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Nature of Arbitration: Is Arbitration a Private Dispute Resolution Process?

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Abstract: Arbitration has the characteristic nature of autonomy and confidentiality, which embodies the characteristic of private dispute resolution. However, the enforcement of arbitration requires the assistance of legal force. The process of arbitration cannot be completed without the support of legal force. Therefore, the process of arbitration is not a completely private dispute resolution process. Based on the basic concepts of arbitration, this paper introduces the characteristics of arbitration autonomy and confidentiality. And then it introduces the situation in which arbitration is assisted by legal force, which embodies arbitration is not a completely private dispute resolution process.

1. Introduction

In modern society, culture, values and lifestyle have been diversified. Correspondingly, different methods to settle disputes have also become diverse. Not only the parties themselves, but even the public authorities are looking for diversified dispute resolution methods to resolve disputes more quickly and effectively, and to restore order [1]. As a way of resolving international commercial disputes, arbitration has the private dispute resolution process and the convenience that judicial proceedings do not have, such the advantages of being time-saving and economical. It can resolve disputes quickly and effectively, meeting the requirements of the parties, and adapt to the needs of international commercial trade development. However, in many cases, arbitration also requires the assistance of compelling force to complete, and therefore, it cannot be recognized as a complete private process of dispute resolution.

2. The process of arbitrating private disputes resolution

2.1. The basic concept of arbitration

Arbitration was not developed from the law, and it was entirely a spontaneous behavior of merchants at the beginning of its development. In daily business dealings, businessmen found that arbitration had its own unique convenience to resolve disputes. The parties of the dispute are bound by arbitration agreements and arbitral awards, but this binding force is not based on legal coercive power but subject to industry practices between merchants [2]. In many cases, the parties need to negotiate on their own to reach an agreement and then generate binding force, which reflects that arbitration is a private way of resolving disputes.

The international commercial arbitration is at the time of the happening of the dispute, when both parties agree to adopt arbitration to resolve it, both parties will need to submit the dispute to the arbitration institution specified in the arbitration agreement or the arbitration jointly selected by the parties through an arbitration agreement determined by themselves [3]. Both parties are bound by the arbitration award and they should enforce automatically. If one party does not enforce, the other party may apply to the court or other enforcement agency for assistance to enforce. From the above we can see that arbitration has played a pivotal role in contemporary national business dealings with its wide internationality, high degree of autonomy, certain coercion, confidentiality, considerable flexibility and strong authority.

2.2. The principle of autonomy of will in arbitration

The principle of autonomy of will is the basis of entire arbitration system. From the time when the parties agreed to settle the dispute through arbitration, including the conclusion of the arbitration agreement until the completion of the award, the principle of the autonomy of will is passed through the whole process [4]. This is the difference between arbitration and court litigation. In international commercial arbitration, the party's autonomy of will is manifested as the freedom of choice in several aspects. First, the dispute resolution method is chosen by the parties. The parties can choose the arbitration agency and organizational form of arbitration. The parties can also choose the arbitration location independently, and the parties can choose the arbitrator to trial the case [5]. The power of the arbitrator to conduct arbitration and make the arbitration award is granted by the arbitration agreement between the parties.

Second, the parties can choose the law to which the arbitration applies. In international commercial arbitration, the choice of the law according to the party's autonomy is widely recognized in the international private law in various countries. Arbitration is ultimately a dispute settlement mechanism created by the parties' agreement and the arbitrator's authority is from the parties. The arbitrator should respect the legal rules of the parties' agreement, otherwise the award made is not enforceable. Because of this, the principle of party autonomy is generally recognized in international commercial arbitration conventions and international arbitration rules. For example, the provisions about UNCITRAL Model Law on International Commercial Arbitration of 1985 also used the terminology in law. The Commission's report indicates that the wording of the rule of law used in the Model Law not only allows the parties to choose the domestic law of any country but also allows the parties to exclude the relevant provisions [6]. In addition, the choice of the parties is not limited to the law and the parties can choose the rules in international conventions or similar legal documents, even if they have not yet entered into force [7]. This is very different from court litigation and it reflects a private dispute resolution process.

However, in the litigation procedure of a commercial dispute, the parties have no power to choose different procedures, and they must follow the provisions of the Procedural Law of the country. For the arbitral procedure, the parties can determine it by themselves, which has been generally recognized by most national legislation. For example, in 1986, The Dutch Code of Civil Procedure stipulates that subject to the provisions of this regulation, arbitration procedures shall be agreed by the parties [8]. The Arbitration Rules of the Singapore International Arbitration Centre in 1991 stipulates that the parties may reach an agreement on the arbitral procedure and it encourages the parties to do so [9]. The parties have the right to decide the rules applicable to the arbitral proceedings, including the application for arbitration, the manner of defense, the trial of arbitration, the determination of the award and effectiveness, etc. Arbitration institutions in different countries have their own arbitration rules [10]. There are also some international and regional arbitration rules in the world which can be chosen to settle the disputes by the parties. If the parties have an

agreement that is distinctly different from the arbitration rules in their arbitration agreement, unless the parties change the original agreement by directly expressing or implying their intentions or arbitration rules selected by the parties prohibit them from making decisions that are different from the arbitration rules they chose, the arbitral tribunal may not violate the agreement of the parties on the grounds of the provisions of the arbitration rules, and the arbitral tribunal should respect the autonomy of the parties.

