Miscellaneous Issues

The Seat of the Arbitration

The seat theory did not receive any attention from classical Muslim scholars because it has no affect on arbitration. None of the classical treatises mention anything with regard to the seat of arbitration; however, the seat of the arbitration is to be decided according to the parties as a clause in the arbitration agreement.

The Rights of Third Parties

Generally speaking, the effect of the arbitral award must not extend to anyone other than the parties to the dispute. If a third party has got an interest in the enforcement of the arbitral award, they can send their request to the court.[156]

The Unanimity of the Award

If the arbitration proceeds with a sole arbitrator, the problem of the conflict of opinions with regard to the final decision between the arbitrators will not exist – the task of making the award is an individual process. However, scholars agree that if multiple arbitrators fail to agree, the award will be void. An award needs to comply with the opinion of the majority of the arbitrators in order to be fair and just.

Hanbali treatises suggest that there are four methods of issuing the arbitral award if the arbitrators do not reach an agreement. First, when drafting the arbitration agreement, the number of arbitrators should be odd. Second, the assistance of an external arbitrator should be sought and the case should be decided according to his opinion, although the external arbitrator is not allowed to come up with a new opinion; his job is only to choose one of the available decisions. Third, if the arbitrators fail to issue the award, the dispute can be decided by another tribunal or by a sole arbitrator. This option may lengthen the dispute, which contradicts one of the main objectives of choosing arbitration as a swift dispute settlement mechanism. Fourth, if unanimity cannot be reached and the parties to the dispute have exhausted the above-mentioned methods, they can refer the dispute to litigation as a last resort.[157]

It has been shown that Islamic Shari′a regulates arbitration proceedings in a comprehensive way, covering all the important aspects from the formation of the arbitration agreement to the enforcement of the final arbitral award. The chapter has also shown arbitration to be a real alternative to litigation in all subject matters. Shari′a arbitration rules are not substantially different from other current rules, but they do form the basis for most arbitration regulations in most Muslim countries nowadays. Before looking at the arbitration regulations in Saudi Arabia, which are

156 Ibid.

157 Supra n. 4, Ibn Qodamah, Vol. 10, p. 546.

codifications of the Hanbali teachings as introduced by Ibn Taymiyyah and Ibn Qodamah, the next chapter will examine the regulatory attitude toward arbitration in Saudi Arabia.

Chapter 4
The Regulatory Attitude toward Arbitration in Saudi Arabia

Commercial arbitration has existed in the Saudi legal system since the enactment of the Code of Commercial Courts in 1931. Nonetheless, international arbitration was not always welcomed by the Saudi government. At first, the Saudi Government did not oppose resorting to international arbitration, although it did restrict it. This restriction started to relax from the mid-1970s, but very slowly. The main purpose of this chapter, which is divided into two parts, is to examine the regulatory attitude toward international arbitration in Saudi Arabia. The first part will discuss the regulatory attitude toward arbitration from the creation of the Saudi state in the 1930s to the first oil boom in the 1970s. It will examine arbitration cases to which the Saudi Government was party, such as the *Wahat Alburaimi* and the well-known case of *Arabian American Oil Company v. Saudi Arabia* (Aramco Case) and their impacts on the Saudi legal system. The second part will cover the period from the mid-1970s until now, a period which experienced a shift in attitudes toward attracting foreign investment.

The regulatory attitude toward arbitration in Saudi Arabia has gone through three phases. At first, international arbitration was welcomed – the first Saudi Government attempt to use arbitration was in the settlement of the *Wahat Alburaim* (Buraimi Oasis Case) in 1955. The arbitration took place in Jeddah, Saudi Arabia, with the British Government acting on behalf of the ruler of Abu Dhabi and the Sultan of Oman. The arbitration agreement established a tribunal consisting of five members for the settlement of the dispute as to the location of the common border between Saudi Arabia and Abu Dhabi, and as to the sovereignty of the Buraimi Oasis. According to the arbitration agreement, the tribunal had to give due regard to all relevant considerations of law, fact and equity, and in particular to the historical rights of the rulers in the area; the traditional loyalties, tribal organization and way of life of the inhabitants of the area; and the exercise of jurisdiction and other activities in the area.[1] The *Buraimi* arbitration did not have a significant impact on arbitration or the Saudi Arabian legal system, unlike the well-known arbitration between the Government of Saudi Arabia and Aramco in 1958, which changed the Government's attitude toward international arbitration for several decades,

