Opinion issued March 19, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00624-CV

IN RE ARAMCO SERVICES COMPANY, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION[1]

By a petition for writ of mandamus, relator, Aramco Services Company ("Aramco"), challenges three orders of the trial court concerning arbitration.[2] Aramco contends that the trial court abused its discretion by (1) appointing arbitrators

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[1] The underlying case is *Dyncorp International LLC*, No. 2008-01281, in the 334th Judicial District Court of Harris County, Texas, the Hon. Sharon McCally, presiding.

[2] The orders are dated April 16, 2009, June 2, 2009, and June 22, 2009.

(2) who are not Muslims or Saudi nationals. We agree that the trial court lacked authority to appoint arbitrators, and therefore do not reach whether the trial court abused its discretion by empaneling arbitrators who are not Muslims or Saudi nationals. Thus, we vacate the trial court's three orders and conditionally grant mandamus relief.

Background

Real party in interest, DynCorp International, LLC ("DynCorp"), and Aramco signed a contract ("the Contract") for an advanced computer system.[3] Under the Contract, DynCorp was to manufacture the computer system in the United States and then install it at Aramco's facilities in Saudi Arabia. The Contract contains an arbitration agreement, written in English, which provides, in part,

> 1. **Choice of Law**
>
> 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.
>
> 2. **Arbitration**
>
> 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

[3] When the Contract was executed, both DynCorp and Aramco were headquartered in Houston and incorporated in Delaware.

("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.

2.1 **Arbitration by One Arbitrator**

If the parties agree to a one-arbitrator arbitration, the parties shall agree upon and appoint an arbitrator, after first ascertaining that the appointee consents to act, within thirty (30) days from the date on which written notice of referral to arbitration by one party is received by the other party (the "notice date").

2.2 **Arbitration by Three Arbitrators**

If the parties are unable to agree on a one-arbitrator arbitration, or, having so agreed, are unable to agree on the arbitrator within thirty (30) days from the notice date, then the arbitration shall be conducted by and before three arbitrators, who shall be appointed as follows. Each party shall appoint one arbitrator, after first ascertaining that the appointee consents to act, and notify the other party in writing of the appointment withing sixty (60) days from the notice date. The appointed arbitrators shall agree upon and appoint the third arbitrator, after first ascertaining that the appointee consents to act, and notify the parties in writing of the appointment within ninety (90) days from the notice date.

2.3 **Arbitrator Qualifications**

The arbitrator(s) selected shall be impartial, and shall have had no interest in or previous connection with the matters in dispute. Neither past or present employees or directors of either party, legal counsel retained by either party, nor persons related to these persons shall be selected as

arbitrators.

2.4 **Arbitration Procedures**

The parties shall agree upon the rules of procedure which shall govern the arbitration proceedings. If the parties are unable to agree upon the applicable rules of procedure, the arbitrators shall by majority vote establish the applicable rules of procedure.

2.5 **Arbitrators Not Conciliators**

The parties hereby explicitly consent to the appointment of arbitrators in accordance with the Regulations and Rules and this Contract. . . .

. . . .

2.9 **Finality**

This arbitration provision shall be specifically enforceable by both parties under the Regulations and Rules, and the award of the arbitrators shall be final and binding upon the parties.

The Arbitration Regulations ("the Regulations"), referenced repeatedly in the Contract, are written in Arabic, and they provide, in part:

Article 8

The Secretariat of the Authority originally competent to hear the dispute shall be in charge of all the summons and notices provided for in this Decree.

. . . .

Article 10

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.[4]

(Emphasis added.)

The Rules for Implementation of the Arbitration Regulations ("the Rules"), also referenced repeatedly in the Contract, are written in Arabic, and they provide, in part:

> **Article 3**
>
> 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.
>
> . . . .
>
> **Article 12**
>
> The notice must be in Arabic. . . .

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[4] DynCorp provided an alternate translation that provides, in part: "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*. . . ." (emphasis added). The parties have not suggested any material difference in their proffered interpretations of the Regulations that would affect our decision in this proceeding.

. . . .

Article 25

> 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.

. . . .

