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The place of formalities in public law: legislation, proceedings, administration

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ABSTRACT: Judgment is one of the ways to resolve disputes between human beings. Judgment is in principle the work of the government, and some disputes, such as criminal matters and matters related to the public order of society, are solely in the hands of the government, but at the same time some matters can be referred to arbitration. Judgment is a private judgment that arose naturally and instinctively among human beings before the emergence of the state and is based on the manners of reason. In public judgments, observance of due process and formalities is a mandatory requirement that has a mandatory aspect and can be avoided only in limited cases where the legislator has issued a permit for non-compliance, while the nature of private judgment requires ease, speed and elimination of formalities. N. According to the rules of civil procedure, the arbitrators are not subject to the rules of procedure in hearing and issuing a verdict, but they must observe the rules of arbitration. This article has caused a great deal of disagreement among jurists to the extent that some jurists believe that since arbitration is a kind of private judgment and is not subject to the rules of procedure, the arbitrator can, at the request of the parties during the arbitration, in addition to legal formalities, It also violates the indisputable principles of the judiciary and ignores it. Contrary to this view, some other jurists state that since the principles of the trial are permanent, general, value-based and abstract, its observance by judges and judges of state courts is mandatory.

***Keywords*:** Formalities, Legislation, Procedure, Administration.

INTRODUCTION

Differences are human twins and are among the realities of human life. Individuals have their own perspectives, interests and ideals, and accordingly, their belongings may interfere with the belongings of other people and as a result, differences may arise. Thus, there have been conflicts and differences in human societies for a long time, and there have been methods and solutions for resolving them. With the development of societies, these methods, like other manifestations of human life, have evolved and modern civilized human beings have learned to resolve their differences. Resolve through war and conflict, but also through peaceful means such as negotiation and understanding or, finally, recourse to the law. The advancement of science and industry, population growth along with the growth of urbanization and the expansion of relations have all required the enactment of law as a regulator of social relations, but law for various reasons can not always keep pace with change and in the dark ambiguity, conciseness, flaws and contradictions Sometimes, he loses his duty of enlightenment and becomes the subject of disputes and disputes (1). Dispute resolution through the state judicial system, ie courts and government-elected judges, due to high workload, slow dispute resolution process, reduced quality of proceedings, related costs, generally leads to dissatisfaction of litigants. Also, in commercial disputes, due to the special nature of the relationship, individuals want to resolve their disputes more quickly and at a lower cost by judges who specialize in the subject matter of the dispute in secret and in public. Arbitration as one of the methods of resolving disputes. It is desirable and has been considered by traders and individuals. Arbitration is a legal method of dispute resolution in which two or more persons delegate the resolution of disputes in which they have an interest to one or more other persons (arbitrator or arbitrators) whose authority in resolving the case arises from a private contract, and They make decisions based on this contract. According to another definition, arbitration is the chapter of disputes between the

parties outside the court by a person or persons chosen by the parties or a third party in this regard. 2 The history of arbitration goes back to before Islam. With the advent of Islam, arbitration (consolidation) became one of the main methods of conflict resolution. A few verses were revealed in the Qur'an and in jurisprudence, Babi was dedicated to the discussion of arbitration under the title of Judge of Consolidation. This title was first used by the first martyr in the textbook. 3 The jurists also recognized Judge Tahkim and considered it valid. This institution was first foreseen in the Provisional Law on the Principles of Legal Trials approved in 1999 AH and then entered the legal system with the Arbitration Law approved in 1990 AH. 4 With the approval of the Civil Procedure Code approved in 1998, Articles 632-680 were assigned to it. Dad. After that, with the change of the Code of Civil Procedure in 2002, the seventh chapter of this law regarding arbitration, Articles 454-501, was dedicated to this issue. In the field of international arbitration, following the example of the UNCITRAL Model Law, the International Commercial Arbitration Law was approved in 1997. Arbitration as an optional method is not only older than justice, but is currently one of the most practical methods of resolving disputes, and the need to use it today with the expansion of international trade relations and the need for urgency in dealing with more feelings. Turns. The need for attention and speed is associated with less legal formalities. Due to its special nature and protection of individuals' rights and public order, the formalities of the state judiciary during the trial and its non-observance can lead to the invalidity of the trial and the verdict. But accelerating the arbitration process requires eliminating unnecessary formalities and this is in line with the existential philosophy of arbitration (2).

