FAITH-BASED ARBITRATION CLAUSES AS A GLOBAL ALTERNATIVE TO DISPUTE RESOLUTION

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ABSTRACT

DynCorp International, LLC, a U.S. company, and Aramco, a Saudi-owned corporation, entered into a contract for a computer system which was to be manufactured in the U.S. and installed at Aramco's facilities in Saudi Arabia. The contract contained a "choice of law" provision requiring the application of Saudi Arabian law even though the contract was entered into and significantly performed in the United States. The contract also contained an arbitration clause, requiring that any disputes be resolved using Sharia law as implemented through an arbitration panel. When a dispute over the ownership of funds arose, DynCorp attempted to bring the matter into the Texas judicial system. In its opinion in the matter (In re Aramco Servs. Co., No. 01-09-00624-CV, 2010 Tex. App. LEXIS 2069, 2010 WL 1241525, Tex. App. Houston 1st Dist. Mar. 19, 2010), the Texas court refused to take up the matter, and effectively upheld the arbitration clause. This paper explores the increasing use and enforceability of faith-based arbitration clauses in international contracts and transactions in light of the Aramco case. The paper concludes that global finance is augmented when parties learn about other faiths (in particular, Islam) so that they can effectively negotiate and, where appropriate, adopt such clauses as a way of making use of alternative dispute resolution.

JEL: K2; K12; K41

KEYWORDS: Faith-Based, Alternative Dispute Resolution, Arbitration, Contracts, Sharia

INTRODUCTION

Arbitration is method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding (Garner & Black, 2004, p. 112).Arbitration is one of several systems of alternative dispute resolution (ADR), that is, procedures for settling dispute by means other than litigation (Garner & Black, 2004, p. 86). Arbitration is not a judicial proceeding that necessarily originates under any particular constitution, statute, regulation, court rule or the common law, but is instead a proceeding which is intended to occur outside of the normal judicial process. By contrast, mediation is an ADR where one or more impartial persons assist the parties in reaching a settlement but do not make a binding determination (Lipsky & Seeber, 1998, p. 134).

Arbitration can in some cases be called for or required by statute or other authority, but is often simply agreed to by private parties as part of their negotiated contracts and transactions. In the former case, there may be formal legal requirements that establish the conditions and parameters of such arbitration. In the latter case, arbitration is the creature of contract and the parties can decide among themselves the range of issues that will be subject to arbitration, the choice of substantive and procedural laws or rules, the extent and scope of possible relief, and any and all other aspects of the agreed-to arbitration. In the former case, arbitration is a required process that is prescribed by law; in the latter, the contracting parties waive their rights to seek redress in traditional processes of law.

Arbitration is often less expensive than traditional civil judicial proceedings, because discovery can be more efficient, the use and cost of attorneys can be minimized, and the proceedings can be structured so that they are less formal and time-consuming.

This paper focuses on those arbitration clauses and systems that draw from religious texts and traditions

for their jurisprudence and procedures. Particular attention is given to the growing use of *Sharia* (Islamic law) within the jurisdictions of the United States legal system. A study of the case of *In re Aramco Servs. Co.* (2010) helps to illuminate the systemic tensions that can arise when Sharia-based arbitration clauses are employed within that legal system. In doing so, this paper expands on the extant literature on faith-based arbitration in the United States. Specifically, it supplements and updates the general observations about faith-based arbitration made by Shippee (2002), Rashid (2004), Kutty (2006) and Wolfe (2006).

To accomplish these objectives, this paper introduces the concept of faith-based arbitration clauses, reviews the policy of judicial deference toward arbitration within the U.S. legal system, and provides a case study that highlights the tension between the Islamic arbitration tradition, on the one hand, and the Western legal tradition on the other. The paper concludes by observing that companies and individuals who negotiate contracts with business entities in predominately Muslim countries will need to educate themselves about such differences and tensions in order to avoid the mistakes that are illustrated in the case study.

LITERATURE VIEW

Faith-Based Arbitration Clauses

Ordinary contract principles determine who is bound by written arbitration provisions. When parties to a contract execute the contract containing an enforceable faith-based arbitration provision, they are consenting to that provision. Two aspects of religious-based arbitration take into account private contracting autonomy: the choice of arbitrators who are versed in the religious law, and the choice of rules of law that align with the expectations of the parties (Dessemontet, 2012, p. 558).

