Journal of Research in International Business and Management (ISSN: 2251-0028)
Vol. 10(2) pp. 01-05, April, 2023
Available online @ https://www.interesjournals.org/research-international-business-management.html
DOI: http:/dx.doi.org/10.14303//jribm.2023.007

Research Article

The nature of arbitration agreement: Case of Iran

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Abstract

The foundation and root cause of the institution of arbitration in the international and domestic arenas was the existence of a normal and public procedure in the formal existence, which resulted in a sluggish inquiry and the expenditure of money by the state and the disputing parties. Thus, in the majority of the world's nations, precise regulations regulating the various types of arbitration and its circumstances and effects were enacted. In the domestic arena, arbitration rules with a focus on civil law are considered to be among non-formal contracts, whereas in the international arena, Iranian Law, in accordance with International Arbitration Law, considers the arbitration contract to be among formal contracts and emphasizes the need for a written arbitration contract; furthermore, in domestic regulations, the arbitration agreement is considered to be subject to the main contract, whereas in Iranian Law on International Arbitration Law, the arbitration agreement is considered to be subject to the main contract.

Keywords: Agreement, Arbitration, Autonomy, Condition, Formal, Non-formal

INTRODUCTION

Numerous disputes referring from international commerce interactions are currently resolved through arbitration. This method of dispute resolution is favored by international commercial activists for several reasons, including its low cost, the secrecy of the investigation into the disputed issue, which protects the commercial secrets of both parties, the absence of red tape in the procedure, and the distrust of each side in the neutrality of a court located in the home country of the other party. In fact, in order to avoid such complications, parties to an international trade contract agree to arbitrate their dispute, which is a private arbitration that is acknowledged internationally.

The arbitration contract appears to have its own unique characteristics. In addition, this agreement has the majority of the effects of legally enforceable contracts and is irrevocable based on the originality of necessity and Article 10 of the Civil Law. In the event that an arbitration contract is terminated or rescinded, the arbitrators will ostensibly no longer be qualified to handle the matter, and it will be assumed by the courts. In the event that the arbitration agreement is conducted as a separate contract from the arbitration subject contract and the dispute, it has its own specific effects and the general conditions of the validity of the contract are also binding in this contract; and in the case of conditions terms of contract, it will be subject to the main contract, and in the event of invalidation or cancellation of the main contract, the arbitration contract will also be null and void.

Definition of arbitration agreement

Arbitration agreement is a contract in which two or more parties agree to submit their existing or potential dispute and argument to the investigation and opinions of a person or individuals other than the official judicial authorities. In the arbitration agreement, the arbitration or arbitrators may have been appointed, or it may have been indicated that the parties send their dispute to one or more arbitrators. The law has not prescribed a particular form for an arbitration agreement; therefore, it may be in the form of an official document or a regular document, and it makes little difference whether it is executed in court or outside of court and in the main contract (Ibid).

Received: 14-Feb-2023, Manuscript No. JRIBM-23-89374; **Editor assigned:** 16-Feb-2023, PreQC No. JRIBM-23- 89374(PQ); **Reviewed:** 02-Mar-2023, QC No. JRIBM-23-89374; **Revised:** 29-Mar-2023, Manuscript No. JRIBM-23- 89374(R); **Published:** 05-Apr-2023

Citation: EL-Annan S (2023). The nature of arbitration agreement: Case of Iran. JRIBM. 10: 007.

Types of arbitration agreement

Arbitration is a code based on the agreement of both parties to a contract, as stated in the arbitration contract. Arbitration contract may refer to either arbitration contract or arbitration clause, since clause is also considered as a type of contract that is based on the agreement of both parties and is included in another contract at their discretion. Arbitration clauses are typically employed when no dispute has developed and even when no dispute is anticipated. Article 1442 of the French Code of Civil Procedure defines an arbitration provision as a contract in which both parties agree to arbitrate any disputes arising out of the contract.

If, following the occurrence of a dispute, both parties independently reaches an agreement in the presence of the arbitrator to resolve the dispute, the resulting agreement is referred to as an "arbitration contract." According to French law, this contract is a post-dispute agreement in which the subject of the dispute is manifest. However, it appears that this type of distinction between arbitration clause and contract was not strongly considered by the legislator, as the sides can also agree to arbitration by signing a separate contract prior to the occurrence of a dispute, as evidenced by Paragraph "C" of Article 1 of the International Commercial Arbitration Law and Paragraph "kh" of Article 1 of the Code for Service Provision of the Arbitration Centre of the Iran Chamber of Commerce (ACIC).

