

SCCA Saudi Case Law Study: Three Years in Review

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In 2021, driven by the interest in understanding the arbitration ecosystem in Saudi Arabia and promoting Riyadh as an arbitral seat, the Saudi Center for Commercial Arbitration (SCCA) collaborated with the Saudi Ministry of Justice (MOJ) in soliciting over 1400 judgments of courts of appeal, as well as certain Supreme Court judgments, issued between 2017 and 2022 relating to motions in aid of arbitration proceedings and motions to enforce or annul arbitral awards. It was particularly important for SCCA to attach empirical data to the enforceability (or not) of arbitral awards in Saudi Arabia. This article outlines SCCA's statistical findings based on the culmination of three years of case law review and summarizes certain interesting decisions that arose in the review process. Indeed, the case law study revealed results far beyond SCCA's expectations, demonstrating a consistent record of an enforcement rate exceeding 92% in every batch of reviewed judgments. The case law study also revealed the courts' deference to arbitration and an unwillingness to assert jurisdiction in those cases.

Keywords: arbitration, Saudi Arabia, KSA, enforcement, annulment, award, sharia, Islam, SCCA, court

1 INTRODUCTION

In 2021, driven by the interest in understanding the arbitration ecosystem in Saudi Arabia and promoting Riyadh as an arbitral seat, the Saudi Centre for Commercial Arbitration ('SCCA') collaborated with the Saudi Ministry of Justice (MOJ) in soliciting over 1400 judgments of courts of appeal, which are the supervisory courts under the Saudi Arbitration Law, as well as certain Supreme Court judgments, to examine judgments issued between 2017 and 2022 relating to motions in aid of arbitration proceedings and motions to enforce or annul arbitral awards (hereinafter referred to as 'award' or 'awards').

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2 OVERVIEW OF STATISTICS

2023 marked SCCA's third year of studying Saudi case law related to arbitration. In 2023 alone, SCCA reviewed 700 court of appeals judgments from 2022, and for the first time, three Supreme Court judgments. Out of 716 motions filed with the courts of appeal, **316 (44%) related to awards**, which SCCA closely examined.¹ The results show continued judicial support in aid of arbitration. 88 of the 316 motions were motions to annul the award, making up 27.85%. Of the eighty-eight motions to annul only five (5.68%) were successful. In other words, eighty-three motions (94.32%) to annul awards were denied.

3 SHARIA AS PUBLIC POLICY

Article 50(2) of the Saudi Arbitration Law² mimics in great part Article V(2) of the Convention on the Recognition of Foreign Arbitral Awards of 1958 (the 'New York Convention'),³ but adds Sharia as an additional requirement that is on the same footing as public policy. It states in pertinent part as follows:

The competent court considering the annulment action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties.

This turns on the question of how to define the threshold for violating Sharia and public policy, which has been highly debated in Saudi courts for some years. In 2010, the Board of Grievances⁴ rejected an annulment motion, noting that an award would only be considered inconsistent with Sharia, and thus be annulled, if it violated authoritative and unambiguous texts.⁵ The following year, rejecting yet another annulment motion, the Board of Grievances explained that for an award to be annulled, it must violate well established or authoritative provisions of the Quran or Sunnah or an existing scholarly consensus (*ijma*).⁶ Moreover, in addressing a request from the Riyadh General Court for direction on the meaning of 'Public

¹ The balance of motions related to arbitral tribunals (50%), arbitration agreements (3%), and other areas (3%).

² Any articles not further defined are those of the Arbitration Law (2012).

³ https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (accessed 21 Oct. 2024).

⁴ The Board of Grievances is the administrative court in Saudi Arabia. Additionally, it also acted as the commercial court until the standalone commercial courts started operations in 2017.

⁵ Board of Grievances, Jul. 2010, Case No. 474/3/1423.

⁶ Board of Grievances, Sep. 2011, Case No. 4248/1.

System/Policy’, Royal Decree No. 44682 of 22 August 2021 confirmed that Sharia and public policy are essentially covering the same area, but clarified that the definition of public policy is limited to general rules of Islamic law that exist in the Quran and the Sunnah.⁷ More recent decisions even found that such violations must be an overt, striking violation of Islamic law.⁸ Only then does a violation exceed the threshold and fall within the realm of Article 50(2). The list of known items that meet this threshold is not extensive and could in principle be summarized in a handful of examples such as ‘straightforward’ interest (*Usury/Riba*), gambling, selling alcohol, prostitution, pornography, and a few other examples. These conclusions are consistent with the results found in the case studies over the three-year span, which demonstrate the high threshold inherent to Article 50(2).

To identify the impact of Sharia on the enforceability of arbitral awards, SCCA analysed the grounds of annulment motions between 2017 and 2022. SCCA identified in total 363 grounds raised in annulment proceedings.⁹ Interestingly, only thirty-seven of those grounds were based on Sharia, making up merely 10.19% of the total in grounds. Moreover, of the thirty-seven grounds based on Sharia only five grounds were successful. Taking a step back, this means that of 349 motions to annul from 2017 to 2022, only five Sharia-based motions actually led to the annulment of an award, making up only 1.43% of the total in motions. Notably, in the most recent study of the 2022 decisions, SCCA found 13 Sharia-based grounds to annul awards, none of which succeeded.

3.1 TIME-RELATED COSTS DO NOT VIOLATE SHARIA

The most common Sharia-based ground is interest or practices arguably tantamount to interest, described as usury. In a case before the Jeddah Commercial Court of Appeals, the plaintiff (respondent)¹⁰ petitioned the court to annul the award on grounds, inter alia, that the arbitral tribunal (hereinafter referred to as ‘tribunal’ or ‘tribunals’) awarded Sharia-prohibited interest. The court rejected the ‘interest’ claim and clarified that the amounts awarded were time-related costs,

⁷ James MacPherson and Fatima Balfaqeeh, Saudi Center for Commercial Arbitration, *A Progress Report on Saudi Arabia’s Arbitration-Friendliness*, 21 Apr. 2023, <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2023/article/progress-report-saudi-arabias-arbitration-friendliness>.

⁸ First Commercial Circuit of the Eastern Province Court of Appeals, 10 Apr. 2019, Case No. 883 of 1440H; First Commercial Circuit of the Eastern Province Court of Appeals, 15 May 2019, Case No. 989 of 1440H.

