



The Main Differences between Saudi Arbitration and American Arbitration

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Abstract

Arbitration is an essential method that helps in resolving issues and reaching settlement. It has been widely regarded as a mainstay in resolving conflicts. In recent years, international arbitration has been used to resolve a number of disputes between states like Eritrea v. Yemen. However, as any other methods, arbitration may be influenced negatively by certain factors in which a country such as Saudi Arabia has to ratify its law in order to attract local and international investors to start their own business in the kingdom without fear or nervousness. Amongst these factors are the choice of law, a requirement to hold a law degree and others.

Introduction

Arbitration is one of the alternative dispute resolutions that disputants can resolve their problems through, and it became widely accepted because of its flexibility and convenience. Therefore, most countries in the world have established and developed this method in their systems, and Saudi Arabia is amongst these countries. In fact, Saudi Arabia has adopted this method since it was founded. To illustrate, the constitution of Saudi Arabia is the Holy Book “Quran” and the traditions of Prophet Muhammad (peace be upon him) in which we find arbitration and its procedure are clearly mentioned and explained. God says, “And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them.”¹ In addition, a man told the Prophet, “When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. He, the Prophet, said: How good this is!”² However, since the Saudi Arabian Arbitration Law is derived from these two sources, which are in fact divine laws, the differences between it and the American Arbitration Law, which is man-made law, are undoubtedly, existed. Therefore, it is quite imperative to recognize these noteworthy differences in

¹ Surat An-Nisa. *Quran Sahih International English Translation* (p. 712). (2004). Jeddah: Al Muntada Al-Islami.

² Ahmad, H. (n.d.). *Kitab Al-Adab. Sunan Abu Dawud* (Vol. 3, p. 153). New Delhi: Bhavan.



order to fully understand how the arbitration law works in Saudi Arabia and to avoid any unexpected damages that might occur due to these significant distinctions. In addition, it gives a vivid image to the government of Saudi Arabia about some of the articles that need to be modified without prejudice to the rules of the Sharia Law since their impacts have been discouraging international companies from investing in Saudi Arabia. It is worth mentioning that back in 1983 it was mandatory that the language of the arbitration agreement, arbitrators, documents and witnesses had to be in Arabic, and in case one of the parties could not speak Arabic, he had to bring a translator. Moreover, once the arbitral award was made, it did not become binding until the relevant court examined it in order to ensure that the whole process was in accordance with Islamic rules.³ However, in 2012, the Kingdom of Saudi Arabia announced the new arbitration law that includes some improvements such as the parties have the right to choose any language they want to use in their arbitration agreement, and the relevant court may not review the arbitration awards.⁴ From these changes and others we can see how they have played important roles in opening many opportunities for the international businesses to be increased in Saudi Arabia. Here are some of the essential differences that have their weights on the arbitration and its elements.

The first difference: Usury⁵

To begin with, the conspicuous distinction between these two laws is interest rate or “Riba” as it is called in Sharia law. Saudi Arabia does not recognize the imposition of interest in any contract. In fact, the law is stated in the following language:

The Sharia’s Islamic law forbids usury in any form or manner whatsoever, whether or not it is gained or in secret. The defendant asserted that a position of the amount claimed by the claimant [...] is illegal. If the defendant’s contention properly invokes Sharia provision, then the Arbitral Tribunal must apply it since it relates to the public order of the Kingdom.⁶

³ The Old Saudi Arbitration Law art.10

⁴ The New Saudi Arbitration Law art.29

⁵ Any positive rate of interest, no matter how low, is both interest and usury in sharia law.

⁶ Nayla, C. (2014). *The Arbitration Brief. Salient Issues in Arbitration From an Arab Middle Eastern Perspective* (Vol.



