ADVANTAGES OF INTERNATIONAL COMMERCIAL ARBITRATION IN RESOLVING THE COMMERCIAL CONTESTS

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Abstract

Flexibility and other advantages that the International Commercial Arbitration has in resolving commercial contests has made it possible that this mechanism be one of the key factors influencing the foreign capital in the developing countries, as well as signing of a large number of contracts involving a large amount of financial means. The purpose of this paper is to focus on analyzing the advantages of the international arbitration as a credible institution with a procedural and mitigating flexibility towards other mechanisms for solving commercial contests. From the other perspective, this paper analytically explains the reasons as to why the parties avoid other procedures in solving commercial contests. The main purpose of this paper is theoretical influence in promoting this institution by specifically focusing on the importance of the advantages that this institution has as compared to the other procedures in solving the commercial contests. This study will be carried out using content analysis method wherein a number of data from various authors will be analysed (analyzing the relevant literature for this institution through which advantages and disadvantages of the Arbitrary Procedure will be explained).

Keywords: *International Commercial Arbitration, contest, global dynamics, appropriateness.*

JEL Classification: K33, K34

1. Introduction

Advantages of the Arbitration Tribunal have increased the number of parties in this procedure; it has added up the number of International Organisations that monitor and arrange Arbitration hearings which have obviously had an effect on the unification of the International Arbitration Regulations. This trend has boosted the countries, on the other hand, to review their Law on Arbitration so as to adapt to the factic circumstances created (global trends) and become as more attractive as possible in procedure and this will further have a positive influence in terms of attracting foreign investitors.

This paper explains the composition of the arbitration tribunal, how the arbitrators have been elected by the parties as an advantage that this system has as compared to the other alternative means of solving the commercial contests with international character.

Besides, it also explains the procedural flexibility, how the arbitration hearings are held and other mitingating procedures towards effective and objective settlement of the above-cited contests.

2. Composition of the arbitration tribunal

One of the main advantages of the arbitration as a contest-solving mechanism is that the parties, out of free will, nominate the arbitrators as well as organize the Arbitration Tribunal. Thus, this is one of the advantages of the Arbitration as compared to the courts of a country that resolve the contests of the very same nature. In this part, arbitrators are first nominated and then their competencies and duties are assigned. Bearing in mind that the disputing parties within the International Commercional Arbitration are big companies which possess a big budget of the capital, electing the arbitrators is given a high priority by the parties by electing those who are more professional and more experienced in the field. The Authonomy of electing the arbitrators by the parties themselves is set forth by the UNCITRAL-it Model Law as well as the New York Convention according to which the compositon of the arbitration was not in accordance with the agreement signed

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by the parties, such a decision by this arbitration is not recognized and cannot be executed.[3] The parties are free to also assign the number of arbitrators.[4]

In order to analyse the advantages of this institution in this domain, we have to elaborate all the characteristics of this institution altogether and they are as follows:

a) Arbitration is a contest-solving mechanism – if there is no contest, there cannot be arbitration between the parties. The cases that are presented to the arbitration are usually those related to unfullfillment of the obligation of a party towards the other party. If there is a Preliminary Aribtration Clause over the agreement on the arbitration between the parties, the case may then be presented if the creditor is willing to ask for implementation of the relevant clause. If there is no such an agreement between the parties, the creditor, in order to realize his right, may then address to the relevant court so as to make the other party fulfill such an obligation by a decision of the court. [5]

b) Arbitration is consensual- According to some authors, arbitration should be founded on the agreement between the parties. This means that not only they should agree on arbitrating on the dispute they have but this also means that the competencies are limited to only what the parties have agreed upon.[6] The arbitrators may then lead the procedure and bring the final decision at the end, which is binding to the parties.[7]

The arbitration procedure can occur if all the parties involved agree to use this way of solving their dispute. Some authors emphasize that "The main characteristic of arbitration is that it is based on the reconciliation of the parties."[8] Reconciliation of the parties limits the power of arbitration, because the arbitrator may act only in accordance to the agreement between the parties. If they have no clause in their agreement over the arbitration, later on, they may sign an agreement after disputes appear, which is known as their additional part.[9]

*c) Arbitraiton is a private procedure***.** Arbitration is not a part of the state court system. As mentioned earlier herein, this is a consensual procedure based on the agreement between the parties. Nevertheless, it has the same function as any other institution in the judicial system of the country. The final result is bringing a decision that is executable by the courts, usually following the same or a similar procedure of executing a judicial decision.[10]

Thus, it is important that the parties involved in an arbitration procedure have the authonomy to decide on how they want their case to be solved. If all the parties involved in the arbitration procedure agree at any moment that their case to be settled in any other way, this is also possible. The parties are always free to decide on using the arbitration as well as not to use it any longer. It is important to note that for as long as the parties are totally free to decide to use the arbitration, they may also decide regarding the Arbitratin Procedure and review the decision brought by the State Court.

