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Arbitration Under Saudi Legal System and Malaysian Law

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Abstract:
Arbitration is an expression of the desire of the parties to a dispute by submitting the subject of their dispute to arbitration through a special court or tribunal, and choose an applicable law to conduct the dispute proceedings. Arbitration saves the time and effort of the parties since it is fast, and also confidential in proceedings. This research reveals the nature of the arbitration proceedings under the Saudi legal system and Malaysian law. It also highlights both the Saudi legal system and the Malaysian law in procedural terms, with clarification of the parameters of the legal procedures for arbitration in the Saudi legal system and Malaysian law, and the similarities and differences in procedural arbitration. It also investigates the analytical, descriptive approach to clarify the procedural steps of arbitration in Saudi and Malaysian law, inductive approach, comparative approach to identifying similarities and differences between Saudi and Malaysian law, as well as the fundamental differences between regimes.

Keywords:*.Arbitration, Saudi, Malaysia, Legal System*

I. INTRODUCTION

Arbitration is an acceptable means for dispute resolution, especially in commercial transaction. The dean of the arbitration traces to the twentieth century as an ideal means of resolving disputes. The arbitration laws have been established in most countries around the globe, where many local, regional and international agreements govern by arbitration.

Arbitration has also finally been among the most important subject taught in various law schools worldwide. In light of the challenges of globalization and the continuing growth of international trade relations, the importance of arbitration has been flourished because of its distinction from the conventional judicial means. Arbitration is notably has flexibility, speed, confidentiality, low cost and the continuing state of relations between the parties.

It is recognized that arbitration is a superlative way to resolve any dispute might arise among parties of a contract. If the conflict continues in civil and commercial dealings, the best solution is to resort to the fastest and least costly means of resolving the conflict. Real experience has shown that remedy to the court order with the consequent delays in the proceedings, the backlog of cases and the failure to adjudicate them for a long time in many cases.

This leads to a need to exacerbate the seriousness of the dispute between the parties, the heavy financial losses of the winner and the loser, which can easily be avoided by fate to the arbitration system.

Arbitration has become the ideal means imposed by times to keep pace with the nature of the speed of business, despite its speed, ease, and low costs. This has made the arbitration in question an ideal choice for large countries and companies to resolve a wide range of commercial disputes through it.

ARBITRATION PROCEDURES UNDER SAUDI ARBITRATION LAW

Article (26) of Saudi arbitration law states that "the arbitration shall commence from the day of receivinga notification from one of the parties to the

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dispute requesting for arbitration from the other party, which is otherwise deemed to be parties to the dispute otherwise agreed upon". Article (27) also states that "parties to a dispute are treated equality and have a right and opportunity to present their claim".

based on these the Articles, it is not allow to the conduct an arbitration proceeding only after some of the procedures established by regulations, of which apply to the resolution of any dispute submitted for arbitration, whether public or private procedures established by the competent arbitration tribunal for the consideration of the dispute.

After creation of the arbitration tribunal, the arbitrators proceed with proceedings assigned, where the new Saudi arbitration law was set out the matters in Part 4 relating to the proceedings for arbitration proceedings. Accordingly, the provisions of the order provided in the new Saudi arbitration law of which is considered to be general, must be taken into consideration.

The proceedings are usually divided into two sections according to the Saudi arbitration law.

1. Special procedures relating to the means and methods of proof in arbitration proceedings.
2. Special procedures relating to parties in the filing of arbitration proceedings.

The special procedures relevant by means and methods of evidence in arbitration proceedings where stipulated in Article (22) that:

1. The competent court of arbitration has the right to order and adoption of provisional procedures according to a entreaty of file a party to arbitration provided that it is before initiating the arbitration procedures, or that is based on the request of the arbitration tribunal while performing arbitration procedure, where mentioned procedures may be reversed in the same way itself unless agreement on the contrast that.
2. The competent court may order the acting judge at the application of the arbitration tribunal.
3. The arbitration tribunal may seek out the succor of interested party in arbitration proceedings as it considers appropriate. That is due to conduct arbitration proceedings such as: inviting an expert or witness, or ordering the document to be brought in respect thereof, or browse the file, that, with no neglect of rights the arbitral tribunal regarding this".

