state through which the award is issued and also under the conditions stated in the articles of the Convention (The New York Convention, 1958). The Convention thus distinguishes between recognizing and enforcing arbitration awards. Recognizing the award means acknowledging that it is valid and binding (Moses, 2012, p. 212–213). The award will thus have an official legal status, as the result of which the award cannot be re-litigated or arbitrated (Moses, 2012). Saudi Arabia recognizes international arbitral awards under the new Arbitration Law and Enforcement Law as long as such awards comply with its rules (Arbitration Law, 2012, Articles 3, 8(2)). To accept the arbitral award, however, Saudi law requires that the arbitral tribunal deposit the original copy of the award or a signed copy in the language in which it was delivered by the competent court within 15 days, with a translation into Arabic certified by an accredited authority if it was performed in a foreign language as stated earlier (Arbitration Law, 2012, Articles 43, 44). The terms of enforcement frequently used for the purpose of execution, which is obtained under the legal process of the authorizing jurisdiction, is explained in the following points.

### **Requirements for Enforcement**

#### ***Scope***

The New York Convention applies to international awards, as provided explicitly in Article I(1) of the Convention, which refers to two types of awards:

- A. Arbitral awards made in the territory of a State other than the State in which the recognition and enforcement of such arbitral awards are sought;
- B. Arbitral awards that are not considered domestic awards in the State in which their recognition and enforcement are sought (The New York Convention, 1958).

The nature of the first type as international awards issued between states is clear, but the definition of a domestic award is not provided in the Convention, which leads to different determinations between states about the second type. Many countries thus enforce only the first type of award, such as Japan and Netherlands. Other states, like the United States, apply this Convention even if the arbitration involves citizens of the United States as non-domestic awards, for example if the relationship involves property located abroad, envisages performance of enforcement abroad, or has some other reasonable relation with one or more foreign states (Moses, 2012, p. 213). Like the United States, Saudi law considers some awards as non-domestic, even if they take place between Saudis. For example:

- A. If the headquarters of both parties to the arbitration lie in more than one country at the time of the arbitration agreement, and if one party has more than one business centre, this depends mainly on the centre that is most relevant to the subject of the dispute, and if one or both arbitrating parties do not have a certain business centre, it depends mainly on their usual residential address.
- B. If the headquarters of both arbitrating parties lie in the same country at the time of the arbitration agreement, and one of the following places lies outside of that country:
  - 1- The venue of the arbitration procedures as assigned in the arbitration agreement or the agreement refers to how to assign the venue;

- 2- The place of executing an essential part of the obligations arising from the trading affairs between both parties; or
- 3- The place most relevant to the subject of the dispute.
- C. If both parties agree to resort to an organization or a permanent arbitration authority, or an arbitration centre lying outside the Kingdom.
- D. If the arbitration subject included in the arbitration agreement is related to more than one country (Arbitration Law, 2012, Article 3).

The Convention thus applies for one type of international awards that all contracting states are bound to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. The arbitral awards that are not considered domestic awards have different determination between laws, which leads to differences in their recognition and enforcement.

In addition to defining its scope, the Convention allows states to make two reservations (New York Convention, 1958, Article I(3)). The first is allowing any contracting state on the basis of the reciprocity principle to declare that applying the Convention to the recognition and enforcement of awards will be only in the territory of another contracting State (New York Convention, 1958, Article I(3)). That reservation is adopted by many contracting states, one of which is the Kingdom of Saudi Arabia, which has declared: ‘On the basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and enforcement of arbitral awards made in the territory of a Contracting State’.<sup>3</sup> In addition to this reservation, the Saudi Ruler states in the enforcement law that the enforcement judge must not enforce an international award except on the basis of reciprocity (Enforcement Law, 2012, Article 11, 12). The only difference between the new enforcement law and the new rules is that the party seeking enforcement under the old law must show that the jurisdiction that issued the international award will, as a matter of reciprocity, enforce an award of the Kingdom, and the new law states clearly that it is the enforcement judge who must find such reciprocity (Al-Ammari and Martin, 2014, p. 404). For example, in one case, a Saudi court requested a specific example of an enforcement of a Saudi judgment in an American court from a party seeking enforcement of an arbitral award in the Kingdom. The party was unable to provide such an example but instead provided the Saudi court with an opinion from the legal office of the United States Department of State, which confirmed that American courts recognize and enforce Saudi judgments. The Saudi court was not, however, satisfied by such proof and refused to recognize and enforce the international arbitration award issued in the United States (Al-Ammari and Martin, 2014). It is not clear how a Saudi court will handle this matter under the new law, because the new law is a good step toward saving the arbitrating parties time and energy by leaving this responsibility of proving a matter of reciprocity to the court. As a result, according to the limitation of reciprocity that Saudi Arabia has adopted, arbitrating parties who aim to enforce an award in the Kingdom should consider the place of arbitration and where it occurs to avoid encountering obstacles at the enforcement stage.