Article 39

> The award is made by the arbitrators who are only bound to comply with the rules of procedure contained in the Arbitration Act and its Implementation Rules [i.e., the "Rules" and "Regulations"]. The award must comply with the provisions of the Shari'a and the laws in force.

DynCorp sued Aramco in Houston, Texas, asserting entitlement to certain funds in a letter of credit opened pursuant to the Contract. On March 25, 2008, Aramco moved to compel arbitration, which the trial court granted on November 13, 2008. Subsequently, DynCorp filed its own motion to compel arbitration. Specifically, Dyncorp sought arbitration before JAMS or the American Arbitration Association ("AAA"). The trial court granted DynCorp's motion in part and denied it in part in an order dated April 16, 2009. The order provides, in part:

> [T]he Court determines that the motion should be granted in part as follows:
>
> 1. On November 13, 2008, this Court ordered the Plaintiff to submit its claims in this lawsuit to arbitration in accordance with the arbitration provision in the contract at issue in this case.

2. The Arbitration provision in the contract provides generally that disputes arising out of or relating to the Contract shall be finally settled in accord with the Arbitration Regulations . . . ("the Regulations") and the Rules For Implementation of the Arbitration Regulations . . . ("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.

3. More specifically thereafter, the Contract provides that, in the absence of an agreement to a one-arbitrator arbitration, "[e]ach party shall appoint one arbitrator . . . and notify the other party in writing of the appointment within sixty (60) days from the notice date—that is, the date on which written notice of referral to arbitration by one party is received by the other party."

4. Under any computation of the "notice date," whether Defendant's March, 2008 motion to compel arbitration; this Court's November, 2008, order granting that motion; or Plaintiff's pre-December, 2008, Demand for Arbitration. More than sixty days have elapsed from the notice date.

5. Defendant has not appointed an arbitrator. Although Plaintiff has notified Defendant of its desire to arbitrate with neutrals associated with JAMS, Plaintiff has not appointed an arbitrator.

6. Thus, the Contract refers to the Regulations, Rules and the Contract for appointment of arbitrators.

7. Article 10 of the Regulations provides that 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 and the arbitration. . . ."

8. If necessary for this Order, the Court specifically determines that this Court is "the authority originally responsible for looking into the case." The parties have each acknowledged this Court's authority by request of this Court, through competing motions to

> compel arbitration, for Order regarding arbitration.
>
> Thus, granting, in part, the motion of Plaintiff and in enforcement of this Court's prior order, the Court compels arbitration and orders each party to submit, no later than May 18, 2009, the name, address, and qualifications of one or more arbitrators who consent to act as arbitrators in this matter. Absent agreement of the parties, this Court will consider appointment of arbitrators on the Court's June 15, 2009 submission docket. A party's failure to submit one or more proposed arbitrators will be treated by this Court as a waiver of that party's right to complain of the Court's selection of arbitrators.
>
> Further, Plaintiff's motion to compel, to the extent it asks this Court to determine any procedure for the conduct of the arbitration (language, venue, etc.), the motion is denied, as the Contract does not provide this Court with the authority to resolve the arbitration procedure disputes.

Aramco filed a motion to clarify and for reconsideration of the trial court's April 16, 2009 order. The motion for clarification and reconsideration contained the affidavit of Mohammed Al-Sheikh, an attorney practicing in Riyadh, Saudi Arabia with an 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 *Qu'ran* and the *Sunnah*.
>
> . . . .
>
> The legal regime in The Kingdom of Saudi Arabia includes *Sharia'ah* principles that are often expressed in general terms, providing a Saudi Arabian adjudicatory body with considerable discretion as to how to apply such principles. Previous decisions of Saudi Arabian adjudicatory bodies are not considered to establish a binding precedent for the decision of later cases; the principle of *stare decisis* is not accepted in The Kingdom of Saudi Arabia. In addition, decisions of various Saudi

> Arabian adjudicatory bodies are not generally or consistently indexed and collected in a central place or made publicly available.
>
> . . . .
>
> For the reasons set forth below, 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. . . .