⁹ 179 grounds in the first report (2017–2020 judgments), 82 grounds in the second report (2021 judgments), and 102 grounds in the third report (2022 judgments).

¹⁰ For purposes of this article, (1) plaintiff refers to the party filing a motion in court; (2) defendant is the opposing party to the court motion; (3) claimant refers to the party filing a claim in arbitration; and (4) respondent is the opposing party to the claim in arbitration.

particularly defined as indirect administrative expenses, for 871 days of delay for which the plaintiff was responsible. Thus, these amounts were not Sharia-prohibited interest.¹¹

3.2 LOST PROFITS AS GROUNDS FOR VIOLATION OF SHARIA

Over the years, Saudi courts have demonstrated that lost profits are not contrary to Sharia, provided they meet certain requirements. This is echoed in court judgments concerning annulment motions. In a case before the Riyadh Commercial Court of Appeals, the plaintiff (respondent) argued, *inter alia*, that the tribunal violated Sharia principles by awarding lost profits.¹² The court rejected the motion and disregarded this and other arguments reasoning that it requires a *de novo* review of the award in violation of Article 50(4), which provides that '[t]he competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute'. Had the court considered lost profits to be contrary to Sharia, it would have invoked Article 50(2) pertaining to public policy. Indeed, the recently enacted Civil Transactions Law now confirms in its Article 137 that parties may recover lost profits.¹³

3.3 LATE PAYMENT CHARGES AS A FORM OF INTEREST ARE USURY

In 2018, the plaintiff filed a motion before the Jeddah Commercial Court of Appeals to annul an award issued against it. For various reasons, the court rejected the arguments because they did not warrant annulment or they required reexamining the facts of the case under Article 50(4).¹⁴ However, the award provided, among other things, for a 'late penalty compensation', which elicited an inquiry from the court on its own initiative per Article 50(2), without being prompted by either party.

In response, the plaintiff explained that it is an increase in debt without consideration, and thus it is prohibited usury under Sharia. The defendant responded that such late penalty compensation was in line with what the Council of Senior Scholars approved and the rules allowing for liquidated damages. The court nonetheless found that the late penalty compensation was not justified in the reasoning or elsewhere in the award, concluding that the tribunal awarded an amount against delay in fulfilment of a debt, which is considered prohibited usury

¹¹ Jeddah Commercial Court of Appeals, 4 Oct. 2022, Case No. 4430103807 of 1444H.

¹² Riyadh Commercial Court of Appeals, 8 Aug. 2022, Case No. 447044096 of 1444H.

¹³ Civil Transactions Law, Royal Decree No. M/191, 19 Jun. 2023 ('Civil Transactions Law').

¹⁴ First Commercial Circuit of the Makkah Province Court of Appeals (Jeddah), 5 Dec. 2018, Case No. 1491 of 1439H.

under Sharia. Thus, the court annulled the award in part, and ordered the enforcement of the remainder of the award.

The late penalty awarded in this case was distinguishable from liquidated damages clauses, which Saudi courts have long held as enforceable and compliant with Sharia according to the Islamic Fiqh Council's guidance.¹⁵ Moreover, the Civil Transactions Law now confirms the enforceability of liquidated damages clauses.¹⁶

From this judgment, and in contrast with previous ones, tribunals can identify amounts that Saudi courts consider are Sharia-prohibited interest, which are essentially amounts ordered purely against a delay in fulfilling a debt and with no further obligations attached to them. Otherwise, Saudi courts have been shown to draw clear conclusions between such 'pure' interest and other payment charges or liquidated damages which are indeed enforceable.

3.4 NO SALE WITHOUT OWNERSHIP

In 2018, the Riyadh Commercial Court of Appeals considered a plaintiff's motion to annul an award under which the defendant was awarded SAR twenty-seven million in the context of a contract for the purchase of steel.¹⁷ The purchase was partially paid for by transferring two buildings. However, in a judgment back in 2016, the Riyadh General Court (lower court) already ruled that one of the buildings did not belong to the defendant. That judgment was later upheld by the court of appeals. The plaintiff argued that the award violated a Sharia principle that prohibits the transfer of ownership of property one does not own. The plaintiff argued that the tribunal ordered him to pay SAR twenty-seven million on the understanding that the plaintiff had received SAR ten million and SAR seventeen million in the form of the two buildings, one of which the tribunal ordered to be transferred to the plaintiff, when in fact the Riyadh General Court ordered it does not belong to the defendant.

As such, this court held that the award violated Sharia, and consequently violated public policy under Article 50(2) because it ordered the plaintiff to pay the defendant SAR twenty-seven million for a building the defendant did not own and could not make use of. Thus, the court annulled the award.

The above cases are a sample of the trends we identified through the case study. In particular, we found that (1) while Sharia-based arguments are frequently

¹⁵ Court of Appeals, Case No. 547 of 1437AH (14 Feb. 2016), referring to Islamic Fiqh Council resolution no. 109 at the Twelfth meeting dated 23–28 Sep. 2000. The Islamic Fiqh Council is an affiliate of the Muslim World League, and is made up of a select group of Muslim scholars to consider and interpret issues based on the Quran and Sunnah. The Council's resolutions are not binding but have persuasive value in Saudi courts.

¹⁶ Civil Transactions Law, Art. 178.

¹⁷ First Commercial Circuit of the Riyadh Court of Appeals, 9 Aug. 2018, Case No. 4876 of 1438H.

invoked in motions to annul awards, courts rarely accept or entertain them, which was evidenced by the low rate of Sharia-based annulments; and (2) indeed, courts rely on limited Sharia grounds with a high threshold for annulling awards.

