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LIMITING THE AUTONOMY OF THE PARTIES' WILL UNDER THE MACEDONIA'S INTERNATIONAL COMMERCIAL ARBITRATION LAW

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Abstract

The autonomy of the parties' will is a key element in determining the legal framework for resolving a dispute through contracted arbitration. However, this does not mean that the autonomy of the parties' will is unlimited. Although each State allows the organization and resolution of disputes through arbitration, nevertheless does not relinquish its monopoly on the defense of matters related to public order and, in this respect, with particular norms anticipates concrete limitations pertaining the autonomy of the parties' will, thus national limitations are the only norms that precede the authonomy of the parties' will. In 2006 Republic of North Macedonia adopted a law on international commercial arbitration that also foresees these limitations.
The purpose of this paper is to analyze and present these limitations of the autonomy of the parties' will and at the same time to determine and meet the conditions for a dispute to be convenient to settle by way of arbitration and give an answer of who is competent to resolve those disputes that do not meet the requirements determined with law regarding the suitability of the case and the party in order to be part of the arbitration procedure for the resolution of the particular dispute.

Keywords: autonomy of the parties' will, arbitrariness, objective arbitrariness, subjective arbitrariness, authonomy limitation

1. Introduction

With the contracting of the essential agreement, the parties, based on the autonomy of their will, determine the mutual rights and obligations, and if not fulfilled with precision, the particular dispute arises. In some cases, the parties in the essential agreement define the instrument in which the final dispute will be resolved.
Considering that the dispute is based on the conflicting interests of both parties, it is evident that the dispute has its weak point, which in fact constitutes the case of the dispute. The will of parties is not emphasized or defined following the conditions with which they will agree in the upcoming procedure in case of disagreement of compromise for Arbitration. On the other hand, if the arbitration compromise does not include the essential procedures regarding the application of the law, it leaves gaps for disregard of compromise and decision as a final solution of the dispute. (Drita M.D. 2014, 177-178)
On of the essential condition that is needed for the arbitration contract to be valid and to generate legal effects is the expressed will of both parties contracting the Arbitration. (Fouchard, Gilard, Golman, 1999, 271; Perović, 2002, 88)
The will and the consent of the parties rely on their autonomy to choose the instrument for resolving the dispute; however, this will and consent must be given to the case by the suitable parties to undergo the procedure and resolve the dispute through Arbitration. Based on this, the question related to the relationship between compatibility or Arbitrability arises, the autonomy of the will of parties, and Arbitration contract?!

Both contracting parties negotiate the arbitration agreement starting from the assurance that the rights and obligations are appropriate for settlement through Arbitration and regarding that, they settle the arbitration agreement, including "trust" around Arbitration; otherwise, this approach starts from the hypothesis that Arbitration does not arise from the arbitration agreement so that arbitration sources cannot be demanded in the agreement, but the opposite. Arbitration is included in the arbitration agreement, and this is how it makes it significantly different concerning the different classical civil law contracts. (Вукадиновић, 106) When it comes to the Arbitration contract through the arbitration clause, the parties always consider the regulation of the rights and obligations and the nature of the dispute that eventually can get out of the failure to complete the agreement. So, it is in the best interest of the parties that need to consider that the potential disputes needed to be suitable to be resolved through Arbitration because otherwise, the arbitration clause cannot produce a legal effect.

2. Suitability or Arbitrability

The word Arbitrability comes from the Latin word *arbitratio*-arbitrage and *bilis*-suitability. Here comes the question of what needs to be adjusted here? In general, in the arbitration rights are known many types of Arbitrability, based on the different thematic circle, and that of:

-Depending on the types of the disputes that can be submitted in Arbitration (the objective limits of arbitration or arbitrability *ratione materiae*);

-Depending on the parties who can submit their disputes in Arbitration (subjective limits or arbitrability *ratione personae*);

-Depending on the fact that the disputes can be resolved through the Arbitration, which is considered to be national or for certain disputes, it is possible that their settlement can be required in foreign Arbitration. (Territorial borders of arbitrability or arbitrability *ratione territorii*);

-Depending on the fact that the disputes can be submitted only in institutional arbitration form (defining the final conditions for their agreement, operation and their work), or they can be sent in other arbitrary forms not organized in permanent ways, the so-called *ad hoc* arbitrations (institutional arbitration borders or arbitrability *ratione insititutionii)* (Compared Emmanuel Gaillard, John Savage, 1999, 313, Fazlia M. D, Shabni F, 2019, 122, Triva Uzelac, 2007, 22, Kamilovska Z.T, 2015, 89).