Formalities in the subject laws

Although one of the salient features of the procedure is its ceremonial nature and the idea of a procedure without any formalities is far from the mind, but the legislator speaks in several laws about the lack of compliance with the procedure, including the issue of meeting the requirements of Article 120 of the Code of Civil Procedure. The damage resulting from the execution of the claim is stated as follows "... the claim for damages in this case is made without observing the formalities of civil procedure" and the note of Article 127 of the same law says "products that are subject to waste are immediately evaluated and without observing formalities by decision and supervision. The court has been sold ... "Article 177 of it also declares regarding the processing of cases of seizure, harassment and obstruction of the right, the processing of the cases subject to this chapter is not subject to the procedures of the procedure and is done out of turn" in Article 66 of the Enforcement Law The rulings on the sale of perishable property and Article 147 on the objection of the executive third party also refer to the non-necessity of observing the formalities. Article 8 of the Family Protection Law approved in 2012 has used the phrase non-observance of formalities. Articles 11 and 23 of the Law on the Establishment of Public and Revolutionary Courts, approved in 1994, use the term court proceedings. Articles 22 and 24 of the Law on Landlord-Tenant Relations, approved on 2/5/1996, and Article 17 and paragraph 3 of Article 19 of the Law on Arbitration Council, approved on 3/21/56, are among the laws that include the phrase "proceedings are not subject to court procedure." Article 21 of the Law on Dispute Resolution Councils states, "The deliberations of the council are not subject to the procedures of civil procedure." Note 1: The proceedings in this article refer to the regulations regarding the formal conditions of the petition, the manner of notification, the appointment of the hearing, the hearing and the like. "Also, Article 477 of the Civil Procedure Code of 2000 states" Arbitrators in the hearing and voting, subject to the law They are not due process, but must comply with arbitration rules. "The latter article is the main topic of discussion in this study (3).

Recognition of the principles of procedure and procedural procedures

In recognizing the principles of procedure from its formalities, several criteria have been presented, which are:

1. Trial ceremonies that have no effect on the realization of the right.
2. Provisions that can be easily removed and modified do not relate to the root of the issue of justice.
3. Provisions relating to the manner in which the claimant's claim is dealt with, the hearing of the defendant's defense and the reasons for it
4. Rulings that are not considered to be the principles of the proceedings. Because if we identify the principles, what remains is ritual. Procedures are also divided into two categories: "purely formalities" and "formalities of introduction to the implementation of principles". Failure to observe the purely formalities of the trial will not in principle cause the invalidity of the issued verdicts, unless these formalities are the prelude to the implementation of the principles of the proceedings, which in such a situation have a direct impact on the validity of the issued verdict (4).

Procedures related to the proceedings during the arbitration

Although the philosophy of arbitration is to expedite the resolution of disputes and the principle of non-observance of formalities does not mean that arbitrators are exempt from formalities in all matters. In other words, during the arbitration, there are matters that non-observance of formalities can lead to the annulment of the

arbitrator's verdict. Therefore, the limits and limitations of Article 477 of the Code of Civil Procedure should be stated, which states: They are not litigants, but must abide by the rules of arbitration ”(5).

