SETTLEMENT OF DISPUTES THROUGH INTERNATIONAL ARBITRATION

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ABSTRACT

Arbitration is one of the forms of resolving disputes between states through judges who are chosen by the parties themselves, based on the rules of the Hague Convention for the Settlement of Disputes, which was approved in 1907. The most frequent forms of this type of judgment are related to the resolution of legal disputes between states that are related to the way international agreements are interpreted and applied. In this sense, the Hague Convention has had a tremendous impact on the role and functioning of arbitrations. On the basis of this Convention, many bilateral agreements have been concluded for the settlement of disputes through arbitration. Based on this fact, the Agreement on Inter-American Arbitration, which was signed in 1929, provided that member states can resolve all disputes between themselves through arbitration, if previously those states have not been able to resolve those disputes. through diplomatic means.

Keywords: Arbitration, dispute resolution, state, convention, party, court.

Entry

From a historical point of view, arbitration as an institution is recognized very early. In various forms, it is known since ancient times and in the Middle Ages. Unlike the classic forms, modern arbitration appears in the XVIII century, in the agreements between the USA and Great Britain. According to these agreements, both countries have been able to choose the same number of arbitrators in case of any dispute. Arbitration has the character of an institution which is formed by agreement between the parties in conflict. In this dispute, the parties agree on the law which should be applied in the specific case. Likewise, his powers are determined by agreement between the parties. These agreements that deal with the selection of the case for arbitration, with the fact which law will be applied and with the determination of the arbitrator's powers are known in the legal literature as compromises.

What are the main advantages of arbitration? Among the main ones can be mentioned:

a) the parties to the dispute can easily choose to handle their dispute before arbitration, rather than before the International Court of Justice, since when it comes to arbitration, those parties are not subject to much pressure of opinion;

b) the parties have greater confidence in arbitration because they also have their arbitrator in this body;

c) in arbitration cases, no third party is included as an interested party, as happens in cases judged before the courts; and

ç) in terms of cost, disputes that are handled before arbitration are lower in cost in terms of trial costs.

In contrast to the advantages, when we talk about the shortcomings, the following should be mentioned:

a) Complaint opportunities and instruments are missing;
b) In general, arbitrators are powerless to take measures against the parties;
c) Verification (clarification) of the actual state of arbitration. is more limited than in regular state courts;
d) Arbitration decisions are not immediately enforceable or are executed with more difficulty, etc.

It is worth mentioning here that some contentious issues, with different laws, are excluded from arbitrariness (eg disputes related to the arrangement of residential spaces, consumers, public interest, etc.). As a sui generis institution and as an exemplary modality of a different solution; alternative non-typical (state) disputes between the parties, has been raised and developed everywhere even at the level and dimensions of business and the global economy. Arbitration is now, without a doubt, the most admired and applied tool and option in the resolution of international disputes

What should be emphasized in this case is the fact that the decisions issued by the arbitration have a binding character for the parties and they are obliged to fulfill those obligations in full, and also these decisions are final and cannot be exercised legal order, in case each party is dissatisfied with those decisions.

Despite this, in certain certain cases the use of extraordinary means is allowed, for example the annulment of the decision or revision, in which case if there is no agreement between the parties to the dispute, international practice provides that these things can be done by the International Court of Justice. The reasons for allowing extraordinary means can be: canceled compromise, exceeding the competences by the arbitrator, application of the law for which the arbitration was not authorized, violation of procedural principles, corruption, fraud, deviation, etc.

Seen from a historical perspective, the Permanent Court of Arbitration, established in 1899 in The Hague, is the first step towards the establishment of an international court of permanent character. It is worth noting that the Permanent Court of Arbitration only had the International Bureau and a list of arbitrators, qualified experts in international law. From the general list of these arbitrators, the states concerned could choose, by agreement, arbitrators to hear the dispute between them. Seen from this aspect, this court was not permanent, because the body of arbitrators, in most cases, was made up of different people. The states freely decided which arbitrators they would trust to resolve the dispute. Efforts to create a permanent court continued after the Hague Conference (1899). In the second Hague Conference (1907), such an initiative failed due to disagreements that appeared during the drafting of the convention project regarding the method of electing judges.
International arbitration received a boost of development especially after 1950. In this sense, the UN in 1959 approves the New York Convention, which represents the basis on which everything related to international commercial arbitration is then built[1]. Further in 1961 the European Convention on International Commercial Arbitration was approved[2].