4 MOTIONS TO ANNUL ARBITRAL AWARDS

4.1 ANNULMENT MOTIONS BASED ON ARTICLE 50(1)

Article 50(1) sets out an exhaustive list of grounds on which parties may rely to seek annulment. This provision mirrors Article 36 of the UNCITRAL Model Law and, in turn, Article V of the New York Convention. It states as follows:

1. *An action to nullify an arbitration award shall not be admitted except in the following cases:*
 - a. *If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term.*
 - b. *If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity.*
 - c. *If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control.*
 - d. *If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute.*
 - e. *If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties.*
 - f. *If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then annulment shall apply only to parts not subject to arbitration.*
 - g. *If the arbitration tribunal fails to observe conditions required for the award in a manner affecting its substance, or if the award is based on void arbitration proceedings that affect it.*

Through the case study, we have seen Saudi courts consistently reiterate the exhaustive nature of the Article 50(1) grounds and the importance of limiting any annulment motion to such grounds. Indeed, the Supreme Court confirmed that courts may not annul arbitral awards on grounds or legal provisions outside the confines of Article 50.¹⁸

¹⁸ Supreme Court, 12 Jul. 2021, Case No. 4339 of 1442H.

4.1[a] 2017–2021 Annulment Motions

4.1[a][i] The Arbitrator Lacks Impartiality and Independence

In the underlying arbitration, the claimant (plaintiff) challenged the respondent's (defendant) party-appointed arbitrator on grounds that the respondent's counsel was also representing the arbitrator in another matter.¹⁹ The tribunal, including the challenged arbitrator, rejected the challenge by a majority vote and proceeded to issue the award dismissing the claimant's claims.

The plaintiff (claimant) filed a motion to annul the award with the Riyadh Commercial Court of Appeals for the arbitrator's conflict of interest based on Articles 16, 17, and 49. Referring to Article 50(1)(e) and Article 16,²⁰ the court concluded that the relationship between the respondent's party-appointed arbitrator and its counsel 'constitute[d] mutual interests and a close relationship', thus giving rise to justifiable doubts as to the impartiality and independence of the arbitrator. The court granted the plaintiff's motion and annulled the award.²¹

4.1[a][ii] Award Did Not End the Dispute

The tribunal issued an award denying jurisdiction due to lack of 'territorial jurisdiction' and ordered the claimant to pay the arbitration costs. The plaintiff (claimant) then filed a motion to annul the award with the Eastern Province Commercial Court of Appeals. The court found that the tribunal violated Articles 40(1) and 41(1), which require that an award must end a dispute. The court cited Article 50(1)(g), under which an award can be annulled if the tribunal fails to observe the conditions required for an award in a manner that affects its substance. Thus, the court granted the plaintiff's motion and annulled the award because the underlying award – finding that the tribunal lacked territorial jurisdiction – did not end the dispute.²²

Interestingly in this case, the tribunal was constituted by court order, and this court noted that it previously dismissed the defendant's challenge to the constitution of the tribunal, which was on the same grounds the defendant had previously challenged jurisdiction in the arbitration and the tribunal had ultimately denied it. The court then observed that the tribunal should have proceeded to consider the

¹⁹ First Commercial Circuit of the Riyadh Court of Appeals, 14 May 2019, Case No. 784 of 1440H.

²⁰ Article 16: '*An arbitrator shall have no vested interest in the dispute. He shall also disclose to the arbitration parties in writing, from the time of his appointment and throughout the arbitration proceedings, any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, unless he has already informed them thereof.*'

²¹ First Commercial Circuit of the Riyadh Court of Appeals, 14 May 2019, Case No. 784 of 1440H.

²² Second Commercial Circuit of the Eastern Province Court of Appeals, 25 Jun. 2019, Case No. 861 of 1439H.

subject of the dispute and issue an award ending it, as it previously dismissed that very jurisdictional challenge.

4.1[a][iii] Violation of Arbitration Proceedings

Article 50(1)(g) provides as grounds for annulment circumstances where ‘*the award is based on void arbitration proceedings that affect it*’. The following cases provide examples of such circumstances in Saudi courts.

Failure of Participation of All Tribunal Members

The tribunal issued an award that was unanimous in part and ordered by a majority that the respondent pay invoiced amounts owed to the claimant and pay the tribunal’s fees. The court affirmed the award and ordered its enforcement.²³ Later, the claimant submitted a request to the tribunal to interpret the award and to issue an additional award. However, the respondent’s party-appointed arbitrator did not attend the deliberations, and the claimant’s party-appointed arbitrator disagreed with the presiding arbitrator on the respondent’s liability. Thus, the additional award was not issued by a majority.

The plaintiff filed a motion to annul the additional award before the Eastern Province Commercial Court of Appeals due to the different determinations. The court found that the additional award violated Article 39(2), which states ‘*If members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within 15 days from the date of its decision regarding the same. Otherwise, the competent court shall appoint a casting arbitrator*’. The court also referred to Article 46(3), which states: ‘*The decision of interpretation shall be deemed complementary to the relevant arbitration award and subject to the rules applicable thereto*’. On that basis, the court granted the plaintiff’s motion and annulled the additional award.²⁴

Lack of Proper Notification of the Award

The Court of Appeals annulled the award, finding that there is no evidence that the respondent was properly notified in the arbitration. The plaintiff (claimant) petitioned the Supreme Court arguing that the Court of Appeals wrongly annulled the award, and argued that the defendant (respondent) did not file its motion within the prescribed time limit under the Arbitration Law. The Supreme Court upheld the Court of Appeals’ annulment citing Article 55(2)(c), which states: ‘*The order to execute the arbitration award under this Law shall not be issued except upon*

²³ First Commercial Circuit of the Eastern Province Court of Appeals, 28 Feb. 2018, Case No. 2924 of 1438H.

²⁴ First Commercial Circuit of the Eastern Province Court of Appeals, 28 Feb. 2018, Case No. 2924 of 1438H.

verification of the following The award is properly notified to the party against whom it is rendered. The Supreme Court found that the defendant was not properly notified of the award and that the plaintiff failed to prove otherwise. As such, the Supreme Court upheld the annulment of the award.²⁵

The Tribunal Exceeded the Scope of the Arbitration Agreement (Article 50(1)(f))

The Court of Appeals annulled the award on the basis that the tribunal ruled on matters not included in the arbitration agreement in violation of Article 50(1)(f).²⁶ The plaintiff (claimant) then petitioned the Supreme Court to reverse the Court of Appeals' judgment.

In this case, the underlying arbitration agreement specifically defined the scope of the tribunal's jurisdiction to determine the claimant's shares in branches of the dissolved partnership between the parties. In particular, any determination on the existence of the partnership or lack thereof was beyond the scope of the arbitration agreement.