Arbitration makes a final and binding decision. Decision of the arbitration is confidential and aims to bring the contest between the parties to an end as soon as possible. The case decided upon may not be appealed. The fact that the decision is binding and may not be appealed is a substantial and distinguishing characteristic from the other procedures of the Regular State Courts, thus this is one of the key factors which prioritises the success of arbitration because this is how the dispute is

[3] New York Convention 1958, art V (1) (d).

[4] Dursun, Ar. Gör. Şeyda, *A Critical Examination of the Role Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent*, Yalova Üniversitesi Hukuk Fakültesi Dergisi, 2012/1, pp. 165, 177.

[5] Shining Guo, Edwina Kwan, Benedict Porter, Domenico Cucinotta, Mengtao Mao, *Fundamentals/An Overview on International Arbitration*, 17 June 2020, https://www.kwm.com/en/cn/knowledge/insights/an-overview-on-international-arbitration-20200617, visited on 09.05.2021.

[6] Bergsten, Eric E, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, United Nations, 2005, pp.,4-8.

[7] Benson Lim (Associate Editor) (Hogan Lovells) and Adriana Uson (Norton Rose Fulbright LLP)/February 12, 2019, *Relooking at Consent in Arbitration*, 1/12/ visited on 09.05.2021.

[8] Borba, Igor M, *International Arbitration: A comparative study of the AAA and ICC rules*, Marquette University, Milwaukee, WI, 2009, p. 3.

[9] Moses, Margaret L., *The Principles and Practice of International Commercia Arbitration*, Published in the United States of America by Cambridge University Press, New York, 2008, p. 3.

[10] Bergsten, Eric E, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, United Nations, 2005, pp.4-8.

resolved much faster.[11] It is important to note that for as long as the parties are totally free to decide to use the arbitration, they may also decide regarding the Arbitratin Procedure and review the decision brought by the State Court.[12]

All of the above are determining factors which prioritise the International Commercial Arbitration as compared to the Regular Courts, thus being a key factor in increasing the importance of this institution in the current trends of global and economic growth.

3. Advantages of international commercial arbitration

Taking the authonomy and the will of the parties into account, this has made this institution to gradually become more and more important in intensified period of globalism. International Agreements that regulate this matter continue to be signed and ratified by an increasing number of countries. The Arbitration Tribunals are treating an increasing number of cases continually. Today, there is a general perception that where the arbitration has been chosen we automatically understand that the parties have made such a choice as they better realize their interests.[13]

The reasons that the International Commercial Arbitration is more important is based on some points which make the arbitration more favorable as compared to judicial processes wherein the authonomy of the will of the parties is among the main ones.

1. *The decisions of the Arbitration are recognized and implemented in most of the countries worldwide.* Based on some International Conventions some of which have been analyzed in this paper, the decisions of the arbitration are recognized and implemented in most of the countries worldwide as a result of especially New York Convention is providing the structure of applying such awards.[14] Generally speaking, it is easier and simplier to know about and implement a decision of transoceanic arbitration than knowing about and implementing a decision of a court of a foreign country. The fact that the parties have chosen to use the arbitration in solving their case does not imply that they will not have problems in solving that case. However, if it was difficult to recognize and implement the decisions of arbitration, then this alternative method of solving disputes would neither be advanced nor it would be put into practice todate.[15]

However, the Arbitration Procedure will not be successful without judicial support. This shows that some countries are not attractive for the International Commercial Arbitration for a mere reason that their courts do not support the arbitration.[16]

2. *The cost* of Arbitration is another advantage. Judicial processes have a high cost in both the fields be it public or else in the private one. Arbitration usually includes a lower cost as compared to the judicial issues in the state courts. The costs of the lawyer are usually cheaper. The costs of travelling related to the trip of the parties to the destinations which is where the arbitration is held are not additional costs related to the arbitration. Even though arbitration has its weak points in this point there are still costs that are not required for the Judicial Prodecure (for instance, paying for the expenses of the arbitrators), yet the cost of the expenses of the arbitration is much lower.[17]

3. *Arbitration Procedure is shorter,* so this requires fewer working hours by the professional

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[11] Aceris Law LLC, *What Makes a Good Final Award in an Arbitration*? 12/01/2019, https://www.acerislaw.com/what-makes-a-good-final-award-in-an-arbitration/, visitet on 09.05.2021.

