

# Saudi Arabia - the story continues

01 September 2021

## Global Arbitration Review

*From the Aramco case to the latest rule changes at the Saudi Center for Commercial Arbitration, **Saud Al-Ammari** of Al-Ammari Law Firm in Al-Khobar, Saudi Arabia, and **Tim Martin** of Northumberland Chambers in Calgary, Canada, discuss the continuing evolution of arbitration in Saudi Arabia.*

Saudi Arabia has long used arbitration (or tahkim in Arabic) as a method for settling disputes under Islamic law or shariah. *The Quran* states in a verse on resolving disputes between husband and wife: “And if you fear dissension between the two of them, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will reconcile them. Indeed, Allah is all knowing and acquainted (with all things)”.

Although this verse refers specifically to marital disputes, Muslim scholars have used it as evidence that arbitration is accepted in all parts of life and all four major schools of Islamic jurisprudence – Hanbali, Hanafi, Maliki and Shafii – have practised it for centuries. In fact, pre-Islamic Arabs also regularly used arbitration to settle disputes.

However, this historical acceptance of arbitration in Saudi Arabia suddenly changed as a result of a singular event arising from the world’s most valuable oil concession.

On 29 May 1933, the ruler of the newly founded nation of Saudi Arabia, King Abdul Aziz bin Abdul Rahman bin Faisal al Saud, awarded an oil concession to Standard Oil of California or Socal, which is now Chevron. The concession was eventually held by a consortium owned by four major oil companies including Socal, known as the Arabian American Oil Co or Aramco (now Saudi Aramco). The shareholders’ number one dictum was never to give it up.

Similar to other oil concessions in the Middle East at the time, the Aramco contract included a short, simple dispute clause that provided for arbitration. However, it had a number of deficiencies, including that it did not provide for a governing law to interpret the contract, nor a set of procedural rules to conduct an arbitration.

This was not a problem until 20 January 1954, when the kingdom awarded a 30-year contract to the Greek shipping tycoon Aristotle Onassis, which granted his company the exclusive right to transport Aramco's crude oil production outside Saudi Arabia. Aramco objected to the awarding of this contract and refused to comply with it on the basis that the Aramco contract granted it the exclusive right to transport its petroleum to any place overseas and upon such terms as it chose, and that it did not allow the kingdom to award such a right to any third party.

This conflict resulted in the historic *Saudi Arabia v Arabian American Oil Co* arbitration of the late 1950s, presided over by Swiss jurist, **Georges Sauser-Hall**, with Egyptian arbitrators **Saba Habachy** and **Helmy Baghat Badawi** as the original co-arbitrators, appointed by Aramco and Saudi Arabia, respectively. Badawi died in March 1957, after the hearing in the case, and was replaced by another Egyptian arbitrator, **Mahmoud Hasan**.

The Aramco legal team was led by **Lowell Wadmond**, chief trial counsel at White & Case, and included **Lord McNair**, a British law professor and former president of the International Court of Justice, and Belgian lawyer **Maurice Bourquin**.

The Saudi team, meanwhile, was composed of **Myres McDougal**, professor at Yale Law School, Italian professor **Roberto Ago** (later an ICJ judge) and the former British Attorney General **Sir Lionel Head**.

Other figures on the case included the young **Pierre Lalive**, who was tribunal secretary, and the young **Stephen Schwebel**, who worked on the Aramco team as a junior associate at White & Case in New York. Both went on to become leading arbitrators and jurists and Schwebel became president of the ICJ.

According to the tribunal, the arbitration was without enmity:

*“As shown by the memorials and oral arguments of both parties, the present arbitration is a friendly one, whose purpose is to decide what is just and right in the dispute which has arisen between the parties, so that they*

*may resume and maintain the friendly and fruitful co-operation which has characterised their relations for nearly a quarter of a century.”*

Given the paucity of the dispute resolution clause in their contract, the parties entered into an arbitration agreement to properly manage this dispute. Among other matters, that agreement provided that:

“The arbitration tribunal shall decide this dispute:

- (a) in accordance with the Saudi Arabian law, as hereinafter defined, in so far as matters within the jurisdiction of Saudi Arabia are concerned;
- (b) in accordance with the law deemed by the arbitration tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.

