

Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court†

With the completion of many of the ambitious infrastructural projects that have catapulted Saudi Arabia into the twentieth century, the need of the Saudi Government to attract non-Saudi companies to undertake these types of projects has largely disappeared. While development proceeds apace in Saudi Arabia, it does so at a less frenetic tempo than in the recent past. In the midst of this development the Saudi business climate has matured, and with it the Saudi commercial legal system. Handshake deals have largely been relegated to folklore, having been replaced by lengthy, heavily boilerplated contracts, often negotiated by lawyers for each side. A bureaucracy has not merely begun to creep into all aspects of Saudi economic life, especially in the area of public sector purchases and construction, it has started to gallop.

In this context it is perhaps inevitable that litigation should become an increasingly commonplace and culturally acceptable means of dispute resolution. The last several years have witnessed a substantial increase in the use of the Saudi courts as a means of resolution of commercial disputes. Whereas only a few years ago parties to disputes often went to great and frequently generous lengths to avoid legal proceedings, today parties to disputes in both the public and the private sectors seem much

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more willing to air their differences in the Saudi courts. The reasons for this development are beyond the scope of this article and in any event are more the domain of sociologists than practicing lawyers. One can speculate, however, that the transition of the Saudi economy from "boom times" to the "real world," and the increasing sophistication of businessmen and government technocrats, have encouraged Saudis to consider litigation as a practical and savory means of dispute resolution. As practicing lawyers we have seen on a daily basis the results of this new acceptance of the litigation tool. Although official statistics are lacking, our experience and that of our colleagues is that the number of commercial disputes in litigation in Saudi Arabia is definitely increasing.

As a ubiquitous party to Saudi commercial contracts, the Government of Saudi Arabia has not escaped the effects of this increase in commercial disputes and litigation. In recent years, Saudi Arabia's administrative court, the Board of Grievances, has taken on an increasing significance as effectively the only forum for claims against Saudi public sector entities. This article presents a brief introduction to the Board of Grievances. After giving a general overview of the Saudi legal system and a brief history of the Board, the article examines the composition, practices, and procedures of the Board, along with a practical outline of how an action is presented and pursued before the Board.

I. Background to Islamic Legal Concepts and the Saudi Legal System

A. RELIGIOUS BACKGROUND

The word "law" in Saudi Arabia is generally understood to refer to Islamic law or what is called the "Shari'ah." The Shari'ah has four primary sources. The first of these is the Quran, which Muslims believe is the word of God delivered to God's messenger, Mohammed. The Quran contains numerous principles and guidelines for human behavior in both secular and religious life.

The second primary source of the Shari'ah is called the "Sunna," and is comprised of that which the Prophet Mohammed was reported to have said, done, or approved. The Sunna, a major source of the Shari'ah, is based on a passage in the Quran that reads: "You shall observe whatever the Prophet directs you to do and you shall refrain from whatever he forbids you from doing."¹ The Sunna thus expounds, elaborates and explains many of the general rules of the Quran.

1. Quran, Sura 59, Ayat (verse) 7.

The third source of Islamic law is called "Ijmah": the consensus of scholars. If at a given time in history, all reputable Islamic scholars agreed on a certain rule as being the "Islamic" response to a specific question, such agreement or consensus was treated as a binding rule of the Shari'ah. Ijmah derives its authority from a saying of the Prophet Mohammed that "my people would never unanimously agree on a wrongful thing."²

The fourth primary source of the Shari'ah is "Kias," or analogy. A feature of the Shari'ah, as of other legal systems, is that the application of law to a specific matter should apply equally to an analogous matter, because similar cases should lead to similar results. Since specific rules in the Quran and the Sunna are limited in number and often general in application, and since the consensus of all Islamic scholars is no longer attainable as a practical matter due to the enormous geographical diversity of the Islamic world, Kias has traditionally represented a vital and flexible source of the Shari'ah.

B. SAUDI LEGAL SYSTEM

Saudi judicial institutions are divided into two general categories: the Shari'ah courts and the specialized secular courts. The Shari'ah courts, formerly courts of general jurisdiction, have had their jurisdiction increasingly limited. In 1930 the late King Abdul-Aziz, the founder of Saudi Arabia, promulgated the Commercial Courts Act,³ which removed certain commercial matters from the jurisdiction of the Shari'ah courts. Today most controversies arising out of commercial matters in the private sector are adjudicated either by the Commissions for the Settlement of Commercial Disputes, which are three-judge panels comprised of two Shari'ah trained judges and a legal advisor attached to the Ministry of Commerce, or one of a number of other tribunals that have been established with specific jurisdiction, such as the Labor courts⁴ and the Negotiable Instruments Offices.⁵

Rarely is any modern Saudi statute promulgated without a provision either establishing a secular commission or tribunal to have jurisdiction over disputes arising under the statute, or establishing the competence of an existing secular court to adjudicate disputes that arise thereunder. As

2. 1 M.A. AL-ZAR'KA, AL MADAKHAL AL-FIG'HI AL-AM I'LA AL-HUKUK AL MA'DANIYA 17 (1952).