Article (28) emphasized the importance of hearing of witnesses during the case of the arbitration processing. If the arbitration tribunal accepts the hearing of witnesses, it must comply with the outlined procedures in the pleadings regulations by the judge to regulate the attendance of witnesses for the testimony and testimonies.

The paragraph also states that the tribunal shall seek the assistance of an expert or expert opinion on the matter, whether from at itself or the demand of a party to the dispute or ask him to submit technical reports on what relates to the facts and technical issues required during the proceedings of the cases in arbitration.

PROCEDURES TO THE PARTY FOR ARBITRATION PROCEEDINGS

This type proceeding is unique to the parties in dispute and to the rivalry as defined by the Saudi arbitration law, where the Parties shall have freedom in which choose the appropriate procedures which must be followed before the arbitration tribunal.

Article: (25/1) states that "parties to arbitration can agree on the procedures followed for the arbitration tribunal, including their right to make these procedures subject to the rules in force in an organization, body, or any center specialized in arbitration in the Kingdom of Saudi Arabia or outside, provided the procedures do not violate the provisions of Islamic Sharia Law." Paragraph (2) of the same article states that "in the absence of such an agreement, the arbitration tribunal may choose the arbitration procedures it deems appropriate, subject to the provisions of Islamic Sharia Law, and the provisions of this law."

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The above-mentioned article emphasizes that if the party to the conflict pick particular and appropriate procedures, the arbitration court shall follow the procedures established by the party to the conflict. If the party to dispute fails to pick appropriate procedures, the arbitration tribunal shall be free to choose and determine appropriate procedures for the conduct of the proceedings.

The party to the conflict duty therefore, follows those procedures. In the meantime, however, the article has been restricted and stipulated that no procedures and rules may be chosen in abuse of the provisions of the Shariah Law and the rules of the Saudi arbitration law and the principle of public order and interest. This requirement would invalidity any arbitration award made by any arbitration tribunal.

Party to the conflict is permitted to choose a language of which the arbitration to be conducted. Article (1/29) instructs that arbitration shall take place in Arabic language except the arbitration tribunal decides or the party to the arbitration shall agree on other language. The rule of agreement shall apply to the language of statements, written observations and oral quarrels, as well as to each award, letter or judgment of the tribunal except or else provided for the agreement of the party or the tribunal's decision. Paragraph (2) of the article affords that the tribunal might decide to link all or certain of the attached written documents to be give in to the case with documents translated into the language used in arbitration. In the case of multiple languages, the tribunal may limit translation to a single language.

The autonomy of the party to a dispute to pick the domicile of arbitration, where Article (28) specifies that parties to the arbitration shall be entitled to agree on the domicile of arbitration within or outside the Kingdom of Saudi Arabia. If then there is no arrangement, the arbitration tribunal shall appoint the appropriate place of arbitration compelling into consideration the surroundings of the case. This does not affect the authority of the arbitration tribunal to take the place it considers suitable to deliberate among its participants, to hear the statements of witnesses, experts or parties to the dispute, to examine the subject of the dispute or to inspect the documents themselves.

The type of arbitral award is close to being determined whether it is domestic or external, and the enforcement action of the arbitral award is therefore taken either through national domestic procedures or through international conventions, such as the United Nations Convention on the implementation of foreign decisions.

The announcement of the arbitration award where Article (30) stipulates that: the Prosecutor shall, on the agreed date, or appointed by the arbitration tribunal, transmit to the respondent and each of the arbitrator statement of their claims, including their names and addresses, the name and addresses of the defendants, the clarification of the facts of the case, their requests, their support and any other matter they need, the parties shall agree to this testimonial.

