ANNULMENT OF THE ARBITRATION DECISION ACCORDING TO THE LEGISLATION AND PRACTICE

Hajredin Kuçi ¹  
Dafina Vlahna ²  
Argona Kuçi ³  
Kastriote Vlahna ⁴

ABSTRACT

Objective: The study of the work has a comprehensive approach, based on current legislation and practice. Based on the fact that the arbitration procedure is an alternative procedure for the resolution of disputes, it is quite demanded, and that there are deficiencies in the literature as well as in the knowledge of the subjects of the law. Thus, when it came to the decisions made in the arbitration procedure, we say that they have the same legal force as the decisions made by the regular courts of the state, and also the annulment of the decision requires special clarification, since there are cases that the decision made in the arbitration proceedings are required to be set aside as the reason that the agreement to arbitrate is void. Thus, the purpose of this paper is to clarify in short points that it is possible to annul an arbitration decision in the event that the arbitration agreement was invalid.

Method: The work is formulated on the basis of appropriate scientific methods. The methods that are included in the paper are scientific methods, historical methods, comparative methods, deduction methods, induction methods, and other methods without which the paper could not be formulated!

Result: The decision made in the arbitration procedure must be made in accordance with the law on arbitration as well as with the principles defined in the law on arbitration, whether domestic or international. If it is found that the arbitration decision is illegal, or not based on evidence, then the same can be annulled. This annulment can be done by the regular state courts, but always in case the party that has a legal interest addresses the court and requests the annulment of the arbitration decision because it is contrary to the law on arbitration or contrary to the agreement on arbitration, or other reasons which the parties may present in the action for annulment of the arbitration award. We will talk more about the annulment of the arbitration decision in the content of this paper.

Conclusion: As a conclusion of the paper, in the general sense of this paper, I have mentioned that the parties during the terms of the agreement must be careful not to conflict with any reason that leads to the invalidity of the arbitration agreement, since this invalidity will have consequences in in the event that an arbitration award has been given by this agreement, as from the regular courts this award will be annulled because the arbitration agreement has been invalid since the beginning of the criminal offense of this agreement or may become invalid and with the passage of time. So, during any action taken by the parties who claim to resolve their dispute through arbitration, they should be careful that everything is in order with the arbitration agreement, as the invalidity of the agreement may lead to the annulment of the award, of arbitration and this would be to the detriment of the party.

Keywords: Arbitration, Alternative Procedure, Arbitration Decision, Cancellation of Decision, Reasons For Cancellation.

¹ Faculty of Law, Private Law, University of Pristina "Hasan Prishtina", Pristina, Republic of Kosovo. E-mail: hajredin.kuci@uni-pr.edu Orcid: https://orcid.org/0000-0001-6100-5794
² Faculty of Law, Financial Law, University of Pristina "Hasan Prishtina", Pristina, Republic of Kosovo. E-mail: dafinab.55@hotmail.com Orcid: https://orcid.org/0000-0003-1977-4076
³ Faculty of Law, Private Law, University of Southeast Europe, Macedonia. E-mail: argona.kuci@gmail.com Orcid: https://orcid.org/0000-0003-1977-4076
⁴ Faculty of Law, Civil Law, University of Pristina "Hasan Prishtina", Pristina, Republic of Kosovo. E-mail: kastriote.vlahna@uni-prizren.com Orcid: https://orcid.org/0000-0001-6100-5794
ANULAÇÃO DA DECISÃO ARBITRAGEM CONFORME A LEGISLAÇÃO E A PRÁTICA

RESUMO

Objetivo: O estudo da obra tem uma abordagem abrangente, baseada na legislação e prática vigente. Pelo fato de o procedimento arbitral ser um procedimento alternativo para a resolução de conflitos, ele é bastante exigido e há deficiências na literatura, bem como no conhecimento dos assuntos de direito. Assim, quando se trata das decisões proferidas no procedimento arbitral, dizemos que elas têm a mesma força jurídica das decisões proferidas pelos tribunais regulares do estado, e também a anulação da decisão requer esclarecimentos especiais, uma vez que há casos que a decisão proferida no processo arbitral deve ser anulada como razão da nulidade da convenção de arbitragem. Assim, o objetivo deste artigo é esclarecer em breves pontos que é possível anular uma decisão arbitral caso a convenção de arbitragem seja inválida.

Método: O trabalho é formulado com base em métodos científicos adequados. Os métodos incluídos no artigo são métodos científicos, métodos históricos, métodos comparativos, métodos de dedução, métodos de indução e outros métodos sem os quais o artigo não poderia ser formulado!