3. Royal Decree No. M/32 dated 15 Moharram 1350 H.

4. Royal Decree No. M/21 dated 6 Ramadhan 1389 H., Labor and Workmen Law arts. 172-188.

5. Ministry of Commerce Ministerial Resolution Nos. 353 and 354 dated 11 Jumad Awal 1388 H., and Ministry of Commerce Ministerial Resolution No. 358 dated 16 Jumad Awal 1388 H.

a result, the Shari'ah courts have essentially been left with jurisdiction only over cases involving family law, real property, and the majority of criminal matters.

The promulgation of the Arbitration Regulations⁶ in 1983 was thought to presage a trend in private sector disputes towards the use of arbitration as an efficient means of dispute resolution. In reality, the implementing resolutions referred to in the Arbitration Regulations⁷ have only recently been adopted⁸ and remain largely untested, although it is expected that this situation will change in the future. At the present time, resort to the Saudi commercial courts remains by far the most common means of formal dispute resolution for private sector disputes.

In disputes involving public sector entities virtually no opportunity exists for formalized dispute resolution other than in a Saudi courtroom. The Arbitration Regulations referred to above by their express terms do not apply to Saudi governmental authorities except where approval of the King has been obtained.⁹ In addition, a 1963 decision of the Council of Ministers proscribed arbitration as a means for resolving disputes involving governmental authorities other than in "exceptional" circumstances.¹⁰ While the Arbitration Implementing Rules expressly contemplate the availability of arbitration in public sector disputes on a case by case basis,¹¹ whether arbitration will in fact become a practical means of dispute resolution in this area remains to be seen. Finally, although Saudi Arabia is a party to the Convention of the International Center for the Settlement of Investment Disputes (the ICSID),¹² it seems unlikely that arbitration proceedings involving a private sector litigant and a Saudi governmental entity under the auspices of the ICSID could occur due to various Shari'ah constraints beyond the scope of this article.

Thus, for a private party with a claim against the Saudi Government or any of its instrumentalities, the usual forum in Saudi Arabia is the Board of Grievances (in Arabic, "Diwan Al-Mazal'im"). The word "usual"

6. Royal Decree No. M/46 dated 12 Rajab 1403 H. [hereinafter Arbitration Regulations].

7. Arbitration Regulations art. 24.

8. Rules for Implementation of the Arbitration Regulations published in the Official Gazette, 10 Shawal 1405 [hereinafter Arbitration Implementing Rules].

9. Arbitration Regulations art. 3.

10. Council of Ministers Decision No. 58 dated 17 Moharram 1383 H. Pursuant to this decision, Saudi governmental entities are also prohibited from agreeing to governing law clauses in contracts that do not stipulate Saudi law.

11. Arbitration Implementing Rules art. 8.

12. The ICSID was ratified by the late King Khalid on 1 Jumad Thani 1400 H. Saudi Arabia has also recently become a party to the Convention Establishing the Multilateral Investment Guarantee Agency promulgated under the auspices of the International Bank for Reconstruction and Development. *See* 20 SAUDI ECON. SURV., 16 Apr. 1986, at 4.

rather than “only” in this context is apt because in the Saudi Arabian political system any person, Saudi or non-Saudi, has the right to seek redress directly from the King. Over the years, we have had a number of public works contract cases that we commenced by petitioning the King directly rather than by filing a claim with the Board of Grievances. In one of these cases both sides agreed as to liability; the only controversy was as to quantum. The King accepted jurisdiction in the case and directed that a technical committee be formed, which disposed of the matter in an equitable fashion. Another such case involved a dispute in which our client had performed an extensive and successful public works project without a written contract. The absence of a written contract was said to have been the result of the contracting agency’s budgetary constraints. This case was sent directly by the King to the Saudi Consulting House,¹³ which recommended a recovery reasonable to both parties. While in theory such direct action by the King is possible in every case, as a practical matter this option should not be considered as a realistic alternative to a Board of Grievances proceeding except in the most unusual circumstances.

II. A Brief History of the Board of Grievances

The late King Abdul-Aziz, following the custom of Islamic rulers before him, used to sit personally to try grievances. On 7 June 1926, the King placed an announcement in the *Um Al Qurra* (the newspaper of record then and now) proclaiming that every person who had a complaint against the Government must reduce it to writing and place it in a “complaints box” to be located at a specified government building. The announcement further stated that King Abdul-Aziz personally would keep the key to the box. The King mandated that any person who had a complaint against an official, senior or junior, or otherwise, must come forward and make his grievance known; the announcement assured complainants that no harm or prejudice would come to them by reason of their complaint.