The respondent shall, within the time settled between the parties, or fixed by the tribunal, and direct a written response to the Prosecutor and each of the arbitrators in their defense to the statement of the case. In its reply, it may include any claim relating to the issue of the dispute, or defend a right derived from it in the defense's intention to compensate. It could do so smooth at a later phase of the proceedings if the tribunal allowed it to delay.

Both parties may be attached the statement of claim or its answer by copying the documents on which it is based, pointing to all or some of the documents, and attaching the evidence intended for submission, and that this does not prejudice in advance the right of the arbitration tribunal at all stages of the proceedings, such as the application for tender of the original documents, or documents upon of which either party relies in the case. Or copy from it".

APPLICABLE LAW

The Saudi regulator granted the parties full freedom in respect of the conflict concerning the select of the

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applicable law, where article (5) of the Saudi arbitration law provides that if the parties agree to make the relationship subject to the provisions of a document (International Convention, model contract or otherwise), the content of the provisions of this document of the arbitration provisions must be made, provided that it does not break up the principle of Islamic law."

Any procedures fixed upon by the parties to the dispute in the subject of arbitration may be applied unless the provisions violate Islamic law, but if an agreement is reached to apply the law of a particular State, the rules of Islamic law must also be observed, and therefore general essential principles are applied without the norm of private international law.

Article (38) states: "if the parties to the arbitration are open to delegate the conciliation to the arbitration tribunal, they shall be entitled to rule accordingly by the principle of equity and trust. Article (39) of the fourth paragraph also provided that if the tribunal authorized the conciliation, the judgment must be unanimous.

According to the above, the Saudi regulator gave the party to the conflict the autonomy to pick the law to apply for the proceeding of the arbitral procedures in the dispute, but this choice is acceptable in two conditions:

1. Respect the rules and provisions of the Islamic Shariah for any law selected by the parties to the conflict, as well as not to violate the public order and interest.
2. Take into account the non-application of special substantive norm of private international law if the law of a state is selected by the party to a dispute.
3. A law directly related to the subject of arbitration must be chosen.

ARBITRATION PROCEDINGS UNDER MALAYSIAN LAW

Arbitration in Malaysia has successive procedures that keep the country popular that everyone comes to settle their disputes.

Arbitration in Malaysia enjoys the same major advantages as arbitration in other countries as the speed of proceedings, the widespread use of documents representing its confidentiality and the applicability of its decisions.

Arbitration proceedings under Malaysian law as provided in article (23) "if the party do not reach agreement otherwise, the arbitration proceedings in the conflict shall arise on the date of receipt of a written request for the assignment of this dispute to arbitration by the defendant. That is, the conciliation proceedings begin directly after an arbitration preparation between the parties to the conflict, and a written demand to refer the conflict to the arbitration was received by the defendant.

When we talk about the commencement of proceedings for arbitration in Malaysia, the arbitration agreement procedures where there are legal requirements regarding the proceedings of the arbitration covenant in the form and content of the Malaysian arbitration law.

The legal requirements for the arbitration agreement in form and content provide a statement and a legal definition in the method and content of the arbitration agreement. Article (9) of the Act provides that:

1. Arrangement between the parties with a view to recourse to arbitration in disputes between them concerning the specific legal connection, whether contractual or else.
2. The arbitration arrangement is similar to the arbitration phrase in a related or single agreement.
3. The arbitration arrangement shall be in writing
4. The agreement duty to be in writing if issued in:

a. A document signs up by both parties;

b. Conversation of messages, fax, telephones or other means of communication that deliver the record of the agreement.

c. Exchanging the prosecution and defense statement, in which one of the parties may claim the being of an agreement so that the other does not deny it.

5. Any reference to documents comprising an arbitration clause in an agreement, it constitutes the

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arbitration agreement providing that the document is in writing, as the reference makes this condition part of the agreement.