Resultado: A decisão tomada no procedimento arbitral deve ser tomada de acordo com a lei de arbitragem, bem como com os princípios definidos na lei de arbitragem, seja nacional ou internacional. Caso se verifique que a decisão arbitral é ilegal, ou não baseada em provas, a mesma poderá ser anulada. Esta anulação pode ser feita pelos tribunais estaduais regulares, mas sempre caso a parte que tenha interesse jurídico se dirija ao tribunal e solicite a anulação da decisão arbitral por ser contrária à lei de arbitragem ou ao acordo de arbitragem. ou outras razões que as partes possam apresentar no pedido de anulação da sentença arbitral. Falaremos mais sobre a anulação da decisão arbitral no conteúdo deste artigo.

Conclusão: Como conclusão do artigo, no sentido geral deste artigo, mencionei que as partes durante os termos do acordo devem ter cuidado para não entrar em conflito com qualquer motivo que leve à invalidade da convenção de arbitragem, uma vez que este a invalidar terá consequências caso uma sentença arbitral tenha sido proferida por este acordo, já que nos tribunais comuns esta sentença será anulada porque a convenção de arbitragem foi inválida desde o início da infração penal deste acordo ou pode tornar-se inválida e com o passar do tempo. Assim, durante qualquer ação tomada pelas partes que pretendem resolver o seu litígio através da arbitragem, devem ter o cuidado de que tudo esteja em conformidade com a convenção de arbitragem, pois a invalidade da convenção pode levar à anulação da sentença da arbitragem e isso seria em detrimento da parte.


ANUNCIO DE LA DECISIÓN ARBITRARIA DE CONFORMIDAD CON LA LEGISLACIÓN Y LA PRÁCTICA

RESUMEN

Objetivo: El estudio de la obra tiene una abordaje abrangente, basado en la legislación y la práctica vigente. Pelo fato de o procedimento arbitral ser um procedimento alternativo para a resolução de conflitos, ele é bastante exigido e há deficiencias na literatura, bem como no conhecimento dos assuntos de derecho. Assim, quando se trata das decisões proferidas no procedimento arbitral, dizemos que elas têm a mesma força jurídica das decisões proferidas pelos tribunais regulares do estado, e também a anulação da decisão requer esclarecimentos especiais, uma vez que há casos que a decisão proferida no processo arbitral deve ser anulada como razón de nulidad de la convenzione de arbitraje. Así, el objetivo de este artículo es declarar en breves puntos que es posible anular una decisión arbitral en caso de una convenção de arbitraje seja inválida.

Método: El trabajo está formulado con base en métodos científicos adecuados. Os métodos incluídos no artigo são métodos científicos, métodos históricos, métodos comparativos, métodos de deducción, métodos de inducción y otros métodos sem os quais o artigo não poderia ser formulado!

Resultado: Una decisión tomada no procedimiento arbitral debe ser tomada de acuerdo com la lei de arbitragem, bem como com os principios definidos na lei de arbitragem, seja nacional ou internacional. Caso se verifique que uma decisão arbitral é ilegal, o no basada em provas, a mesma poderá ser anulada. Esta anulación puede ser feita pelos tribunais estaduais regulares, pero siempre caso a parte que tenga interés jurídico se dirija al tribunal e solicite uma anulación de decisión arbitral por ser contraria a lei de arbitragem ou ao acordo de arbitragem. ou outras razones
In principle, the procedure before international commercial arbitration is one-level and as a result, the parties do not have the possibility of presenting ordinary legal remedies. So, the decisions of the arbitration tribunal are final and of course cannot be appealed as a regular legal remedy. However, the decisions of the arbitral tribunal may be the subject of an action for the annulment of the decision, which action is presented to the competent court. (Iset., 2015) The submission of an appeal against the arbitration decision by the party dissatisfied with it can only be expressed exceptionally, and that this depends on the will of the parties. Indeed, the parties may contract the possibility of striking the arbitral award by appeal if this is allowed by the provisions of the national legislation or by the provisions of the institutional regulations of arbitration. In such a situation, the second-instance proceedings would take place before another arbitral tribunal, which would assume a role similar to that of the second-instance court. However, such an opportunity is rarely used in practice, since contracting it would eliminate the advantages that international commercial arbitration has over the judicial process, which consist of economic, efficient and expeditious dispute resolution. (Iset., 2015).

2 LITERATURE REVIEW

Based on the division of sources used during the formulation of the paper, I emphasize that these sources can be divided into three categories different, since among them there are also laws, journals, decisions from the judicial system, etc. Therefore, in the first category of
literature that will be used in the formulation of the paper are books and scientific papers that have do with the topic of the paper in question. The materials obtained from the first category of sources formulate almost half of the work, but always based on them and drawing the best of books and journals dealing with the subject of arbitration procedure. So through the analysis of comprehensive materials in the first category, certain issues that are the main component of the paper will be analyzed. The second category of sources (literature) in the formulation of the paper consists of: the local law of the arbitration procedure and of other countries as well as neighboring countries and international laws as well as other legal acts that deal with the issue of the arbitration procedure. As well as in the third category of sources (literature) that will help the formulation of the paper in question, there are cases treated in specific points which are taken from the developed practice in general, I emphasize that the literature of the work mainly has materials focused more on the first category mentioned above, that is, it will mainly be taken from classic books, electronic books, both from the Albanian language and from foreign languages. I emphasize that all the literature included in this work includes auxiliary literature which has helped us in preparation of the topic, such as: dictionaries, guides, etc.

