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A Comparative Analysis of Setting aside the Arbitration awards of International Commercial Cases: A Case study of Iranian and Chinese Acts

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Abstract

Raising controversies in commercial and economy contracts within international arena has always overwhelmed the two parties of them; which is prolonged through procedures taken by Internal Forums. As a legal institute, arbitration plays a vital role in betterment of such situation through catalyzing the process by putting a faster end to the case and offering a simpler route. As a county with great number of commercial and economic relations with other countries of the world, China is considered as a country which has a significant role in International commercial system and Iran is not an exception to these countries. Commercial relations between Iran and China can be potential of some probable controversies and so an investigation into solutions to such controversies can be of great importance too. Aim of the present study is to investigate setting aside the arbitration in international commercial cases in Iranian and Chinese rules. After making an investigation of rules between the two countries, it can be concluded that there is no big difference between procedures employed by them in setting aside the arbitration though there are some disagreement about some rules. Thus, a true conceptualization of different dimensions of rules of setting aside arbitration in rules of these two countries can pave the way to solve many probable problems.

Keywords: Arbitration Law, International Commercial Arbitration, Iranian International Commercial Arbitration Law, Arbitration Law of the People's Republic of China, Set Aside Arbitration Award

Introduction

Economic and trade relationships have constantly been susceptible to probable controversies. Solving such controversies through arbitrage and the organ responsible for implementing it, i.e. arbitration, has always been and still is the best alternative. Although arbitration has not yet been successful of being considered as an alternative to public litigation within internal laws, it has gained a relatively significant role in the international arena. Todays, arbitration is deemed as an indispensable part of international law in a way that many organs in charge of the rights of international trade have been developed through arbitration. Merchants, economic activists and others have made agreement in referring their controversies to arbitration, instead of litigation; resisting this and solving cases in courts can be expensive and unusual. Nevertheless, arbitration within the boundaries of a country can be more simple and can rise less problems due to the notion that it follows a single legal set of riles. When inter-boundary factor is added to this organ, the issue becomes more complex. Better understanding of different rules of arbitration in other countries, particularly those which are in wide trade and economic connections with Iran, can be of great importance. This is because economic activists can make a comprehensive understanding of other guest country's rules of arbitration and improve trade-economic relations. Voiding an arbitration and requesting this are also important since they defuse a final award. A good understanding of this might cause no spoilage of the parties' rights, which would lead to fair awards. In so doing, comparatively analyzing setting aside an arbitration in Islamic Republic of Iran's and Republic of

China's arbitrations, the present study is aimed at investigating into principles and obligations of setting aside an arbitration and requesting for this in both sets of rules.

Defining the Concept of Void and Voidable Legal Acts

A void legal act is referred to as an act whose presence and non-presence is the same and has no effect both now and in the future. The reason for the introduction of the latter can be proved by the notion that an unenforceable contract has no effect until the time of implementation, but would be valid since then. Therefore, an unenforceable contract is not considered void though it has no effect. Sometimes, legal conditions of acts are digressed from their initial verdicts and form new legal conditions. According to the three verdicts of 'being valid', 'being void' and 'being unenforceable', legal conditions of contracts can be considered in six assumptions, some of which are neutral. For instance, a void contract has no legal existence and is equal to nothing. However, it is sometimes mistakenly thought that in case both parties agree upon it, it would be efficient, but the parties' agreement can have no effect and does not revitalizes the contract. For this aim, parties need to make a new contract following basic conditions .

No effectiveness of contracts where basic conditions of transactions are not followed by them can be a factor impeding willpower and consideration of managing the contract by the society; this is sometimes used for the support of people (Katoozian, 1992). In terminology of law, void means making setting aside validity, demolishing, and breaking down something; literally speaking, it means devaluing a legal act or event with legal value (Jafari langroodi, 1999). Accordingly, a voidable legal act is referred to as a true legal act which might be reported as void as a result of clear or implied will of each of the parties or a third person or as a request of them, accompanied with a verdict of the court.