The article makes it clear that the arbitration agreement duty to be in writing, that is, it must be a signed document by the parties or parties to the dispute, or be included in the exchange of written communications, or through an chat of statement of claim and defense.

The parties shall be free to choose the language by which arbitration shall proceed, as provided in article (24):

1. Parties agree to the freedom to choose the language used in arbitration proceedings.

2. If the party to the Agreement fails under subparagraph (1), the arbitration tribunal shall address the determination of the language to be used in the arbitration proceedings.

The agreement or decision must apply, respectively, in the subparagraphs: (1) and (2), unless otherwise recommended in the agreement or resolution, by a written statement submitted by one of the parties, at a hearing or decision of a judgment, or other decisions of the tribunal.

3. The tribunal shall decide that any evidence or document shall be escorted by a translation into the language fixed between the parties or specified by the arbitration tribunal.

Malaysian law defined the question of the arbitration jurisdiction and the types of disputes in which arbitration might not be included.

Article (4) provides that:

1. Any conflict of which the party decided to submit to arbitration under the seasonal arbitration arrangement shall be affected unless it is contrary to public policy.

2. Any written law provides jurisdiction over a legal issue to a court of law but does not mention to the adjudication of this matter through arbitration for disagreement in the matter.

Under this article of Malaysian law, any question of dispute of which the party agreed to arbitrate may be arbitration except the arbitration agreement is conflicting to public policy. Arbitrators are chosen according to Malaysian law, as provided in article (12):

1. Party is at liberty to fix the figure of arbitrators.

2. If the party fails to fix the number of arbitrators, the arbitration tribunal may:

a. At international arbitration, three arbitrators shall be arbitrators.
b. At Local arbitration shall be the same arbitrator.

Article (13) states that:

1. Unless the agreement of the parties is, by contrast, no person shall be prevented from acting in the place of the arbitrator based on his nationality.

2. Party shall be at liberty to agree on ways of employing the arbitrator or the Chairman of the arbitration tribunal.

3. If the party fails to agree on the procedure mentioned in subparagraph (2), the tribunal shall be contained with three arbitrators; each party shall appoint one arbitrator, with the selected arbitrators assigning the third arbitrator who shall be the Chairman of the arbitration tribunal.

4. If subparagraph (3) is not applied:

a. The party fails to assign and the trial within thirty days of receiving of the written application in respect of such action by the other Party;
b. The arbitrators fail to settle on the selection of the third arbitrator within thirty days of their selection, or any extension of a period, and the parties may agree that the application may be submitted to the Director Asia International Center for Arbitration for such appointment in respect of arbitration.

5. If the arbitration is approved by one arbitrator:

a. If the party fails to decide the procedure mentioned to in subparagraph (2)
b. If the party fails to reach a decision on the arbitrator, the parties may apply to the Director of the Asia International Center for Arbitration for such an selection in respect of arbitration.

6. If the procedure for the appointment of the

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arbitrator is agreed between the parties, it will result in:

a. The failure of one party to have access to the remedies required under these procedures;
b. Parties or arbitrators are incapable to extent an agreement under these procedures,
c. Failure of a third party, as well as any center to accomplish its ask assigned to it under this procedure, a party might apply to the Asia International Center for Arbitration for action, except the agreement on the selection procedure offers other ways of lock up the selection.

7. If the Director of the Asia International Center for Arbitration is unable to operate under (subsections) (4), (5) and (6) within thirty days of the date of the application, then any party might apply to the High Court of responsibility for such selection.

8. In the case of appointment of the arbitrator, the Director of the Asia International Center for Arbitration or the High Court shall, as appropriate, give due consideration to:

a. To provide the mandatory certificates in the arbitrator by the agreement of the parties.
b. Other concerns that is prospective to ensure the responsibility for the choice of an independent arbitrator.
c. To propose, about international arbitration, the appointment of an arbitrator other than the nationality of the parties.

9. No decision by the Director of the Asia International Center for Arbitration or the High Court under this article might be challenged.