3 METHODOLOGY

During the preparation of the work, adequate literature was used from local and international authors, and especially from international and local legislation. Taken in general, the literature used in the paper is mainly based on the statements of legislation such as UNSTRAL, then the New York Convention, and these are compared with the statements in the Kosovo Arbitration Law. Among other things, the practice of the courts was also looked at, what they do in the event that the annulment of an arbitration decision is requested. All these, based on the mentioned literature, are presented in the content of this paper.

4 RESULTS AND DISCUSSION

4.1 ARBITRATION AWARDS MAY BE SET ASIDE

When the procedure for the annulment of the arbitration award is started, one of the primary tasks of the court before which such a request is made is to verify what kind of arbitration award it is about in the specific case: a domestic award or a foreign award arbitration. This is important, as the court can only set aside those arbitral awards that are considered or
qualified as domestic. Unlike those, foreign arbitration decisions are subject to judicial review in the procedure of their recognition and execution, a procedure which takes place before the courts of the state where their recognition and execution is sought and not before the court of the state to which it belongs there is a decision. (Vlahna, 2022) Determining the national relevance of arbitral awards is the responsibility of each country's national legislation. In contemporary international commercial arbitration law, two criteria are most commonly used to determine which arbitral award is "domestic", which qualifies as "foreign". The first criterion is the territorial one, while the second is the procedural criterion. (Jovićić, 2007).

4.2 CAUSES FOR SETTING ASIDE THE ARBITRATION AWARD

The lawsuit for the annulment of the arbitration decision, as we emphasized above, is a limited legal remedy also in terms of the causes for which the full-power arbitration decisions can be challenged, concretely it can be presented to the competent court and that only for the reasons of expressly provided by law. (Iset., 2015) Therefore, the party that is dissatisfied with the final result of the arbitration procedure can request the annulment of the arbitration decision only for those reasons, which are taxatively emphasized in the national legislation of the country to which it belongs there is a decision. The grounds for annulment of arbitral awards vary from one legislation to another, although recently a harmonization has been achieved in this aspect, as many national legal systems have adopted almost entirely the grounds provided for in the UNCITRAL ML. The reasons for the annulment of the arbitration decision are foreseen in the Laws of Kosovo in article 36.2 and have the character of numerus clauses. This means that only for these reasons and not for other reasons can the decision of the national arbitration be annulled. (Iset., 2015).

4.2.1 Grounds for Annulment of Arbitration Awards, the Existence of Which Must be Proved by the Claimant

Here we are talking about those causes that lead to the annulment of the arbitration decision by the court only if before the latter the plaintiff proves the existence of at least one cause that is taxed in the law. It is understood that the plaintiff can invoke all the causes of annulment provided by the legislator of the country to which the decision belongs, but in order to succeed with the presented lawsuit, he must prove the existence of any of the causes of annulment. with the exception of the causes related to the non-arbitration of the dispute and
Annulment of The Arbitration Decision According to The Legislation and Practice

violation of the public order of the state where the decision was taken, since the court considers these last two ex officio even when the plaintiff has not been called to them expressly and in detail. (Vlahna K. K., 2020) The reasons which are evaluated according to the request of the party are presented one by one below:

4.2.1.1 Lack of Intent to Attribute

As well as other legal acts that are based on the ML of UNCITRAL, it distinguishes two categories or groups of causes, also between the group of causes that the court evaluates only on the basis of the request of the party and the group of causes that the court evaluates ex officio.

Specifically, according to the UNCITRAL PP, the arbitral award can be set aside if the claimant proves that:

- the party to the proceedings was unable to enter into the arbitration agreement or to be a party to the arbitration agreement, under the law applicable to its capacity, or
- the arbitration agreement was not bound at all or was not valid according to the law to which the parties refer or if this reference is missing from the parties, according to the law of the Republic of Macedonia, or
- the party who submitted the claim was not properly notified of the appointment of arbitrators or of the commencement of the arbitration proceedings, or was unlawfully prevented from being examined in the arbitral tribunal, or
- the arbitration award relates to the dispute that is not provided for in the arbitration agreement, or that is not included in the provisions of the arbitration agreement, or contains decisions on issues that exceed the limits of the arbitration agreement. In such cases, if the award on the issues submitted to arbitration is severable from the award on those issues not submitted to arbitration, only that part of the arbitration award containing provisions relating to the issues not submitted to arbitration may be set aside. were submitted to arbitration, or - the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the arbitration agreement of the parties, unless this agreement is contrary to any provision of this law, the implementation of which the parties cannot exclude him. , or in the absence of such an agreement of the parties, not to be in accordance with this law. (UNCTRAL, fv. article 35, paragraph 2, point 1.)
4.2.1.2 The Contracting Party did not Have the Ability to Attribute