The second reservation allowed under the New York Convention is that a contracting state may declare that the Convention will apply only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law of the state making such a declaration (New York Convention, 1958, Article I(3)). Saudi Arabia is not among the 44 countries that have accepted this reservation. However, since the term ‘commercial’ is not defined, the practice will be different from country to country, with the result that international arbitration between states will not be uniform in practice. This may cause the Convention to fail in one of its goals (Moses, 2012, p. 214).

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<sup>3</sup> Such reservations are available at New York Convention website at: <http://www.newyorkconvention.org/list+of+contracting+states>.

### ***Requirements for Enforcement***

The New York Convention does not provide specific guidance about the procedure for enforcement, but leaves this matter to the contracting states in accordance with their own rules (New York Convention, 1958, Article III), except for some requirements stated in Article IV:

1. The party applying for recognition and enforcement of the arbitral award must, at the time of the application, provide:
  - a) The duly authenticated original arbitral award or a duly certified copy thereof;
  - b) The original agreement or a duly certified copy thereof.
2. If the arbitral award or agreement is not made in an official language of the state in which the award is relied upon, the arbitrating party applying for recognition and enforcement of the award must produce a translation of these documents into that language. The translation must be certified by an official or sworn translator or by a diplomatic or consular agent (New York Convention, 1958, Article IV).

Article 53 of the new Saudi Arbitration Law gives the same requirements as the Convention, as explained earlier (Arbitration Law, 2012).

In addition to the above-stated requirements, the Convention requires that contracting states not impose more onerous terms or higher services fees or charges on the recognition or enforcement of arbitration awards to which this Convention applies than are imposed on the recognition or enforcement of domestic awards (New York Convention, 1958, Article III). The Saudi law does not differentiate between domestic and international awards in the conditions or fees in the course of enforcing arbitration awards, and most of the conditions imposed by Saudi laws are similar to those that stated in the Convention. However, Saudi enforcement law distinguished between local and international awards issued from the Kingdom, and international awards from a foreign state in the enforcement and recognition stage. The international awards that have come from another country do not need to go to the competent court of appeal like other arbitral awards for ratification but can be enforced directly through enforcement courts (Enforcement Law, 2012, Article 9). Hence, enforcement of international awards issued from a foreign state will face only one stage, while other awards will face two stages, one before the competent court and another at an enforcement court, which make them harder to enforce than the first type.

### **Grounds for Non-enforcement Under the Convention**

Grounds for not enforcing an arbitral award under the New York Convention are the same as the grounds set forth in Saudi law and the UNCITRAL Model Law (Enforcement Law, 2012, Article 11; New York Convention Articles V; UNCITRAL Model Law on International Commercial Arbitration, 2006, Article 35, 36; Arbitration Law, 2012, Article 55). The Convention provides specific grounds for not enforcing an arbitral award, which means that the award must be enforced completely, unless there exists one of the stated grounds (New York Convention, 1958, Article V). Such grounds are not based on the merits, so the facts and the law in the case cannot be reviewed under the Convention. However, the grounds for not enforcing an award is based on the arbitrating parties' will as stated in the arbitration agreement and on the integrity of the arbitration process, such as fairness and taking a chance at a reasonable hearing (American Arbitration Association, 2006, p. 157–175; Moses, 2012, p. 217).

### ***Incapacity and Invalidity***

The first defence that an arbitrating party can assert is comprised of the following:

- a. Incapacity of the party or;
- b. The arbitration agreement is not valid.