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[13] Bunni, Nael, G., *The FIDIC Form of Contract*, Blackwell Sciencies, 1996, p. 385.

[14] Martinez Ramona, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, UN Convention of 1958: "Refusal" Provisions, Vol. 24, no. 2, Summer 1990, pp. 493.

[15] Brown, Mayer, *The pros and cons of arbitration, LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc. © LexisNexis 2012 1012-080*, http://www.mayerbrown.com/files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Pros-Cons-Arbitration_oct12.pdf, visited on 12.05.2021.

[16] Marful-Sau, Samuel, *Can International Commercial Arbitration be Effectitve Without National Courts?* A Perspective of Courts Involvement in International Commercail Arbitration, University of Dundef, p. 6.

[17] Brown, Mayer, *op. cit.*, p. 3.

staff that is dealing with the arbitration case.[18] The time length of resolving dispute is yet another big advantage of arbitration as compared to the Regular State Courts. Even though sometimes, without their will the arbitrations may not control the deadlines of the Arbitration Procedure, or sometimes the parties have no fear of not respecting the deadlines in order to present them in arbitration, these cases are still rare.[19]

5. Finally, the fact that the parties *may elect the arbitrators*, the venue of the arbitration and the rules that will be applied in the Arbitration Procedure (the authonomy of the will of the parties) is yet another big advantage for private jurisdiction. It is possible to choose the legislation that best suits to the case and resolve it in the best possible way, instead of a legistlation that does not suit to the specific type of dispute.[20]

6. Another advantage is the possibility to choose *the language* in the procedure that will be followed and non-formal environment which is typical of an arbitration.[21]

7. *Confidentiality of the procedure*- It is one of the main advantages of the arbitration as compared to that of the Regular Courts. Appeals presented in courts are almost always open to public and this can cause big damage and serious loss to companies when the issue is related to industrial secrets. In the cases judged in the State Courts the authonomy of the will of the parties is totally excluded because the parties may exclude the public from hearings. Arbitration is carried out in the private offices and conference halls. This is another reason the parties decide that the contest be solved by the arbitration.[22]

All these above-mentioned advantages are main paradigms of the success of the International Commercial Arbitration. Some studies and information conclude that day-to-day arbitration is becoming more and more important in the modern world as one of the most effective way of resolving international commercial disputes.

Institutions such as AAA (American Arbitration Association) and ICC (International Chamber of Commerce) aim to resolve disputes deriving from all the parties worldwide. However, many Regional Arbitratoin Institutions have been created, and this means that the parties ask that there is a Regional Institution for monitoring their Arbitration rather than the above-mentioned global institution.[23]

Different places have been grouped to regional institutions, so as to make their group stronger in the international field. This way, institutions such as: EU and the Economic Chamger of Free Trade in the Northern America represent countries that are geographically connected and have a certain level of dependance.[24]

Regionalisation of Arbitration increases the quality of work of Arbitration as well as it increases its use worldwide and it is in accordance to global trends because regionalisation implies economic, cultural and political integration of the region which is in accordance to the process of globalization.[25]

As a result of transformations of the political systems and global economy, most of the authors consider arbitration the most appropriate and possible alternative in resolving International Disputes.[26]

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[18] Borba, Igor M, *International Arbitration: A comparative study of the AAA and ICC rules*, Marquette University, Milwaukee, WI, 2009, pp. 39-45.

[19] Allen, R. Clayton, *Arbitration: Advantages and disadvantages*, Allen &Allen, https://www.allenandallen.com/arbitration-advantages-and-disadvantages/, visited on 12.05.2021.

[20] Martinez Ramona, *Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions*, UN Convention of 1958: "refusal" provisions, vol. 24, no. 2, summer 1990, pp., 488.

[21] Sastrowiyono Akhmad Al-Farouqi, *The Pro's And Con's of Arbitration: A Study of International Arbitration with Perspective of Indonesian and Korean Law, LEXRenaissance* No. 2 VOL. 4 July 2019: 231-247 p. 237.

[22] USAID, *Training Manual, Arbitration*, Contract Law Enforcement Program, February 2014, USAID, Kosovo, p. 15.

[23] Granoff, Jonathan & Suleimenova, Aigerim, *Globalization and Arbitration*,, Aug. 10, 2012, http://www.americanbar.org/content/dam/aba/events/dispute_resolution/Globalization_and_Arbitration.authcheckdam.pdf. 16 January 2015.