Comparison of Void and Voidable Acts

Some experts in laws have included voidable legal acts in void acts. They consider the process of setting aside an act as a relative phenomenon. In other words, "capability of being voidable is the guarantee for the implementation of relative void of the contract; i.e. when basis of void is supporting rights of specific persons, the law-maker would give the contract to them so they could request for setting it aside from the court and, in this sense, skip the trouble-making organ" (Katoozian, 1992). It is noteworthy that a void legal act is not legally valid and cannot get validity even with satisfaction of both parties: satisfaction of both parties is a new legal act not related to the previous legally void act. This is because being void lacks fundamental factor which is called validity of the legal action and distinguishes act from experts of law and legal nature. But, voidable legal act has been initially true and has had its legal nature and sometimes the right to making it void, based on specific principles, can be given to somebody supported by law. However, it the person supported by law does not make use of their will, that legal phenomenon would remain untouched and would continue its existence.

Comparison of Voidable and Unenforceable Transaction

Some experts of law have stated the similarity between 'voidable' and 'unenforceable' by saying that "the capability of being void is alike unenforceability since both in both a person who is supported by law can state the validity" (Katoozian, 1992). Unlike the above idea, he continues that "A voidable contract has legal enforceability even before the statement of it validity" (Katoozian, 1992). In other terms, an enforceable legal act has no legal effect though it gains enforceability and effect by a person who is supported by law. A voidable legal act has legal effect and is enforceable from the first but the supported person has the power to either take its effect or leave it enforceable.

Comparison of Voidable and Terminable Transactions

Terminable contract is referred to as a contract can be stated invalid by each of the parties, a third person or award of a judicial authority. Depending on the principle of unilateral irrevocability of contract the origin of termination might be law or stipulation. Terminable and voidable transactions are both among the true transactions and are legally valid and effective. But, with termination the legal act is ineffective from the first moment while previous effects still remain. However, in setting aside, effects of the legal act vanish since the start.

Statement of the problem

International arbitration is a mechanism which has been proposed for the total and necessary solving of the controversies related to contract or non-contract relationships which requires the factor of international approved by independent arbitrators according to rules, bylaw, and legal or non-legal regulations. Professor René David knows arbitration as a tool where a controversy between two or more persons is brought to one or more other persons (arbitrator or arbitrators) who have gained their authority from a private agreement (not a state's authorities) and would decide on the case based on an already made agreement (David, 1985). Anyway, with development of international trade and globalization of economy, arbitration has increasingly expanded as a way of solving the international trade and economic problems. In this way, this has changed to a common way in solving international issues (Pryles, 2008). This is due to the notion that arbitration has more privileges than litigation, one of the most important one of which is the procedures in the latter. Investigation in the courts follows partially inflexible procedures which have been passed by the legislation. Moreover, in litigation, the admittance, evaluation and values of evidences have been defined by the legislation. Unlikely, in arbitration investigation is flexible enough and parties are able to define investigation of the case according to their requirements (Ilhyung, 2011). The factor of internationality or internality of trade arbitration might also lead to implementation of a different set of arbitration rules. Some legal regimes, such as Iran, have their peculiar regulation for internal and international arbitration. Nonetheless, some other countries, like China, have preferred unified rules for both types of arbitration (Park, 1999). Legal regime of Republic of China does not follow a peculiar set of regulations for the international trade arbitration. However only in its 7th arbitration rule with the title of 'Special Provisions for Arbitration Involving Foreign Elements' with 9 articles, it precisely and investigates some rules of trade arbitration. According to the first article of the 7th season, i.e. article 65, other regulations of this rule are implemented with regard to points which have not been predicted in this chapter and those for which there are no specific regulation.

Regarding termination of an arbitration, mention can be made of article 70 of 7th season of this Chinese Arbitration. Following this article, "If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the people's court shall, after examination and verification by a collegial panel formed by the people's court, rule to set aside the award.", the first clause of article 260 of Chinese Litigation Bylaw approved in 1991 presupposes two conditions. First, the contract made between the two parties does not include the arbitration and, second, that no written agreement is formed after the controversy. Therefore, written form of agreement for the arbitration is one of requirements of Chinese Legal Discipline. Generally, termination of arbitration award as a result of arbitration agreement has also been included in clause 1 of article 58 of Chinese Arbitration Law. In what follows, this will be more explained and compared with that in Iranian law.