The determination of incapacity or invalidity will be in accordance with the law that was chosen by the arbitrating parties, or, if no law was chosen, it will be in accordance with the law of the country in which the award was made (New York Convention, 1958, Article V(1)). Under the Saudi Arbitration Law, there is no determined age of legal capacity. However, in returning to other Saudi laws that handle such a matter, such as the Child Protection Law, the study found that 18 years old is deemed to be the age of legal capacity (The Saudi Child Protection Law, 2014; Saudi Labour Law, 2005, Article 2). In legal entities, however, the legal capacity will fall to the person who is authorized to sign the arbitration contract for legal entities according to the type of company. For instance, in the joint stock company, the Chairman of the Board of Directors represents the company before the courts, tribunals and third parties (Saudi Corporate Law, 2015, Article 82(1)). Hence, every legal entity has a different form of legal capacity depending on the Saudi law of companies. Although the Convention refers the rules of incapacity and invalidity to the applicable law, it provides the standard that the arbitration agreement must meet to be valid. In the arbitration agreement, which must be in writing, the arbitrating parties undertake to submit to arbitration all or any differences that arise or that may arise between them with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (The New York Convention, 1958, Article II). The Convention also states that the term 'agreement in writing' under the Convention must include an arbitration clause in a contract or an arbitration agreement, and it must be signed by the arbitrating parties or contained in an exchange of letters or telegrams (The New York Convention, 1958).

#### ***Lack of Notice or Fairness***

The second ground for not enforcing an arbitral award under the New York Convention is not giving an arbitrating party full opportunity to present his side of the disputed case (New York Convention, 1958, Article V(1)(b)). This defence can be based on a lack of notice of the appointment of the arbitration tribunal or of the arbitration proceedings or on the basis that the party was unable to present his case (The New York Convention, 1958). One of the famous examples of this ground is *Iran Aircraft Industries v. Avco Corp*<sup>4</sup>. Avco Corporation (Avco) entered into a contract with Iran Aircraft Industries for the repair and replacement of helicopter engines. A dispute between the parties arose, and an arbitral tribunal denied Avco's claims. The United States Court of Appeals for the Second Circuit denied enforcement of the award. In so ruling, it found that the tribunal's award was subject to the defences to enforcement provided in the New York Convention, because Avco had been 'unable to present its case' within the meaning of Article V(b) of the Convention. In other words, Avco did not have the chance to present its case in a meaningful manner. One of the judges had approved a method of proof, proposed by Avco, which was a submission of Avco's audited accounts receivable ledgers. However, another judge later asked for the actual invoices to substantiate Avco's claim. The Court thus concluded on appeal that Avco was misled regarding the evidence that it was required to submit and was thus deprived of the opportunity of presenting its case.

#### ***Arbitrator Acting in Excess of Authority***

The third defence that an arbitrating party can assert is actions by the arbitral tribunal that exceed its authority (The New York Convention, 1958, Article V(1)(c)). This can take different forms, such as that the arbitration award deals with matters not within the scope of the arbitration agreement, or that it contains decisions on issues beyond the framework of the arbitration agreement (The New York Convention, 1958). However, if decisions on matters submitted to arbitration can be separated from those that were not, those parts of the arbitration award that contain decisions on matters submitted to arbitration can be recognized and enforced (The New York Convention, 1958). In international commercial arbitration, the defence based

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<sup>4</sup> (1992) 980 F. 2d 141 - Court of Appeals, 2nd Circuit.

on the ground of exceeding authority non-enforcement has rarely succeeded (Moses, 2012, p. 221), and the study did not find a case in the Saudi courts has addressed this issue.

***The Tribunal or the Procedure Is Not in Accord with the Arbitration Agreement***

Article V(d) of the New York Convention provides that the grounds for not enforcing an arbitration award include the composition of the arbitration tribunal or the arbitration procedure did not comply with the arbitration agreement. Also, the arbitration was not in accordance with the law of the state in which the arbitration took place (New York Convention, 1958). The defence on these grounds is not often successful in international commercial arbitration (Moses, 2012, p. 222).

***The Award Is Not Yet Binding or Has Been Set Aside***

The fifth defence is that the arbitration award is not yet binding on the arbitrating parties, or that it has been set aside or suspended, whether by the competent authority or under the law of the country in which the award was made (The New York Convention, 1958, Article V(1)(e)). The award must thus be binding and unappealable so as to be fully enforceable; this process was explained under Saudi law earlier in the article. The municipal courts, however, have discretion to enforce an arbitral award even if the award was vacated in another jurisdiction, because the Convention uses the word ‘may’ instead of ‘must’ if defences arise that could create a loophole in applying the Convention between contracted states. At the same time it provides an advantage for enforcing the vacated award in the countries that can enforce such awards, such as France, and unlike the Kingdom of Saudi Arabia (Moses, 2012, p. 222–226).

The last two defences under the New York Convention are those that permit the court to refuse recognition and enforcement of an arbitral award by itself without a request from an arbitrating party (The New York Convention, 1958, Article V(2)).

