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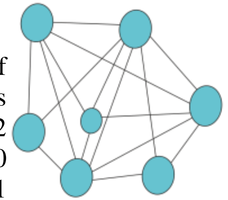

Article

Arbitration and the Importance of the Arbitration Agreement

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Abstract

Dispute resolution through arbitration based on the prior alignment of the wills of the parties has long been known and has a long tradition. This specific way of resolving disputes has survived throughout this long time as a result of the trust that the parties have shown in it, presenting to the arbitration for resolution their disputes. The normative regulation of dispute resolution before international commercial arbitration in its current form is of modern times. As an alternative method of resolving disputes, arbitration manages to have recognition and implementation in both local and international society. Although it is said that resolving disputes in arbitration proceedings is the same as resolving disputes in regular courts, which puts into dilemma the conditions that must be met to begin resolving an issue in arbitration proceedings. One of these conditions is the arbitration agreement itself, which the parties themselves must establish an agreement to resolve their disputed issue through arbitration proceedings. Such a thing does not happen in the procedures conducted in the regular state courts, since in order to initiate the contentious issue in the regular court, only the plaintiff is enough to initiate the lawsuit and have a legal interest regarding the object of the lawsuit. The Arbitration Agreement is of special importance to the Arbitration Courts, which in case the parties are not created cannot resolve the issue in the arbitration procedure, since the parties themselves are the ones who with their agreement determine the essential elements of the arbitration procedure as well as themselves, the development of the case in arbitration proceedings.

Keywords: Arbitration; Arbitration Procedure; Arbitration agreement; **The** importance of the arbitration agreement; Validity of the arbitration agreement;

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INTRODUCTION

Considering that the arbitration agreement is the essential clause of the development of the progress of a pre-arbitration procedure, **it therefore** began to address in more detail the importance of the arbitration agreement. For civil disputes, specifically from commercial law, it was a step towards the development of the Courts and the Laws on Arbitration, on which always lies the agreement that the parties create among themselves to find solutions to their dispute through arbitration.

Taking into account the arbitration agreement, the parties from the beginning of the conclusion of the main contract must announce that in case of dispute over the object of the main contract to enter into a second contract which contains the arbitration agreement, which in this case the case disputed in case it happens to be resolved through the arbitral tribunal. However, during the whole procedure, the parties to the agreement must take into account whether that agreement is valid, since if the agreement is considered invalid, then the arbitral award will be invalid. Regarding the invalidity of the agreement and the cases when an agreement can be considered invalid will be addressed in this paper.

I. Understanding of the Arbitration

Arbitration is an alternative mechanism for resolving disputes, widely used in developed countries, and is also available in Kosovo. Important reasons why businesses often select arbitration before appearing in regular state courts are speed, efficiency, party autonomy, and the ultimate nature of arbitration decisions. For this reason, the International Economic Chambers are the initiators of international economic arbitration, so IEC procedures are often used, today for international arbitration. Arbitration proceedings can be conducted in this way because they are considered useful to the purpose, provided that the parties are treated equally and given the opportunity to be heard.

The arbitration procedure begins on the date when the claim is accepted by the defense (defendant) unless the parties agree otherwise (Morina, 2015:183). So, the arbitration procedure regarding a certain dispute begins on the day when the request for the dispute to be submitted to the arbitration for settlement is accepted by the respondent.[1] In general, arbitration can be defined as a means of resolving a dispute between two parties by a decision given by a third party to natural or legal persons (Puto, 2010) (states) on the basis of which disputes arise between states. They try to regulate them through international arbitration.[2] Arbitration is first and foremost created on the basis of the agreement of the parties, since without the consent of both parties this in reality cannot be realized (Hetemi, 2007:471). At each stage of the proceedings, the arbitral tribunal may hold a hearing with witnesses to hear the experts and to enable the parties to express their views on the evidence. The arbitration procedure is markedly different from the judicial procedure, among other

[1] See: Law no. 02 / L-75; Kosovo Arbitration Law; Prishtina 2008; Article 18;

[2] International arbitration means the settlement of disputes between states by a decision given by one or more arbitrators or by a body chosen by the parties.