Legislation creating a modern day version of the Board of Grievances was promulgated by the late King Saud in 1955¹⁴ and subsequently supplemented in piecemeal fashion over the years.¹⁵ In 1982 a comprehensive Royal Decree promulgated by the late King Khalid provided the statutory basis under which the Board of Grievances now operates.¹⁶

13. For a discussion of the Saudi Consulting House, see section VI.C *infra*.

14. Royal Decree No. M/2/13/8759 dated 17 Ramadhan 1374 H.

15. For example, see Board of Grievances Resolution No. 3570/1 dated 1 Dhual Hijjah 1379 H., and Council of Ministers Resolution No. 818 dated 17 Jumad Awal 1396 H. [hereinafter Resolution 818].

16. Royal Decree No. M/51 dated 17 Rajab 1402 H. [hereinafter 1982 Law].

Interestingly, the Board of Grievances functioned for over twenty years as the primary adjudicatory authority for disputes arising between contractors and governmental entities in respect of public sector projects without any specific statutory authority for so doing. Neither the aforementioned 1955 Decree establishing the modern day Board of Grievances nor the various revisions throughout the years of the Tenders Regulations,¹⁷ which regulate Saudi governmental purchases and public sector construction projects, expressly provided that the Board of Grievances had such jurisdiction. However, most governmental contracts during this period stipulated the Board of Grievances as the appropriate adjudicatory authority in the event of disputes thereunder. Not until 1976 did the Council of Ministers expressly vest the Board of Grievances with jurisdiction over governmental contract disputes,¹⁸ which disputes the Board of Grievances had routinely been hearing for years.

III. Jurisdiction of the Board of Grievances

As indicated previously, a comprehensive law governing the Board of Grievances was promulgated in 1982. In many respects the 1982 Law codified existing practices and previous piecemeal statutes. For example, article (8)1.(d) of the 1982 Law expressly states that the Board of Grievances has authority to decide "suits presented by those concerned in disputes relating to contracts to which the [Saudi] government or a general corporate person is a party."¹⁹ This wording covers the typical action in which a contractor (be he a Saudi person or entity, or a non-Saudi entity) in a public works project makes a claim against a Saudi governmental "employer."

17. The most recent of which is Royal Decree No. M/14 dated 7 Rabi Thani 1397 H., the Tenders Regulations [hereinafter Tenders Regs.], and Ministerial Resolution No. 2131/97 dated 5 Jumad Awal 1397 H., the Rules for Implementation of Tenders Regulations [hereinafter Tenders Implementing Regs.].

18. See Resolution 818.

19. 1982 Law art. (8)1.(d). In a recent policy change, the Board of Grievances now also will adjudicate disputes arising between Saudi contractors and the U.S. Corps of Engineers acting as a contracting party on behalf of the Saudi Government pursuant to the Agreement Relating to the Construction of Certain Military Facilities in Saudi Arabia, 24 May 1965-June 1965, United States-Saudi Arabia, 16 U.S.T. 890, T.I.A.S. No. 5830, 548 U.N.T.S. 285, *extended*, 25 November 1981-10 May 1982, T.I.A.S. No. 10388, *extended*, 25 June 1985-8 July 1985. In addition, the 1982 Law does not define the term "general corporate person," but this term appears to refer to governmental entities such as Saudia (the Saudi flag airline), the Saudi Seaports Authority, Petromin, the Saudi Arabian Monetary Agency, the Royal Commission for Jubail and Yanbu and the like. In our view, however, controversies involving entities with partial but not total Saudi governmental ownership, such as certain of the petrochemical ventures, would not be adjudicated by the Board of Grievances unless a particular statute provided otherwise. Instead, the general commercial courts (the Commissions for the Settlement of Commercial Disputes) would be the competent judicial fora for actions against these types of entities.

A claim against the Saudi Government arising out of the action or inaction of a minister or a governmental agency alleged to be in excess of or contrary to his or its authority would also be brought before the Board of Grievances.²⁰ The Board is expressly prohibited, however, from considering sovereign acts²¹ or the appropriateness or effect of statutes and legal decisions of the general commercial or the Shari'ah courts.²² Thus, a wrongful call of a bank guarantee in a public sector project would be litigated before the Board of Grievances, as would a claim alleging a minister had acted in excess of his authority. A claim by a contractor alleging damages because of an action taken by a Saudi governmental authority in accordance with a Saudi law, however, would not be heard by the Board of Grievances and would probably not be justiciable in any Saudi court.

The Board of Grievances is also empowered to enforce foreign judgments.²³ Based on our experience, however, the only foreign judgments the Board would enforce would probably be judgments issued by the courts of Arab League States, which are governed by a specific treaty.²⁴ Because of Shari'ah constraints, the Board of Grievances probably would not enforce the judgment of a United States court; instead, a trial de novo would be required with Saudi law as the governing law.

