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## **The Future of Peace: Solutions for Arbitration Procedures between Israeli and Saudi Arabian Entities**

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# The Future of Peace: Solutions for Arbitration Procedures between Israeli and Saudi Arabian Entities

By: Avi Steinberg<sup>1</sup>

Israel and Saudi Arabia are not natural partners. Despite a murky future at the present, peace between the two is on the horizon. With the advent of the Abraham Accords, a historic initiative by the Trump Administration to foster peace between Israel and its Arab neighbors, Israel has reached previously unthinkable diplomatic heights. Israeli citizens can now visit places like Dubai. Through remarkable events such as this, now the future beckons that an Israeli deal with Saudi Arabia appears to be the next step towards comprehensive peace in the region. Of course, with peace comes a trade agreement. With that trade agreement would come with eventual business disagreements or issues between Saudi and Israeli entities that would end up in arbitration. In this context, an arbitration agreement between Israel and Saudi Arabia would likely be akin to Israel's provisions with the UAE. Nonetheless, enforcing an arbitration award in Saudi Arabia would be risky due to the Kingdom's legal quirks.

In a new relationship between Saudi Arabia and Israel, there could be even greater stakes to arbitration due to the fragile perceptions the nations have of one another. Furthermore, it is likely many of the Saudi entities subject to arbitration would be government businesses or under the control of the Sovereign Wealth Fund. Consequently, not only would Israeli businesses be arbitrating with Saudi companies, but in fact the government itself and by extension, the King. These issues set up interesting questions both for the process of arbitration and its potential.

## I. Introduction

Israel and Saudi Arabia are not natural partners. Nonetheless, recent developments over the last decade have made future diplomatic recognition and official trade between the two nations appear like a matter of time. With the advent of the Abraham Accords, a historic initiative by the Trump Administration to foster peace between Israel and its Arab neighbors, Israel has reached previously unthinkable diplomatic heights.<sup>2</sup> Israeli citizens now visit places like Dubai by the hundreds of thousands.<sup>3</sup> Through remarkable events such as this, now the future beckons that an Israeli deal with Saudi Arabia appears to be the next step towards comprehensive peace in the region.<sup>4</sup> Of course, with peace comes a trade agreement. With that trade agreement would come with eventual business disagreements or issues between Saudi and Israeli entities that would end up in arbitration. In this context, an arbitration agreement between Israel and Saudi Arabia would likely be akin to Israel's provisions with the UAE but enforcing an arbitration award in Saudi Arabia would be risky due to the Kingdom's legal quirks.

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<sup>2</sup> See Press Release, Donald Trump, President of the United States, Trump Statement on the Abraham Accords (Aug. 13, 2020), <https://2017-2021.state.gov/the-abraham-accords/> [<https://perma.cc/7B7J-T56H>].

<sup>3</sup> See Joel C. Rosenberg, *HUGE SUCCESS STORY: 1 million Israelis have traveled to UAE since Abraham Accords signed 3 years ago*, ALL ARAB NEWS (Sept. 14, 2023), <https://allarab.news/huge-success-story-1-million-israelis-have-traveled-to-uae-since-abraham-accords-signed-3-years-ago/> [<https://perma.cc/7VFV-ZCU2>].

<sup>4</sup> See Will Weissert, *Saudi crown prince says in rare interview 'every day we get closer' to normalization with Israel*, ASSOCIATED PRESS, <https://apnews.com/article/saudi-prince-us-politics-fox-a65f1e4c39ee2d83667aa433f59b59c8> [<https://perma.cc/4KUN-84SL>].

In a new relationship between Saudi Arabia and Israel, there could be even greater stakes to arbitration due to the fragile perceptions the nations have of one another. Furthermore, it is likely many of the Saudi entities subject to arbitration would be government businesses or under the control of the Sovereign Wealth Fund.<sup>5</sup> Consequently, not only would Israeli businesses be arbitrating with Saudi companies, but in fact the government itself and by extension, the King. These issues set up interesting questions both for the process of arbitration and its potential.

