

SHARIA REQUIREMENT TO ENFORCE INTERNATIONAL ARBITRAL AWARDS IN YEMEN: A LEGAL ANALYSIS

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Abstract- the study conduct the arbitration system through clarifying the obstacles that perhaps challenge the enforcement of international arbitral awards IAA. Thus, the study contributes to describe the extent of the application of the sharia in relation to the recognition and enforcement of international arbitral awards in Yemen. The scope of this study is bound to examine the extension of applying sharia on the enforcement of IAA through referring to sharia sources such as the primary sources of the Holy book (Quran) narration of Prophet Mohammed (pbuh) and the secondary sources like opinions of four Islamic Schools of thoughts that relate to arbitration. Also, the researcher will refer to international provisions that relate to the enforcement of the arbitral award in order to identify the differences between the two legal systems that may impede the enforcement of IAA under the ground of the contravention with sharia. Yemen is one of the Middle East countries that apply sharia, which may reject the arbitral award if contravenes the sharia principles.

Keywords- sharia, arbitration, the enforcement, the arbitral award

1.0 INTRODUCTION

Yemen is located in the Middle East which practices sharia law. The constitution declares Islam as the religion of the state¹ with the sharia law as the main source for all laws.² As such, the sharia law prevails upon other human laws, Allah says in Surah Al-Ma'idah verse No: 44, whosoever does not judge by what Allah has revealed, such is Kafirun. Allah (swt) also states in Surah Al-Ma'idah verse No: 45, whosoever is not judged by that which Allah has revealed, such is Zalimun. Thus, the enforcement of the arbitral award is impaired if the arbitration agreement or the arbitral award violates the sharia.

Since it is found that the international arbitration is important to attract investment, it is necessary for Yemen to examine its application and enforcement in the country. Especially, on the impact of sharia which is perhaps very challenging to the enforcement of IAA so this is going to be the main focus of the research.

2.0 PROBLEM STATEMENT

A Commercial association exists worldwide among different people from different nations, so as to maintain a steady economic growth. The arbitration system recognizes the parties' autonomy relating to the choice of law or the place where the award is given.³ However, it is not very important for the

¹ Article 2 of Yemeni Constitution.

² Ibid, Article 3.

³ Ahmad Hindi, "Implementation of the provisions of the arbitrator-is the implementation of the provisions of national and foreign arbitrators" (master's thesis, University of Dar Aljameh Aljadidah, 2001), 5.

disputed parties to have assets in the host states.⁴ Therefore, the creditor party has to make reference to the state where the debtor party has assets to coerce the debtor party to enforce the award. Consequently, the article focuses on sharia effect as it is a major hindrance that may beset the enforcement of international arbitral award (IAA) in Yemen as elaborated below:

Sharia rules play an important role in commercial transactions which has to be considered. As noted that there are similar points between sharia law and western law and different points as well.⁵ The differences between the western scholars and Islamic scholars are existed in the matter of arbitration and business as a whole.⁶ The Islamic legal system is based on culture which complies with sharia perspective, so as to avoid non-enforcement of the award the arbitrators have to be familiar with sharia law and historical arbitration background.⁷ Hence, ignoring the culture of each nation will lead to hostility among nations and this will adversely affect the enforcement of IAA. Thus, for the successful arbitration system, the arbitrators have to do more research to have knowledge of other nations' culture.⁸ At the beginning, Arab countries have welcomed the international arbitration system as they considered the positive effects that could benefit international trade.⁹ However, some of these countries became reluctant to continue to recognize the foreign arbitration because of a contravention of the public policy, especially, the sharia rules.¹⁰

As Yemen is one of the Arab countries and addressed in this study, the problem of contravention of sharia exists. According to Mayer, the enforcement of IAA in Yemen, perhaps faces challenges if the award contravenes the sharia law.¹¹ Therefore, the award could have a better chance to be enforced if the debtor party has assets outside the Middle East to seek the enforcement of the award there.¹² Otherwise, the arbitral tribunal has to avoid terms that may arise suspicious of contravention of sharia.¹³ It is necessary to refer to section 53 (g) of YAA that provides the foreign award is binding, unless the award is contravening the sharia. Further, section 55 (b) provides the foreign award cannot be enforced if the competent court considers it as against the sharia and public policy as a whole. Therefore, the arbitral award would not implement in Yemen if it contravened the Islamic law which is the main source of all laws so it will prevail upon other human laws, and this is clearly stated in an article 3 of Yemeni constitution.

