THE SAUDI CENTER FOR COMMERCIAL ARBITRATION ADOPTS NEW ARBITRATION RULES

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International Arbitration Alert

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The Saudi Center for Commercial Arbitration (SCCA) recently issued a new and updated set of arbitration rules (SCCA Rules 2023). Overall, the product is an enhanced, modern set of rules that aim to allow for more efficient and sophisticated arbitral proceedings and that are likely to benefit a rapidly growing arbitration jurisdiction with ambitions of becoming a central regional hub for dispute resolution.

Background

The SCCA is a relatively new institution, established in 2014, but it has quickly become a prominent regional arbitration center that administers arbitrations in both Arabic and English. Its original rules were adopted on 1 May 2016 (SCCA Rules 2016). The new SCCA Rules 2023 came into force on 1 May 2023 and, following a public consultation and input from local and international arbitration practitioners, incorporate a number of modern innovations and features inspired by the rules of other leading arbitration centers.

SCCA Court

Perhaps the most prominent addition is the role given to the SCCA Court, a body formed in November 2022. This follows in the footsteps of other successful international arbitral institutions, such as the London Court of International Arbitration and the International Chamber of Commerce. It is comprised of 15 renowned arbitration practitioners. Various decision-making functions, which under the previous rules were allocated to the SCCA as administrator, such as nominating arbitrators where the parties fail to do so on time, are now in the domain of the SCCA Court.

Challenging the Appointment of an Arbitrator

The SCCA Rules 2023 maintain the ground for party challenges to the appointment of an arbitrator from the SCCA Rules 2016, namely where circumstances exist that give justifiable doubts as to the arbitrator's impartiality or independence. They also raise two new ones: (1) where the arbitrator has failed to perform his or her duties (previously a ground for removal by the administrator but not challenge by a party), and (2) where the arbitrator manifestly does not possess the qualifications agreed to by the parties.

Emergency Arbitration

While the SCCA Rules 2016 contained provisions for the appointment of an emergency arbitrator to award interim relief prior to constitution of the tribunal, the SCCA Rules 2023 contain more detailed provisions. In particular, a time limit for issuing an interim award or order is set, at no later than 15 days from the transmission of the file to the emergency arbitrator (which may be extended by the administrator on reasonable request from the emergency arbitrator or on the administrator's own initiative should it be necessary).

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Early Disposition

The SCCA Rules 2023 contain provisions for the early disposition of claims or defenses, a process similar to summary dismissal or determination. A party may apply to the tribunal to dispose of an issue of jurisdiction, admissibility, or legal merit without the need to follow every step that would otherwise be taken in the ordinary course of an arbitration. This procedure may operate in cases where: (1) an allegation of fact or law material to the outcome of the case is manifestly without merit; (2) even if the facts advanced by the other party are assumed to be true, no award could be issued in that party's favor under the applicable law; or (3) any issue of fact or law material to the outcome of the case is, for any other reasons, suitable for determination by way of early disposition.

If the tribunal allows an application for early disposition to be heard, it shall establish a procedural timetable to determine the application giving each party an equal and reasonable opportunity to present their case. It then shall issue an order or award within 30 days of allowing the application to proceed (though in exceptional circumstances the SCCA as administrator may extend this by up to 15 days).

Representation by Foreign Counsel

The SCCA Rules 2023 specifically provide that "[e]ach party may be represented or assisted by persons chosen by it," and "[u]nless applicable law requires otherwise, any party may be represented or assisted by legal practitioners or any other authorised representatives, including foreign legal practitioners regardless of the jurisdiction in which they are based or licensed to practice." In substance, this does not change the rules, but it is a welcome clarification to prevent parties making arguments that foreign counsel does not have the right to represent their clients in arbitration under the SCCA Rules 2023.

The SCCA Rules 2023 also add a requirement that a party must promptly inform the other parties, the tribunal, and the administrator where it wishes to change or add a representative. The tribunal may refuse to allow a proposed change of representative if it considers it necessary to safeguard the composition of the tribunal (for example, to prevent a party from manufacturing a conflict of interest) or the finality of the award.

