



Correlation between the doctrine of separability with competence- competence in Iran and the UK law

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Abstract

In the domestic and international law, the doctrine of separability, meaning the independent existence of an arbitration clause has been accepted as a cornerstone of the whole system of arbitration. According to this principle, firstly, contract arbitration shall be without any effect of the fate of the original contract. Secondly, the arbitrator shall have jurisdiction in matters relating to the existence or validity of an arbitration clause. Indeed, the theory of separation lead to the conclusion that arbitrator should individually decide about their jurisdiction. We tried to consider the theory of competence- competence relates to the principle of the separation of the arbitration and analysis that are Iran and English law recognized two principles?

Keywords: the doctrine of separability, competence, competence principle, arbitration, English law, Iran law

Introduction

The consequential results of the arbitration clause is that if the original contract is valid, the condition will also authentic and in case of dissolution of the original contract, the arbitration clause itself is disbanded but if we consider the doctrine of separability, if the main contract for any reason shall not correct, will not spread to its condition. This is while Iran's law in this regard is silent, however does this mean denial? The other issue is that what is the limits and scope of competence of arbitrators. Is the arbitrator can decide on its own jurisdiction, or is that the responsibility of the court or third party? Therefore it is necessary to examine the correlation between these two rules.

Part 1: the doctrine of separability in Iran and English Law

1) Iran Law

According to this theory when obligations arising from contracts executed and finished, the arbitration clause has independent life ^[1] and even in cases of force majeure or illegal contract, will continue. Some believe that independence is not recognized in Iran's law ^[2] and invoke to article 461 of the Civil Procedure Code that says: "When compared to the original transaction or contract relating to arbitration has dispute between the parties, the court first addressed and commented". According to the statement, the first court investigates the transaction or contract arbitration and then if it was correct transaction or agreement, the arbitration clause will be valid too.

While the provisions of article 461 is not a general warrant because the article is about the cases in which the parties have already announced their arbitrators or through another ways arbitrator is selected and court intervention is not necessary to resolve disputes about the original contract ^[3].

Note that according to Iranian law under Article 461, two subjects are under court jurisdiction. One dispute relating to the transaction that its dispute was referred to arbitration (dissolution, annulment or nullity of the transaction) and second dispute of arbitration agreement. On one hand, according to Article 454 of Civil Procedure when a claim based on the invalidity of the transaction is discussed, it can be

referred to arbitration in any stage of the proceedings, in other hand, 461 of the same law the court has considered.

These two contradictory articles can be summed if it is said that if the dispute is deal in court, the parties may refer to arbitration proceedings, but if there is no dispute in the courts and it refers to arbitration it is better in order to solve the dispute, firstly the claim is brought to court. It seems that bringing claims of invalidity and the invalidity of the arbitration agreement to court, invalidates the arbitration agreement in court, hence it is better that the court should only be used in this regard as supervisor.

It seems, however, with strict position against independence arbitration clause in Iran Law one of the issue that considered as an exception is predictor condition of compensation, even though the main contract is invalid, it still has validity and there is the possibility of its implementation and the damage. This is one of norms of the Arbitration rules as well, Article 8 of the Law on International Commercial Arbitration, refers to the principle of independence and provides: "The court in which action the subject of an arbitration agreement before it is brought, should refer the claim to arbitration with the request of one of the parties by the end of the first session ...". In the following, the independence of the arbitration from original contract confirms and states ... unless the court ascertains the arbitration agreement is null and void or unenforceable ..." and implicitly accepted that if the court ascertains the nullity of the agreement, should be subject to arbitration and the court take the view of lack of competency. In Article 16 of the above act also re-states that: "The arbitrator can about your competence as well as the existence and validity of the arbitration agreement make a decision. The arbitration clause as part of a contract is deemed as an agreement independent and the decision of the arbitrator regarding to invalidity the contract itself will not be considered as an invalidity of an arbitration clause contained in the contract ^[4].

Given the widespread recognition of the independence of the arbitration clause in the national laws and international commercial arbitration, Iran's legislators have been forced with the dominant and comprehensive trends to sign this rule in the International Commercial Arbitration. This procedure of

legislation it brings to mind that if the independence of the arbitration clause in the law of Iran was faced with a fundamental barrier or if it has legally basic problems, in international commercial arbitration should also be hampered? Again, the same rules in Article 9, under the effects of the arbitration agreement, it suggests that: "objection to the existence or validity of the original contract shall not prevent the competency of arbitrator to deal with this objection, provided that they establish the validity of the arbitration agreement. Even if the contract does not exist or is invalid, the arbitrator can handle the rights of the parties and decides their objections against the claim and anyway, arbitration clause is independent of the original contract".

