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Review Article

The Role of Ethics in the Development of Arbitration Clauses Towards Third Parties in Iran

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Abstract

Introduction: The issue of developing arbitration on persons other than parties to the arbitration is one of the issues that are disputed by legal scholars. In the arbitration agreement, no person, except the parties to the agreement, is bound to arbitration and has no right to invoke it. Therefore, the current study was formed with the aim of investigating the role of ethics in the development of arbitration clauses towards third parties in Iran.

Material and Methods: In order to achieve the goal of the research, in addition to legal books in this field, articles related to the research keywords from 2011 to 2021 were examined from the databases of Magiran, Civilica, Sid, and Ensani.

Conclusion: A creditable nature is not limited to external signs such as correspondence or names included in the contract, but it is a creditable fact that may prove that the works of the contract belong to a person who was not present when the contract was concluded and his name has not even been mentioned. In fact, the ethical basis requires that every person accepts the obligation or action that is related to the rights and obligations of the arbitration parties and does not shy away from responsibility. On the other hand, no one should be held responsible for the obligations of others, and the development of the arbitration clause should not cause losses to third parties. Therefore, the development of the arbitration clause must be done within the bounds of the obligations.

Keywords: *Arbitration, Development, Third Party, Ethical Principles*

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INTRODUCTION

Today, the issue of the development of arbitration clauses, especially in international commercial arbitrations arising from many complex and multifaceted contracts, is considered an ambiguous and at the same time problematic issue. For example, this is evident in the statistics listed in the comparative list, according to which, in the arbitrations conducted according to the arbitration system of William Park's articles, the issue of the development of the arbitration clause was raised, and interestingly, the number of cases in which the arbitration clause development in the arbitrations ICC has been applied successfully is equal to its failure cases. Of course, taking into account the number of arbitral awards that were issued with the development of the arbitration clause and subsequently annulled in the courts of the seat of arbitration, it should be said that although the aforementioned sample statistics indicate the growing trend of applying the development of the arbitration clause in these arbitrations, it does not indicate a high probability for its final success, and this indicates a significant lack of acceptance [1].

Regarding the development of the arbitration clause, several theories have been proposed in different countries. Among the theories proposed in the judicial procedure of the United States of America, we can mention the theories of real original, hidden original, real representation, conclusion of arbitration clause by reference, assumption of arbitration contract, estoppel, third party and beneficiary. Also, among the theories used in the Swiss judicial procedure for the development of the arbitration clause are the theories of (implied) guarantee of representation, interference in contracts, group of companies, discarding the corporate veil, estoppel, denial (prohibition of access) of justice and ceremonial efficiency. Development of the arbitration

agreement will be acceptable only from the point of view of the laws of countries such as France, which have flexible formal regulations regarding the form and conclusion of the arbitration agreement.

Nowadays, arbitration is the main method of solving international commercial disputes [2], because it is efficient, exclusive and cheap. Almost everything related to arbitration can be agreed upon by the parties. The parties can negotiate and agree on most cases related to arbitration. Among other things, the parties can choose an expert as an arbitrator or agree that the arbitration process will be confidential and that the arbitration will take place in a neutral country.

According to the arbitration based on the agreement of the parties, unlike the judicial process where the jurisdiction of the court is determined by the law, the arbitration parties determine the jurisdiction of the arbitration themselves. Therefore, if the arbitration agreement is extended to a third party, all these agreements will face serious problems and the implementation of the arbitrator's decision will also have more problems. Therefore, the current study was formed with the aim of investigating the role of ethics in the development of arbitration clauses towards third parties in Iran.

METHOD AND MATERIALS

In order to achieve the goal of the research, in addition to legal books in this field, articles related to the research keywords from 2011 to 2021 were examined from Magiran, Civilica, Sid, and Ensani databases.

DISCUSSION

The Concept of Arbitration

Proceedings are only an exercise of the government's sovereignty and should be conducted by government judges; But because the number of lawsuits is increasing day by day, the courts cannot deal with them quickly and get people's satisfaction in a favorable way, or the litigants may not want to file their lawsuits in the court due to reasons such as the heavy cost and the delay of the proceedings. In this case they can raise it with people who are known for correctness and trustworthiness and who have legal information and technical information as well. Therefore, next to the government proceedings, a type of non-government proceedings or private proceedings has been created, which is called arbitration; which is done by an arbitrator (private judge).

