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The Role of Shari'a Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia

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I. Introduction

There is no question that today business world recognizes no boundaries; where an “international transaction” virtually converted into a regular operation. In alliance with this fact, arbitration has become an exceptionally popular dispute settlement mechanism, for it succeeded to eliminate jurisdictional boundaries to an outstanding extent while maintaining a binding and enforceable outcome in the end. That being said, “outstanding extent” does not cover an entirety. States still exercise a significant control over arbitration proceedings, may it be through the mandatory rules of *lex arbitri*, the supervision and assistance of the state courts or the recognition and enforcement of an arbitral award.

It is interesting to examine states' authority over the recognition and enforcement of foreign arbitral awards within the perspective of the Saudi Arabian legal system[1], by examining its implementation of the public policy exception provided under the New York Convention.[2]

II. Recognition and Enforcement of Foreign Arbitral Awards

To be able to resort to available legal channels to ensure the performance of an arbitral award, first, the award in question needs to be recognized and enforced by the respective state where the performance is being sought.^[3] In other words, states hold the ultimate power to render an award legally enforceable within their jurisdiction. Naturally such substantial power calls for an explicit framework in order to avoid unpredictability and dissimilar practices. The New York Convention, with 149 member states^[4], is the key international legal instrument for the purposes of setting international standards for the recognition and enforcement of foreign arbitral awards.

Under Article V^[5] of the NY Convention, circumstances where an arbitral award may be refused are laid down (“grounds for refusal”), according to these the violation of the public policy of the state where the enforcement is sought, among others, is recognized to be of such nature. That being said, it should be stressed that the grounds for refusal are exhaustive; meaning that no circumstances outside the scope of those listed shall be deemed as a valid ground for non-recognition and enforcement of an arbitral award.

III. Public Policy Exception

Due to the fact that each state is different in its social, economic and legal background; their application of the very same legal text may result in rather different outcomes. Indeed, when it comes to “public policy” provisions of many international texts, said discrepancy grows even further since the norm itself embodies a large scale of ambiguity and there exists no clear and comprehensive uniform definition^[6].

In that respect, the Arbitration Law dated 2012 of the Kingdom of Saudi Arabia certainly raises some questions given that Article 55 seeks not only compliance with the public policy rules of the Kingdom but also with the rules of Shari'a Law in order to recognize and enforce a foreign arbitral award. Hence, the question is whether or not Saudi Arabia has imposed more onerous conditions on parties' shoulders than those stipulated under New York Convention by seeking compliance with the Shari'a law.

IV. Saudi Arabian Legal System and the Public Policy

Shari'a Law is the principal source of legislation in Saudi Arabia^[7]. Saudi Arabian government issues laws and regulations only if these do not conflict with the established principles of Islamic law, as they are held preeminent and sacred. In this vein, established Islamic rules are respected in Saudi Arabia to be the rulings of God, as opposed to creation of mankind. Hence, these established Shari'a rules are held higher than any other rule issued by the Saudi Arabian government. As a result, the obligatory provisions of the Shari'a law form part of Saudi Arabia's public policy.^[8] In other words, public policy in Saudi Arabia encompasses the mandatory principles of Sharia law. Therefore the explicit indication of 'Sharia Law' under Article 55 becomes only indicative rather than prescriptive since the public policy of Saudi Arabia already includes the mandatory terms of Sharia Law.

In this regard, if one considers the wording of the Article 55 as a setback against the enforcement of an arbitral award in Saudi Arabia, no resolution can be produced as the position of Sharia Law is manifestly resolute in the Kingdom and it is not realistic to expect it to be changed. Indeed, some of the prohibitions in Islamic commercial law such as interest (*riba*), avoidance of excessive risk (*gharar*), avoidance of transactions based on luck or chance

(*maisir*)[9] may be difficult to relate in other legal systems, but they are all based on a specific rationale and constitutes a part of Kingdom's public policy rules. Hence the issue here is not the rules themselves but how these Sharia rules are implemented as a 'public policy' exception.