Christian Conciliation: Faith-based arbitration clauses tend to reference the religious laws and principles of the three most widely held monotheistic religions: Christianity, Judaism and Islam. In the Christian religious tradition, over three hundred churches, ministries, and organizations are a part of Peacemakers Ministries, making it is the largest, multi-denominational Christian dispute resolution service in the country (Shippee, 2002, p. 243). The Peacemakers organization emphasizes mediation but will utilize arbitration on occasion. An example of a Peacemakers "conciliation clause" (that allows for arbitration in the event that mediation does not succeed in resolving an issue) is as follows:

> [T]he parties agree that any claim or dispute arising out of or related to this agreement or to any aspect of the employment relationship, including claims under federal, state, and local statutory or common law, the law of contract, and law of tort, shall be settled by biblically based mediation. If the resolution of the dispute and reconciliation do not result from mediation, the matter shall then be submitted to an independent and objective arbitrator for binding arbitration (Peacemaker Ministries, 2013).

Jewish House of Judgment: The most well organized, geographically broad, and widely used religious arbitration system is the *Beth Din* (literally, "House of Judgment") system employed by Jews (Wolfe, 2006, pp. 437-438). Beth Din of America, for example, is an extension of the Rabbinical Council of America, which was established in New York in 1960. The organization regularly arbitrates a wide range of disputes among parties, ranging in value from small claims to litigation involving several million dollars. According to their website, these cases can include: commercial (such as employer-employee, landlord-tenant, real property, business interference, breach of contract, breach of fiduciary duty, investor mismanagement, defective merchandise and unfair competition disputes), communal (such as rabbinic contract disputes and other congregational issues) and familial (such as family business, inheritance and matrimonial) disputes (Beth Din of America, 2013a). A sample arbitration clause reads as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration by the Beth Din of America, Inc. currently located at 305 Seventh Avenue, New York, New York, in accordance with the Rules and Procedures of the Beth Din of America, and judgment upon the award rendered by the Beth Din of America may be entered in any court having jurisdiction thereof (Beth Din of America, 2013b).

Sharia Pathway to Submission: *Sharia* (or *Shari'a*) is the Islamic legal system of legal principles that delineates the pathway to submission to God (Esposito 2003, p. 111). The primary source of Sharia is the *Qur'an*, the sacred text of Islam (Kutty 2006, p. 583), which strongly advocates amicable settlement of disputes in an equitable and fair manner and promises divine blessings to those who do so (Rashid, 2004, p.97). Under most interpretations of Quranic legal principles, parties in dispute are strongly encouraged to resort to arbitration only after negotiations and mediation have first been attempted (Rashid, 2004, p.105).

Although both substantive and procedural law under Sharia tends to be somewhat informal, parties to contracts and commercial arrangements can elect arbitration as an ADR by including an arbitration clause that points to a particular Islamic forum such as a local mosque, Islamic center, or Sharia judicial organization. An example of such an arbitration clause is as follows:

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an Islamic Mosque located in the State of Minnesota pursuant to the laws of Islam (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel (Abd Alla v. Moursi, 2004, p. 570).

Deference to Arbitration Clauses in the U.S.

Deference to Arbitration Decisions Generally: Arbitration clauses of any kind are not explicitly upheld as a matter of routine by the courts in the United States. Although courts to not routinely review arbitration awards for conformity to substantive or procedural law, they will occasionally vacate or set aside arbitration awards that are contrary to public policy (Helfand, 2011, p. 1256). Generally, courts will consider vacatur of an arbitration award only if allowing it to stand would violate a strong public policy, would result in a manifest disregard of the law, would be irrational, or would not manifestly exceed a specific, enumerated limitation on the arbitrator's power (*Action Box Co. v. Panel Prints, Inc.*, 2004, p. 252). Judicial review for manifest disregard of federal law necessarily requires the reviewing court to do two things: first, determine what the federal law is, and second, determine whether the arbitrator's decision manifestly disregarded that law (*Greenberg v. Bear*, 2000, p. 27).