The plaintiff argued that the tribunal did not exceed the scope of the arbitration agreement. Rather, according to the plaintiff, the tribunal merely inquired and added to the subject of the dispute – within its authority – to understand the features of the partnership. The plaintiff also argued that even if the tribunal violated the arbitration agreement, the defendant (respondent) waived its right to object under Article 7, which states that:

If a party to arbitration proceeds with arbitration procedures knowing that a violation of a provision of this Law, which may be agreed to be violated or of a term in the arbitration agreement, was committed and he fails to object to such violation within the agreed upon period or within 30 days from his knowledge of the violation in the absence of an agreement, this shall be deemed a waiver of said party's right to object.

The Supreme Court found that the tribunal must abide by the party-agreed scope in the arbitration agreement. Thus, the court annulled five of the tribunal's seven findings because they covered matters outside the arbitration agreement.

The Supreme Court also found that the defendant did not waive the right to object under Article 7 because the violation (i.e., ruling on matters not covered by the arbitration agreement) occurred in the final award – not during the proceedings – and, as such, the defendant correctly relied on Article 50 to challenge it. The Supreme Court upheld the Court of Appeals' annulment of the award based on Article 50(1)(f), confirming the tribunal ruled on matters not covered by the arbitration agreement.²⁷

²⁵ Supreme Court, 7 Sep. 2021, Case No. 43558 of 1443H.

²⁶ Supreme Court, 5 Sep. 2021, Case No. 43867 of 1443H.

²⁷ Supreme Court, 5 Sep. 2021, Case No. 43867 of 1443H.

4.1[b] 2022 Annulment Motions

As stated above,²⁸ in 2022, out of eighty-eight annulment motions, only five resulted in partial or full annulment of awards, none of which were founded in violations of Sharia or public policy.

4.1[b][i] Truncated Tribunals

In two court decisions issued out of two different circuits, the court of appeals annulled awards issued by two-member ‘truncated’ tribunals. In the first one before the Riyadh Commercial Court of Appeals, the plaintiff petitioned the court to annul the award on grounds that it was issued by a two-member tribunal after the third tribunal member resigned and the tribunal did not suspend the proceedings pending appointment of a replacement arbitrator.²⁹ The underlying arbitration clause provided for a three-member tribunal. The plaintiff cited Article 19, which states: ‘*If the mandate of an arbitrator expires due to his death, disqualification, dismissal, recusal, disability, or any other reason, a replacement shall be appointed according to the procedures followed in the appointment of the arbitrator whose mandate has expired.*’³⁰

The court annulled the award based on Article 50(1)(e).³¹ It referred to Article 19 and Article 6 of the Implementing Regulations to the Arbitration Law which provides that ‘*[i]f an arbitrator’s mandate expires in the cases specified in Article 19 of the Law, except where such mandate expires due to his disqualification, the arbitration proceedings shall be stayed until a replacement is appointed in accordance with the Law.*’³² The court also cited Article 13, which states: ‘*[t]he Arbitral Tribunal shall be composed of a sole arbitrator or more, provided that their number is odd, or otherwise the arbitration shall be null and void.*’ Accordingly, the court found that the arbitration proceedings violated the parties’ agreement and the law. It also implied that the violation of Article 13 is a matter of public policy implicating Article 50(2).

Similarly, in a case before Almadina Almunawwarah Commercial Court of Appeals, the plaintiff petitioned the court to annul the award on grounds, *inter alia*, that it was issued by a two-member tribunal.³³ The court upheld the challenge and annulled the award because it violated the arbitration agreement and Article 19 as well as Article 6 of the Implementing Regulations. In this regard, the court relied

²⁸ *Supra* at s. II.

²⁹ Riyadh Commercial Court of Appeals, 7 Feb. 2022, Case No. 437595561 of 1442H.

³⁰ (Emphasis added).

³¹ ‘*If the composition of the Arbitral Tribunal or the appointment of the arbitrators has been made contrary to the provisions of the present Law or to the agreement of the parties.*’

³² Implementing Regulations to the Arbitration Law, Ministerial Resolution No. 541, 22 May 2017.

³³ Almadina Almunawwarah Commercial Court of Appeals, 21 Nov. 2021, Case No. 437287735 of 1443H.

on Article 50(1)(e) as well as Article 50(1)(g).³⁴ Notably, the court invoked Article 50(2) on public policy by reference to Article 59 of the Commercial Courts Law, which provides in pertinent part that ‘*the judges who attended the hearing must take part in the deliberations*’. In doing so, the court implied that a tribunal member’s absence from deliberations is a violation of public policy.

4.1[b][ii] Violation of Arbitration Proceedings

The plaintiff filed a motion to annul the award with the Jeddah Commercial Court of Appeals on two grounds: (1) that the tribunal awarded Sharia prohibited interest, and (2) that the tribunal ordered the payment of additional fees contrary to the arbitration procedure agreement between the parties and tribunal (i.e., terms of reference).³⁵ The court dismissed the ‘interest’ argument.³⁶ The terms of reference limited the tribunal’s entitlement to additional fees to circumstances where a party submits additional requests or claims beyond those in the terms of reference. In the award, the tribunal increased the tribunal fees on the basis of the extended duration of the proceedings, having recognized that there were no new or additional requests made by either party.

The court referred to the terms of reference as well as to Article 24, which states: ‘*If there is no agreement between both parties to the arbitration and the arbitrators on the arbitrators’ fees, such fees shall be determined by the Competent Court which shall decide such matter by an irrevocable decision which cannot be subject to any type of recourse*’. The court found that the tribunal violated the terms of reference and annulled the award only as to the tribunal’s decision to order additional fees, while upholding the remainder of the award. The court referred to Article 50, without specifying the sub-section. That said, Article 50(1)(g) provides as annulment grounds circumstances where the award is issued based on invalid arbitration proceedings and this judgment suggests that a violation of the terms of reference qualifies as such.