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things, in contrast to its relation to the rules of procedure. For court proceedings, most of the rules are of an imperative nature (ius cogens) so that procedural law does not authorize the parties to determine by their agreement the rules by which the court will act (the principle of constitutionality and legality) (Musa, 2012:80). If an oral hearing is held, the arbitral tribunal shall be obliged to invite the parties to attend the hearing in a timely manner.[3]

The arbitral tribunal shall request from the parties all evidence which proves the allegations in the lawsuit or counterclaim. In order to resolve a certain dispute, the arbitral tribunal, with the utmost care, determines which evidence will be processed in the proceedings. It is more important to respect the principle of equality of arms in the arbitration proceedings during the elaboration of evidence where they should have an equal position. In order to obtain the necessary evidence, the arbitral tribunal may seek the assistance of the state courts in securing various decisions and for the elaboration of the evidence by the state court when these cannot be elaborated by the arbitral tribunal (Musa, 2012:84). Given that arbitration is an institution with a very long tradition and a great affirmation, which is growing, it is perfectly understandable that arbitration in legal theory can be explained and defined in different ways. Thus, we can say that there are many attempts to define arbitration.[4] The expression "arbitration" can have at least two meanings, on the one hand with this term we mean the way, method or technique of resolving disputes, and on the other hand with it we mean the body or institution that resolves the dispute, respectively brings decision on the contentious issue.[5] International trade arbitration can be defined as "a private method of resolving disputes, chosen by the parties themselves as an effective way to end disputes between them, without resorting to the courts of law. In addition to these abstract definitions which define arbitration as a way, method or technique for resolving disputes, in legal theory there are also many other abstract definitions which define arbitration as a body or institution that resolves disputes (Redfern & Hunter, 2004).

The same definition regarding the notion of arbitration is made by the current law in Albanian-speaking countries as follows: Arbitration is one of the most common and contemporary methods for resolving disputes that arise during operational developments in international trade. This is a private means of resolving conflicts based on the prior agreement of the parties to refer the eventual dispute to a private court. The procedure before the arbitral tribunal tends to be much faster than the same contentious case being referred to a national court to be tried, respectively. Regular courts usually have limited time, long and varied lists of cases that require more concentration and attention to judge a case which is a difficult situation. Although the arbitral tribunals must meet the requirements of natural justice and decide in accordance with the law they must and can approve procedures with flexibility and speed. Arbitration can be more expensive than litigation

[3] Article 26 of the Rules of Arbitration under UNCTRAL Model Law.
[4] The most important acts relating to the right to commercial arbitration are: the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitration Decisions of 1927, the New York Convention on the Recognition and the execution of foreign arbitration awards of 1958, the European Convention on International Commercial Arbitration of 1961, the Washington Convention on the Settlement of Investment Disputes between States and Citizens of Other States of 1965, and the international model Model-Law on Arbitration. UNCITRAL international trader of 1985.
[5] The European Convention on International Commercial Arbitration of 1961 in Article 1, paragraph 2, sub-b, provides for these two meanings.), but also before institutional arbitrations.

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in a regular court, but traders agree with this procedure and agree in principle to stay in this procedure precisely to gain time and procedural simplicity. In addition, the costs of arbitration must usually be borne by the parties and are not taxable by the taxpayer.

I. 1. Arbitration agreement

The final arbitration agreement between the parties to the dispute is the basis of the arbitration procedure and the authorization of the arbitral tribunal. By concluding the arbitration agreement, the parties entrust the arbitral tribunal with a decision on the disputes which have been included in the arbitration agreement. The powers of the arbitral tribunal are limited by the arbitration contract. With an arbitration contract, the parties can determine the essential elements of the arbitration procedure themselves, so they can determine the material and procedural elements (Hetemi, 2007:427).

The necessary condition for entering the arbitration procedure is the arbitration clause. This stipulates that the parties in a legal case are not subject to due process of law, but to arbitration. In the event of an existing conflict, the parties may agree to adjudicate their dispute through arbitration. Under normal circumstances, arbitration clauses are part of the content of the contract. The arbitration clause contains information on whether all or only the legal disputes set out in it are adjudicated within the framework of arbitration. It also contains information about the composition of the arbitral tribunal, or on the basis of which the rule will be judged, as well as where the seat of the arbitral tribunal should be.

In international business relations**,** it is very logical to also determine in which language the arbitration procedure will take place. The arbitration clause must also contain the right applicable in this procedure.

The 2012 UNCITRAL[6] Rules of Arbitration model arbitration clause has the following content:

Any dispute, dispute or claim arising out of or relating to this contract, or its breach, termination or invalidity, shall be settled by arbitration in accordance with the rules of UNCITRAL, where the parties shall have the following in mind:

(a) The appointment authority is ... [name of institution or person];

(b) The number of arbitrators is ... [one or three];

(c) The place of arbitration shall be ... [city and country];

(d) The language to be used in arbitration proceedings shall be.[7]

[6] See: http: //www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. (01/06/2016). I get on dt. 01.04.2015, time 17:12.

[7] All disputes arising out of or in connection with this contract are ultimately settled under the Arbitration Rules of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.

