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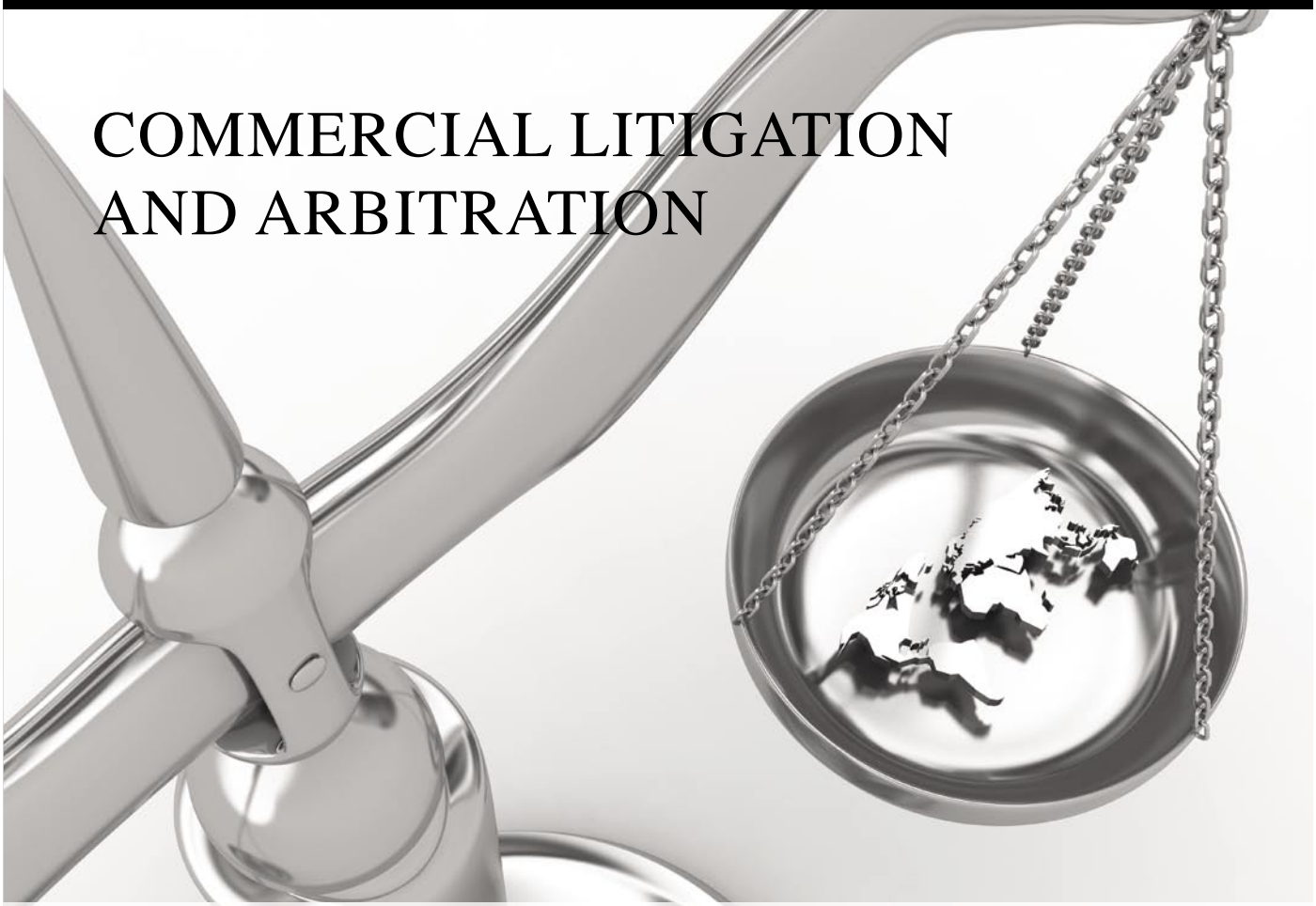

## Dispute resolution with the end objective in mind

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FW MAGAZINE

REPRINTED FROM

May 2011 Issue

MIDDLE EAST

# International arbitration of commercial disputes involving parties from Saudi Arabia and the GCC

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While the Arab world has a rich history of using arbitration to address a wide range of disputes, more recent experience in the latter part of the 20th Century has often been unsatisfactory for both local and foreign parties relying on arbitration to fairly resolve commercial disagreements. While 'freedom of contract' and the concept of arbitration are well founded under Islamic (or Shariah) law, there has been a particular wariness in Saudi Arabia towards international dispute resolution that seeks to designate a neutral choice-of-law and independent arbitral forum as an alternative to judicial enforcement of contractual rights in the Saudi courts. The present analysis looks at some practical issues and emerging developments that may affect the approach to be taken regarding international arbitration clauses and proceedings involving parties from Saudi Arabia and the GCC.