The modern international commercial arbitration law presents greater flexibility. The parties are not bound to the conflict rules, instead, they are able to choose the law of a certain country as the applicable law of arbitration in a direct way. And when the law of the certain country is imperfect and it is not suitable for international business relations or if the country has made various restrictions and unfair treatment for its own interests, the parties may reach an agreement to apply other proper international arbitration rules [11]. And the arbitration institution may judge the arbitration case according to this rule. The autonomy of will of the commercial arbitration procedure is so important for maintaining the flexibility of arbitration and solving the commercial disputes fairly and promptly, which fully embodies the arbitration is a feature of private dispute resolution [12].

2.3. The privacy procedure of arbitration

The process of arbitration to resolve disputes is privacy and this characteristics is recognized by most countries. The most basic meaning of privacy is that arbitration cases are not heard in public. That means, in general, persons unrelated to the case may not participate in the arbitration proceedings without the consent of all parties to the arbitration and the arbitral tribunal [13]. Most of the rules of major international arbitration institutions stipulate the privacy of arbitration. For example, the arbitration rules of International Chamber of Commerce stipulate that the arbitral tribunal is fully responsible for the trial process of arbitration, and all parties have the right to participate. The outsiders shall not attend the tribunal without the consent of the arbitral tribunal and the parties involved [14]. And the UNCITRAL arbitration rules stipulate that: unless the parties have otherwise contrary opinions, the opening of the court should be carried out in secret [15]. The International Centre For Dispute Resolution, the International Center for Settlement of Investment Disputes, the London Court of International Arbitration and other commercial arbitration institutions also have similar provisions. This is also a big difference between arbitration and litigation, which reflects that the process of arbitration is private dispute resolution.

2.4. The confidential procedure of arbitration

The privacy and confidentiality of arbitration are interrelated. As the privacy of arbitration needs to be guaranteed, there are corresponding requirements for confidentiality. The principle of confidentiality of arbitration has always been regarded as the essential nature of arbitration. It is an important factor in distinguishing between arbitration and litigation. In practice, many parties prefer to choose arbitration for its confidentiality. The confidentiality of arbitration has a great advantage in maintaining business reputation, avoiding the parties getting into more disputes and protecting their trade secrets [16]. The confidentiality of arbitration is the arbitrators, the parties and other participants in the arbitration shall not disclose the various documents and materials related to international commercial arbitration to a third party not related to the arbitration such as the various evidence and the arbitral award [17].

The purpose of arbitration which does not conduct public hearings is to ensure that internal information is not leaked. In order to achieve this goal, the participants in the arbitration are required to bear the obligation of confidentiality and they are prohibited from using or disclosing

the materials and documents in the arbitration [18]. In an arbitral procedure, a large number of documents will be generated including the initial argument documents, the disclosed documents of both parties, the witness testimony exchanged between the two parties, the expert opinions, the control arguments prepared before the trial, the court records and the transcripts of the evidence and even the final arbitral award [19]. Disclosure of the documents to the unrelated third party is equivalent to revealing the content of the party's dispute to the outsiders, and the outcome of the arbitration is likely to be affected by the outside world. Therefore, for the smooth progress of arbitration and guarantee the privacy of arbitration, the participants of the arbitration should strictly fulfill the obligation of confidentiality of arbitration.

The Dolling-Baker v.Merrett case handled by the English courts is considered a classic case of dealing with the confidentiality of arbitration. The judge generalized the suitable object of confidentiality and considered that the information obtained from the arbitration could only be used for arbitration itself [20]. Although the contents of these documents and materials themselves are not confidential, participants in the arbitration should still guarantee their confidentiality because the confidential nature of the arbitration itself causes the participants of the arbitration to bear the implied obligation, which means that they should protect the contents of these documents from being leaked [21]. In 1993, the case about Hassneh Insurance Company of Israel v. Stuart J. Mew was a more influential case concerning the confidentiality of arbitration. In this case, the court basically adopted the Dolling-Baker case's viewpoint that the confidentiality is the implied obligation of arbitration [22]. The judge wrote in the verdict: if each arbitration agreement contains an implication that the trials will not be made public, then the confidentiality requirement should in principle be extended to all documents produced in order to hear and the most obvious example is the manuscript or transcript of the evidence [23]. That is to say, the case further expands the scope of the object of confidentiality obligations. Therefore, the confidentiality of arbitration is an indispensable nature of arbitration in resolving private disputes and it should be applied to the entire process of arbitration.