The Board of Grievances also decides questions arising out of, among other things, trademark matters²⁵ and licenses issued by the Foreign Capital Investment Committee of the Ministry of Industry and Electricity.²⁶ In addition, the 1982 Law contains a catch-all provision that enables the Council of Ministers to refer whatever matters "it deems fit" to the Board of Grievances for consideration.²⁷

IV. Independence

The Board of Grievances is an independent judicial tribunal with ties to no governmental authority other than the King.²⁸ That the Board is directly answerable to the King provides to the fullest extent possible in

20. 1982 Law arts. (8)1.(b), (c).

21. *Id.* art. (9).

22. *Id.*

23. *Id.* art. (8)1.(g).

24. Agreement for the Execution of Court Decrees, 22 Safar 1372 H, translated in 2 M. KHALIL, *THE ARAB STATES AND THE ARAB LEAGUE* 109 (1962).

25. Royal Decree No. M/5 dated 4 Jumad Awal 1404 H., Trademarks Regulations art. 59.

26. Royal Decree No. M/4 dated 2 Safar 1399 H., Foreign Capital Investment Code art. 10.

27. 1982 Law art. (8)2.

28. *Id.* art. (1). The first article of the 1982 Law states: "The Board of Grievances shall be an independent administrative judicial board directly affiliated to His Majesty the King."

a political system such as Saudi Arabia's that the Board is structurally separate from the various governmental entities that are typically the defendants in Board of Grievances proceedings.²⁹ The highest official attached to the Board of Grievances, the President, is appointed by the King,³⁰ and the 1982 Law specifically provides that the President is "directly answerable" to the King and has the rank of a Minister of State.³¹ The President of the Board serves for a term determined by the King³² and can be removed from office only by the King.³³ Other than the President, most ranking members of the Board of Grievances are, except for a one-year probationary period, appointed for a term that ends upon the member reaching seventy Hejira years of age³⁴ (roughly equivalent to sixty-eight Gregorian years). If a judge "loses the trust and esteem required by his position," however, the King is empowered to remove him earlier upon the recommendation of a committee of the Board of Grievances.³⁵ Judges may also be removed for poor "efficiency."³⁶

Prior to the 1982 Law, the Board of Grievances, upon its receipt of a claim, prepared a written summary thereof. Depending on the nature of the claim, the Board then sent the summary to the King. If the King so directed, the Board would accept the case for adjudication. If the King did not consider it necessary or appropriate for the Board to decide the case, the Board would decline to exercise its jurisdiction over the matter.

The King's prior approval was not generally necessary for the Board of Grievances to hear claims alleging a breach by a governmental contracting party of contractual provisions resulting in damages to a contractor.³⁷ Other types of claims, however, such as a claim based on loss that was the result of unforeseen circumstances, did require such approval. We are aware of at least one instance in which a dispute involving a claim under a Saudi public works contract was not considered by the Board of Grievances because the King believed there was no justiciable controversy. We petitioned the King a number of times without success

29. In disputes arising out of public sector contracts, the Saudi governmental party is virtually always the defendant, largely because of three factors. First, that party is the beneficiary of easily callable bank guarantees. Second, most Saudi Government construction contracts provide that the Government may operate the contractor's equipment (leased or owned) on site to complete a project. *See* Tenders Implementing Regs. art. 33. Third, the Tenders Regulations specifically prohibit a contractor from stopping the work on the grounds of breach by the Saudi governmental employer. *Id.* art. 29.

30. 1982 Law art. (3).

31. *Id.* arts. (2), (3).

32. *Id.* art. (3).

33. *Id.* art. (3).

34. *Id.* arts. (14), (15).

35. *Id.* art. (15).

36. *Id.* arts. (22), (26).

37. *See* Resolution 818.

to reconsider his decision, which essentially deprived our client of a forum in which to adjudicate his claim.

Although neither the 1982 Law nor its predecessors made any substantive mention of procedural matters, the pre-adjudication practice of obtaining the King's approval prior to the commencement of a Board action appears to have changed with the advent of the 1982 Law, and the Board no longer defers to the King prior to exercising its jurisdiction over disputes otherwise within its competency. In our view it is unlikely the Board would refuse to exercise its jurisdiction in a controversy arising out of public works projects for reasons not connected with jurisdictional considerations.

V. Composition of the Board of Grievances

At the present time six panels or committees of the Board of Grievances have been established to hear cases involving public works contracts disputes. Three of these panels sit in Riyadh, Saudi Arabia's capital; one sits in Jeddah, Saudi Arabia's commercial center; one sits in Dammam and one in Abha. Each panel is comprised of three judges.

