Nature of Arbitration in Islamic Republic of Iran

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Abstract: Today, with possibilities which technology has provided human with, different relations in various communicational areas have changed. One result of these transformations is increasing expansion of international business. Modern business is crossing countries' boundaries with a significant speed, calling all nations for interacting and trading with each other. This institution has special rules and mechanisms in order to achieve its own goals. In the past legal orders, governments were using similar rules and mechanisms limitedly domestically. Although those national rules are still being exercised by governments in different legal orders, in relation to international business, those rules are such that they resolve problems created by the absence of a single legal order at international level and by government on the path of global business development. One of these institutions and mechanisms is prosecution which plays a crucial role in settlement of international merchants' disputes. Major character of arbitrators is their being consensual and contractual, which distinguishes this mechanism from others being used to settle disputes. Having looked at the background, advantages and characteristics of arbitration, present paper compares its nature with the most important other settlement methods, that is, judiciary consideration, compromise, and expert advice. [Ehsan Nazari, Mohammad Reza Ghaleghi . Nature of Arbitration in Islamic Republic of Iran**.**

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1. Introduction

Different verses of Holy Quran such as Sura Nessa, verse 57 and 59, and Sura Hojorāt, verses 9 and 10, refer to and recommend that compromise and peace be established among Muslims. In relation to divorce, Holy Quran emphasizes on referring discords to arbitration. On other hand, acceptance by Islamic Law of arbitration is evidenced by Islam Prophet's Sonnah which tries to compromise and settle disputes among individuals and groups as well as by the event of arbitration which occurred after Seffin War.

In Roman Law, freedom to conclude certain contracts has been recognized since Justinian I period although arbitration contracts were not included among them, they were not considered void even though, unlike a judge's decision, an arbitrator's was of no sanction and it was impossible that its substance be exercised through judiciary authorities. If both parties foresaw penal amend terms in their contract to be paid in case one party denied enforcement of arbitrator's award, of course, such compensation could be sought from denying party. But in the Middle Ages, private arbitral tribunals were created gradually with formations similar to those of arbitration institutions, with dispute parties being allowed to select a judge although this selected judge's rule was not binding like that of an appointed judge (Khazaie, 2007,20:7).

Since 19th century, arbitration has been led to becoming court. Alabama dispute between Great Britain and the United States of America resulted in conclusion of Washington treaty which formed a basis for major rules of international arbitration. Later, those rules were codified at 1899 and 1907 Hague Conferences and, then, other conventions were signed and went into effect and arbitration found modern and progressive rules (Safaie, 1996, 116).

1- Important and advantages of arbitration

Nowadays, in international business, most disputes are settled through arbitration which is a term of most respective contracts. What distinguishes arbitration from other ways of dispute settlement, especially from judiciary considerations in the courts, and leads to its preference is advantages this method has, among which followings can be referred to (Khazaie, 2007,7:84; Hause Messeninger,1991,223):

1.1- Typically, arbitrators are specialists in the matter of disputes, having more command of the material aspect of the, and both parties are free to select their own trustworthy arbitrators, on the other hand, which results in their more satisfaction with the course of dispute settlement.

1.2- Arbitration is away from legal complexities and difficulties and slowness of governmental proceeding, having no formalities, and it is claimed that it is faster and less expensive, has more

flexibility, and dispute parties are allowed to determine consideration rules.

1.3- Unlike judiciary consideration, arbitration is closed and confidential and dispute parties can protect their business secrets from prospect competitors and customers, other people, and finance office while preventing their enterprise's financial problems, conditions and experiences from being disclosed.

1.4- Arbitration is a peaceful method helping to maintain parties' subsequent business relations and to settle their disputes non-legally.

1.5- Arbitrator's award says the final word which is preferred by merchants to legal exact accuracy.

1.6- Compared to exercise of one country's court rules, that of arbitrators awards is easier in other country while doing so is more convenient at international level.

Despite these advantages, unfortunately, our country's domestic arbitration has not much developed due to such different reasons as lack of explanation an arbitration status, judges' doubt about legitimacy of arbitration and placing no value on it within judiciary procedures, low wages paid to arbitrators, and lack of people's awareness of this way of dispute settlement and its validity.

