

THE PARTIES' ARBITRATION AND ITS ROLE IN THE PARTIES' PEACE IN IRAN LAW

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ABSTRACT

In Iran law, the arbitration has been always respected as a way to resolve the problems and the disputes. By approving the arbitration act in 1927, it was predicted a kind of compulsory arbitration. The compulsory arbitration was continuing up in 1979. But now, with the exception of the divorce which referring the dispute to arbitration is still compulsory, in the other cases, referring to the arbitration is optional. The arbitration can be compulsory or optional. The origin of compulsion can be caused of the law, the contraction or the parties' request. Arbitration in family claims in the case of the lack of agreement to refer to the arbitration and presence the arbitrator, possess the required qualifications. In order to do that, the Article 189 of the Economic, Social and Cultural Development Program Law of the Islamic Republic of Iran, established an organization called Dispute Resolution Council. By approval of the general and revolutionary courts and proposing the strengthening judge, many questions arouse for the jurists. Some of them, due to the fact that the Article 6 of this law has been generalized and doesn't have any other explanation to be helpful, have announced that the Article 6 is the issue of the rules of the Public and Revolution Courts in order to make a religious way to the arbitration.

In this article, with studying about the arbitration contract and clause and the limits of the court intervention in arbitration, it's been tried to describe the arbitration structure and study the intervention cases of the courts to deal with the arbitration and the possibility to limit the court's involvement.

KEYWORDS: Expert, Arbitration, Peace, Opinion, Arising of Dispute

INTRODUCTION

The agreement of parties to refer the problem to the arbitration cause the court have no competency to hear the issue of arbitration, unless the arbitrator can't deal with the problem or the arbitrator's verdict is rescinded.

Referring to arbitration towards to the public and government property is dependent to the following rules:

1- If a party to a suit is an outsider, it's required approving the ministers council and the Islamic Consultative Assembly

2- If the issue of the dispute is important to the law, it's required approving the ministers council and the Islamic Consultative Assembly

3- in usual cases (except two mentioned cases), it's required approving the ministers council and notification of Islamic Consultative Assembly

The claims related to settlement of the bankruptcy issues, can be referred to the arbitration. According to Articles 9 and 13 of the Cooperative Economy of the Islamic Republic of Iran Law and the statutes of cooperatives, the judges must refer the files related to the cooperative corporations to the related associations. The following claims can't be referred to arbitration:

1- bankruptcy claims

2- The claims about the marriage, divorce, the arbitration is related to the people's personal interests.

In general interests (such as all not-litigious, penal and administrative matters) there is no the right of arbitration.

But about the expertise that is one of the important reasons of approving and is applied in the form of the files. The expert and witness's testimony is of the same type. The difference is the expression of them. The witness's conclusion is customary and exoteric. But the expert's conclusion has a long proceeding and also it affects on the conclusion. This strength and weakness has caused this fame that make the court asks the witness about the matter and asks the experts about his opinion. However, the current modern arbitration rules permit that the courts investigate, due to disregarding the natural justice. It indicates that the quality of arbitration's opinions is under the control. So, the juridical supervision guarantees that the norm of public orders isn't ignored by arbitrators. But in

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implementing this issue, the courts mustn't investigate the arbitration opinions according to the norms used in internal conflicts. The court intervention in the arbitral process can be divided into the three distinct steps:

- A- The court intervention before the judging
- B- The court intervention during the judging
- C- The court intervention after the judgment

In this article, it's been tried to study about the court intervention in the arbitration claims as assistance and supervising basis to determine the extent of the court intervention to support the arbitration process.

1- EXPLANATION OF THE ARBITRATION

Literally, the arbitrator and arbitration have the several meanings. One of its meanings is JUDGMENT and arbitrator has defined a JUDGE. Arbitration means sharing a complaint with a judge, petition, making the lawsuit one side, governing among the people.

In terms, arbitration is that the parties take their complaint to people not to the court, to solve the problem in a short time and without formalities (S. Afshar 1994, page 214).

To explain the status of the arbitration contract in terms of the validity condition of the agreement between the parties in the current law system, it's been paid first to study the arbitration contract (first speech), and then its formality (second speech).