The practice of arbitration (tahkim) in the Middle East was an integral part of tribal justice in the pre-Islamic period. It is also specifically approved in the Qur'an (Koran), as is the use of consensus (ijma) as an alternative dispute resolution tool. Indeed, the Treaty of Medinah signed in 622 A.D. among Muslims, non-Muslim Arabs and Jews called for disputes to be resolved through arbitration. Even in the early 1900s, European merchants and traders made use of a commercial arbitration centre in Bahrain before London and Paris became prominent for such matters, and Saudi Arabia relied primarily on arbitration to resolve oil concession disputes through the 1950s.

That long tradition began to erode, however, when a series of arbitration decisions disregarded otherwise applicable Islamic domestic law and dismissively concluded that there was no general law of contract in the Shariah, thus permitting foreign arbitrators to rely on English law to hand down decisions adverse to the Sheikh of Abu Dhabi (1951), Ruler of Qatar (1953) and Kingdom of Saudi Arabia (1963). The latter decision stemmed from a historic dispute between the Arabian American Oil Company (Aramco) and the Saudi government in which non-Arab arbitrators determined that Shariah was not a sufficiently detailed legal system to handle a complex energy dispute and thus could not serve as governing law. Since that decision, governmental entities in the Kingdom have been prohibited by Royal Decree from submitting to mechanisms for international dispute resolution or the selection of any foreign law to govern a dispute, absent a specific waiver from the Council of Ministers. The prevailing frustration and scepticism in Saudi Arabia and other GCC countries toward Western-style arbitration is grounded in the belief that the international framework as it has emerged gives short shrift to the core religious foundation, cultural values, language and legal traditions of Islam and the Arab world.

This lingering distrust has been paired with other stereotypical perceptions in both directions. Through Arab eyes, the Western world is often viewed as arrogant, disrespectful, overly posturing in written communications and generally manipulative of the legal system. In contrast, Saudis and other Gulf businesspersons may not be given the credit they deserve as successful (and sophisticated) professionals in finance, trade, technology, science, law and other areas of endeavour, sometimes because of limited second language capabilities. Further, the fact that GCC countries have relied to a significant extent on human resources from other countries as they develop business opportunities and diversify their economies should not be presumed to reflect on the quality or diligence of the talent being deployed. Finally, the assumptions and preferred methods with respect to business relationships and associated communications are simply different and more personal in Saudi Arabia and the GCC (with a general disinclination to engage in duelling correspondence in the Western tradition), which derives in part from Shariah principles and Arab culture generally. While the means of communicating in the Arab business world may be significantly different from the West – frequently relying more on personal relationships and verbal communications than written correspondence – it is certainly not wrong or any less credible. Many of these perceptions creep into the world of international dispute resolution when parties from Saudi Arabia or the GCC are involved, and efforts should be directed at evening the playing field and crafting arbitration mechanisms which help avoid misunderstandings, maximise good-will, encourage mutual fairness and make the entire process more efficient.

First, if the other party and its assets are in Saudi Arabia, careful thought should be given to the effectiveness of relying on a standard arbitration provision that, for example, seeks to have an international tribunal apply English or New York law. Since any award would have to be enforced in Saudi Arabia, and the local courts will conduct a de novo review based on Shariah law as applied in Saudi Arabia, it might be wiser and more productive to simply designate Saudi law (or Shariah law principles) as controlling in the arbitration clause. For several reasons, it might also be preferable to select a regional arbitral forum that will apply recognised international standards, which may be more efficient, culturally sensitive and comfortable for the parties, and result in an award that will have a better chance of being recognised for subsequent enforcement in Saudi Arabia or other GCC jurisdictions. Finally, it may be that a different approach to selecting an arbitral tribunal is more productive. For example, each party might designate one member of the tribunal who would not have to be a lawyer, and those two members (or an independent arbitral body) would then designate a chairman who must be familiar with Shariah law. Again, the goal would be to obtain a more efficient decision, in a setting with greater cultural sensitivity, which would also be viewed more favourably in the context of enforcement.

