THE PERMANENT ARBITRATION TRIBUNAL ROLE IN THE RESOLUTION OF FOREIGN TRADE DISPUTES AND IN ENHANCING THE INTERNATIONAL BUSINESSES TRANSACTION SECURITY IN THE REPUBLIC OF KOSOVO

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Abstract
The arbitration is a usual and contemporary method of solving disputes which arise during international trade operations. The arbitration is considered a private mean of solving disputes which are based in a previous agreement of parties that refer the possible disputes in a private tribunal. This form and method of developing a court case usually is preferred for a variety procedural and financial reasons. The regular courts usually have limited time, long and different lists of cases that require deep attention of adjudication. This brings a lot of difficulties. Despite the arbitration courts must meet the requirements of justice and decide in accordance to law in the same time they must approve the procedures in a flexible way. The arbitration can be more expensive than a judiciary process of a regular court. To the companies is convenient this procedure and in principle they agree to remain in this procedure to gain time and procedural simplicity. Besides this, the arbitration expenses usually must be affordable by parties and pursuant to rule these expenses are not subject to taxes. The companies very often prefer the privacy of the process for advertising that take part during the judicial procedure. In the Republic of Kosova is founded the Permanent Tribunal of Arbitration. The primary legislation is completed but is essential to be completed also the secondary legislation, enhancing the image of the tribunal and companies become aware that the contestable issues can be solved by this tribunal.
Key word: Tribunal, Arbitration, court, international conventions, law, decision.

Introduction

A part of countries in South Eastern Europe are in the initial phase of becoming European Union member. Without any doubt, the harmonization process and alignment of the rights of national law with the right of the European Union, before of all the principles set in the White Book and the Treaty of Lisbon which are dedicated to the preparations for membership. These are important tasks of State institutions. Within this process the institutions that can contribute are the academic-scientific institutions considering the fact that these institutions have enough knowledge for European right and can review and harmonize the process according the required standards. Obviously, this initial phase of legislation harmonization process of the country determined by the European Union should be initiated based in the national legislation tradition but also in comparative methods of other countries that already have passed this process.

This process is an institutional project and also is dedicated to the citizens of the country all ministries and legislative bodies. Within this harmonizing activity another important role plays also the completion of internal legislation for arbitration. This legislation not only will influence in discharging the overloaded work of regular courts but greatly influence in increasing and guaranteeing the foreign investments. The companies very often prefer the privacy of the process for advertising that take part during the judicial procedure.

1. A historical background for arbitration

The arbitration[1] for the human society exists since the ancient time. According to some thinkers and different publications the arbitration had always exist and consequently is as old as human society is. To the academic institutions the phenomenon of arbitration has exceeded the international perceptions and now represents a phenomenon definitively intellectual[2].

By summarizing the historical sources for the meaning, the role, the existence of arbitration starting from antic Greece, Rome and near and middle east, we can conclude that the arbitration is a very old institution created and developed during the time in almost in all the world. Until the mid-nineteenth century has dominated the traditional arbitration, that before all, had the task of safeguarding the good relations of the people that were obligated to live in community as the cases of families, relatives etc. In that time the need for arbitration was necessary only in extremely problematic cases and to solve these disputes the intervention of the third part was necessary. The parties in contest choose as arbitrator an objective, knower, reliable and authoritarian person. Is to be mentioned that according to this model have been managed and regulate political and propriety issues in old Greek policies. This traditional type is not abandoned even in nowadays to solve the determined disputes in social life but also have been developed new methods according to different criterions. According to Pak, the arbitration can be classified in the following criterions: according the way of solving the dispute: the arbitration with which the disputes are solved with juridical means and arbitrations with which the disputes are solved with no juridical means; according to participation parties: the arbitration with which the disputes are solved between the Sovran states, the arbitration for foreign trade and the arbitration for national trade; according to the sustainability: the arbitration for permanent and temporary trade (ad hoc); according to completeness of norms: arbitration for foreign trade,

[1] According to Albanian dictionary – Publisher Toena Tiranë 2002 Arbitrazh has two meanings; resolution of disputes between parties by a commission of arbitrors, and the second; Special Bodie that deals with disputes with economic, financial etc characters.. According to the dictonary of foreign words and foreign expressions of Mikel Ndreca the word arbitrage is – judgment by the referee

[2] Jarrosson CH., La notion d'arbitrage, Paris 1987 pg, 1

arbitration for national trade respectively the arbitration of Chamber of Commerce and the arbitration ad hoc.[3]

This paper deals with the contract in base of which is contracted the competence of international arbitration (permanent – institutional or temporary – ad hoc) for commercial and resolution of propriety disputes in international level where the parties, based to the legal competences, believe the solution of their disputes to the arbitration tribunal as any other court decision.