Arbitration is the resolution of disputes through the hearing and issuing of verdicts by persons who are usually chosen by the parties to the dispute or by the judicial authorities [3]. Arbitration actually works within the government system and is a private system. The arbitrator in a case is a private judge chosen by the parties. In an arbitration case, disputes that are private are dealt with [4].

Development of the Scope of the Arbitration Agreement

The development of the scope of the arbitration agreement can be divided into the development of the subject scope and the development of the personal scope of the arbitration contract.

A) Development of the subject area of the arbitration agreement

The parties to the arbitration clause or agreement may include some issues related to the main contract under its scope and not include other issues under the scope of the arbitration clause and agreement. The most important issues that may be raised in this topic are the expansion of the arbitration clause to different issues in a contract and the expansion of the arbitration clause from an arbitration agreement to other contracts and also the expansion of the arbitration clause from a contract to non-contractual matters. It is possible that the parties intentionally or unintentionally and due to lack of information or experience or misunderstanding, set the arbitration clause or agreement in such a way that all issues and disputes related to a contract, especially issues related to the interpretation and implementation of the contract are not covered. In such cases, the condition or contract regarding this non-inclusion may be so clear that it makes it difficult or impossible for any interpretation to expand its scope. However, in cases where the arbitration clause or contract has the ability to be interpreted in the direction of expansion, the arbitration court may expand its scope.

Sometimes the parties, especially in international trade, have regular and multiple contractual relationships with each other, and these contractual relationships, which are based on the same and similar standard conditions, are so related and connected that they can be collectively called a "group of contracts" [5]. Now, it is possible that only one or some of these contracts explicitly have an arbitration clause, and other contracts are silent on how to resolve disputes related to that contract. In fact, the development of the arbitration clause in these contracts is based on the assumption that it is due to the presumption of superiority. In this situation, it is assumed that the parties have agreed that all disputes regarding the contracts between them should be settled through arbitration and according to the same

conditions as before. The commitment of the parties to such custom and procedure is also emphasized in paragraph 9 of article 1 of the principles of international commercial contracts of the International Institute for Harmonization of Private Laws. If we evaluate the development of the arbitration clause according to the first argument, i.e., with the mission of discovering the will and intention and consent of the parties using evidence and evidence, each of the parties will be able to prove the contrary of the above assumption and prove their lack of intention and consent. under the assumed condition, to prevent the settlement of the dispute through arbitration. However, if we believe in the creation of a specific custom between the parties, the parties will be required to observe the custom in and settle their disputes through arbitration, and there will be no need to confirm their intention and satisfaction for each case.

Sometimes an important main contract is concluded and to implement its various aspects, several sub-contracts are concluded between the parties of the main contract and even between some of the parties to the main contract with other parties. Now, if other contracts, in any way, refer to the arbitration clause contained in the main contract, this is the same as including this clause in the subcontracts. The problem is related to the time when such a reference has not been made and only one or more related contracts have an arbitration clause and the rest of the contracts are silent on how to resolve disputes. In such a situation, it is necessary to decide what the intention of the parties was by examining the circumstances and conditions of each case and interpreting the existing arbitration clause [6]. Did they intend that all disputes regarding all related contracts in between be resolved with the arbitration clause included in one or some of the contracts or not? The procedure and history of the relations between the parties and the manner of their actions and other evidences and the Emirates in this field can be useful in explaining the intent and will of the parties. The international arbitration procedure and the judicial procedure of the courts in some countries support the development of the arbitration clause in the group of contracts, although in few cases.

B) Development of the personal territory of the arbitration agreement

It is possible to develop the arbitration agreement in the field of its personal territory; In such a way that a person or persons who are petitioners or defendants are placed in arbitration and are investigated and a verdict is issued, while they are not the original party to the arbitration agreement and are considered non-signatories [7].

All contracts, including the arbitration contract, are not always concluded and signed by the original, but the arbitration contract may be concluded in the form of various forms of representation. It is also possible that after concluding the initial arbitration agreement, another person or persons may also join it by observing the necessary conditions. To the mentioned cases, the transfer of the arbitration agreement together with the main agreement should be added. In these cases, the development of the arbitration clause revolves around the real intention of the parties in binding the non-signatory to the arbitration agreement. In order to observe fairness and justice and prevent the abuse of some interested parties in the main contract, some countries have tried to use different theories, beyond the intention and agreements of the parties, to give an opinion on the development of the arbitration contract to seemingly third parties. However, it is one of the principles of arbitration that no person should be forced to arbitrate, and for this reason, the prevailing judicial practice in the countries still considers consent to arbitrate as a definite and necessary condition and does not accept the development of arbitrage contrary to it [8].