2- THE NATURE OF ARBITRATION AND AUTHORITY OF THE ARBITRATORS

2-1- Peace among the people, a strengthening nature

The opinions are different about the arbitrator's authority. The jurists believe that the arbitrators can vote to addition not subtraction (Alhralamly 1992, VOL 1, page 429; Rohani 1993, VOL 22, page 253). Also about the arbitration nature that is attorneyship or judgment, there are different ideas. The jurists believe that the judges' action is strengthening not judgment (Hamou; Tousi 1988, VOL 3, page 191-192).

M. Nagafi (Saheb Javaher) concluded that judges take an action based on strengthening by virtue of verse 35 of Nisa Sura and the statements inserted in this regard (Najafi 1945, VOL 31, page 213-215). The jurists' difference of opinion about the judges' powers back to sayings narrated by innocent imams peace upon them. Imam Sadiq stated "it's not permitted for the arbitrators that divorce the husband and wife without their permission (in the divorce granted at a woman's request against compensation). The arbitrators have to bet with them that accept what they order, if they order they must divorce, they accept it and if they order they stay with each other, they accept (Alkini 1988, VOL 6, page 146). Some professors by virtue of the jurists' difference of opinion have written "the famous opinion in jurisprudence is that the arbitrators are forbidden to order to divorce" (Katouzian 2003, VOL 1, and page 346).

It can be concluded by the above matters that the arbitration has a non- juridical nature in Islam. It's a prevention policy. The arbitration issue includes all the family compliments. But for the current rules, the arbitration is considered.

2-2- The Necessity Nature

The arbitration is a duty sentence. But there's a difference of idea among the arbitrators that if the arbitration is obligatory or recommended. Shahid Sani believes to its obligatory (Al Jabi Al Ameli 1989, VOL 5, pages 429-432).

But some writers have concluded that the arbitration is a sufficiency obligatory that is undertaken on Muslim nation as a duty (Diyani 2004, NO 43, page 16).

THE COURT INTERVENTION

3-1 Before the Judgment

The court intervention before arbitration is the actions the court is obligated to do them before beginning of it. The court intervention begins when one of the parties referring to arbitration, claims that the arbitration contract is invalid. The reasons can be different, such as one of the parties' dissatisfaction with the arbitration and disorder in arbitration process. The court actions before beginning the arbitration divided to two issues:

- 1- The actions in the case of arbitration contract
- 2- The actions in the case of choosing the arbitrator

3-2 The Court Intervention during the Arbitration

During verification, the court can have an effective role. According to this fact that the arbitrator has the authority, so it's enough to solve the problem. By the way, during verification, the court is responsible for alter the arbitrator and in the case that one of the parties requests, it can act to alter the arbitrator.

3-3 After the Issuance of the Arbitration Judgment

The courts role according to the authority that they have in supporting the arbitration judgment will reveal after the issuance of the judgment and its execution step. The courts are the supervisory authorities in verification of judgment if there's any protest against them. Juridical control of judgment during verification causes it will be executed or it will be voided for the special reasons specified in the law.

THE ARBITRATION CONTRACT

The arbitration is a custom based on satisfaction of the parties that this satisfaction is written in the arbitration contract. The purpose of the arbitration contract is the arbitration condition, because the condition is considered as the contact that is based on the parties' agreement (Katouzian 2004, page 167, J. Langroudi 2001, page 268). If the parties' agreement be written in another contract to refer to the arbitration for the probably dispute, it's called "the arbitration condition". The arbitration condition is used just when the dispute hasn't arisen yet or even it's possible that never arises. The Article 1442 of the civil legal procedure of France considers adoptive 5 arbitration conditions that based on it the parties promise the dispute caused by contract will be settled by arbitration. If after the dispute, the parties agree to solve the dispute in front of an arbitrator this agreement is called "arbitration agreement". In France law, this contract is concluded after the dispute arises and its subject is specified (Karimi and Partou 2012, page 105). But it seems that this kind of dividing between the arbitration contract and agreement isn't considered by legislator so much, because before the dispute arises, the parties can come to agreement by concluding a desperate contract.