Concerning termination of arbitration award in legal regime of China, it must be noted that despite the fact that Chinese court can take steps for termination of the award, it is also possible that each party can refer to the intermediate people's court where the jury exists and apply for

termination of the award. However, termination of the arbitration award by the intermediate people's court is dependent on the notion that the plaintiff could prove at least one of the points included in article 58 of Arbitration Law of China.

1. Loss of an Arbitration Agreement

In case an award is issued for a controversy through arbitration and both parties would be able to prove that no condition existed for referring the controversy to arbitration, the issued award is voidable. If no credibility of the agreement means loss of an agreement, then it must be stated that clause 1 of article 58 including regulations of article 17 of the same law are as follows.

An arbitration agreement shall be null and void under one of the following circumstances:

(1) The agreed matters for arbitration exceed the range of arbitrable matters as specified by law;

(2) One party that concluded the arbitration agreement has no capacity for civil conducts or has limited capacity for civil conducts; or

(3) One party coerced the other party into concluding the arbitration agreement.

In this respect, Iranian Law includes regulations, though with a more defined and precise framework. Arbitration is based on consensus of both parties and so it is valid only when both parties are lack of capacity of each party can set aside the arbitration agreement and devalue the whole arbitration (Shiravi, 2015). Article 33 (A) of Iranian International Commercial Arbitration Law states that one condition for setting aside the arbitration is lack of capacity. In addition, article 33 (1) (A) of International Commercial Arbitration Act elaborates this more specifically. “When arbitration agreement is not valid as a result of the law that the parties have agreed upon and, in silence of law, is obviously against Iranian Law”, arbitration can be set aside, too. This is because arbitration depends on the parties’ agreement and the arbitrators’ authority for investigating the controversy is rooted in arbitration agreement. When a true agreement made on the basis of referring the controversy to arbitration is not obvious, there would be no arbitration (Shiravi, 2015).

As mentioned above, no validity of the arbitration agreement in acts of each country can cause setting aside if the arbitration award. But in Iranian Act, no reference has been made to loss of arbitration agreement as a reason for setting aside an award while in Arbitration Law of the People's Republic of China mentions this in clause 1 of article 58. In this sense, two conditions can be considered. First condition concerns when one party refers the controversy to arbitration and then the other party agrees and makes meritorious defense of their case. The second condition concerns when both parties choose an arbitrator and refer the controversy to them. Anyway, in such cases, the parties agree on referring the controversy to an arbitrator. Either they choose an arbitrator or they go to arbitration, they need to make a meritorious defense.

The second condition is when one party by itself, without the knowledge of the other party, brings the controversy to arbitration and the arbitrator issues an award when one party is absent. In this case, despite the fact that reference can be made of such regulations, it must not be forgotten that almost all legal regimes have provide each party with the right to object the investigating authority; this can be named as one of most obvious principles of investigating claims. Therefore, it must be mentioned that reference to lack of an arbitration agreement, as one instance of setting aside an arbitration award in Arbitration Law of the People’s Republic of China is stating the obvious. Although no obviously stated, it is safe to say that this can be implied from all arbitration act and litigation of almost all legal regimes in the world. Therefore, loss of this in Iranian Arbitration Act does not mean a deficiency of this country’s act, but it means confirming Chinese Law.

2. Derogation from Arbitration Agreement

As arbitration is based on parties' consensus, the arbitrators' authority in solving a controversy is also dependent on the parties' consensus. Therefore, derogation from the content of the agreement letter can make the arbitrator's award voidable when it is above the arbitrator's authority.

Clause 2 of article 58 of Arbitration Law of the People's Republic of China states that: "The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission" It names this point as the one which grants the capability of being void to the arbitration's award. In the same vein, article 33(1)(e) incorporates similar obligations by stating that "… when the arbitrator has issued an award which has above his authority. If the topics referred to arbitration are distinguishable, only that part of the award is voidable which has been above the arbitrator's authority".

Moreover, article 33(1)(f) states that: when the compounding of jury or the procedures are not in agreement with the arbitration agreement or when, in case of silence or loss of an arbitration agreement, it is on the contrary with regulations included in the Iranian Law". This case is among the points where the arbitration award gets the capability of being void.

