

Comparison of case arbitration and organizational arbitration in Iran law

Javad Khaleghian *, Seyed Asghar Hendi, Farnoosh Baghian

Private Law Department, North Tehran Branch, Islamic Azad University

Abstract: There are two types of arbitration in terms of formalities: private arbitration and organizational arbitration. In former type of arbitration, the proceedings are conducted by parties to the claim. If no resolution is achieved, parties can resort to official authorities; while in the latter form, proceeding is performed based on a mechanism that is set by an organization. Generally, arbitration has some advantages towards official judicial authorities including quickness, proficiency of arbiters over the case, flexibility, neutrality, confidentiality by arbiters and low-cost. This research indicates that there is no difference between the two forms of arbitration in terms of nature. The difference lies in the manner which arbitration is performed. Iranian law-makers consider it helpful to allow certain organizations with full set of technical options and also proficiency in arbitration course of actions to handle disputes.

Key words: Private arbitration; Organizational arbitration; Arbitration advantages; Arbitration functions; Nullification of arbiter's decision

1. Introduction

Arbitration is a form of legal procedure; a procedure by which two persons are appointed (directly or indirectly) by parties to a claim to make a final resolution over the claim, while they are not officially judges. Arbitration has some other characteristics that make this form of proceeding preferred to that which is conducted by courts of law. A successful arbitration is the one which produces a decision (by appointed arbiters) that is accepted by the losing party. It is a primary basis for arbitration. If arbitration decision was not accepted by either party, sing party must be made accept the decision through governmental or non-governmental authority. For this purpose, decision must have been based on fairness and personal/social justice as well as public order. In such a case, even an appointed non-governmental arbiter can act as a judge. If such requirement was met, governmental authority can use its power to ensure losing party will put it into practice in favor of wining party, and the decision will enjoy legal guarantee (Nikbakht, 2012).

Generally speaking, arbitration is based on an agreement by which parties undertake to resort to arbitration, in case of dispute, instead of resorting to judicial proceedings.

Arbitration is divided into two categories, in terms of how it is conducted:

- 1-Arbitration for private cases
- 2-Arbitration for organizational cases

Sometimes, arbitration is supervised by a particular organization; this type of arbitration is

organizational arbitration. In organizational arbitration mechanism is determined prior to arbitration; i.e. a pre-determined mechanism is applied to all cases.

In some cases, arbitration is not supervised by a particular organization; i.e. it is merely based on an agreement by parties. In this form of arbitration, decisions is made directly by arbiters and parties based on a mechanism that is agreed upon.

2. Concept of arbitration

In private arbitration, many things are to be agreed by parties including the number of arbiters, who must be appointed, place, time and language of arbitration meetings. In this form of arbitration, parties are to candidate arbiters. When arbiters were appointed, the arbitration process is to be proceeded in participation of parties and arbiters. In case of failure to achieve a final resolution (such as failure of either party to appoint an arbiter), the case must essentially be handled by judicial authorities. The form of arbitration about which Iranian civil code has made provisions is private arbitration. It prescribes arbitration [appointing one of more than one person(s) for handling disputes]; while it has made no mention of organizational arbitration. Thus, before international commercial code was approved to pave the way for establishment of Arbitration Organization, the arbitrations that were carried out in Iran were mainly of private one. In organizational arbitration, the organization that is going to handle the arbitration must essentially meet certain requirements: first of all, arbiter must be a legal entity. It means that natural persons are not qualified to be arbiter. Secondly, the arbiter [legal

* Corresponding Au thor.

entity] must exclusively have been appointed for arbitration, and must have originally established for that purpose. Some have posed a third precondition: the arbiter must be a permanent entity. This precondition is automatically met because when the arbiter is required to be a legal entity, it implies that the arbiter is a permanent entity. It is important that the above-mentioned preconditions be met collectively, even if one of them is not met, the arbitration is no longer organizational but the private one. So bar associations that occasionally handle arbitrations are not organizational arbiters.

In organizational arbitration, arbiters are appointed or arbiter relief by arbiter organization; while in private arbitration this responsibility is carried out by judicial authority. In former one, parties must not only pay for arbitration process but for administrative matters that may arise as a result of arbitration. When parties agree that an organization is competent for arbitration, it means that they agree with that organization's mechanism and rules of arbitration. Furthermore, in organizational arbitration, the arbiter organization is directly not involved with arbitration process, but it solely appoints arbiter. It does not imply that the appointer must essentially be a legal entity, because in some occasions, a natural person may be qualified for such appointment. However, in former case (when appointer is a legal entity), the entity's function is by no means limited to solely appointment, but must handle some administrative affairs such as notifications etc., while natural persons' responsibility is limited to appointment of arbiter (Amin, 2012).