2) English Law

Independence or separation of an arbitration clause with respect to some restrictions from 1942 British law has been accepted that is creature of precedent and common law. Although this reform was recognized Arbitration Act 1698 of England, but in English previous rules, i.e. 1950, 1698 and 1979 there is no explicit provisions of the legal character of an arbitration clause. This legal principle is not rooted in the English laws; but it is rooted in British common law and precedent and it is based on the decision of the House of Lords in the case of *Hayman- Darwin's* [5], in the way that the House of Lords be interpreted and applied in the past fifty years by judges.

Section 7: Separability of arbitration agreement: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement".

Article 30 of the same rule also confirmed that Section 30: "Competence of tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this part".

The first case accept the independence of the arbitration clause in English can be considered *Hyman* case and highlight decision of the House of Lords issued in 1942 [6].

In this case one of the parties claimed that because the other side completely violated the original contract, the contract is deemed terminated and also as a result arbitration clause is terminated. Court rejected that argument, saying that claim of one party that has not any obligation is rejected based on that other party completely violated the contract [6].

Part 2: Jurisdiction of Arbitrators to rule on its own

For each arbitrator it is important than he would ensure that his official position and role are clear and unshakable and must ensure to that before beginning to work. Therefore, before accepting arbitration, the arbitrator must be able to convince himself that he has possibility of performing this task both professionally and in terms of jurisdiction. Focus more on this

issue may convince him that did not involve in issue, For example, arbitrator may have a personal relationship with a one of party of dispute. In other cases, it is possible to arbitrator to have doubt whether he is the authority for the job or not and the possibility arises that he pauses and assesses overall status [7].

There are three views on the meaning of rule of competency of arbitrator. Firstly, the arbitrator asserts his comments about a decision-making power, without making any limitation for jurisdiction the court at the same subject. In fact, the courts are decision makers under national law. Secondly, the Court will stay away of any involvement in the jurisdiction until the sentence is passed; in this regard, arbitrator will decide the first on competency. Thirdly, the court will not interfere with the authority of the arbitrators completely and as the arbitrator will assert the first point, the last word is suggested by him too. Such an outcome requires that judges determine that the parties have actually agreed to such an outcome firstly.

This inherent authority that it can be considered optional feature of arbitration [8] often has studied under different titles such as the authority of competency [9] autonomy (in the international literature usually refers to this principle, a word that is used in Germany, *kompetenz-kompetenz*, are used). In a case in 1512 Number of ICC and counterclaim in the case of (b) between Iran and the US [10] It was mentioned that the competency of arbitrators is compliance with law and justice and is consistent with International trade community needs.

In addition to this system, a system known as control concurrent exists that arbitrator can make decision on its own jurisdiction as a preliminary issue and then the parties can object and take the decision in court. Criticism which is entered to this type of judgment is that it can discourage people to arbitration as well as can lead to prolongation of the arbitration and the arbitration process [11].

1) Competence- competence principle in Iran law

Competence-competence principle in Article 16 of international commercial arbitration of Iran which inspired by Article 16 of the model law and Article 21 of the UNCITRAL Arbitration Rules, from view point of lawyers has created overall development in the Code of Civil Procedure. This Article provides: "1- arbitration may be make decision on its jurisdiction and about the existence or validity of the arbitration agreement ...". Before the International Commercial Arbitration Act, vacancies of this rule was felt despite the silence of the Civil Procedure, ratification of this article, along with the development of self-sufficiency in order to increase efficiency for international arbitration is one of the good act of Iranian legislators. It seems that while there is no explicit prohibition Arbitration Rules in regard to jurisdiction, it can be said that Iran's arbitration rules accepts this rule, with a some evidence in this area; for instance, paragraph 3 of article 489 of the Civil Procedure Code.

This article describes the annulment of the arbitration award and in his third paragraph asserts commenting outside the scope of jurisdiction as one of the cause of annulment of the arbitration.

It is obvious that if the arbitrator does not have the authority to make decisions, as a rule, the legislator should provide that the proceeding must be stopped; so when there is no such a duty exists, the arbitrator can decide if a given jurisdiction in this regard to be objected [11].

2) The rule of competency in English Law

This principle was not recognized in Britain in the previous law, but now it is included in Article 39 of the Arbitration Act 1996^[12]. This rule as a standard separately can be seen in the section 30 of the Act. Section 30: "Competence of tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this part".

Indeed, it is the competency of the arbitrators under the control of the judicial system. For example, Article 32 of the Regulation raises the authority of court to challenge the tribunal's jurisdiction. Section 32, Determination of preliminary point of jurisdiction: 1 "The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73)"

Article 73 also talks about the loss of this right. Section 73, loss of right to object: 1 "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection...". The severity of this rule is somewhat modified by Article 7 that courts cannot take jurisdiction of arbitrators^[13].