Essentially, this law is derived from the book of God, “O you, who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful.”⁷ In addition, the Messenger of Allah (peace be upon him) cursed the one who accepted usury, the one who paid it, the witness to it, and the one who recorded it.”⁸ Thus, any contract that contains usury must be unconscionable and unenforceable whereas it is allowed in the American Arbitration Law. According to RCW 19.52.020, “Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of....” As a matter of fact, this particular point has driven investors away and made them think that the Saudi Law is a repressive and mysterious while in fact, the Saudi arbitration is derived from the “United Nations Commission on International Trade Law Rules” as well with only a few differences that in fact, do not just serve the interest of Saudi Arabia, but the rest of the world. In Buckeye Check Cashing, Inc. v. Cardegna,⁹ borrowers brought class action against a lender alleging that the loan contract was usurious. The lender filed a motion to compel arbitration, and it was denied. Thus, he appealed, and The District Court of Appeal held that the language of the arbitration agreement was broad enough to encompass usury; hence, the lawsuit was subject to arbitration. On the other hand, if this case had been filed in Saudi Arabia, the court would not have enforced the arbitration clause, and it would have been deemed as an unreasonable agreement since the contract is usurious. With this particular difference, it is unattainable for the government of Saudi Arabia to modify it since it is derived from the Sharia law.

4). Retrieved from <http://digitalcommons.wcl.american.edu/ab/vol4/iss1/4/>

⁷ Surah Al Imran. *Quran Sahih International English Translation* (p. 712). (2004). Jeddah: Al Muntada Al-Islami.

⁸ Ahmad, H. (n.d.). *Kitab Al-Buyu. Sunan Abu Dawud* (Vol. 3, p. 153). New Delhi: Bhavan.

⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So.2d 228 (Fla.App. 4 Dist.,2002).



The second difference: Choice of Law

Another key difference is the limitation of choice of laws. According to Article 2 of Saudi arbitration, arbitration agreement is valid so long as it is not against the rules of Sharia Law.¹⁰ In reality this condition may create fear and anxiety in a party who has no knowledge about the Sharia Law, and that explains why international commerce has not sharply increased in Saudi Arabia comparing to its neighboring countries such as the United Arab Emirates in which parties have the right to choose the law they prefer.¹¹ Similarly, in the United States, The Federal Arbitration Act grants parties the freedom to choose whatever law they prefer to apply when a dispute is arising out of their contract. However, it is vital to indicate to an important point that might not be known for most people which is according to Richard Birke, a former director of the dispute resolution program at Willamette University College of Law, the law that is chosen must not be directly inconsistent with the FAA rules. In contrast, if the chosen law complies with the FAA with minor differences that are indirectly against the rules, the FAA may allow such agreement. The best example for this point is Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University Case.¹² In that case, parties agreed to arbitrate any dispute arising out of their contract by the law of the place where the project is taken a place. A dispute arose; thus, the appellant demanded to arbitrate; however, the trial court denied his motion and granted appellee's motion to stay arbitration. Volt appealed alleging that stay arbitration is prohibited by section 4 of the FAA which states that if a party rejects to arbitrate under a written agreement, the other party may petition any United States district court in order to enforce such agreement. However, The State Court of Appeal states that since the chosen law clause was specified; therefore, it must be applied even if that against the section 4 of the FAA. Ultimately, The Supreme Court held that since it is required to enforce

¹⁰ The New Saudi Arbitration Law art.2

¹¹ United Arab Emirates - International Arbitration 2014 Ch. 4

¹² *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (U.S.Cal.,1989)



such agreement by the FAA, certiorari was denied. It is crucial pointing out that this distinction is also a divine command in which a party not allowed to refer for a man-made law except in cases that are not against the Islamic rules. In fact, it is stated in Quran, “And who ever does not judge by that which Allah has revealed, such are the wrongdoers”¹³ As a result, foreign investors are struggling to identify effective ways to resolve their disputes with their parties in Saudi Arabia.

The third difference: Qualifications of an Arbitrator

Another major distinction that its implications have not only negatively affected parties but countries, arbitrators, and the arbitration itself is the qualifications of choosing an arbitrator. In order for an individual to function as an arbitrator, the arbitrator shall be a man and hold at least a college degree in law. Moreover, he should be a Saudi citizen or a foreign Muslim.

The condition of being a man:

Even though the condition of being a man to be an arbitrator is not mentioned in the arbitration's terms and conditions, it is the general and obvious rule in the kingdom of Saudi Arabia that a female shall not be a judge or an arbitrator. In fact, this condition is derived from different sources such as the Quran, the traditional of the Prophet (peace be upon him), and the consequences that some countries have faced due to appointing women to function as judges and arbitrators. In fact, the majority of Muslim scholars have stated that Islam forbids women to work as an arbitrator, and they rely on a statement that the Prophet has given when he heard that the people of Persia had appointed a woman as a ruler over them he said “No people will ever prosper who entrust their leadership to a woman.”¹⁴ As a result of this impediment, some foreign investors may not even think to start their own business in Saudi Arabia since they feel that they have been restricted from practicing their right to select whom they want. In addition,

¹³ Surat Al-Mā'idah. *Quran Sahih International English Translation* (p. 712). (2004). Jeddah: Al Muntada Al-Islami.