[24] Olga Owczarek, *Regionalisation of arbitration: a new challenge*?, May 3, 2016, Practical Law Arbitration, Thomosn Routers, http://arbitrationblog.practicallaw.com/regionalisation-of-arbitration-a-new-challenge/, visitet on 09.05.2021.

[25] Ibid.

[26] Harmathy, Attila, *New Experiences of International Arbitration*, Electronic Journal of Comparative Law, vol. 11.3 (December 2007), pp..9-13., http://www.ejcl.org/113/article113-11.pdf, visited on 12.05.2021.

If we give an overview of possible tendencies in using arbitration in the future, without any doubts there will be:

An increasing number of arbitration cases. The clearest future trend of International Commercial Arbitration is that the number of cases is increasing. Despite the global pandemic which has made physical hearings more difficult to be held, many arbitrations have organized virtual hearings. At the same time, this shows the importance and necessity of this institution in the future. With the continuous expansion of international trade and investments, the number of arbitration cases will generally increase. Another reason for this is that some local courts in some of the regions of the globe are affected by corruption and companies consider arbitration a more reliable and neutral option. Another fact is that hearings are held privately and confidentionally, away from politicians, shareholders and media.[27]

Inreasing number of aribtration centers. For as long as there are no statistics to register the number of arbitrations ad hoc, the arbitration centers report a rapid growth of requests.[28]

A bigger uniformity of regulations. There is an unavoidable trend towards uniformity and harmonization of regulations and laws that regulate International Commercial Arbitration. In the last twenty years, uniformity of both the groups of regulations in arbitration as well as national legislation has increased. National law-makers are expected to be put under pressure by their business communities to adapt their law framework to the requirements of the international business practices, effective mechanisms of solving contests. Since 2006, a part of this process has also been UNCITRAL, which has engaged the working group in reviewing its regulations and have had many meetings in various countries worldwide in order to receive viewpoints from a wider group of the users of arbitration services. After the UNCITRAL-it regulations have been reviewed, other institutions have followed the same example. ICC has already started reviewing its regulations and LCIA has followed the same example undoubtfully. This obviously reflects the fact that the lawyers and arbitrators dealing with International Arbitrations are less dependent on their specific national features and are more open and flexible to particular disputes at international context.This increasing harmonisation of regulations will most likely continue, especially after new regulatioins of UNCITRAL- were approved in the summer of 2010.[29]

Increase of diversity in the subject matter of international arbitration. In the conditions of the subject matter of Arbitration the past has shown that techonological changes and the practice of International Contracts dictates the future of the International Arbitration subject matter. For instance, new types of contracts in fields such as communication, techonology transfer, genetic engineering, electronic, amusing and sports trade in the future, more particularly disputes in these fields are expected to be among the largest number of disputes that will have requirements from the International Commercial Arbitration. Increase of the importance of intellectual property implies that the World Organization of Intellectual Property should expand.[30]

All these predictions are based on the increasing trend of the importance of arbitration in the past. The trend of development and cooperation is expected to be more intensive than in the past, thus we will parallelly need an increased number of Arbitration Organizations.

4. Conclusion

The above – mentioned analyzed characteristics of the International Commercial Arbitration create a positive image of this institution, therefore it can be concluded that this alternative of solving contests is very effective in resolving international commercial disputes as compared to the other mechanisms and the dynamics of using this mechanism in the future will icnrease rapidly.

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[27] Herbert Smith Freehills LLP, *Rise in arbitration cases in 2020 despite reduced Volume of in person hearings due to coronavirus pandemic*, https://www.lexology.com/library/detail.aspx?g=caa661ab-434a-4856-8783-84f349e06036, visited on 09.05.2021.

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[29] Drahozal, Christopher R., *Diversity and Uniformity in International Arbitration Law*, Emory International Law Review, Volume 31, Issue 3, 2017, pp., 395.

[30] Rees, Hefin, *A Seminar on International Commercial Arbitration*, At 39 Essex Street Chambers, London, 13 May 2010, pp. 7-11.

Awareness raising using various means, such as: seminars, various workshops, meetings with foreign investitors and people who do business, especially trading, media, scientific publications and the impact of these means in using arbitrations increases commercial and economic opportunity and dependency in all the societies.

As a result of economic dependency through international business entities it is exptected that advantages in using this mechanism will increase further yet in the future, especially review and administering of proofs in arbitration hearings will be conducted using electronic communication platforms, for instance: Skype, Zoom etc.

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