Violation of the arbitrators from their limitations of authority is not merely limited to the initial agreement of arbitration. However, parties might expand boundaries of the arbitration agreement implicitly or explicitly. For example, when boundaries of arbitration agreement is expanded within terms of reference or when parties have implicitly agreed upon expansion of boundaries during their investigation. In principle, the issue of violation from boundaries exists when it had been mentioned by any of the parties during the process of investigation but the arbitral tribunal has not taken it into account or plaintiff has no knowledge of that. In this sense, another issue has also been predicted in Iranian Law; if the issued award is distinguishable, the court needs to confirm the part of the award which is within the boundaries of the issued authority and to reject the other part. Nevertheless, the whole award is rejected if violation from the authorities are in a way that distinguishing is not possible (Shiravi, 2015)

3. No Following the Bylaw Regulations

Not following the formative regulations leads to rejection of principle of justice (Shackleton , 2002) . Diverse legal regimes have applied different criteria. It is required that minimum of regulations be followed and the investigation of the arbitration be fairly done. Undoubtedly, giving correct information about appointing the arbitrators or about investigation of the arbitration is considered as some instances of justice. In addition, giving the opportunity to present their materials and positions for any of the parties and replying to what the other party has presented can be considered the same (Julian et la, 2003). In other terms, like rules of civil procedures, it is the original correspondence considered in arbitration as a means of following the principle of justice.

Concerning requesting for setting aside an arbitration, clause 3 of article 58 of Arbitration Law of the People's Republic of China states another point as the following:

Article 33(1)(c) of Iran's International Commercial Arbitration Act states that: "when regulations of this act are not followed in terms of imparting notices for designating an arbitrator or requesting for arbitration". In this case, arbitration award can be announced void.

As it can be observed, there are almost similar rules regarding not following the procedures of both countries. However, a difference exists and it is that Iran's Law introduces its main goal as that set by International Commercial Arbitration Act, besides imparting two criteria for the impart of notices for the arbitrator designation and requesting for an arbitration. On the contrary, Chin's Law refers to Republic China's procedures approved in 1991. In this sense, the present authors believe

that Iran's Law has had a better performance since parties of an international arbitration can gain fair prominence on the case by concentrating on one act- Iranian Arbitration Act. Furthermore, China's Law necessitates that the foreigner party needs to study both the Arbitration Act and the complicated rules of procedures; and this makes arbitration difficult for the foreigner party.

4. Fake Evidences

Similar regulations exist in both Iran's and China's Acts in terms of fake evidences. This is due to clarity of the issue since no legal regime admits the credibility of fake evidences. In clause 4 of article 58 of China's Act and article 33(1)(e) of Iran's Arbitration Act, fake evidences based on which an act has been issued can set aside the arbitration.

5. Withheld Evidences

Concerning requesting for setting aside arbitration, clause 5 of article 58 of Arbitration Law of the People's Republic of China says that: "The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration"

Similarly, article 33(I) of Iranian Commercial Arbitration Act states that: "if, after issuance of arbitration, evidences are found lending support to innocence of the opposing party and it is proved that those evidences have been concealed or falsified".

In this vein, concealment of evidences which can influence the arbitrator's idea can be cited as the one according to which setting aside the arbitration can be requested.

6. Arbitrator's Objectivity

According to clause 6 of article 58 of Arbitration Law of the People's Republic of China, another case where the arbitrator's award can be void is "The arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case." Therefore, the arbitrator's subjectivity can be a prerequisite for setting aside the arbitration award. In Iran's Commercial Arbitration Act, this is not obviously mentioned, but article 33(1)(g) states that: "arbitration award must be issued with the arbitrator's positive comment whose challenge has been confirmed by an authentic source". So, cases concerning challenging an arbitrator need to be noticed. Article 12 (1) states that: "an arbitrator is challengeable only when the atmosphere raises justifiable doubts about his subjectivity or being fair, or when they do not own the qualifications agreed by the parties. Each party can announce an arbitrator challengeable by referring to new criteria they have just discovered". Hence, Iran and China's Acts have rules that follow the same purpose, i.e. both know that violation from an arbitrator's fairness can set aside an arbitration award.

7. Force Major

According to Article 33(1)(d) of Commercial Arbitration Act "since it had been above its authority, requestor of setting aside the award had not been successful in presenting their evidences". This is a strength point in Iran's Law which is not found in China's Law; in spite of its importance, such a rule is not predicted in China's Law.