One of the most important doctrines in the development of the arbitration agreement is the "group of companies" doctrine, which courts sometimes confirm the implied consent of the non-signatory and his obligation to the arbitration agreement by meeting the necessary conditions. In these cases, the contracting company is a member of a group of companies, and usually the most important issue is whether the arbitration agreement concluded by the company belonging to the group of companies can be applied to other companies belonging to the group that have not signed the contract. Is it expansion or not? This issue is mostly raised in cases where the non-signatory is a subsidiary or parent company of one of the signatories and is involved in the implementation of the main contract. Of course, such a problem only arises when the member companies of the group all have separate and independent legal personality [9]. Otherwise, if the company or companies are merely branches of the main institution and company and do not have independent legal personality, the issue of development of the arbitration clause is generally excluded and any legal act and contract, including the contract and arbitration clause, naturally and without the need to resort to theory and solutions similar to the doctrine of the group of companies, it will include the status of all branches [10].

The Place of Ethics in the Development of Third-Party Arbitration

The arbitration process has two main ethical characteristics that distinguish it from the trial process:

First, being confidential means not disclosing documents and information or facts that are prepared for arbitration or learned during it.

Second, being private means that it is not possible for a third party to enter the arbitration proceedings.

However, from the very beginning, some people did not consider the privacy and confidentiality of arbitration to be essential and believed that there should be necessary transparency in the subject law and arbitration rules in these cases or that the parties have explicitly agreed on its privacy and confidentiality. However, in the UNCITRAL arbitration rules approved in 1976, there was no discussion under the title of third-party entry, and also in the UNCITRAL model international commercial arbitration law that was approved in 1985, there was no provision in this case. Despite the amendment in 2006, this law did not mention the entry of a third party, but in the amended version of the arbitration rules approved in 1976 in 2010, sub-paragraph 5 of article 17, it accepted the possibility of entering a third party only at the request of the parties to the dispute, with conditions that are more favorable to the third party. by the parties close to the third entry; That is, even if the commercial interests of third parties were overshadowed, the arbitration court could not bring the third party into the arbitration without the request of the parties to the dispute, even in relation to the subject of the dispute; That is, the entry of a third party was practically out of the jurisdiction of the arbitration courts, and if the parties saw their commercial interests at risk, they would not allow third parties to do so. This was while sometimes the goal of arbitration was to resolve disputes that could not be reached by the arbitration court without the involvement of a third party [11, 12].

Iran's international commercial arbitration law approved in 1997 despite the adoption of UNCITRAL model arbitration law in international commercial arbitrations approved in 1985 and contrary to it, the possibility of a third party entering the arbitration process is discussed under article 26 and not at the request of the parties to the arbitration, but at the request, the third party himself has predicted that it is called a third party entry lawsuit; However, with the approval of UNCITRAL's law on transparency in arbitrations based on the agreement between the government and the investor approved 213, which was implemented in April 2014, there were changes in the discussion of third party entry, which certainly helps to protect the rights of third parties.

The parties to the arbitration are those who have signed the arbitration agreement or the main contract containing the arbitration clause, and at the time of referring their dispute to arbitration, any person other than the parties is referred to as a third party [13]. The moral basis requires that any person Accept the obligation or action related to the rights and obligations of the arbitration parties and do not shirk responsibility. On the other hand, no one should be held responsible for the obligations of others, and the development of the arbitration clause should not cause losses to third parties. Therefore, the development of the arbitration clause must be done within the bounds of the obligations.

Two conditions are necessary for a third party to enter the arbitration process.

First, arbitration between the parties should be initiated.

Second, the arbitration has not been terminated so that third parties who directly or indirectly have their interests involved in this arbitration can enter the arbitration process and since these persons are not parties to the arbitration agreement, they have no rights or obligations in the arbitration agreement.