## II. Dynamics

The nation of Israel is one of the most controversial subjects in modern times. Anything regarding its politics, social issues, or trade will engender strong opinions across the political spectrum around the world. Nonetheless, some facts are indisputable. Israel exists as the lone Jewish state on earth with a population of 9.3 million people.<sup>6</sup> Of those 9.3 million, 21% are an Arab minority closely related to Palestinians.<sup>7</sup> Zionists founded Israel in 1948.<sup>8</sup> In the years since, there has been a seemingly never-ending cycle of bloodshed and hate. Nonetheless, Israel exists today as one of the strongest Middle Eastern economies with a GDP that rivals the oil-rich Gulf States despite the fact Israel lacks natural resources of its own.<sup>9</sup> Instead of fossil fuels, the Israeli economy instead leads the way in technological innovation, with the country earning the moniker, “the start-up nation.”<sup>10</sup> Israel is also has a parliamentary system and a Prime Minister.<sup>11</sup>

The Abraham Accords, pioneered by President Donald Trump and his son-in-law Jared Kushner, opened previously unthinkable avenues of Middle East Peace.<sup>12</sup> Before historic agreements with nations such as the United Arab Emirates (UAE), Morocco, or Sudan, many thought there would not be further diplomacy between Israel and the Muslim world until the resolution of the Palestinian issue.<sup>13</sup> Nonetheless, Israel has signed recognition agreements and even a free trade deal with the UAE.<sup>14</sup> As Israel consolidates its diplomatic gains, it sets its sights on the main prize: normalization and a trade deal with Saudi Arabia.

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<sup>5</sup> See George Hay & Karen Kwo, *Saudi's \$700 billion PIF is an odd sort of sovereign fund*, REUTERS, <https://www.reuters.com/breakingviews/saudis-700-bln-pif-is-odd-sort-sovereign-fund-2023-09-21/> [https://perma.cc/3X26-4VC4].

<sup>6</sup> See CIA FACTBOOK, Israel (2023), <https://www.cia.gov/the-world-factbook/countries/israel/#people-and-society> [https://perma.cc/XB9E-N5P8].

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at introduction.

<sup>9</sup> See *id.* at econ.

<sup>10</sup> See Peter L. Rothholz, *Dan Senor and Saul Singer's Start-Up Nation: The Story of Israel's Economic Miracle*, JEWISH BOOK COUNCIL (book rev.), <https://www.jewishbookcouncil.org/book/start-up-nation-the-story-of-israels-economic-miracle> [https://perma.cc/9TGU-3EDG].

<sup>11</sup> See CIA FACTBOOK, Israel.

<sup>12</sup> See Asma Khalid, *Biden is building on the Abraham Accords, part of Trump's legacy in the Middle East*, NPR (July 9, 2022), <https://www.npr.org/2022/07/09/1110109088/biden-is-building-on-the-abraham-accords-part-of-trumps-legacy-in-the-middle-eas> [https://perma.cc/KX63-U48U].

<sup>13</sup> See Massimiliano Fiore, *The Abraham Accords and the Palestinian Issue*, E-INT'L RELS. (Nov. 1, 2020), <https://www.e-ir.info/2020/11/01/the-abraham-accords-and-the-palestinian-issue/> [https://perma.cc/3CFN-AT8F].

<sup>14</sup> See Agreement on the Protection and Promotion of Investments, Isr.-UAE, Sept. 15, 2020, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download> [https://perma.cc/N8WN-C92R].

The Kingdom of Saudi Arabia is a powerhouse for the energy industry and the religious center for the Muslim world. The House of Saud founded the nation in the wake of the First World War and has no religious or ethnic minorities besides mostly low-wage workers brought in from other nations.<sup>15</sup> The nation contains two of the holiest sites of Islam (in Mecca and Medina respectively).<sup>16</sup> As a result, the Kingdom sees itself as a defender of the faith and has exported a strict reformist movement (Wahhabism) around the globe.<sup>17</sup> Additionally, the nation is one of the largest oil producers and is known for its wealth. The state oil company, ARAMCO, is one of the most valuable corporations in the world.<sup>18</sup> This combination of religious fundamentalism and wealth has become controversial in recent times as Saudi Arabia has been accused of human rights abuses and past financing of terror groups such as Al-Qaeda.<sup>19</sup>

These differences between Israel and Saudi Arabia have led to a contentious relationship that is thawing in the face of a changing political and economic landscape. Beginning with the 1948 Israeli War of Independence for example, Saudi Arabia supplied weapons and soldiers to attack Israel.<sup>20</sup> Afterwards, Saudi Arabia led the oil embargoes of the 1970's meant to stifle western support for Israel.<sup>21</sup> Even up to the present, Saudi Arabia is a vocal supporter of Palestinian rights.<sup>22</sup> These sets of facts beg the question: what has changed? The answer is one old and cliché: the enemy of my enemy is my friend. Saudi Arabia and the Islamic Republic of Iran have been embroiled in a cold war for control of the Muslim world.<sup>23</sup> Israel, a sworn enemy of Iran, has become a silent partner with the Kingdom in the fight.<sup>24</sup> This cooperation has begun to bear other fruits, openly economic or diplomatic, in the wake of the initial round of the Abraham Accords.