8. Void Award

In some cases, awards are void from the beginning. In this case, no authority is given to the parties and interruptions of any party might not influence the award's credibility. According to the last part of article 58 of Arbitration Law of the People's Republic of China "If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award".

Accordingly, Chinese people's public benefits define limitations. In the present authors' opinion, using the expression 'public benefits' instead of 'public discipline' is an indicator of Chinese people's communistic views. However, Iran's Law in its article 34 takes account of cases of setting aside an arbitration award in details. It states that "in the following cases, an arbitrator's award is basically void and not implementable:

1. In case the topic of the main controversy is not solvable through arbitration according to Iran's Law

2. In case the content of the award is against the public discipline, morality or rules of the country

3. In case, the issued award concerning immoveable property is in contradiction with rules in Islamic Republic of Iran or Credible Official Documents, unless the arbitrator can comprise in the former case".

According to the logic of international arbitration, those controversies are capable of being arbitrated on the basis of rules of arbitration. Therefore, when a controversy is out of arbitration within the Arbitration Act, one cannot rely on parties' will to solve it.

In Iran, only very few cases have been clearly sent out of the circle of arbitration. According to article 496 of Rules of Civil Procedures "these cases cannot be submitted to arbitration: a) cases of bankruptcy; and b) cases related to marriage, marriage annulment, divorce and parentage". So, the only commercial controversy which is not capable of being referred to arbitration according to Iran's Law is bankruptcy because other cases included in article 496 of rules of Civil Procedures are not related to commerce. (Shiravi,2015)

Based on clause one of article 34 of International Commercial Arbitration Act, the arbitration award issued in such cases is basically void and cannot be implemented.

Moreover, regarding implementation of foreign verdicts (including arbitration and court's awards) disagreement between the verdict and general discipline of the target country is a pre-condition for all countries. Legal specialists have made many attempts to define public discipline.

With regard to the fundamental relationship between discipline in a society and its benefits and the notion that public discipline is unstable as a result of dynamic rules and atmosphere of the society in different times and places, public discipline has never had an stable regulation (Arfania, 2010). Generally, it can be said that public discipline is a set of rules and regulations which guarantee the maintenance of the flow of public services, safety and morality and so people are not able to discard it by contract (Nasiri,2011).

According to clause 2 of article 34 of Iran's International Arbitration Act, an award is generally void when its content is against public discipline or morality. In many countries and international documents mention has been merely made of opposing public discipline of a country, while it seems that Iran's Law adds morality too. This rationale is that public discipline and morality are not two separate things. What often ruins public discipline is against morality and any immoral thing ruins public discipline, too (Shiravi, 2015).

Iranian Lawyers believe that public discipline implies a general connotation including morality. (Safaee, 2010). Inclusion morality after public discipline is an explanation to the latter. In fact, there is a top-down relationship between these two concepts, meaning that what is against morality is against public discipline, while the opposite is not true.

As it was noted, by investigating rules of arbitration it was evident that Iran's legal regime includes more points for setting aside arbitration than that of China.

Conclusion

Setting aside arbitration implies that an award which had been directly issued by an arbitrator can be disvalued by one party due to some specific circumstances. But, when an award is made void, it means that it had been initially ineffective due to some loss of some fundamental elements; that is, neither the arbitrator nor each party can request for its implementation. Due to its great significance, this legal condition has been predicted in rules of arbitration in many legal regimes. As it was noticed in the above, almost similar rules exist for this in Islamic Republic of Iran's Law and Arbitration Law of the People's Republic of China. There are slight differences in some cases where some rules have been included in one while excluded from the other. Two reasons can be stated for this. The first and the more important reason regards the flow of homogenization of rules, particularly in the commercial and international relationships. This gains more importance when many states are after making their commercial rules with the UNCITRAL Arbitration. So, increasing similarity between the states' rules is due to this flow in the recent world and arbitration is not an exception to this. The second reason for the loss of significant differences between Iran's and China's Laws is that both countries own legal regimes which are alike in the score of international commercial and trade relations. This can help a lot in expanding the commercial relations between the two countries. Further, it can assure both countries that no deadlock would arise when trying to solve future problems.

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