¹⁴ Aḥmad, A. The Book of the Etiquette of Judges. *Sunan an-Nasa'i* (Vol. 6). Retrieved from <http://sunnah.com/nasai/49/10>



the kingdom of Saudi Arabia is currently suffering from the lack of local arbitrators since it is only licensing men to practice this method. Subsequently, it results in limiting some foreign companies from operating in the country. In the United States, on the other hand, it is allowable for women to become arbitrators or even judges. For instance, Kathleen Roberts, who has served as a United States Magistrate Judge in the Southern District of New York, has arbitrated many cases such as a breach of contract dispute between American software manufacturer and its Taiwanese distributor.¹⁵ Therefore, it is important to consider the opinion of the minority scholars whose statement could be used to modify this condition to improving arbitration, its elements, and other areas. Those minor scholars believe that opting a woman as either a judge or an arbitrator never goes against the principles of Islam especially; the third companion of the Prophet (peace be upon him) has appointed a woman as a judge when he was the caliph.

The condition of holding a law degree:

Legal knowledge is an essential requirement for becoming an arbitrator in the kingdom. However, this article has nothing to do with the Sharia law. As an illustration, Islam forbids anybody to judge between people without knowledge. “Indeed, we have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate.”¹⁶ This verse necessitates a judge or an arbitrator to be knowledgeable. However, knowledge is not constrained to legal background. This is vitally important in complex cases, where many legal knowledge holders have no expertise in the area. It is worth mentioning that knowledge is not measured by a certificate given after graduating from a law school. In reality, many of noted and experts in different fields are prevented from practicing arbitration simply because they do not have a law degree. In fact, Ahmad ibn Hanbal, the founder of the Islamic school that Saudi Arabia is following today was qualified enough to function as a judge or an arbitrator even though he graduated from none of today’s

¹⁵ Retrieved from <http://www.nysb.uscourts.gov/sites/default/files/mediators/kroberts.pdf>

¹⁶ Surat An-Nisa. Quran Sahih International English Translation (p. 712). (2004). Jeddah: Al Muntada Al-Islami.



theological seminaries. In the United States for instance, an arbitrator is not required to be full of legal capacity or to have a college law degree in order to arbitrate between disputants while in fact its arbitration law is considered one of the top arbitration laws in the world. Therefore, restricting qualified people who might also are capable of speaking different languages from being an arbitrator due to this condition makes Saudi arbitration law appear weak and ineffective. Majed Qaroub, a member of the consultant arbitration committee at the Saudi Justice Ministry, and head assistant of the Arab Chamber of Arbitration and Documentation, notes that the lack of local arbitrators leads foreign investors in Saudi Arabia to use other alternative disputes besides Saudi arbitration.¹⁷ Another implication that is brought about by this restriction is wasting parties' money since finding an arbitrator obtaining a college law degree and specialized at the field that parties are disputing about makes him demand unreasonable amount of money. Therefore, the kingdom of Saudi Arabia should overlook this condition. It is fair mentioning that the new Saudi Arbitration took a step forward and declares that if the arbitral tribunal is made up of more than one arbitrator, it is sufficient that the head of the tribunal has this condition.¹⁸

The condition of being a Saudi citizen or a foreign Muslim:

The previous Saudi arbitration states that the arbitrator has to be either a Saudi arbitrator or a foreign with a condition that he must be a Muslim. However, in the new arbitration this article was removed without indicating to it again which in fact creates ambiguity among parties and their chosen arbitrators because none of them knows whether the arbitral award would be acceptable and enforceable according to the new arbitration law. Surely, this uncertainty affects the economy and the marketplace of Saudi Arabia. Moreover, it affects the international investors and their investments. It is worth noting that there are two opinions between Muslim scholars about whether a non-Muslim's decision is acceptable or

¹⁷ Al-Jassem, D. (n.d.). *Arbitration laws still considered weak, ineffective in Kingdom*. Arab News. Retrieved June 27, 2015, from <http://www.arabnews.com/news/454354>