3. Intervention of the court's enforcement rules on arbitration

The autonomy, privacy and confidentiality of arbitration reflect the process of private dispute resolution in a large degree, but these natures of arbitration must be achieved without violating the mandatory requirements of the law. These characteristics of arbitration are subject to legally enforceable rules. Therefore, arbitration is not a complete private dispute resolution process and it cannot be separated from the mandatory requirements of the law.

The interference of the law's enforcement rules on arbitration is in no way equivalent to negating the nature of the arbitration contract. It is the confirmation, support and guarantee of the free will of the parties for the consideration of the country's own interests and order. For example, the court supervised the process of the international commercial arbitral by revoking the arbitration award, which is a special procedure, which means there are some unreasonable circumstances in the international commercial arbitration award [24]. So the party applies to the court and they are examined and verified by the court. The court revokes the original arbitral award, making it an invalid award. In the case of Ivan Milutinovie PLM v. Deutsche Babcock, after the commencement of arbitration, an arbitrator in the three-member arbitral tribunal announced his resignation. The arbitration court refused his resignation and thought that this arbitrator had the obligation to continue the arbitration. In the event that the arbitrator did not participate and did not sign, the presiding arbitrator and another arbitrator made a partial ruling and the arbitral tribunal approved the ruling [24]. Around the question of whether the ruling should be revoked, the Swiss courts conducted a 10-year trial.

Ultimately the arbitral award was revoked. This fully demonstrates that in the process of arbitration to resolve disputes, when the arbitration is illegal and unfair, and the public interest is violated, the court can uses its coercive force to supervise the arbitration process and intervene in the outcome of the arbitration.

More mandatory rules do not reflect the state's obligations, but the constraints and guarantees of arbitration for autonomy and privacy [26]. The control of arbitration by domestic law is realized through the judicial supervision to arbitration by the domestic courts. According to the New York Convention, the court of the place of arbitration and the court of the country in which the award is based shall have the right to revoke the arbitral award [27]. If the arbitration violates their mandatory rules, especially the mandatory rules of the place of arbitration, the arbitral award may be revoked, which is also the source of the mandatory effect of the mandatory rules [28]. Therefore, arbitration is not a complete private dispute resolution process. In the process of arbitration to settle disputes, the participation of the country and the court's coercive force can play the role of supervising and constraining the arbitration, which is conducive to the fairness of the arbitration results.

The procedural justice of international commercial arbitration requires the supervision and support of the court. It is impossible to make the arbitration completely exclusive from the interference of judicial power. Arbitration requires legal enforcement rules to guarantee its implementation [29]. Judicial intervention in international commercial arbitration is to protect the realization of autonomy and privacy of the arbitration [30]. On the other hand, the implementation of the arbitration agreement is guaranteed. The court supervises the arbitration, which can effectively prevent the arbitrator from being arbitrary and correct procedural errors in the arbitration, which guarantees the realization of arbitration fairness [31]. Since the arbitral tribunal is a non-government organization and it does not have the power to give mandatory orders, the arbitral tribunal has no power to take enforcement measures in terms of obtaining evidence and property preservation [32]. However, evidence and property preservation are important conditions for the smooth conduct of arbitration, and they are related to the realization of the autonomy of parties. Therefore, the parties have the right to request assistance from the court. The court may, through its national coercive power, give favorable support to the arbitration in the case of summoning witnesses, preserving property and evidence, and enforcing arbitral awards [33]. If the parties are not willing to follow the orders, the court's interference in arbitration is particularly important. Through the assistance of the court's enforcement rules, arbitration disputes can finally be resolved.

4. Conclusion

The wide adoption, high degree of autonomy, confidentiality, certain coercion, considerable flexibility and strong authority of arbitration are widely recognized. Arbitration is ultimately a dispute resolution mechanism created on the basis on the agreement by the parties, which is different from the mandatory litigation system. First of all, the principle of autonomy of will, as the first principle of international commercial arbitration, fully embodies the process of arbitration for private dispute resolution. The parties may choose the arbitrator, the arbitration institution, the place of arbitration, the arbitration procedure and the law applicable to the arbitration through making arbitration agreement, and the arbitration is private and confidential, which makes the arbitration a private disputes resolution process in most cases. However, these natures of arbitration that reflect the private dispute resolution are subject to the law's mandatory rules, and they should be achieved without violating the mandatory requirements of the law. Therefore, the process of arbitration is inevitably subject to the supervision and management of the law, and the enforcement of the arbitral award requires the mandatory legal rules as a guarantee. In conclusion, arbitration is not a

completely private dispute resolution process and it cannot be separated from the mandatory requirements of the law.

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