### III. A Future Trade Agreement

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<sup>15</sup> See *Chronology: The House of Saud*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/saud/cron/> [<https://perma.cc/W688-AHU7>]; CIA FACTBOOK, SAUDI ARABIA (2023), <https://www.cia.gov/the-world-factbook/countries/saudi-arabia/#people-and-society> [<https://perma.cc/EVL8-VBRV>].

<sup>16</sup> See CIA FACTBOOK, Saudi Arabia.

<sup>17</sup> See David Commins, *Wahhabi Doctrine and its Development*, Fondazione Oasis, <https://www.oasiscenter.eu/en/wahhabism-and-its-development> [<https://perma.cc/G77T-BHNQ>].

<sup>18</sup> See Kif Leswig, *Apple is no longer the world's most valuable company*, CNBC, <https://www.cnbc.com/2022/05/11/saudi-aramco-surpasses-apple-as-the-worlds-most-valuable-company.html> [<https://perma.cc/N8QG-ZM74>].

<sup>19</sup> See generally *Saudi Arabia 2022*, AMNESTY INT'L, <https://www.amnesty.org/en/location/middle-east-and-north-africa/saudi-arabia/report-saudi-arabia/> [<https://perma.cc/ES9Z-EF58>]; *Evidence of Financial Links Between Saudi Royal Family and Al Qaeda*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/documents/evidence-of-financial-links-between-saudi-royal-family-and-al-qaeda> [<https://perma.cc/JZ8N-UL3T>].

<sup>20</sup> See OFF. OF THE HISTORIAN, DEP'T OF STATE, MILESTONES: 1945–1952, The Arab-Israeli War of 1948 (last visited Sept. 24, 2023), <https://history.state.gov/milestones/1945-1952/arab-israeli-war> [<https://perma.cc/SS5C-3JFX>].

<sup>21</sup> See OFF. OF THE HISTORIAN, DEP'T OF STATE, MILESTONES: 1969–1976, Oil Embargo, 1973–1974 (last visited Sept. 24, 2023), <https://history.state.gov/milestones/1969-1976/oil-embargo> [<https://perma.cc/5DUH-9T2X>].

<sup>22</sup> See Tovah Lazaroff, *Saudis insist Palestinians must be part of Israel peace deal, says Blinken*, THE JERUSALEM POST (Sept. 14, 2023), <https://www.jpost.com/middle-east/abraham-accords/article-759009> [<https://perma.cc/683X-78LC>].

<sup>23</sup> See Jonathan Marcus, *Why Saudi Arabia and Iran are bitter rivals*, BBC NEWS (Sept. 16, 2019), <https://www.bbc.com/news/world-middle-east-42008809> [<https://perma.cc/HQ3X-B8KJ>].

<sup>24</sup> See *Why Saudi Arabia and Israel oppose Iran nuclear deal*, AL JAZEERA (Apr. 14, 2015), <https://www.aljazeera.com/news/2015/4/14/why-saudi-arabia-and-israel-oppose-iran-nuclear-deal> [<https://perma.cc/HN3X-HXXU>].

As the two nations grow closer, Israeli companies appear primed to capture the Saudi market. The Saudi Sovereign Wealth Fund launched Vision 2030 with the goal of transforming the Kingdom's economy.<sup>25</sup> In a historical context, Israeli access to Saudi oil would be a boom financially, helping to keep energy prices down while further legitimizing whichever Israeli government is in power at the time. As for the Sovereign Wealth Fund, some investments have been in sports or tourism, others have been in technology.<sup>26</sup> In this sector, investment in Israeli science would be a smart bet. For example, Israel has led the way in computer systems and important desalination techniques.<sup>27</sup> Through this context, one can begin understanding the types of investment that will occur and how the contours of arbitration will develop.

What Saudi Arabia would want in return for diplomatic normalization is not the concern of this article. It must be noted that reports say that Saudi Arabia would want the ability to generate its own nuclear power, a voice in the management of the Al-Aqsa Mosque in Jerusalem, and concessions from Israel on the Palestinian issue.<sup>28</sup> Currently, there is a belief that a deal will likely be made sooner rather than later.<sup>29</sup>

Once Israel and Saudi Arabia reach a political deal, they will likely reach a trade agreement that is analogous to the one agreed upon earlier between the Israelis and the UAE. The Israeli-UAE deal is a free trade agreement that affects 96% of products.<sup>30</sup> Since the deal, trade between the two nations continued to grow exponentially as the new markets expanded demand.<sup>31</sup> Some duties evaporated with the agreement while others are being phased out in less than 3-5 years.<sup>32</sup> Arbitration parameters are set forth in the agreement as well.<sup>33</sup>

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<sup>25</sup> See David Ottaway, *Saudi Anxiety Grows Over Vision 2030 for the Kingdom*, 110 VIEWPOINTS 1 (Apr. 2017), <https://www.wilsoncenter.org/publication/saudi-anxiety-grows-over-vision-2030-for-the-kingdom> [https://perma.cc/PT6D-U5GU].