The decision of the arbitral tribunal would be annulled by the court, if at least one party to the arbitration agreement did not have the capacity to act. From this rule defined in the Laws of Kosovo (Kosovo., f. Arbitration Law of Kosovo. Article 36 par. 2 under par. A) (i) of LA:) [7] it follows that the party would have to have full capacity to act, while the limited capacity to act is not enough. (Iset., 2015, f. Pg. 273). From the linguistic interpretation of this provision, it follows that the party should have full capacity to act all the time until the arbitral tribunal's decision is issued. And in case the court finds that one party did not have full capacity to act, it will cancel the decision of the arbitration tribunal because the arbitration agreement itself was invalid. (Iset., 2015).

4.2.1.2.1 Non-Existence or Invalidity of Arbitration Agreement

The jurisdiction of any international commercial arbitration tribunal derives from the parties' agreement on arbitration, therefore, the question of the existence and validity of such an agreement is a matter of great practical importance at the stage of judicial review of the arbitration award. The arbitration agreement is treated as an independent agreement in relation to the contract in which it is included and that the resolution of this agreement, in general, does not depend on the invalidity of the main contract. However, both the main contract and the arbitration agreement may be affected by the same defect. Therefore, in cases where the cause of invalidity of the main contract directly affects the arbitration agreement, then the arbitral tribunal must declare the arbitration agreement invalid. For example, the parties' lack of consent to the main contract may also mean their lack of consent to enter into the arbitration agreement contained in that contract. Although the final result of the main contract and the arbitration agreement may be the same (that both are declared invalid), it is important that that result is reached by a separate assessment because the procedure for verifying the invalidity of the arbitration agreement is separate from the procedure for invalidity of the main contract. The resolution of the arbitration agreement for the Invalidity of the arbitration agreement is a reason for filing a lawsuit for the annulment of the decision of the arbitration court. The agreement which was initially valid, but later this agreement was extinguished, e.g. through regular denunciation of the agreement, it will be considered invalid. The arbitration agreement shall also be void if the form of the arbitration agreement has not been complied with as provided in the arbitration law (Iset., 2015, f. Pg. 274). Indeed, the non-existence or invalidity
of the arbitration agreement is universally accepted as a basis for setting aside the arbitral award in both domestic and international sources of arbitration law. It, at the same time, constitutes an obstacle to the recognition and execution of foreign arbitral awards in accordance with the New York Convention of 1958. So, if the arbitration agreement does not exist at all as concluded between parties, or if it is not valid under the law designated by the parties or, in the absence of such a determination, the arbitral award is set aside. The invalidity of the arbitration agreement may be caused by non-compliance with the form provided for the arbitration agreement, as well as due to material deficiencies (flaws in terms of the content of the agreement). This is how we distinguish the formal invalidity and the material-legal invalidity of the arbitration agreement. What is important to note in this case has to do with the fact that according to many national legal systems, the party is obliged from the beginning of the arbitration (during the development of the arbitration process), not to lose the right to summoned for this reason at the stage of the process according to the claim for annulment of the arbitration decision. (UNCTRAL, fv. Articles 4, 7(5)). According to this position, the party in its claim cannot invoke the non-existence or invalidity of the arbitration agreement if it has waived the invocation of this cause before the arbitration during the conduct of the arbitration procedure.

**4.2.1.1.3 Violation of the Principle of Hearing the Parties**

The principle of listening to the party and together with the principle of adversariality are basic principles not only in the procedure before the arbitration court. (Iset., 2015, f. Pg. 276) The decision issued without declaring the other party is an unfair decision and should be annulled even if that decision is correct from the point of view of material legality. It is enough to violate the principle of listening to the parties, (Law No. 03/L-006 of the Dispute Procedure of the Republic of Kosovo, 2008), for the decision to be considered unfair, with the consequence that the decision will be annulled. (Iset., 2015, f. Pg. 276) Based on the LA, the court will annul the decision of the arbitral tribunal, (Law No. 03/L-006 of the Dispute Procedure of the Republic of Kosovo, 2008, f. Article 36 par.2 under par. a). (iii);) if the party provides the facts and evidence that it was denied in any way the right to be heard and the opportunity to make a statement regarding the case. which are the object of the dispute in the procedure before the arbitration tribunal. (Iset., 2015, f. Pg. 276)
4.2.1.4 Void Agreements