It appears that these articles provide the parties with autonomy in determining the number of arbitrators, as well as provide the parties with the independence to agree on the procedure for assigning an arbitrator or the principal arbitrator.

In supposed case of the failure of the party to decide in the choice procedure, or the failure to agree on an arbitrator, when the party fails to take the appointment procedure in the arbitration agreement, in the event of a dispute, or if they reject to work out their rights to assign a member of the tribunal.

The Director of the Asia International Center for Arbitration, formerly known as Kuala Lumpur Regional Center for Arbitration is given the authority to assign an arbitrator and must do so within 30 days, if the party is unable to application the High Court to appoint an arbitrator.

Where the Director of the Center or the High Court appoints an arbitrator, both bodies shall have due respect to any qualifications obligatory by the arbitrator by the agreement of the party, or other respects which may allow for the selection of an independent and neutral arbitrator in respect of international arbitration, it is desirable to appoint an arbitrator of a nationality other than that of the parties.

It is noted that the High Court and the Asian International Center for Arbitration are given a role and authority to intervene in the procedures for the appointment of arbitrators.

How is the witnesses' evidence obtainable and use of witness statements with a thorough cross-examination is common, or are direct oral examinations common, or are the witnesses questioned by the arbitrators?

It is common for witness evidence and witness statements to be presented in writing or witness statements signed by the witness, where the arbitration tribunal shall determine the timetable and procedures for the completion and exchange of witness testimony. Witness testimony may also be exchanged for appeal at a later date if the arbitration tribunal is brought to it. After the witness's initial questioning by the party to which he is contacted, the witness will be submitted for questioning by the other parties and then re-examined.

Following article 118 of the Evidence Act of 1950, all persons must be qualified to testify except those who are unable to understand the questions posed to them, or who are unable to provide rational answers to those questions because of age, old age or illness, whether in the body or mind or any other reason of this kind.

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In article 21 (3) (h) of the Act, the arbitral tribunal can issue an order to examine a party or witness to the oath or confirmation.

The difference in the admission of the witness's testimony lies in the differences between that of a witness who is particularly connected with a party (such as the legal representative) and that of an unrelated witness.

For non-associated witnesses, the ordinary provisions on the admissibility of evidence are applied under the evidence Act of 1950.

As to how the expert testimony is presented, are there any formal requirements regarding the independence or impartiality of expert witnesses, or there some flexibility in how expert evidence is presented.

Expert evidence is provided through written reports. If the contents of the written reports may not relate to the technical facts that are not agreed upon, depending on whether there is an agreement on the technical facts by the experts, such a procedure shall be ratified by the parties to the dispute and the arbitral tribunal following article (28) of the Malaysian Arbitration Act.

APPLICABLE LAW

The Malaysian law of neutrality is the dominant one to be applied in a dispute of a domestic nature, while any other law is chosen even if it is successful in the case of an international dispute, provided that it does not violate internationally recognized legal norms.

Article (30) provides that:

1. Unless the parties agree, by contrast, that is, the domestic arbitration controls in Malaysia, the arbitral tribunal shall adjudicate the dispute by Malaysian substantive law.
2. Concerning any international arbitration, the tribunal must decide on the conflict by the law agreed upon by the party.
3. Any appointment by the parties to the law of a particular State may be interpreted, unless otherwise provided, such as mentioning to the applicable law of that State or contrary to the origins of the laws.
4. If an agreement cannot be found under subparagraph (2), the arbitral tribunal shall apply the law specified by the rules of the conflict of laws.
5. The arbitration tribunal should not, in all cases, decide the dispute according to the terms of the agreement, but should consider the trade-related customs of the transaction.

The Malaysian legislature gave the parties autonomy to choose the seat of arbitration, except in the event of the form, for which the arbitration tribunal would choose an appropriate seat for the parties to the dispute.

