



# International Commercial Arbitration and Arbitrators' Gender: Saudi's Perspective

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## **Abstract:**

It is undoubted that women are underrepresented in international judicial bodies. However, this article aims solely to present the position of the Saudi legislator on the issue of arbitrator's gender. By presenting the prior and current Saudi arbitration laws and examine the actual practice of Saudi courts regarding arbitrator's gender, author seeks to provide a comprehensive perception of the legal status of women in Saudi arbitration law. This paper concluded that the Saudi legislator has made significant efforts to render the international agreements more effectively. It is worth noting that there is no law or regulation preventing women from being arbitrators. Thus, there is no justification for the disillusionment among western researchers on this issue. This paper suggests that courts must comply with Saudi laws without broad interpretation of the laws.

**Keywords:** Arbitration, Arbitrator Gender, Saudi Public Policy

## الملخص:

لا شك أن هناك قصور في التمثيل النسائي في الهيئات القضائية الدولية بشكل عام، وعلى الرغم من ذلك تتناول هذه المقالة بشكل خاص موقف المشرع السعودي من هذه القضية. تهدف المقالة إلى عرض جميع الأنظمة المتعلقة بهذه المسألة، سواء كانت أنظمة حالية أو سابقة للوقوف على التطورات التشريعية التي جرت على هذا الموضوع، كذلك قدمت هذه المقالة بعض الأحكام والممارسات القضائية والسياسة المتعلقة بدور المرأة في التحكيم. خلصت المقالة بعد تحليل القوانين والأحكام والدراسات المرتبطة بهذا الموضوع إلى أن المشرع السعودي قد سعى جاهداً إلى تطوير الأنظمة المتعلقة بالمرأة بشكل خاص، والمتعلقة كذلك بدورها في المجال القانوني. يلاحظ كذلك سعي السعودية إلى تعزيز دورها في مجال التحكيم التجاري الدولي عن طريق الانضمام إلى الاتفاقيات الدولية في هذا المجال. فيما يتعلق بالأنظمة، خلصت الدراسة إلى أن ليس هناك ما يمنع أو يعيق تولى المرأة للتحكيم وإصدار القرارات التحكيمية في المملكة العربية السعودية، وبالتالي ليس هناك ما يبرر الانتقادات الحادة الموجهة إلى السعودية في مجال تنفيذ القرارات التحكيمية الدولية، كذلك قدمت هذه الدراسة توصية فيما يتعلق بتنفيذ المحاكم السعودية للأحكام الأجنبية، وهي ضرورة عدم توسع المحاكم في تفسير مفهوم السياسة العامة.

**الكلمات المفتاحية:** التحكيم، جنس المحكم، النظام العام السعودي.

## Introduction

Arbitrators' gender is considered one of the most controversial issues related to international commercial arbitration specially in Islamic countries. In countries which their legal system is derived from the Quran<sup>1</sup> and Sunna<sup>2</sup>, such as Saudi Arabia, there is still doubt about the women's right, particularly whether women are occurring judicial positions or not? (Saudi Basic Law of Governance, 1992)

However, the 2000s and 2010s saw major developments in all fields regarding women's rights. For instance, as a major step in female participation in public life, in 2013, king Abdullah appointed 30 women to Shura council. Moreover, the first female ambassador was appointed in 2019 for the first time in country's history (BBC News, 2013).

In spite of the steps have already been made to promote women's roles in society, there is still ambiguity about whether arbitral awards issued by women can be enforced in Saudi Arabia? to answer this question,



this article has been divided into four sections, section one, is Saudi Arabia obliged to implement the arbitral awards? ; section two, the 1983 Saudi Arbitration law ; section three, the 2012 Saudi Arbitration law ; section four, conclusion.

### **Research Significance:**

The enforcement of arbitral awards is the main aim of all arbitration agreements and generally it represents one of the most significant steps in international commercial arbitration – if not, the most crucial. Therefore, presenting Saudi legislator and court position of such a thorny issue will give the arbitrators and international arbitration community a comprehensive perception about this issue and hence they can avoid such obstacles when it comes to arbitral award enforcing.

### **Research Questions:**

The questions will be addressed here concern:

- 1-whether arbitral awards issued by women can be enforced in Saudi Arabia?
- 2-what is the Saudi legislator’s perspective regarding female arbitrator?

### **Research Methodology**

In order to answer the above questions, the method to be adopted in this paper is doctrinal approach. Thus, this paper is based on the interpretation of laws and courts decisions. However, although the lack of sources regarding this topic, the author sought to present all accessible literature.

### **Is Saudi Arabia obliged to enforce non-domestic awards?**

There have always been concerns about to what extent Saudi Arabia is committed to implement non-domestic awards. According to Roy, “some countries can use public policy exception to refuse arbitral award implementation”. Roy describes Saudi Arabia as “traditionally hostile” to the recognition and enforcement of non-domestic arbitral awards,



arguing that because “Saudi Arabian law and policy is diametrically opposed to the rules and laws of many member nations, courts may find it easy to reject non-domestic arbitral awards pursuant to New York Convention Article V(2)(b)” (Roy, 1994).

However, it is worth noting that after being the biggest producer of oil, Saudi Arabia started to have a crucial role in the international trade and hence Saudi leadership sought to offer suitable legal environment for potential disputes could be rising between the parties. Therefore, Saudi efforts led to establish Riyadh agreement which is one of the most significant agreements between Arabic countries in 1983 (Riyadh agreement, 1983).