No clear definition has already been provided as to 'arbitration organization' in Iran, except Arbitration Code draft that is waiting to be approved into law by Iran's parliament*.

Article 2, Paragraph 8 of this draft defines arbitration organization as a 'body', under any title such as center, entity, institute etc. that is designed to support, supervise and push administrative affairs of arbitration in accordance with relevant laws and regulations. The subject matter of arbitration is handled by 'arbiter' who is appointed by a mutual consent in accordance with the mechanism set by the arbitration organization. Paragraph 10 of this draft defines 'organizational arbitration' as a form of arbitration that falls within the remit of legal entity; otherwise, the arbitration is 'private'. Different laws/codes call the entity that is going to handle organizational arbitration under a variety of titles such as organization, center, entity etc. For example:

1) Islamic Conference Organization Immunities & Privileges Agreement enacted on 15 June 1976 (published in official gazette no. 9775 dated 5 July 1978). Chapter Eight of this Agreement, under title of 'Settlement of Disputes' prescribes in Art. 29: Islamic Conference shall establish an 'organ' to handle the following affairs: a) disputes arising from contracts

or other matters that fall within the remit of private law concerning the Islamic Organization,

2) I.R. Iran's Chamber of Commerce, Industry and Mines Code, approved on 6 March 1991 amended 6 December 1994 prescribes, under Art. 5, that: 'this Chamber is mandated to handle, in accordance with the articles of associations that has been drafted by the Judiciary and approved by Islamic Parliament, all disputes arising from commercial matters relating to its members and any other party who applies for arbitration.

3) Chamber of Cooperatives Code approved on 7 September 1991. This law prescribes, under Art. 57, Para. 3, that: this Chamber is mandated to handle all and any disputes concerning cooperatives in order to ensure a final resolution for such disputes'. The law-maker has puts the following prescription, under Art. 12 of Iran's Chamber of Commerce Arbitration Center: the prescriptions under this article are the same as what which have been made under Art. 10 of Iran's Chamber of Commerce Arbitration Center:

'general rules an procedure concerning the subject matter of Art. 57, Para. 3 of Iran's Cooperative Code approved on 4 September 1991 with respect to domestic/international commercial disputes shall be handled in accordance with General and Revolutionary Courts Procedures approved on 09 April 2000 and International commercial arbitration code approved on 17 September 1997. This chamber's responsibility is to achieve reconciliation not judgment.

3. Advantages of organizational arbitration towards private arbitration

In organizational arbitration, the organization declares to all interested parties that it has ability and expertise enough to handle civil disputes; similar to a medical doctor who sets up a private clinic or a lawyer who establishes a law firm, or anybody else who creates a center to provide a particular service. This form of arbitration is a service that the organization which is going to handle it can provide (Yousefzadeh, 2013).

'Parties can choose to refer their dispute to an arbitration organization/institution' (Art. 24, Iran's Arbitration Code draft, 2013).

This is an innovative action which immunizes courts of law from handling a large number of disputes. Some believe that civil procedure does not allow legal entities to handle arbitration; it allows only natural persons to handle arbitration. So efforts to find a law that prescribes organizational arbitration yielded no result. The rules set by Iran's Chamber of Commerce Arbitration Center, as a prime example of organizational arbitration, are noticeable. In organizational arbitrations, the organization is not directly involved in arbitration, but it solely handles appointments process (arbiters) and administrative affairs concerning the arbitration process. It also supervises the course of arbitration and declares the decisions and obtains costs' (Art. 25, Iran's Arbitration Code 2013).

* Iran's Arbitration Code Draft - Iran's Chamber of Commerce: Arbitration Center- 7th edition, 2013

It the provision made by Art. 25 may seem to be evident, but it was necessary to make it a provision even though it may be evident. As was mentioned earlier, our courts do not match completely with the concept of organizational arbitration. So, making this provision seems to be essential to prevent wrong interpretations and subsequent aftermaths. None of our laws had already envisaged that. However, Art. 10 of Iran's Chamber of Commerce Arbitration Center declare that 'arbitration organization shall handle the course of arbiters' appointment'. Art. 26 of Iran's Arbitration Code prescribe the following missions:

1. To verify qualification of arbiters through comments and records submitted by parties
2. To handle exchange of pleadings and course of correspondence prior to the arbiters' appointment
3. To appoint arbiter, when it is necessary
4. To ensure arbiters' prescriptions are best enforced by parties
5. To make a resolution for claims concerning arbiter relief
6. To provide facilities needed for arbitration course including holding meetings, handling correspondence etc.
7. To declare arbitration outcome
8. To provide facilities for optional enforcement of the arbitration decision upon parties agreement
9. To file all cases that are referred to organization
10. To provide educational- research services concerning domestic/international arbitrations
11. To establish links with arbitration organizations based at foreign countries

The missions of arbitration organization that have been declared by Art 26 can reflect evidently the privileges and advantages of organizational arbitration to private arbitration. Art. 30 of the said code prescribes that 'in organizational arbitrations, mechanism/procedure is set by organization. In other forms of arbitrations, it is set either by this code or by mutual agreement.'

When a case is referred to an organization for the purpose of putting it to arbitration, it means that parties agree with the mechanism and arrangements that the organization uses for arbitration. This has additionally been declared legally in order to avoid confusion and obscurity. This legal provision seems to be essential, particularly because arbitration organizations are legally bound to observe laws and regulations as well as public order when setting arbitration mechanism. However, in private arbitrations, there is no pre-determined mechanism in place. Since the parties agreements are needed to be overseen, parties' mutual agreement has been incorporated into Iran's arbitration code as a means by which the mutual agreements can be overseen. Parties' power in setting arbitration procedure has a precedent in Iranian law.

International Arbitration Code states 'Art-3: notifications shall be served by one of the following mechanisms: A) in organizational arbitrations, this responsibility is carried out by organization'.

Art. 19 – Setting Arbitration Mechanism

1-Parties are empowered to be involved in the arrangements concerning establishment of arbitration mechanism, provided that they observe relevant law and regulations

2-In case that no agreement was achieved by parties, arbiter shall handle the case in accordance with provisions made by this law. Persuasiveness and legal value of inputs falls within discretion of arbiter.

Iran's civil code on arbitration and resolution states that: 'Art 477- Arbiters are not bound to adhere to civil code in their decisions, but they shall essentially stick to arbitration rules'.

Anstiral sample provisions as to arbitration process:

'Art 19- Arbitration Mechanism: parties may choose arbitration formalities by mutual consent with due observance of laws and rules. If case of failure to make such agreement, arbitration authority shall handle arbitration within its discretion. The discretion comprises of power to establish persuasiveness and legal value of inputs.

Art. 34- as to protesting the arbitration outcome, this law prescribes that: composition of arbitration panel or arbitration procedure must not be in accord with 'arbitration agreement'; unless the agreement is contradictory to one of the provisions made by this law from which neither party can withdraw. If there is utterly not an agreement (as to composition and procedure of arbitration), it must have been contrary to the provisions made under this law. Organizational arbitration has long been playing a notable part in settlement of business disputes. This form of arbitration is characterized by availability of an organization which is in charge of pushing arbitration process forward technically up to the final end. Needless to say that such a process will impose cheaper costs and will save more time and energy. Since arbitration is originally of a contractual nature, and arbitration service is granted by a mutual consent between parties, the relationship between organization and parties is of contractual nature. Indeed, organization is a means to facilitate arbitration. It is not only responsible to handle administrative, supervisory and expertise aspects of the arbitration process, any newly emerged matter that may be of expertise nature fall within the remit of organization. This can show the advantage of this form of arbitration to private arbitration more evident. It must be admitted that in organizational arbitration, everything shall be in accordance with a mechanism (which has been set by organization); a mechanism to which parties are adherent and consider it to be binding. It not only does not undermine the power and function of parties, but it fills the gaps by providing options, when is needed, in favor of achieving a final resolution. A primary intention of parties for resorting to arbitration is avoiding to refer the case to courts. Parties are quite aware that if they do not assist the process in favor of reaching a final resolution, there is no option but to refer the case to court of law; an option to which

the parties are unwilling because of time and cost considerations. Organizational arbitration is an ideal option that avoids it.

Since an organizational arbitration through which a full set of technical options are available seems necessary to be established in Iran, as has been admitted under Art 6, Para. 2 of Iran's International Commercial Arbitration Code, the substance of organizational arbitration and any process that is related to arbitration which legally the courts must handle them has been recognized, and relevant provisions have already been made under Iran's Arbitration Center.