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The validity of an arbitration clause depends on whether it is valid under national law. Applicable national law must be defined in accordance with the rules of private international law. The validity of an arbitration clause also depends on whether the contract is valid or if it was agreed in writing. If one of the parties complains against the validity of an arbitration clause, then according to the rule, the arbitrators are the ones who decide on the validity and competence (the so-called Competence-Competence).[8] At the same time, the parties to the agreement on the implementation of the arbitration clause must be allowed to participate in the arbitration process. Also, if the parties have agreed to adjudicate their disputes within the framework of arbitration, then the courts are incompetent for such legal disputes. This lack of jurisdiction of the courts must be made valid by one of the participating parties at the beginning of the trial.[9]

I. 1. 1. The meaning and significance of the arbitration agreement

Arbitration agreement is the basis of arbitration because it expresses the consent of the will of the parties to entrust the arbitration with the resolution of their existing or future dispute. The agreement of the parties is a necessary condition for any resolution of disputes outside the state courts, therefore it is a necessary condition for resolving disputes through international commercial arbitrations. This agreement constitutes the legal basis for the constitution and functioning of arbitration, without which there is no arbitration. In the same vein are the words of a well-known arbitrator, who states that "of course, no arbitration is possible without its basis, the arbitration agreement." (Jan van den Berg, 1981:144). Thus, it is rightly stated that the basis for the procurement of arbitration competence and at the same time the basis for the submission of the competence of the regular state court, which would otherwise be competent to adjudicate the dispute, if this agreement did not exist. " Regarding the definition of the meaning of the agreement in the local and foreign legal doctrine, as well as in the national legislation and in the international acts that refer to the matter of arbitration, it is not insisted on a strict (rigorous) definition of the arbitration agreement (Petrović, 1998:493). So, there is no generally accepted definition of an arbitration agreement, and to date many definitions have been given, which are mainly based on some element of it.[10] Therefore, the essence of the arbitration agreement lies in the fact that this is a legal-private contract of the parties with which they transfer the resolution of disputes to the jurisdiction of the arbitration, which decides instead of the state courts.[11]

Definition of the arbitration agreement is made by the Kosovo Law on Arbitration, which according to him states that: "Arbitration Agreement" means the agreement reached between two or more persons, that some or all legal disputes, which have arisen or that may arise between them, shall be subject to arbitration. According to the European Arbitration Convention, "Arbitration

[8] See Article 5 of the European Convention; Article 21 OF UNCITRAL Rules of Arbitration. In the context of the ICC arbitration proceedings, the International Court of Arbitration has an important role (see Article 8.3 of the ICC 2012 Arbitration Rules).

[9] See: http: //www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. (01.06.2016). I get on dt. 01.04.2015, time 17:16;

[10] Regarding the definition of arbitration agreement, see also: Geneva Protocol on 1923 arbitration clauses, Article 1, paragraph 1; EC for International Commercial Arbitration, Article 1, par. 2; UNCITRAL ML, Article 7, par. 1.

[11] See: Law no. 02 / L-75; Kosovo Arbitration Law; Prishtina 2008; Article 2.

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Agreement" means either an arbitration clause in a contract or in an arbitration agreement, contract or arbitration agreement, which has been signed by the parties or contained in an exchange of letters, telegrams or communication. **With** correspondents and in relations between states whose laws do not require a written form for an arbitration agreement, any agreement concluded in the forms permitted by these laws**.**[12]

Therefore, we can define the arbitration agreement as a kind of agreement by which the contracting parties entrust the arbitration with the resolution of all disputes or any of the disputes that have arisen or may arise in the future from their legal relationship, provided that for these disputes the exclusive competence of the state courts shall not be provided.

I. 2. The validity of the arbitration agreement

If the parties wish to ensure that their arbitration clause is enforced, they shall ensure that this clause provides for the basic elements, in particular the purpose of arbitration, the institution of arbitration (if determined for institutional arbitration), the rules of arbitration, the number of arbitrators, the place of arbitration, and the language in which it will be used. Because there are many cases in which inexperienced businessmen or lawyers themselves draft contracts, some of the above-mentioned elements are often overlooked. There are also situations when the arbitration clause is compiled under pressure or fraud. In the first situation we are dealing with the "validity" of the arbitration clause[13], and in the second with the "existence" of the arbitration clause. These two concepts are very similar to the concepts of invalidity, according to the Law on Obligations of Kosovo, in which the issue of "validity" of an arbitration clause would be parallel to that of "relative invalidity",[14] and the issue of "existence" it is parallel to the "absolute invalidity" of the same law. The jurisdiction of an arbitral tribunal derives from the arbitration clause. Thus, any dilemma regarding the validity of that clause can provoke challenges of jurisdiction. Up to the invalidity of a clause can come as a result of:

1. non-determination or erroneous determination of the arbitral institution
2. non-determination or erroneous determination of arbitration rules
3. non-fulfillment of the condition for "writing"
4. non-arbitrariness of a case
5. Lack of willingness of the parties to arbitrate (also considered by some courts as the basis for defining an arbitration clause as non-existent).