The development of such arbitration within the improvements of international Commercial relations is considered a new phenomenon. In the begging of XIX century some commercial societies started to respect the arbitration as a permanent and special institution to solve the disoutes in international commercial sphere. The rules of arbitration have gradually overcome the country legislation and have become an autonomous system that has been implemented by powerful economic subjects. Specific economic subjects are Lloyd Insurance in London, London Corn Commercial Association, etc.[4]. The reason that has leaded the businesses' subject to stipulate international contracts has been the desire to solve the disputes by law and in a specific way taking into consideration professional usage and behaviour rules. The complex nature of foreign Commercial relations structure requires a higher level of attention in solving these contexts. The parties in contests belong to business world and their aim is to develop their business activities according to the principle known as "*goodwill*". This principle that often is considered very important the preservation of good business relations. The role of the arbitration of international Commercial first of all is not only to solve the disputes. The arbitration has the mission to build a fair Commercial practise and the juridical - business principle - *bona fides.* The arbitration acts also as psychological factor and very often plays a crucial role for the subject which does not adhere to the international Commercial standards.[5]

2. The advantages of solving international business disputes through arbitration

The international Commercial arbitration represents a specific and complex institution for the proceeding method in solving the disputes during the business activity in international Commercial sphere. The particular of this institution is the competence which derives from the will and consensuality of contraction parties[6]. One of the main reasons pushing the subjects to be determined within an international business contract, which is referred to improve the operations and specific relations in case of an eventual context, the arbitration is competent to determine and solve the problem. This is done for the only reason that it dominates the conviction that the case will be solved in the right way, rapid, with professionalism and by personalities that have the right qualification and qualities. The parties before the arbitration usually belong to business world and their aim is to exercise the business activity. Considering this fact the parties are more interested to preserve these business relations than to gain the initiated dispute.

The role of arbitration in international Commercial is not based only in solving the disputes. Primarily this institution has the mission of practices based in the principles of fer *play* and *bona fide* within the international commercial activities in general. According to the rule besides the attitudes of the arbitration are also considered the effects coming by risks in case of solving the contest in this tribunal.

In this meaning, the arbitration contributes in overcoming the contests and in the creation of the conditions for the continuation of international Commercial transactions. For this reason the arbitration plays an important role not only in law sphere but also for the political and economic relations.

The importance of accepting the solving of eventual dispute by one of the arbitration in international commercial is because of the doubt that contractual parties have in national tribunals of foreign countries. Despite the principles and convictions for regular and impartial courts nevertheless very often the practise have proved that these courts have been partial and in favor of local party. Such situations have favoured the arbitration as a very serious and impartial form in solving the disputes. In determining the stakeholders for arbitration have influenced also the possibility that the parties have to choose the arbitrator, that usually are experts of International Commercial, with necessary knowledge for techniques and business operations. Apart from having the possibility of choosing the arbitrator or the panel of arbitrators the parties have also the possibility to declare in what material and procedural right they want to proceed. Except this, the parties according to consensuality principle have the right to choose the location of arbitration that means the location where the arbitrator will take the decision that has immense importance in execution phase.

The importance of arbitration stays in procedural rapidity. The decision of the arbitration is meritorious and against this cannot be appealed. The only juridical mean that can be exercised against this decision is the request to undermine the decision by the court of the competent state where the procedure is done. Anyway, this can be done only by claims when are not respected the procedural conditions and not because of the material and factual conditions. The procedure before the arbitration is no public because of the business secrets of the parties. All these circumstances have contributed to arbitration to have the primary role in solving the contests of international Commercial flow and business life.