4.1[c] Conclusion

The case review showcased Saudi courts’ strict compliance with Article 50; the courts have consistently rejected any annulment arguments outside the parameters of Article 50 and have reinforced their commitment not to conduct de novo

³⁴ ‘e) *If the composition of the arbitration tribunal or the appointment of arbitrators is carried out in a manner that violates this Law or the agreement of the parties*’. ‘g) *If the arbitration tribunal fails to observe the conditions required for the award in a manner that affects its substance, or if the award is based on void arbitration proceedings that affect it*’.

³⁵ Jeddah Commercial Court of Appeals, 4 Oct. 2022, Case No. 4430103807 of 1444H.

³⁶ *See supra*, s. (a).

reviews of arbitral awards through the frequent application of Article 50(4). These cases demonstrate a positive trend of the Saudi courts solidifying their commitment to an arbitration-friendly judicial system.

4.2 UNSUCCESSFUL ANNULMENT MOTIONS BASED ON ARTICLE 50(4): NO REVIEW OF THE MERITS OR SUBJECT MATTER LAW OF THE ARBITRAL AWARD

The Board of Grievances' infamous decision in *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)* was a hallmark for an interventionist approach of Saudi courts.³⁷ In 2008, an ICC tribunal had rendered its award dismissing Jadawel's USD 1.2 billion claims and ordered it to pay Emaar's legal costs. The enforcement action pending before the Board of Grievances then took a different turn. Not only did the court reexamine the award, it reversed it, ordering Emaar to pay more than USD 250 million to Jadawel in damages. This can no longer occur under Article 50(4).

While Article 50(2) vests courts with the authority to annul an award on its own initiative if it '*violates the provisions of Sharia and Public Policy in the Kingdom*', Saudi courts now carefully exercise this discretion. In fact, this case study demonstrates the strict compliance of Saudi courts with Article 50(4), which mandates that '*[t]he competent court shall consider the action for nullification in cases referred to in this Article without inspecting the facts and subject matter of the dispute*'.³⁸

As previously mentioned, Article 50(4) enshrines the widely known concept that judges should not second guess arbitrators' conclusions, that is, they shall refrain from reinspecting the facts and subject matter of the dispute. It is imperative to distinguish these two concepts. Article 50(2) goes towards the output of the decision-making process, whereas Article 50(4) protects the path that leads to such output. Put differently, the Sharia-compliance test has nothing to do with how the arbitrator reaches the outcome by way of analysing the facts and the law. Article 50(2) merely serves as a back-end filter that eliminates awards that would otherwise result in a violation of Sharia and public policy, a widely known concept in other jurisdictions when applying a public policy defense as a last resort.³⁹

As such, a misapplication or misinterpretation of the provisions of Sharia by an arbitrator may still lead to an enforceable outcome so long as the output itself is not in conflict with Sharia and public policy. In fact, this case study has shown that all attempts by parties to invoke Article 50(2) based on contract law

³⁷ <http://arbitrationblog.kluwerarbitration.com/2018/12/07/so-you-think-you-can-enforce-an-arbitral-award-in-the-kingdom-of-saudi-arabia/>, 21 Oct. 2024.

³⁸ (Emphasis added).

³⁹ For example, annulment of awards granting 'punitive damages' in Europe due to public policy considerations.

arguments – allegedly violating Sharia and public policy – have failed or have been disregarded by the courts. This court response is in line with other jurisdictions where a mistake made in the application of the substantive law does not in itself impact the enforceability of the award unless it also violates the public policy at the arbitral seat where a party pursues annulment, or at the place where a party pursues enforcement of the award.

4.2[a] 2017–2021 Motions

The case study demonstrated the Saudi courts' consistent application of Article 50(4), particularly the courts' unwillingness to entertain any motions that may cause investigating the facts and subject matter of the dispute, reviewing the evidence and documents underlying the award, or the soundness of the tribunal's conclusions and reasoning.

In 2019, the Eastern Province Commercial Court of Appeals rejected a motion to annul the award because it required the court to investigate the facts and subject matter of the dispute and none of the grounds presented were covered under Article 50, so the court dismissed the motion.⁴⁰ A similar judgment was issued by the Jeddah Commercial Court of Appeals.⁴¹

Also in 2019, the plaintiff filed a motion to annul the award with the Eastern Province Commercial Court of Appeals based on Article 50(1)(d), (f), and (g), arguing that the award excluded the application of any of the party-agreed statutory rules, and that the tribunal did not observe the conditions required for the award.⁴² Furthermore, the plaintiff argued that the tribunal refused to appoint an expert despite the parties' agreement, and that the award contradicted what the tribunal decided at the hearings, citing in this regard Article 108 of the Saudi Law of Procedure before Sharia courts. The dispute arose out of the performance of construction works. The court rejected the motion, finding that the plaintiff did not establish a violation of any provision of Article 50(1). In fact, the plaintiff's grounds for annulment required investigating the facts and subject matter of the dispute in violation of Article 50(4). As such, the motion was not successful.

In 2018, the Jeddah Commercial Court of Appeals had to dispose of both a motion to enforce and a motion to annul an award issued in a dispute arising out of

⁴⁰ First Commercial Circuit of the Eastern Province Court of Appeals, 11 Nov. 2020, Case No. 185 of 1442H.

⁴¹ First Commercial Circuit of the Makkah Province Court of Appeals (Jeddah), 30 Apr. 2019, Case No. 812 of 1440H.

⁴² Second Commercial Circuit of the Eastern Province Court of Appeals, 16 Nov. 2020, Case No. 328 of 1442H.

a labour supply and services agreement.⁴³ The plaintiff (claimant) presented multiple grounds to support its annulment motion, including that the tribunal dismissed its demand for the defendant (respondent) to pay SAR 5,400,000 based on a penalty clause, and that it ignored – without justification – its request for specific performance. At the first hearing, the plaintiff argued that the award is deficient, defective, and contrary to the tenets of Sharia, and that it disregarded the terms of the contract. The plaintiff further argued that the award decided issues not covered by the arbitration agreement and failed to take the contract and commercial customs into account. The defendant argued that none of the plaintiff's arguments are valid as they are not supported by Article 50. The defendant then applied to enforce the award.