The focus should be brought on how the rules on public policy are perceived and applied in the enforcement procedure of an international arbitration award. It is often voiced that the Kingdom should implement a more transparent case law and codify the established Sharia rules categorically [10] in order to avoid any arbitrary practice, encourage consistent rulings and secure legal certainty. If the rules are persistently applied in this transparent manner, necessary precautions may be taken by the arbitrators, such as rendering an award that is separable in its parts which may potentially be considered to be in violation of Saudi Arabian public policy rules so that the rest of the award remains executable.

V. Conclusion

The main purpose of the New York Convention is to facilitate recognition and enforcement of foreign arbitral awards in the contracting states. Therefore, in order to achieve a universally harmonized infrastructure of recognition and enforcement, the 'public policy' exception is meant to be narrowly interpreted. In this regard, the fact that Saudi Arabia seeks compliance with its Sharia rules, should not be a source of distress for actors of other legal systems as long as the public policy exception is implemented in a transparent and systematic manner, in accordance with the purpose of the New York Convention, respecting the 'international' feature of the dispute in question. It should not be disregarded that the task resides not only with Saudi Arabia but each New York Convention signatory state to

apply public policy exception in accordance with the spirit of the instrument.

[1] Saudi Arabia is recognized to be the home for the first written constitution in the world, Medina Charter, which was promulgated for a plural society, granting equal rights to every citizen.

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

[3] Alfons, Claudia. Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature, Peter Lang, 2010, p.17.

[4] As of 2013: <http://www.newyorkconvention.org/contracting-states>, retrieved on 17.07.2015.

[5] Under Art. 5 of New York Convention, the grounds for refusal are, in summary, incapacity of the parties to the arbitration agreement, invalidity of the arbitration agreement, violation of due process or right to be heard, the award being ultra petita and infra petita, improper composition of the arbitral tribunal, non-compliance with the relevant arbitration procedure, setting aside of an award, non-arbitrability of the matter or violation of public policy under the laws of the state where the enforcement is being sought.

[6] Belohlavek, Alexander J. Arbitration, Ordre Public And Criminal Law. Bilingual Edition (English, Russian) Interaction of Private and Public International and Domestic Law. Vol. 2 (of 3 publ.), Kyiv, Taxon, 2009.

[7] Saleem, Abdulrahman Mamdoh. A Critical Study on How the Saudi Arbitration Code Could Be Improved and on Overcoming the Issues of Enforcing Foreign Awards in the Country as a Signatory State to The New York Convention '.*CEPMLP Annual Review*, Vol. 16, 2013.

[8]Childs, Thomas. Egypt, Syria and Saudi Arabia Enforcement of foreign arbitral awards in Egypt, Syria and Saudi Arabia, *Arbitration Newsletter*, 2010. Retrieved on 28.01.2016, from:

<http://www.kslaw.com/imageserver/kspublic/library/publication/9-10arbitrationcommitteenewsletterchilds.pdf>

[9]Garner, James M. A Critical Perspective on the Principles of Islamic Finance Focusing on Sharia Compliance and Arbitrage. *Leeds Journal of Law & Criminology*, Vol. 1, No. 1. Retrieved on 28.01.2016, from:

http://criminology.leeds.ac.uk/files/2013/09/Islamic-Finance-Principles_Garner.pdf

[10] “In addition Saudi judges have had wide discretion to issue rulings according to their own interpretation of Sharia law, and the judiciary has long resisted the codification of laws or the reliance on precedent when making rulings. From a practical standpoint a party seeking to enforce a foreign arbitral award against a party domiciled in KSA faces a number of significant challenges which relate to KSA’s judicial system and its strict adherence to Sharia law. One area in which the Regulations fail to improve matters, however, is the enforcement of foreign awards in KSA, which to date has been an uncertain prospect. Although the Regulations affirm that the courts will have due regard to KSA’s obligations under international agreements, nothing more is said about enforcing foreign awards” Zegers, Jean-Benoît and Elzorkany, Omar. Kingdom of Saudi Arabia. *Arbitration Guide IBA Arbitration Committee*, 2014