<sup>26</sup> See *Fund Investment Map*, PUB. INV. FUND (Saudi Arabia), <https://www.pif.gov.sa/en/Pages/OurInvestments-Map.aspx> [https://perma.cc/G7PS-SNBU].

<sup>27</sup> See Rothholz, *Dan Senor and Saul Singer's Start-Up Nation: The Story of Israel's Economic Miracle*; Rowan Jacobsen, *Israel Proves the Desalination Era Is Here*, SCIENTIFIC AM. (July 29, 2016), <https://www.scientificamerican.com/article/israel-proves-the-desalination-era-is-here/> [https://perma.cc/6LNR-DJTL].

<sup>28</sup> See Barak Ravid, *Top nuclear experts urge Biden to not allow Saudi uranium enrichment in mega-deal*, AXIOS (Sept. 21, 2023), <https://www.axios.com/2023/09/21/saudi-nuclear-power-uranium-mbs-biden-megadeal-israel> [https://perma.cc/NK8G-TQYR]; Mordechai Keder, *Don't let Saudis have any role on the Temple Mount, put Israel in charge – opinion*, The Jerusalem Post (Aug. 30, 2023), <https://www.jpost.com/opinion/article-756768> [https://perma.cc/4M96-E2JH]; Lazaroff, *Saudis insist Palestinians must be part of Israel peace deal, says Blinken*.

<sup>29</sup> See Harley Lippman, *A Saudi-Israel peace treaty is inevitable*, THE HILL (Sept. 8, 2023), <https://thehill.com/opinion/international/4192700-a-saudi-israel-peace-treaty-is-inevitable/> [https://perma.cc/334T-SVF6].

<sup>30</sup> See *Israel, UAE sign free trade pact into effect*, REUTERS (Mar. 26, 2023), [https://www.reuters.com/world/middle-east/israel-uae-sign-free-trade-pact-into-effect-2023-03-26/#:~:text=JERUSALEM%2C%20March%2026%20\(Reuters\),nations%2C%20Israel's%20ForeFor%20Ministry%20said](https://www.reuters.com/world/middle-east/israel-uae-sign-free-trade-pact-into-effect-2023-03-26/#:~:text=JERUSALEM%2C%20March%2026%20(Reuters),nations%2C%20Israel's%20ForeFor%20Ministry%20said) [https://perma.cc/ALL9-DF97].

<sup>31</sup> See Press Release, N.Z. Ministry of Foreign Affs. and Trade, *UAE - Israel Free Trade Deal enters into force - May 2023*, <https://www.mfat.govt.nz/en/trade/mfat-market-reports/uae-israel-free-trade-deal-enters-into-force-may-2023/#:~:text=Download%20PDF-,Summary,a%20result%20of%20the%20agreement> [https://perma.cc/T4JF-NBBG].

<sup>32</sup> See *id.*

<sup>33</sup> See *Agreement on the Protection and Promotion of Investments, Isr.-UAE*, Sept. 15, 2020, at § D, Article 24.

#### IV. The Parameters of Arbitration between Israel and the UAE

The basic terms of arbitration between Israel and the UAE are set forth in their respective trade agreement. The treaty makes clear that WTO regulations apply along with interpretations by the organization's appellate body.<sup>34</sup> Section D, Article 26 of the deal lays out the mechanics of arbitrations.<sup>35</sup> UNCITRAL Arbitration Rules apply as boilerplate language, but these terms can be changed by the arbitrators or there are parties upon agreement by both sides.<sup>36</sup> It must be noted that UNCITRAL does not require arbitrators to be independent from the respective parties, nonetheless, they are still expected to act independently or disclose conflicts of interest.<sup>37</sup> The arbitrators are not allowed to be UAE or Israeli nationals (arbitrators also are not allowed to be citizens of nations that do not have diplomatic relations with either country).<sup>38</sup> The first two arbitrators are picked by the respective parties and then the two select the third.<sup>39</sup> After this process, all documents must be submitted and hearings concluded within 180 days.<sup>40</sup> Nevertheless, the agreement does not specify where exactly the arbitration itself must take place.

