



The Status and Validity of the Independence of Arbitration Condition in Iranian Law and International Commercial Arbitration Law regarding the UNCITRA Arbitration in Education

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ARTICLE INFO	ABSTRACT
<p>Received: 28 April 2020 Revised: 16 May 2020 Accepted: 30 May 2020 Online: 05 June 2020</p>	<p>Education is shifting more and more from public goods to private goods. This process starts with State-building of education and then moves towards commercialization and full privatization. Also, the activities of private sector have affected formal and informal education systems in both arenas of educational services and educational provision. The consequence of these changes is presence of different actors and, of course, possible differences between them. Since the geographical scope of commercialization of education is not limited to national borders of a country, the purpose of this article is to examine status and validity of independence of arbitration in Iranian law and international commercial arbitration law with an approach to UNCITRAL arbitration. The present research method is a comparison with documentary approach and data analysis method is re-analysis. The research findings indicated a legal vacuum in the field of education business at both national and international levels for Iranian actors. The research findings also showed that there are similarities between Iranian law and UNCITRAL arbitration regarding status and validity of independence of arbitration condition. In addition, lack of a clear concepts' definition of "business activity" and "citizenship" are two major differences between Iran law and UNCITRAL law. According to the research findings, Iranian legislators and educational policymakers are encouraged to prepare and approve a separate law on educational business.</p>
<p>KEYWORDS</p> <p>Educational Business Privatization of Education Trade Arbitration UNCITRAL Arbitration</p>	

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1. Introduction

Although the role and function of education system in providing human resources has been evident since the time of Adam Smith, its commercial aspects have grown further in the last half century (Hawley & Paek, 2005; Nafukho, Hairston & Brooks, 2004). The history of educational systems' evolution shows that public education as a right has been largely provided by governments (United Nations, 2020). However, empirical evidence and many studies show that two major developments have taken place in recent decades regarding the right to education: First, the majority of governments provided basic education for children and young people free of charge through establishment of public schools (Roser and Ortiz-Ospina, 2020; UNICEF, 2007; UNESCO, 2015); Second, the majority of governments have paved the way for a reduction in their role in education by welcoming private sector (OECD, 2005; Kharisma & Pirmana, 2013; Verger, Fontdevila & Zancajo, 2015). Therefore, education is shifting from a public good to a private good more than ever (Anomaly, 2015; Shaw, 2010). This trend suggests that in many societies, education is moving away from "state-oriented" to "commercialization" and then "complete privatization" (Burch, 2006; Rikowski, 2017 ; Besley and Maitreesh Ghatak, 2001).

In Iran, the privatization of education has been a gradual but steady trend over the past four decades. Prior to the victory of Islamic Revolution in Iran in the late 1970s, there were few non-governmental schools and a small market for the sale of stationery. With the growth of population rate from about 1.5 to more than 3.5 during the 1980s, student population reached more than 17 million (Zarghami, 2014). Coinciding with economic pressures of allocating government funding to the costs of Iran's war with Iraq, this increase has put a lot of economic pressure on education system. These pressures provided an opportunity for private sector to participate more in a variety of forms, such as private tutoring, private schools, private publishers, and non-public schools. A lucrative business with more than 17 million customers that the legal system was not prepared to deal with.

With the end of Iran's war with Iraq, the government was given more time to take action. The first step was to increase number of schools and universities. The second step is to change direction of population policies in favor of reduction birth rate and growth rate of student population. The third step of government was to hold a hard entrance exam for candidates entering

universities and higher education institutions. Influenced by previous three steps, the fourth step of government was to pass educational commercialization laws and issue licenses for private sector to enter various scenes of educational activities (Hashemian, Zandian & Agham Mohammadi, 2015).

