



Investigation terms and implementation guarantee of arbitration secrecy rule in international trade

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ABSTRACT

Nowadays, secrecy or clearance of trade arbitration is one of the main subjects that it was presented in legal associations and different states courts judicial survey. One of the arbitrator's advantages against justice courts investigation is closed and private feature, which contest parties select disparity problems solving in judicial courts and they appoint arbitrators in this case. So, there is a close and clear relationship among contest parties and arbitrator association members. In other words, arbitration meetings and arbitration association attendance is private and only persons allow to presence who they agreed for contest parties subjects. Therefore, the aim of current study is investigation arbitration secrecy and its necessity in international trade and study results showed that, arbitrator secrecy is main principle in internal and international forums or courts in most of states.

Keyword:

Secrecy, Arbitration, Trade, International law

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Introduction

Arbitrage or private justice* is main survey of contest problems solving in international trade. This justice survey is based on volition freedom principle and it was confirmed in all of world legal systems. (Shiravi , 1391 ; Joneidi , 1378) Arbitrator or private justice advantages against public justice† cause to traders reference own contests or discrepancies to arbitrator term‡ or arbitration agreement§ and also organizational arbitration in international level before implementation period. One of secrecy advantage in proceeding relate to international trader encouragement about justice accepting to discrepancies problems solving. What is main international trade arbitration resource about arbitrator secrecy aspect? What is main pattern in arbitrator secrecy maintain commitment according to arbitration implementer legal resources? What are infringement implementation guarantee and territory in mentioned commitment? Comparative study of legal systems in range of international trade arbitration law shows that , there are not equal viewpoints about commitment resources and existence. Actually , commitment confirming was faced with important problems in lack of clear agreement among parties. In some of states law ; mentioned principle or commitment was rejected. So , based on subject importance ; we have been tried in current study to investigate secrecy commitment positions and terms in international trade arbitration and it's necessity and browse these related concepts.

Arbitration secrecy terms:

By accepting privacy , we can focus on secrecy subject and also by regarding secrecy term we face with this question ; Is mentioned term transmit to arbitration contract? If response is positive ; secrecy commitment circuit arbitrator contracts in next stages and is it impact implemented survey? Arbitrator and legal institute must be regard parties volition about secret subjects maintaining.

By accepting arbitrator privacy principle , the main question is presented ; is this subject inference from inherent commitment and arbitrator secrecy implied pattern? If proper result is obtained ; the next question relate to contracts which they have role in arbitration creation and it's survey such as special arbitration contract (reference term to arbitrator agreement) among parties or arbitrator consolidation contracts such as arbitrator agreement among arbitrator implementer and parties or arbitrator organizing contract between arbitration institute and parties.

It is clear that ; secrecy commitment is not relate to arbitration private nature , but it allows to description prevent of third parties presence in arbitrator holding place. Proceeding meetings are held in private place and it is not allow public presence. Actually we can not prevent third parties entrance to proceeding meetings and parties have commitment about documents , information , proceeding meetings declaration and issued vote.

Attendance to disparity has not secret nature. Job or involvement mysteries have not secrecy nature and they are not created suddenly without reasons. Secrets maintaining have legal origin and they transfer to persons mysteries by legal commitment. This commitment is presented in France and Islamic Republic of Iran penal code. ** according to 648 article in Islamic penal code ; physicians , surgeries , obstetricians , pharmacists and another related jobs , which they must maintain secrets ; if they disclosure people secrets , they will condemn to 3 months and 1 day to one year custody or 1500000 to 6000000 Rials cash penalty. This commitment or retribution implementing guarantee only impose for persons , who they have special information according to position , job or delegation.

Outside of legal commitment ; secrecy maintaining has not another origin except contractual origin. There is not obstacle for secrecy maintaining of information , documents as reasons to arbitrator courts based on parties commitment. Justice or courts that they reject secrecy principle focus on reasoning and they believe secrecy maintaining legal commitment isn't relate to implied arbitrator contract or dependent of certain subjects. (Australia Supreme court , 1996)

Basis of arbitration secrecy:

Arbitration has judicial and contractual nature. Based on judicial nature non-proclaim case of counselor is main rule , which there is in different courts. Arbitration is not exception from this rule and consulting is non-proclaim for arbitrator decision making. In arbitrator , before investigation termination ; parties equality and defense right prevent one of arbitrators viewpoint about disclosure arbitration subject. This action implementation guarantee cause to arbitrator adapt or arbitrator vote nullity. After investigation terminating , respect to arbitrator independence is presented and another arbitrators may disclosure special arbitration position.