Specific conditions of arbitration agreement

Arbitration agreement, either as arbitration contract or conditions terms of contract, must have several specific conditions which include:

Specification of the subject of arbitration

Based on Article 458 q.a.d.m., if the arbitrator is chosen after the dispute, the subject of the dispute that is sent to arbitration must be explained, and the arbitrators must be informed of the specifics.

Specification of the subject of the dispute that is referred to the arbitration is often sufficient; however, the scope of the arbitrators' assignment must be specified in sufficient detail. In fact, arbitrators must examine and render suitable verdicts within the area of their assignment; consequently, they cannot research subjects that are not within the scope of their assignment and must investigate all subjects within that scope.

Determination of arbiter or arbiters

Under any case, in various types of arbitration agreements (autonomous agreement or arbitration clause), in addition to an agreement on referring to the arbitrator, the arbiter selection order or arbitrator(s) may have been defined. Article 455 substantiates. By way of the reference of Articles 460 and 464 q.a.d.m. with respect to the determination of arbitrator in arbitration contract, although in arbitration contract the arbitrator or arbitrators are typically determined, determination of arbitrator in the contract is not a requirement for contract validity. In accordance with Article 458 q.a.d.m., the characteristics of the arbitrator or arbitrators must be appointed in such a way that errors can be rectified in each instance when the arbitrator is chosen.

On the basis of this article, it is possible to argue that the arbitrator or arbitrators' decision is binding under the domestic arbitration contract. In international arbitration, determination of the arbitrator is not needed at the time the arbitration agreement is drafted; hence, determination of the arbitrators might occur after the main agreement and in the future. In the event that the arbitrator or arbitrators are determined in an arbitration contract, their acceptance is not a condition for the arbitration contract's validity, as the sides can agree on another arbitrator or arbitrators based on the criteria of Article 463 q.a.d.m. even if the arbitrator has been determined and that person does not want to or cannot judge. However, if another arbitrator disagrees, the arbitration agreement will become ineffective.

The effects of arbitration agreement with regard to the persons

Arbitration agreement, whether as a stand-alone contract or as part of the terms and conditions of a contract, is effective only with respect to the parties that governed it and has no effect on third parties. In fact, according to Article 457 of the Civil Procedure Code, "the third party that has been drawn to the Procedure against the law or has entered the dispute before or after referring the dispute to arbitration, can agree with both sides of the main argument in referring the issue to arbitration and determining the appointed arbitrator or arbitrators; and if no agreement is reached, his/her argument before the regulations will be investigated autonomously." Ineffectiveness extends to the heirs of both sides, as well, making arbitration inapplicable (Eisenberg, 1994).

Therefore, if after agreement one of the parties dies, arbitration will be abolished and the heirs will not be subject to the agreement (protection of each party also eliminates arbitration). (Paragraph 2 of Article 481 of the Civil Procedure Code); nonetheless, the question is whether the assignee is also bound by the arbitration clause if the subject of the main contract is transferred to another party after the arbitration contract has been executed. As the "third" assignee is not considered and the abolition of arbitration has only been foreseen in the event of death, protection, and agreement, a positive response should be provided (Karimi & Parto, 2012).

Arbitration contract; formal or non-formal

The legislator who in the past legislative periods made a special effort to regulate arbitration, tried to legislate and

pass the International Commercial Arbitration Law and General and Revolutionary Courts Procedure in civil matters in the years 1997 and 2000 by distinguishing between domestic and international arbitration. International arbitration is governed by the International Commercial Arbitration Law, whereas domestic arbitration is governed by the Civil Procedure Code. By examining International Commercial Arbitration Law and the Civil Procedure Code as well as the doctrine voted about the form of arbitration contract, it is hoped to ascertain the legislative intent regarding the formality or informality of arbitration contracts. Due to the consensual nature of the contracts and the absence of a reference to the Civil Procedure Code, some individuals do not believe that a formal agreement is required for the fulfilment of an arbitration agreement.