1 The arbitration agreement between the Government of the United Kingdom (acting on behalf of the ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur) and the Government of Saudi Arabia, Jeddah, 30 July 1954 (HMSO Cmd 9272, 1954) cited in J.B. Kelly, 'The Buraimi Oasis Dispute', *International Affairs*, 32/3 (July 1956), pp. 318–24.

in what can be called the second phase.[2] During this phase, Saudi Arabia looked at international arbitration as a threat to its national sovereignty. The Aramco award of 1958 had a significant impact on accepting arbitration agreements and clauses providing for international arbitration by governmental bodies; and will be discussed later in this chapter. The third phase started with the first oil boom in the 1970s and has continued up to now.[3] Economic expansion and infrastructure-building caused Saudi Arabia to relax its attitude toward international arbitration, by joining the ICSID convention, reforming the arbitration regulations and offering more protection to foreign investments. The first part of this chapter deals with arbitration from the creation of the Saudi legal system and the enactment of the Code of Commercial Courts in 1931 until the first oil boom in the mid-1970s. The second part deals with the current approach that started as a result of the oil boom.

Arbitration in the Saudi Legal System Prior to the Oil Boom

Arbitration under the Code of Commercial Courts 1931

The related provisions of the Code of Commercial Courts are concerned only with commercial arbitration between private parties. The Code includes nine brief articles for regulating arbitration proceedings. Article 493 allows disputants to stipulate to arbitrate in a written notarized deed. The parties to the arbitration are free to decide on the number of arbitrators, the timescale and the way of rendering the arbitral award, whether it is by unanimity or by majority. Arbitration under this Code is institutional,[4] and the proceedings are held under the supervision of the Commercial Court.[5]

Article 494 deals with the procedural law of arbitration. Arbitrators are required by this article to apply the provisions of the Code of Commercial Courts in the light of Shari′a procedural rules, with the support of the arbitration agreement.[6] As with the relevant provisions in the Arbitration Act of 1983, an arbitral award is not enforceable unless reviewed by the Commercial Court, which will either approve it for enforcement or repudiate it.[7] With regard to the revocability of the appointment of arbitrators, the Code prohibits the revocation of the appointment of the arbitrators by the parties after the Court's approval; nonetheless, the disputants

2 This case is also known as Aramco Case or the Onassis Case.

3 F. Sami, *International Commercial Arbitration in Arab Countries* (1st edn., Dar Althaqafa Li Nashr wa Altaouze′, 2006), p. 423.

4 However, article 613 sets the administrative fees for enforcing arbitral awards that have not been supervised by the Court.

5 The Code of Commercial Courts of Saudi Arabia, article 493.

6 Ibid., article 494.

7 Ibid., articles 495 and 497.

have the right to challenge the award before the Court.[8] The Code also includes provisions to determine the administrative fees.[9]

However, these provisions were not available in real life because Shari′a courts at that time did not recognize the arbitration agreement or the arbitration clause in cases where the parties insisted on their right to arbitrate in accordance with the arbitration agreement. Even if the court approved an arbitration agreement or clause, enforcement of the arbitral award was voluntary. Accordingly, reference to arbitration was very limited; the conflict between the Commercial Court and Shari′a courts led arbitration to become ineffective, time-consuming and, in many cases, harmful to the parties involved. The Arbitration Act of 1983 superseded the arbitration provisions of the Code of Commercial Courts. However, ad hoc arbitration in cases of a non-commercial nature is still governed by the provisions of the Code.[10]