Based on the above, we can conclude that the autonomy of the will of the parties can be limited to:

-Subjective suitability
-Objective suitability
-Territorial suitability or territorial borders
-Institutional suitability or institutional limitation of suitability

It should be mentioned that all of these restrictions depend on the national legal framework that the states have provided for their limitations. For this reason, we cannot speak of the unified limits because they always depend on the state's evaluation of what types of disputes, they will leave to the exclusive rights of national courts to resolve them.

The Republic of North Macedonia has defined these restrictions mainly through the adoption of the Law on International Trade Arbitration (Official Journal of the Republic of Macedonia, no. 39/2006).

2.1 Subjective Arbitrability

Without a doubt, the parties have a crucial role in delegating the right of their dispute to be resolved by Arbitration. Here the autonomy of their will is undoubtedly undisputed in terms of contracting the competence of Arbitration to resolve the particular dispute.
In this case, the state is the only one who has the right to be a party in the procedure for resolving the disputed by Arbitration.
The Republic of North Macedonia has included the theory of limited state immunity in the Law on Arbitration (Article 1(7)), which states that all legal entities established by the Republic of Macedonia, all state bodies self-governed units and legal; entities created by them, may participate into an agreement that the arbitration verdict can be canceled by the court if the party who filed the lawsuit proves that the party in the preceding cannot be a contracting body to the arbitration agreement or to be a part of the arbitration agreements, under the competent law due to its ability (Articles 35(1)). The Primary Court Skopje I-Skopje has the exclusive right to judge the lawsuits for annulment of arbitral decisions set out in Article 35(2) of the law on Arbitration. The individual judge rules these lawsuits.
According to the law on the international private rights of Macedonia, for the legal and business capacity of natural persons, competent jurisdiction is that of the state to which the person belongs. The legal entity has the affiliation of that state based on which the right has been established. If the legal entity has its residency in another country and not in the one on which it was established, and according to the law of another state, it has its affiliation, will be considered a legal person of that state (Article 16 of the law on private international right).

2.2 Objective Arbitrability

Given that each state, in particular, determines the corpus of disputes that are part of the exclusive right of their courts despite efforts to harmonize, or at least the approximate achievement of the definition of the notion of Arbitrability, we can conclude that the unified concept of Arbitrability does not yet exist (P. Sundin, E. Wernberg, 2007, 63).
In this regard, North Macedonia, through the law on private international rights, has determined which disputes remain in the exclusive right of its courts of the country. According to this law, within the exclusive right of the country's courts are the following disputes (Articles 65-67, 69, 71, 73, 76, 78, 84-86 of the law on private international right):

-Disputes over the establishment, termination, and status changes of legal entities;

-Disputes regarding the validity of the registration in public registers recorded in North Macedonia;

-Disputes over the appearance and validity of industrial property rights, if the claim is filed in North Macedonia;

-Disputes over ownership and other real property rights, in disputes due to infringement of possession of a real estate, as well as for disputes over loans or leases of real estate or contracts for the use of the apartment or business premises, if the real estate is located in the territory of North Macedonia;

-Disputes over property rights over airplanes or ships and in disputes over the lease of aircraft or ships

-Disputes over the existence or non-existence of marriage, dissolving marriage or divorce (marital disputes) if the defendant spouse is a citizen and resides in North Macedonia;

-Disputes over the confirmation or denial of paternity or maternity, if a lawsuit is filed against a child who is a citizen and resides, respectively residence in North Macedonia;

- Disputes over the custody, upbringing, and education of children who are under parental care, if the defendant and the child are citizens and if both have a residence in North Macedonia.

- Disputes from inheritance reports and disputes over creditors' claims against inheritance, in cases where it is a question of succession of real estate property of a citizen of North Macedonia, a foreign citizen, a citizen without nationality, of persons whose citizenship cannot be determined or of persons who have refugee status, if the real estate is located in North Macedonia.