One of the most important measures taken by government after taking the above-mentioned steps was adoption of the "Schools and Non-Governmental Schools Law ". The consequence of this law was establishment of more than 11,000 non-governmental schools with more than 180,000 principals, teachers and employees, and 1 million students (customers) (Zinivand, 2018). Also, due to the university entrance exam, hundreds of private schools began to hold extracurricular classes and private publishers to produce textbooks and simulate exams across the country. While there is no real and codified assessment of financial turnover of these schools, institutions and publishers, the unofficial report of education officials in Tehran shows that the annual turnover of private institutions is approximately 4500 billion Tomans (more than US\$1,000,000,000), which is equivalent to 15% of the budget of two ministries of education and higher education in one financial year (Khabar News Agency, 2018). All this happened while dozens of people in the role of customers, employers, employees and workers are dealing with these institutions, and of course their business relationships require adoption of commercial laws, especially determining their status in the event of financial and material disputes. In fact, the main issue of present study is what considerations Iranian arbitration laws take into account when there is a dispute between educational business actors, and what similarities or differences these laws have with the international arbitration clause.

As mentioned above, on the one hand, commercialization and privatization of education have an increasing trend in most countries of the world. For this reason thus, different reactions of governments to this phenomenon have been observed in recent decades i.e. passage of laws for or against educational trade, enactment of laws regulating and relations of actors in this economic field. On the other hand, in many commercial laws and regulations, the Iranian government pays attention to international law and its similarity with domestic laws. Given these two points, it is important to take advantage of the experiences of other countries in the field of educational business, especially since the efforts of present researchers show that there is no research background in this regard in Iran. Therefore, main purpose of present study is to investigate status of independence of arbitration in Iran's law and international commercial arbitration law with an

approach to UNCITRAL Arbitration in the field of education. The research questions according to the main purpose are:

- What are the actors, shapes, dimensions, and types of business education?
- What are commercial rules of education in Iran?
- What are characteristics of Iran's commercial arbitration law?
- What are characteristics of international commercial arbitration law?
- What are similarities and differences between Iranian and international commercial arbitration law - with an emphasis on UNCITRAL arbitration?

2. Research Method

The present study is a historical research with a comparative approach. The method of data collection is documentary and through the study of texts, books, articles, national upstream documents, international reports and websites about objectives of research. A re-analysis approach was used to analyze data (Giddens, 1999). This method is able to analyze written sources and any text - such as verbal, visual, printed and electronic data that may be obtained from study of documents (Hsiu-Fang & Shannon, 2005). According to content of resources, the sampling method was done through intentional and theoretical sampling method (Flick, 2013). Also, note-taking techniques, systematic review, classification and conceptual tables, data reduction and determining the main components were used to read texts and resources (Sadeghi Fasaei and Erfan Manesh, 2015). Therefore, since the validity of a historical research is based on type of documents that the researcher uses, an attempt was made to find primary and direct sources as much as possible to determine validity of the data (Sarukhani, 2004).

3. Results

The results of data analysis are presented in 5 sections. In the first part, forms and dimensions of education trade and relationship between active market participants are explained. The second section deals with commercial laws of education in Iran. Third and fourth sections refer to characteristics of independence of arbitration clause in Iranian law and UNCITRAL arbitration. The fifth section examines the similarities and differences between commercial arbitration laws in Iran and UNCITRAL arbitration, with a major emphasis on education.

First: the dimensions of trade education

The first thing to note is presence of private sector in both formal and non-formal education systems. Private sector activity in the formal system is largely limited to establishment of non-public schools, while the establishment of private schools (for example, for teaching subjects such as mathematics, science, or foreign languages) and university entrance preparation classes (classes and pre-exams for university entrance exam) is focused on the informal education system (shadow education) (Wai-Ho Yung and Bray, 2017). The second point focuses on activities of the private sector in two areas of educational services and provisions (Klein, 1984). In the field of educational services, students and their parents (as customers) are required to receive more education through enrollment in non-public schools, hiring a private tutor for individual education, and attending private classes of institutions and schools. The field of educational provisions is mainly related to the purchase of educational goods such as educational aid books, books containing exam questions, educational CDs and other internet services. Also in this area, we can mention the provision of items such as right to access online books, conference papers and publications online and in the form of contracts related to copyright and annual subscription. These divisions represent a wide range of business activities that occur between a specific customer (students and their parents) with dozens of unspecified vendors. It is natural that it is very difficult for these actors to examine and analyze educational and trade relations and to pass special laws for them, so that many countries have not been able to determine a specific framework for "educational business" - due to market expansion, laws uncertainty and weakness of the regulatory system - (Zhang and Bray, 2016). It is clear that both the field of educational services and educational provisions relationship are not only limited to customer (students and parents) and includes other actors. These actors include owners (founders), directors of institutions and schools, teachers, administrative staff, publishers, authors of books and articles, research institutes, international organizations, owners of scientific databases and government (Figure 1):