***Subject Matter Not Arbitrable***

Not all subject matters are capable of arbitration, and some matters can be arbitrated in one country but not in another (Moses, 2012, p. 226–228). The New York Convention refers to the law of arbitrability only from the perspective of enforcing the award. It requires the competent court to look to its own rules to determine whether the subject of dispute is arbitrable (New York Convention, 1958, Article V). Determination of the law governing arbitrability is thus significant and crucial.

Under Saudi law, the issue of the arbitrability of the subject matter is vague. The provisions of the Saudi law provide two types of disputes that cannot be arbitrated:

- a. Personal status, and
- b. Issues that cannot be reconciled (Arbitration Law, 2012, Article 2).

The first type is stated, but the second one is not. However, the implementing regulations of the old arbitration law mention the second type by provided three instances of disputes that cannot be reconciled (Implementing Regulations of the Saudi Arbitration Law, 1983, Article 1):

1. Hadd (plural: Hudud), which refers in Islamic Sharia to unchangeable punishments prescribed by primary sources of Islamic Sharia, considered as the right of God (Allah) (Hossain, 2013, p. 7–8). Hudud are specified both in their quantity and quality and as being the right of Allah to prescribe for public and individual interest. In addition, Muslims cannot annul them. According to the majority of the Muslim scholars, Hudud crimes are as follows:
  - a. Zina (unlawful sexual intercourse);
  - b. Theft;
  - c. Qazf (false accusation of Zina);
  - d. Drinking intoxicants;
  - e. Hirabah (highway robbery);
  - f. Baghy (rebellion); and

g. Riddah (apostasy) (Hossain, 2013).

Once the offender is convicted of a Hadd crime, the judge has no choice but to impose the prescribed punishments, neither more nor less, even if the victim consents to mitigation or removal of the offence (Hossain, 2013).

2. Lian

This dispute involves a husband who accuses his wife of adultery without supplying witnesses (Nasir, 1990, p. 159–161).

Such a dispute is explicitly addressed in the Quran, which states that the husband must swear four times that his accusation of the wife is real, followed by a fifth oath in which he invokes the wrath of God (Allah) upon himself if he is lying. The wife may then neutralize the claim by responding to it with four oaths of her own, and a fifth calling upon her the wrath of God (Allah) if her husband is telling the truth. If she refuses to take the oath, she is presumed guilty and subject to the punishment for adultery. However, if she takes the oath, she is declared innocent and permanently divorced from her husband. As a result, her husband forfeits any paternity claims over children born after their sworn oaths (Nasir, 1990, p. 159–161).

3. Any subject related to the public policy

The third instance provides a broad loophole, because ‘public policy’ is a general term in meaning and vague in practice, as will be shown in the last defence of the New York Convention. Because of this, in addition to the generality of the last instance stated in the implementing regulations of the old arbitration law, all previous situations given as examples, which means that there are other subjects, cannot be reconciled and thus cannot be arbitrated, which leads to a kind of risk at the enforcement stage in the Saudi court.

**Public Policy**

Article V(b) of the New York Convention authorizes the competent court to refuse to enforce or recognize the arbitral award if doing so would be contrary to the public policy of that state (New York Convention, 1958). This defence should arise if enforcing such an award would violate the forum country’s most basic notions of morality and justice (Moses, 2012, p. 228–229). The term ‘public policy’ is not defined in the Convention, so that the states apply it differently. Some narrow its scope to achieve the Convention’s goal of enforcing international awards in a uniform way among states. Other countries interpret this defence broadly to protect national political interests (Moses, 2012). For example, the United States Second Circuit Court of Appeals affirmed the enforcement of an arbitral award against an American company:

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be refused on this basis only where enforcement of such an award would violate the forum country’s most basic notions of morality and justice. (*Parsons and Whittmore Overseas Co., Inc. v. Société General de L’industrie du Papier*).<sup>5</sup>

In 1995, however, a Turkish court refused to enforce an ICC award that was based on Turkish substantive law, because the tribunal did not use both Turkish substantive law and Turkish procedural law. This violates Turkish public policy, even though there is no material difference in the procedural law of Turkey and the procedural law that applied (Moses, 2012, p. 228). Hence, the absence of a specific definition of ‘public policy’ in the Convention creates a broad loophole in practice between contracting states, which can lead to unjust and improper results.