Void arbitration agreements are those that can be attacked and declared void, while ab initio non-existent agreements are those that never came into force because the parties never finalized the agreement. Various courts and commentators have distinguished between agreements that are void (ie where the agreement exists but is subject to rescission) and contracts that are non-existent ab initio, (ie a contract that never existed). (Pollux Marine Agencies & Pottawatomi Indians v. Kean-Argovitz Resorts) Some authors and some cases refer to non-existing agreements ab initio as "defective clauses at birth" (.g. Sté Navimpex v. Sté Viking Traller) Courts have found that contracts that do not exist ab initio are "challenges to the very existence of the contract" as opposed to "attempts to avoid a contract or to annul it" that are otherwise subject to arbitration. If an entire contract is non-existent ab initio, the non-existence of the contract includes the agreement to arbitrate. These concepts have formed the basis of UNCITRAL. Model Law, Article 8(1 ), which provides that if a matter that is the subject of an arbitration agreement is brought before a court and a party requests the court to refer the matter to arbitration, (UNCITRAL, f. Article 8(1).) the court shall refer the matter to arbitration, arbitration except if it finds that the arbitration agreement is:

1. null and void,
2. dysfunctional, or
3. impossible to realize. (Convention., fv. New York, Article II.3.)

An agreement to arbitrate is considered null and void when the agreement was never actually reached or, if reached, was non-existent ab initio. Agreements to arbitrate, which have been revoked or set aside, are deemed to be null and void. Agreements to arbitrate are found to be null and void if they are defective from their formation, usually due to fraud, duress, illegality, mistake, and lack of authorization. In other cases, courts have found that arbitration clauses are null and void when the arbitrator was also a party to the contract. The contract is considered non-functional when an external event breaks the contractual relationship, immediately the contract is terminated and the arbitration clause is broken. The contract is considered non-functional when an external event breaks the contractual relationship, immediately the contract is terminated and the arbitration clause is broken. of the arbitration agreement are so unintelligible, undefined, or contradict each other that the tribunal cannot determine the parties' intent. For example, if an arbitration agreement selects an arbitrator who should hear the case, but the same is not available, or an institution is defined that does not exist, then the arbitration clause is considered to be "impossible" to be performed.
4.2.1.4.1 Writing Condition

The condition that stipulates that the arbitration agreement must be in writing in order to be valid is actually stipulated in the arbitration rules of most institutions that deal with this form of dispute resolution. The Law of Kosovo on Arbitration foresees this condition stating that "Arbitration agreements are concluded in written form" and at the same time specifies that this condition is considered fulfilled "even if the conclusion of the arbitration agreement is documented in the form of an exchange of letters, fax, telegram or other means of telecommunication or electronic communication, in the form of a bill of lading, if the bill of lading expressly contains an arbitration clause, or in the case of filing a lawsuit and answering the lawsuit, within which one party claims that there is an arbitration agreement and the other party does not contest this". (Kosovo., f. Article 6) The importance of the existence of the arbitration clause, as an integral part of the contract made in written form, has been confirmed in several cases. ((CLOUT))Under the New York Convention, it is sufficient that the agreement to arbitrate be reached within the framework of an exchange of letters or telegrams. In addition, the number of communications exchanged between the parties may be adequate record of a written agreement to arbitrate. (Convention., fv. New York, Article II(2))

4.2.1.5 Separation Principles

Arbitration clauses can be challenged as invalid or non-existent based on claims that the commercial contract (of which the arbitration clause forms part) is invalid or non-existent. It is logical to conclude that, if there was no contract or agreement on any of the terms of the contract (including the contract clause), then the arbitration clause should also be considered void. However, it is important to note that the reason the parties include the arbitration clause in the first place is because they want to resolve their eventual disputes through arbitration. So, to resolve these situations, arbitration panels and courts have promulgated the doctrine of severability. (UNCTRAL, f. Article 16 (1)). This doctrine simply means that the arbitration clause is an independent agreement, separate from the rest of the contract of which it is a part. (Conventioin., fv. New York, Article 2.3). The principle of severability is foreseen in the Law of Kosovo on Arbitration, where it is stated that the arbitration court decides on the validity of the arbitration agreement "in this context, the arbitration clause that is part of the contract is dealt with. as an agreement separate and independent from the contract. (Law no. 02/L-75). The doctrine of severability is widely recognized and many courts have held that the arbitration
agreement is a separate contract, separate from the commercial contract. Moreover, most institutional arbitration rules have incorporated these principles into their rules, thus defining that the arbitration agreement survives any eventual defect in the main contract. (UNCTRAC, f. Article 16 (2)). Many courts have held that even if the contract is non-existent, entered into through misrepresentation or non-disclosure, whether negligent, fraudulent, or even without bad faith, or if the contract is repudiated, the arbitration clause survives the main contract, sufficient for the agreement to arbitrate to be reached in the framework of the exchange of letters or telegrams. In addition, the number of communications exchanged between the parties may be adequate notice of a written agreement to arbitrate. (Convention., fv. New York, Article II.2).