The UAE also possesses some quirks to its arbitration procedures as the nation grows Dubai as a financial center. For example, the default position of the UAE is toward confidentiality for arbitration whereas Israel's is neutral.<sup>41</sup> Dubai also has "onshore" and "offshore" arbitration sites.<sup>42</sup> Onshore sites would have proceedings in Arabic while their offshore counterparts in Dubai operate in English and the common law.<sup>43</sup> As a result, Israel and the UAE thus conduct their business in offshore forums in Dubai. Because the UAE signed the 1958 New York Convention, offshore awards can be implemented by UAE domestic courts.<sup>44</sup>

Overall, these terms for arbitration are contractarian, giving wide latitude to the respective parties to decide what are the best terms and procedures. This maximum power to such sophisticated parties reflects a deep understanding for the need of quick, *ad hoc* developments while understanding there could be protracted conflicts that need special allowances. In this sense, Israel and the UAE are approaching this issue with a simplicity that exhibits their faith in both one another and the free market.

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<sup>34</sup> *See id.*

<sup>35</sup> *See id.* at § D Article 26.

<sup>36</sup> *See id.*

<sup>37</sup> *See* UN Arb. Rules, UNITRAL, at page 12.

<sup>38</sup> *See* Agreement on the Protection and Promotion of Investments, Isr.-UAE, Sept. 15, 2020, at § D Article 26 Par. 7.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See* Danny Steel & Zvika Zelichov, *Arbitration considerations for Israeli and United Arab Emirates entities following the Abraham Accords*, KENNEDYS (Jan. 21, 2021), <https://kennedyslaw.com/en/thought-leadership/article/arbitration-considerations-for-israeli-and-united-arab-emirates-entities-following-the-abraham-accords/> [https://perma.cc/RFE7-WJUL].

<sup>42</sup> *See* *Dispute Resolution in the Middle East*, DLA PIPER, pg. 4 (handbook), <https://www.dlapiperintelligence.com/dispute-resolution-in-the-middle-east/handbook.pdf> [https://perma.cc/GE7U-9DXB].

<sup>43</sup> *See id.*

<sup>44</sup> *See* Steel & Zelichov, *Arbitration considerations for Israeli and United Arab Emirates entities following the Abraham Accords*.

The fact that an arbitrator cannot be from a national of a country that does not recognize Israel is a significant provision in the agreement. Given the amount of UN member states that do not recognize Israel, there is a distinct disadvantage in arbitration for UAE entities.<sup>45</sup> Besides arbitrators from places such as Bahrain, Egypt, or Morocco, they cannot use otherwise talented people from the Middle East and North Africa.<sup>46</sup> Consequently, the arbitration process may slow due to having to bring in arbitrators from further away locales instead of from inside the region or even other Gulf States besides Bahrain. This fact will of course drive-up costs throughout the 180-day process if an arbitrator must be brought in from outside Dubai or Tel Aviv. An out-of-region arbitrator would not matter to an Israeli entity as it would likely pick an arbitrator from Europe or the United States due to both political and cultural considerations regardless. But since the third arbitrator must be picked by the first two, this might once again put an UAE entity at a disadvantage due to the high bar in choosing another arbitrator.<sup>47</sup>

Overall, the UAE's arbitration rules are detailed and mature. Subsequently, it is understandable that the agreement between Israel and the UAE lacked otherwise requisite detail. An arbitration with Saudi Arabia would be quite different.

## V. Arbitration Predicaments in Saudi Arabia

Saudi Arabia recently modernized its entire arbitration process within the last decade.<sup>48</sup> Whereas there used to be a drawn-out, judicial process, now its system is much more akin to the UAE or Western Nations.<sup>49</sup> Furthermore, the Kingdom has invested into its new arbitration initiative, the Saudi Center for Commercial Arbitration (the "SCCA").<sup>50</sup> The SCCA, with mediation quarters in both Riyadh and Jeddah, is a part of Vision 2030 to increase international prestige while modernizing Saudi Arabia's economic and legal processes.<sup>51</sup>

Saudi Arabia still does not have the same degree of development or legal culture geared toward arbitration compared to the UAE, and its system must account for sharia as well as common law. Of course, the English once controlled the UAE to a degree that never occurred in Saudi Arabia.<sup>52</sup> Thus, the common law legal structure or influence permeates much further through its institutions. For example, a Saudi judge basically must sign off an award if a party wants a judgment enforced within the country itself, which is a huge check on whatever the arbitrators could rule obviously.

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<sup>45</sup> See *List of countries and status of diplomatic relations with Israel*, ISRAELI MINISTRY OF FOREIGN AFFRS. (as of Sept. 2023), [https://www.gov.il/en/Departments/General/israeli\\_relations](https://www.gov.il/en/Departments/General/israeli_relations) [<https://perma.cc/3UQH-SX5D>].

<sup>46</sup> See *id.*

<sup>47</sup> See Agreement on the Protection and Promotion of Investments, Isr.-UAE, Sept. 15, 2020, at § D Article 26 Par. 7.