2- Definition and characteristics of arbitration

Arbitration is defined as a technique the aim of which is to settle a dispute in relation to two or more individuals' relationships by one or more other persons(s) called arbitrator(s) who are given the powers through a private contract based on which they give their awards with no such functions being assigned to them by governments (Safaie, 1996,84); and/or arbitration is defined as settlement of parties' dispute outside the courts by one or more persons selected by contract parties or third parties for this purpose (Shams,2005,3:521). Article 1 of international business arbitration law also defines arbitration as settlement of ligitants' disputes outside the courts by a (some) natural or legal person(s) (mutually agreed upon and/or appointed); however, it is impossible to give a single comprehensive definition generally agreed upon of arbitration in that it has particular meanings in different systems. And perhaps this is why typical UNCITRAL Arbitration Rules has given no definition of arbitration and provides merely in Article 2, clause a, that by arbitration means any kinds of arbitration whether or not it is managed (and attended) by a permanent institution.

In any case, to understand arbitration nature requires recognition of its characteristics, the most important of which are as follows and any mechanisms having these characteristics is considered arbitration:

2.1- Arbitration is a mechanism for dispute settlement, therefore, if there is no dispute, to outline arbitration has no basis.

2.2- It is consensual (explicitly or implicitly): dispute parties can refer the issue willingly and voluntarily to arbitration. So if any are forced to do so, such way is not regarded as arbitration. If arbitrator or law invites parties to refer to arbitration, but they establish no executive guarantee for it and parties agree on it, there will be no problem with arbitration since it is considered as mere invitation and guidance, not as force, therefore, it does not negate parties' consent and will.

2.3- It is private, not public, in other words, and official public authority or organization can't be in charge of arbitration (Khazaie,2007,7:44).

2.4- It results in a final binding award involving both parties' rights and obligation. That is, in case some dispute occurs, both parties must be required to refer the issue to arbitration and to accept and implement substances of arbitrator's award, otherwise it is not regarded arbitration (Bazgir,2001,45).

3- Arbitration and judiciary consideration

Arbitrators are given capacity and power under arbitration contracts, but in general, they are not asked to judge on and settle disputes exclusively. It is at this point where distinctions between arbitration and judiciary consideration fade, resulting in disagreements among jurists. On this basis, in contrast to a group who believe an arbitrator has no power but that which is given to him by a contract, whose award is to implement the very contract, there is another group who believe judgment and dispute settlement are a part of public services and an arbitrator's decision is, on its contractual basis, a judiciary one in nature, being a part of this very justice organization. It should be recognized that to give an answer to this question whether nature of arbitration is contractual or judiciary is practically useful just like answering this question: Is external arbitratory decision similar to that of external courts, or should it be treated as a private contract?

In any case, advocates of this view that arbitration is judiciary in nature refer to the following reasons in order to support it:

3.1- Like a judge, an arbitrator considers his capacity to deal with referred dispute. Such power has been given to arbitrators by Article 16 of international business arbitration law and typical UNCITRAL Rules while considering his own capacity to deal with brought actions is a competence/ capacity specific judges appointed by government and, as we know, such power is not inferred from substances of an arbitration agreement.

3.2- Today, it is accepted that an arbitrator can consider the claims of primary contracts' invalidity which involves arbitration requirement, which has been recognized by Article 16 of international business arbitration law and typical UNICITRAL Rules. This is the case while mentioned contracts are the only source of arbitrators capacity/ competence; and if the validity of such contracts is doubtful, the source of arbitrators' capacity is doubtful, too. On the other hand, decision of an arbitrator to cancel the primary contract, he still retains his capacity so the source of his capacity is not just parties' agreement but it is also acceptance of law and the former only provides the ground for creating legitimate capacity for an arbitrator.

3.3- As Article 30 of transnational civil procedure code principles states, final decisions issued in the course or at the end of proceedings hold in a foreign country naturally in agreement with regulations of these rules based on the type of procedure code need to be identified and exercised unless they are in breach of substantive public order and, on this basis, this award is identifiable and executable in other countries in case some principles of that, such as effective notice given to defendant, doctrinal justice and fair code, and effect of validity of judged matter, have been observed (Ghamami, Mohseni, 207,179).

Such a rule has been established by Article 35 of typical UNCITRAL Rules on international business arbitration; according to this and to Article 488 of civil procedure code, the order of arbitrators' awards' exercise is subject to that of courts' rules' which signifies judiciary nature of arbitration.