Saudi Arabian law, as used herein, is the Moslem law

- (a) as taught by the school of Imam Ahmed ibn Hanbal
- (b) as applied in Saudi Arabia.”

The tribunal issued its award on 23 August 1958, finding in favour of Aramco and denying the kingdom the right to award the transport concession to Aristotle Onassis. In a detailed discussion, the tribunal determined that the parties “did not stipulate the application of a single law to their dispute” and rejected the exclusive use of the laws of Saudi Arabia because “the parties have intended from the very beginning to withdraw their disputes from the jurisdiction of local tribunals.”

Instead, the tribunal decided the merits of the case on the basis that:

- The concession agreement was the fundamental law of the parties;
- That law must be supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence;

- The sale and transport of oil as governed by custom and practice in maritime law and the international oil business would apply; and
- Public international law applied to matters such as transport by sea, the sovereignty of the state on its territorial waters and the responsibility of states for the violation of its international obligations.

Even though it disagreed with the outcome of the Aramco arbitration, Saudi Arabia accepted the tribunal's decision as acknowledged by King Faisal bin Abdulaziz Al Saud in a message to the president of the Conference on World Peace Through Law in September 1965:

“We implement the ruling which an arbitration court rendered in favour of a foreign company and against the government with the same strictness and alacrity as we implement a ruling rendered in our favour. This we do voluntarily and willingly because we are executing one of the injunctions of God Almighty.”

Despite its loss, the kingdom continued to work with Aramco on a cooperative and friendly basis. Looking back on the arbitration in 2010, **Stephen Schwebel** wrote:

“To its great credit, the government of the Kingdom of Saudi Arabia acted in compliance with the award. It made no further attempt to enforce the Onassis Agreement. It abstained from international arbitration for decades thereafter. But it permitted Aramco to maintain and expand its operations to their immense mutual benefit.”

As a direct result of its disappointing experience in the Aramco arbitration, the Saudi government, however, came to regard international arbitration as a two-edged sword, which resulted in it adopting a restrictive approach to arbitration. This had far-reaching implications for the kingdom's legal system that lasted for many years.

In 1963, the Saudi Council of Ministers issued Resolution No. 58 that required the exclusive use of the Saudi courts (which only applied shariah in the Arabic

language) in its government contracts and which directed all government ministries and agencies not to sign any arbitration agreement without prior authorisation from the president of the Council of Ministers. They were effectively barred from participating in arbitration.

This restrictive approach began to slowly change when Saudi Arabia ratified the Riyadh Convention providing for judicial cooperation among Arab League states in 1985 and the New York Convention in 1994, both of which provide for the reciprocal recognition and enforcement of international arbitration awards.

### **The old arbitration law**

In parallel with the ratification of those conventions, Saudi Arabia enacted its Arbitration Act of 1983, a brief and vague law that repealed the relevant provisions of the Commercial Court Code of 1931. The implementing regulations of this act, which provided more detailed guidance on Saudi arbitral proceedings, were adopted by royal decree in 1985. However, this law and its implementing regulations still limited the scope of arbitration in Saudi Arabia.

Saudi arbitration law and procedures during this period came to be seen as difficult and inefficient in resolving commercial disputes. They allowed Saudi courts to intervene throughout the arbitration process, resulting in arbitrations being stymied and arbitration awards not being enforced.

Saudi courts regularly re-examined the merits of arbitration awards when asked to enforce them, with the result that parties were often forced to re-litigate arbitrated cases in the kingdom's courts. The unsatisfactory result was that, in the words of **Abdulrahman Baamir** and **Iliad Bantekas**, writing in *Arbitration International* in 2009, "... arbitration remains a very speculative business, since the parties and their lawyers navigate through legal uncertainty."