Figure1. Educational Business Stakeholders

The main actor in educational business is a person who, as a salesperson (for example, the founder of a non-governmental school, institution or private school) has an interactive relationship with each actor and also forms relationship of actors with each other (Table 1). As Table shows that the founder of a non-governmental school or private institution receives money from parents and students For the relationships and services they provide, while she/he has to pay money to other actors (headmaster ,teachers and so on). Of course, the founder's relationship with the State is more complex, as it simultaneously receives financial and material resources from the State (in the form of loans, land or buildings) and pays the government money (in the form of taxes or employee insurance contributions). Also, the dimensions of relationship between founder and each actor can be varied. In financial terms, the founder receives and pays money from / to different actors. In the executive dimension, she/he hires people to facilitate main activity (training) as an administrative force. In the educational dimension, the founder has an educational and financial relationship with teachers. Naturally, all of this requires existence or approval of commercial laws that, in possible cases, can take into account the rights of both parties.

Table 1

Educational trade actors by type and dimensions of relationship

Actor	Dimensions of business relationship	Type of business relationship
Founders	Educational, executive, financial	Recipient and payer
Parents& students	Educational, executive, financial	payer
Directors	Educational, financial	Recipient
Teachers	Educational, financial	Recipient
Administrative staff	Educational, financial	Recipient
Publishers	Educational, financial	Recipient and payer
Authors	Educational, financial	Recipient
Research institutes	Educational, executive, financial	Recipient and payer
International organizations	Educational, executive, financial	Recipient and payer
Owners of scientific databases	Educational, financial	Recipient
State	Educational, financial	Recipient and payer

Source: Research data

Second: Trade rules of education in Iran

An examination of upstream documents of the Iranian education system shows that most important law that has been drafted and approved by the Islamic Parliament of Iran with cooperation of institutions such as the Supreme Council of Education, the Supreme Council of Cultural Revolution, and the Cabinet is “Administration of Non-Governmental Schools and Educational Centers Law” in 2016 (Ministry of Education, 2020a). This law consists of 39 articles and 44 notes and in first article mentioned that the purpose of its approval is to help country's education system by benefiting from public participation in education based on upstream documents such as the "Document of Fundamental Change in Education" and document of " Comprehensive Scientific Map of the Country" (Supreme Council of Cultural Revolution, 2010; 2011). Article 2 of this law considers school, educational center and non-governmental educational center as places that are established and managed by individual or legal persons in accordance with objectives, rules and general instructions of the Ministry of Education. Article 4 refers to

establishment of a Supervisory Council at the district, regional, provincial and national levels with the presence of a lawyer to determine legal matters. According to this article, possible cases of arbitration between the founder and other actors will be the responsibility of Supervisory Council of district of school or private institution.

Article 16 refers to right of founders and other actors to object to the arbitral awards issued by the supervisory councils and considers the National Supervisory Council - located in the Ministry of Education - as the final authority for voting. Of course, Article 36 reiterates that the votes of the National Supervisory Council can be submitted to the Court of Administrative Justice up to three months after issuance. Article 25 also refers to the founder's duty to pay employee's share of insurance, and Articles 34 and 35 refer to administrative violations of employees and legal penalties. As can be seen, this law has three main problems: First, it does not explicitly mentions the arbitration clause under which the aforementioned actors are mutually committed and obliged to settle their future disputes between the parties. Secondly, the votes and rulings of the Supervisory Council have no legal applicability, and the parties can refer to other authorities and open a new file of complaint. Third, there is no reference to the activities of other actors in educational business (especially in the field of educational provisions). In this situation, it seems that the legislature has considered commercial field of educational services and provisions to be subject to the country's commercial arbitration laws (including the arbitration condition).

