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Arbitrage and the Arbitration Procedure

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Abstract:

The object of this paper is arbitrage and the arbitration procedure. Arbitration is a form through which the parties will resolve their contests in a more efficient manner. It is not the metric system or a replacement of the judicial system, but it is very helpful at the large volume of work of the courts.

Kosovo has its own Law on Arbitration, a law that determines the rules that apply to arbitration agreements, arbitration proceedings and the recognition and enforcement of arbitration decisions made inside and outside Kosovo.

This paper has its importance especially in the notice of the court in the most clear way on the role of the arbitration in the business community, to place them in arbitration proceedings, easing the burden of their long contest resolution, more optimal solution for parties especially in major economic contests.

The need for knowledge for such a research, what is the involvement of the court during the arbitration process, is it especially important in the field of legal education of legal professionals in practice, considering that refeiring to training judges methods which excels its effect and how to help as an institute and facilitate the work of the court.

Key words: court, arbitrage, arbitrator, arbitration agreement, arbitral tribunal

INTRODUCTION

Arbitration is the most perfect form of Alternative Contest Resolution (ACR) and closest to the state court proceedings. Its legal basis can be found in the national laws of various states.

In the modern world of business and technology, businesses are more inclined than ever to resolve contests out of classic court procedure.

As businesses needs and goals vary depending on the type of transaction, it is important to assess which way the contest resolution responds better to the transaction as concerned.

Arbitration is a procedure which dominates globally on the present-day contests between businesses. Most complicated contests and of a greater value are resolved by arbitration tribunals around the world. Arbitration is a more simple process, not costly (cheaper) and a quicker way to resolve conflicts. Arbitration is often used for commercial contests resolutions, especially in contests of a commercial transaction. Proceedings before the arbitration constitutes trial, because the arbitration settle the contest between the parties by the decision which is given in the form of judgment.

According to the Kosovo Law on Arbitration, a contest can be settled through arbitration only when there is an agreement of the parties, through which they accept the contest to be resolved through arbitration.[1]

The lack of an effective mechanism for ACR is a major obstacle to economic growth in Kosovo. Courts in Kosovo are faced with a large volume of cases filed day by day and those that have been collected for a long time.

Furthermore, even after a case has been examined, the judgment may not be legally valid because judges have lack of experience in the interpretation of commercial contracts.

[1] Law on Arbitration, no.02/L-75, article 5.1

Kosovo has a great need for an institution such as arbitration, for many reasons of which can be distinguished: the burden would facilitate arbitration courts, offers an opportunity to resolving the contests in a way that is more acceptable to business communities it encourages international trade and investments, freedom of the parties to decide how they wish to resolve contests between them.

JUDICIAL LIMITATIONS ON THE POWERS WHEN THE PARTIES HAVE CHOSEN ARBITRATION AS A MECHANISM FOR A RESOLUTION OF A DISPUTE

Most arbitration laws as well as international conventions do not go too far, but at least they allow a review of the existence of an arbitration agreement or a complete overhaul. In addition some arbitration laws provide a special act to settle the preliminary point of jurisdiction.[2] In other words, the court has a range of powers to intervene in the proceedings of the arbitral tribunal.

The precondition to avoid the court's jurisdiction is entering into a clear agreement between the parties to possibly resolve their disputes through arbitration.

Parties seeking a private solution to their dispute by referring it to an arbitrator or an arbitration tribunal consisting of three arbitrators. This can be done only by a written agreement. In fact there must be a contractual clause contained in the arbitration agreement. With these clauses parties exclude the jurisdiction of the courts.[3] The effect of such an arbitration agreement is that a State court has no jurisdiction, which in reality would not exist if there was no arbitration agreement.[4]

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[2] Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, (Holand: Kluwer Law International, 2003), p. 4

[3] Vjosa Osmani, *Arbitrazhi, Për EMSG-Menaxhimi ekonomik për stabilitet dhe zhvillim*, (Prishtinë: USAID, 2008), Moduli 3, p. 4

