

Privatization and Arbitration Legal Models in the Resolution of Business Disagreements

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Abstract

The object of scientific study in this paper is the importance of the right of arbitration which is arbitration, legal research and its regulation through international instruments, national laws and other legal acts of many issues. The right of arbitration in general involves resolving disputes the whole of the agreements for the works, and economic actions, commercial ones. Arbitration is a way of resolving disagreements between the parties in legal relations. On the basis of this strategy is the idea that all the strategic sectors of the economy are to be privatized. This means that state enterprises not yet transformed will be transformed into a commercial company. In implementation of the privatization process of state capital companies will be free to transfer in whole or in part to the private sector of the two types of rights: the right of ownership and the right to use the development.

Keywords: Privatization, National court, arbitration, legal relations, international instruments.

1. Introduction

The Resolution of Disagreements through arbitration has been known from ancient times. The roots can be found on older clan, to which his tribe leader appointed representatives who in his name shall be resolve disagreements between the various members of society. The object of scientific study in this paper is the importance of the right of arbitration which is arbitration, legal research and its regulation through international instruments, national laws and other legal acts of many issues. The right of arbitration in the whole involves resolving disputes of the agreements for the works, activities and the economic actions, commercial ones.

1.1 Privatization methods and formulas

In selecting the method of privatization are influencing various factors, including the size of the company to be privatized, as well as the characteristics of the buyers / potential investors. In Albania, the law allows the use of all types of methods of privatization. All these methods are based on the objects to be privatized.

Methods of privatization in Albania can be divided into three groups:

1. The method of "excretion" from ownership: The method of "excretion" from ownership the state transfers ownership rights to the new private owner, without taking any financial risk. However, unemployment generated from privatization is a social risk that the state must take into account and should afford. Thus, an indirect financial involvement of the state is inevitable. The methods listed below are characterized by way of transfer of the right of the ownership.
2. Direct Sale method. With the method of "excretion" State sells directly to enterprises (or its own parts) to private buyers.
3. Direct Sale can be done in two ways • direct sale through auction / tender • sale to a buyer of first set (default)
The second method is used in Albania. Objects privatized by this method were mainly residential houses shops,

restaurants, parts of enterprises, etc. (so-called small privatization).

1.2 Sale of directors and employees (MBO, EBO)



Tab 1: Muço, M & Peter S & Anita T 2004, "Inflation, Exchange Rates and the Role of Monetary Policy in Albania", European Bank for Reconstruction and Development, pp. 88-92 August '04.

What is common to these privatization schemes is that property rights are transferred to a particular group, which can be managers or employees of the former company. In Albania these schemes are used mainly to privatize parts (sub-units) enterprises

Public auction With this method used for the privatization of small and medium enterprises (or parts) the ownership is transferred through an open competition. The reasons for using this method were:

- to be more transparent in privatization techniques
- politically the privatization method is more acceptable than other methods, such as direct selling.
- Maximization of the results of privatization. In fact, this method has not given the expected results.

1.3 The liquidation and the analyze of company assets

The liquidation is the closing of a company and the sale of its assets, while it has interrupted its activities, often due to bankruptcy. In "theory" of privatization is said that this privatization method is used in certain circumstances. For various reasons the Government may prefer to liquidate an ease enterprise and its assets, rather than selling it as a functioning enterprise.

In Albania after the liberalization of prices in 1991, many SOEs went bankrupt. The liquidation would have been the best method for their privatization. However privatization was preferred term instead of the term liquidation. The abovementioned methods (direct sales, MBO, EBO, public auction) often are first followed by the "undeclared" bankruptcy.

Arbitration is a way of resolving disputes between the parties in legal relations. Arbitration is called Arbitral body or organ of non-state character who chooses disagreements of parties regarding the disputes between them. The basic characteristic of arbitration is private resolution and outside the court's jurisdiction. Arbitration in his work is a competitor of the state court, since the arbitration decision is a kind of court decision. It is not done in front of the courts as public authorities, but before an arbitrator, arbitrators of arbitration, ie authorized institutions (*Court of Arbitration, 2011 pp 23*). For the settlement of disputes between the parties in arbitration, should include an arbitration clause in the contract, which provides the mechanism for resolving disagreements.

2. The Purpose of the Study

Arbitration is the most common and contemporary method of resolving disagreements that rise up during the development of international trade operations. It is a private means of conflict resolution based on the preliminary agreement of the parties to refer the eventual context to a private court. This form and method to develop a case usually preferred for certain reasons.