Thus, the need to familiarize policymakers and educational planners, legislators, and stakeholders in the field of educational business with trade laws in Iran and international organizations is revealed. Based on this need, the aim of present researchers is to investigate condition of arbitration independence, because the business relationships of Iranian citizens have crossed national borders more and more every day and have made it necessary to interact with foreign partners. For example, in the context of global bilateral or multilateral treaties, as well as international conventions, Iran should be considered one of the most unique countries in the world because it has so far refused to join most important conventions on guaranteeing the rights of authors (Asgari Arjangi, 2019). While, under influence of the Ministry of Science, Research and Technology policies and over the past decade, the scientific work of Iranian professors has increased dramatically (books and articles), but they cannot enjoy its benefits. It is in these cases that the issue of arbitration and its independence or non-independence can become doubly important.

Third: Independence of arbitration condition in Iranian law

Before discussing the independence of arbitration in Iran, it is necessary to briefly define this concept. While commercialization of education has increased in all societies, including Iran and all kinds of educational services are exchanged as goods between the buyer and the seller, it is important to determine the legal status of these trade exchanges, especially when there is a dispute between the parties, and to raise concerns about arbitration and its dimensions. The importance of this issue in legal relations between individuals is such that the authors of Iranian school textbooks have found it necessary for pupils to obtain information about resolving disputes and all types of lawsuits (Social Studies Textbook, Grade 8, Ministry of Education, 2020). The underlying concept of resolving disputes is the existence of an arbitrator and condition of arbitration between the parties.

When two individual or legal persons enter into a contract for an object, service, goods, or any other matter between them, it will be necessary to refer to arbitration if there is a disagreement between them regarding performance of contract. In this case, two questions arise for the legislature: First, should the clause of original contract be assigned to determine the manner of arbitration, or should another agreement be made regarding the arbitration clause between parties. The second question is whether the arbitration clause has the legal nature of separation from the original contract, which means that if the original contract is void, the arbitration clause will also be invalid. In response to these two questions, the independence of arbitration is examined in Iran and UNCITRAL arbitration laws.

In Iranian law, an agreement on arbitration, whether as a condition of the original transaction or as a separate agreement is a contract and is subject to the general terms of contracts set forth in Article 190 as well as Articles 219 of the Civil Code. Article 454 of the Code of Civil Procedure also stipulates that the parties may refer their dispute to arbitration "by consensus" (Article 454 of the Civil Code, adopted in 2013). According to Article 455 of the Code of Civil Procedure, this compromise can be in the original transaction or can be regulated by a new contract and the parties can be obliged to resolve it in the event of a dispute between them through arbitration (Faradid Legal Institute, 2013). However, some jurists, referring to Article 461 of the said law, have tried to extract a general ruling and do not consider condition of arbitration to be independent. Therefore, in order to investigate and answer the question of whether in Iran's law the condition of arbitration

is independent of the main contract or is considered a condition during the contract, it is necessary to refer to the rules related to obligations and conditions during the contract in civil law.