[4] Zivilprozessordnung § 1032 Schiedsvereinbarung und Klage vor Gericht

In the provision of the Kosovo Law for Arbitration it says*:" No court in Kosovo has the right to intervene in arbitration proceedings, unless it is otherwise provided by the law."*[5]

It is important to note that the restrictions on the powers of the court where the parties have chosen arbitration is a matter which is dealt very seriously by the courts of the majority of the signatory countries of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As an example, most European states maintain that the arbitration clause is an explicit exception to the judicial powers. In particular, Switzerland, which is known as one of the countries favoring arbitration, has taken the position that any interference is not allowed by the court, after it has started arbitration proceedings. Germany is the only European country, which law on arbitration allows the parties to submit a complaint to the court before the establishment of the arbitral tribunal. Justification is provided in the commentary to the German Law as something necessary for public policy issues and procedures. As we see, with some exceptions in the laws of some countries, such as Germany, the courts are usually not allowed to interfere and are obliged to direct the parties to arbitration whenever between them they are connected to a valid arbitration agreement.[6]

JURISDICTION OF THE COURT FOR THE REVIEW OF AN ARBITRAL AWARD ON JURISDICTION OVER THE DISPUTE, EXISTENCE OR VALIDITY OF AN ARBITRATION AGREEMENT

Determining the existence and validity of an arbitration agreement are issues that have caused much debate, with special attention on who will be the decision-making authority

[5] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 3

[6] Osmani, *Arbitrazhi, Për EMSG-Menaxhimi ekonomik për stabilitet dhe zhvillim*, Moduli 3, p. 5

on this issue, the arbitrators or the courts? On this question, the answer required competence-competence principle that arbitrators may decide on their powers, but the decision of the arbitrators may be a subject to be reviewed by court.[7]

The arbitral tribunal is an institution which exercises judicial power and the resolution of disputes through this institution presents alternative dispute resolution. This indicates that the arbitral tribunal has all legal powers as has the state court in connection with the exercise of judicial power.[8]

The arbitral tribunal and the court can consider in parallel the tribunal's decision on jurisdiction, substantive contractual issues and not attributed.[9] This situation can occur if one party starts proceedings before the arbitral tribunal based on an arbitration clause included in the contract, and the other party submits a claim before a court and requires discontinuation of proceedings. The question is which institution should suspend proceedings to allow the other to continue?

Starting from the principle of "competence-competence", clearly determined that the arbitral tribunal decides on its own competence. If a party is not a party challenging that right in the arbitration agreement (because it has not signed the arbitration agreement, it has been fraud in the arbitration agreement or if the dispute is not submitted to arbitration), it can participate arbitration proceedings. The party that thinks up the objection of competence which is based on non-existence, nullity or invalidity of the arbitration agreement, must do so in the proceedings before the arbitration, but not later than looked at the issue merits. If it's based on the fact that the contested issue exceeds the limits of the authorization it needs to be

[7] Ibidem, p.3

[8] Iset Morina, *Arbitrazhi dhe procedura e arbitrazhit,* (Prishtinë: Tribunali i Përhershëm i Arbitrazhit të Kosovës, 2015), p. 123

[9] Steven C. Bennet, ESQ, *Arbitration:Essential Cocepts,*(New York: ALM Media, LLC, 2002), p. 64

submitted shortly, as soon as it occurs. But if there are justifiable reasons, the objection of competence may be submitted later.

After the examine of the objection of the defendant, or after mainly investigating its jurisdiction, arbitration is declared competent or not competent to resolve the dispute that has been submitted with the claim. If arbitration concludes that it is not competent to resolve the dispute, he once declared incompetent to hear the parties. When calling itself competent arbitration and render a decision regarding the dispute, either party may attack it and seek the annulment of the state court.[10] The request must be filed within thirty days from the day on which the party received the decision.[11]

The request must be filed within thirty days from the day on which the party received the decision:

- confirm the decision of the tribunal related to his competence;
- to change the decision or
- cancel the decision in completely or in part.

