

Dispute resolutions from the field of economy via contracting competence through Arbitration in the republic of Kosovo

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Abstract

In terms of globalized economy, the integration trade cooperation process between state institutions, international organizations, and business entities are being followed by a dynamism regarding creation, modification, and termination of relations through the contracts which are now more standardized. Good business practices offered a good experience in terms of solving disputes on business transactions, local or international, security, efficiency and speed of trialing are enforced only if this issue is foreseen and contracted with special courts of arbitration. The role of arbitration on international trade is not only the solution of disputes. The arbitration has as its mission before the building of a fair trade and legal practice such as bona fides.

Keywords: Arbitration, economy, globalization, dispute.

Introduction

Arbitration is the most common contemporary method of dispute resolution that arises in international trade operations. It is a private mean of dispute resolution based on initial agreement of parties referring to a dispute in a private court. This form and method to conduct a court issue usually it is preferred for a number of reasons. The procedure before the arbitration court has a tendency to be much faster than the same dispute issue if addressed to a national court for a trial. A contracted or assigned court of arbitration to hear and solve a disagreement according to practices very surely will pay full and continuous attention to the contested issue.

Regular courts usually have limited time, long list of cases that require deeper concentration and attention to judge a case which is a difficult situation. Although the courts of arbitration should fulfill the requirements of natural justice and decide in compliance with the law they should and can approve flexible and quick procedures. Despite the fact that arbitration may be more expensive, trial process than the one carried out at a regular court, is convenient to the traders and in principle they agree to stay with this procedure to win time and simplicity of the procedure. Except that, the expenses of arbitration usually should be affordable by the parties, and according to the rule they should be tax-free. The traders often prefer the intimacy of the arbitration process over publicity that arises during the trial procedure.

1.1 The history of arbitration and reasons of its birth

Dispute resolution through arbitration is known from antiquity. The roots may be found in old clan societies, where the leader of a tribe appointed its representatives who would then solve disagreements among different members of society. As the most known and the oldest agreement of arbitration that is considered to be is the agreement between Sumerian towns of Lagosh and Ume, in the fourth millennium B.C. for settling the borders (International Review, 2011, 23).

In the beginning during the history, arbitration often was serving the first states, according to which private persons contracted their engagement for resolution of disputes in order to avoid strict formalities, ritual court procedures of that time, but also for resolution of disputes to which no appropriate claims were determined. The advantages of arbitration were seen from that time, which was applied not for domestic disputes but also between citizens of different states (IERM, 2013, 34).

“The arbitration courts emerged in the antique Greece. For the first time private judges were engaged to solve disputes between entangled citizens, although they were procedures of reconciliation and negotiation” (Thaçi, 2012, 24).

The resolution of disputes out of state courts was also known in ancient Rome, when citizens could contract arbitration, but they also had a possibility to give up from the judgment of the arbitration, then they could continue the procedure with the same application at the regular court. However the parties did not have that right if they had an earlier agreement in written form. Arbitration shows up again at the end of XVI century, when after the stagnation, trade started to grow and grow again. In Europe the first rules of arbitration were drafted in France who long time ago before the French revolution had its evolved domestic and foreign arbitration.

1.2 Methods of using arbitration law

Like every science, every action, every instrument has its own method of practical use, so does the arbitration law have its own methods of functioning. Arbitration methods are determined based on actions and means that are used on the subject of the dispute during its work. There are general methods that are used in some social sciences. Law on arbitration applies the same methods of the legal science, however taking into account its specifications and the subject that this science deals with it application and diversity of these methods is specific (Thaçi, 2012, 30).

The methods used by the law on arbitrations are as follows:

- Expertise method
- Analysis method
- Synthesis method
- Deduction method
- Abstraction method
- Classification method
- Comparison method

These methods are applicative methods from the arbitration law through which economic disputes are resolved and all these are international practices of functioning of the arbitration law.

1.4. Dispute resolution through arbitration

International trade arbitration presents a specific and complex institution regarding the way of its creation and proceeding methods for resolution of disputes that arise from operations that are carried out and end in the area of international trade. A characteristic of this institution is a competence which derives from the will and consensus of the contracting parties.

It is well known that the complicated character and structure of international business relations require maximum care and special treatment when resolving certain disputes in this area. This is because a belief prevails that the dispute shall be solved quickly, professionally, and by personalities that are qualified and have proper moral and professional qualities. The arbiter of this court usually belongs to business world and business activity (Krasniqi, 2007, 90).

From these reasons the parties' interests are sometimes higher to keep their business connections and authority status rather than win the initiated dispute. The role of arbitration in international trade is not only based on resolution of certain disputes. The mission of this institution is to build a practice based on *fair play* and *bona fide* principles within international trade activities in general (Krasniqi, 2007, 93).

Results of the survey

In this sense, arbitration contributes on surpassing the disputes and creation of conditions for regular attendance of international trading transactions. For that reason arbitration has an important role not in the area of law but also in political and economic relationships (Krasniqi, 2007, 90).

"Regardless of principles and beliefs of certain countries for impartiality of the regular national courts, the practice has not rarely shown that there are cases when these courts were favoring the local party. Such situation favored and actualized arbitration as a serious and impartial forum on resolution of disputes (Krasniqi, 2007, 99).