Article (22) provides that:

1. Party is allowed to agree on the domicile of arbitration.
2. If the party fails to agree under subparagraph (1) on the place of arbitration, the arbitration tribunal shall determine the place, taking into account the circumstances of the cases, where the parties or parties are comfortable.
3. Nevertheless subparagraphs (1) and (2) of the arbitration tribunal, which indicates that the parties may not agree on the contrary, such as to raise the question of meeting in which place the members may be deliberated, to hear witnesses, experts, and parties, or to inspect goods, property or other documentation.

According to the procedures we have spoken of as case law, if the law of a State is made of an international character, the place of arbitration shall be held in that State. For example, if the parties to the dispute choose Indian law, arbitration often has a place in India. If English law is chosen, the place of arbitration shall be in England, for example in London.

COMPARISON BETWEEN SAUDI AND MALAYISAN LAW OF ARBITRATION PROCEEDINGS

The both Saudi and Malaysian legal system have complied in the proceedings with similarity that arbitration proceedings shall commence from the day on which one of the parties to the dispute

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received the request for arbitration from the other party that is a party to the dispute unless the parties to the dispute agreed otherwise.

And their agreement likes the hearing of witnesses in the progression of the arbitration proceedings. However, in the Saudi system, if the arbitration tribunal accepts the hearing of witnesses, it must comply with the provisions of the hearing regulations, while in Malaysian law the provisions of the Malaysian evidentiary law are complied with. The two systems agreed on the question of the use of an expert or experts to take an opinion on a matter or to request him to submit technical reports on matters which had been brought to the required facts and substantive matters during the course of the arbitration proceedings.

The two laws agreed on the question of the freedom of the parties to a dispute to choose a language for the conduct of arbitral proceedings, in which the parties were free to choose any language they wished for the conduct of the arbitration proceedings in the matter of their dispute. The two regimes also agreed that the venue of the arbitration contract would be free to be chosen since the parties concerned in the arbitration were entitled to agree on the place of arbitration whether inside or outside Saudi Arabia, whether inside or outside Malaysia.

In the matter of the law to be applied, the Saudi regime has overtaken the Malaysian regime by the fact that the Saudi regulator has given the parties to the dispute full freedom to choose the law to be applied in domestic or international arbitration, provided that it does not conflict with the rules and principles of Islamic law and the general cough system. Malaysian law makes a difference between domestic and international neutrality, providing for the choice of any law in a dispute of an international nature only, while Malaysian arbitration law is applied in a dispute of a domestic nature only, without reference to the question of conflict with Islamic Sharia law.

The Saudi legal system and Malaysian law differ in choosing the rules of the procedure followed by the courts, as the Saudi regime stipulated that the arbitration parties should agree on the procedures followed by the arbitration tribunal, including their right to make these procedures subject to the applicable rules of anybody or organization, or arbitration center within or outside Saudi Arabia provided that the proceedings do not violate the provisions of Islamic law.

While Malaysian law did not stipulate that legal procedures - provided for by the gays or parties - should be approved for Islamic law, it left the matter public for its release without complying with the Islamic Shariah law.

II. CONCLUSION

The Saudi legal system and Malaysian law are consistent with many issues of arbitration proceedings, perhaps because both the Saudi and Malaysian arbitration laws are taken from the UNCITRAL Arbitration Rules of the United Nations (UNCIRAL).

III. FINDINGS

1. The Saudi legal system and the Malaysian arbitration law have similarities in many respects in agreement on the issues of neutrality and the conduct of its procedures 2. The Saudi legal system of arbitration trumps Malaysian law in caring for the side of Islamic

3. Both legal systems have comprehensive and smooth arbitration procedures that guarantee the rights of the parties to settle their emerging dispute.

IV. RECOMMENDATION

1. It is recommended that both Saudi legal system and the Malaysian law maintain these comprehensive arbitration rules and regulations, and make sure that they develop more facilities to support the issues of neutrality.

2. Malaysian law should give more attention to the Islamic Sharia side.

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