3. The International Legal resources

3.1. International conventions

Decisive roles, in the evolution and advancement of the arbitration, especially in international Commercial relations,

[3] Pak M., Priznanje I izvršenje sudskih arbitražnih odluka, Zbornik postiplomskih specijalističkih studija na Pravnom Fakultetu u Beogradu, me thirrje Ugovonri u međunarodnoj trgovini I, Beograd, 1987

[4] Ibid

[5] Goldšatjn A & Triva S., Međunarodna tregovačka arbitraža, Zagreb 1987 pg. 10

[6] This is agreed by many authors that deals with arbitration issues

have played and still play the multilateral, regional and bilateral conventions. The first two multilateral conventions that have regulate the arbitration issues date before the Second World War. These are the protocol for arbitration issued on 24 September 1923 (known as Geneva Protocol) and the Convention for the execution of decisions of foreign arbitrations of 26 September 1923 (known as Geneva Convention). In the time when these documents have been available are considered very important because of the fact that very fast have overpass the difficulties presented in the past. The progress of arbitration especially according to the conventions dispositions for receiving and executing the decisions of international arbitration in 1958 (known as Convention of New York) had an impact in weakening and reducing the importance of Geneva Protocol and Geneva Convention.

These two documents are not valid for the states who have accepted the convention of New York.[7] The abovementioned Conventions are implemented only in countries that are not signatories of the Convention of New York and the countries which have ratified this convention. The Convention of New York till now represents a universal and legal instrument – a special international convention of arbitration in international commercial. This convention have been applied by 160 states and is implemented and interpreted by tribunals in a big number of states and at the same time represents a particular subject for scientific studies in all the world[8].

In the context of the conventions in regional significance that regulate the arbitration of international commercial the most important is the European Convention of international arbitration of 21 April 1961 done in Geneva from the Economic Commission of United Nations. The European Convention represents an important stage of arbitration right evolution of the foreign commercial. If we discuss for disputes in investments fields an important role plays the Washington Convention of 18 March 1965 accepted by 130 states.[9]

3.2. Laws – important rules for the arbitration harmonization in international Commercial.

One of the most important documents for the unification and harmonization of arbitration regulative for international Commercial is the Model Law of arbitration for international Commercial that is approved by the UN Commission on 21 June 1985 (UNICITRAL)[10]. The principal aim of bringing the Model Law is the determination of general rules that will determine the modern standards of International Commercial Arbitration that will be accepted by all countries independently what economic system these states have. In this meaning with the Resolution of Organization of United Nations dated 11 December 1985 to all the states is recommended "to take into consideration the Model Law when they execute any of legislation revision and to adapt the contemporary needs for International Commercial Arbitration"[11].

Although the differences between the national juridical systems have brought complication in the unification of the regulative for international arbitration, the role of Model Law today is estimated as reasonable. The reason of this success without doubt stays in his flexible character that this document reflects. In the contrary of specific legislations and international conventions that do not accept the modification of the proper rules, the Model Law propose to these countries to revise and harmonize these rules according to the Model Law. In this way every state is free that for his integration process to harmonize the national legislation based to Model Law that is considered to be very flexible.

Taking into consideration the solutions offered by the Model Laws some of the states have decided to proceed with the liberalization of regulative for international commercial arbitration. The Model Laws have been accepted by a big number of juridical systems and today over 20 countries have drawn the law for the arbitration and some more and some less of these countries are based in these model laws.[12] Have to be emphasized that these countries are joined by twenty countries of USA and all the provinces in the territory of Canada.

3.3. National law as a juridical resource

An important and specific juridical resource for the function and competences of international commercial arbitration is the national law. Its importance is growing in the last twenty years due to its security, efficiency and professionalism in solving contests of international commercial. The reasons for particular arbitration laws are multiple. First of all are those who derive from intensive operations and are characteristic for international business. The arbitration has become the ordinary way to solve the disputes even in those countries which have "inconsistencies"[13]. The Model Law of International Commercial Arbitration had been proven to be the most important base for the modernization of the rules in International Commercial Arbitration.