Arbitration Clauses in the Oil Concessions in Saudi Arabia

On 29 May 1933, the founder of the kingdom of Saudi Arabia, King Abdul-Aziz, concluded a contract on oil exploitation with the Standard Oil Company of California (Socal), the parent company of Chevron. Under that contract, the company was granted an exclusive concession for 60 years in the eastern province of Saudi Arabia.[11] In accordance with the concession agreement, Socal established a corporation, the California-Arabian Standard Oil Company (Casoc) and assigned to it all its rights and obligations under the agreement. In 1936, owing to the failure in locating oil and the high cost of operations, the Texas Oil Company acquired a 50 per cent stake in the concession, which had been ratified by the Government of Saudi Arabia. The company name was changed in 1944 from California-Arabian Standard Oil Company to Arabian American Oil Company (Aramco).[12] At the time of drafting the concession agreement, Saudi Arabia did not foresee the possibility of a dispute with Aramco, and so it left out a solid arbitration clause. However, article 31 of the concession agreement did state that any dispute would be settled through an arbitration panel consisting of three arbitrators and that Islamic law as taught by the Hanbali school would apply. The issue of the applicability of Islamic law was even clearly expressed in the arbitration agreement between the

8 Ibid., article 496.

9 Ibid., articles 610, 611, 612 and 613.

10 N. Albejad, *Arbitration in Saudi Arabia* (1st edn., Institute of Public Administration, 1999), p. 30.

11 In 1939, by a supplementary agreement, the concession area was extended to cover about 116,000 square miles and the period was extended to 65 years.

12 See, in general, Saudi Aramco. Available online at <http://www.saudiaramco.com> [accessed 8 April 2009].

Government of Saudi Arabia and Aramco in 1955; nonetheless, the arbitration tribunal failed to apply it in the dispute, as will be seen below.[13]

Owing to the outcomes of the Aramco arbitration and following the Council of Ministers Resolution No. 58 of 1963, Saudi Arabia avoided the possibility of not applying its law in disputes raised in the future. This was demonstrated by the great attention paid to the concession agreement between the Government of Saudi Arabia and Auxirap (French Red Sea). The Auxirap agreement of 1965 was outstandingly more favourable to Saudi Arabia than the Aramco one had been. Article 63 of the 1965 concession agreement provided that any dispute raised as a result of the interpretation or the execution of the agreement should be referred first to a committee of two experts, one chosen by the Government of Saudi Arabia and the other by the concessionaire. If the committee failed to reach an acceptable settlement, the dispute would be referred to the Committee of the Settlement of Mining Disputes in accordance with the Mining Act of 1963.[14] The agreement was altered later that same year after the participation of the Petromin Oil Company in the same concession,[15] owing to the distinction between the Auxirap and Saudi Government dispute and the Auxirap and Petromin one. There would have been no change in the dispute settlement procedure if the dispute had occurred between Auxirap and the Saudi Government; however, a dispute between Petromin and Auxirap would have needed to be settled by means of international arbitration just like any normal commercial dispute.[16] As an added security, Saudi Arabia obliged Auxirap, as the operating company for the concession, to incorporate a joint venture company in Saudi Arabia and to set the maximum foreign ownership limit at 60 per cent.[17] It can be seen from the arbitration clauses in other oil concessions (especially after the Aramco award) that Saudi Arabia tried not to refer to arbitration outside its jurisdiction. This is clear from the agreements with the Japan Petroleum Trading Co. of 1957, in which article 55 stated that disputes were to be finally resolved by a five-arbitrator panel sitting in Saudi Arabia. Article 23 of the agreement between Saudi Arabia and the Trans-Arabian Pipe Co. also provided for a three-arbitrator panel sitting in Jeddah. Thus the Saudi Government tried to secure its position in any possible conflicts to ensure the application of Saudi law in any future disputes, especially after the disappointing outcomes of the Aramco award.[18]

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13 A. Ashoush, *The Law of the Oil Concessions in the Arab Countries* (1st edn., Alsharikah Almuttahidah Lelnashr Wa altawze′, 1975), p. 415.