[12] See: http://www.euralius.eu/pdf/multilateral-agreement/Konventa-Evropiane-e-Arbitrazhit-Nernternbetar-Tregtar.pdf. Article 1.

[13] See: Law no. 04 / L-077 of Kosovo Obligations Relations; Prishtina 2012. Article 97, paragraph 1; According to which article it is stated that: The contract is void when the party has entered into a disability to act, when during its conclusion there were defects in terms of the will of the parties, as well as when this is determined by this law or by special provision.

[14] Yes there. Article 89, paragraph 1; According to which article it is stated that: Contract that is contrary to public order, imperative provisions, or morality of the company is null and void, if the purpose of the violated rule does not guide in any other sanction or if the law in the particular case does not predicts something else.

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An arbitral tribunal usually does not begin to analyze in detail the arbitration agreement to see whether it meets all the prerequisites for validity, unless one of the parties challenges the tribunal's jurisdiction on the basis of an invalid arbitration clause. For this reason, this concept is very similar to that of "relative invalidity" which we encounter in the Law on Obligations of Kosovo, where this issue can be raised only at the request of one of the parties.[15] If the jurisdiction of the tribunal is challenged on the basis of an invalid clause for arbitration,[16] then it is the duty of the tribunal to decide whether there is jurisdiction or not, based on the principle of “competence-competence”,[17] arbitral tribunal to decide on cases relating to the validity of an arbitration clause.

II. The importance of the validity of the arbitration agreement in making an arbitral award

The agreement of the parties is a necessary condition for any resolution of disputes outside the state courts, therefore it is a necessary condition for resolving disputes through international commercial arbitrations. This agreement constitutes the legal basis for the constitution and functioning of arbitration, without which there is no arbitration. In the same vein are the words of a well-known arbitration commentator, who states that "of course, no arbitration is possible without its basis, the arbitration agreement." (Jan van den Berg, 1981:144)

If the arbitral proceedings take a decision which does not have a valid agreement of the parties from the beginning when the parties have established the agreement, then the decision may be revoked by the court if the arbitration agreement is proved to be invalid under the law for which the parties have submitted it either according to the law in force at the moment.[18] Giving up can also be avoided if there is no valid reference because it is only a valid reference which gives jurisdiction to the arbitrator.[19] The validity of the agreement must be tested in accordance with the law to which the parties have submitted it. When there is no such indicator, the validity will be examined according to the law in force at the moment. This of course means the law of the place where the contract was done.

II.1. The components of a valid arbitration agreement

To form a valid arbitration agreement between the parties, all essential ingredients must be tested. A business contract, lease or other written contract may contain an arbitration clause. Using such

[15] See: Law no. 04 / L-077 of Kosovo Obligations Relations; Prishtina 2012. Article 89, paragraph 1;
[16] See: UNCITRAL Model Law, Article 8 (2);
[17] See: Law 02 / L-75; Kosovo Arbitration Law; Prishtina 2008; (Article 14); According to which it is stated that: The arbitral tribunal decides on the validity of the arbitration agreement and whether it is competent to resolve the dispute which has been submitted to it. In this context, the arbitration clause, which is part of a contract, is treated as a separate and independent contract.
[18] See: 1996 Arbitration Act. Article 34, subparagraphs (ii) of point (a);
[19] Haran Sharan Khemka v. Achint Chemicals, (2005) 2 RAJ 463. State of UP v. Allied Constructions, Supra note 21;

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a clause, the parties to the contract agree to arbitrate any future dispute. As with any clause, all parties must agree to its use in the contract before the contract is signed. Given the specifics of the arbitration agreement and relying on the prevailing views in legal theory, which are also recognized by international commercial arbitration law, we can conclude that there are four basic conditions for the validity (validity) of the agreement on arbitration, and they are:

1. Arbitration of the dispute;
2. The ability of the parties to enter into an arbitration agreement;
3. The form of the arbitration agreement and
4. The content of the arbitration agreement (substantive requirements for the validity of the arbitration agreement) (Knežević, 1999:39).

II. 1.1. Mutual consent of the parties

A reference to a contract with a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a part of the contract.