The court sided with the defendant and denied the annulment motion as none of the plaintiff's grounds were covered by Article 50. It further held that the grounds are mere facts that would prompt reconsideration of the subject matter of the dispute, the evidence and documents underlying the award, and the procedures carried out by the tribunal. This would result in an investigation into the soundness of the tribunal's conclusions and the reasoning on which it based its decision and run afoul of Article 50(4). Therefore, the court found that there is no impediment to enforcement and that the award satisfied all statutory requirements pursuant to Article 51(2). Thus, the court rejected the annulment motion, affirmed the award, and ordered execution of the same.

4.2[b] 2022 Motions

The Supreme Court recently confirmed the courts' limited authority in reviewing awards, where it reviewed a judgment issued by the Jeddah Commercial Court of Appeals annulling an award based on 'erroneous findings' made by the tribunal. Before the Supreme Court, the appellant argued that the Court of Appeals violated Article 50(4) and went beyond the Article 50(1) annulment grounds.

The Supreme Court first reiterated that once a tribunal has decided a matter, its award has *res judicata* effect. This requires stripping any other body of the jurisdiction to reconsider the subject matter of the dispute. As such, the Supreme Court noted, when a court's consideration extends to the examination of the validity or correctness of the tribunal's ruling, it has thereby overstepped the

⁴³ First Commercial Circuit of the Makkah Province Court of Appeals (Jeddah), 12 Mar. 2019, Case No. 464 of 1440H. It is not uncommon for Saudi courts to decide motions to enforce and annul in the same proceeding, thereby increasing process efficiency. This is also supported by Art. 51(2), which states that if the competent court affirms the award, it shall order its execution.

boundaries of its jurisdiction, as that is within the exclusive competence of the tribunal.

In its findings, the Supreme Court did not oppose the Court of Appeals' conclusion that the tribunal had erroneously applied the terms of the contract and awarded the claimant the entire contract value without first validating that the work was indeed completed. But the Supreme Court underscored that this is a factual finding that exclusively falls within the jurisdiction of the tribunal and cannot later be reviewed by the courts. As a result, the Supreme Court found that the Court of Appeals violated Article 50(4) and overturned and remanded the case to the Court of Appeals for further action.⁴⁴

In similar vein, the Supreme Court reviewed a judgment issued by the Jeddah Commercial Court of Appeals on 31 July 2022 in which it annulled an award based on an alleged violation of public policy.

The Court of Appeals annulled the award on the premise that the tribunal did not consider the notification requirement of Article 161 of the old Saudi Companies Law to formalize the transfer of shares in the limited liability company (LLC) at issue. Article 161 required that for the claimant to establish partnership and for the respondent to assign his share, all shareholders of the LLC must be notified of the assignment. Furthermore, the Court of Appeals found that the award violated Article 50 by not factoring in the improper representation of an LLC shareholder and was not in line with official documents such as the LLC's articles of association.

Before the Supreme Court, the appellant argued that the Court of Appeals exceeded its authority in reviewing the award per Article 50(4). The plaintiff argued that the Court of Appeals thoroughly examined the facts and subject matter of the award, weighed the evidence, and considered the methodology, grounds, and reasoning of the award with respect to the subject matter as the basis for its ruling to annul the award.

The Supreme Court agreed with the appellant and rejected the Court of Appeals' public policy findings. It noted that Article 50(2) would have been relevant had the tribunal ignored the applicable law, and thereby decided the matter under the wrong legal framework. However, the parties' rights and obligations under the contract do not relate to questions of application of the law. It is also not evident from the reasoning that it is connected to any of the annulment grounds stipulated in Article 50. In the end, the Supreme Court found that the Court of Appeals overstepped the boundaries of its jurisdiction under Article 50(4) by reviewing what the tribunal had already decided. As a result, the Supreme

⁴⁴ Supreme Court, 24 Aug. 2022, Decision No. 6024415, Case No. 349001348 of 1443H.

Court overturned the ruling and remanded the case to the Court of Appeals for further action.⁴⁵

5 JUDICIAL SUPPORT IN AID OF ARBITRATION

Article 22 allows parties and tribunals to seek assistance from the courts:

- (1) *The competent court may order provisional or precautionary measures, upon the request of either party, prior to commencing arbitration proceedings, or upon a request by the arbitration tribunal during arbitration proceedings. Said measures may be revoked in the same way, unless otherwise agreed upon by the two parties to arbitration.*
- (2) *The competent court may, upon a request by the arbitration tribunal, issue an order of judicial delegation.*
- (3) *The arbitration tribunal may, as it deems fit, seek the assistance of the competent agency in the arbitration proceedings, such as calling a witness or an expert, ordering the submission of a document or a copy thereof, reviewing said document, or any other proceeding, without prejudice to the right of the arbitration tribunal to conduct said proceeding independently.*

Under this provision, once the tribunal is constituted, courts are seized of the authority to order provisional or precautionary measures at the request of a party. While the jurisprudence on this issue is not vast, it is consistent. In 2022, the plaintiff filed a motion to freeze a bond call before the Riyadh Commercial Court of Appeals. The court did not accept the interim measures motion because the arbitral proceedings had already started, citing Article 22(1).⁴⁶

In another case before the Almadina Almunawwarah Commercial Court of Appeals, the plaintiff filed a motion for an order to take over the site. The court accepted the motion as it was before the tribunal was constituted. However, the court rejected the motion reasoning that deciding it required the court to consider the merits of the case, which is reserved to the tribunal.⁴⁷

6 PERIODS OF TIME AND DEADLINES

There are various significant timeframes and deadlines found in the Arbitration Law: the period to object to any violations of the arbitration procedures or the arbitration agreement (or otherwise risk a waiver under Article 7), the period to

⁴⁵ Supreme Court, 2 Nov. 2022, Decision No. 6024415, Case No. 439444102 of 1444H.

⁴⁶ Riyadh Commercial Court of Appeals, 14 Mar. 2022, Case No. 437853914.