From this perspective, social interests are insufficient for considering a contract formal, and for the formal or solemn form of a contract, stipulation of law is required, not social interest; and despite its accumulated corrupt sequence, this theory appears to be consistent with the prevailing principles in Iran's domestic legal system. International Commercial Arbitration Law, which was enacted in 1998, is more explicit than the form of arbitration contract, and in Article 7, it requires the use of a written form of arbitration contract. Consequently, arbitration agreements governed by International Commercial Arbitration Law must be drafted in writing. However, it appears that the philosophy of referring to arbitration requires the arbitration contract to be in the written form, and can prevent the occurrence of many problems, such as: dispute in the principle of existence of arbitration contract and its conditions and restrictions; however, as long as these formalities are not stipulated by the legislator, the agreement of referring to arbitration cannot be regarded as a formal contract; thus, reform of the arbitration law is necessary (Dashti & Karimi, 2013).

The principle of autonomy of the arbitration agreement

Regarding the autonomy of the arbitration clause, some authors have argued that the primary condition is invalid and that the arbitration clause, like the other conditions and terms of the contract, is subject to the main contract and does not exist independently; however, the arbitration clause is not required to comply with the main contract. The proponents of the arbitration provision's lack of autonomy use the concept of (accessorium sequitur principal) and argue that the contract's claim of nullity immediately incorporates the arbitration clause provided in the contract (Collier & Lowe, 2000).

According to them, as long as the assignment of the contract's validity or invalidity has not been resolved, the arbitration clause is also vulnerable to the claim of invalidity and its fate is uncertain, and this should be explored by the court. Consequently, the arbitration reference is ineligible to investigate the qualification based on the arbitration clause. In addition, arbitration is an exception to the concept of qualification of courts of justice, and the principle is implemented in the event of reluctance. Opposed to this view, proponents of arbitration clause autonomy argue that this clause is independent from the main contract and is unaffected by its possible invalidity or nullity. In other words, the arbitration provision is an independent contract in terms of subject matter and verdict, as the subject matter is the purpose of both sides for the separate contract and the mere fact that it was mentioned in the main contract does not refer to the circumstances of the contract (Kaplan, 1959).

In addition, the conditions terms of contract typically pertain to the subject of the contract and are compatible with the subject of the deal (such as the conditions related to the particulars of sale or the method of submitting or the method of payment, etc.), whereas the arbitration clause is not compatible with the main deal and should not be confused with the terms of the deal. The philosophy and intent of the arbitration clause is to refer to arbitration all disputes between the sides regarding the main contract. One of these disputes is the dispute over the validity or invalidity of the main contract, and if we consider it an exception to arbitration, we have acted against the intent of both sides (Soltani, 2017).

The principle of autonomy of arbitration agreement in Iran’s law

In Iran's legal law, is arbitration agreement independent of the signed contract to resolve disputes arising from that? In order to address this question, the case in which the dispute is sent to domestic arbitration must be distinguished from the case in which international arbitration is considered, as the answers in these two forms of arbitration are not same (Seifi, 1998).

The civil procedure code

Article 461 of the Civil Procedure Code states, "When there is a dispute between the sides about the concept of agreement or contract regarding arbitration, the court investigates it and then renders a decision." As can be observed, this article focuses primarily on the fact that the sides differ on the deal's principle (that is, its validity and nullity) and that the court must investigate and remark on the nature of this dispute. As this article immediately follows Articles 459 and 460, which refer to the determination and nomination of the arbitrator by the judicial court, it is clear that Article 461 has considered the autonomy or lack thereof of the arbitration provision from the main agreement (Karimi & Parto, 2012).

This article also intends to express the dependence of the arbitration clause on the main contract, since if a court determines after an investigation that the main contract is invalid, it should disregard the arbitration contract and not attempt to select an arbitrator so that the arbitrator can investigate the effects of the invalidity of the main contract. The basis for disregarding arbitration is also that the arbitration contract is void due to the invalidity of the main contract (Lew et al., 2003).

However, if the validity of the deal is determined, investigation into the dispute resulting from such a deal must be delegated to arbitration, unless the arbitration contract is void, in which case the court must investigate the effects of the announcement of validity of the main contract at the will of both sides and one of them. Accordingly, there is no error in the view that: "The requirement for referring to arbitration, which is incorporated in the main contract, is a consequential condition whose fulfilment is required only if the contract is effective and legitimate. Therefore, the dispute over the conflict's legality cannot be addressed to such arbitration". Since, as some authors have stated, the soul and concept of the dominant law in the relationship between the main contract and arbitration clause determine compliance with the terms of the contract, it is necessary to specify the limits of this compliance (Waldron, 1950).