2.1 Hypotheses

Hypothesis 1: Procedures before the Court of arbitration tends to be much faster than the same contentious issues to be addressed to a national court judge in order to be realized respectively.

Hypothesis 2: A court of arbitration of the contract - specified to listen and select a disagreement according to great safe practices will give full and ongoing attention to the contentious issue.

Hypothesis 3: The state remains the owner and transferred to the private sector only rights of users / or development rights, possibly together with some financial risk.

At first in history, arbitration has often been in the service of the first states, under which private persons have contracted their commitment to resolving disputes in order to escape a fierce formalities of rituals procedures of judicial system of that time, but also for resolving disputes which have not been determined with appropriate charges. By that time are seen the advantages of arbitration, to which it is applied not only in the local context, but also between citizens of different states. (*Court of Arbitration, 2011 pp 23*)

"The courts of arbitration appeared in the ancient Greek, where for the first time engage private judges to choose disputes between confused citizens, even though these were the conciliation and mediation procedures." The choice of state disputes outside courts was known even in old Rome, where citizens can arbitrate contractor, but were also able to renounce the arbitration decision, then could continue the same procedure at the request of the court order. However the parties did not have this right if previously they had made the arbitration agreement in writing. (*Puto A, International law text, 2014*)

2.2 The notion of international commercial arbitration

In actual use now is the term International Commercial Arbitration. Officially this term could be applied only to arbitration that is organized in accordance with the Convention on International Commercial Arbitration of Europe which was signed in Geneva on 21 April 1961, but in practice the notion International Commercial Arbitration means any arbitration for resolution of international trade dispute which does not belong to an internal legal system..¹

3. Literature Review And Hypotheses

There is also another point of view according to which it is the ATN arbitration in which as referees can participate citizens of other countries, not only those who are citizens of the state where the headquarters of arbitration is located. Here we speak about all arbitration dealing with international trade dispute resolution, whether national or international. We are dealing here with a different way of resolving international commercial disputes by way of their choice in the national government or international courts.

3.1 The strategic investor

This approach implies direct negotiations between the State as owner represented by the respective authority and private investors will take majority of shares to ensure the running of the enterprise.

The strategic investor is often seen as a precondition to provide technology and financial resources available to the privatized company. At first, this method was meant to be used only for the so-called the strategic sectors.

But in fact, after the privatization of trading companies with MPM first went very smoothly, which was judged that could be resolved by applying the method of "The strategic investor" for the majority stake. This method is used in combination with MPM formula: the controlling package of shares to "The strategic investors and the rest of the shares to the public with MPM".

The Instrument for implementing this method is an open auction or tender.

The method of "non-excretion" from ownership

The method of "non-excretion" from ownership may be an intermediate step towards privatization (sales), showing the ability of the company to be sold in order to survive in the market. The state remains the owner and transferred to the private sector only rights of users / or development rights, possibly together with some financial risk.

¹ <http://www.kosovo-arbitration.com/>

3.2 Transformation and commercial development

Transformation involves the conversion of SOEs in the legal form of a private commercial company, established by the respective laws. The reason is that SOE transformation is acting on the legal and economic conditions the same as private companies will gain the ability to survive and become privatized.

Their only difference from private companies is that the shareholder is the state itself. In Albania, the transformation is considered as a first step toward privatization especially with MPM, the method of strategic investor or public offering of shares

At first it was thought that the time between transformation and privatization was very short, so you never emphasized management. It quickly became clear that almost in all occasions, the transformation did not improve the performance of state-owned companies, regardless of the period up to privatization (mainly with MPM) which has been, in most cases, relatively short.

This applies both to the recognition of decisions of other authorities that settle international trade disputes, especially international trade justice. "It is true that there is an essential difference between judicial settlement and resolution by arbitration of international commercial disputes but has enough meeting points, especially when it comes to their impact on the creation of the rules of international commercial law.

For the right of International Commercial law are of great interest all decisions taken by the Permanent Court of Arbitration. The dispute over the treatment the preferential states in Venezuela is resolved by the court in 1904, the issue of tax residence in Japan, the issue of fishing vessels in the North Atlantic have been solved by 1910, a dispute about the exposure of the real treasure of churches is resolved in 1920, Norway dispute talks regarding claims against the US in 1922 etc.