⁴Ahmad Hindi, "Implementation of the provisions of the arbitrator-is the implementation of the provisions of national and foreign arbitrators" (master's thesis, University of Dar AljamehAljadidah, 2001).

⁵ Herbert Smith Freehills, "Arbitration in DUBAI and the UAE," (October 2013):1.

⁶BabakHendizadeh, "International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award" (master's thesis, Canadian Queen's University, 2012) 34.

⁷Hendizadeh, "International Commercial Arbitration," 33-34.

⁸Ibid, 58.

⁹Ibid, 56-57.

¹⁰ Ibid.

¹¹MayerBrown, Arbitration in the Middle East: How Important is International Arbitration in the Middle East? A Lexis, PSL document produced in partnership with Mayer Brown International LLP
https://www.mayerbrown.com/files/News/e8ac863e-39f2-4583-b6fc-41abb24698bd/Presentation/NewsAttachment/a872cb8f-1755-46d1-bb66-41dfd222be9a/LexisNexis_2012_arbitration-in-Middle-East.pdf (accessed March 30, 2016).

¹²ibid

¹³ Ibid.

3.0 THE LITERATURE REVIEW

In an interesting literature is written by Mark Wakim, entitled “Public Policy Concerns Regarding Enforcement of International Arbitral Award in the Middle East”.¹⁴The author stated that foreign law systems began to acclimate to the Middle East countries, but the knowledge requirement of applicable law is essential to understand the nature of resolving disputes in the Middle East. Ignore the norms that religious structure is supportive Commercial Arbitration to resolve differences operations is irrational. Religious structure plays an important role in the acceptance and success of the international commercial arbitration. Religion may affect the operational procedures. If the arbitrator violates the Islamic law (Sharia), the public policy will affect the outcome of the arbitration. Hence, those lawyers outside the Middle East region have to be familiar with the law of those countries, because Islamic law is a major importance in directing the legal system of the most Middle East countries.

Sharia does not come from the Codes, Acts and the like, but from the divine law which was revealed by God (Allah) to his messenger Mohammad (pbuh), including the Quran and Sunna. A believer should never violate what God and the prophet (pbuh) ordered him/her to do. Provisions of humanitarian law were to be ignored if it came into conflict with internal or natural law. In other words, if human law was contrary to the law of God, it was to be disregarded. Sharia is true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting...It is a sin to try to alter this law, nor it is allowable to attempt to repeal any part of it, and it is totally unacceptable to abolish it entirely... [God] is the author of this law, its promulgator, and its enforcing judge”, as God is the author of Islamic law, it certainly is increasingly all-encompassing and, in fact, is equivalent to the rule of law in the modern state. Every aspect of life is regulated by Sharia law.

It is stated that uncertainty (Ghirar) and usury (Riba) to the IAA or the agreement as a whole to be void, it is undoubted that the all Muslim scholars agree on the forbidden of dealing with any transaction stipulates ratio as interest whatever as a profit, fine, and commission. However, the legal system in the Middle East differs in their application of sharia. In some Middle East countries, the commercial law derived from sharia and in other countries not complies with sharia. For instance, Kingdom of Saudi Arabia law completely derived from sharia, while Lebanon law depends on culture.

