

Economic Obstacles of Right of Access to Justice in Arbitration Tribunal.

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Abstract

Arbitration as an alternative to state courts will succeed in fairly resolving disputes if it can remove the obstacles to hearings and guarantee the equal treatment of the parties. In litigations, judicial assistances (legal aids) such as insolvency proceedings come to the help of the impecunious party so that the economic obstacles do not lead to the violation of basic and fundamental rights such as access to justice and defense. While such assistances (legal aid) can be objectionable in arbitration, arbitrators begin looking in to the case only after receiving a fee sometimes considerable in amount. Arbitration institutions also have strict regulations in this regard. The status of the party who has to file a counterclaim, without being able to pay the relevant fee, is not clear. On the other hand, if the party cannot file the counterclaim, the arbitration award may be annulled due to the violation of a fundamental right such as access to justice.

This issue may be raised in both domestic and international arbitration and has caused some of verdicts in national courts and awards in arbitration tribunals. In some countries, based on the principle of the right of defense and equal treatment with the parties, it is attempted to find a way for defendant and hearing of counterclaim. Hence when a defendant is bankrupt or he has a verdict about his financial inability, they force the arbitral tribunal to accept the counterclaim without the costs. If the arbitration tribunal under its rules cannot judge without cost or refrain from accepting counterclaim, the arbitration award will be declared invalid by the judiciary in these countries. This way that is based on European principles of human rights and internal rules of some of countries is gradually developing. Accordingly the right of access to justice and obtain the justice require that financial inability does not cause the loss of the right to defense because judicial courts have laid down assistances (legal aid) for insolvent persons. In arbitral tribunals, arbiter should hear the dispute of insolvent persons by distribution of the costs or refrain from awards and guide the plaintiff that he may go to court, rather than arbitration. Some of writers have stipulated the insurance of arbitration costs but it does not any field for enforcement. In a further analysis of this debate, some believe that the

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concept of non-enforceability of arbitration agreement may include insolvency of one of the parties not to be able to pose its lawsuit in the arbitral tribunal. This concept that is mentioned in many arbitration laws and regulations, whether national or international means that where there is no possibility to arbitrating, the contract is non-performance. In the assumption that the defendant after the litigation of counterclaim is not able to afford costs, the arbitration agreement actually is non-performance and so the court can void an arbitral award that has been issued regardless of the defense of insolvent person.

In Iranian law, this problem could benefit from similar approaches because the principal of subrogation for arbitration rather than the courts, including means in the case of posing of dispute in the arbitral tribunal, the parties rights of defense and equal treatment will be respected. Hence if a defendant expresses the defense about offset or extinction of debt that is costly under the arbitration rules (the institutional arbitration) or statement of arbiter, the arbitration agreement should be unenforced or the arbiter will require issuing an award with no charge or void the award that has been issued without defense. In this debate it appears unenforceability is logical.

From the perspective of Islamic jurisprudence, legal fees should not be led to not hearing the dispute and the violation of justice and it is clear that issuing the verdict regardless of the counterclaim cannot provide the justice.

When the defendant cannot pay the arbitration cost for counterclaim, the plaintiff can oblige the cost or the arbitration agreement is unenforced with the final decision of the court about the insolvency or bankruptcy of defendant or his insolvency case. In this case, in order to provide the principles of equal treatment, the access to justice and the right of defense, the arbiter has to announce termination of the arbitration process and guide the plaintiff for referring to the court. In this article, the aforementioned problem is evaluated with regard to the European case law and the solution in the Iranian law and the analysis based on which the court has the capacity to hear the case will be defended. This analysis is based on the fact that although the arbitration regulations do not stipulate, it is necessary for the legal general principles such as the right to defense.

Keywords: Arbitration institute, Counterclaim, Equal treatment, Fees, Right of access to justice, Right of access to justice, Right of defence.

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