In current situations, arbitrator viewpoint implementation guarantee and secrets disclosure arbitration charge or

* La Justice Privee

† La Justice etatique

‡ La Comprmissoire

§ Le Comromisz

** 226-13 article of France penal code law: (secret information clearance for persons and their secret maintaining behalf persons according to position , job , action , temporary operation) is type of crime.

responsibility is investigated against one arbiter who disclosure own opinion. Counselor non-proclaim for decision making in courts has natural origin , which it isn't transmit to trial. These limitations aren't prevented arbitrage disclosure specially by another persons or parties.

Reasons of some secrecy impositions in codified law relate to arbiter judicial nature. So, arbiter secrecy maintaining relate to arbiter implementer and we can anticipate their in judicial proceeding rules or regulations.

Consulting secrecy principle in arbitrage cause to arbiter court members disclosure own viewpoints or opinions for parties before vote or verdict issuing. Arbiter secrecy maintaining commitment arouse parties equality principle , their defense and arbiter independency.

Trade arbitrage secrecy rule:

According to 657 article of civil proceeding law and regulation : “ Arbiters are not followed investigation and proceeding according to courts and trial principles , but they must be regarded contract terms.” One of main principles in proceeding is court meetings non-disclosure and if meeting non-disclosure be intruder of public disciplines or good faith ; court can issue meeting non-closure agreement. (136 article of 1318 solar year civil code proceeding) So , arbitrage is not formed courts non-closure regards.

Arbitrage method and survey focus to regarding proceeding non-disclosure before reference contract and we don't want anticipate or determine parties agreement and arbitrage council decide in cases based on regulations. Every agreement behalf arbiter council will indispensable. Arbiter council member decision about secrecy may be different based on parties request with direct action. This agreement is done according to disparity subject and family-personal or job secrets maintaining and we must regard all terms and directions about case , hostility and facilitating parties contention. If documents and information dissertation be tortious for contention parties ; in this case we can prevent arbiter news for certain times and this decision will be dispensable.

One of main subjects in arbiter secrecy and it's limitation refer to third party entrance right to case. According to 26 article of international trade arbitrage law which it was issued at 1376 solar year “ if third party has independent right in arbiter subject or he/she has interest as party ; he/she can enter to arbiter before proceeding termination and he/she must accept agreement , arbiter regulation and arbiters condition and also arbitrage must not any objection behalf parties.” This passage was criticized by some of authors and another writers tried to describe arbiter possibility in multistage patterns. Advantage of mentioned rule relate to arbiter privacy and weakness among parties and hostility solving and arbitrage

secrecy is not documented. Also we can reason that entrance third party has disparity. Third party agreement is necessary against arbiter regulation and every secrecy term relate to arbitrage maintaining or agreement about arbiter vote enactment in presence of strangers and arbiter meetings and they must accept by third party previously to confirm third party in arbitrage.

France judicial survey always supported trade arbitrage secrecy. We can refer to Paris revision court vote at 1986 , 18th February with one of arbitrage case in London and it was terminated to arbitrage vote issue at 1983 , 31th December (by Lord Vilber Force as case arbiter) and also convinced person was a Frenchman and he wanted to request nullify arbitrage vote in Paris court and at last , mentioned case was rejected in revision court at 1986 , 18th February. According to 1504 article and France new civil proceeding ; only issued international arbitrage vote are exceptional in France and it's justice courts and affirmative rule cause to impossible conditions without any agreement.

Also , according to convinced mutual request ; Paris revision court refer to huge costs and losses at the result of arbitrage disclosure in openhanded meetings . based on Paris revision court vote , proceeding virtual nature in arbitrage maintaining and secrecy regarding cause to terminate private disparities which arbitrage two parties were agreed in this case. So issued letter and enactment at 1981 , 21th May for France ministers member was not mentioned in international arbitrage secrecy and France judicial survey declared it as a legal principle in state.