If the arbitration agreement is challenged, the court must decide on its validity and give directions on the issue, even if necessary by prohibiting proceedings pending a determination of the case. [12]

If the tribunal decides to continue with the arbitral proceedings despite the fact that it is reviewing its decision on jurisdiction, there will be two parallel procedures. Some arbitral tribunals decide to suspend their proceedings until the decision on the competence of the tribunal by court.[13]

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[10] Faik Brestovci, *E drejta procedurale civile ndërkombëtare*, (Prishtinë: UP, 2000,) p. 146

[11] Osmani, *Arbitrazhi, Për EMSG-Menaxhimi ekonomik për stabilitet dhe zhvillim*, 2008

[12] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Pracitcs of International Commercial Arbitration*, (United Kingdom: Sweet & Maxwell, 2004), p. 399

[13] Brestovci, *E drejta procedurale civile ndërkombëtare*, p. 137

If the contract despite the existence of the arbitration proceedings initiated in state court, the defendant has the right to file the objection of competence.

Since the existence of the arbitration clause is necessary in order that the tribunal has proper jurisdiction, sometimes the parties go to court to prove the existence or non-existence of an arbitration clause. If the parties want to ensure that their arbitration clause will apply, they must ensure that this clause provides them the basic elements, particularly the intention to arbitrate, arbitration institution (if set ot institutional arbitration) arbitration rules, the number of arbitrators, place and language which will be used.[14]

When drafting arbitration clauses should be considered "availability" clause and the "existence" of the arbitration clause. Most legal systems are in favor of the tribunal to decide on these cases when it comes to determining the validity and existence of the arbitration agreement.

So, the validity of a jurisdiction clause of an arbitral tribunal derives from the clause. Thus any dilemma regarding the validity of that provision may encourage challenges to the jurisdiction.[15]

A tribunal usually does not begin to analyze in detail whether the arbitration agreement meets all the conditions of validity, unless one of the parties is challenging the tribunal's jurisdiction under an invalid clause for arbitration. The arbitral tribunal shall decide on the validity of the arbitration agreement and that it is competent to resolve the dispute which has been submitted. In this context, the principle of separability, an arbitration clause which is part of a contract, the agreement is treated as a separate and independent from the contract.[16]

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[14] Osmani, *Arbitrazhi, Për EMSG-Menaxhimi ekonomik për stabilitet dhe zhvillim*, Moduli 5, p. 13

[15] Ibid.

[16] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 14.1

If the respondent does not use the mentioned objection assumed that the parties have concluded (being released in consideration of the case) and quietly agreed to the cancellation of the contract on arbitration. If the court approves the objection, it declares incompetence and instructs parties to submit the dispute to arbitration.

LEGAL REGULATION OF ARBITRAL PROCEEDINGS

On 26 January 2007 "Arbitration Law of Kosovo" was approved, which was drafted with the assistance of USAID, based on the UNCITRAL model law on arbitration.[17]

Kosovo law has also incorporated the European Community Directive 93/13 / EEC, adopted on 5 April 1993 on Consumer Protection and the United Nations Convention on the recognition and enforcement of arbitral awards in foreign countries dated June 10, 1958.[18]

Arbitration procedure trials are regulated in a part of the Law on Contested Procedure, Law No.03 / L-006.

Kosovo Arbitration Law includes three areas of arbitration proceedings, the rules on arbitration agreements, which largely determine the principles associated with the formal terms of a settlement to the arbitration rules of the arbitral proceedings where the very process of pre-hearing, hearing, appearance statements, witnesses and other relevant issues, the rules on recognition and enforcement of arbitral awards-decision-making procedure, their form and effect as well as a requirement to be declared an enforceable decision.