The trial court denied Aramco's motion for clarification and reconsideration on June 2, 2009. Aramco complied with the April 16, 2009 order by designating 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. On June 22, 2009, the trial court signed an order that overruled Aramco's objections and appointed Dr. Sherif Hassan, Ted Akin, and Trey Bergman as arbitrators.

Standard of Review

The mandamus relief here sought is available only when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error

of law" and there is no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). The reviewing court may not substitute its judgment for that of the trial court when reviewing factual issues. *Id.* at 839–40. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless the decision is shown to be arbitrary and unreasonable. *Id.* at 840. Mandamus relief is proper when a trial court improperly designates an arbitrator. *See In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex. 1998).

The Arbitration Agreement

Aramco contends that the trial court should not have designated itself as the "Authority" referenced in Article 10 of the Regulations. Specifically, Aramco asserts that "[b]ecause the term 'Authority' is not expressly defined in the Regulations, resort to other Saudi law is necessary to determine its meaning." Aramco states that the term "Authority" is referenced in the Regulations and Rules in a context that does not anticipate application to the trial court. Aramco also asserts 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 contends that the trial court could not designate arbitrators because neither party had requested it to do

so. DynCorp responds 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 and the AAA, and that Texas procedural laws should apply to the Contract. DynCorp also contends that the Contract is ambiguous and therefore improper for mandamus review.

"Arbitration agreements are interpreted under traditional contract principles." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Id.* (emphasis supplied). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* "Texas courts generally apply Texas procedural law even while applying the parties' contractual choice of law for substantive matters." *Nexen, Inc. v. Gulf Interstate Eng'g Co.*, 224 S.W.3d 412, 417 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "When the only evidence before the court is the uncontroverted opinions of a foreign law expert, a

court generally will accept those opinions as true as long as they are reasonable and consistent with the text of the law." *Ahumada v. Dow Chemical Co.*, 992 S.W.2d 555, 559 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

The determination of whether a contract is ambiguous is a question of law for the court to decide by examining the contract as a whole in light of the circumstances present when the contract was entered. *Universal Health Servs. v. Renaissance Womens Group*, 121 S.W.3d 742, 746 (Tex. 2003). If contract language can be given a certain or definite meaning, then it is not ambiguous and should be interpreted by the court as a matter of law. *DeWitt County Elec. Coop. v. Parks,* 1 S.W.3d 96, 100 (Tex. 1999). On the other hand, a contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L & F Distribs.*, 165 S.W.3d 310, 312 (Tex. 2005). Lack of clarity does not create an ambiguity, and "not every difference in the interpretation of a contract . . . amounts to ambiguity." *Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 134 (Tex. 1994). "Whether a contract is ambiguous is a question of law, subject to de novo review." *Bowden v. Phillips Petroleum Co.,* 247 S.W.3d 690, 705 (Tex. 2008). A court should construe an unambiguous contract according to the plain meaning of its express wording. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985).

Here, "no party . . . interested in expediting the arbitration" requested that the

trial court appoint arbitrators under Article 10 of the Regulations. Even if the request contemplated by Article 10 had been presented to the trial court, the trial court is not the "Authority" empowered to appoint arbitrators. For example, Article 8 of the Regulations provides that the "Secretariat" of the "Authority . . . shall be in charge of all the summons and notices," and Article 12 of the Rules specifies that notice must be provided in Arabic. Article 9 of the Rules provides that the clerk of the "Authority" will act as "secretary of the arbitral proceedings," which Article 25 specifies are to be conducted in Arabic. Unrebutted expert testimony accepted into evidence by the trial court suggested that the "Authority" had to be a court of Saudi Arabia. In the face of such evidence and the plain provisions of the Contract, the Rules, and the Regulations, the trial court erred when it concluded that it could act as the "Authority."

In light of our conclusion that the trial court could not be the "Authority" empowered to appoint arbitrators pursuant to the parties' agreement, we do not reach the question concerning the empanelment of non-Muslim arbitrators.

Conclusion

The trial court improperly designated arbitrators in the instant matter. We therefore conditionally grant the petition for writ of mandamus, and direct the trial court to vacate its April 16, 2009, June 2, 2009, and June 22, 2009 orders.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.