14 The committee is to be established by article 50 of the Mining Law of 1963.

15 The Saudi Arabian Lubricating Oil Company was formed in 1968 by a royal decree as one of the joint ventures of the General Organization of Petroleum and Minerals (Petromin). The company was renamed the Saudi Arabian Lubricating Oil Company in 1997 after Petromin's shares in the company were transferred to Saudi Aramco.

16 See supra n. 13, Ashoush, p. 415.

17 Ibid., p. 613.

18 A. Lerrick and Q. Mian, *Saudi Business and Labour Law* (2nd edn., Graham & Trotman, 1987), footnote 15, p. 153.

Aramco v. Saudi Arabia

Background

In January 1954 an agreement was concluded between the Government of Saudi Arabia and Aristotle Onassis, the Greek-born shipping tycoon. Hereinafter it will be referred to as the Onassis Agreement. The original deal was amended in April of the same year. It has been argued that the provisions of that agreement were only beneficial to Onassis and those middlemen who facilitated the deal. It was also argued that Onassis's main concern was to guarantee the employment of 10 oil tankers that he was chartered on in a long-term contract in a time when the global tankers market was experiencing overcapacity in addition to global depression in the demand for oil.[19] Others, however, argue that the agreement was an attempt to break Aramco's monopoly over Saudi oil.[20] Nevertheless, and away from politics, Saudi Arabia sought its own interests, as is clearly demonstrated in the provisions of the agreement.

The agreement granted Onassis the right to establish a private company in Saudi Arabia under the commercial name the Saudi Arabian Maritime Tankers Company (Satco). The newly formed company was bound to maintain a minimum of 500,000 tons of tankers under the Saudi Arabian flag and to register this tonnage in Saudi Arabia.[21] The agreement obliged Satco to establish a marine school in Jeddah and to employ its graduates onboard Satco tankers. Satco further undertook to give Saudi Arabian employees and workmen preference in working on its tankers.[22] Moreover, Satco was obliged to carry on its tankers, free of charge, 50,000 tons of oil and oil products from Saudi Arabian ports in the Gulf to any Saudi port in the Red Sea.[23] The Government of Saudi Arabia was entitled to receive a royalty of one shilling and sixpence for every ton shipped abroad in Satco tankers, as well as the payment of all port and harbour duties in Saudi Arabian ports.[24] The agreement foresaw a possible increase in Satco's fleet, which had to always represent a minimum of 500,000 deadweight tons of tankships during the life of the agreement.[25]

Satco's tankers had to bear Saudi Arabian names and Satco had the right to enjoy the Government's protection, which is the right of any Saudi Arabian

19 D. Holden and R. Johns, *The House of Saud* (1st edn., Sedgwick and Jackson, 1981), pp. 181–82.

20 Ibid.

21 Article 14 of the Onassis Agreement as quoted in the Aramco award 27 ILR (1963), pp. 116–27.

22 Ibid., articles 6 and 9.

23 Ibid., article 10; however, it did not state the frequency of this shipment, whether it will be for one time only or in a frequent manner.

24 Ibid., articles 11 and 12.

25 Ibid., article 14.

company.[26] The agreement obligated Saudi Arabia to enact a Maritime Law.[27] The controversial provisions of the agreement raising the dispute were articles 4 and 15. According to these provisions, the Saudi Arabian Maritime Tankers Company had the right of priority for the transport of oil for a period of 30 years from the date of signing the agreement, renewable for a further period by mutual agreement.[28]

The dispute at issue started when the Government of Saudi Arabia ordered Aramco to apply Royal Decree No. 5737 of 09/04/1954, which ratified the Onassis Agreement concluded on 20 January 1954. The royal decree gave the Onassis Agreement a legal status similar to that of the Aramco concession agreement of 1933. On 23 January 1954, the Saudi Minister of Finance advised Aramco of the signing of the agreement and informed it of the content of article 4. The letter read as follows:

> [I]it is taken for granted that the Saudi tankers have priority over other tankers for loading Saudi petroleum (in second place) after the tankers owned by your company or by companies which founded you and which have been actually transporting Saudi petroleum before December 31, 1953.[29]

Aramco's Response

Aramco rejected the Onassis Agreement and responded to the Minister of Finance's letter, saying that the implementation of the Onassis Agreement would be:

- contrary to and in violation of both the letter and the spirit of the existing agreement between the Government of Saudi Arabia and Aramco;
- contrary to the long-established business arrangements and procedures developed with reliance on these agreements;
- contrary to established worldwide custom and practice in the international oil industry;
- of a disastrous effect upon the presently established sales outlets for Saudi oil and the possible future development thereof; and
- wholly impractical.[30]

Aramco based its rejection on the above-mentioned grounds without any real justification. This carried on throughout the proceedings, as Aramco failed to prove that the Onassis Agreement would cause any injury to its interests.

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26 Ibid., articles 2 and 3.
27 Ibid., article 5.
28 Aramco award, 27 ILR 117 (1963), p. 128.
29 Ibid., p. 130.
30 Ibid.

The Saudi Government's Position

After months of negotiations to reach an amicable settlement, the parties agreed to submit the dispute to an ad hoc arbitration tribunal in Switzerland. The arbitration proceedings started in 1954 but the award was not issued until 1958. Although it was only an arbitration relating to the interpretation of a concession agreement, many circumstances lengthened the proceedings to four years. Throughout, the Government of Saudi Arabia tried to reach an amicable settlement outside the tribunal. The arbitrator appointed by Saudi Arabia, Dr Badawi, died during the proceedings and was replaced by Mr Mahmoud Hassan; and both, in addition to the arbitrator appointed by Aramco, were Egyptian nationals. Dr Badawi and Mr Habachy, the arbitrator chosen by Aramco, appointed the Swiss Georges Sauser-Hall as a referee. The Saudi Government recognized that the concession agreement of 1933 gave Aramco very extensive rights, exclusive in character, in respect of the operations pertaining to its enterprise, but it contended that these rights did not include transportation of petroleum and petroleum products by sea. The Government contended that Aramco was granted an exclusive right to transport its oil and oil products only to the seashore including the exclusive area in Saudi Arabia and to the limit of the territorial waters of the state, but this grant did not include the right to cross Saudi Arabia's maritime frontier and reach the high seas.[31]

The Government based its argument on the text of the concession agreement, which did not expressly provide for granting Aramco the exclusive right of transportation by sea to foreign countries.[32] The Government also relied upon the principle of restrictive interpretation of the obligations assumed by a sovereign state in agreements with private individuals or companies, inasmuch as a government must always bear in mind and safeguard the interests of the community.[33] The Government took the position that it could withdraw from the arbitration any act performed under it to exercise its sovereign power. The Saudi Government concluded that, with regard to the transportation of oil and oil products to foreign countries, Aramco was in the same legal position as other inhabitants of Saudi Arabia; it therefore had to comply with any restriction adopted by the Government in connection with external transport of oil and oil products. The company had no ownership in these products or in any other property interest that would immunize it, or its buyers, from governmental action regulating such transport.[34]

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31 Supra n. 28, Aramco award, p. 140.

32 Supra n. 28, Aramco award, p. 132. Aramco alleged that it has the exclusive right of transportation of Saudi oil; however, it has never exercised it, either by engaging in such transport or by exerting control over such transport.

33 Ibid.

34 Ibid. In support of the Government's point of view, some Muslim scholars exclude minerals from the scope of private ownership. See supra n. 18, Lerrick and Mian, pp. 170–71.