4.2.1.1.6 The Concept of Arbitrariness

The concept of "arbitrability" means that an arbitral tribunal or a court must assess whether a particular type of dispute can be properly arbitrated, or whether it should be dealt with by competent courts. Arbitrability is defined where the validity (Convention., fv. New York, Article I.1) and acceptance of an arbitral award is addressed. (Convention., fv. New York, Article I.2.).

The Law on Arbitration of Kosovo defines "arbitration", which provides that "A dispute may be resolved through arbitration only if there is an agreement of the parties whereby they agree that the dispute shall be resolved through arbitration." Most importantly, this article further states that "disputes related to civil-legal and economic-legal claims may be submitted to arbitration, unless prohibited by law." (Law no. 02/L-75, f. Article 5). The law does not specify any limitations on the types of disputes that would not be arbitrable. However, it is clear that disputes that do not fall into the two mentioned categories, which are civil-legal and economic-legal, will be rejected by the arbitral tribunal as non-arbitrable (for example, cases based on criminal law). (Law no. 02/L-75, f. Article 5.2). Due to the different rules in different legal systems, it is strongly advised that the parties analyze the applicable law and assess whether any dispute arising between them will be arbitrable under that law and thus avoid problems that may arise. result from this matter.
4.2.1.1.7 Incorrect Definition of the Institution and Rules for Arbitration

Misidentification of the institution or of the arbitration rules is sometimes taken as a basis for declaring the arbitration agreement invalid. This usually happens when the parties do not refer to the institution or rules for arbitration by name, or if they do not refer to them at all. The decisions of many courts on these issues have varied, however, the assessment that finds the most support is that, if there has simply been a "misinterpretation" of the institution or the rules, then the court or tribunals try to give effect towards her clause that attempts to interpret the will of the parties to the agreement. However, if the parties refer to institutions or rules that do not exist, then most courts declare these provisions invalid, since in these cases it cannot be determined what the will of the parties was. It is quite common for arbitration agreements in which the institution or rules for arbitration are incorrectly cited or unclear. However, most tribunals and arbitral tribunals have found that these clauses have effect in all cases where the intention of the parties was clearly to choose a relevant institution or rules, and where, for example, if no other arbitration institution or rule can to be implemented. is implied when mentioned. However, it should be noted that a defective clause can only be rectified if there is a high degree of certainty as to the true intention of the parties through interpretation. For example, if the parties refer to the "German Arbitration Association" instead of the "German Arbitration Institute" and this is the only institution in Germany that deals with the arbitration of disputes, then it is very easy to determine the intention of the parties. . But if the parties simply state "New York, Arbitration," without reference to the institution or rules, then it would be difficult, if not impossible, to determine where the parties wish to arbitrate their disputes, since New York has more than an arbitration institution. (http://www.euralius.eu/pdf/multilateral-agreement/Konventa-Europiane-e-Arbitrazhit-Nderkombetar-Tregtar.pdf.)

4.2.1.1.8 Preventive Measures That can be Used to Avoid Violations Arbitration Clause (Agreement).

A party can sometimes go to court, regardless of the fact that an arbitration clause is included in the contract, claiming that the arbitration agreement never came into force or that it has become invalid as a result of relevant circumstances. On the other hand, the party who claims that such an agreement exists and is valid, initiates arbitration proceedings and also claims that the party who went to court has in fact breached the arbitration agreement. For such
a case not to happen, the parties can take preventive measures at the time when the arbitration agreement is made.

These include measures of:

- irrevocably submit to the jurisdiction of the arbitral tribunal
- Waiver of objection to actions that comply with the arbitration clause, due to forum non conveniens.
- Waiver of objection to actions that comply with the arbitration clause, based on issues of the conclusion of the contract
- Waiver of Objection to Arbitration Proceedings for Failure to Appear
- compensation for all reasonable costs of implementing the agreement and any eventual decision
- Waiver of objection to actions that comply with the arbitration clause based on the defense of "sovereign immunity"

The above-mentioned preventive measures can help the parties to enforce their arbitration agreement despite the objections that may arise as a result of the initiation of the dispute. Therefore, it is advisable for drafters of arbitration agreements to take these factors into account if enforcement of the arbitration clause is important to them.

**4.2.1.9 Consequences that may Flow as a Result of a Breach of the Arbitration Agreement**

If one party, despite the existence of an arbitration agreement, initiates court proceedings, it may happen that the arbitration tribunal decides against this party, in which case it is established that the party in question has violated the arbitration agreement. (Law no. 02/L-75, f. Article 14).

In addition, the party claiming that the arbitration agreement exists has several other options:

- First, the party that has not breached the agreement can ask the tribunal to issue an injunction against the suit; (the arbitral tribunal may issue an injunction against the suit, thus ordering the party to suspend the court proceedings). (RPSH, f. Civil procedure code of RPSH. Article 297)
- Second, the party that has not breached the agreement can ask the tribunal to issue a declaration of release from liability; (this request is usually made in cases where the opposing party asks the court to execute (enforce) the award. Thus, the party before the arbitral tribunal must act as quickly as possible to obtain the tribunal's decision first, in
order to establish res judicata on the case. This can be achieved through a declaration of release from responsibility, and helps this party to resist any attempt to execute (enforce) the court decision).