Despite the considerable deference traditionally afforded to the decisions of arbitrators, courts have conducted a more searching review of arbitral awards in certain circumstances. In most U.S. jurisdictions, arbitration can be properly vacated if it violates an explicit Constitutional, legislative or judicial expression of public policy, or when granting finality to the arbitration would be inconsistent with a party's unwaivable rights. Judicial review and vacatur of arbitration award is proper when upholding arbitrator's decision would be inconsistent with the protection of a party's clear rights.

Deference to Faith-Based Arbitration Decisions: Arbitration decisions rendered by faith-based tribunals are generally treated in the same manner as other arbitration decisions, but they present additional

complexity as a result of their connection to religion. Religious laws and customs do not necessarily correspond to or comport with secular rights and traditions. When this occurs, the secular courts must determine how to sort out religious freedoms from secular requirements.

This tension between the sacred and the secular has been addressed by the U.S. Supreme Court on several occasions. In the case of *Employment Division v. Smith* (1990), for example, the Court concluded that religious freedoms do not extend to the point where Native Americans may smoke ceremonial peyote in complete disregard of drug laws. Similarly, the *Court in Board of Education v. Grumet* (1994) determined that a school district may not redraw its coverage map so that it encompasses only members of the Satmar Jewish community.

Faith-based arbitration decisions, similarly, do not enjoy complete immunity from judicial oversight. This is especially true in cases where the procedural rights afforded by the religious legal system (such as the right to cross-examine witnesses or the right to an attorney) are not followed *(Mikel v. Scharf*, 1981), an in cases where the decisions of arbitrators exceed their authority *(Neiman v. Backer*, 1995). Some issues and some subject matter that as a matter of public policy the government reserves to itself, such as child custody, may also be considered outside the jurisdiction of faith-based arbiters (*Stein v. Stein*, 1999).

In short, the deference toward secular arbitration, as generally shown by the U.S. legal system, extends to faith-based arbitration. But just as this deference is not unlimited in regard to secular arbitration, it has its limits in the context of faith-based arbitration. And as more and more Sharia-based arbitration decisions are brought before U.S. courts for judicial review, it becomes necessary to consider whether the same judicial demeanor will be employed as has been the case when arbitrations pursuant to Jewish and Christian protocols have come under judicial review.

THE ARAMCO SERVICES COMPANY CASE

The DynCorp-Aramco Arbitration Agreement: When considering the evolving relationship between Western jurisprudence and Sharia, the case of *In re Aramco Servs. Co.* (2010) is instructive. The facts set forth in the court's ruling in this case indicate that DynCorp International, LLC, a U.S. company, and Aramco, a Saudi-owned corporation, entered into a contract for a computer system which was to be manufactured in the U.S. and installed at Aramco's facilities in Saudi Arabia. The contract, written in English, contained an arbitration agreement which provided, in part:

> The laws of Saudi Arabia shall control the interpretation and the performance of this Contract and any other agreements arising out of or relating to it, regardless of where this Contract shall be entered into or performed. Any dispute, controversy or claim arising out of or relating to this Contract . . . which is not settled by agreement between the parties shall be finally settled in accord with the Arbitration Regulations, Council of Ministers Decision No. 164, dated 21 Jumada II 1403 ("the Regulations") and the Rules For Implementation of the Arbitration Regulations effective as of 10 Shawal 1405 ("the Rules") and any amendments to either then in force, by one or more arbitrators appointed in accordance with the Regulations, the Rules and this Contract (*In re Aramco Servs. Co.*, 2010, p.2).

The "Regulations" as referred to above were a separate document, written in Arabic. These Regulations required that any arbitration decision made by the arbitrator(s) must comply with Sharia. The regulations also provided, in part:

> The Arbitrator must be a Saudi national or a Moslem foreigner chosen amongst the members of the liberal professions or other persons. He may also be chosen amongst state officials after agreement of the authority on which he depends. Should there be several arbitrators, the

> Chairman must know the Shari'a, commercial laws and the customs in force in the Kingdom... Arabic is the official language and must be used for all oral or written submissions to the arbitral tribunal. The arbitrators as well as any other persons present shall only speak in Arabic and a foreigner unable to do so must be accompanied by a sworn translator who shall sign with him the record of his oral arguments in the minutes (*In re Aramco Servs. Co.*, 2010, pp. 5-6).