2.3 Territorial Arbitrability

The parties have full autonomy to determine the place where the arbitration proceedings will take place. However, what limits the independence of the will of the parties is the need for the appropriateness of adjudicating a particular dispute through Arbitration based on the place (locus arbitri) where the Arbitration will be located.
Various national systems have set certain restrictions on the autonomy of the will of the parties regarding the place of Arbitration or the Arbitrability (appropriateness) of the place of Arbitration to resolve a particular dispute.
The parties may agree on the place where the Arbitration will take place. If there is no such agreement, the place of application of the Arbitration shall be determined by the arbitral tribunal, taking into account the circumstances of the dispute, including the suitability of the designated country for the parties (Article 20 (1) of the law on international commercial Arbitration of North Macedonia).
Regardless of the provisions of paragraph 1 of this Article, the arbitral tribunal may meet in any place which it deems appropriate for deliberation between its members, for the hearing of the witnesses, experts or parties, or the control of goods, items or other documents, unless the parties have agreed otherwise (Article 20 of the law on international commercial Arbitration of North Macedonia).
This law is applied in the International Trade Arbitration if the place of arbitration is in the territory of the Republic of Macedonia. The provisions of Article 8,9 and 37 of this law will be applied even when the place of International Trade Arbitration is not in the territory of the Republic of Macedonia.
International Trade Arbitration, under the agreement of the parties, it resolves the disputes over the rights that are available to them.

Arbitration is considered International if:

1) At least one of the parties, at the time of conclusion of the arbitration agreement, is a person with permanent residence or home outside the territory of the Republic of Macedonia or a legal entity, whose headquarters is not in the region of the Republic of Macedonia.

2) The place where the major part of the obligations from the trade report should be applied or the place with which the dispute case is in a closer relationship is not found in the territory of the Republic of Macedonia. For the application of paragraphs 3 and 5 of this Article, if:

1) One of the parties has many headquarters, and its headquarters is the one which has more close relations to the arbitration agreement;

2) The party, which is a legal entity and has no headquarters, will be considered by its business unit.

For the resolution of disputes referred in the 2nd paragraph of this Article, the parties can contract the Arbitration which is located outside the territory of Republic of Macedonia, only if at least one of the parties, when the agreement took place they agreed that the disputes needed to be submitted through Arbitration, following the Article 7 of this law, has been a person with

permanent residence or abode outside the territory of the Republic of Macedonia or a legal person whose headquarters is outside the area of the Republic of Macedonia.
This law is not related to the cases for which the law is defined that the court in the Republic of Macedonia is exclusively competent for resolving specific disputes. The Republic of Macedonia, legal entities, established by the Republic of Macedonia, all other state bodies, self-governed local units, and legal entities found by them, may enter int agreement for International Trade Arbitration. (Article 6 of Law on International Trade Arbitration of the Republic of North Macedonia).

2.4 Institutional arbitration or institutional limitation of suitability

In general, the parties have the freedom to choose the type of Arbitration themselves, whether ad hoc or the temporary or institutional or permanent Arbitration. For this type of need for the suitability, most of the national legislation has not provided any restrictions.
Respectively, the ad hoc and institutional arbitrations have left as equal and free opportunities for the parties to be determined by evaluating their suitability following the nature of the dispute.

The International Trade Arbitration Law of the Republic of North Macedonia has an opened posture relating this issue, defining "Arbitration" like any arbitration, regardless of whether its organization is to be trusted to a permanent arbitration institution" (Article 2(1) of the Law on International Trade Arbitration of the Republic of North Macedonia).

3. Conclusion

Addressing to the topic about the Restriction of autonomy of the parties will, according to the Law of International Trade Arbitration of Macedonia, and comparing the norms of the law with different sources of Arbitration in terms of locating the autonomy of the will of the parties we come to the technical conclusion:

-The Republic of North Macedonia is part of those groups that treat the case of the autonomy of parties that have addressed the law for dispute procedures, the law for federal trade arbitration and the law on the international private right, that has great potential in the definition of limiting the autonomy of parties and their will while contracting the arbitration agreement.

-Not restricting the will of the parties in terms of the establishment of previous requests for arbitration proceedings for resolving the dispute is much easier to protect the private interests of the national system.

-The law about trade arbitration of the country is based on the official sources of justice for Arbitration, and this harmonization has helped the parties to resolve their dispute through Arbitration.

-By limiting the autonomy of the will of the parties relating to a defined group of disputes to whom it is reserved the exclusive right of national courts and national law, the federal system is protected from recognition and execution of foreign arbitral awards by which they would violate the public order of the country.

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