Furthermore, in 1994, as a vital step towards more efficiency in the field of international commercial arbitration. Saudi Arabia acceded to New York convention which consider the most successful agreement in the field of international commercial arbitration and hence Saudi Arabia becomes committed to enforce non-domestic arbitral awards (New York Convention, 1958). However, article V of the Convention stipulates that any decision violating public policy shall be null and void.

Interestingly, despite this stipulation, the Convention does not define the concept or limits of public policy. Consequently, this ambiguity can lead to a broad interpretation or misuse of the exception by national courts.

Additionally, by stipulating this exception without any interpretation it can be said that this convention has left room for national courts to interpret this exception broadly. Thus, This would indirectly lead us to ask: can Saudi courts refuse enforcing the arbitral awards issued by women since such an arbitral violates Sharia law and hence breaches Saudi public policy?

### **The 1983 Saudi arbitration law:**

Despite the fact that the 1983 Saudi arbitration law did not explicitly preclude women to be arbitrator



there is a considerable debate among western and Muslims researchers about this issue. This argument could be arising since Saudi legal system is based on Sharia law which prohibits such a procedure.

According to the provisions of Sharia, the arbitrator is required to have the same qualifications as the judge (Saleh, 1984). To expand on this point, Muslim scholars, namely Malki, Shafai, and Hanbali explicitly believe that women are not qualified to be judges (Aldimyati, 2015). They based this claim on a Hadeeth (a saying attributed to the Prophet Mohammed), the Hadeeth says, “A people that make a woman their ruler will never prosper”. [Sahih al-Bukhari 7099]

In this respect Martin and Alamari argue that Saudi courts take the gender of the arbitrator into consideration. Thus, arbitral awards issued by women shall be null and void (Al-Ammari, 2014).

On the other hand, from Abo Hanafia’s perspective, women are qualified to be judges (Alnaqeeb, 2001). He based his opinion in verse 2:282 of the Quran which states that “And call in to witness two witnesses of your men; yet, in case the two are not two men, then one man and two women from among the witnesses you are satisfied with, so that (in case) one of the two women should err, then either of the two should remind the other”. [The Quran 2:282]

Likewise, Mohammad concluded that neither the Quran nor the Sunna have explicitly prohibited or allowed women to rule. Thus, Islam has given freedom to Muslims societies to choose what is appropriate with their circumstances (Elius, 2010).

Moreover, It is important to highlight the obstacles faced Saudi women in judicial representation. For instance, although Saudi Lawyers law which was issued in 2001 did not stipulate specific gender for being lawyer, in practice the evidences show that there is no representation of female lawyers until 2012 when the Saudi Ministry of Justice granted the first license to a female lawyer (Carrington, 2013).

It is worth noting here that this issue and other rendered the Saudi legislator to enact new arbitration law with contemporary reforms.



### **The 2012 Saudi Arbitration law:**

In spite of being a signatory since 1994, Saudi Arabia did not enact new arbitration law until 2012. The prior Saudi Arbitration law was criticised for being outdated and vague (Sayen, 1987). Consequently, Saudi Arabia sought to modernise and improve its arbitration law to comply with the international, bilateral and regional agreements.

In 2012, as a significant stage of gradual reform, Saudi Arabia issued the new arbitration law with new reforms. In general, it is worth noting that the Saudi legislator has relaxed the conditions related to the arbitrator. For instance, in terms of arbitrator's religion, whilst the prior law stipulated that the arbitrator must be Muslim, the new arbitration law did not specify any religion as a term.

However, although the new Saudi arbitration law did not require specific gender for the arbitrator, Alaessa claims that the gender of arbitrator is a part of Saudi public policy and hence arbitral awards shall be null (Alaessa, 2014).

In contrast, in 2016, in spite of the objections of one of the parties on this decision which violets Saudi public policy, the Saudi administrative appeal court appointed the first female arbitrator in a commercial case (Saudi Administrative Appeals Court, 2016). In this respect, Almulhim comments: "The finality of this decision does not preclude the possibility that challenges might arise in the future in other cases. First, while this decision is final, it is not binding to other courts. Second, as the first case to deal directly with the issue of female arbitrators, it might be too much to assume that all future cases will take a similar approach. Finally, there is also a question of whether any objection might be raised at the enforcement stage" (Almulhim, 2017).

It is noteworthy that Saudi courts do not apply or rely on precedents. Similarly, there is no distinction between domestic and international public policy in the Saudi arbitration law which will eliminate the possibility of refusing arbitral awards issued by women.



## Conclusion

Although there is widespread disillusionment among western researchers about Saudi's position on this issue. Saudi Arabia should be praised for its attempts to enhance arbitration law to comply with the modern practice of international commercial arbitration.

It is worth noting that the new Saudi arbitration law does not contradict international agreements. Likewise, there is a significant improvement in the Saudi judicial system. Although precedents are not binding authority, as already noted above, there are serious attempts to achieve the purpose of the international agreements which is the implementation of arbitral awards.

However, in respect of this particular issue, there is no doubt that the lack of clarity will negatively affect the portrayal of the Saudi economy and the extent of Saudi Arabia's commitment to international arbitration agreements. Therefore, Saudi legislator must be clear on this issue. Furthermore, as a precaution, arbitrators and parties should consider gender issue when they seek to enforce the arbitral award in Saudi Arabia and hence avoid arbitral award refusing.

In addition, it can be recommended that Saudi court should invoke public policy exception narrowly and applying the laws and regulations without broad interpretation. As a step towards such approach, coding Sharia rules will ease the process of implementing decisions by courts.

## Footnotes:

- 1- The holy book of the Islamic religion.
- 2- a collection of traditional Muslim laws based on the prophet Muhammad's life and actions, used with the Quran to guide Muslims.



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