<sup>48</sup> See Dr. Meshal Al Akeel et al., *Arbitration in the Kingdom of Saudi Arabia Part 1 – Arbitration in Saudi Arabia: why it's on the rise*, MAYER BROWN (Sept. 26, 2022), <https://www.mayerbrown.com/en/perspectives-events/publications/2022/09/arbitration-in-saudi-arabia-why-its-on-the-rise> [<https://perma.cc/T9YZ-FR3S>].

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See OFF. OF THE HISTORIAN, DEP'T OF STATE, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: The United Arab Emirates* (last visited Sept. 24, 2023), <https://history.state.gov/countries/united-arab-emirates> [<https://perma.cc/KJ29-JUCJ>].

<sup>53</sup> Saudi Arabia courts *must* also account for sharia law (also known as “public policy”) when enforcing arbitration awards even though it bases its procedures off UNICTRAL model code in the same manner as the UAE.<sup>54</sup> For instance, arbitration must not contravene sharia law.<sup>55</sup> Other requirements include:

[That] Saudi courts are not competent to hear the case in respect of which the court judgment/arbitral award was passed and that the foreign court/arbitration tribunal which passed it is competent in accordance with its conflict of law rules; the litigants to the case in respect of which the judgment/award was issued were duly summoned, properly represented and were able to legally represent themselves; the court judgment/arbitral award has become final in accordance with the law of the court/arbitration tribunal that issued it; the court judgment/arbitral award is in no way inconsistent with any judgment or order previously passed by the Saudi courts;<sup>56</sup>

Mainly, the sharia and public policy requirement could obviously create issues in an international context. Of course, many international corporations’ officers are not Muslim and there could be an issue adapting a typical arbitration framework to sharia law. Even if the arbitrators have a law degree, there could be an issue of running afoul of sharia. Naturally, this risk restricts whoever entities could select to arbitrate disputes.

There is a simple solution for this issue of sharia law compliance. Since Saudi Arabia has now incorporated offshore arbitration practices into its policies, this requirement is not as stringent as it used to be.<sup>57</sup> Nonetheless, issues could still arise. As a result, it would be wise to have arbitrators take a crash course in sharia law before conducting an arbitration to issue spot any part of an award. Otherwise, arbitrators could be opening themselves up to liability through claims of negligence if an award cannot be enforced due to a violation of sharia law.

Additionally, even though Saudi Arabia is a member of the New York Convention and recognizes awards given outside of its jurisdiction, there is a requirement that an arbitration award does not go against “Saudi Public Policy.”<sup>58</sup> Whatever these considerations are may be unknown. In addition, much of arbitration could be between private foreign corporations and Saudi public entities. Therefore, there could be complications to enforcing an adverse award onto the Saudi government on its own soil. Resultantly, this “public policy” requirement acts a potential roadblock in enforcing judgments against Saudi government entities. This sharia training would

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<sup>53</sup> See Raid Abu-Manneh et al., *Arbitration in the Kingdom of Saudi Arabia Part 3 - The SCCA Arbitration Rules 2023*, MAYER BROWN (June 22, 2023), [https://www.mayerbrown.com/en/perspectives-events/publications/2023/06/arbitration-in-the-kingdom-of-saudi-arabia-part-3-the-scca-arbitration-rules-2023#:~:text=Further%2C%20Sharia%20principles%20will%20continue,of%20awards%20in%20Saudi%20Arabia.&text=Article%2037\(4\)%20provides%20that,laws%20or%20rules%20of%22law](https://www.mayerbrown.com/en/perspectives-events/publications/2023/06/arbitration-in-the-kingdom-of-saudi-arabia-part-3-the-scca-arbitration-rules-2023#:~:text=Further%2C%20Sharia%20principles%20will%20continue,of%20awards%20in%20Saudi%20Arabia.&text=Article%2037(4)%20provides%20that,laws%20or%20rules%20of%22law) [https://perma.cc/QE3N-NSJ4].

<sup>54</sup> See Al Akeel et al., *Arbitration in the Kingdom of Saudi Arabia Part 1 - Arbitration in Saudi Arabia*.

<sup>55</sup> See *id.*

<sup>56</sup> See *Enforcement of Foreign Judgments and Arbitral Awards in the Kingdom of Saudi Arabia*, INT. ARB. (Sept. 2016) (client publ’n for Shearman and Sterling, LLP), <https://www.shearman.com/-/media/files/newsinsights/publications/2016/09/saudi-arabia-publications/enforcement-of-foreign-judgments-and-arbitral-awards-in-the-kingdom-of-saudi-arabia.pdf> [https://perma.cc/QX2X-E85J].

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*



help to ensure that the arbitration process does not lead to any problems along with a regular assessment of political and social considerations.