The consent of the parties is the basic requirement for the arbitration agreement. Their intention to appear in arbitration must undoubtedly arise from the agreement. The New York Convention (Article II. 1) requires that the parties to the agreement "undertake to submit to arbitration" their disputes.

This expression means:[20]

• The agreement must contain an obligation, rather than a permissive one, the enterprise, and

• The agreement must provide arbitration, instead of another dispute settlement process.

The agreement must originate from the free will of the parties. Therefore, if one of them acted out of error or as a result of fraud, coercion or unfair influence, there was no real consent and the agreement to arbitrate is not valid.[21]

II. 2. Non-existence or invalidity of the arbitration agreement

The jurisdiction of each international commercial arbitral tribunal derives from the agreement of the parties 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 arbitral award. The arbitration agreement is treated as an independent agreement in relation to the contract in which it is included, and that the termination of this agreement, in general, does not depend on the nullity 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 the nullity

[20] See: New York Convention (Article II. 1);
[21] See: Law no. 02 / L-75; Kosovo Arbitration Law; Prishtina 2008; Article 5, paragraph 1;

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of the main contract directly affects the arbitration agreement, then the arbitral tribunal must declare the arbitration agreement invalid. For example, the lack of consent of the parties to the main contract may also imply their lack of consent to enter into the arbitration agreement included in that contract. Although the final result of the main contract and the arbitration agreement may be the same (both to be declared invalid), it is important that the result be obtained through a separate assessment, because the procedure for the verification of the invalidity of the arbitration agreement is special from the procedure for the invalidity of the main contract.

Termination of the arbitration agreement for the invalidity of the arbitration agreement is the reason for filing a lawsuit for annulment of the decision of the arbitral tribunal. The agreement which was initially valid, but later this agreement was terminated, for example, through the regular denunciation of the agreement, will be considered invalid. Also, the arbitration agreement will be invalid if the form of the arbitration agreement has not been respected as provided by the arbitration law (Morina, 2015:274). Indeed, the non-existence or invalidity of the arbitration agreement has been universally acknowledged as the cause for annulment of the arbitral award in both domestic and international legal sources of arbitration. It is also an obstacle to the recognition and enforcement of foreign arbitral awards in accordance with the New York Convention of 1958. Therefore, if the arbitration agreement does not exist at all as concluded between them. Parties, or if it is not valid under the right set by the parties or, in the absence of such a designation, the arbitral award shall be annulled. The invalidity of the arbitration agreement may be caused as a result of non-compliance with the form provided for the arbitration agreement, as well as due to material deficiencies (deficiencies in terms of the content of the agreement). Thus, we distinguish between formal invalidity and material-legal invalidity of the arbitration agreement. What is important to note on this occasion is that under many national legal systems, the party is obliged to invoke the non-existence or invalidity of the arbitration agreement from the very beginning of the arbitration (during the course of the proceedings. arbitration), so as not to lose the right to be summoned for this reason at the trial stage according to the lawsuit for annulment of the arbitral award.[22] According to this position, the party in its lawsuit cannot invoke the non-existence or invalidity of the arbitration agreement if it has issued a summons to that cause before the arbitration during the course of the arbitration proceedings.

CONCLUSION

All international instruments are directly applicable to disputes with foreign investors in Kosovo. 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 increase

[22] See: UNCITRAL ML Article 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 Articles 31 and 73; LA of Croatia Articles 5 and 6 (8); LA of Serbia, Articles 12 (5) and 43. Such an attitude is also found in the decision of the Court of Appeals of Paris, dated 27 September 2001, in the case of 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 Paris Court of Appeals rejected the request for annulment on the grounds that the party had failed to challenge the arbitral jurisdiction during the arbitration proceedings itself and therefore considered that the party had waived its right to present the objection).

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foreign investment 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 begun through arbitration centers, which operate within the Kosovo and American Chambers of Commerce. So from the general aspect of the right to arbitration, we need to know that in order to resolve a dispute over arbitration and to apply these regulations as well as the laws set for arbitration, the parties at the beginning of the main contract must enter into a contract. Second (accessory) with the aim that in the event that in the future the main contract creates disputes 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, we have pointed out that the parties to the agreement must be careful not to conflict with any cause that may result in the invalidity of the arbitration agreement, as this invalidity will have consequences if a decision is given. Of arbitration from this agreement, as this decision will be annulled by the regular courts as a reason that the arbitration agreement was invalid from the beginning of the crime of this agreement or may become invalid and over time. So during any action taken by the parties claiming to resolve their dispute through arbitration, they must be careful whether everything is in order with the arbitration agreement as the reason for the invalidity of the agreement may come to the annulment of the decision. Arbitration and this would be to the detriment of the party.

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