Prior to the 1982 Law the Board of Grievances panels were typically comprised of one Shari'ah trained judge who was usually a Saudi national, and two legal advisors with backgrounds in public administrative law who were Muslim Arabs but not necessarily Saudi Arabs. Because Saudi Arabia had no administrative law tradition, many legal advisors from various Arab states, notably Syria and Egypt, became actively involved in the work of the Board of Grievances from its inception. Most of these advisors were educated and trained in countries following or influenced by the French legal system; consequently, many of the decisions drafted by these legal advisors adopted the principles laid down by the Conseil d'Etat in France to the extent such principles did not conflict with Shari'ah precepts.³⁸

The 1982 Law, however, brought about a major change in the composition of these panels. Each Board of Grievances panel is now comprised of three Saudi judges who, among other qualifications, must be graduates of a Shari'ah program of a Saudi university or the holders of another "equivalent university degree."³⁹ To enable the judges to have some familiarity with the types of secular matters that are the subject matter of Board of Grievances proceedings, new Board of Grievances judges are

38. For example, the Board of Grievances has in previous decisions accepted the principle of compensating a contractor where unforeseeable circumstances altered the "balance" of the contract against such contractor ("la notion d'équilibre financier"). See Board of Grievances Resolution No. 46/1398 in respect of Case No. 231/195/1396.

39. 1982 Law art. (11)(d).

required to take a six-month course of study of Saudi Arabia's secular laws at the Public Administration Institute in Riyadh.

Today, at least some of the panels still have foreign legal advisors (some of whom were formerly members of Board of Grievances panels) attached to them as advisors and consultants, but not judges. As Saudi judges, with time, become more versed in their responsibilities, we expect the role of these remaining legal advisors to decrease.

VI. A Board of Grievances Proceeding

Perhaps the most useful way to impart how the Board of Grievances actually operates is to guide the reader through a routine proceeding from its inception to its conclusion. We should stress, however, that the use of the word "routine" to describe any legal proceeding in Saudi Arabia must be viewed in the context of Middle Eastern judicial proceedings generally. Although a substantial part of our own legal practice is comprised of litigation before the Board of Grievances and other Saudi courts, we have yet to see any proceeding that could be described as "routine" in the Western sense of that word.

The predecessor statutes to the 1982 Law made no provision for rules of procedure. Although the 1982 Law provides that "rules of pleadings and procedures . . . shall be issued by a resolution of the Council of Ministers,"⁴⁰ to date that Council has issued no such rules. While this situation enables a trial lawyer to be creative in areas where in other jurisdictions rules of civil procedure might otherwise give rise to more predictable proceedings, the lack of specified procedural and pleading rules can occasionally frustrate the efficient progress of matters in litigation. We understand that draft rules of procedure have been circulating within the Board of Grievances, but we have no indication how quickly, whether, or in what form such rules will be adopted.

A. COMMENCING AN ACTION

The claimant commences his case by filing a statement of claim either with the office of the Board of Grievances located in the region in which the events giving rise to the claim have occurred or with the President of the Board of Grievances. If the latter, the President of the Board will assign the claim to the panel in the appropriate region.

The statement can be as detailed or as brief as circumstances permit and tactics dictate. At a minimum, the statement should indicate the names of the parties, the jurisdictional basis of the action (for example, that the

40. *Id.* art. (49).

claim arises out of a construction contract with a Saudi governmental authority), the contractual provisions at issue, and a statement as to damages. In our experience, it is not necessary at this stage to quantify damages with precision, and it is usually sufficient to state that damages will be specified and proved in subsequent hearings. With the statement of claim the claimant's representative should submit evidence of his authority to act on behalf of the claimant. This evidence is typically a power of attorney, which if prepared outside Saudi Arabia must be notarized and certified by the Saudi Consulate located in that area. The law does not require that a litigant in a Board of Grievances case be represented by counsel, although most non-Saudi claimants are. The Saudi Government is usually, but not always, represented by counsel, typically from in-house legal departments.

The language of the proceedings is Arabic, and all documents submitted to the Board of Grievances must be submitted either in Arabic or with an Arabic translation prepared by a licensed translator attached. Frequently, public sector construction contracts are negotiated in English, which is often the common language of the contractor and the Saudi governmental employer's consultant or project manager. As a matter of Saudi law, however, such contracts must be signed in Arabic and accordingly, the operative and legal language thereof is Arabic.⁴¹ The importance of contractors' satisfying themselves that the Arabic language of the signed document accurately reflects the negotiated commercial terms and intentions of the parties should be obvious. In our experience, however, contractors take astonishingly little care in verifying the accuracy of the Arabic versions of contracts by which they will be legally bound. We are involved at the present time in a case in which the inept Arabic translation of a single but crucial word in a construction contract clause has created considerable difficulties for our client, whose already complex claims have been further complicated by this mistranslation.

Upon submission of the statement of claim, the staff of the Board of Grievances prepares a summary thereof and submits it to the President. The purpose of this summary appears to be to ensure that the Board of Grievances has jurisdiction over the claim. Assuming it has jurisdiction, the Board summons both parties to an initial hearing before the appropriate panel at a time chosen by the Board. The notice to the defendant usually includes a copy of the plaintiff's statement of claim. The time lag between the initial submission of a claim and the notice of the initial hearing can be considerable.