Concerning foreign entities, the process of arbitration within the Kingdom could be tricky given the sensitive nature of many awards and the extra hurdles parties may have to clear. Furthermore, if one party is not fluent in Arabic, there could be issues in explaining technicalities to Saudi courts who conduct their hearings in Arabic.<sup>59</sup> Even with a translator, there may be concepts or parts of an agreement that are either extremely sensitive or difficult to explain. Consequently, arbitrating and then attempting to enforce a judgment in Saudi Arabia could come with unique problems. Nonetheless, the Kingdom is clearly making a commitment to modernizing its arbitration processes and already its choice as a venue is increasing.<sup>60</sup>

## VI. Arbitration in Israel and a Confluence of Both Systems

Israel has a much more mature arbitration process than Saudi Arabia. The nation has been guided by the same arbitration law since 1968.<sup>61</sup> There are some special features to its procedures as well. For example, arbitrators are pre-selected.<sup>62</sup> Additionally, there is a more direct appeals process than what is typically found in arbitration while cases can even be heard directly by a judge in special circumstances.<sup>63</sup> Israel also has several arbitral institutions, chief among them is the Israeli Institute for Commercial Arbitration.<sup>64</sup> The Israeli system shares much with the American process of arbitration, for example:

[Similarities are the] institutional choice of arbitrators and the informal spirit of hearings in comparison to litigation. The similarities between the [Israeli and the America FAA] are in line with many international standards such as, for example, the impartiality and neutrality requirements of an arbitrator, the final and binding nature of the award, and the special carve-outs with respect to labor and employment matters. Both acts include provisions that give parties the freedom to choose their preferred arbitration track, choosing between institutional arbitration and an *ad hoc* proceeding, tailoring the contract to the parties' specific wants and needs.<sup>65</sup>

Israel is also a member of the New York Convention and UN organizations that govern the international standards of arbitration.

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<sup>59</sup> See Amgad Husein & Jonathan Burns, *Choice of Forum in Contracts with Saudi Arabian Counterparties: An Analysis of the DIFC Common Law Courts from a Saudi Arabian Perspective*, 48 INT'L LAWYER 179, 183 (2014), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1606&context=til> [https://perma.cc/Z77E-WCKS].

<sup>60</sup> See *id.*

<sup>61</sup> See Annabelle Atias, *Legal Origin and Court Involvement: A U.S.-Israeli Comparison of Commercial Arbitration*, 2020 MO. J. DISP. RESOL. 7 (2020),

<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1855&context=jdr> [https://perma.cc/LR98-Y63T].

<sup>62</sup> See *id.* at 7.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 11.

Together, the Israeli and Saudi Arabian systems are surprisingly alike with some exceptions. An interesting similarity that both systems have that is not found in American arbitration is the amount of possible judicial overview available to an arbitration (but to differing degrees). Meanwhile, Israeli Courts have greater judicial discretion over the arbitration process than other Western nations or offshore sites would have in the Middle East.<sup>66</sup> Nonetheless, Saudi system possibly has even more discretion in the way of enforcing awards through sharia and public policy complications.

## VII. Business Risks of Arbitration in Saudi Arabia

For an Israeli company, the business risks of arbitration in Saudi Arabia appear immense. The issue of Saudi public policy and agreements that must be made in accordance with sharia law create potential roadblocks. Furthermore, the political and economic ramifications are of concern. In a scenario in which an Israeli entity attempts to enforce an award against a Saudi entity in Saudi Arabia, and a Saudi court refuses due to “public policy” concerns, then there could be a chilling effect on business between the two nations. Even though this could be an otherwise isolated incident, there are inherent issues to the Saudi legal system. The system is not independent in the Western sense. The Judges on the Court account for sharia law as well as serving the King.<sup>67</sup> Even though the Kingdom’s government is not the exact same as some of its entities, this means the court may effectively still be ruling against itself since everything is still under control of the King. Saudi Arabia also has issues recognizing foreign judgments because of their special exemptions under both Saudi public policy and sharia.<sup>68</sup> Resultantly, there could be a lack of consistency in enforcing judgments as Saudi Arabia if there is some compelling reasons for a domestic court to avoid enforcement, such as a judgment against the government.<sup>69</sup> A foreign company may be hesitant to do business with an entity under the Saudi Arabian government’s control for which there is no recourse outside of the nation because there would be no enforcing that award. There must be proper incentives for Israeli companies to operate within the Kingdom.