Another similarly literature focusing on the arbitration in the Middle East which the context written by J. Cammell “Commercial Arbitration in the Islamic Middle East”.¹⁵ This study demonstrated that the sharia is the law that prevails in global trade in eighteen countries in the Middle East except Israel, Pakistan, and Turkey. So the foreign investor has to be aware of the foundations of Islamic law so as not to put his investment in jeopardize. Arbitration is practicable in those countries and enforceable if the arbitral award does not contradict the rules of Islamic law. Many Arab countries have ratified NEW YORK CONVENTION 1958 (NYC) such as Egypt, Syria, Djibouti, Jordan, Kuwait, Saudi Arabia, Morocco, Tunisia, Bahrain, Brunei, Lebanon, Iran, Qatar, Oman, but a conservative enforcement of foreign judgments if conflicted with the law. Thus, in order to avoid non-enforcement in those countries as well as leave no argument for the defendant to refuse to enforce the arbitral award base on public policy, the international lawyers have to be cautious when drafting international arbitral award and avoid terms that are inconsistent with the sharia, they have to formulate the terms that may raise suspicion of violating the sharia, especially in regard to usury (Riba) and uncertainty (Ghirar). Moreover, it is

¹⁴ Mark Wakim, “Public Policy Concerns Regarding Enforcement of International Arbitral Award in the Middle East,” *New York International Law Review* [Vol. 21 No. 1 (Winter 2008)].

¹⁵ J. Cammell, “Commercial Arbitration in the Islamic Middle East,” *5 Santa Claraj. Int'l L* (January 2006): 169.

mentioned that the arbitrator has to hold qualifications at the same as the judge's qualifications that need to be satisfied before a person can be appointed as arbitrator.

The two above articles have focused on the Middle East which is more concerned about the public policy. The enforcement of foreign award cannot be implemented in some Middle East countries if the award violated the rules of Sharia, especially, if the award provides interest whatever as a profit, fine, or commission. Also, the agreement itself is void if it is dealing with uncertainty (Ghirar) or usury (Riba) terms. This is very important to refer to as Yemen is considered as an Islamic country, so the award that violated the Islamic law will not be enforced under the ground of violation of Islamic law and public policy of the country as a whole. Section 53 that provides the arbitral award will be refused if it is violated the Sharia rules or the public policy.¹⁶ Therefore, throughout this study will discuss the Sharia rules to understand the agreements, procedures, and the awards which contravene the sharia and whether such contravention would prevent the enforcement of the arbitral award.

4.0 THE LEGISLATIVE PROBLEM OF THE PUBLIC POLICY

The public policy is determined as an obstacle faces the enforcement of IAA, which sharia is a part of the public policy. The convention allowed the local court to reject to recognize and enforce the award based on an article V (2) (b) if the award is contradicted with the public policy of the country where the recognition and enforcement is sought. The convention specified the permissible grounds to refuse the enforcement of the foreign award, it is more likely the local courts to refuse to enforce the arbitral award by other exceptions like public policy.¹⁷ Such exception to the enforcement is enough to frustrate the convention's goals.¹⁸ For instance, public mandatory is considered as a part of public policy which the state determines it as sovereign affairs to protect the public interest.¹⁹ Therefore, the arbitration tribunal has to make pre-determined in the first instance of the arbitration proceedings like whether the arbitration issue violates the public mandatory of the state where the enforcement is sought? Is the enforcement violate the public mandatory? If the arbitration issue violates the public mandatory, it should not be arbitrated.²⁰ Thus, the tribunal has to pay more concentration to the issues that are inappropriate to be settled by arbitration mechanism.²¹ The issues that are considered as public mandatory do not have to adjudicate by the arbitral tribunal which only the national courts are competent to deal with such issues. Otherwise, the arbitral award will not be enforced by the competent court if it violates the public interest.²² It can mean that when the issue included public mandatory, then the arbitral tribunal has to withdraw its authority from conducting such issue, so the disputed parties have to refer their dispute to the local court in which behind the terms agreed in the

¹⁶section 53 of Yemeni Arbitration (Act No. 22) 1992

¹⁷ Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law* (New York: Boston, 2009), 118

¹⁸ Ibid.

¹⁹ Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law* (New York: Boston, 2009), quoted in A. Bermann, Introduction: Mandatory Rules of Law in International Arbitration, 18 AM. REV. INT'L ARB. 1 (2007).