Saudi Arabia insisted that, in addition to the principles of Islamic and international law, the general principles of law recognized by civilized nations do not support the contention that the concession agreement of 1933 exempts Aramco from the regulatory power of the Saudi Government. The Government added that since the Onassis Agreement had been ratified by Royal Decree No. 5737, it had become the law of the land that everyone had to respect.[35] The Saudi Government contended, therefore, that Aramco could be lawfully bound to ship oil and oil products to foreign markets on Satco tankers, in conformity with the Onassis Agreement ratified by the royal decree. To exercise its sovereignty, the Government insisted that Aramco be forced to submit to any regulatory restriction providing for a preferential right in the transportation of its products from Saudi Arabia in favour of tankers flying the Saudi Arabian flag. Despite the fact that Saudi Arabia ratified the Onassis Agreement in the interests of its community, it guaranteed the minimum standard of protection to the rights of Aramco.[36] Royal Decree No. 5737 gave Satco's tankers a right of priority after Aramco's tankers and tankers owned by the owning companies of Aramco, which is a right that Aramco has never exercised since its creation. This means that the application of the royal decree caused no injury to Aramco. Moreover, under Islamic law, the 'generic terms of a contract must be interpreted extensively'. If Aramco was granted the right of transport, it should have exercised it; Aramco did not do so for more than 17 years. For the sake of the manifestation of the general principles of law recognized by civilized nations, the Government cited the French administrative law, as developed by the French Conseil d'État, to support its contention that a state has the right to exercise its regulatory powers in order to control, and if necessary adapt, the methods used by a company operating a public service. In the Government's opinion, the 1933 concession is included in the concept of public service.[37]

Applicable Law

According to article 4 of the arbitration agreement between Aramco and the Government of Saudi Arabia, dated 15 February 1955, the arbitral tribunal would have to decide on the dispute in accordance with Saudi Arabian law insofar as matters fell within the jurisdiction of Saudi Arabia. The tribunal would be free to decide the applicable law where matters were outside the jurisdiction of Saudi Arabia.[38]

35 Supra n. 28, Aramco award, p. 141.

36 Ibid., p. 140; the letter of the Saudi Minister of Finance quoted above.

37 Ibid.

38 Article 4 (b) of the arbitration agreement defined Saudi law as Muslim law under the teaching of the school of Imam Ahmad ben Hanbal, as applied in Saudi Arabia.

With regard to the procedural law, despite the fact that the parties agreed for the arbitration to take place outside Saudi Arabia, the law of the seat could not be applied to the arbitration. The tribunal stated:

> [C]onsidering the jurisdictional immunity of foreign states, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the tribunal is unable to hold that arbitral proceedings to which a sovereign state is a Party could be subject to the law of another state.[39]

As mentioned above, the parties to the arbitration agreement agreed to apply the principles of Islamic law, as taught by the Hanbali school. The tribunal, though, supported Aramco's argument and stood against the application of Saudi law; however, it did explain its opinion in a 'more polite way' than Aramco.[40] The tribunal stated that:

> [T]he regime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by the act of authority. Hanbali law contains no precise rule about mining concessions and [is] *a fortiori* about oil concessions.[41]

This quotation simply reveals a lack of knowledge of Islamic law, which has rules to govern all kinds of contract. If, for instance, the Hanbali school is unable to govern a concession agreement, resorting to other schools through the method of qiyas can solve the dispute. As was mentioned in a previous chapter, using qiyas does not require any act of authority. It needs only adequate knowledge of the situation and accurate reasoning, without any resort to official authority, because it is the law of God, not of the state. The rules apply to the exploitation of hidden wealth such as gold and silver, can apply to oil and gas by means of analogical reasoning. The law applicable to this case under all conflict of laws theories can only be Saudi law. The tribunal denied the application of Saudi law in the dispute and claimed that Saudi law has no rules for governing oil concessions.

The concession agreement of 1933 was an agreement between a state and a private American party and so could not be subject to public international law. The tribunal quoted: 'Any contract which is not a contract between states in their capacity as subjects of international law, is based on the municipal law of some country.'[42] But if international law cannot be applied because of the nature of the dispute, and other municipal laws cannot be applied because a state cannot fall under a jurisdiction of another state, what is the applicable law? Even the general

39 Supra n. 28, Aramco award, p. 154.
40 Ibid., pp. 162–63.
41 Ibid.
42 See, in general, supra n. 28, Aramco award.