• Third, the non-breaching party may seek damages for breach of the arbitration agreement. (Some courts have held that there is compensation for damages caused by a breach of the arbitration clause. This includes the costs of any counterclaim, costs incurred in court proceedings in which the court's jurisdiction is challenged, and for any increased costs of additional arbitration sessions which must be held as a result of parallel proceedings before the court and the arbitral tribunal simultaneously.) (Rules, f. Article 15).

These remedies are not available to the parties in all legal systems. Therefore, instead of using these legal remedies, it is recommended that the parties undertake one or all of the preventive measures.

5 REASONS FOR THE ANNULMENT OF THE ARBITRATION DECISION WHICH THE COURT EVALUATES ACCORDING TO OFFICIAL DUTY

This group of causes includes: non-arbitrability of the subject matter of the dispute and infringement or violation of the public order of the state to which the arbitration decision belongs. (A. J. van den Berg, 1958, f. p. 360). When any of these reasons exist, the court may set aside the challenged arbitration award, even when the claimant has not expressly invoked those reasons. Let's take each of these causes in turn:

a) Non-arbitrability of the subject of the count (non-arbitrability ratione materiae). Disputes submitted to international commercial arbitration for resolution must be arbitrable. Otherwise, the competent national court will always cancel the arbitration award if it finds that the subject matter of the dispute is non-arbitrable according to the law of its country. (LATNRM, fv. article 35, paragraph 2, point 1). The term "non-arbitrability" means the unsuitability of the dispute to be referred to arbitration for resolution.

b) Violation of the public order of the state to which the arbitration decision belongs. Finally, the LATNRM provides that the arbitration award will be annulled if the court ex officio or based on the initiative of the party that filed the lawsuit finds that the arbitration award is contrary to public order. It follows from this that the public order (ordre public) is a legal institution that leads to the annulment of arbitration decisions, if these decisions are in conflict with the basic principles of the legal system of the country of origin of the decision. (Bilalli, 2008, fv. Kuçi, Hajredin, p. 312-315.).
6 DISCUSSION AND CONCLUSION

All international instruments are directly applicable to disputes with foreign investors in Kosovo. The implementation of the Arbitration Law in Kosovo as one of the means by which the resolution of business disputes is accelerated, would reduce the number of cases in the Courts and the increase of foreign investments in Kosovo. Although the citizens of Kosovo are still not aware of the importance and role of arbitration, although there is still a lack of proper awareness of businesses about the importance of arbitration centers. The resolution of business disputes between Kosovo businesses has started to be done through arbitration centers, which operate within the framework of the Kosovo and American Chambers of Commerce. So from the general aspect on the right of arbitration, we must know that for the settlement of a dispute by arbitration and for the application of these regulations as well as the laws defined for arbitration, the parties at the beginning of the conclusion of the main contract must also conclude a contract second (accessory) with the aim that in the event that in the future disagreements arise from the main contract, then this dispute will be resolved through arbitration. So first, the parties in the relationship of obligations must enter into a written agreement (arbitration agreement). In the general sense of this paper, I have mentioned that the parties during the terms of the agreement must be careful not to conflict with any cause that leads to the invalidity of the arbitration agreement, since this invalidity will have consequences in the event that a decision is given of arbitration from this agreement, since by the regular courts this decision will be annulled because the arbitration agreement was invalid from the beginning of the crime of this agreement or it can become invalid and with the passage of time. So, during any action taken by the parties who claim to resolve their dispute through arbitration, they must be careful if everything is in order with the arbitration agreement, as the invalidity of the agreement may lead to the annulment of the decision. of arbitration and this would be to the disadvantage of the party.

6.1 RECOMMENDATIONS

Based on the content of the sentence, and we analyze what was done on the subject in question, he said that he should participate in the arbitration procedure of the general well-informed start that he received for him an arbitration procedure is of particular importance, this is due to the fact that the cancellation of this situation may cause the cancellation of the arbitration decision and also the procedures in this way, as it is not yet the beginning of a case.
Thus, as a recommendation for all parties who claim to choose their case through arbitration procedures, it is to get a good understanding of the arbitration procedures, as well as the elements of arbitration and everything that does not have that procedure and that the law allows for arbitration, Kosovo, as well as international.

REFERENCES


[2]. According to: The author of the book Arbitration and Arbitration Procedures, Prof. Dr. Iset Morina drew attention by pointing out that: only the national arbitration decision can be challenged with a lawsuit for annulment, since only the national arbitration decision can be annulled, while the foreign arbitration decision can be recognized or the recognition of that decision can be refused.