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, New York
[2] European Convention on International Arbitration, April 1961, Geneva

Regarding the arbitration procedures, concrete results were achieved in 1976 only with the Arbitration Rules which have been approved by the United Nations Commission on International Commercial Law known by the abbreviation UNCITRAL. Later in 1982, based on the above rules, a Guide to Arbitration was issued, while in 1985, the Law on Arbitration was approved, which not only supported the arbitration process, but was also characterized by the degree of freedom of the parties to develop a process such as they wish regardless of whether the arbitration may be institutional or ad hoc arbitration.

The role of regular courts in the effectiveness of the international arbitration process

In order for the arbitration process to be an efficient alternative in the out-of-court settlement of disputes, it is good that as an institution it is kept as far away from the influence of state courts as possible. Based on this principle, as a result of the improvement of international arbitration, especially after 1959, as mentioned above, thanks to the adoption of conventions, many countries began to adopt national laws that limited the intervention of their courts in arbitration processes.
Despite the fact that the parties are free to autonomously choose their own forms of dispute resolution, they often turn to the court of their own country during the arbitration process. So, there is a connection between the arbitration and the court, which connection is made possible through national legislations. This involvement of national courts in international arbitration processes begins before the arbitration tribunal for the settlement of disputes between the parties is established, where the lawsuit in the national court is used for the purpose of protecting evidence or to establish security measures in order to avoid damages possible, that can be caused to the claimant while the international arbitration process lasts[3].

When we talk about the role of national courts in the international arbitration process, we can say that this role includes two main functions of the courts: on the one hand, the courts provide assistance and support, and on the other hand, they play the role of supervision and control.
Although the arbitration process is considered independent from national courts, there are still arguments on the role of national courts in this process:

a) National courts are important in guaranteeing the integrity of arbitration;
b) Considering that the authority of the arbitrators derives from the agreement between the parties, there must be a system to monitor or control the work of the arbitrators when they exceed their authority outside the limits of the agreement;
c) The parties want legal certainty regarding the outcome of a process before arbitration, therefore the right to have the possibility of appeal to the national court against the arbitration decision must be guaranteed;
d) States themselves are interested in following arbitration decisions in order to provide protection for weak parties, third parties or for their own state interests;
e) The parties are not satisfied only with an arbitration decision which recognizes a right, but simply want that right to be executed and this possibility is guaranteed only by the national court, through the mechanisms provided for in the New York Convention.

Despite all this, the authority of the national court in the international arbitration process is limited, since that authority can be exercised only in cases of finding serious procedural violations or violations of the public policies of the state of the court's jurisdiction.

[3] UNCITRAL Model Law, 1985

Supporting national courts in imposing interim measures and preserving evidence throughout an arbitration process

During the development of an arbitration process, the national courts, at the request of the interested party, have the authority to establish temporary measures in support of the process, which request is first assessed by the court as to whether it is fair and appropriate, e.g. measures related to the issuance of interim orders, granting of guarantee measures, etc[4].

Another support that national courts can provide in arbitration processes is related to obtaining or preserving evidence that is considered valid for that process. In addition to domestic legislation, the Model Law[5] also provides national courts with such authority. In fact, this authority is attributed to the national court only within the state of the seat of arbitration[6].

Recognition and execution of arbitration decisions by local courts

Considering the fact that an arbitration award is final and binding on the parties, it can only be confirmed by the national court. The recognition and execution of these arbitration decisions implies the principle of "res judicata", that is, the matter has been judged, and in this case the process for the parties is considered closed.