The issue of public policy is different under Saudi law. Islamic Sharia as applied in Saudi courts is considered part of the public policy in the Kingdom (Al-Ammari and Martin, 2014, p. 402–405). However, public policy principles cannot be specified in the Saudi courts for two main reasons. First, there are not enough published cases. Saudi Arabia has begun to

<sup>5</sup> (1974), 508 F. 2d 969 - Court of Appeals, 2nd Circuit.

release a few of the cases, but there are still not enough to establish a clear picture of the meaning of public policy in the Kingdom.<sup>6</sup>

Even if the Kingdom had enough published cases, the principle of *stare decisis* is not recognized in the Saudi courts, which makes it hard to predict future decisions even if the facts are the same as or very close to the facts of the previous case (Al-Ammari and Martin, 2014, p. 405). The Ijtihad (Bhala, 2011, p. 334–335)<sup>7</sup> as applied in the Saudi court without binding precedents thus provides the court with the power to refuse any award if the court considers the award to be against public policy or Islamic Sharia, even if the subject is not settled among Muslim jurists. For example, in Case Number: 3375/1 / ق of the year 1424 h,<sup>8</sup> the Saudi court refused to enforce a foreign judgment for the amount of 50.69338 USD. The court based its decision on the fact that the judgment involved singing and music, and the Kingdom of Saudi Arabia derives its authority from the Book of Allah and the Sunnah, which forbid these. The court also confirmed that, although there is a debate between Muslim jurists about whether singing is forbidden, it would not change the decision, because it had arrived at the judgment based on faith. This case provides a clear picture of how the Ijtihad as applied in the Saudi court leads to an unpredictable decision about refusing to recognize and enforce an international award.

Thus, Article V(2)(b) of the New York Convention provides a safe harbour in which the Kingdom can refuse to recognize or enforce an international arbitral award contrary to public policy or Islamic Sharia while maintaining its history and religious beliefs. However, this creates a problem for foreign investors and contractors who choose to do business in the Kingdom. The Kingdom's adoption of the New York Convention was intended to give the international community security in commercial contracts with Saudi Arabia, and to confirm that disputes will be adjudicated fairly. On the contrary, Saudi courts will find it easy to reject international arbitral awards under New York Convention Article V (b), as shown earlier, and it may not be required to enforce any more international arbitral awards than was the case prior to the Kingdom's 1994 accession to the New York Convention (Roy, 1994, p. 953–955).

For a loophole in the Convention, there are different proposals to resolve the public policy matter in the Convention, such as a proposal to establish a new international court, a new convention, a new organization, or even define an international framework of public policy with which all contracting states must comply. Such proposals are explained extensively in the different sources (American Arbitration Association, 2006, p. 50–52). However, this study found that the Kingdom of Saudi Arabia must review its handling of the public policy question to achieve the aim of the New York Convention.

The Kingdom can give the New York Convention greater effect if it chooses to give Article V(b) a narrow reading. For example, American courts have held that all New York Convention defences should be given a narrow reading so that they are effective only when enforcement of an award would violate the most fundamental notions of justice (Roy, 1994, p. 953–955). The Kingdom of Saudi Arabia, with its need to gain the confidence of the international commercial community, may choose to give the public policy defence set forth in Article V(2)(b) of the New York Convention a narrow reading, which will undoubtedly require a review of the Ijtihad as it is applied in Saudi courts and which could conflict with the predictability of decisions and obstruct efforts to bring the Kingdom into step with the rest of the international community.

<sup>6</sup> The Saudi courts have begun to publish some of cases at its website at <http://www.bog.gov.sa/ScientificContent/JudicialBlogs>.

<sup>7</sup> The process of legal reasoning through which the jurist derives the law from the Quran and the Sunnah of the Prophet Muhammad by independent reasoning.

<sup>8</sup> ق is the Arabic letter and 1424 h is the Muslim calendar. The case is available at the Diwan Almazalim website at: <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/1430/Documents/>.

## CONCLUSION

The new Saudi Enforcement Law is a significant step toward harmonizing Saudi law with the international community and its standards. This new law also facilitates enforcement of international and domestic arbitral awards with the creation of a specific authority and specific procedures applicable to such enforcement, which was absent in the past. In theory, the enforcement court will not review the merit of the dispute. In practice, however, the public policy addressed by the new Enforcement Law could be obstructive, especially towards awards issued by foreign arbitrators who are not versed in Saudi law or Islamic Sharia as applied in the Saudi courts.

The meaning of ‘public policy’ is not clear in the Saudi courts, and Islamic Sharia applies it through the Ijtihad, which is not bound by any precedent decisions. This makes an arbitral award that violates Saudi public policy undefined. However, enforcement judges may refuse to enforce only that part of the award that conflicts with public policy instead of the entire award, unless that part is not severable from the rest of the arbitral award. The new Saudi Enforcement Law remains a significant step toward international legal principles, but it needs to review public policy matters to be more predictable at the enforcement stage of the arbitration process.

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