The Scope of Arbitrability under Iranian law

Shapur Farhangpur
Department of law, shoushtar Branch, Islamic Azad University, shoushtar, Iran.

ARTICLE INFO
Article history:
Received 25 September 2014
Received in revised form
8 November 2014
Accepted 14 November 2014
Available online 23 November 2014

ABSTRACT
Arbitrability of disputes is a very topical issue in the field of international commercial arbitration. Each country determines which disputes are considered to be arbitrable. Therefore, when including an arbitration clause into a contract, the parties should assess the arbitrability of any potential dispute from the viewpoint of the legislation applicable to international commercial arbitration, as well as the legislation of the country where the award is intended to be enforced. As for the arbitrability of disputes in Iran, recent international arbitration law has developed approaches in the area of arbitrability that should be taken into account. This paper seeks to answer the question of which subjects are arbitrable in Iran. It analyses the laws of Iran to find the subjects that not arbitrable which subject matters are inappropriate for submission to arbitration and should instead be decided by a court of law under Iranian law.

INTRODUCTION
The question of arbitrability places limits on the legal issues that may be adjudicated by an arbitral tribunal. According to Redfern and Hunter "[a]rbitrability ... involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts". In other words arbitrability draws the line between freedom of contract and the role of the courts as protectors of the public interest. Thus, traditionally arbitrability is concerned with particular subject-matters that cannot be decided by arbitration, "even if the parties have otherwise validly agreed to arbitrate such matters". The question of arbitrability is not easily determined. For determine arbitrability one must find the law governing arbitration. In other words the national law is the governing law. The law governing the arbitration agreement is the "law expressly or impliedly chosen by the parties" or "in the absence of such choice, the law which is most closely connected with the arbitration agreement, which will in general be the law of the seat of the arbitration" (Collins 829). In this paper arbitrability under Iranian law will examine. Under Iranian law Insolvency, taxation dispute, employment disputes, construction dispute are not arbitrable.

1. Arbitration legislation in Iran:
In Iran, law related to international arbitration derives from seven sources: constitution, international treaties, Law on International Commercial Arbitration 1997 (LICA), specific laws that allows State to refer dispute to arbitration, The 2001 Act on the Accession of the Government of the Islamic Republic of Iran to the Convention on Recognition and Enforcement of Arbitral Award (New York convention 1958), agreement between the Islamic Republic of Iran and the Asian-African Legal Consultative Organization for establishment Tehran Regional Arbitration Center, Articles of Association Act of Arbitration Center of the Iran Chamber (ACIC) 2002 and the opinions of courts. The sources of the arbitration law therefore can be categorized in the foregoing order as well:

I.1- Constitution:
Article 139 of Constitution of Iran provides some provision for referral to arbitration of dispute concerning public and governmental properties.
1.2-International Treaties:
Treaties are One of international arbitration sources in Iran. Treaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other government, shall have the force of law(article 9 civil code), when the treaty approved by the Iran parliament(article 77 Constitution).

1.3-The International Commercial Arbitration Law:
Before 1997, both domestic and international arbitration were governed by the Civil Procedure Code of Iran (CPC). The Law of International Commercial Arbitration (LICA) was introduced in 1997 and since then has governed international commercial arbitrations where the place of arbitration is Iran. LICA has improved the arbitration regime governing international commercial relationships in Iran, which now recognizes institutional arbitration. LICA is based on the UNCITRAL model law. LICA adopts a definition of international arbitration different from that of the model law: arbitration is regarded as “international” if one of the parties to the arbitration agreement is of non-Iranian nationality under Iranian law (art.1.b).

1.4-The Agreement Between Iran And Aalco:
Islamic republic of Iran on 3 May 1997 signed an agreement with the Asian-African Legal Consultative Organization (AALCO). After the agreement having been ratified by Iranian parliament came into force in July 2004. Pursuant to the agreement the Tehran Regional Arbitration Centre (TRAC) has been established as an independent international organization. TRAC has been publishing its rule of arbitration in July 2005 and commenced its activities.

1.5- Other Laws:
Other law under Iranian law like the act of article of association of National Iranian Oil Company (1950), Third Economic, social and cultural Islamic Republic of Iran act (2000) provided law about arbitration.

2-Arbitrability:
Arbitrability is one of the issues where the contractual and jurisdictional nature of international commercial arbitration collide head on (lew, mistlis & kroll 9). It involves the simple question of what type of issues can and cannot be submitted to arbitration and whether specific class of disputes are exempt from arbitration proceeding.

Scholars make a difference between objective and subjective arbitrability for the purpose of differentiating between the parties that may arbitrate (subjective) and the dispute which can be arbitrated (objective) (Schwartz 18). So the arbitrability arises in to situation, objective arbitrability and subjective arbitrability. We shall examine subjective and objective arbitrability in turn.