3.4- Arbitration institution like Source have special rules and formalities irrelevant to arbitration contracts, in other words, parties can refer their dispute to arbitration institutions only in accordance with agreement respective disputes, for this reason, arbitration nature and arbitratory consideration manner are judiciary.

Despite mentioned reasons, nowadays, predominant view is that arbitration is contractual in nature. Supporters of this view believe that an arbitrator capacity and competence is created by the contract and role of law is to accept validity of and to confirm such a contract, but this is not to say that arbitration has judiciary nature. Answers this last group gives to previous group's arguments are presented in the order of problems development:

Firstly, an arbitrator's decision on his own capacity is a basic, not a final, one. In other words, given quickly settlement of disputes inherent to arbitration, it is accepted that an arbitrator can decide on this matter preliminarily and begin to consider it if he considers himself competent, not waiting for the court's decision. But final decision on an arbitrator's competence is made bye a court given the executive guarantee included in Article 16 of international business arbitration law and typical UNCITRAL Rules as well as in clause 3 of Article 489 of civil procedure code; and in case the arbitrator is not competent, the court orders not to exercise the award or to cancel it if prosecution brings a matter against that award.

Secondary, given Article 16 of international business arbitration law and typical UNCITRAL Rules, today, and institution called "Arbitration condition independence" is accepted in International Business Law. Decision issued by Lord Scarman from British court defines this institution in this way "Arbitration contracts are mostly found in business, industrial contracts in the form of arbitration terms and conditions, but, according to the parties' intention, these contractual agreements are independent and separate, being subject to primary contracts "(Schmitov,2008,2:992).

According to this view, which is accepted as an institution today, arbitration requirement, which comes as a part of a contract and depends on it in terms of its creation, survival, and permanence according to legal logic, is considered an independent contract; and arbitrators are still competent based on arbitration requirement even if they have issued awards stating invalidity and nullification of primary contracts because inclusion of such a requirement implies that contract parties do not want courts to consider their disputes; and this incapacitation effect of arbitration contracts negates courts capacity and its inclusion effect gives capacity to arbitrators. With this argument, arbitrators' powers after announcement of contracts' nullification is also created and retained by parties' will and agreement.

Thirdly, this is true that an arbitrator's award is executable just like a court decision is, but this is not to say that arbitration is judiciary in nature because if it was so, like a judge, an arbitrator must monitor his award exercise while this is not the case since, according to Articles 25-27 of civil judgments enforcement law, monitoring execution of sentences and resolving problems occurred during the course of execution is a responsibility of the courts issuing sentences.

Fourthly, to refer disputes to arbitration institutions is optional, not compulsory. However, we have principle of prosecution legitimacy in our legal system, according to which if a general offence is committed (notice that offences are basically of general reputation), prosecution institution is required to prosecute the offence and offender (Zera'at, 2003, 168), in other words, in case an offence is committed, the matter must be brought to office of public

prosecutor. On the other hand, it is accepted by almost all institutions that dispute parties are allowed to select rules governing consideration or to change consideration rules of arbitration institution except for cases recognized as basic consideration rules by institution. Such authority has been accepted by Article 19 of international business arbitration law and typical Rules. If no such agreement is reached, rules of arbitration institution are exercised and this is the case while in judiciary proceedings, consideration rules and procedure codes are often imperative and parties' agreement does not matter in changing them (Shahbazinia, 2007).

Fifthly, there are several differences between arbitration and judiciary proceedings, some of which are represented below:

1- Unlike a judge, an arbitrator is not required to observe procedure code rules and evidence of case proof and even to observe substantive rules of obtaining rights.

2- What can be referred to justice relates to legal dispute settlement which may not be the subject of arbitration; a third party is selected by contract parties, for example, in order to reconsider or supplement their contract, circumstances of which changed. Such disputes cannot be referred to courts since they are not considered legal disputes (Safaie, 1996, 108).

3- Arbitration disappears in case of one party's death or interdiction (Article 481 of civil procedure code). This is the case while many jurists believe that arbitration is an irrevocable contract. In other words, arbitration contract and its obligations are standing due to contract parties and are not transferred to any persons (albeit being their heirs or deputies); but this is not the case in judiciary consideration.