In the event that the party that has lost the dispute in arbitration does not comply with the decision, then the party that has won the dispute will ask the court of its own state to enforce this arbitration decision through the apparatus of force, as it acts in cases others when it comes to court decisions. Based on the rules established by the New York Convention, national courts recognize an important legal instrument for the implementation of an international arbitration decision, with the exception of some cases or situations which the Convention itself has excluded[7].

Regarding this role that national courts have in the recognition and execution of arbitration decisions, today there is almost a consensus at the global level, without which role of the courts arbitration would certainly lack efficiency.

The basic features of the causes that can refuse the recognition and implementation of arbitration decisions are defined by the New York Convention[8], which causes are generally accepted by national courts. They are presented as follows:

a) Incapacity of the parties and invalidity of the arbitration agreement, which according to the Convention means the legal inability of a party to conclude an arbitration agreement. In this case, it should be noted that the Convention does not exclude the fact that a state or public body is a party to an arbitration agreement regarding a private law relationship. As for the invalidity of the agreement, this fact can also be used as a reason for refusing to implement the arbitration decision, e.g. when there is no will of the parties to conclude the agreement, or when the applicable law requires specific conditions that constitute the elements of the arbitration agreement, or in cases where the arbitration agreement is not concluded in written form, which leads to its invalidity and consequently even in the non-implementation of the arbitration decision[9]. Likewise, the question

[4] UNCITRAL Model Law, Article 9
[5] UNCITRAL Model Law, Article 27
[6] UNCITRAL Model Law, Article 1, par.2

[7] New York Convention, Article 5
[8] New York Convention, Article 5
[9] New York Convention, Article 2.2

of the composition of the arbitration forum, when it is not in accordance with the rules of the convention[10], can be considered as a reason for refusing to implement an arbitration decision.
b) Infringing on a fair and honest process, another cause is the recognition and implementation of a foreign arbitration decision, for the reason that the development of a fair process is considered a fundamental right for the parties in the procedure.
c) Exceeding the authority of the arbitration forum is also a reason for refusing to recognize and implement an arbitration decision. In other words, this excess of authority means when the arbitration award contains provisions beyond the requirements submitted by the parties.

Types of International Arbitration Awards

During an arbitration process, the arbitration forums, in addition to the final decisions they issue regarding all the claims of the parties in dispute, they can also issue partial, temporary decisions, but also various orders during the course of the arbitration process, but that these actions are not considered final arbitration awards.

When we talk about orders we say that they serve procedural issues, which issues must be resolved in advance in order for the arbitration process to move forward. This is about the issue of evidence, the place and time of the hearings, etc. And when we talk about the final decisions of the arbitration, it means the resolution of the rights of the parties in the arbitration process. Based on this conclusion, based on the New York Convention, only the final arbitration decisions have the status to be subject to judicial review in the country of origin or the country of implementation, based on the reasons that are foreseen by this Convention.

What distinguishes an arbitrator's orders from arbitral awards is that the orders are usually not reviewable by a court, despite the fact that they may be reviewed by the arbitral tribunal itself.
In the event that a party cannot challenge an arbitration order in court and is convinced that that order is unfair, the party must immediately file the challenge before the arbitral tribunal. This action will enable the party to, at later stages, defend the position that such an order was the cause of an unfair procedure that has made it impossible for the party in question to adequately defend the contested case.

The final decisions of the arbitration are considered those decisions of the tribunal by which all disputes between the parties are resolved. Such a final decision produces several legal effects. First, there is the possibility of its opposition by the party who lost the dispute and which party tried to annul this decision according to the laws of the country of arbitration.

In addition, another consequence of a final decision is the fact that it can be enforced through the intervention of the national legal order, according to the rules provided by the Convention, always assuming that it is a question of a country that is a member of the Convention.
Finally, the issuance of a final arbitral award has the effect of terminating the task of the tribunal, which then has no further jurisdiction.
Repeatable arbitration awards or in some other cases are used as interim awards, although different authors distinguish between these two terms. According to some authors, partial decisions refer to

[10] New York Convention, Article 5.2.a

substantial claims of concrete cases, while temporary ones refer to issues on jurisdiction or on the applicable law in the concrete case.