London, New York, Paris, Hong Kong and Singapore are well recognised arbitration cities, and commonly designated in contractual arbitration clauses for the resolution of international disputes. But some new and interesting options are emerging in the Middle East, with legal reforms derived from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration or other recognised standards and the establishment of regional centres promising to be progressive, accessible, transparent, confidential, efficient and user-friendly for both local and foreign parties. For example, Qatar recently opened its International Arbitration and Conciliation Centre. The UAE has the Dubai International Arbitration Centre, the Abu Dhabi Commercial Conciliation and Arbitration Centre (established in 1993), and the more recent Dubai International Financial Centre (DIFC) which has enacted comprehensive arbitration legislation making it open to parties beyond its own jurisdiction and aligned with the London Court of International Arbitration ▸▸

(LCIA). Similarly, Bahrain has partnered with the American Arbitration Association (AAA) to create the Bahrain Chamber of Dispute Resolution (BCDR). The BCDR-AAA was established in conjunction with legislation creating an arbitration 'free zone' so that disputes heard there will not be subject to legal challenge in Bahrain, so long as parties agree to be bound by the outcome. These and other regional alternatives are clearly competing to be on the cutting edge of international dispute resolution, which those countries view as being an important component of their continuing investment and economic diversification programmes.

Saudi Arabia's domestic arbitration system (Saudi Arbitration Act issued by Royal Decree in 1983) is not based on the UNCITRAL Model Law and has far greater uncertainties and duplicative judicial involvement than other arbitration laws in the region. However, it is possible that Saudi and international parties might both benefit from designating one of the newer alternatives in Bahrain, Qatar or the UAE. The Kingdom is a party to the 1983 Convention on Judicial Co-operation between the States of the Arab League (Riyadh Convention), and Article 37 provides that arbitral awards and judgments from originating states generally will be recognised and enforced in recipient states.

With the continued dramatic growth and economic diversification in Saudi Arabia and throughout the GCC, international arbitration of commercial disputes is becoming increasingly common. While arbitration has been a part of the region's religious, legal and cultural heritage for generations, current international dispute resolution mechanisms must be carefully tailored to provide a respected and efficient platform to reach fair resolutions, which can then be effectively enforced. Reliance on a standard arbitration clause with a foreign choice-of-law and designation of a location outside the GCC may not be the best option for either local or international parties. And if a commercial dispute is ultimately going to be governed by Shariah law as applied in Saudi Arabia, for example, the contractual provisions must be carefully reviewed for terms or conditions that may be rejected by Saudi courts. These issues are not always obvious, and the goal is to avoid unwelcome surprises down the road. ■

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For more than 20 years, the lawyers of **Squire Sanders** (www.ssd.com) have handled a wide range of matters throughout the Middle East including Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen. Through its recent combination with Hammonds, Squire Sanders is now one of the top 25 global law firms. In addition to assisting local and multinational companies, financial institutions, and investors establishing or expanding their operations in the Middle East, the firm has advised numerous governments and governmental instrumentalities throughout the region. Working closely with independent network firm **EK Partners & Al-Enezee Legal Counsel** in Riyadh and **El-Khoury & Partners** in Beirut (EKP, www.ekplegal.com), the firm's team seamlessly provides clients with the optimal combination of local presence, legal expertise, sector experience, language capacity, and cultural understanding. In the context of commercial disputes, the team of Squire Sanders and EKP lawyers has the skill and experience to handle the full range of matters from local Saudi litigation to complex international dispute resolution under any of the customary mechanisms, jurisdictions, and choice-of-law. Other Middle East matters include those involving corporate law and governance, cross-border strategic transactions, mergers and acquisitions, foreign investment, project finance, private equity, banking, securities, construction, real estate, hospitality, administrative, regulatory, health care, telecommunications, maritime, intellectual property, energy, environmental, insurance, labour and employment, international trade, taxation, government restructuring, and privatisation.