4- Arbitrators are free to accept or reject arbitration, not being required to accept it unless they have already accepted arbitration in which case they are required to consider the matter. Rules of Articles 465 and 473 of civil procedure code support this statement, but judges are required to consider matters brought to them or they are considered as denying of justice.

5- Judges should not meet aspects of refusing to judge, including they should not be close relatives of the case parties, but this is not the case for arbitrators because they are selected by parties' agreement; Decision 1019, 03.01.1991 issued by division 22 of National High Court of cassation supports this statement, stating that "…Therefore, according to dispute parties' agreement, no problem is considered with awards of majority of arbitrators and since selection of arbitrators is based on parties' agreement, close relationships between them and dispute parties is not a cause to refuse to accept them … "(Bazgir, 2001, Decision 24).

Based on what mentioned so far, today, internationally dominant view is that arbitration is contractual in nature, however, it should be recognized that many arbitration effects are not caused by parties' will but rather by governments' will to involve citizens in judicial formations, in particular, as we know, principle of will rule has some limitations in all countries. Therefore, perhaps above view has been developed in an attempt to develop arbitration, in other words, by accepting contractual nature of arbitration, it provides the ground to give maximum freedom to the parties in order for them to establish their intended rules. As a result, more accurate view is that arbitration has both judicial and contractual elements (Schimtov, 1999, 2:990). In other words, basis of arbitration is both parties' agreement and it is impossible by no private treaty. Given the contractual element, arbitrators' consideration capacity is justified and they should not go beyond the scope of capacity conferred to them by parties. On the other hand, an arbitrators is a private judge selected, directly or indirectly, by both parties, who must, like a public judge, consider the dispute impartially with natural justice; he should make it possible for parties to take advantage of equal opportunities to adduce evidence, to prove claims, and to defend against other party's claims. And a court can annul an arbitrator's award if he violates law and/or makes a technical mistake, for example, he admits an unacceptable ground in relation to the matter in issue and/ or he passes a sentence on something outside the matter in issue or beyond limits of his capacity. So it must be accepted that arbitration has not only mixed nature but also compound rules. Arbitration and justice should not be considered as two rivals with conflicting behaviors, but rather they should be regarded as two arms of justice, which assist and cooperate with each other (Khazaie, 2007,7:34).

4- Arbitration and expert advice

Since disputes occur in different areas, each of which has wide technical and scientific aspects, a judge specialized in law may not be able to capture all litigious aspects of a case and to give a fair sentence. For this reason, nowadays, it is accepted by all legal systems that judges need to refer to opinions of knowledgeable and specialized individuals; this is also true for arbitrators although dispute parties can one or more arbitrators knowledgeable in the matter given the dispute area and their own relationships. In this regard, Articles 26 of typical UNCITRAL Rules provides that arbitration tribunal can also assign one or more experts to a particular matter and manage in such a way that they have access to necessary

evidence, documents and property unless both parties have agreed in a different way.

On this basis, expert advice is defined as some research the courts (or arbitrators) entrust to a qualified person called expert in order to discern the truth or to prepare its arrangements, and ask him to provide judges (public or private) with technical/ scientific or professional information not available to the courts (or arbitrators) and/ or to express his belief or opinion inferred from technical and scientific evidence (Katouziyan,2004,2:116).

Like arbitrators, selected experts must be impartial and independent and submit their complete and typical reports according to technical principles. Like arbitrators' sentences, such reports must be justified or they are not valid (Katouziyan, 2004, 2:153). On the other hand, dispute parties can select experts consensually, and these mutually agreed upon experts are called certifiers (Katouziyan,2004,2:120). Also, dispute parties can agree that the expert's opinion terminates their dispute, in which case expert's opinion, like an arbitrator's, will lose its appeal ability (provision of Article 331 of civil procedure code). Despite said matters, nature of expert advice is different from that of arbitration, some differences are pointed to below:

4.1- An arbitrators is entitled to manage and evaluate grounds, but an expert has no such competence, that is, an expert can only infer in relation to the matter aspects, express his belief, and reach at a conclusion, but he has no competence to comment on ruling aspect of the issue (Shams, 2005,3:342), and he cannot make a decision imposable on parties, therefore, as a judge's trustee and assistant, an expert provides him with his own specific opinions and elements of final analysis in order for the judge to make final decision (Ghamami; Mohseni, 2007,151).

