Science Arena Publications
Specialty Journal of Politics and Law
Available online at www.sciarena.com
2017, Vol, 2 (4): 64-69

The Concept and Variants of Arbitrability in Iranian Law

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Abstract: *One way to resolve disputes and claims is to refer them to authorities rather than the courts of law. Among these cases, we can refer to arbitration. Although the settlement of disputes by arbitration is one of the effective ways to deal with claims, there are a series of particular disputes and claims that cannot be referred to arbitration or their referral to arbitration might encounter some restrictions. In fact, arbitrability indicates some bans and restrictions that every legal system takes into account to protect special interests. Iranian legislators explicitly prohibit the referral of a series of disputes to arbitration and these cases are not limitative because there are other claims that cannot be referred to arbitration due to their relationship with the general rules and the imperative laws as their proceedings by private judges is against public policy. There are some formalities for a number of claims and a case in point is Article 139 of Iranian Constitution and Article 457 of Civil Procedure which is concerned with the claims about public or state properties. Such claims can be referred to arbitration but there are terms and conditions for this referral such as the approval of the Committee of Ministers and the awareness or the approval of the Parliament. Therefore, in this study, an effort is made to investigate the concept of arbitrability and its variants in Iranian law.*

Keywords: *Arbitration, arbitrability, public policy*

INTRODUCTION

The arbitration agreement, in principle the arbitration contract, is an agreement whereby the parties agree that their dispute, whether it is brought before a court or not, or their possible conflict and dispute that may occur in the future should be referred to one or more arbiters for arbitration and legal proceedings.

Arbitration is one of the first legal and judicial institutions which are independent of the governments and have existed since the old times. While according to Article 159 of Iranian constitution, the judiciary is the official authority for investigating the complaints, the parties can agree to resolve the dispute by giving the jurisdiction to an arbitrator.

Records of human life history showed that arbitration was involved in the removal of any kind of dispute and it can be used with regard to all issues of human life. However, over time, different countries or, arguably, different legal systems refused to accept arbitration for all claims and disputes and considered restrictions and prohibitions in some cases. These restrictions and prohibitions include various types and a case in point is refusing to allow claims concerning public law, family disputes, bankruptcy and other cases be resolved by going to arbitration. Such restrictions and prohibitions raise an issue that is known as “arbitrability” or “the possibility of referral to arbitration” in the legal literature.

Perhaps, it can be asserted that one of the reasons for such restrictions and prohibitions is, on the one hand, due to the importance of the issue in question and, on the other hand, the importance of the investigations of authorities with respect to the outcome of the dispute. At least in relation to public law or in other words, the issues that are concerned with the public interest, the authority in charge of the proceedings of these claims and disputes shall be the general system of litigation consisting of the courts and private prosecutors are not allowed to intervene in this limited area and it can be considered as the lack of trust in the arbitration in this context.

Now, with respect to the advantages and disadvantages that might exist for arbitration, one of the disadvantages of arbitration is the possibility that it might overlook the public rights and interests as there are some particular claims and disputes whose main concern is the provision of the interests of a third party or the public.

In other words, in some cases, private disputes are so closely involved with the public interest and those benefits are so important that the government uses exclusive jurisdiction and prohibits private entities from dealing with them in line with its duty to protect the interests of the public and the observance of justice.

The national legislations and laws concerning arbitration may limit or make an exception for the access and referral of the government or state institutions to arbitration. In terms of the domestic and international public policy, some of the topics can be referred to arbitration. In the laws of some countries, the issues that cannot be resolved by arbitration were identified and limited, but in other countries, a judge might resolve the question of arbitration.

In other words, in the laws of some countries, general criteria are anticipated for arbitrability such as the financial value of having dispute and whether it can be concerned with money or the ability of the parties to put an end to this dispute by reconciliation. In Iranian law, there is no general substantive criterion. In this paper, an attempt is made to examine the aspects of this issue and discuss the approach of the Iranian legal system in the arbitrability of disputes so that a number of criteria can be provided for arbitrability in this regard.

1-1 Arbitrability as a term:

Literally, arbitration means justice and fairness, and resolving disputes among the people or ending a quarrel between two or more persons (Moein, 2014). On the other hand, arbitration has several literal meanings such as judgment. Apparently, the word was originally *"Dadvar"* that meant 'fair' and a "d" was omitted from the spelling to make it easier to pronounce (Dehkhoda, 2014). It has been noted in Black's Law Dictionary that arbitration is a way of resolving disputes in which two or more impartial parties selected by those involved in the dispute will consider the problem and make a binding decision (Garner, 2009) and 'arbiter' (Birjandi et al., 2000) is the word used in this regard while arbitrability refers to the possibility that a case might be referred to arbitration. It discusses what cases can be resolved by going to arbitration.

2-1 Arbitrability in legal terminology:

In legal term, arbitration is "the method which its aims to resolve a question of the relationship between two or more persons by one or more parties called arbiters or arbitrators who acquire their authority from a private contract and give their verdict based on that contract without given such a task by the government" (David, 1996). According to another definition, "arbitration is an institution whereby the parties give authority to those appointed themselves as their arbiters to settle their disputes" (matthieu de boisseson, 1990).