### **The transition to modern international arbitration practice**

All this began to change in 2012, when Saudi Arabia enacted a new arbitration law and a new enforcement law, under which arbitral awards are considered writs of execution. This was followed in 2017 with the approval of new arbitration implementing regulations. They were part of the kingdom's broad, ongoing reform

of its legal system to improve the business environment, support sustainable economic development and attract foreign investment to Saudi Arabia, which is consistent with the kingdom's 2030 Vision.

The new arbitration law was based on the UNCITRAL Model Law on International Commercial Arbitration. The kingdom modified the model law to address issues of concern to it, in particular by requiring the arbitration process to not "violate shariah" as practised in the kingdom. UNCITRAL subsequently listed the Saudi arbitration law among the laws based on the UNCITRAL Model Law, with the modifications included in the 2012 law.

The new arbitration law and its implementing regulations are a significant improvement on the 1983 arbitration law, more closely aligning Saudi arbitration law and procedures with international arbitration practice. The law respects the right of parties to manage their dispute resolution process with minimal interference from the courts. Parties now have greater flexibility in selecting their arbitrators; the arbitral rules and institutions for their arbitration; the seat of arbitration; and the language they want to use. Parties can do all this as long as they do not contravene shariah and the public policy of the kingdom. Finally, Saudi courts are now required to recognise and enforce awards from international venues outside the kingdom.

In addition to the new arbitration law, the government put in place other legislative and procedural reforms to support the growth of arbitration within the kingdom. The Government Tenders and Procurement Law of 2019 encourages the use of arbitration in government purchase contracts. This law grants government entities the ability to include an arbitration clause in their contracts after obtaining the approval of the Ministry of Finance. Both the Ministry of Finance and the Ministry of Commerce have recently approved and issued government contracts that allow for arbitration as a dispute resolution mechanism.

And the restrictions imposed on the use of arbitration by government entities resulting from Resolution No. 58 of 1963 were reversed by High Order No. 28004 issued by the President of the Council of Ministers on 19 January 2019. This new

directive encourages all government entities and state-owned companies to settle their disputes with foreign investors through arbitration, as stated by the Saudi finance minister Mohammed Al-Jadaan at the SCCA International ADR Conference in November 2019:

“Recourse to arbitration has now become a right of ministries with the agreement of the Ministry of Finance. Whereas recourse to arbitration was previously an exception, now, this is a clear confirmation by the government of the importance of arbitration and the government’s commitment to participate in more rapid, cost-effective dispute resolution.”

In 2017, all commercial disputes were transferred to the newly formed Saudi Commercial Courts. Its regulations were revised in 2020 by Royal Decree No. M/93 to support the enforcement of arbitral awards, encourage pro-arbitration judgments and to increase the acceptance of international arbitration practice in the Saudi courts.

The Saudi Ministry of Justice has also provided extensive training to its judges on supporting arbitration in the Saudi legal system.

As a result, among other advances, Saudi courts are now enforcing awards issued by non-Muslim tribunals and applying the principle of partial enforcement of a foreign judgment or arbitral award where a portion of it runs counter to Saudi public policy or shariah. This ensures that any procedural mistakes in an international arbitration award, which violate shariah principles, do not nullify the entire award in Saudi courts.

### **The Saudi Center for Commercial Arbitration**

To support best practices in the management of arbitration cases in the kingdom, the Saudi government established the Saudi Center for Commercial Arbitration in 2014. The SCCA is the first institutional arbitration centre in the kingdom and also acts as the official representative of the Saudi government in local and international arbitration circles. UNCITRAL has recognised the SCCA as one of 19 arbitration institutions around the world, and one of only 3 such institutions in the Arab world.

The SCCA created a number of strategic partnerships to achieve its goal of becoming a world-class arbitration institution. One of the most significant was a partnership with the International Centre for Dispute Resolution of the American Arbitration Association (ICDR-AAA).