4. Research Goal

The practice of Permanent Court of arbitration in the Hague against sustained observations can be said that has contributed to the affirmation of certain principles of international law. What is crucial in this court and different from previous international courts is the fact that the party litigant may appear as Member States as well as by legal and natural persons and legal entities.

I.e. litigants in Court of Justice could be: Commission of the European Economic Community; Member countries of the Convention; their legal entities and persons nationals of Member States. These two last subjects to be eligible as a party presentation in future decisions need to be sent to them by the cause that affects their interests. But when it comes to the lawsuit with which action is initiated with the rules of the court provided that the lawsuit must be presented within two months and that if the date of publication of the legal act (in the form of a decision or legal provisions) concerned or notice the claimant for such act or failing that from the day the claimant became aware of the existence of such act.

4.1 Methods of Synthesis

As necessary and very appropriate method for the safety of useful knowledge for the object of study is applied as analytical method, but with a different methodological approach opposite to the analytical methods.

4.1.1 Arbitration reforms and EU standards

Through established methods of synthesis and general knowledge required for arbitration and then are applied scientific methods of analysis in order to create a complete information regarding the types of arbitration and the same object to the arbitration dispute. This means cases for which there did not exist prior basic knowledge and is not made concrete observation. So, from what is mentioned above in connection with the method of synthesis and of all this method is to operate for the creation of scientific views about synthesized knowledge for a certain type of object in the dispute before the arbitration institution.

4.1.2 The inductive method

Through this method becomes interconnection of individual facts in the trial overall. When studying a subject of dispute to arbitration, then some such, in accordance with the inductive method. The principle that contracts worth to principle of equivalence of reciprocal contracting parties, according to the inductive method, is concluded correctly that this principle

is essential for each contract, because it coincides with the nature, character and function contracting, as well as the principles of othercontracting it is the autonomy of the will, the equality of contracting parties etc.

Forced execution of the decisions concerned is regulated by state rules of civil procedure which requires execution (enforcement) of the decision with a monetary obligation. Executive Order is given without any verification (audit) unless prior verification of the authenticity of certain state powers that for the first thing they should inform the Commission of the European Economic Community and the Court of Justice. If these formalities were completed at the request of an interested party, and this may require the violent execution addressing directly to the competent authority according to the internal rules of the state.

5. Sample and Data Collections

Compulsory execution may be extended only on the basis of the decision of the Court of Justice. But the control of measures regularity of the execution is ensured by the State Court in which the execution is done. This is provided in Article 192 of the Rome Convention. If the state chosen as usual by the court does not execute the decision of the Court of Justice may eventually create a political problem.

5.1 Method of Comparison

On the right of arbitration this is a general method for a critical view of arbitration works when they are similar or related to countries or different times with respect to the acquisition, creation, modification and their realization. ²Through this method are realised useful swaps in theoretical and practical knowledge and experience between the affirmative international arbitration institutions and different countries. It must be said that this method is mostly affirmed and practiced in arbitration law which it's of international character and use different legal sources.

5.2 Center for Dispute resolution investment

The idea associated with dispute resolution investment between countries and legal persons who are nationals of other countries in international arbitration became eventually accepted by all as one of the preferred ways of resolving contentious situations that are not so rare. Submission of such contests in the international authorities is certainly more practical than their resolution by the courts of any country. (Petters 2001)

On the one hand the foreign investor has good reason not to believe in the independence and impartiality of the courts of the State in which foreign investments are made. From the other side of the state which is in dispute with the (foreign investor) may be the same reason that he feared being subject to jurisdiction of the court of the State of the investor or any third country. Numerous arbitration in different countries with their work can also promote distrust disputants who in most cases are motivated by political reasons.

5.3 Arbitration Opinions about developments in Kosovo

There were opinions that there is no need for connecting the Convention and the establishment of the Centre on the pretext that the International Arbitration Court of Permanent (Permanent Court of International Arbitration) the possibility of resolving disputes between States and Nationals of Other States.