⁴⁷ Almadina Almunawwarah Commercial Court of Appeals, 11 Aug. 2022, Case No. 447111869.

submit the statement of claim⁴⁸ and the statement of defense,⁴⁹ the twelve-month arbitration period,⁵⁰ the extension of the arbitration period in case of a party's death or loss of legal capacity,⁵¹ the deadline to deliver the award to the parties within fifteen days from the issuance of the award,⁵² the deadline to deposit the award with the court within fifteen days from the issuance of the award,⁵³ the thirty-day extension period to the otherwise sixty-day deadline to issue an additional award,⁵⁴ and the deadline to file an annulment action.⁵⁵

The period that has likely caught most practitioners' attention is the twelve-month arbitration period found in Article 40. It provides that – absent party agreement on a period – the tribunal shall issue its final award within twelve months from the date of commencement of the arbitration proceedings.⁵⁶ The tribunal may extend this period by another six months unless the parties agree to a longer period.⁵⁷ In case of an arbitrator replacement, the period can be extended by another thirty days.⁵⁸ If the award is not issued within the set period, either party may request the competent court to either grant an additional period or terminate the arbitration proceedings altogether.⁵⁹

Considering the overall structure of Article 40, the twelve-month period appears not to be mandatory in nature as parties can derogate from it by agreeing to a different period. But two key questions remain: (1) Does agreeing to institutional rules qualify as an agreement on the period, thereby preempting the application of the twelve-month period?; and (2) if not, do courts routinely grant a petitioner's motion to terminate an arbitration proceeding if the twelve-month period has elapsed?

As to the first question, various international arbitration rules provide for some form of timeline. The question is: Is the timeline specific enough to qualify as a period agreed upon by the parties as required in Article 40(1)? By way of example, under the SCCA Expedited Procedure Rules, the final award must be issued thirty days following the date of closing of the proceedings and, in any event, within 180 days from the date the arbitral tribunal is fully constituted, whichever event occurs

⁴⁸ Article 30(1) of the Saudi Arbitration Law.

⁴⁹ Article 30(2) of the Saudi Arbitration Law.

⁵⁰ Article 40 of the Saudi Arbitration Law.

⁵¹ Article 41(2) of the Saudi Arbitration Law.

⁵² Article 43(1) of the Saudi Arbitration Law.

⁵³ Article 44 of the Saudi Arbitration Law.

⁵⁴ Article 48(2) of the Saudi Arbitration Law.

⁵⁵ Article 55(1) of the Saudi Arbitration Law.

⁵⁶ Article 40(1) of the Saudi Arbitration Law.

⁵⁷ Article 40(2) of the Saudi Arbitration Law.

⁵⁸ Article 40(4) of the Saudi Arbitration Law.

⁵⁹ Article 40(3) of the Saudi Arbitration Law.

first.⁶⁰ While arbitrations generally do not exceed six months in the case of the SCCA Expedited Procedure Rules, the academic question remains as to whether the thirty-day and/or the 180-day period qualify as a party-agreed period when the starting date of such periods are not preset, that is, unknown at the outset. This question becomes even more relevant for larger cases that fall under the SCCA Arbitration Rules, in which Article 33(3) provides that the final award shall be issued within seventy five days from the date of closing the proceedings, unless otherwise agreed by the parties, specified by law, or determined by SCCA. Identical language can be found in Article 33(1) of the International Centre for Dispute Resolution's (ICDR) Rules. The International Chamber of Commerce's Rules of Arbitration (ICC Rules) provide that the award shall be issued within six months from the last signature on the Terms of Reference (capable of extension by the ICC Court of Arbitration).⁶¹ The London Court of International Arbitration (LCIA) provides for three months following the last oral or written submission to issue the award.⁶² These starting dates for the period to run are less prescribed than the one provided in the SCCA Expedited Procedure Rules, but nonetheless likely to meet the specificity threshold.

This area is yet to be tested in Saudi courts. That said, the Arbitration Law was promulgated in 2012 with the right intention to expedite the resolution of disputes. At that time, Saudi Arabia had only seen non-administered (*ad hoc*) arbitration proceedings at national level where parties often (and to this day) do not address any timeline at all in their arbitration agreement. In contrast, parties that are now opting for institutional arbitration make an active and deliberate choice to have their dispute administered pursuant to time-tested institutional arbitration rules that come with their own deadline regime. The fact that the starting date for the arbitration period is not fixed in the abovementioned institutional rules is intended and rooted in the fact that flexibility is much needed in domestic as well as international arbitration proceedings; particularly in larger, more complex cases where the application of a strict period could potentially interfere with due process considerations.

It is the author's opinion that incorporating the SCCA Arbitration Rules in the parties' contract by reference preempts the application of the twelve-month period found in Article 40(1) as the deadline regime provided is specific enough to qualify under Article 40 as a party-agreed period. Reading it any other way would disregard the parties' choice to replace the statutory period found in Article 40 with SCCA's more flexible timeline regime. It would also ignore the reality of

⁶⁰ Article 10 of the SCCA Expedited Procedure Rules (Appendix II to the SCCA Arbitration Rules).

⁶¹ Article 31(1) of the ICC Rules.

⁶² Article 15.10 of the LCIA Rules.

other institutional cases such as awarded cases under the ICC Rules that close on average in two years,⁶³ while those under the LCIA Rules close on average in fifteen months.⁶⁴ In contrast, awarded cases under the SCCA Arbitration Rules currently close on average in ten months.

As to the second question, case law has shown that courts do not automatically terminate an arbitration where the twelve-month period of Article 40(1) has elapsed. Rather, the following decisions suggest that courts take a pragmatic, more flexible approach towards the twelvemonth period.

6.1 THE TWELVE-MONTH PERIOD IS NOT ABSOLUTE IN NATURE

In 2018, the First Commercial Appeals Circuit of the Eastern Province Court of Appeals rejected a motion under Article 40(3) to terminate a pending ad hoc arbitration proceeding that had passed the twelve-month mark.⁶⁵ Upon the court's request, the tribunal explained to the court (1) that a technical expert had to be appointed, (2) that it was the plaintiff (respondent) who was late in paying its share of expert fees, and (3) that the tribunal eventually had to ask the defendant (claimant) to pay that share. The court ultimately found that the delay in the resolution of the case was not attributable to the tribunal but to the parties and the nature of the dispute. The latter required the appointment of a technical expert to give an opinion on the subject matter. The parties then caused further delay in the selection of the expert and the payment of the fees. Most notably, the court found that the purpose of the provisions relating to the period of arbitration are to expedite the resolution of the dispute. But to count the delay caused in this instance (particularly where the party that moved before the court had caused the delay that led to exceeding the twelve-month mark) towards this period would amount to a ploy to subvert the arbitration agreement through the lapse of the twelvemonth period.