41. Royal Decree No. 3/11/9574 dated 27 Rabi Thani 1401 H. and Royal Decree No. 3/11/351 dated 20 Jumad Thani 1400 H.

B. THE COURSE OF HEARINGS

Hearings before the Board of Grievances are relatively informal by United States standards. The panel may question representatives of the plaintiff and the defendant on points raised in submitted briefs or on other matters of law or fact as the panel may deem appropriate or relevant. The oral testimony of witnesses is not typically a feature of the hearings, but in view of the flexible approach taken by the Board of Grievances as to procedural matters generally, there would appear to be no reason why witnesses could not be called and questioned. In fact, in a recent case we called three expert witnesses to give oral as well as written testimony, and the Board of Grievances accepted them.

In respect of civil matters before the Board of Grievances, no detailed rules or procedures govern the introduction or suppression of evidence or discovery. Generally speaking, the sessions consist of a wide-ranging "give and take" among the parties to the litigation and the members of the panel. Production of documents is routine and generally uncontested. We should note, however, that in one of our ongoing cases discovery has for the first time in our experience become a major issue in a Board of Grievances proceeding. In this case, the defendant, a governmental contracting agency, cited in a reply brief numerous documents that our client had not seen. In accordance with usual practice, the defendant supplied the documents to the Board, but in a departure from that practice refused to provide copies to our client unless the Board formally ordered otherwise. We petitioned the Board of Grievances on an *ex parte* basis to issue such an order. The first and rather automatic reaction of the panel member with whom our petition was lodged was that the documents requested were "internal Government documents" and therefore could not be released "to the public." The controversy at issue, however, did not involve a Ministry of Defense and Aviation contract or similar sensitive type of contract. We took the matter, again on an *ex parte* basis, to a higher level at the Board of Grievances, which indicated that we were entitled as a matter of right to receive copies of any documents from the defendant required in connection with the case and submitted to the Board of Grievances. Even so, for reasons that never became apparent, the Board did not order the defendant to supply such copies. While we were ultimately able to see the documents, we were unable to photocopy them.

Hearings are scheduled in accordance with the panel's case load at any given time. At present, the interval between hearings is usually four to eight weeks, but the panel for the most part views with flexibility requests to shorten or lengthen this period.

At the initial hearing one of two things usually happens. The defendant may (and typically does) request a postponement, which the panel always

grants. In general, unless it is obvious to the panel that one side is seeking to gain tactical advantage by postponements, the panel readily grants postponements without either party having to cite a compelling reason therefor. As time goes on, however, the panel may begin to require at least cursory reasons for a postponement and in certain circumstances may refuse to grant a postponement, although this action would be unusual. If neither party requests a postponement, the defendant will instead submit a rebuttal, usually summary in the extreme, to the plaintiff's statement of claim. The plaintiff, on whose shoulders generally rests the entire burden of proof, will then be requested by the Board of Grievances to provide at the next hearing documents giving rise to and supporting his claim.

At the end of each hearing, one or more of the judges on the panel will dictate to the court clerk the official minutes of the hearing. These minutes do not in fact fully summarize what occurred at the hearing; there is no transcript or transcription per se prepared for Board of Grievances hearings, and no court reporter in the American sense of that term. Rather, these minutes record major admissions or stipulations and set forth any additional documentation and written briefs that the panel orders one or both of the litigants to submit at the next hearing.

The rest of the Board of Grievances proceedings will consist of hearings encompassing informal oral argument, the submission of reply briefs, rebuttal briefs, counterreply briefs, and counterrebuttal briefs on issues and subjects determined by the panel. The hearings conclude when the panel feels it has all the evidence and information necessary to enable it to render a decision, and when the parties to the proceeding believe that they have presented all their arguments and have submitted all their evidence. Most Board of Grievances proceedings exceed one year; more complicated cases can last considerably longer.

C. THE USE OF EXPERTS AND TECHNICAL COMMITTEES

Some years ago, certain public sector contracts distinguished in their "disputes" clauses between "technical" disputes and "legal" disputes. These clauses typically provided that disputes as to "technical" matters would be referred to a technical committee established by the parties to such contract, and "legal" matters would be referred to the Board of Grievances itself. Today, the jurisdiction of the Board of Grievances extends to all matters arising out of claims relating to public works contracts, be they technical or legal. In certain cases the panel decides straightforward technical questions by itself. For example, in one case with which we are familiar, the Board itself interpreted a soil investigation report

without resort to expert opinion in a controversy concerning the financial consequences of unusually difficult soil conditions.

When the technical issues are complex or highly specialized, or when they require consideration of voluminous materials, the Board of Grievances will usually refer such issues to a "committee of experts." In the past, these committees were comprised of three specialists in the field in which the particular controversy arose; the plaintiff and the defendant each appointed one expert, and the Board of Grievances appointed the third. These committees acted by majority rule and presented their findings in writing to the Board. Usually, a panel would adopt such a report as its own findings.