Therefore, according to the entry of the third party in the proceedings and in analogy with it, it can be said: the entry of the third party in the arbitration is the legal action of a third party, whether real or legal, who is not a party to the arbitration agreement and by submitting an independent petition to the arbitration court of the arbitration process, to the plaintiff, the defendant, or both parties, in order to enter into the main subject of the arbitration and in order to claim an independent right to all or part of the demand of the main lawsuit, or to declare that it is beneficial to be entitled to one of the parties to the main dispute before the termination of the arbitration process, following the legal procedures. In recent years, due to the increasing number of investment cases in the arbitration courts, where one side is the investor government and the other side is the investor, many criticisms were made to the arbitration process; Because in most of the cases, these cases had a bad effect on the general public or some of them, but due to the fact that these persons were not parties to the arbitration, they could not enter the arbitration process and defend their positions directly or indirectly [14]. The reason for this is related to the nature of arbitration, which is different from the process of litigation in which the entry of persons is based solely on the interests of each person, and any real or legal person can enter the process of litigation to protect their legal and financial rights, but

having an arbitration agreement prevented such people from intervening in this field, and this caused some to consider this process unfair and seek criticism to increase the transparency of the arbitration process.The result of these criticisms led to the interference of the persons referred to as "friends of the court" in the arbitration process. Although many definitions have been presented to the friends of the court, but the common feature of these definitions is that a person (persons) who, although not a party to the lawsuit, but has an important interest in it, and at the request of the arbitration court or his own request and acceptance by the arbitration court, the bill related to the subject under consideration, and the arbitration court has the authority to accept or reject this bill.

In the international commercial arbitration law, after the rules mentioned above, a new document published by UNCITRAL was the model law of international commercial arbitration approved in 1985, which has 36 articles and is intended to be used in international commercial arbitrations between Governments approved, despite the subject matter covered by this law, which broadly includes issues related to commercial arbitration, but in this law, not only the possibility or non-possibility of a third party entering the arbitration process, but also confidentiality and privacy, which The main features of commercial arbitrations are kept silent and no legal provision has been established for any of these features. This law was amended in 2006, and in the amended version that was approved in 36 articles, only the articles in the main law were amended and no new regulations were added to it. The UNCITRAL Arbitration Rules of 1976 were amended in 2010. This law was compiled in 43 articles and once again repeated the two exceptions to privacy and confidentiality that existed in the original version, with the difference that in addition to the agreement of the parties, other conditions were also included. determined that based on them, the arbitration verdict can be made public, of course, this was not the only change related to the issues under investigation, but this time, it also included in its text the entry of a third party into the arbitration process at the request of the arbitration parties; Therefore, in paragraph 3 of article 28 it is stated: the hearings of the lawsuit must be private unless the parties to the lawsuit agree otherwise, also in paragraph 5 of article 34 it is stipulated: the arbitration award is with the consent of all parties to the lawsuit or the place and to the extent that A party's legal, in order to protect or pursue a legal right, or in connection with legal proceedings before the arbitration court or other competent authorities, can be published. As it can be seen, this article has added two more cases to the exception of paragraph 5 of article 32, that is, in addition to the agreement of the arbitration parties, the final ruling can be published, if one of the parties to the arbitration to preserve its legal right or pursuing it in relation to its legal duty requires publication of the judgment, and also in order to present it to the courts or other competent authorities, the final arbitration judgment can be published. Among the items that have been added in this amended version, which in turn can be considered a development in the course of commercial arbitration, is Article 17, which states the general rules in arbitration. Sub-paragraph 5 of this article states that "the arbitration court can, at the request of each of the parties, allow one or more third parties to enter the litigation as a party to the arbitration, in this case, this person will be considered a party to the arbitration agreement. Unless the arbitration court, after giving the opportunity to listen to all the parties, including the person or persons joining the arbitration, realizes that due to discrimination against each of those parties, it should not have allowed third parties to join.

CONCLUSION

Consent is one of the pillars of every contract, and the arbitration contract is no exception. In fact, satisfaction is the most important feature of arbitration and is very much considered by the judicial and arbitration authorities, because it is an exception to refer to the judicial authorities and deal with arbitration. When a person consents to having his dispute resolved through arbitration, he waives his right to refer to official judicial authorities; Therefore, the issue of whether he consented to this withdrawal or not, must be ascertained. In the extension of the arbitration agreement, the most important issue is obtaining the consent of the third party, in other words, the agreement can be extended to a third party if, despite the lack of signature during the formation of the contract, his consent can be obtained in some way. Sometimes the consent is actually obtained, that is, there are evidences that indicate that the third party has really consented to arbitration, and sometimes this consent is not known, but for reasons such as the active participation of the third party in negotiations with the implementation of arbitration, this consent is assumed.