So, through these arbitration decisions, not all issues in the dispute between the parties are resolved, as was the case with the final decisions. When it comes to these types of awards, the UNCITRAL rules provide for the possibility that the arbitral tribunal may take interim measures, e.g. measures to store the goods in a certain place or even sell them if those goods can be damaged due to the deadline[11]. These actions of the tribunal can be considered as orders, but they can also take the form of a partial or temporary decision until the parties' dispute is resolved with a final or final decision.

Conciliatory decisions are another type of decisions when it comes to arbitration, which mean situations where the parties at any moment during an arbitration process, can decide to resolve the issue by agreement, terminating the arbitration procedure[12]. In cases where the parties reach such conciliation agreements on disputed issues, then they can further follow two paths:

a) They can format their agreement with a conciliatory arbitration decision; or
b) They can only be satisfied with the agreement between themselves.

Absentee arbitral awards are another type of arbitral award that means the situation where an arbitral award is made despite the absence of one party to the arbitration proceedings. In the event that the defendant is absent or withdraws from the arbitration process, the tribunal finds it impossible to automatically issue a final decision in favor of the other party, in this case in favor of the plaintiff[13]. In such cases, the arbitral forum must consider very carefully all the evidence presented and ensure a meritorious decision on the disputed issue. In such situations, the absence of the losing party in the process is an additional burden for the arbitration forum itself, which must prove that at each stage of the arbitration process, the party has been notified and offered every opportunity to be an active part of the process.

Conclusions

In these contemporary times, when there is a world that is developing at such a fast pace, and where international commercial arbitration is increasingly creating a monopoly as the most efficient way to resolve disputes of this type, the very important role of this the system. These processes, which are continuing to develop with great momentum, can be considered completely reasonable, based on the aspect of the definition of arbitration, the purpose for which it works, as well as for reasons of protecting the interests of the parties, which have believed and continue more and more to solve the disputes they have through this system.

[11] UNCITRAL Regulation, Article 26, paragraph 1
[12] UNCITRAL Regulation, Article 34, paragraph 1

[13] UNCITRAL Model Law, article 25.b

REFERENCES

- Alan Redfern, The Jurisdiction of an International Commercial Arbitrator (Mar. 1986).
- 2- Peter Stone, EU Private International Law, Harmonization of Laws (Elgar European law 2006)
- 3- Dr. Julian D.M Lew, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (1986)
- 4- HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON
- INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 4 (1989)(discussing UNCITRAL arbitration)
- 5- INTERNATIONAL CHAMBER OF COMMERCE, PUB. No.447-3, ICC (as amended Jan. 1, 1988)
- 6- Jean Robert & Thomas E. Carbonneau, The French Law ofArbitration (1983)
- 7- Jennifer Bagwell, Enforcement of Arbitration Agreements: TheSeverability Doctrine in the International Arena-Republic of Nicaragua v. Standard Fruit Co (1992)
- 8- Rene David, L'arbitrage dans le commerce international,Economica, 1982
- 9- Stephen M. Schweber, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS (1987)
- Prof. Dr. Asllan Bilalli Zgjidhja e Kontesteve Afariste nëpërmjet
- Arbitrazheve Tregtare Ndërkombëtare
- Ramadan Thaçi „E DREJTA E ARBITRAZHIT ", Prishtinë, 2012
- Prof. Dr Armand Krasniqi – E drejta biznesore ndërkombëtare
- Prof. Dr Armand Krasniqi – E drejta biznesore ndërkombëtare
- http://www. kosovo-arbitration. com/legjislacioni-kosovar-i-
- arbitrazhit
- http://www. gazeta zyrtare. com/e-gov, LIGJIT NR. 02/L-75
- http://www. gazeta zyrtare. com/e-gov, LIGJIT NR. 02/L-75
- Programi sistemi i përmbarimit te marrëveshjeve dhe vendimeve
- ne Kosove – USAID 2010 Programi sistemi i përmbarimit te marrëveshjeve dhe vendimeve ne Kosove – USAID 2010