6.2 THE TRIBUNAL'S POWER TO EXTEND IS NOT LIMITED TO THE ORIGINAL TWELVE-MONTH PERIOD

In 2018, the Jeddah Commercial Court of Appeals faced an interesting situation where the tribunal had already extended the arbitration period four times based on

⁶³ <https://www.hugheshubbard.com/news/comparing-timelines>, 21 Oct. 2024.

⁶⁴ <https://www.hugheshubbard.com/news/comparing-timelines>, 21 Oct. 2024.

⁶⁵ First Commercial Appeals Circuit of the Dammam Court of Appeals, 15 Oct. 2018, Case Nos. 901 and 1109 of 1439H.

party agreement.⁶⁶ It then extended the period one more time without party consent pursuant to Article 40(2). The plaintiff (respondent) filed a motion to terminate the arbitration proceedings, disagreeing with the tribunal's interpretation of the law insofar as the right to extend applies to the original twelve-month period. The plaintiff also argued that the parties were not informed of the extension, and that the tribunal made its decision after the statutory period had expired. As such, the award must be annulled. The court rejected the plaintiff's motion finding that the tribunal acted within its powers and lawfully extended the period in accordance with Article 40(2). In doing so, the court essentially dismissed the idea that the power to extend under Article 40(2) exclusively applies to the original twelvemonth period, a welcomed clarification in cases where party-agreed extensions have already been in play.

6.3 THE COMPETENT COURTS CAN EXTEND THE TWELVE-MONTH PERIOD IRRESPECTIVE OF ALREADY EXISTING EXTENSIONS

In 2018, the Jeddah Commercial Court of Appeals considered an extension request under Article 40(3).⁶⁷ The twelve-month period in the underlying arbitration proceeding had ended. The sole arbitrator used his statutory powers to extend this period, which then also ended. The plaintiff (claimant) then filed a motion with the court to extend the period by another six months per the arbitrator's request, arguing that the arbitration proceeding was in its final stage. The defendant (claimant) objected, arguing that an extension is not warranted as the plaintiff had abandoned its claim for a period of three years referring to Article 41(b). The plaintiff countered that the claim had not been abandoned and instead was in the hands of the arbitrator. The court granted the six-month extension, finding that – without further reasoning – nothing exists in either Sharia or the law that prevents fulfilling the plaintiff's request. This decision underscores that the competent courts have the discretion to further extend the arbitration period, irrespective of previous extensions given by tribunals.

This conclusion is further supported by a decision of the same court a year later in 2019.⁶⁸ There, the sole arbitrator in the underlying arbitration decided to liquidate the company at issue and accordingly extended the statutory arbitration

⁶⁶ First Commercial Circuit of the Makkah Province Court of Appeals, 23 Oct. 2018, Case No. 241 of 1439H.

⁶⁷ First Commercial Circuit of the Makkah Province Court of Appeals, 2 Jul. 2019, Case No. 1494 of 1440H. Art. 40(3) provides: '*If the arbitration award is not issued within the period provided for in the preceding paragraph, either party may request the competent court to issue an order specifying an additional period or terminating the arbitration proceedings. In such event, either party may file a case with the competent court.*'

⁶⁸ First Commercial Circuit of the Makkah Province Court of Appeals, 14 Oct. 2019, Case No. 136 of 1441H.

period by six months pursuant to Article 40(2). After a further extension and after it became clear that the legal liquidator's report would need time that would exceed the already extended arbitration period, the plaintiff (claimant) requested, and the court granted, a further extension of six months. The court deemed the request appropriate and just, considering that the arbitration was in its final stages and that an expert has been assigned in connection to the subject of the dispute.

6.4 TRIBUNALS CAN EXTEND THE TWELVE-MONTH PERIOD WITHOUT THE NEED TO CONSULT THE PARTIES

In 2019, the Third Commercial Circuit of the Riyadh Court of Appeals considered an annulment motion based on the expiration of the twelve-month period.⁶⁹ The plaintiff (respondent) argued, among other things, that the tribunal's attempt to extend the arbitration period in the procedural hearing failed as it did not hear the parties beforehand or otherwise inform them of its intentions to extend the period, let alone obtain their approval. The court quickly rejected this argument by finding that this is not a legal justification to annul an award and is not based on any statutory violation (i.e., Article 50(1)). The court eventually dismissed the motion and all other arguments to annul the award.

While the cases on this issue are not vast, they are consistent and lead to the paramount conclusion that Article 40 is not a mandatory provision and parties may indeed contract out of it. Additionally, it is also the author's view that an agreement to opt for institutional rules can be deemed a derogation from Article 40 such that the twelve-month period is no longer applicable to the arbitration.

8 CONCLUSION

This case law study has revealed much needed empirical data that showcase a mature and reliable arbitration ecosystem in Saudi Arabia. The low number of successful annulment motions exhibits the courts' seriousness in giving arbitration the support it needs to succeed. That said, the future will tell whether this remarkably positive statistic in excess of a 90% rejection rate of annulment motions is partially rooted in the fact that many parties may have impulsively filed annulment proceedings without evaluating their chance to succeed. Indeed, until September 2021, Saudi courts did not impose fees for filing cases, thereby facilitating access to the judiciary at no cost. Since then, however, the Judicial Costs Law has been enacted, imposing different fees on filing cases with courts.⁷⁰ Thus, it

⁶⁹ Third Commercial Circuit of the Riyadh Court of Appeals, 3 Nov. 2019, Case No. 2737 of 1440H.

⁷⁰ Judicial Costs Law, Royal Decree No. M/16 dated 30/01/1443H (corresponding to 7 Sep. 2021).

remains to be seen how this piece of legislation may affect the motion practice over time.⁷¹ For now, the above findings show a strong stance in favour of arbitration with sophisticated court decisions that demonstrate a good understanding of the parameters of the Arbitration Law that was modelled on the UNCITRAL Model Law – findings that will be welcomed by local as well as foreign investors seeking assurance that their investment is protected in case a dispute arises.

⁷¹ Judicial Costs Law, Royal Decree No. M16/1443, 7 Sep. 2021, <https://cfee.moj.gov.sa/system.html>, 21 Oct. 2024.