2.1-Objective Arbitrability:
Objective arbitrability involves determining the types of disputes which can be resolved by the arbitration and which can be resolved exclusively by the courts (Redfern/Hunter 5:3-12). Under objective arbitrability, a dispute cannot be submitted to arbitration as a matter of law because it involves matters directly linked to the public interest. Traditionally, certain kinds of claims such as antitrust or competition law issues, securities issues, intellectual property disputes, and personal status and employment issues were deemed ininharable matters, which view has been eroding for the past quarter century40

Under art.11 of the New York Convention on the recognition and enforcement of foreign arbitral awards (1958) and art.V2(a) of the UNCITRAL Model Law on International Commercial Arbitration(1985) the parties can submit to arbitration all or any deference which may arise between them "concerning a subject matter capable of settlement by arbitration". Objective arbitrability is also set forth in Article V(2)(a) New York Convention which states that recognition and enforcement of an arbitral award may be refused if the court where such recognition and enforcement is sought finds that “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

2.1.1. Objective Arbitrability In Iran:
International commercial Arbitration in Iran is governed by the provisions found in LCIA and other miscellaneous laws. LCIA provisions do not apply in domestic arbitration which has its own arbitration law and governed by civil procedure code (CPC). Pursuant to Iranian international arbitration Law, for an arbitral tribunal to have jurisdiction to determine the merits of a specified dispute and to issue a valid final award, there must exist a written agreement signed by all of the parties that the dispute be arbitrated. Moreover, even if there exists a contract containing the arbitration clause between each of the parties and duly signed by them, it should still be considered whether the subject matter of the dispute and the claims as formulated are arbitrable.

Article 34 of the LCIA provides that an arbitral award may be set aside by the court only if:
1- the subject-matter of the dispute is not capable of settlement by arbitration under the Iran law.
2- the award is contrary to the public policy or good morals of the country or the mandatory provisions of this Law.
3- the awards dealing with real estate situated in Iran, the arbitral award is in conflict with mandatory laws of the Islamic Republic of Iran or with the provisions of the valid official instruments, unless, the “arbitrator” is empowered to act as amiable compositeur.

Under Iranian law subject matter that are not capable of settlement by arbitration include Insolvency under section 496 (1) civil procedure act .Taxation disputes under the section 224 Direct Taxation Act of the Iranian 1987 and its subsequent amendments, construction dispute related to land and building with the municipals under section 100 municipals law 1949,Employment disputes under section 157 labor law 1990 and dispute related to public and state property according to article 139 constitution(shiravi 82).

Subject matter that contrary to the public policy or good morals of the country or the mandatory provisions of LCIA (article 34.b) also not arbitrable. Islamic republic of Iran law not determine what actually the public policy .In summary public policy include matters relating to personal status such as marriage, inheritance, systems of government, individual ownership and the other rules and foundations upon which society is based ,in such manner as to not conflict with the definitive provisions and fundamental principle of Islamic Sharia. Deciding which subject matter is contrary to public policy or not, related to interpretation of courts. Mandatory provisions also are rules that related parties cannot agree against them, this provision also related to public policy. Dispute about provisions of the valid official instruments of real state also not arbitrable (art.34.c).

2.2. Subjective Arbitrability:
Subjective arbitrability means capacity of the person or entity to enter into arbitration agreement. The issue of subjective arbitrability usually refers to capacity of public entities and State-controlled entities to submit dispute to arbitration (Eduardo 13). In some legal systems, public entities remain prohibited from submitting their dispute to arbitration. For example French, Belgian and Syria have restrictive in this respect.

This point of view, however, is based on an in accurate assumption, because a distinction must be drawn between acts performed by state entities aiming at a higher public interest (ius imperium) and mere instrumental act or economic activities carried out by State entities (ius gestionis). The situations in which State entities acts as the public power are not subject to arbitration, as they concern public interest.

2.2.1. Subjective Arbitrability in Iran:
Under article 139 of the Constitution of Iran, if one party is of non-Iranian nationality, referral to arbitration of disputes concerning public and governmental properties requires the approval of the Council of Ministers and of the Consultative Assembly (the Parliament of Iran).Article 139 provide:

"The resolution of dispute concerning state property or the submission of such dispute to arbitration ,shall in each case be subject to approval by the Council of Ministers and must be notified to parliament, cases in which one party to dispute is foreign as well as important domestic disputes must also be approved by Parliament ".

So according to article 139 State or State entity don’t has the capacity to enter into arbitration agreement without obtain authorizations and if done so the arbitration agreement will be void.

Conclusion:
The question of arbitrability in Iran is complex as it is elsewhere .On the one hand there is objective arbitration, which examine the question whether or not the subject matter of dispute is capable of being resolved by arbitration. on the other hand ,subjective arbitrability concern with the capacity of the person especially State entities who entered into arbitration agreement .In Iran subjective arbitrability has been an issue when public entities or State owned entities are involved in arbitration because under Iranian law State entities must obtain authorizations for referral to arbitration .

REFERENCES