²⁰ Ibid

²¹ Ibid

²² Ibid.

arbitral agreement.²³This is against the principle of party autonomy and the arbitration principle that give the right of the disputed parties to choose the law which is suitable for their confidence.²⁴

The public policy is the main power in the hand of the local courts that authorizes the competent court to refuse the arbitral award.²⁵ The International Law Association Committee on International Commercial Arbitration (ILA) has stated in the final report 2002 that fifty year of arbitration, the public policy is considered as the most contradiction to the convention that its adverse effect up till now is effective.²⁶ILA has spent an effort to constitute guidance on universal public policy but failed to convince all the signatory states.²⁷ Another author stated that the public policy is the main key element beset the challenges of IAA.²⁸The local courts authorized by article V. 2 (b) to determine whether the arbitrated issue violates the public policy or not. Thus, as there is no universal guidance on public policy which only the local courts have jurisdiction to interpret the meaning of the public policy as they think fit. It means that public policy depends on the legal system of each state as each state has different politics, culture, religion, economics, legal system, and the like, so what is considered as public policy in one state may not be the same in another state.²⁹ Such factors change and develop from time to another, so the standard of public policy has to cope with according to the surrounding circumstances.³⁰

On the other hand, the author argues that public policy is not major challenges towards that enforcement of a foreign award.³¹ However, leaving the public policy without specific guidance may lead to misuse such provided authority by the local courts. Thus, some local courts, as well as arbitration tribunal, consider that the international law is the law that has to apply to the international arbitration agreements; it is only the rules of domestic law could come into the picture through limited public policy.³²The domestic law is not the right law to consider the arbitration agreement as valid or void.³³ The international law rules are super to deal with the recognition and the enforcement of international arbitration agreements.³⁴However, the NEW YORK CONVENTION 1958 (NYC), as well as the Model Law, excuses the state to reject the awards that are incapable to be settled by arbitration, such as competition and anti-trust claims, securities claims, bankruptcy, employment contracts, consumer disputes and so on.³⁵Thus, the state where the enforcement is sought on a case that is incapable to be settled by arbitration has jurisdiction to refuse the recognition and the enforcement of the

²³ Article V (1) (a) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards.& article 34 (2) (a) & 36 (1) (a) (i) of UNCITRAL Model Law on International Commercial Arbitration 1985.

²⁴ Ibid.

²⁵ Pierre Mayer & Audley Sheppard, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards," *Arbitration International* 19.2 (January 2003): 249-253.

²⁶ Mayer and Sheppard, "Public Policy and Enforcement of Awards," 249-253.

²⁷ Sameer Sattar, "Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?," *Transitional Dispute Management Journal* 8.5 (December 2011):4-5, quoted in ObinnaOzumba, *Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?* (2009).

²⁸ Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 815, 2d ed. (2001).

²⁹ FifiJunita, "Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms," *Contempt. Asia Arab. J* 5 (May 2012): 45

³⁰ Ibid.

³¹ Karl-Heinz Bockstiegel, "Public Policy as a Limit to Arbitration and its Enforcement," *Disp. Resol. Int'l* 2 (2008): 123.

³² Born, *International Arbitration* (2012), 56-57, quoted in *MunicipalteKhoms El Mergeb v SocieteDalico*, 1994 Rev. arb. 116, 117 (FrechCour de Cassation civ. le).

³³ Born, *International Arbitration* (2012), 56-57.

³⁴ Ibid.

³⁵ Article II (1) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards & article 1 (5) of UNCITRAL Model Law on International Commercial Arbitration 1985.

award.³⁶ Hence, the most local courts apply their own non-arbitral rules to reject the recognition and the enforcement of some arbitral disputes.³⁷