¹⁸ The New Saudi Arbitration Law art.14.3



not. The minority scholars are inclined that the award of a non-Muslim arbitrator must be binding as long as the award is given in accordance with the sharia law, and I agree with them. This condition reminds us of Aramco Services Company v. DynCorp International, LLC Case when both parties have agreed to arbitrate any arising issue out of their contract by the Saudi Arbitration Law which used to include the third article that states an arbitrator must be either a Saudi or a foreign Muslim. A disagreement occurred; thus, DynCorp filed a lawsuit against Aramco in Texas Trial Court which led Aramco to file a motion to compel arbitration and it was granted it. However, DynCorp filed another motion in the same court, and its motion was partly granted. The trial court noticed that both parties have failed to choose an arbitrator at the specified time, and in this case it is the authority's job to appoint arbitrators according to their contract. The Trial Court called itself the authority since both parties have filed their motions in it. However, Aramco objected claiming that the authority should be the Saudi Law, but its objection was denied. The Trial Court gave the parties more time to choose their arbitrators. Aramco chose a Saudi arbitrator whereas DynCorp chose a non-Muslim arbitrator, and the court agreed on that which led Aramco to appeal. The Texas Court of Appeals hold that the authority should be a Saudi Arabian Court.¹⁹ As we see, the Saudi law was strict on appointing a Muslim arbitrator; however, ignoring this condition in the new arbitration makes it more peculiar. As it is obvious, the situation is completely different in the U.S. since the American arbitration does not base any of its requirements on race or religious beliefs.

The fourth difference: Woman's testimony

Another significant distinction that is not mentioned in the arbitration law; however, it is enacted in the Court System of Saudi Arabia since it is derived from the Islamic sources is that the testimony of a

¹⁹ Whitney, H. (2011). *Foreigners Beware: Exploring the Tension between Saudi Arabian and Western International Commercial Arbitration Practices: In re Aramco Services Co.* Retrieved from <http://scholarship.law.missouri.edu/jdr/vol2011/iss2/8/>



woman, in some cases such as financial matters, is worth half of that of a man and her testimony is rejected unless there are another women and a man. Allah says in Chapter fourth of the Holy Quran:

And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her.

This does not mean that women are mentally deficient. However, the point is that they at certain times probably get emotional, cannot recall or make an error due to the various negative effects that they encounter during certain times. This condition and others cultivate more doubts and fears in international investors and drive them to seek other foreign forums to start their commerce, and that gradually influence the arbitration and its elements in Saudi Arabia. The American arbitration makes no distinction between a man's testimony and a single woman's testimony. This condition demonstrates the reason why a woman cannot be an arbitrator in Saudi Arabia which is if she is weaker than a man in this aspect, so how is she expected to handle legal issues?

Conclusion

Saudi Arabia is one of the most rapidly growing countries in terms of its economy; therefore, investors demand its arbitration; however, the lack of knowledge about Sharia Law has created ambiguity among parties and their arbitrators about its arbitration's terms and conditions, and that has negatively influenced its economy. Thus, the Saudi government had to take two steps in order to remove any vagueness from its arbitration and to develop it as well. First, it promoted its arbitration law by adopting both local and international terms and conditions so long as those terms and conditions do not conflict with the Sharia Law. Wissam Hachem, a member of the Beirut Bar Association says, "We believe that the introduction of the new changes is a step towards achieving a friendlier, regulated environment."²⁰ In

²⁰ Hachem, W. (n.d.). Lexology. *The new Saudi arbitration law: a step towards international norms*. Retrieved July 3, 2015, from <http://www.lexology.com/library/detail.aspx?g=eff5c2fd-dcdd-40e2-9592-c960b33b6458>



addition, the Saudi and the British governments have agreed to establish a Saudi arbitration center in London in order to counter investor concerns about the legal system and to promote foreign investments in Saudi Arabia.²¹ These changes and those terms and conditions that are recommended to be modified in this paper will definitely make of the Saudi Arbitration a popular and an attractive one.

²¹ Binham, C., & Warrell, H. (n.d.). FT. *Saudis seek private court in London*. Retrieved July 5, 2015, from <http://www.ft.com/intl/cms/s/0/47db481c-1f93-11e2-b273-00144feabdc0.html#axzz3fBSkFmXQ>



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