Arbitration privileges compared to litigation

Various reasons can lead to the preference of arbitration and encourage individuals to arbitrate. Much has been said about these causes. Contemporary scientist René David has divided these causes into four categories. 1. His category: Dispute resolution According to the principles that judges follow in their decisions, but in better conditions than the court, which makes litigation faster, more economical and more flexible. And is decided by persons trusted by the parties with expertise that cannot be expected from government judges. The second category: the substantive settlement of disputes based on principles other than those observed by judges. Judges rule on the basis of the rights of the individual government, but the parties want other rights to apply to them, such as customary business or customary law in transnational commerce. The third category: achieving a solution that is even possible for the parties in a way that does not disrupt the continuation of their future relationships. Fourth category: Resolving a dispute that can not be raised in court but to prevent a dispute, such as completing the contract or reviewing the contract. Although it is not common to discuss completing or revising a contract internally, the motives for referring to an arbitrator are largely the same. In arbitration, the main motive around the dispute in referring to arbitration can be considered its advantages such as speed of proceedings, elimination of formalities, confidentiality, savings, etc., which we will briefly review the following cases: Speed in proceedings: Government courts are often overcrowded. This multiplicity of workshops can take months and sometimes years to process claims. Prolongs the trial. It is no longer of much value to him. Civil litigation begins with an almost detailed introduction and proceeds slowly on rough and steep roads, and after the result is obtained, it is possible that the same process will be repeated due to the appeal of one of the litigants, and therefore the result may be When it becomes clear that he no longer has any attraction for the convict. Good judgment (if there is no objection to the arbitrator) is in one step and its speed. Elimination of formalities: Civil courts in the proceedings are required to observe the procedures of civil procedure, which have a mandatory aspect and public order. Also, the acceptance, evaluation and positive value of the reasons have been determined by the legislator. Observance of these formalities increases the length of the proceedings, while speed is very important in business (6). Observance of the rules of civil procedure, such as the need to file a lawsuit in a special printed form called a petition in a certain number of copies, the attachment of sufficient certified images of documents, ... are all necessary formalities in the proceedings. Conversely, the arbitrator has the necessary flexibility in adjudication, and the arbitrator has the privilege of entering into the dispute chapter without cumbersome formalities (Article 477 of the Code of Civil Procedure). Confidentiality: In most countries, court hearings are held in public, and only in special cases is the court allowed to hold hearings in private. The openness of the hearings is in accordance with the principles of the proceedings and internationally accepted standards, but since the arbitration is a private hearing, the hearings are held in private and the arbitrators are prohibited from disclosing the dispute and the provisions of the contract. Therefore, if the parties to the dispute do not want their issues to be made public for any reason, referring to arbitration can well serve this purpose for them (7).

Written lawsuit in the Code of Civil Procedure 1997

Filing a lawsuit in accordance with Article 48 of the Code of Civil Procedure begins with the filing of a lawsuit. There is no explicit text in the arbitration regulations of the Code of Civil Procedure in this regard, but it is obvious that the arbitrator's trial requires a request from the interested party. In other words, even in the case where the parties in the arbitration agreement appoint a certain person as arbitrator and after the dispute is realized, the arbitrator becomes aware of the dispute and can not proceed directly and his review requires a request. But at the same time, the application does not need to be printed on a special printed form such as a petition and does not require a stamp, so the application can even be oral, in which case the arbitrator must write it and have it signed by the applicant or otherwise. 8).

Written lawsuit in the International Commercial Arbitration Law 1997

In International Commercial Arbitration Law, the legislature has used "Request for Arbitration" instead of the term "petition" used in the UNCITRAL Model Arbitration Law. Paragraph B of Article 4 AH of the International Commercial Arbitration 1997 states: "Unless otherwise arranged between the parties, the request for arbitration shall contain the following points." 1. Request for referral of the dispute to arbitration 2. Name and address of the parties 3 Statement of claim and request 4. Arbitration condition or arbitration agreement The arbitration request may contain information about the number of arbitrators and how they are selected as described in Chapter 3 of this law, as well as about the agreements, contracts or events that "As can be seen, the request for arbitration includes mandatory and optional cases. Similar to the provisions in Article 3 of the UNCITRAL Model Law. Article 24 of the International Commercial Arbitration Law also guarantees the fulfillment of a formally incomplete request: "1. If the plaintiff fails to submit the

request without a valid excuse, the arbitrator shall issue an order to annul the request for a hearing." This means that an incomplete request does not create any obligation for the arbitrator, and the substantive conditions must be observed in the request for arbitration, regardless of the formal conditions. In other words, it must contain sufficient explanations along with justified reasons and known demands (21).