4.2- Unlike an arbitrator's, opinion of an expert is final and decisive while either party can object his report and opinion by stating objection grounds. However, in some cases and for some types of arbitration, it is possible to appeal against the arbitrator's sentence, in contrast, in some cases, opinion of an expert is not objectionable and, for this reason, to distinguish arbitration from expert advice becomes difficult, therefore, sometimes an expert is given the title of arbitrator wrongly. In France, for example, those who were obliged to submit their reports to the courts after trying to make parties come to terms have been called reporting arbitrators frequently although there is some consensus that their reports do not impose any obligations on judges. On the other hand, if an expert, in some cases, reflects the truth strongly and reports result so that they could not be questioned and objected by arbitrators or judges who consider the dispute in next stage, we will face, not a simple expert advice, but some arbitration or over arbitration (Khazaie,2007,7:85; Safaie, 1996,85).

4.3- Given the arbitration definition, no compulsory arbitration exists, but for expert advice, it should be recognized that if there exist some technical and specialized aspects beyond the scope of judges' knowledge, it is compulsory to refer such aspects to experts. Of course, when the matter is such that any ordinary persons or any judges have knowledge of that due to their personal mastery, experts should not be referred to (Katouziyan, 2004, 2:116).

4.4- Conditions differ for arbitrators and experts. In Islamic Law, it is believed that all conditions essential for an appointed judge to have, including general conditions like maturity and wisdom and specific conditions like being Muslim, male, just and having independent judgment (*Ijtehad*), are essential for a ruling judge (Joneidi, 1999, 27) although condition of being authorized by Imam is not required. Today, general conditions like maturity and wisdom are not questionable, but for being just, all legal systems accept that an arbitrator needs to show practical justice, to observe equality of dispute parties. And this degree of justice is for sure within all Islamic Law texts (Joneidi,1999,27).

For condition of being male, it is said that since international business arbitration exclusively relates to financial affairs, it seems that women's arbitration is acceptable, particularly that the right to judge is one of Human Rights (Khazaie,2007,7:225); however our legislators' position is specified by conditions of ruling judges determined by jurisprudence (Islamic Law). Instead of declaration of arbitrators' positive conditions, Article 466 of civil procedure code declares negative conditions, stating that incapacity and conviction of prohibition of arbitration. Therefore, legislators' silence on arbitrators' conditions is in position of expression and, on this basis, rule of legislation is that any person can be selected as an arbitrator unless he is prevented from arbitrating under particular regulations and laws, therefore, it is stated that arbitration is a right which can be exercised by people having capacity to exercise, being allowed to be selected as arbitrators (Shams, 2005,3:536).

But not all individuals have the right to become an expert and everyone can't be selected as an expert because in addition to be trustful, an expert needs to have scientific and specialized qualification required by the matter referred to him.

5- Arbitration and accommodation

With regard to accommodation, a third party has the right to judge on fairness basis; he tries to give a

solution being accepted by both parties, therefore, it is both similar to and different from arbitration because the solution a mediator gives is binding only after it is accepted by parties and accommodation is reached, but an arbitrator's decision needs not to be accepted by parties, being imposed on them without their consent (Khazaie,2007,7:42)..*h*

4. Discussions

1- Today, most disputes on international business are settled through arbitration because it has advantages over dispute condition by courts, because of which merchants are interested in arbitration internationally.

2- Among major characteristics of arbitration are being consensual, private and final, which distinguish it from other settlement ways such as judicial consideration, expert advice, and accommodation.

3- Although some similarities exist between arbitration and judicial consideration such as considering his own competency (arbitrators' and judges'), validity of arbitration contract, and enforceability of the arbitrator's sentence (award), it is distinct from judicial consideration because of being consensual and of other aspects. However, this view that nature of arbitration is merely consensual and contractual can't be accepted given its effects which, in some cases, are outside limits of dispute parties' will and consent; and more accurate view is that arbitration has a mixed (contractual- judicial) nature, of course, contractual aspect is preferred.

4- Arbitration nature is different from that of expert advice. Among major differences between them, incapacity of an expert to comment on sentences as well as his opinion's not being decisive and final can be mentioned.

5- Arbitration nature is also different from that of accommodation because the solution a mediator gives needs to be accepted by both dispute parties while an arbitrator's decision is imposed on them, not requiring their acceptance.

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