3.4. Competences constitution of arbitration – arbitration contract

The jurisdiction or competences of arbitration are based in an agreement between parties that previously have agreed to believe the disputes to the arbitration. For this reason a valid contract to assure the arbitration competences is the base to create the jurisdiction and at the same time exclusion of a competent state court. The agreement for arbitration is presented in two forms. The first deals with

[7] Art VII/2 of New York Convention

[8] Peter Gillies & Gabriël Moens; INTERNATIONAL COMMERCIAL AND BUSINESS: LAW, POLICY AND ETHICS Cavendish Publishing (Australia) Pty Limited Sydney • London 1998, pg. 729

[9] ibid

[10] For more see http://www.uncitral.org/

[11] Ibid.

[12] According to Peter Gillies & Gabriël Moens; INTERNATIONAL COMMERCIAL AND BUSINESS: LAW, POLICY AND ETHICS Cavendish Publishing (Australia) Pty Limited Sydney • London 1998 Australia, Bermuda Islands, Canada, Qipro, Egjipti, Holanda, Hong Kongu, Mecsico, Germany, Nigeria, Peru, Singapori, Switzerland, Tunisia, Ukraina etc have regulate the arbitration issue based to Model Law – UNCITRAL. .

[13] Example United Kingdom

previous contracting of its competences and the second when the parties agree to solve the case in an arbitration tribunal.

Recognition and implementation of arbitration decisions

The problem of recognition and implementation of arbitration decisions is reflected in the fact that these decisions in direct way force the state authorities to implement all of them without exception. This means that if the party lose the contest and do not voluntary accept to fulfil the obligations of arbitration decision then is obligated to implement this through national courts.

The bases of Model Law are the parties' willingness autonomy and consensuality principle to avoid the jurisdiction of regular national courts and contracting the arbitration tribunal. In way to avoid such situations and to facilitate the recognition and implementation of arbitration awards, international convention (the most important is the New York convention) and Model Law that uniformly is every state's task to approve and implement the law for the arbitration in international commercial with which will assure the recognition and the implementation of arbitration decisions.

This would ensure that the arbitration's decision, regardless the country when the decision was taken will be recognized as obligatory for the competent court also in the foreign country.

4. Arbitration procedures according the law for arbitration in the Republic of Kosova.

The Law of the Republic of Kosova for the Arbitration defines the arbitration agreement as "agreement reached between two or more persons, and some or all the juridical disputes raised or may arise between them, will be subject of arbitration". (art.2).[14] The dispute can be solved through the arbitration only if there exists an agreement between parties (art. 5.1). An important issue for the arbitration is that parties deliberately have agreed to use the arbitration and to renounce the right for judicial review in country's courts. The definition if the parties have agreed for arbitration is regulated by the art. 6. of the Law of Kosova for arbitration, which is discussed below.[15] The law for civil procedure contains similar dispositions (art. 511.1). Kosova law for arbitration requests that the agreement of arbitration must be in writing (art.6.1). The law incorporates amendments of UNCITRAL Model for the arbitration law, done on 2006 that define that the arbitration law have to be in writing form or documented by ..... (art. 6.2). This avoids the need for signature and make possible to have the document by modern methods of communications (telecommunication, electronic communication, etc). However, if a consumer is the arbitration agreement part, then the agreement of arbitration is considered to be stipulated in writing form if all parties in this agreement sign personally the document containing the arbitration clause (art.6.3).

According to Kosova law for arbitration in case of failure of arbitration form agreement, the arbitration tribunal do not accept the case (art. 6.4). In accordance with UNCITRAL Model the agreement can be in the form of inclusion the clause for arbitration within the main contract or as a special agreement for arbitration. As long as this is not defined in an explicit way in the Law of Kosova for arbitration, this means that referring to the clause for arbitration art. 6 the law for contextual procedure require a writing agreement through modern form of communication (art. 511.). In the same time is emphasized that the arbitration agreement is valid if is included in all the contract.[16]

4.1. The parties included in the agreement

The individual and juridical persons have the right to be parties of an arbitration agreement. The definition "juridical person" includes the juridical persons which are defined according to the private and public right (neni 2).