The definitions provided by Iranian authors are similar to those mentioned above. As an example, based on one of the definitions, "arbitration is the resolution of a dispute between individuals outside a court by person or persons selected by the parties or another person for the same purpose" (Shams, 2006). Dr. Matin Daftari defines arbitration as refraining from going to a court to resolve one's disputes relating to the rights and private interests and accepting the arbitration of the people whom one trusts on account of their knowledge and technical information or their reputation for honesty and trustworthiness (Daftrai, 1999). The main feature of the arbitration, which makes it similar to judicial proceedings in the courts, is that the proceedings are adversarial and the arbiter's verdict is binding. The striking similarity caused many writers describe the arbitrator as a "private judge" and consider his work exactly as the judge's work and this means that the arbitrator is also responsible for resolving the disputes with the difference that his mission has a contractual nature and not a legal nature. Arbitration in law is not evolved as something different from its literal sense because in arbitration we deal with judges but not the state judges; rather, we deal with a contractual judgment (Jarrosson, 1987).

In fact, arbitration points to a judicial authority that is formed with the consent of the parties and the legislators to serve as a judge and settle the disputes. Some Law experts defined arbitration by noting that people are permitted to avoid the intervention of the authorities in cases involving their private rights and interests and seek the judgment of private parties who are reliable in terms of technical information and knowledge or their reputation for integrity and honesty. This process is called private arbitration (Daftari, 1999).

In this sense, despite the fact that there is no explicit mention of the basis of the arbitration which is the contract, the nature of arbitration has been expressed clearly. The Iranian Civil Procedure Code has offered no definition for arbitration; however, from the provisions noted in the law with regard to arbitration, it can be inferred that this law has also the same interpretation of arbitration as can be viewed in the conventional public legal systems. For example, Article 454 of the mentioned law stipulated that "all those have the qualifications in filling lawsuits can bring their conflict and dispute before the arbitration of one or more arbiters if they agree on the terms regardless of the fact that it can be brought before a court of law at any stage of proceeding".

From the perspective of the law, arbitration is a private judicial authority based on the will of the parties in a particular case. The law of international commercial arbitration in Iran defined arbitration as: "Arbitration refers to the resolution of disputes between the persons making a claim out of a court by a natural or legal person or persons who were appointed and accepted by the parties. First, arbitration is recognized as the resolution of disputes and this is normally viewed in reconciliations. Previously, we established that arbitration is a form of judgment based on the principles of law that may or may not lead to the resolution of disputes and this is different from the resolution of disputes, unless the issuance of a verdict is considered as the settlement of a dispute, whether or not it actually leads to the settlement of the dispute.

In other words, the withdrawal from a claim is considered as the resolution of the dispute. Secondly, there is no consensus on clear indications in this definition while an agreement is the central axis of arbitration [10], essentially, an agreement that makes arbitration credible under the protection of law. Thirdly, in arbitration, the parties are committed to obey the verdict of arbitrator based on the contract except in extraordinary cases while this implication cannot not be inferred from the above-mentioned definition. Then, if we want to offer an inclusive definition of arbitration, we must emphasize the fulcrum of arbitrability that notes a private agreement is legally binding and the purpose of arbitration is such a judgment. Therefore, arbitration is the private judgment based on the contract between the parties involved in a civil dispute that is binding for them. As regards the validity of arbitration in international agreements in terms of Islamic jurisprudence, there is no room for dispute over the legitimacy of arbitration after the approval of the International Commercial

Arbitration in 1997 and the approval of the Procedure Code of the Public and Revolutionary Courts in 2000 with respect to civil matters and the compatibility of both cases with the law of Sharia in the Guardian Council of the Constitution and, finally, the approval of a single article regarding the accession of the Islamic Republic of Iran to the recognition and enforcement convention of foreign arbitral rules" (Zanjani). Arbitrability literally means what claims and disputes can be referred to arbitration which is known as 'arbitrabilite' in French (Eskini et al., 2012).

2 – Types of arbitrability

Arbitrability is categorized into subjective and objective cases which will be elaborated in what follows.

1-2 Subjective arbitrability

Subjective arbitrability explains which individuals can go to arbitration. Thus, Iranian legislator in Article 454 of Civil Procedure Code states that "all persons qualified in filing a lawsuit are able to reach a compromise to take their conflict and dispute to arbitration." This issue is examined from a subjective perspective.

1-1-2 limitations of the subjective arbitrability

According to Article 454 of Civil Procedure Code, the basic principle is that all individuals have the right to go to arbitration unless in exceptional cases. Below, the restrictions related to natural individuals going to arbitration and the limitation of legal persons are elaborated.