It should be noted that decisions regarding to the execution of the Centre (execution) produce the effects of local decisions to a member state of the Convention and are executed in the way in which decisions are executive ones in such state. Convention are not affected by the national rules pertaining to state immunity in execution procedure. By this Convention is excluding the right of states and its subordinate matched to so-called diplomatic protection for citizens that are presented as a party to the arbitration procedure of the Centre. Svensson, Lars (2000),

From what is said above it appears that we are dealing with objective presumption with which the parties can not dispose freely and conditionally it need to extend the competence of the Centre. Svensson, Lars (2000), From the practice of the Centre, respectively of arbitration colleges and from clauses models it appears that what was said is only partially correct. In them explicitly is stated that it would be useful for the parties to determine the content of specific terms and thus become sure that the legal presumption for creating (establishing) the competence of the Centre for the issue of their proceedings.

²Ramadan Thaçi "The right to arbitration", *Pristine*, 2012, p. 34

5.4 The purpose of analyze

If clients did not agree, then comes into consideration the attempt finding "objectively" for the existence of the presumptions about the jurisdiction of the Centre.³

Specifically, should be consider the fact that one of the parties to the dispute and the State its consent can provide it differently to the jurisdiction of the Centre. He can be contained in the agreement with the foreign investor directly, which happens often. (Peters 2005)

6. Copmerative analyze of hypothesis

Almost all the countries of Central and Eastern European the development of capital market has preceded in parallel with the development of mass privatization process. Referring to the history of the development of capital markets is clear and it is important to understand from all that the capital market arises as a need of self economic financial development of a transfer of constant capital, so as a natural process in certain moments, and not as an initiative of a certain government or institution. (Muco & Tanku 2011)

In the countries of Central and Eastern Europe is a characteristic that the birth and initial development of capital markets is interdependent and follows the process of privatization. The latter is having essentially the change of ownership is causing and stimulating the movement, exchange, thus the necessity of establishing the relevant markets. At this moment it is important this market be formalized, having as main purpose the protection of anyone who invests in Bonus letters due to fraud and falsification. (Annel E, 2005)

How can impact the privatization process in the development of the capital market?

Firstly: This can be done through the development of a privatization scheme, where public offerings play a key role; (D. Zsolt 2001)

Secondly: By encouraging the creation and participation of a significant number of specialized mediators, such as investment funds. Completion of the privatization process through public offerings would be applied to that part of the privatization scheme that will be realized in cash. This would make the existence of public participation and the fact of listing of the shares of these companies will help to have a correct assessment and transparent one of their means. Taylor, John B. (2000),

The fact that these companies will display a prospectus approved before the public before emitting their shares, it enables the creation of a more accurate idea and complete the latter ones. Also listing of these companies on the Stock Exchange will lead to an increased level of activity and behavior of a good experience and encouraging further treatment stock as one of the most important instruments in the capital market, as in the primary and in the secondary one. Taylor, John B. (2001),

The process of privatization through Bonus letters (vouchers) necessarily requires the existence of specialized intermediaries. Otherwise it can really make it possible to transfer to private sector companies, but it can cause loss of a basic mechanism for restructuring and market guidance to these companies. Practice has shown that in countries where it is pursuing a program of mass privatization through Bonus letters (vouchers), the investment funds could play a key role in the development of the capital markets and in the process of supervision and control of companies (enterprises).

7. Conclusions

Since lack of legal requirements for the qualification of an arbitrator in arbitration Law of Kosovo is in accordance with international practice, it is very important that arbitrators are not subject to criticism. This is particularly important in Kosovo because there is a general lack of confidence in the courts and other experts such as lawyers, accountants, etc.

If the parties do not have confidence in the arbitral tribunal and the arbitrators, they will avoid arbitration just in the way that now that avoid judicial review in the courts. As discussed above, the benefit of institutional arbitration is that the institution offers competent referees. This includes power in arbitration proceedings.

Institutional sponsors arbitration in Kosovo should set minimum standards for arbitrators which reflect the nature and complexity of disputes which are submitted to the tribunal. In addition to the general level of professional experience, specific experience in the matter of dispute is the main benefit of arbitration and represents another priority to trial before a judge who has no experience in that particular matter. Taylor, John B. (2001),

If the parties reach the agreement then the Commission should draw up report in which should explain the (lay) the

³<http://www.kosovo-arbitration.com/>

object of the contest and conclude that the parties have reached agreement. If the Commission at any stage of the proceedings considers (thinks) it is unlikely that the parties reach an agreement then it would conclude (and) procedure and will compile report in which to give an explanation that the dispute is submitted for settlement and the parties have not reached an agreement (compliance). If one of the parties does not come or does not cooperate during the procedure the Commission will close the procedure and the report will conclude that such party has not come, or has failed to cooperate during the procedure.

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