International commercial arbitration law

The autonomy of the arbitration clause from the main contract is addressed as a substantive problem in the second section of Article 16. Based on this section, a contract's arbitration clause is considered as a separate agreement for the purposes of this law's enforcement. The arbitrator's decision regarding the nullity and ineffectiveness of the contract in and of itself will not invalidate the arbitration clause specified in the contract. Regarding this Article, an explanation appears to be required.

First: Obviously, when the arbitration clause that is part of a contract is seen as an independent agreement, the agreement that is regulated after the occurrence of a dispute and independently between the parties for referring their disputes to arbitration will be regarded as independent. Consequently, despite the fact that this article refers to the autonomy of the arbitration clause, the autonomy of the arbitration agreement has unquestionably been considered by the legislator, regardless of whether this agreement has been regulated as a condition or as an independent contract (Shams, 2002).

Second: the final portion of Article 16 only addresses the effects of nullity and ineffectiveness of the (main) contract on the arbitration clause; nonetheless, cancellation of the main contract has little influence on the arbitration clause's binding condition. In France, for a long period there was a conflict between the courts on this matter. In order to settle this dispute, Paragraph 3 of Article 1458 of the new French Code of Civil Procedure states that the court of justice cannot decide its own disqualification in this instance.

The Civil Procedure Code in Iran lacks a specific guideline in this regard, but as this issue is one of the examples of judicial qualification recognition, it is important to understand how it might be handled. Obviously, if the court is unaware of the existence of the arbitration clause and neither party mentions its existence, the judge will conduct an investigation and render a judgement. In contrast, if one of the sides mentions the existence of the condition and objections to disqualification, the court must end its investigation until the other party suggests the nullity of the arbitration clause and the court accepts their grounds. When no party of an argument opposes to the qualification of the court and proposes arbitration, but the court observes the existence of an arbitration provision, this problem is typically challenged. In this instance, can the court issue a disqualification contract for the arbitrator? A review of the provisions of the Civil Procedure Code reveals that the principles pertaining to qualification have an authoritative aspect; therefore, the court has the authority to decide in every case involving the qualification of the court; and if it believes that it is not qualified to do so, it can issue a disqualification contract (or, in other words, a contract of not hearing the argument, since the court does not lose its innate qualification in any way). In reality, the arbitrator's qualifications are determined solely by the desires of both sides. Thus, they can both agree on this problem and, if they do, openly or implicitly invalidate it. In the event that one of the sides, despite a previous arbitration clause, has brought the dispute to court and the other party has not objected, it could be argued that both sides have implicitly breached their previous agreement by arbitration and, therefore, the arbitration court is no longer qualified to investigate the dispute settlement between them and the court of justice must investigate this dispute. Thus, the courts of justice cannot personally avoid investigation and issue the disqualification or rejection contract of the case by considering the sides' arbitration provision. Nevertheless, some professors assert that implicit termination of arbitration is not possible. It is only feasible with the explicit consent of both sides.

CONCLUSION

The arbitration agreement, whether a clause or contract, is an agreement based on Article 10 of the Civil Law, and like any other contract, it is necessary between the sides. However, a criterion for distinguishing a necessary contract from a permissible contract cannot be inferred from the verdict of the aforementioned article, and the criterion for distinguishing a necessary contract from a

permissible contract is that which has been expressly stated in Articles 184 and 185 of the C Existence of arbitration clause in the contracts causes the argument of the subject of the agreement to be considered as the qualification of the arbitrator, and the state court is prohibited from investigating it. If the arbitration vote is not terminated in the court and its request for identification is not rejected due to invalidation of the final vote, it is the reliable, effective, and final arbitrator of the dispute between the sides.

A review of the opinions of legal academics reveals that various factors can explain the rejection of arbitration clause depending on the main contract. In actuality, the assumed will of the parties regarding the autonomy of the two agreements and the existence of the international material principle for admission of this principle can each be a logical justification for the acceptance of the theory of autonomy; however, according to us, it is the practical advantage of the principle of autonomy that has led to its acceptance in the international community. Acceptance of "the theory of autonomy" promotes the appropriate resolution of disputes over foreign investments. Regarding the formal and consensual nature of domestic arbitration, it appears that so long as these formalities are not mandated by the legislature, the agreement for reference to arbitration cannot be regarded as a formal agreement. Consequently, reform of the Civil Procedure Code for recognizing the arbitration agreement as formal appears necessary and can be an effective step towards achieving arbitration goals.

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Citation: EL-Annan S (2023). The nature of arbitration agreement: Case of Iran. JRIBM. 10: 007.