1-1-1-2 limitation of natural individuals

Basically, typical individuals are free to go to arbitration. This principle is stipulated in Article 454 of Iranian Civil Procedure Code:"All those have the qualifications in filing lawsuit can bring their conflict and dispute before the arbitration of one or more arbiters if they agree on the terms whether or not it was brought before a court of law at any stages of proceeding."Article 456 also states: "In the case of transactions and contracts concluded between Iranian nationals and foreigners, as long as there is no dispute, the Iranian party cannot be obliged in any way as the party involved in the deal to go to arbitrators with the same foreign nationality in case a dispute occurs.

Any contract and deal which is against this legal prohibition will be null and void in those parts which are illegal. Therefore, with respect to the discussed article, going to arbitration is possible in cases that occurred and the agreement on the resolution of the future disputes through arbitration is not permitted while article 454 of Iranian Civil Procedure Act legalized this possibility. The limitation in this regard revolves around the absence of qualification as such individuals are clearly referred to in the third note of Article 83 of Iranian Civil Procedure Act approved in 2000 and such individuals are the minors, the insane and the bankrupt parties. These individuals lack "legal capacity to pursue lawsuits" in terms of paragraph 3 of the Article. The point that is noteworthy here is that not only these certain individuals have no right to bring a case before the court, but their representatives are also prohibited from doing this. Nevertheless, in the case of the bankrupt parties, the issue is somewhat different. It is true that the bankrupt cannot take legal action, but his deputy can take legal actions on condition that the arbitrator's verdict is not in violation to the mandatory rules on bankruptcy. Otherwise, as some law experts stated, the verdict is invalid with respect to the contradictory parts. Thus, with regard to what was discussed, all those who are in charge of their own assets and properties have the right to go to arbitration but they cannot be referred to arbitration in some particular disputes (Eskini et al., 2012).

2-1-1-2 The limitation of legal entities

Legal persons can be classified into private legal individuals and public legal individuals. According to the laws of most states, persons of private law have the right to go to arbitration to resolve a dispute. The fulcrum of this fact can be inferred from Article 588 of the Commercial Code of Iran and this article states that: "A legal person can have all the rights and obligations that the law gives to people, except for the rights and duties that may naturally be only possessed by a human".

The provisions of Article 454 of the Civil Procedure Law include legal persons as well. Of course, it must be noted that the law indicates that these individuals or their legal cases are prohibited from going to arbitration and referral to arbitration is not permitted with these two assumptions. In the case of legal persons of the public law, the status of these individuals is different; this is especially the case for governments and state agencies. On the international scale, there are three ways in which the states might address the public individuals. Some governments and international organizations do not consider the states as fit for arbitration and some other states such as the UK allow the cases to be referred to governments for arbitration.

Other countries like Iran limited the referral to arbitration by a number of formalities in accordance with Article 139 of the constitution. This means that going to arbitration in the case of public properties should be passed by Parliament and the Council of Ministers. The important domestic issues also require parliamentary approval in this regard.

2-2 Objective arbitrability and its constraints

In this section of the paper, we discuss objective arbitrability and its constraints. In doing so, the first and second paragraphs of objective arbitrability will be discussed with regard to this type of arbitrability.

2-2-1 Objective arbitrability

Objective arbitrability indicates what claims can be referred to arbitration. Article 469 of Civil Procedure Code in this regard states that "The claim of bankruptcy and claims relating to marriage and divorce and the termination of marriage cannot be resolved by arbitration" (Eskini et al., 2012).

2-2-2The constraints of objective arbitrability

As regards the limits of objective arbitrability, it can be stated that any claim can be referred to arbitration except when there is a prohibitory law as Article 469 of the Civil Procedure Act which was approved in 2000 has prohibited the referral of a series of claims to arbitration. In this way, it can be stated that claims about marriage, the termination of marriage, divorce, parentage, and bankruptcy cannot be resolved by arbitration.

Conclusion:

Given the numerous services that the judicial system offers in resolving the disputes, the promotion of the private sector in the area of arbitration given an emphasis as an effective and efficient way to resolve the disputes. With regard to the current status of arbitration in various legal systems and the laws made in this connection, the issue must be paid more attention than ever before. Arbitration was practiced in a traditional way in the past and it must be transformed into a modern practice. This is the concern whose relevance is understood more today. This concern demands the establishment of an arbitration system. In fact, as judicial courts exist in all areas, the courts of arbitration must exist accordingly. Regarding the claims and disputes, it should be noted that they can be referred to arbitration that Iranian legislator clarified some cases but a number of ambiguities remain on account of the essential criteria. In fact, as discussed in the article, the referral to arbitration otherwise known as arbitrability is related to the subject of dispute and not the parties because the

possibility of the referral to arbitration for the parties differs from the discussion on the claims or subjects that can be referred to arbitration. One of the major hindrances that can be effective in referring such claims to arbitration in both domestic and international laws is the public policy. By looking closely at the cases of the prohibition and restriction of referral to arbitration, we may assert that the substantive criteria for arbitration consist of the public policy and proper conduct. As regards the kinds of arbitration, it was concluded that there are two types of arbitrability. The first type is subjective arbitrability which mentions the individuals can go to arbitration and the second type which is objective arbitrability discusses what claims can be referred to arbitration.

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