The translation of an additional provision of the Regulations (known as "Article 10") from Arabic into English appeared to be somewhat unclear. This provision had to do with the procedure for appointing one or more arbitrators in the event that a dispute arises but, after some delay, arbitrators are not yet appointed. Aramco's translation of this provision reads as follows:

> If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s) . . . and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final (*In re Aramco Servs. Co.*, 2010, p. 5).

DynCorp's translation of Article 10 of the Regulations from Arabic into English was slightly different, as follows:

> If the disputants fail to appoint the arbiters . . . the authority originally responsible for looking into the case shall appoint the necessary arbiters in response to a request by the party who is interested in expediting the procedure. . . . (*In re Aramco Servs. Co.*, 2010, p. 5, n.4).

Trial Court's Assumption of the Power to Appoint Arbitrators: DynCorp sued Aramco in Houston, Texas, asserting entitlement to certain funds in a letter of credit opened pursuant to the Contract. In response, Aramco filed a motion to compel arbitration in accordance with the arbitration agreement as set forth above. Subsequently, DynCorp filed its own motion to compel arbitration. Specifically, DynCorp sought arbitration before JAMS/Endispute, Inc. ("JAMS"), a private, for-profit dispute resolution company. or the American Arbitration Association ("AAA"). In other words, DynCorp sought to avoid the Sharia-compliant arbitration process to which it had agreed, while Aramco sought to enforce that contractually prescribed process.

In its initial ruling on the competing motions to compel arbitration, the trial court ruled in favor of Aramco, but with a twist. The agreed that the contractually prescribed arbitration should proceed, but the court interpreted Article 10 so as to inject itself into the process. That is, the Texas trial court specifically determines that it was, as set forth in Article 10 (above) "the authority originally responsible for looking into the case." After all, it reasoned, both companies effectively acknowledged the Texas court's authority when they filed competing motions to compel arbitration. Therefore the court determined that it was the authority originally responsible for looking into the case, and assumed to itself the authority to appoint arbitrators.

Aramco disagreed, and filed a motion for clarification and reconsideration, and attached an affidavit of Mohammed Al-Sheikh, an attorney practicing in Riyadh, Saudi Arabia with expertise in Saudi Arabian law. The affidavit provides, in part:

> The paramount body of law in The Kingdom of Saudi Arabia is the *Shari'ah*. The *Shari'ah* is comprised of a collection of fundamental principles derived from a number of different sources, which include the Holy *Qur'an* and the *Sunnah*... Saudi Arabian law, including its Arbitration

> Law, contemplates that the authority originally competent to hear the dispute is a Saudi Arabian court. Council of Ministers Decision No. 221, dated 6 Ramadan 1423 (corresponding to 11 November 2002) grants to Board of Grievances jurisdiction over any Saudi Aramco commercial disputes (including arbitration). . . . Thus, in my opinion, the Saudi Board of Grievances is the authority originally competent to hear this dispute. . .(*In re Aramco Servs. Co.*, 2010, p. 8-9).

In the meantime, Aramco designated Dr. Sherif Hassan, a Muslim, as an arbitrator. DynCorp proposed Ted Akin, Levi Benton, and Trey Bergman, all non-Muslims, as arbitrators. Aramco filed an objection to DynCorp's designation of arbitrators on grounds that the arbitrators proposed by DynCorp were unqualified to serve under the Regulations and Rules because they were neither Muslims nor Saudi nationals. In response to Aramco's objections, the trial court signed an order that overruled Aramco's objections and appointed Dr. Sherif Hassan, Ted Akin, and Trey Bergman as arbitrators. That is, two non-Muslims and one Muslim were appointed.

Appellate Court's Reversal of the Trial Court: In response to the trial court's appointment of a non-Muslim majority of arbitrators, Aramco appealed the matter to the Court of Appeals in Texas. In its appeal, Aramco contended that the trial court should not have designated itself as the "Authority" referenced in Article 10 of the Regulations. Specifically, Aramco asserted that because the term "Authority" is not expressly defined in the Regulations, resort to other Saudi law was necessary to determine its meaning. Aramco states that the term "Authority" is referenced in the Regulations and Rules in a context that did not anticipate application to an American court. Aramco also asserted that the trial court should have relied on, but instead disregarded, Mohammed Al-Sheikh's affidavit stating that the Authority is the Saudi Board of Grievances. Finally, Aramco contended that the trial court could not designate arbitrators because neither party had requested it to do so.