The terms of contract are set out in Articles 233 to 246 of the Civil Code. By studying these articles, it becomes clear that the condition of arbitration is not a type of condition in the contract, because first of all, the condition of arbitration is subject to its own rules (Articles 454 to 501 of the Code of Civil Procedure). Second, the condition of a contract is usually a condition that governs the transaction itself and forms one of pillars of the subject matter of transaction, such as terms of delivery or description of goods or payments that have a complementary or explanatory aspect to the main subject of contract. In civil law, the condition of marriage under Imami Jurisprudence - which is followed by the Islamic Republic of Iran - is discussed as a condition of adjective, verb or result, and the subject and conduit of all three is the subject of contract and transaction; although the condition of arbitration may be considered as a condition of action or result. The fact is that as long as there is no dispute between the parties, condition of arbitration is not relevant and may never refer to arbitration (Mohaghegh Damad, 2011). Third, the referral to arbitration as a condition of the transaction - which is prescribed in Article 455 of the Code of Civil Procedure - is not a "transactional condition" but is subjectively separate. In fact, the arbitration clause, like the arbitration agreement, is an independent contract and has an independent subject matter as well as its own intent and consent, which is required by Article 10 of the Civil Code and Article 219 of the Civil Code. It should be noted that the condition of arbitration is a condition of contract, yet it does not mean full compliance with fate of original contract, because in case of a contract in civil law, it can be found that the dissolution of original contract does not necessarily lead to dissolution of arbitration clause (Katozian, 1990; Emami, 1995).

Contrary to this view, some Iranian jurists, referring to Article 461 of the Code of Civil Procedure, believe that in domestic arbitration, if the main transaction is invalid, the case is out of jurisdiction because the court must resolve dispute between parties regarding principle of transaction and realization of transaction and after verifying validity of transaction, the arbitration authority is formed and therefore, arbitration condition is not independent of contract (Langroudi, 2010, Mohajeri, 2001). In general, it can be concluded that despite the pros and cons of arbitration clause in Iran Civil Code, the legislature - given the international orientation on independence of arbitration clause - explicitly accepted it. Article 16 of the International Commercial Arbitration Law of Iran stipulates that an arbitrator may decide on his or her competence and incompetence, as

well as on the existence or validity of an arbitration agreement. Therefore, the arbitration clause - which is part of a contract - is considered an independent agreement in terms of the implementation of this law. The decision of arbitrator regarding invalidity or invalidity of contract will not in itself constitute an invalidity of the arbitration clause stated in the contract (AmirMoazi, 2009, 273).

Fourth: International Commercial Arbitration Law - with an emphasis on UNCITRAL

The global economy is largely based on international trade, and its legal destiny is increasingly judged, as the parties often have the citizenship of different countries. Since the parties often do not want to go to court of other country, dispute is considered according to the international law. Therefore, in most international commercial contracts, the parties also stipulate that any dispute between parties will be referred to agreed arbitration authority (Raisi and Saedi, 2013). The United Nations Commission on International Trade Law, abbreviated to UNCITRAL, was established on December 17, 1966. The UNCITRAL's goal is to help expand trade by unifying laws and facilitating international trade. In fact, after the significant expansion of international trade in the 1960s, developed and developing countries were encouraged to reduce trade barriers in order to make better use of its benefits. One of the major obstacles to development of international trade was different laws of the countries (United Nations, 2010). Under these circumstances, the existence of an organization to expand coordination between laws of countries became apparent.

However, in international commercial arbitration, the issue of independence of the arbitration clause has been explicitly accepted and issue of doubt has been closed. Regarding the status and validity of the independence of arbitration clause in the UNCITRAL law, it should be said that there is a positive view on this issue in Article 21 of the said law and the independence of arbitration clause has been accepted. Paragraph 2 of Article 21 of the UNCITRAL provides for the independence of arbitral tribunal and provides that the arbitral tribunal shall have the power to decide on existence or validity of contract of which the arbitral tribunal is a part (Seifi, 1998). In terms of Article 21, the condition of arbitration will be considered as an independent agreement from the other terms of contract (Daryaee Baghdadabadi and Dehghan Chenari, 2015). Therefore, the decision of arbitral tribunal that contract is void and ineffective will not result in the invalidity of arbitration clause. In addition to above rules of arbitration, Article 7 of the 1961 Geneva Convention, Article 41 of the 1965 Washington Convention, and Article 16 of the UNCITRAL Model

of Arbitration (1985) have clearly provided for independence of arbitration clause (Asadi Nejad, 1999). The question now is how the arbitration clause works in the field of educational business activities.