A simple solution to this scenario would obviously be the mutually assured destruction of reciprocity. If Saudi Arabia refuses to enforce an award against one of its entities, then Israel would do the same when Saudi Arabia wishes to do the same. This could ensure that both nations will respect arbitration results. Nonetheless, there could be further issues. For starters, Israeli entities conducting business in Saudi Arabia will likely not be entities controlled by the Israeli government. As a result, the New York Convention will apply to them much easier as awards will be enforced against them in other jurisdictions besides Israel for which there is no recourse if those Israeli entities wish to continue business in those jurisdictions. For instance, if a Saudi Arabia entity wants to enforce a judgment against a private Israeli software company, it possibly would not matter that Israel would refuse to enforce an award within its borders. All the Saudi entity would have to do is attempt to enforce the award in France. Since France, Israel, and Saudi Arabia

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<sup>66</sup> See Atias, *Legal Origin and Court Involvement*, at 7.

<sup>67</sup> See Joshua Teitelbaum, et al., *Saudi Arabia: Government and society*, ENCYCLOPÆDIA BRITANNICA (last updated Sept. 26, 2023), <https://www.britannica.com/place/Saudi-Arabia/Government-and-society> [<https://perma.cc/6VMT-TVU9>].

<sup>68</sup> See *Enforcement of Foreign Judgments and Arbitral Awards in the Kingdom of Saudi Arabia*, INT’L ARB.

<sup>69</sup> See *Cross-Border Enforcement Center— Saudi Arabia*, BAKER MCKENZIE, <https://resourcehub.bakermckenzie.com/en/resources/cross-border-enforcement-center/emea/saudi-arabia/topics/judgments> [<https://perma.cc/QZL4-3F9W>].

are all technically signatories of the New York Convention, France would have to enforce the award against the Israeli entity if the award did not violate French law and could have been arbitrated there as defined under the New York Convention.<sup>70</sup>

Conversely, if an Israeli private company attempts to enforce a judgment against a Saudi Arabian entity in Europe or the United States, it may be quite tricky. Diplomacy may take precedence. In such a scenario, the Saudi Arabian entity could be controlled by the Kingdom itself. Therefore, even though France would have to technically enforce the judgment, there would most likely not be much muscle behind it due to the possibility of upsetting the Kingdom and by extension, possibly causing a diplomatic incident or harming future business (even if the proceedings remain confidential). Even if a nation wishes to enforce an award against the Saudi government, there's probably not much it could do short of extraordinary measures if the Saudi Kingdom refused to recognize the award. Consequently, even though a nation would have to technically enforce a judgment, they could possibly look for some technicality to allow themselves to avoid the issue entirely. Many countries would likely not be willing to fine a Saudi entity or create a political firestorm demanding the Kingdom effectively recognizes the judgment.

### **VIII. A Possible Solution**

The solution for Israeli entities could be a “take it or leave it” proposition. If Israeli companies decide conducting business in the Kingdom would cause too much liability (due to the risk an award could go unrecognized), then Saudi Arabia will of course lose business. If enough Israeli entities refuse to do business in the Kingdom due to their fears over possibly corrupt enforcement of awards, then there would be a situation where it could hurt the relations between the two nations when there is already so much at stake. Additionally, this would harm Saudi prestige internationally at a time where the Kingdom is attempting to bolster its image. Israeli companies refusing to do business with the Kingdom would be public indictment on Saudi Arabia's legal system. The attempted arbitration reforms that have both been championed and heavily invested into by the Kingdom would take a definite step back. A solution for this issue is that the Israeli government could provide arbitration insurance for Israeli entities choosing to do business in Saudi Arabia. These entities would get some amount of the award from the Israeli government if Saudi Arabia refuses to enforce the judgment.

Nonetheless, the Israeli public would likely wonder about doing business with a nation whose practices appear so unscrupulous as to create a new system to enforce otherwise binding decisions. The answer is the possible relationship with Saudi Arabia would do so much for Israeli legitimacy, and the Kingdom's economy is so large that such an arbitration insurance program could in fact be worth it. The importance for Israel of this new general diplomatic recognition and the ensuing new marketplace cannot be understated even if there were less than ideal aspects to the relationship.

### **IX. Conclusion**

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<sup>70</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. v (2) (b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [also known as the New York Convention], [https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac\\_view=-1](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1) [<https://perma.cc/S7ZL-2ESX>].

The future is hard to tell when it comes to the economy. When the economy is mixed with the intricacies of Middle East diplomacy, predictions become impossible. Nonetheless, hopefully there will be peace between the nation of Israel and the Kingdom of Saudi Arabia. It would show that even one-time bitter enemies can change, and man can overcome hatred. As for business arbitration, the Kingdom poses unique challenges that could be difficult for an Israeli entity to adapt to (even despite reforms). For the Kingdom, one hopes that it continues to modernize its business practices as it has already made significant headway in even the last decade. In another decade, the Kingdom will have hopefully grown even more in this regard. Additionally, hopefully reciprocity is fully adhered to, and all arbitration is followed in accordance with equity and justice.