International trade arbitrage law which it was issued at 1996 , relate to silence holding of secrecy rule and this rule was confirmed in many England courts recently and we will investigate some aspects of this subject:

Focusing on privacy as arbitrage feature:

According to England courts ; arbitrage councils are non-governmental courts ant their aim relate to persons disparity solving. This feature was focused for the first time in The Eastern Saga contest and court vote was repeated in all of next stages with issued arbitrage secrecy.

In mentioned case , the first disparity was about ship renting contract among landlord and lodger whit it was referenced to arbitrage and it happened among main landlord and second lodge and it transferred to arbitrage council or board. Lodgers requested share arbitrage meetings for two disparities by accepting and confirming arbitrage board , but ship landlord believe that , 2 disparities were different and he complained justice court about arbitrage board agreement and it relates to justice interest and reference disparity to arbiter which it is private affair among claimants and arbitrage agreement. Only, parties clearance agreement

cause to backtrack and third party persons can enter to contest.

Secrecy as an implied term in disparity reference to arbitration:

London revision court in 1990s vote declared ; arbitration real nature cause to creating implied imposition for parties and prevention information asserting in arbitration investigation , but parties agreement or court order is permit in Stockholm court at 1998 , 10th December and Sweden arbitration law or judicial survey has not verdict about arbitration secrecy and court concluded , secrecy is one of main principles in arbitration and implied term uses in arbitration contracts. Court document to own vote or verdict and arbitration has privacy nature against justice courts investigation and secrecy possibility is main and important reason which arbitration parties select it. Secrecy is applicable for all information that it terminates to arbitration investigation such as arbitration view points or decided subjects , except agreement among parties.

In Iran legal basis concepts and according to current tradition , trade or corporation associations follow arbitration contract subject and reasons show that , it is par of contract by implied or non- implied declaring and if parties don't know tradition (Based on 356 article of civil code) , mentioned tradition in secrecy can account as implied term basis for non-disclosure in disparity reference contract to arbitration.

Arbitration regulations that they accepted secrecy rule as descriptive case:

One of main regulations relate to UNCITRAL Laws at 1976 and they refer to arbitration investigation court meeting secrecy except closure agreement among parties (25 article , 4 clause) and lack of dissertation principle in arbitration vote relate to accepting contest parties in another way. (32 article , 5 clause)

Arbitration international justice statute in Paris ICC international trade board (applicable from 1st January as appendix arbitration regulations) declare in 6 article with "Secrecy" subject : " Justice affairs have secrecy aspects and every body cooperate in these affairs , he/she must regard principles. Justice must available terms that outside persons can presence in meetings and restricted committees and they will access to documents in justice or informal office. In 20 article and 7 clause ; arbitration regulations refer to this case : " Arbitration court can decide about trade secrets maintaining and secrecy information."

In 20 article and 7 clause , we can not conclude about I.C.C. arbitration secrecy. Arbitration court can decide about trade secrets maintaining and secrecy information , but there is not any imposition for secret information without reasoning.

International arbitration judicial survey and arbitration secrecy rule:

International arbitration judicial survey has not viewpoint about secrecy rule through arbitration association statute. In some cases , arbitration secrecy was supported implicitly and we refer to arbitration vote at 1983 , 21th October for disparity among German group and Cameron government about foreign investment and information were declared for German group as convinced party. Revision plea was referenced to special committee based on Washington 1965 convention and 52 article and it was investigated according to arbitration vote dissertation , mental damage possibility for another party.

So , arbitration board focused on secrecy principle validity. In another example that relates to disparity among Indonesia government and Asia Comco company ; case was referenced to arbitration and company charges wanted to interview with local newspaper and they described subjects with arbitration concepts in Hong Kong. By Indonesia requesting , arbitration board in temporary order (according to 47 article of Washington convention) need to intensify every action for disparity , specially prevention every advertisement against investment in Indonesia. Indonesia document was determined with arbitration secrecy and arbitration board accepted secrecy rule and 1983 , 9th December vote relate to dessert article which complainant can't damage to Indonesia government and this country officers declared some subjects in Indonesia newspaper about own positions describing about arbitration.

Sanction of non-regarding arbitration secrecy rule:

Generally , we can investigate 3 types of sanction for violation of arbitration secrecy rule , they are:

1. Arbitration agreement nullity:

Some of judicial courts in European states declared that , every disclosure in decisions and arbitration votes or another information during proceeding cause to violate arbitration main rules without disclosure or extensive range and they cause to contract nullity and reference disparity to arbitration. So , courts agree on vote and nullify it.