In accordance with the UNCITRAL model of arbitration law, Kosovo Law on Arbitration expressly states the Court, front of which an action is brought related to a matter that is subject to arbitration and dismiss the claim if the defendant in his statement of defense invokes the arbitration agreement

[17] Flandra Kukovca, Tema e Masterit, "*Involvimi i gjykatës gjatë procesit para arbitrazhit",* (Prishtinë: Universiteti i Prishtinës, 2002), p. 42
[18] Ibidem

unless the court finds that the arbitration agreement is void or that the disputed subject matter is not covered by the arbitration agreement.[19]

Before the beginning of arbitration proceedings, the tribunal decides on the jurisdiction to resolve the dispute that has been submitted and the validity of the arbitration agreement.[20] Law on contested procedure has similar provisions.

Procedures for the appointment of arbitrators in accordance with the UNCITRAL model for the Law on Arbitration. Tribunal may consist of a sole arbitrator or a panel, the number should always be an odd number. The parties agree to the appointment and the procedure of their appointment. If you do not agree, the law defines the body of three arbitrators, one appointed by each party and the third chosen by the two arbitrators and shall act as chairperson of the arbitral tribunal. If a party fails to appoint its arbitrator or the two arbitrators fail to appoint a third party, within 30 days, the court may appoint the relevant request of the respondent.[21]

The provisions for challenging arbitrators in Kosovo Arbitration Law are similar to provisions of the UNCITRAL model.

The only basis for opposing the possible appointment if there is reasonable doubt about the impartiality or independence of the arbitrator, or if the arbitrator does not possess the qualifications to be agreed by the parties.[22] The parties may agree on the procedure for challenging the arbitrators and if such an agreement is not reached, either

[19] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 7
[20] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 14
[21] Kukovca, "*Involvimi i gjykatës gjatë procesit para arbitrazhit",* p. 43
[22] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 10.2

party may request an objection.[23] If the challenged arbitrator does not withdraw, the decision on the request for the arbiter disqualification is taken by the arbitral tribunal.[24] If the objection is not successful, the opposing party may ask the state court within 15 days, to decide the dispute. Against such decision it can not be appealed. Arbitration proceedings may continue and the relevant decision can be taken while the request is pending.[25] If an arbitrator is expelled or withdraws, the replacing arbitrator is appointed in accordance with the same procedure through which the original arbitrator was appointed.

Kosovo's Law on Arbitration provides that the tribunal or the parties may request the assistance of the court for the purpose of extracting evidence or carry out other legal actions to which the Tribunal is not competent to perform.[26]

The procedure for obtaining evidence ordered by the court during the arbitration process is the same as in court proceedings.[27]

As the Kosovo Arbitration Law allows the court to issue a temporary warrant at the request of a party regardless of whether the arbitration agreement or whether the arbitration procedure has been initiated. The party that poses request must present credible evidence that it may cause immediate or irreparable damage or loss of unless temporary measures are taken.[28]

As Kosovo Arbitration Law as well as the UNCITRAL model Law on Arbitration has to provide that the arbitral

[23] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 11.1-2
[24] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 11.3
[25] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 14
[26] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 28
[27] Kukovca, "*Involvimi i gjykatës gjatë procesit para arbitrazhit",* p. 44
[28] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 8

tribunal may decide whether it has jurisdiction in connection with a lawsuit and the arbitration agreement is valid.

Kosovo law establishes that the party should immediately challenge the tribunal's jurisdiction when it is informed on this matter. If a party disagrees with the tribunal's decision, it has a thirty-day deadline to ask the Court to review the decision. It is anticipated that the decision to the parties has the same legal effect as a final and binding judgment of the court.[29]

The law covers the enforcement of domestic and foreign arbitration. The request for the Court to declare local executable decision should be accompanied by a copy of the reaffirmed decision. The Court could disprove the decision if there is no basis to revoke the decision. [30]

The legal framework of arbitration in Kosovo's legislation is completed. Depending on which stage is the procedure that involves the framework of the Arbitration Law, Civil Procedure Law and the Law on Execution Procedure. [31]

THE PRACTICAL ASPECT OF KOSOVO ARBITRATION

In Kosovo, the arbitration court was established in July 2011 under the charter of a permanent tribunal, no.228, within the Kosovo Chamber of Comerce. In this context, it has not yet solved any specific case to the arbitration court, but now there is a dispute which lawsuit is onging.