4. Difference of organizational arbitration and private arbitration: arbitration contract

It is important to know what difference between organizational arbitration and private arbitration is and which cases do not fall within arbitration scope, in order to gain an insight into organizational arbitration. Mutual consent is a primary precondition for referring a case to arbitration; a precondition that is essentially declared in contracts that parties make for this purpose. This precondition is binding also in the process of formation of arbitration panel. When the contract between organization and parties is admitted by arbiter, a contract is made by multiple parties: to which parties, arbiter organization, and arbiter are parties. It is much like a contract that much of its provisions are going to be enforced by organization and the organization assigns part of them to arbiter. On the other hand, organization functions as an interface to link the case to arbiter in line with other functions that it has in technical layer.

While, in private arbitration, parties are linked directly to arbiter the interface is missing, although no difference may be observed in the substance of arbitration compared to organizational arbitration. In former type of arbitration, no organization is available to handle technical affairs and to facilitate arbitration by providing certain options and managing unexpected matters. The organization shall additionally make a division of labor: administrative labor is carried out by the organization and legal affairs are awarded to arbitration panel.

While in court procedure in which judicial power is dominant, either party can force the other party to appear in court even if he is not content with it, in arbitration everything is based on mutual consent for which an arbitration contract is entered by parties. This contract is formed in two ways: independent contract or arbitration contract. In the former case, disputes may arise after parties concluded the contract, while in latter case, the contract is concluded after the dispute has arisen for which arbitration becomes necessary. Nevertheless, Art 8 prescribes that the mutual consent may not essentially be in writing, but practical form of consent is effective as well: Art. 2 Para. 1 of Iran's Arbitration Code prescribes the same definition for

'arbitration contract'. Iran's civil code does not clear that agreement for arbitration must essentially be in writing. However, Art 634 of civil code persuades that such agreement must be in writing, as can be concluded from terms and expressions employed by this provision. Nonetheless, Art 8 of Iran's Arbitration Code repeat the provision made under Art 7 of International Arbitration Code which is, in turn, adopted from Anstiral sample (Art 7). Iran's Arbitration Code defines, under Art. 1, the arbitration agreement as was mentioned with no difference. Therefore, it can be concluded that no difference is there between organizational arbitration and private arbitration in terms of substance of arbitration, but the only difference lies in the formalities and mechanism by which the arbitration process is enforced. When the arbiter is appointed without intervention of an arbitration organization, the arbitration is of private type in which all matters are to be handled and enforced by parties directly. Such handling requires mutual consent. This form of arbitration allows parties to dominate the course of arbitration, which suits the individual-government cases. This form of arbitration has an additional advantage: parties are more inclined to keep inputs given to the course of arbitration as confidential in the absence of another party (organization).

In spite of these advantages, private arbitration has some disadvantages: extreme domination of wants. In organizational arbitration, when an impediment arises to stop arbitration, there is an organization which gets involved to pave the way for a final resolution.

6. Conclusion

It can be concluded that no difference is there between organizational arbitration and private arbitration in terms of substance of arbitration, but the only difference lies in the formalities and mechanism by which the arbitration process is enforced. In private arbitration, parties are dominated over the course of actions and have more intention for keeping arbitration inputs confidential, while in organizational arbitration there is a pre-determined mechanism set by the arbitration organization, the course of action is monitored by the organization and parties shall pay for it. In this form of arbitration, outcome is more binding.

2- two main secrets for success of arbitration organizations are: 1- having a permanent procedure for all cases 2- being well-organized and tailor-made for such matters. This form of arbitration relieves parties from many useless affairs that can be performed by another party.

7- it is hoped that organizational arbitration start to become a common solution for businesses to solve their disputes in the shortest amount of time possible. This can benefit private sector as much as possible, a solution that parties to a dispute can resort to by a mutual agreement during which arbitration panel can be appointed by a mutual

consent and the resolution is achieved more easier compared to courts procedures.

References

- Mohebbi. Mohsen. Experience judgment as to implement the arbitration award. Judging a 1. Tehran. Iranbaan. 2004.
- Nikbakht. Hamid Reza. Recognition and enforcement of arbitral award in Iran. Institute of Business Studies and Research. 2012.
- Safaei Hassan. International law and international arbitration. Tehran. Mizan publication, 1996.
- Saifi. Jamal. Capacity of institutional arbitration in international commercial disputes. 1. Arbitration a Tehran. Iranbaan. 2004.
- Shahla. Amin. Arbitration Center of the United States of America. Institutional or ad hoc arbitration? Journal of honorarium. 2012.
- Skini. Robaiee. Issues of international trade law. Danesh Emrouz publication. 1992.
- Yousefzadeh, Morteza. Arbitration procedure. Corporation. 1st edition / 2013.