In the case of the Channel Tunnel between England and France (EUR tunnel against Balfour) also said that British court shall be referred to arbitration based on the arbitration clause and announce the lack of competence Lord Mastil asserts that in the case trial Agreement is confirmed based on arbitration clause and the mere existence of an arbitration clause is sufficient for the court to be incapacity. This rule in Aramko case is confirmed too^[14]. Even as the one author said in the eyes of English judge competency of arbitrator stems from arbitration agreement^[15].

Part 3: Relation between the competence-competence principle and the principle of independence

It is recognized that the arbitral tribunal has the competence to determine its own jurisdiction without involving the courts. The fact that arbitrators have jurisdiction to determine their own jurisdiction, known as the "competence-competence" Under this theory the arbitrators can determine the existence of the arbitration clause, its validity and scope, without the need to invoke the jurisdiction of a national court^[16].

This principle is the transposition, in a qualified way, to arbitration of the general procedural principle that any court is entitled to rule on its own jurisdiction. Recalling the distinction between the two principles (separability and competence-competence), we can say that if, under the autonomy/separability principle, arbitrators have jurisdiction to rule on any dispute over the existence or validity of the main contract, under the competence-competence principle they have the power to rule on any question relating to their jurisdiction or, in other words, to the effectiveness of the arbitration agreement as such. The separability doctrine is the first stage in establishing the arbitral tribunal's functional

independence. The survival of the arbitration clause gives the tribunal the right to proceed in hearing the dispute. The first issue that will arise when there is doubt about the propriety of the appointment of the tribunal is its jurisdiction.

Thanks to the independence of the arbitration clause, jurisdiction of arbitrator over the validity of the arbitration agreement that was accepted by judges. Then arbitrators have the authority to determine the validity of the original contract because their powers obtain from arbitration agreements, which theoretically is separate from the main contract. In fact the cause of this rule because of this rule is separation of arbitral tribunal from the Court of arbitration place. It is unacceptable the jurisdiction of those who two parties have confirmed is denied and is recourse to national courts for their qualification and confirmation of their jurisdiction^[17]. In other words, if the tribunal shall decide on its own competence it must firstly imagine and accept the competence and this is what is called the theory of the independence of the arbitration clause.

Article 16 of the UNCITRAL Model Law arbitration asserts that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

However, in some countries, rather than arbitrators, national courts make decision. For example, in the popular case named Prima Paint^[18] said that if the claims of fraud in the documentation arbitration clause is raised, the Federal Court decides the case. Other cases that can be pointed out in this regard is the case of Harbor Insurance Company as mentioned that arbitrators can settle dispute even considering the invalidity of the settlement agreement, provided that the arbitration clause was not directly affected by the invalidity. It should also be noted that the private life of an arbitration clause of the contract is separate too from arbitrators jurisdiction, Independence doctrine that speaks about the validity of an arbitration clause and the arbitration clause itself may be valid, despite imperfections in the other terms of the contract, this does not mean that this condition is valid or wrong decision of arbitrator about the validity of this condition prevent the court's next hearing. The doctrine of Separability and competence-competence overlap in this matter that arbitrators who will decide on their jurisdiction, look the arbitration clause as separate element not as the whole contract, however, since acceptance of competence-competence rule implicitly means accepting the principle of independence. Therefore, any decision about the contract, whether the reference to the jurisdiction of or related to other issues, including the validity or invalidity of the contract, is in the hand of arbitrator. The principle competence-competence principle as a general principle about the ritual form of arbitration or as one of the hearing proceeding does not mean that the last word about the competence of arbitrators is stated by that. But it does mean that the first one who comments on the jurisdiction is arbitrators^[19]. In other words, the arbitral tribunal is and the first primary reference and the courts are secondary reference and vetting of judges are final^[20].

Conclusion

Principle of competency is considered as one of effects of the principle of independence, but both are essentially separated and most interpreters have warned about mixing the two issues. However the common thread of independence and the rule of jurisdiction is that both principles create a mechanism to prevent the person to stop the flow before you start. In addition to, arbitral tribunals in determining jurisdiction consider only their arbitration clause and do not need validation or invalidation of the original contract.

The purpose of the rule of the authority of arbitration- as an established and undisputed principles in the theory and practice of international arbitration- and the arbitration clause of the contract is the same and in any case lead to the conclusion that arbitration initially has authorization in the matter of jurisdiction, although the court has the right too, if any objection to jurisdiction will be existed.

In any case revise and repair the faults of the current provisions of the arbitration in Iran is one of the essential tasks of legislation, Among these tasks, approved the authorization of the arbitral tribunal to determine your eligibility and to determine the validity of the arbitration agreement is essential issue.

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