At present, the Board of Grievances will normally refer technical matters to the Saudi House for Consulting Services, a professional and well-regarded consulting-for-hire organization established in Riyadh in 1979.⁴² (Even so, when the subject matter is highly specialized we have had success recently in persuading the Board of Grievances to accept technical expertise from other independent sources, such as the local universities.) The Saudi Government owns the Saudi Consulting House, but has committed itself in the establishing regulations to distribute up to fifty percent of its ownership interest to Saudi professionals in the various technical disciplines in which the Saudi Consulting House operates.⁴³ Although the Council of Ministers oversees the general policy of the Saudi Consulting House, its day-to-day consulting operations are independent from the Government and controlled by the professionals employed by it. In our experience its work is highly competent and impartial.

Either the plaintiff or the defendant, or the Board of Grievances on its own motion, may request that a technical aspect of a claim be referred to the Saudi Consulting House. In some instances we have resisted the involvement of the Saudi Consulting House in an action, usually on the grounds that what appeared to be technical issues were in fact merely contractual issues that did not require an outside consultant. In these cases we felt that the involvement of the Saudi Consulting House would needlessly delay or complicate the proceedings.

D. EXHIBITS, SITE VISITS, ETC.

In our experience the Board of Grievances is receptive to site visits if convinced the exercise will assist a panel in understanding a particular aspect of a claim. We have also made use of photographs, charts, and

42. Royal Decree No. M/17 dated 4 Jumad Thani 1399 H. [hereinafter Saudi Consulting House Regulations].

43. Saudi Consulting House Regulations art. 2.

models in Board hearings to illustrate points that we believed better lent themselves to a graphic display than to prose, although such practices are probably uncommon.

E. TYPES OF RELIEF

In the typical Board of Grievances case, the award sought is money damages. Under the Shari'ah, a Saudi court, including the Board of Grievances, will in most instances not award damages considered "speculative" in nature, such as lost profits or lost opportunity.⁴⁴ In addition, a court will not award interest on overdue payments, regardless of the reason for delay, because the obligation to pay interest or monies in the nature of interest is unenforceable in Saudi Arabia as a matter of the Shari'ah.⁴⁵

At the present time we have a case pending before a Board of Grievances panel in which we are making a claim in respect of overdue payments. The construction contract between our client and the Saudi governmental employer contains a clause that provides that if payment by the employer is not made on a timely basis, the contractor will be entitled to be paid "the cost of the delayed payment for the period of delay" up to a maximum of one percent per month of the contract price. We are arguing that this clause is a liquidated damages clause and not an interest clause. The former type of clause is generally enforceable in Saudi Arabia while the latter is not. Thus far the panel has not given any indication that it considers this claim to involve interest.

Previous Board of Grievances decisions contain precedent for awarding liquidated damages to a contractor when the Saudi Government improperly delayed payments. In one case the Board accepted the reasoning that where a public works contract stipulated that liquidated damages be paid by a contractor to the Saudi governmental employer when performance of the works had been improperly delayed⁴⁶ (i.e., a delay fine), the contractor was as a matter of equity also entitled to damages for improperly delayed payments by the Saudi governmental employer even in the absence of a specific contract clause on point. The difficulty in these types of cases is proving actual damages. For example, if a plaintiff could produce evidence it borrowed to finance the delay, the plaintiff's documentable costs such as bank charges would probably be recoverable. If, however, the plaintiff financed such delay by internal means, the Board of Grievances would not award damages unless direct costs could be demonstrated and proved. The Board of Grievances also has the com-

44. 6 A. AL-SANHOURI, *MASSADER AL HAQ FI AL FIKH AL ISLAM* 168 (1968).

45. Quran, Sura 2, Ayat 275-281; Sura 3, Ayat 130.

46. *See also* Tenders Regs. art. 9.

petence to grant nonmonetary relief and has done so. In our experience, however, such relief is unusual and restricted to particular situations involving irreparable harm or damage.

To illustrate the availability of injunctive relief let us consider a case in which a Ministry is threatening to call a guarantee of a contractor on grounds that the contractor believes wrongful. A mere allegation that the call was wrongful would probably not be enough for the Board of Grievances to enjoin the Ministry from making such a call because money damages (not including interest) arguably would compensate the contractor in such a situation. If the contractor were to allege that the call was not only wrongful but also would put him into bankruptcy, thereby causing him irreparable harm, the likelihood of an injunction would certainly increase. Putting aside the ability of the contractor to prove impending bankruptcy, in these circumstances the Board of Grievances conceivably might order the Ministry not to make a call until the merits of the call could be considered. We are theorizing here and are not aware that any such case has ever been litigated in Saudi Arabia.⁴⁷

A more realistic possibility for obtaining injunctive relief would be a case in which a governmental authority ordered the demolition of a building, which order was resisted by the owner on the grounds that the governmental authority exceeded its authority in giving the order. A showing of irreparable harm would obviously be far easier to demonstrate in this situation.