A working group from the SCCA and the ICDR-AAA drafted the SCCA arbitration rules based upon the UNCITRAL Model Rules, due to their international recognition and acceptance among users and courts. In finalising its rules, the SCCA took into consideration the best case management practices used by other leading global arbitration institutions. Those rules were first published in July 2016. Similar to many of the leading international arbitration institutions, the SCCA regularly updates its rules to ensure that its services are continually improved in line with international standards.

The SCCA established a rules advisory committee to advise it on ongoing developments in the arbitration world and improvements to incorporate into its rules. The committee's members are an elite group of prominent international arbitrators from multiple jurisdictions who are known for international commercial arbitration. That committee has recently recommended a number of changes to the SCCA rules to ensure they are in line with international best practices regarding costs and fees of arbitrations administered by the SCCA and its tribunals.

The SCCA has adopted these recommendations, which it will incorporate this year into an appendix to the rules, along with a new fee schedule. The SCCA plans on finalising revisions to its rules by the end of 2022. Those planned revisions and the new fee schedule are described below.

The upcoming changes in the SCCA rules reflect the continuing and ongoing evolution of arbitration in Saudi Arabia (along with the legal system generally) to meet international standards of arbitration practice and the enforcement of arbitral awards. The result is a more "arbitration friendly" jurisdiction that has the institutional framework to support the efficient and effective resolution of disputes through arbitration.



## **Planned revisions to the SCCA rules and its fee schedule**

The SCCA is to update Appendix I of its rules dealing with fees and costs, along with its fee schedules, to address a number of issues raised by its users. Clients asked for alternative fee arrangements (hourly rates), optional payment methods (instalment plans) and the ability to separate advance deposits (rather than pay in equal shares) to account for significant disparities in claims and counterclaims.

The planned revisions will do away with the current concept of “filing fees” and only require the claimant to advance a non-refundable registration fee of 5,000 Saudi Arabian riyals to be credited towards its portion of administrative fees. Arbitrators asked for more clarity regarding cancellation fees and whether the deposit collected by the SCCA for arbitral tribunal fees per the fee calculator represents the amount likely to cover the fees or is the maximum amount possible.

The planned changes in Appendix I (Costs and Fees) of the SCCA rules are:

Article 1 (Registration Fee) no longer makes a separation between the SCCA filing fee and the SCCA final fee. It now merely requires a claimant to pay a registration fee of 5,000 Saudi Arabian riyals for all claims under the SCCA rules (both regular and expedited). The registration fee remains non-refundable but will now be credited towards the SCCA administration fees. It simplifies the initiation process with a flat rate and provides for a small discount when compared to the current SCCA final fee. Also, the registration fee will not apply to counterclaims.

Article 2 (Administrative Fees and Expenses of the SCCA) consolidates SCCA administrative fees and expenses into one provision. It confirms the authority of the SCCA to fix the advance deposit (generally to be paid in equal shares) and determine the final amount. It also clarifies when the SCCA may increase its fees and determine the amount if a matter terminates before the award has been issued. Finally, it states that the parties are jointly and severally liable for the SCCA administrative fees and expenses.

Article 3 (Fees and Expenses of the Arbitral Tribunal) consolidates arbitral tribunal fees and expenses into one provision. As for the former, it reiterates that parties

now have a choice between the default SCCA fee schedule, and an alternative fee arrangement based on an hourly rate. It also clarifies that arbitral tribunal expenses must be reasonable and lists the most common expenses. Finally, it states that the parties are jointly and severally liable for the arbitral tribunal fees and expenses, irrespective of which party appointed an arbitrator.