Occasionally, the petitioner may submit his application in a concise and inherently incomplete manner, in which case paragraph 1 of Article 22 of the International Commercial Arbitration Law stipulates: 1. Applicants must fulfill their obligations within the time limit agreed by the parties or determined by the arbitrator. Or other aspects according to which he considers himself entitled, as well as to provide the points of dispute and the request or the requested damages .... ». The guarantee that the plaintiff submitted his request in full or with insufficient evidence and did not substantiate it sufficiently despite the warning is stated in paragraph 3 of Article 24: »If either party attends the hearing and "Or refuse to present the evidence cited by him. The arbitrator can continue the investigation and proceed to issue a verdict based on the available evidence." (9)

The claim is written in the UNCITRAL regulations

The UNCITRAL Arbitration Rules use "notification of arbitration" instead of "request for arbitration" or "petition". 2 According to paragraph 3 of Article 3 of the UNCITRAL, the matters that must be included in the notification of arbitration are: request for referral of the dispute to arbitration, name and address of the parties to the dispute, referral to arbitration condition or independent arbitration agreement under which the request for arbitration is submitted; Reference to the contract from which the dispute arose or in connection with it, statement of the general nature of the claim and reference to the relevant amount (if any), mentioning the request or guarantee of the requested performance and proposing the number of arbitrators (one or three) In case of prior agreement. In addition to the above, some issues may be voluntarily included in the notification of arbitration. These cases, in accordance with paragraph (4) of Article 3 of the UNCITRAL, include suggestions on how to appoint a single arbitrator and an appointed official, notification of the appointment of an arbitrator and petition (10).

Judgment period

Arbitration period is one of the important points of arbitration. Since one of the important advantages of arbitration is to speed up the process and the dispute season, usually the parties to the dispute in their contract set a certain period for consideration and issuance of the arbitrator, which is called the contract period, in which case the arbitrators are obliged to mention To decide on the litigation. The guarantee of non-observance of this period is the invalidity of the issued vote. The parties to the arbitration agreement must be able to agree freely in determining the duration of the arbitration as much as they have the power to refer their existing or potential dispute to arbitration (22). Although in determining the duration of the arbitration, in addition to the interests of the parties, the interests of the arbitrator should also be considered, but the arbitrator has no role in this matter and in case of dissatisfaction can only refuse to accept the arbitration or oblige the parties to reconsider. . Contract period means that the parties to the arbitration contract have determined the arbitration period in accordance with Article 458 of the Code of Civil Procedure at the time of preparing the contract. According to Article 458: "In each case where an arbitrator is appointed, the subject and duration of the arbitration and ..... must be determined." (14).

Since this is based on agreement, this period can be less than or more than 3 months. The arbitrators can only vote within the time limit set by the parties, after which they will lose their jurisdiction. This deadline is a container in which the arbitrator must take all necessary measures such as obtaining an expert opinion, ... and it can not be claimed that the deadline is only for the issuance of the verdict (15) The arbitration period should be issued and it should be submitted within the same deadline. Therefore, if the arbitrator's verdict is issued within the deadline but is submitted outside it, it is invalid. Arbitration is also calculated from the date of acceptance of the arbitrators, not from the day when the subject of arbitration was announced to the arbitrator or he was offered arbitration. It should be noted that the arbitration period can be extended, whether it is determined by the parties or the legal period governing it. In fact, the parties to the arbitration agreement can increase or decrease the arbitration period or suspend or suspend it (17). Another noteworthy issue is the delegation of the authority to extend the arbitration period to the arbitrator. Although some authors 1 believe in the validity of such a delegation, there are conflicting rulings in the jurisprudence in this regard. [16]

Conclusion

Due to the increasing development of economic relations, international trade relations and the need to expedite the settlement of trade disputes, the need for arbitration to become more widespread is felt more than ever. Arbitration, as an institution with a long history that has existed for a long time, has always been considered by the parties to disputes, and the benefits of this private judgment have forced them to choose it. Advantages such as

speed, confidentiality, selection of a specialized judge at the will of the litigants, less formalities, ... The philosophy of this institution tends to reduce formalities, but it is impossible to imagine a judicial system without observing the minimum formalities that ensure the implementation of legal principles (23) Legal principles that oversee the observance of the rights of the litigants and require a fair trial. Thus, despite the nature of arbitration, which simplifies the procedure, it is necessary to observe the necessary minimums. Therefore, in this study, we decided to identify these minimums and while introducing them, to meet the essential needs of the esteemed judges in terms of knowledge of the necessary formalities.

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