DynCorp responded by claiming that that the trial court properly determined that it was the "Authority" referenced in Article 10, that DynCorp had, in fact, requested the trial court to designate arbitrators in its motion to compel arbitration before JAMS or the AAA, and that Texas procedural laws should apply to the Contract. DynCorp also contends that the Contract is ambiguous and therefore it would be improper for the Texas court to enforce it as written.

The appellate court agreed with Aramco. In its opinion, the appellate court noted that other terminology in the Regulations, like the word "Secretariat" and the expression "clerk of the Authority" seemed to imply that the "Authority" had to be a court of Saudi Arabia. And since the trial court could not act as the "Authority," it did not have the power to appoint arbitrators after all.

Lessons from and Implications of the *Aramco* Case

From the standpoint of the US legal system, this case reflects a growing trend toward a respect for, and an unwillingness to interfere with, faith-based arbitration. The Texas court in this case clearly intended to inject itself and "protect" DynCorp from having its dispute over the ownership of funds arbitrated under Sharia as interpreted and enforced by Muslims of Saudi Arabian nationality in accordance with Saudi Arabia law. There are a number of reasons why the Texas trial court might have been motivated to make this attempt, and it would be both dangerous and pointless to guess at what those motivations might have been. Nevertheless, when it reversed the trial court, the Texas appellate court did what courts are increasingly willing to do in recent years: grant deference to arbitration clauses that point to Sharia law (even though Sharia law essentially involves the interpretation of the Qur'an, a religious sacred text).

From the standpoint of DynCorp, this case serves as a reminder that arbitration clauses, including faith-based arbitration clauses, ought not be entered into lightly. In hindsight, it is likely that the owners and managers of DynCorp now realize that they should have been more careful about agreeing to an

arbitration clause (in English) that incorporates by reference rules and regulations written in Arabic. Even if they had been willing to agree to Sharia law as the choice of law, they might well have been better served if they had been more careful to allow for a broader pool of possible arbitrators (rather than the narrow pool of Muslims of Saudi Arabian origin). Finally, the vagueness about which authority was empowered to appoint arbitrators in the event that the parties were not able to agree to arbitrators, should have been clarified. These are all good lessons for companies doing business with companies from the Middle East whose preference for choice of law is Sharia.

CONCLUSION

Some might argue that the Western legal tradition still carries with it a Judeo-Christian heritage. Others might suggest that that heritage has largely been left in the past, and that the Western legal tradition is now truly secular. Either way, there is within Western jurisprudence, a lack of familiarity with legal institutions like those in Islamic countries in which there is no separation of church and state. This is particularly true in countries where Sharia is the basis for law.

This paper has explored the increasing use and enforceability of faith-based arbitration clauses in international contracts and transactions, and has considered the traps and pitfalls of adopting such clauses in light of the problems that occurred in the *Aramco* case. By using the case study approach, the *Aramco* case was analyzed and shown to be an example of how the tension between the Islamic arbitration tradition, on the one hand, and the Western legal tradition on the other, can be in conflict. While the observations and conclusions drawn from this case study are insightful and significant, the case study method is limited to specific cases and does not afford the opportunity to collect and analyze empirical data in a way that points to trends and statistical phenomena. An understanding of the increasing role of faith-based arbitration clauses generally, and clauses that point to Sharia law in particular, would benefit from future empirical research that would show such trends and statistical phenomena.

Meanwhile, we conclude here that, as Western companies interact increasingly with countries and companies for whom Sharia forms the basis of law, they will more frequently find themselves faced with negotiations over arbitration clauses that point directly to the Qur'an. This can be both a challenge and an opportunity. It is a challenge, because it involves and requires a significant learning curve about Islam, the Qur'an, and Sharia law and procedure. But it is also an opportunity, because without going through the effort to learn about, and become conversational about, the Muslims faith, contract negotiations, for which arbitration clauses can serve as a solution to possible problems, will be neither more robust or more successful.

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