Consolidation

The SCCA Rules 2023 contain a provision for the consolidation of two or more pending arbitrations into a single arbitration, where: (1) the parties have agreed to consolidation, (2) all of the claims in the arbitrations are made under the same arbitration agreement, or (3) the claims are not made under the same arbitration agreement, but the disputes in the arbitrations arise in connection with the same legal relationship and the SCCA Court finds the arbitration agreements to be compatible.

An application to consolidate arbitrations cannot be made if the tribunal in any of the arbitrations is fully constituted, unless all parties agree or the members of each tribunal are identical and the tribunals request consolidation.

If the SCCA Court does decide to consolidate arbitrations, the parties in those arbitrations are deemed to have waived their right to nominate an arbitrator; instead, the SCCA Court will complete the appointment of the tribunal, which may include revoking the appointment of previously appointed arbitrators or appointing additional arbitrators.

Law of the Arbitration Agreement

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The SCCA Rules 2023 set out a default provision for the law applicable to the arbitration agreement. This is often overlooked by parties. Typically, a contract will stipulate its substantive governing law, but the arbitration agreement (which under most laws is deemed separate from the main "host" contract) may have its own governing law, which is rarely expressly stated in the contract. The SCCA Rules 2023 provide that the default law applicable to the arbitration agreement is the law applicable at the place of arbitration (seat), unless the parties agree otherwise in writing.

Sharia Law

The previous rules provided that the parties' agreed governing law would be applied by the tribunal "without prejudice to the rules of Sharia" or Islamic jurisprudence. Such a clause is omitted from the SCCA Rules 2023, which simply provide that the tribunal will apply the substantive law designated by the parties or, absent such designation, the law that it determines to be appropriate.

However, while *Sharia* law is removed from the main body of the rules, it is not disregarded. The set of standard clauses published alongside the SCCA Rules 2023 includes an alternative governing law clause that allows the substantive law of a contract to be fixed "to the extent that such law does not conflict with Shari'ah…[,]" should the parties wish.

Publication of Awards

In a departure from prior practice, the SCCA Rules 2023 permit the SCCA to make public any award, order, decision, or other ruling unless any party objects to publication before the arbitration has concluded. It may anonymize or redact any decision made public. This ought to increase transparency, with relevant safeguards to protect privacy and confidentiality.

Online Dispute Resolution

The SCCA Rules 2023 contain revised Online Dispute Resolution (ODR) Procedure Rules—something that was not originally present in the SCCA Rules 2016, but was added in an appendix in 2018. The ODR Procedure Rules apply where the parties agree in writing and where the aggregate amount in dispute (excluding arbitration costs) does not exceed SAR200,000. They provide for a streamlined online procedure, with a sole arbitrator who will issue a final award within 30 days of his or her appointment (to be extended only in exceptional circumstances at the administrator's discretion). Ordinarily, the ODR proceedings are based on written submissions only, though the arbitrator may hold a telephone or videoconference hearing if he or she sees fit or the parties agree.

Third-Party Funding

The rules on disclosure now require a party to promptly disclose to the administrator, tribunal, and other parties "the identity of any non-party who has an economic interest in the arbitration's outcome, including any third-party funder."

Cybersecurity, Privacy, and Data Protection

The SCCA Rules 2023 take account of the growing importance of cybersecurity, privacy, and data protection issues in international arbitration, and they require parties, the administrator, and tribunals to adopt reasonable information security measures in the circumstances of the case. The new rules set out some factors to consider in determining what is reasonable in a particular arbitration, namely:

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1. The risk profile of the arbitration;
2. Existing information security practices, infrastructure, and capabilities of the parties, tribunal, and the SCCA;
3. The burden, costs, and relative resources of the parties, tribunal, and the SCCA;
4. Proportionality relative to the size, value, and risk profile of the dispute; and
5. The efficiency of the arbitration.

Furthermore, the SCCA Rules 2023 give the tribunal the power to determine and modify specific information security measures applicable to the arbitration. However, the rules are not prescriptive as to precisely what measures should be employed in any particular circumstance.

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