Regarding the possibility or impossibility of generalizing arbitration, there are opposing and favorable views, and various methods to identify the element of satisfaction

have been proposed and implemented so far. Applying these methods is sometimes close to justice and fairness and sometimes based on benefits such as protecting people with good intentions. But what is important is to obtain or assume satisfaction. In this regard, the courts and arbitration authorities have gradually abandoned strict principles for obtaining consent and have extended contractual principles to obtain the implied condition of consent to arbitration. The main issue is whether there is a balance between this strictness and flexibility; On the one hand, legal flexibility allows third parties to refer to arbitration despite the absence of an agreement, and on the other hand, in the event of a dispute, the parties are unable to determine the correct channel to resolve the dispute. It seems that the best solution is to consider the general principles of satisfaction and relativity of the contract in applying the opinion regarding the extension of arbitration to third parties; Therefore, among the ideas and methods presented, the method that is closer to the goal of securing the consent of the third party or non-signatory is acceptable; Because the extension of the scope of the arbitration agreement to a third party and the effects of dispute resolution through arbitration is actually an exception to the rule of jurisdiction of judicial authorities, which should be interpreted and observed as much as possible within its scope; Courts and arbitration authorities should not show too much freedom and flexibility, and a certain level of strictness should be observed to reach a specific legal position. On the other hand, the issue should not be treated narrowly, because it is considered an obstacle to the efficiency of arbitration as a suitable method, especially in the settlement of international disputes. It seems that the method in which more attention is paid to the element of satisfaction is the style method. In our legal system, in addition to the fact that the element of consent in all contracts is highly emphasized and paid attention to, from the provisions of the commercial arbitration law, the tendency of our legislator to identify the element of consent, even though implicit and unwritten, in the arbitration agreement is obvious. On the other hand, the method that is better for the beneficiary of the generalization and helps to realize the generalization.

Ethical Consideration

Ethical issues (such as plagiarism, conscious satisfaction, misleading, making and or forging data, publishing or sending to two places, redundancy and etc.) have been fully considered by the writers.

Conflict of Interest

The authors declare that there is no conflict of interests.

REFERENCES

1. Mohebi M. Bank guarantee procedures in Iran-United States Claims Tribunal. J Int Law. 1996;14(20). **doi:** 10.22066/cilamag.1997.18187
2. Safaei SH. International law and international arbitration. 1st ed. Irna/Tehran: Mizan Press. (In Persian). 2013.
3. Moradian G. Arbitration in contracts: benefits of arbitration. 1st ed. Iran/Tehran: Khorsandi Press. (In Persian). 2015.
4. Mousavi SR. Arbitration in Iranian law. 2nd ed. Tehran: Tissa Press. (In Persian)2014.
5. Joneidi L. Execution of foreign commercial arbitration awards. 3rd ed. Tehran: Shahr Danesh Legal Research Institute. (In Persian)2013.
6. Rashidi O, Amini E, Eskini R. Interpretation of the compulsory arbitration clause. Private Law Res. 2020;0(32):53-81. **doi:** 10.22054/jplr.2020.40179.2138
7. Nikbakht H. Identification and implementation of arbitration decisions in Iran. 1st ed. Tehran: Business Studies and Research Institute. (In Persian).2014.
8. Khakpour A, Eskini R, Bahmaei M. The arbitrator's contract. Judiciarys Law J. 2019;83(107):1-19. **doi:** 10.22106/jlj.2019.78146.1871
9. Khazaei H. Private and confidential boundaries of arbitration in domestic and international trade law. Law Quarter. 2009;39(3). **doi:** 20.1001.1.25885618.1388.39.3.6.4
10. Dashti M, Karimi A. A comparative study of arbitration contract: consensual or special. Comparative Law Rev. 2013;4(1):99-115. **doi:** 10.22059/jcl.2013.35232
11. Moradi A, Saberian A. Ethics and excuse in contract execution in Iranian civil & commercial law. Int J Ethics Soc. 2021;3(1):1-8. **doi:** 10.52547/ijethics.3.1.1
12. Rafiee A. Investigating criminal responsibility of international organizations in the international law system. Int J Ethics Soc. 2021;3(1):9-14. **doi:** 10.52547/ijethics.3.1.9
13. Ishikawa T. Third party participation in investment treaty arbitration. Int Comparative Law Quarter. 2010;59(2):373-412. **doi:** 10.1017/S0020589310000059
14. Brekoulakis S. The relevance of the interest of third parties in arbitration: taking a closer look at the elephant in the room. Centre Commer Law Stud. 2009;113(4):1166-8.