[4]. In the legal theory, there are also other criteria for determining the national affiliation of arbitration decisions. So, in this regard, the personal criterion is also distinguished (according to which the affiliation of the arbitration decision depends on the national affiliation of the participants in the concrete arbitration procedure), as well as the concept of the existence of a q. "a-national arbitration decisions", which are not connected to any country, or to any national legal order. Regarding these criteria, see: K. Jovičić, 'Odluke internationale tvrđanske arbitraje koje se mogu poništavati pred sudom', Pravni Život, no. 12/2007, Belgrade, p. 585-588;


[6]. Yes there. Page 272;


[8]. UNCTRAL article 35, paragraph 2, point 1.


[13]. See: UNCTRAL ML Articles 4, 7(5) and 16(2); LA of Kosovo article 6.2, 14.2, and 27; LATNRM article 4, 7(1) and 16(2); LA of England article 31 and 73; LA of Croatia article 5 and 6(8); LA of Serbia article 12(5) and 43. Such a position is also found in the decision
of the Court of Appeal of Paris, dated September 27, 2001, in the case SA Caisse Fédérale de Crédit Mutuel du Nord de la France v. Société Banque Delubac et Compagnie - published in Revue de l'arbitrage, Volume 2001, issue 4, pg. 916-917 (The Court of Appeal of Paris rejected the request for annulment based on the fact that the party failed to challenge the jurisdiction of the arbitrator during the arbitration procedure itself and therefore considered that the party waived the right to filed the objection).


[15]. See: Law No. 03/L-006 of the Dispute Procedure of the Republic of Kosovo, where according to it it is stated: According to this principle, the court has the duty to give each of the parties the opportunity to present their opinion regarding the issue on which the procedure is being developed, and also the possibility of declaring about the statements and claims of the opposing party. This principle, which is also known as the principle of adversariality, obliges the court to enable each of the parties in the dispute to actively participate and at the same time ensure the equality of the procedural parties before the court in the presentation and collection of relevant facts to decide in a meritorious manner a concrete legal issue (Article 5 of the LPK). Only in the cases defined by law, the court has the right to decide on the request for which the opposing party was not given the opportunity to declare (Article 5.2 of the LPK). HEARING OF THE PARTIES Article 373 LPK "upon the proposal of the party, the court may decide to take evidence by hearing the parties".


[17]. See: Arbitration Law of the Republic of Kosovo. Article 36 par.2 under par. a). (iii);


[20]. See e.g. Sté Navimpex v. Sté Viking Traller, 06.12.1988, (Fr)).

[21]. See: UNCITRAL Model Law, Article 8(1).

[22]. See: New York Convention. in Article II.3.


[24]. See: Customary Law in UNCITRAL Texts (CLOUT):
http://www.uncitral.org/uncitral/en/case_law.html);

[25]. See: Article II(2) of the New York Convention;

[26]. See: UNCITRAL Model Law (Article 16 (1);

[27]. See: New York Convention, Article 2.3.

[28]. See: Law no. 02/L-75, Law on Arbitration of Kosovo. Article 14.
[29]. See: UNCITRAL Model Law. Article 16 (2); ICDR Arbitration Rules (Article 15(2); and Kosovo Arbitration Rules (Article 24.1)).


[32]. Yes there. Article I.2.

[33]. See: Law no. 02/L-75, Law on Arbitration of Kosovo. Article 5.

[34]. Yes there. Article 5.2.


[36]. See: The Kosovo Arbitration Law (Article 14) is clear in giving the arbitral tribunal the power to decide on cases regarding the validity of an arbitration clause. In short, "The arbitration tribunal decides on the validity of the arbitration agreement and whether it is competent to resolve the dispute that has been submitted to it." This is also provided for in the Rules of Arbitration in Kosovo.

[37]. See: Civil procedure code of RPSH. Article 297.


[39]. In the legal theory, the position prevails according to which both causes are related to one issue, and that is the violation of public order. According to this position, the arbitrability of the dispute is part of the general concept of public order. Regarding this position see: A. J. van den Berg, The New York Arbitration Convention of 1958, T.M.C. Asses Institute, The Hague, 1981, p. 360.

[40]. See eg, LATNRM article 35, paragraph 2, point 1 (first cause); UNCITRAL ML Article 34(2)(b)(i); Law of Kosovo Article 36(2)(b)(i).


As for the definition of public order, there is no unique and clear definition for this legal institution, neither in legal theory, nor in the legislation of different states, nor in judicial practice. However, from the legal doctrine we are highlighting one of the definitions for which we have special consideration, since it clearly emphasizes that public order "reflects the fundamental economic, moral, political, religious and social standards of any state or supranational community", also professors A. Bilalli and H. Kuçi when they deal with ordre public, they talk about "fundamental legal principles", about "basics of social regulation", as well as about "values of the legal system" of the state before the court whose annulment is sought of the arbitration award.