4.2. Arbitration fields

Kosova law for arbitration is applied for the arbitration of all the disputes in all civil and economical issues unless is prohibited by other laws (art. 5.2). The disputes that belong to these two categories (civil-juridical and economical - juridical) cannot be subject of arbitration. The wild field action of Kosova arbitration law is in accordance with the UNCITRAL Model for arbitration law (art.1) that defines that the term "commercial" should be interpreted in way to cover the issues emerged by all relations of commercial character, independently the fact if are ore not of contracting character.[17] *The law for contested procedure determines that the parties may agree to solve the contest which emerges from material juridical relation (art 511.2).*

4.3. The division of arbitration clause

The art.14.1 of Kosova law for arbitration applies the division principle. With the aim of defining the availability of the agreement and arbitration tribunal competences to solve the disputes represented the arbitration clause that is part of the contract is considered as special agreement of the contract.[18] As a result of this, if the decision of arbitration tribunal says that the contract is not valid do not mean "*ipso jure"* the invalidity of arbitration agreement.

4.4. The impact of the agreement

In accordance with UNCITRAL Model for arbitration law, the Kosova law for arbitration requires from the court to dismiss the petition if the respondent person in his answer is called by arbitration agreement, except cases when the court concludes that the arbitration agreement is not valid or the contesting issue is not covered by the arbitration agreement (art.7). Before starting with arbitration procedure, the arbitration tribunal decides for the

[14] http://www.kosovo-arbitration.com

[15] Systems for enforcing agreements and decisions program in Kosovo – USAID 2010 pg-6

[16] Systems for enforcing agreements and decisions program in Kosovo – USAID 2010 pg-10

[17] Systems for enforcing agreements and decisions program in Kosovo – USAID 2010 pg-10

[18] Systems for enforcing agreements and decisions program in Kosovo – USAID 2010 pg-12

competences to solve the dispute that is submitted in the validity of arbitration agreement (art.14). *The law for contesting procedure has similar dispositions (art. 514 and 520.* If the respondent does not present his answer and neither takes part in hearing or have not submitted any evidence in the term, the arbitration tribunal can continue with the arbitration procedure and issue the appropriate decision (art.26).

Conclusions

Arbitration is one of alternative and efficient ways of solving disputes. The companies in the conditions of the global economy are very interested to solve in rapid and non-bureaucratic way their disputes. The arbitration is a procedure that in nowadays dominates in contesting issues between the businesses. Actually, the most complicated and highest value issues are solved by arbitration tribunals in the entire world. The arbitration procedures are transparent and provide control means of the procedure for both sides. The procedure is foreseen by the arbitration rules, but the duration, the administration of proves is done in accordance with the parties. The parties are entitled to propose one arbitrator which has the professional and ethical capacities and to be impartial. The social – economic integration process for the countries which pretend to be an important actor of these processes is not easy. This is due to higher integrative costs. In the front of the governments and institutions are posed commitments in many dimensions to address the complex activity of integration. Among the most significant are estimated to be those who deal with harmonization of local and community legislation that facilitate or regulate the international trade. The development of international trade has begun to be more secure and dynamic in those countries which apply the Law Model for arbitration in international commercial known as New York Charter. The responsible governments which deeply understand and implement the principles of the free trade are focused toward the restriction of political and economical sovereignty in favor of direct implementation of arbitration decisions executing those without any exception. The rationality of this approach stands on the effects that have created the contractual right and the principles of the parties' autonomy to regulate the issues regarding the international commercial. It has been confirmed that the countries which have not yet prepared the legislative basis urgently have to draw up the law in accordance with Model Law for International Commercial Arbitration. The adaption and implementation of this law will influence in stimulating the integrative processes, in increasing the foreign investments and in increasing the new work places in many economic sectors.

I can conclude that in the Republic of Kosova exits a semi completed legal framework for the foundation and the function of Arbitration Tribunal. Depending on which stage of the procedure the case is, this framework includes the Law on Arbitration, the Law on Contested Procedure and the Law on Executive Procedure. Three issues must be prioritized; the first to draw up the secondary legislation, the second to promote the existence and functionality of the tribunal and the third to increase the confidence of companies that the contesting issues must be addressed to the Arbitration Tribunal of the Republic of Kosova.

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