To understand as to how each state interprets the scope of public policy, it can be referred to United Arab Emirates (UAE) laws that are relevant to public policy that studied by Khalil Mechantaf under the title of “Public Policy in the UAE as a ground for Refusing Recognition and Enforcement of Awards”.³⁸ The UAE has its own law in the matter on the grounds to refuse the recognition and the enforcement of the arbitral award. This could be seen in section 3 of the UAE Civil Code 1985 that provides personal status like marriage, inheritance, descent are considered as public policy, as well as the rules that related to sovereign governance, commercial freedom, trading in wealth, rules of personal property, and final decisions that inconsistent with the societal foundation and Islamic sharia principles. It is important to refer to the case No.180/2011 on February 2012, in this case, the purchaser (respondent) refer to the Dubai Court of the First Instance to recognize and enforce an award made by the Dubai International Arbitration Center (DIAC) against the appellant (real estate developer). The dispute arose in the matter of the sale agreement validity. DIAC held that the sale agreement of the unit is invalid because of the failing to register the unit at the Interim Real Estate Registered, so the court ordered the real estate developer to return back the paid money to the respondent. The Court of the First Instance recognized the arbitral award. The appellant appealed on the ground that the tribunal extended its jurisdiction and did not give him reasonable time to defend his claim, his appeal was rejected. The same claim transferred to the Dubai Court of Cassation, which annulled the Court of the First Instance’ decision, it holds that the real estate issue is related to the public policy, so the conciliation is not allowed. Section 203 (4) CCP considers real estate as public policy and the prohibited an application of conciliation over public policy.

In my opinion, the public policy bears the arbitral tribunal hardship as it has to be familiar with the municipal law of the state where the enforcement is sought in order to know whether the issue violates the public policy and the award can be enforced or not. Also, the public policy contravenes the doctrine of the parties’ autonomy; this operates against the freedom of choice of law, as it is commonly known that the parties are free to agree on the terms they agreed on so there is a challenge of the arbitration agreement as the choice of law is a major term of the arbitration agreement. Compulsory referring to the national court is against the arbitration principle that provides the party autonomy to agree on the terms they like. So the parties can’t conclude an agreement as they wish. Therefore, the researcher could determine the public policy is an obstacle factor towards enforcement of a foreign award.

As far as Yemen is a concern in this research, it should refer to sharia as public policy. In Yemen the jurisprudence according to sharia perspectives.³⁹ The constitution that provides all laws shall be based on sharia.⁴⁰ Thus, YAA provides sharia rules as a ground to refuse the enforcement of IAA if the award contravened sharia, which could be seen in section 53 of YAA that provides it is not allowed to reject the arbitral award unless it contravenes the Islamic law. Also, section 55 that provides the court of appeal

³⁶ Article V (2) (a) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards & Article 36 (1) (b) (i) of UNCITRAL Model Law on International Commercial Arbitration 1985.

³⁷ G. Born, *International Commercial Arbitration* 515 etseq (2009).

³⁸ Khalil Mechantaf, “Public Policy in the UAE as a ground for Refusing Recognition and Enforcement of Awards,” Wolters Kluwer (July 2012) <http://kluwarbitrationblog.com/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/> (accessed February 1, 2016).

³⁹ Edward Burke, “One Blood and One Destiny? Yemen’s Relations with the Gulf Cooperation Council. Kuwait Programme on Development, Governance and Globalisation in the Gulf States,” (2012): 2.

⁴⁰ Unit, Economist Intelligence. “Yemen Country Profile 2015.”

http://reliefweb.int/sites/reliefweb.int/files/resources/acaps_country_profile_yemen_24july2015.pdf.

has jurisdiction to reject the arbitral award, even without a request of any of the parties, if the award rendered over a dispute which cannot be settled by arbitration mechanism, it is against the Islamic law, or public policy as well. The Yemeni courts do not enforce an international arbitration agreement or IAA if contain any term stipulates a payment as interest as far as the judges adjudicate the commercial disputes based on sharia.⁴¹ To be more understanding must refer to the case of **Abdul Baqi Abdul Qadir v Zayn bint Ahmad Hashim**,⁴² the court held that if the award contravened the sharia, or the public policy of the country, the award would not be enforced.

5.0 CONCLUSION

Hence, YAA leaves full discretion to the competent court to determine the validity of the award, if it is contravened to Islamic principles, if it is, then according to section 53 the competent court is more likely to reject to recognize and enforce the arbitral award, such rejection can take action upon the request of any of the parties as well as the court could do so if it is contravened section 55, but in section 55 the court has the discretion to reject the award without the request of any of the parties. The arbitration tribunal has to know the law of place suit of the arbitration the enforcement state of the arbitral award.

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⁴² Abdul Baqi Abdul Qadir v Zayn bint Ahmad Hashim , Commercial Appeal No.2 of 1977.

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