In legal terms, an issue that will be brought before the court (eg on request of a party to seek judicial review would be resolved in this way): Supposed that a contract between the

[29] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 38

[30] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 38

[31]Tribunali i Përhershëm i Arbitrazhit i Kosovës, *Legjislacioni Kosovar i Arbitrazhit,* http://kosovo-arbitration.com/legjislacioni-kosovar-i-arbitrazhit, (accessible on:14.10.2016)

plaintiff and defendant both society operating in Pristina. The contract on behalf of the claimant's personal assistant, signed by the company director leader of the plaintiff, who according to his contract had no authority to sign any contract. Despite what the respondent considers the contract as valid. Further, the arbitration agreement only refers to "arbitration" without specifying no institution or the Arbitration Rules or the number of arbitrators. After that the case can be sent before an arbitral tribunal, the respondent shall appoint an arbitrator, which does not inform the plaintiff. In the end the tribunal consists of 4 members which is not allowed by the Kosovo Law, under which the number of arbitrators shall be odd. In this case, the court can cancel the decision for the following reasons: the party who has signed the agreement had no authorization, the arbitration agreement was not valid, the applicant was not notified of the appointment of an arbitrator, the composition of the tribunal is not in compliance with applicable law.[32]

The request for the annulment of the decision must be submitted to the Court not later than ninety days from receiving of the decision by the parties. The Court may annul the decision and return the case to the arbitral tribunal to initiate arbitration proceedings again or to take such an action, which according to the arbitral tribunal will eliminate the reasons for revoking the decision.[33]

The court decides the verdict. Before rendering a ruling the Court is obliged to hear the opposing party. In the case of lodging a complaint for annulment of the decision from the arbitral tribunal, the court is obliged to hear all sides.[34]

[32] Osmani, *Arbitrazhi, Për EMSG-Menaxhimi ekonomik për stabilitet dhe zhvillim*, 2008

[33] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 36.4

[34] Assembly of the Republic of Kosovo, *Law No. 02/L-75 on Arbitration of Kosovo*, 2008, article 37

CONCLUSION

I do not mind that judicial review may be needed as an opportunity for consumer protection, but then the danger is that the process may lose flexibility and speed which is one of the biggest advantages of the arbitration process. The wrong review process can be very inefficient and involves risk vain effort of the arbitral tribunal. Any review of a decision in court is very limited.

The first challenge in creating a system of arbitration is to address the downturn facing provisions between the Law on Arbitration and Chapter 31 of the Law on the Contested Procedure of Kosovo, based on the principle "Lex Specialis Derogat Legi Generali" (special norms repeal the general norms), and taking into consideration the principle "Lex Prior Specialis Derogat Legi Posteriori Generali" (norms of previous special repeal later general norms), should be clarified that disputes within the scope of the Kosovo Law on arbitration does not subject to the provisions of the arbitration law on the contested procedures.

The second challenge in creating a system of arbitration is the creation of institutional arbitration of high quality (sponsored). Kosovo's Chamber of Commerce and American Chamber of Commerce in Kosovo possess the best opportunities for the provision of arbitration services to a wide business community in Kosovo. It is just as important that the Kosovo courts have the capacity to execute the decisions arising from the arbitration, such as those issued within the country as well as those issued abroad. In this regard, the support of the Kosovo Judicial Council will be very important.

For a long time the courts demonstrated animosity towards the courts of arbitration. In any case, this attitude during its development period is being changed.

It is important that the courts understand their role and refrain from hearing matters where the parties aimed the use of arbitration to resolve their disputes.

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