Article 4 (Methods of Calculation) provides more detail about how the base amount for any fee calculation under the SCCA fee schedule works. It addresses situations where any claims, counterclaims, *etc* are not quantified, remain undetermined, or are non-monetary in nature to address previously experienced uncertainties. Where parties do not quantify such amounts, the SCCA will determine the amount to be used for the calculation. Article 4 now addresses set-off defences by stating that such amounts shall not be added to the amount in dispute when the arbitral tribunal, in consultation with the parties, determines that such set-off will not require significant additional work. Finally, Article 4 clarifies that any increase in the amount in dispute affects the SCCA administrative fees and arbitral tribunal fees (where the SCCA fee schedule applies).

Article 5 (Deposits) clarifies that the SCCA may fix an advance deposit for arbitral tribunal fees that is higher or lower than the average amount stated in the SCCA fee schedule. It also conditions the transfer of the file to the tribunal on payment of the advance deposit for arbitral tribunal fees. Fluctuations in the amount in dispute, the addition of tribunal-appointed experts, or evolving difficulties or complexities of the arbitration may necessitate payment of additional deposits. In case of an alternative fee arrangement based on an hourly rate, the SCCA may now request deposits likely to cover the arbitral tribunal fees and expenses. Finally, the SCCA may now allow for deposits to be paid in instalments or by way of a bank guarantee.

Article 6 (Methods of Payment) now lists the preferred methods of payment. It clarifies that deposits shall not result in any charges for the SCCA and that they shall reside with the SCCA until the case has been closed by the SCCA. Article 6 states that compensation paid under the SCCA fee schedule excludes VAT or any other form of taxes or charges and that the collection and

payment of any applicable VAT remains the responsibility of the arbitrator. It also provides that the SCCA will withhold taxes where required by Saudi law.

Article 8 (Fees and Expenses of the Tribunal Secretary) provides that the SCCA Secretary Regulations apply whenever the arbitral tribunal decides to appoint a tribunal secretary. Where the SCCA Fee Schedule applies, no further tribunal secretary fees shall be charged to the parties. In all other cases, the arbitral tribunal shall fix a reasonable hourly rate after consultation with the parties and the SCCA. The parties are jointly and severally liable for the tribunal secretary fees and expenses.

The SCCA intends to provide users with a set of guide notes and a video to explain the fee calculator after the launch of these changes in Appendix I dealing with costs and fees.

Planned future changes in the SCCA rules, which are covered in the interim by the new Appendix I revisions described above, will occur by late 2022 and will include:

Article 34 (Costs of Arbitration) states that the arbitral tribunal shall determine the costs of the arbitration other than those to be determined by the SCCA, which are laid out in Articles 35 & 36. This future change in the Rules will be addressed in the immediate term by the above revision to Article 2 of Appendix I.

Article 35 (Administrative Fees and Expenses of the SCCA) provides that the SCCA shall determine the SCCA administrative fees and expenses at the conclusion of the proceedings, and may readjust its fees at any time. This clarifies that SCCA administrative fees may be refundable depending on the stage of a case and the level of progress made. This future change to the Rules is also covered in the revision to Article 2 of Appendix I.

Article 36 (Fees and Expenses of the Arbitral Tribunal) provides that the SCCA shall determine the arbitral tribunal fees and expenses, and that the ad valorem SCCA Fee Schedule shall serve as the default mechanism to compensate arbitrators. However, this revised rule now allows parties to agree to alternative fee arrangements based on an hourly rate, thereby adding the flexibility to decide

whether the latter approach is more suitable and cost-efficient. Details of these changes are provided in Article 3 of Appendix I.

Article 37 (Deposits) requires the SCCA to fix an advance deposit that is “likely to cover” the costs for, among other things, the arbitrator and tribunal-appointed expert compensation and expenses. The revised language provides the SCCA with the discretion to fix separate advance deposits, which is useful when there is a significant disparity between claims and counterclaims. It also clarifies that the award will only be sent to the parties after the requested fees have been fully paid. Any unused deposits will be reimbursed after the period prescribed for award clarifications, modifications, or requests for additional awards (Article 33) has passed. This future change to the Rules is addressed in the revision to Article 5 of Appendix I.