Fifth: Comparison of Iran's commercial arbitration laws and UNCITRAL

On September 17, 1997, the Iranian parliament passed the International Commercial Arbitration Law. This law is largely inspired by the UNCITRAL, although some of parts of this law are not a complete reflection of UNCITRAL and have been adapted to the internal conditions of Iran (Seifi, 1998). Iran's International Commercial Arbitration Law has two salient features: One is the use of dominant rules and standards in theory and practice of international arbitration, and second; is correction of deficiencies in Iran's previous arbitration regulations. Also, the most important similarity between two laws can be considered as the explicit identification of principle of independence - or separation of arbitration clause from the original contract. However, due to the purpose of present study, important differences between two laws can be noted:

One of the differences between Iran's International Commercial Arbitration Law and the UNCITRAL is on Article 1, paragraph 2, which includes commercial activities including sale and purchase of goods and services, transportation, insurance, finance, consulting services, technical cooperation, representation, contracting and similar activities. This definition shows that Iranian law does not have a precise definition of business relations and is indifferent to developments in field of educational business. Of course, by neglecting, consulting services, technical cooperation and similar activities can be generalized to educational business. In fact, it is necessary for the Iranian legislator to explicitly mention scientific-educational services in the Iranian International Commercial Arbitration Law. Another difference between Iranian law and UNCITRAL law goes back to the concept of citizenship. Iran's new law relies on the non-Iranian citizenship of one of the parties to the arbitration, while not providing a precise definition of the concept of citizenship. Accordingly, the concept of non-Iranian citizenship will not include holders of dual Iranian-non-Iranian citizenship, because according to Article 989 of the Civil Code, such a person is still considered a citizen of Iran. This definition can create challenge for many Iranian university professors, researchers, and students who have scientific-business relationships with universities, research centers, and foreign publishers (in the form of a senior researcher, postdoctoral student, or author of books and articles).

4. Conclusion

The trade in educational goods is experiencing a growing market in all countries. One of the main reasons for this boom is growth of information and communication technologies and facilitation of circulation of scientific and educational resources. The growth of public education and expansion of higher education have also added to the prosperity of education business. The consequence of this trade is, on the one hand, the emergence of a variety of educational goods, expansion of employment market, and on the other hand, increased likelihood of conflicts of interest between sellers and buyers at both national and international levels. Increasing trade disputes between education traders make it necessary to develop and enact appropriate laws.

In Iran, the education business market has grown larger and more active over the past four decades, affecting both formal and informal education systems from preschool to higher education. The findings of present study showed that except in pre-primary schools and non-governmental schools, there is no comprehensive law on activities of private sector in other areas of educational business. It was also revealed that the present law lacks strong legal authority and that the parties to the contract can refuse to accept votes. The research findings also show that educational business is largely subject to the Code of Civil Procedure in terms of judicial law. In addition, the findings of the study on the arbitration clause showed that due to expansion of Iranian scientific-commercial relations at the international level, there is no complete adoption between Iran's international trade law and the UNCITRAL law. In fact, the most important problem in Iran is the lack of attention of legislature - both in the Code of Civil Procedure and in the Law on International Commercial Arbitration - to educational business. Therefore, both in the trade relations of domestic stockholders and in their relations with foreigners, this issue have created fundamental challenges for Iranians. Within the country, for example, legal disputes and cases such as independence or non-independence of arbitration between the founder of a private school and teachers are referred to the Ministry of Labor. In this situation, civil procedure or labor law is often the criterion, which is not very consistent with the nature of educational business activities. Also, there is no clear legal relationship between Iranian activists and the foreign side. For example, in relationship between country's scientific associations and international associations, councils and commissions or foreign universities, this legal vacuum is evident, so that in critical situations - such as US sanctions against Iran - scientific associations cannot use the rights and benefits of international relations.

The main suggestion of present study to the Iranian legislators and policy makers is to prepare and approve a separate law for national and international educational trade.

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