The selection of the arbiter influenced on determination of interested parties for arbitration, usually they are experts of international trade turnover and have enough knowledge about business techniques and operations. As we can select the arbiter and arbitration panel, the parties can freely declare which material or procedural laws want to proceed.

Except that the parties have the right according to the consensus principle to select the place of arbitration which means to select the country where the arbiter shall issue an award which has significant importance in its execution phase.

The special importance of arbitration is in the speed procedure. Within the process – arbitration trial, according to the rule the adjudication is of a single instance and less formal than the one that is issued by a regular court. The arbitration award is merited and the parties cannot appeal the award. The only legal remedy which can be applied against this award is the application to annul the award of the arbitration which will be decided by the competent domestic court according to the place where the procedure was conducted.

However, the annulment of the arbitration award can be applied only on allegations that the procedural conditions were not respected and in no way the material and

factual conditions were not respected. The procedure before arbitration is not public because of the interests and business secrets that the parties have. All these conditions affect the arbitration in gaining a primary role in dispute resolution of international trade turnover and business life.

Methodology of the research paper

The reasons for passing special national laws for arbitration are multiple. In the first place there are those arising from intensive operations that are characteristic for international business. Arbitration has become the most common method for resolving disputes. In this context, the Arbitration Model Law on International Trade has proven to be the most important base for the modernization of the rules of international trade arbitration. Obviously this implies the need for national laws in this field to harmonize with it.

3.1 The constitution of the arbitral competence - the contract on arbitration

Jurisdiction or competence of arbitration is based on the agreement of the contracting parties who agreed in advance on the dispute but the resolution is entrusted to arbitration. "Therefore a valid contract to provide arbitration competence is the basis of establishing jurisdiction and at the same time exclusion (off) to a competent state court (Colon, 2011, 123).

The problem of recognition and enforcement of arbitration awards is reflected, that they may directly compel state authorities to enforce them without exception (Colon, 2011, 145). The basis of it is the autonomy of the will of the parties and the principle of the consensus to avoid regular jurisdiction of national courts and the contracting of the competence of arbitration court.

3.2 Types of arbitration

In current flourishing practice of arbitration proceedings, there are two main types of arbitration:

- Ø Ad hoc arbitration (A-temporary) and
- Ø Institutional arbitration (permanent selected courts).

Ad hoc arbitration - is a chosen court which is established under the contract of the parties with the task and aim to judge only of a particular dispute, in order to cease to exist after the trial of the case (USAID 2010, 6).

Institutional Arbitration - is a permanent organization, established with the task to carry out its function of the selected court, even when the parties involved in the dispute are advised to do that. These arbitrations are non-state services, ready to assist entities in need.

Agreement for arbitration

The dispute can be settled through arbitration unless there is an agreement between the parties (Article 5.1). "The focus of particular importance to arbitration is that the parties intentionally agreed to the use of arbitration and waive their right to judicial

review in the courts of the country. Determining whether the parties have agreed to arbitration is the condition loosely covered in Article 6 of the Kosovo Law on Arbitration which is discussed below". It also notes that the agreement for arbitration is validity (Article 5.12).

Analysis and research

There are two categories of cancellation: when the basis for the annulment of the award is evidenced by the party invoking the cancellation, and when this is done by the court on its own initiative. Provisions for legal remedies are in compliance with the UNCITRAL Model for the Law on arbitration (USAID 2010, 16).

Ground to be proved by the party:

- one party had no capacity to act
- arbitration agreement is not valid - the claimant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings (USAID 2010, 16).

Basics grounds that the court may consider:

- arbitration is prohibited by law
- Execution of the award is contrary to public policy.

Board sets the arbitration fees and compensation of arbitrators, experts and witnesses and other expenses. The arbitration fee is 8% of the value of the subject (Krasniqi, 2010, 48).

The losing party pays all expenses

KCC reports that since 2000 a total of eight procedures were organized. Disputes were among Kosovo and foreign companies. It seems that these informal procedures have been initiated by the embassies (commercial services) upon request of foreign companies.

Further KCC has reported that international companies have sought the assistance of KCC in resolving disputes with their local partners, but local companies refused to participate and take a stand that they can resolve disputes directly with their business partner. This issue is addressed in the education and public relations part.

Conclusions and recommendations

As described above, the institution may create the application for arbitration, support the arbitration process and enable quality control while maintaining high standards for arbitrators and reviewing arbitration awards. Since KCC and AmCham are the only institutions which are currently prepared to move forward in the development of ADR, SEAD will initially focus its assistance to these institutions.

Kosovo also continues to need to have consultations with regard to international arbitration and mediation, especially in the following areas: Update rules (rules of arbitration proceedings) to comply with current law on arbitration and international standards (Krasniqi, 2010, 89) In all cases, the standards are generally based on documented experience, training, education and reputation. An arbitral tribunal usually does not begin to analyze in detail the agreement for arbitration to see that it

meets all the prerequisites of validity, unless one of the parties challenges the jurisdiction of the Tribunal on the basis of an invalid clause for arbitration”.

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