The arbitration contract in condition and contract, is an agreement that is concluded according to the Article 10 of civil law and like all the other contracts, it's needed the parties respect to it (Imami 2008, page 171; Katouzian 2004, page 253; Shahidi 2009, page 279). However the legislator in Article 481, consider one of the parties' death as decline of the arbitration. But this issue isn't conflict with the nature of revocable contracts, because the main criteria in distinction of the revocable contracts is the right of each party to terminate it and termination of the contract for death, lunacy and even in some cases is the feature of irrevocable contracts, because the death and interdiction can't terminate the contract even in some contracts such as donation. So against the Article 954 of the civil law, the sentence is not general and doesn't include all irrevocable contracts (Katouzian 2006, page 46). As the result, the criteria to distinct the revocable and irrevocable contract is what mentioned in Articles 184 and 1855 of the civil law.

3-3-3-2 The Arbitration Contract: Formality or Agreement

The Jurists agree in accepting the agreement in legal actions (Shaygan 1996, page 85, Adl 1999, page 96, Amiri Qaem Maqam 1999, pages 89 and 185, Katouzian 2006, page 88, Shahidi 2006, page 84, Safaei 2003, pages 42 and 48). According to Article 191 of the civil law, basically the contract is concluded with the agreement and it doesn't need to formalities. This group of contracts are called "agreement contract" since the parties agree on that. But sometimes this agreement is valid in the case of having formalities, it's called "formality contract".

The legislator set the document in concluding some contracts because of the importance of them. Setting the document in these contracts is necessary and they are invalid without it. In some cases, although the legislator considers the parties agreement in concluding the contract, but to him, it's valid just by a formal document (Katouzian 2006, page 352).

For example, the peace pact and a deed of grant should be in the form of a formal document to be proved.

The Article 454 of the civil legal procedure stipulates that "all people who have qualification of the claim, can refer to arbitration of one or some people, whether it's proposed in the court or not".

According to Article 455 of the civil legal procedure, the parties can be obligated or agreed that refer to arbitration in the case of the dispute. They can choose their arbitrators before or after arising of the dispute.

The lack of clearness of two mentioned articles about concluding the arbitration contract has caused that the legislators interpret it differently. As a result, some of them believe that setting a document is necessary to conclude an arbitration contract due to the mentioned issues and the other related issues in this field. Against, the agreement contract has some fans.

THE EFFECTS OF ARBITRATION

Arbitration is solving the dispute with the agreement of parties (Hayati 2005, page 521). The arbitrator is chosen by the parties before or after disagreement or it can be possible that the selection of arbitrator is delegated to the third party or in some cases, it's determined by the court (Mohajeri 2000, page 273). So, there are three possibilities in choosing the arbitrator: choosing by the parties, choosing by the third party and choosing by the

court. Although at first it's up to judge to alter the arbitrator verification to the arbitrator, but then, the court intervention during the arbitration verification will be inevitable.

CONCLUSION

It can be concluded that the court intervention in arbitration isn't not only disturbing of it, but even it can be supporting of that. However, the court intervention should have a specific frame and range to not to be interfered with the parties' goal, because if in some cases, the court intervene in the arbitration process without permission of the law or parties, then it causes unjustness and spoiling one of the parties' right or at least delaying in execution of the sentence. The arbitration is an independent structure that is powered by the legislator. It has a contractual nature. Despite the contractual nature of the arbitration, the arbitration authorities' goal like courts is execution of the justice. The agreement of the arbitration judgment with the public order of the venue is required to the juridical supervision, till the arbitration authorities get some powers like the court powers. The arbitration dependence to the courts assistance in the arbitration process and execution of judgment is inevitable.

Although it seems that the aim of referring to the arbitration is that the contract is written and it can avoid from many problems such as disagreement in the existence of the arbitration contract and its condition and limits. However, till when these formalities don't be stipulated by the legislator, the agreement to refer to the arbitration can't be a formality contract. So, it's necessary to adjust the civil legal procedure to present formality the arbitration contract. It can have a significant effect on realization of the arbitration goals.

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