F. JUDGMENTS

When the hearings are finally concluded, the Board of Grievances accepts the case for a period of "deliberation and judgment." During this period, which usually measures several months (or years), depending on the backlog of cases and the complexity of the particular case, the panel acting at the hearings considers the various documents submitted by the litigants. During this period, the Board may, and frequently does, at its discretion reconvene the hearings if it finds that additional argument or evidence is needed.

The procedures whereby the Board of Grievances renders its judgments are not set out in any statute and are considered matters of internal administration. We believe, however, that the following outline reasonably accurately describes the judgment-making process of the Board of Griev-

47. The Ministry of Finance has recently instructed Saudi public sector entities that construction contract guarantees may be called only after the convening of a "special committee" to determine whether such a call is "justified." See 19 SAUDI ECON. SURV., 29 Jan. 1986, at 2.

ances. First, the panel that heard the case prepares its tentative judgment; it then sends a draft to the President of the Board of Grievances for his consideration. At the President's discretion, the draft judgment may in turn be sent by the President to a "review committee" headed by the President, and comprised also of the Deputy President and three of the most senior judges on the Board. This review committee then studies the draft judgment and may of its own initiative make substantive changes therein. Upon the completion of its review, the committee sends the draft judgment back to the President.

In the past, after the President had approved the draft judgment as reviewed or modified, he would send it to the minister or the highest authority of the defendant governmental authority with a request for comments within a fifteen-day period. If the defendant had no comments, the judgment was usually made the formal decision of the Board of Grievances. If the defendant did have comments, the President considered them without reference to the plaintiff. The President then either altered the judgment to take the comments into account or directed that the judgment be rendered notwithstanding the comments. At the present time, judgments are no longer sent to the defendant prior to their rendering and are issued directly after review by the President.

The significant role of the review committee in this process should be well understood by plaintiffs. Some years ago we had a case in which we submitted an agreed negotiated settlement of a public works contract claim to the Board of Grievances for ratification. The Saudi governmental defendant's outside technical consultants has also approved the negotiated settlement. Notwithstanding the foregoing, the review committee considerably reduced the amount of the settlement without explanation or reference to the parties to the action, and this reduced award was made the judgment of the Board of Grievances. Repeated attempts to appeal this judgment on a variety of grounds over a period of years ultimately proved unsuccessful.

Recently the Board of Grievances has begun to collect and publish some of its decisions. At the present time, one volume has been produced of the Board of Grievances' civil decisions,⁴⁸ but to our knowledge this compilation has not been translated into English. Traditionally, the Saudi courts have not accorded weight to precedent. We have, however, in the past used the results and reasoning of previous decisions of the Board of Grievances in arguments and briefs in subsequent unrelated Board of Grievances proceedings. We believe that citing previous Board of Grievances decisions has some value, albeit perhaps indirect.

48. *Magmoui' at Al Ma'baadi Al Shariah'at Wa Al Niza'miyah Al Latti Gara'rat-ha Hiyat Wa Lijaan Wa Dawayr Al Diwan Fi Al Mudat min 1397-1399* (Riyadh 1404 H.).

G. APPEALS

At the present time the law contains no provision for appeals of Board of Grievances decisions. Such decisions are considered final when rendered. This situation could change, however, if procedural rules for the Board of Grievances are adopted and an appeals panel provided for. In a number of cases over the years we have asked the President of the Board of Grievances to "reconsider" decisions on the basis of what we regarded as exceptional circumstances. This type of review was informal and generally unsuccessful.

Theoretically, a litigant always has at least one avenue of appeal: redress to the King. The likelihood that an appeal to the King based on an unfavorable Board of Grievances decision would result in any change in such decision is, however, remote. In our experience, a Saudi government defendant, when directed to pay a judgment by the Board of Grievances, will usually pay such judgment without obstruction or undue delay.

H. CONCLUSIONS

As with courts around the world, the proceedings of the Board of Grievances are affected by docket congestion and the delaying tactics of litigants. In addition, as with any court, there are good results and, occasionally, disappointing results. Nonetheless, cases do move through the Board of Grievances and both sides of a controversy have a full opportunity to be heard and judged.⁴⁹

While litigation should, in our view, continue to be viewed as a last resort in this jurisdiction, the Board of Grievances does provide an opportunity for a hearing of grievances against the Saudi Government in public sector contract disputes. Non-Saudi plaintiffs routinely win cases and so do the Saudi governmental authorities. To the best of its ability the Board of Grievances looks at the merits of the case and not the identity of either of the parties to a dispute.

49. Superficial articles on the Board of Grievances undoubtedly have contributed to Western anxiety as to Saudi legal institutions. For a typical example of this genre, see *MIDDLE EAST EXECUTIVE REP.*, April 1985, at 13, in which, in an unsigned article, the Board of Grievances is curiously described as "nascent," its procedures "shrouded in secrecy," and the prospects "poor" for a fair resolution of disputes.