Criticism of this kind arbitration nullity relate to implicit text or legal reason without sanction and public conclude that , arbitration has dangerous solution and violation of secrecy rule may be prevented in crime and disregarding in arbitration agreement. So arbitration nullity according to secrecy implicit rule will has negative consequences for contention parties and it will be danger for arbitration system during long period. How we can silent violation for implicit rule without legal imposition behalf parties in arbitration agreement? This case is reason of arbitration vote nullity. Difference

in viewpoint cause to new complaint and contention in justice will has validity or invalidity for arbitration vote.

2. Damage compensation:

All of lawmakers and courts believe that , the best pattern of sanction in arbitration secrecy rule violation relate to loss in party with damage about information disclosure. It may be cause to lack of anticipation arbitration secrecy violation about damage payment amount for parties and it is as term of arbitration contract. (damage of violation term) So , arbitration board act directly about damage determination and disclosure arbitration survey and it convinced guilty person to compensation and also it confirms justice action after arbitration vote issuing and damage because of arbitration secrecy rule violation. Damage compensation amount includes material and mental losses based on general concepts in civil liability.

3. Discipline or penal punishments:

In some of arbitration centers internal regulation declared that , disclosure of every information in arbitration cause to job liability and official responsibilities violation and official violation boards permit to determine discipline retributions such as reproach , pendency and offender employee discharge. Also experts violation or persons with job position relate to accessibility of secret information about arbitration survey. Arbitration survey disclosure is kind of secret information example and decisions about internal or external policy availability purposely will cause sentence legal retribution.

Discussion & Conclusion:

Some authors believe that , privacy and secrecy aren't intuitive and they agree codified law and arbitration rule must have requirement transparency or parties agree implicitly about it's privacy and secrecy. Therefore , law or arbitration contract are he basis of arbitration secrecy and privacy. We can not conclude privacy and secrecy from implicit commitment arbitration judicial or contractual patterns. It is clear that arbitration secrecy or privacy is useful for parties , but these features aren't main terms in commit of arbitration contract. Parties must arbitrate in privacy and secrecy maintaining agreement implicitly. Arbitration secrecy in main contract or disparity reference contract to arbiters is investigated after problem solving and it accept during proceeding in arbitration court. It is possible to declare arbitration regulations based on current conditions. Assumption subject includes Islamic Republic of Iran 165 constitute and it declares that : " in private contention for parties , request may not openhanded or proclaim. In France law and 1469 article of new civil proceeding regulation , subjects were declared secret for arbiters. In Iran law , public court proceeding and revolution didn't mention civil affairs secrecy in part

or whole of arbitration regulation , but 477 article relates to lack of arbiters capability and proceeding regulations vote. So they can hold meeting non-proclaim form along the last part of Islamic Republic of Iran constitute 165 article. If we accept privacy , we must pay attention to it's privacy effect and declaring secrecy in main contract cause to present this question ; Is mentioned term transmit to arbitration contract? If response be positive ; what are effects of commitment secrecy maintaining on next stages and current surveys of arbitration contracts? Why arbiters and institute must regard parties volition about secrets maintaining? In few states law , there are clear forms of trade arbitration secrecy implicitly. The only judicial survey in states , scientists view in trade arbitration law cause to creating extensive literature in current subject. If we regard 1976 UNCITRAL trade arbitration regulations as pattern for claimant secrecy , in this case we will use 2 principles to use public which they are: 1. Arbitration meetings secrecy principle except of parties agreement (25 article , 4 clause) 2. Arbitration meetings secrecy principle except of claimants agreement (32 article , 5 clause)

1985 UNCITRAL international trade arbitration regulation and law is guideline for state internal lawmakers and 1376 solar year (Shahrivar month) law in Islamic council congress and 10s states follow this case. In this part , arbitration proclaim or secrecy was held in silence. Before 14 years , author of current study was in Vienna as Islamic Republic of Iran representative in 18th meeting of international trade law commission (UNCITRAL) and experts discussed about international trade arbitration and samples , but none of representative or state didn't mention trade arbitration secrecy requirement. They wanted to distinguish this subject, arbitration contract ratification mansuetude and they believed that arbitration dispensable reference subjects must be transfer to every state legal system and we don't need impose this subject in UNCITRAL vote or verdict.

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