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VALIDATING ARBITRATION CONDITIONS IN BANKING CONTRACTS AND ITS JURISPRUDENTIAL REGULATIONS

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ABSTRACT

The existence of robust warrants like arbitration contracts for resolving the financial claims based on effective methods causes the return of the banks' claims and increases the profits of these institutions, and at the same time it is useful for both the borrowers and the banks because the more reliable the bank loan contracts, the more their contract would be coherent and solid. Of course, in operational terms, the banks most often prefer resisting the arbitration for the fear of unusual decisions and judgments by the arbitrators or the separation of the disputes being tried in an arbitral institution which has caused the banks to prefer courts over the arbitral institutions for the resolution of the discrepancies and they have also offered good and ponderable reasons for such a preference that is going to be investigated in the current study.

Keywords: *Arbitration, Bank Contract, Arbitration Condition's Independence.*

INTRODUCTION

Attentions have been paid since long ago to the arbitral institutions for the resolution of the contractual disputes between the parties so that many researchers have dealt with this issue so far. However, the present article tries elaborating the jurisprudential and legal regulations of arbitration thereby several major topics from the perspective of the jurisprudence and Islamic laws within the format of primary and secondary questions are being explored as:

1) Is arbitration institution legitimate in Islamic jurisprudence and Iran's statutory provisions? In other words, do Islamic jurisprudence and laws consider it influential to allow the dispute parties appoint certain arbitrators for the resolution of their disputes?
2) Assuming the permissibility and the influence of arbitration in law, what disputes can be adjudicated to the arbitral institutions? Does the arbitral institution's jurisdiction extends over all sorts of claims, including criminal, legal, financial and nonfinancial? Does it have any limitations in terms of the sorts of claims?

The present study also tries answering to the following secondary questions:

- Accepting the two aforesaid presumptions, to what extent are the verdicts and sentences issued by the arbitral institutions credible?
- Is the setting of an arbitration condition in the contract considered as a primary and independent contract or secondary and dependent one?

1. The History and Proofs of Arbitration Permissibility:

To be able to perceive any subject more subtly, it is better to review its historical trend as the first step so as to explore and investigate its apparent and content variegations in the course of time; thus, before dealing with the arbitration subject, its jurisprudential and historical

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regulations are succinctly examined from the perspective of the Holy Quran and the authentic jurisprudential and narrative resources. Arbitration has been most predominantly proposed under the title of "Hakamiyat" in Islamic jurisprudence literature which is an Arabic term derived of the root "Hakam", meaning to make a judgment. The latter term is per se an old word derived of Semitic languages and its original meaning refers to wisdom and sagacity. This basic meaning was gradually developed to include some other meanings, the most important of which are the followings: 1) prohibition; 2) corroboration and solidification; 3) arbitration. The last of the meanings paved the way for its common meaning, i.e. arbitration as opposed to trial. This common meaning that is mostly expressed within the format of arbitration and appointment of an arbitrator refers to a method of resolving the hostilities characterized by a sort of optionality which emerges on two grounds: the first is in appointing of an arbitrator and the second pertains to the arbitrator's verdict enforcement. Arbitration is numerously different from judgment, which is another method of resolving the disputes. Some of these differences stem from the following characteristics:

1) The arbitrator is appointed and deposed by the claim parties while the government is the authority for appointing and deposing a judge.
2) The claim parties' agreement on the arbitrator is not a prerequisite.
3) The performance bond of the enforcement of the verdicts issued by the judge and the judicator lies in their being of a force majeure and indispensable nature whereas the arbitrations are not this much strong and influential.

Arbitration has been existent before the advent of Islam amongst the people. Each society with any degree of simplicity or complexity has a sort of dispute resolution methods strongly associated with the society's type. Essentially, non-obedience of the arbitrator's verdict was some sort of disrespect and breaking of the promise and, besides being condemned by Arabs, it had to be faced with the arbitrator or his tribe's silence and indifference. However, the expediency of the individuals, rules the enforcement of the issued verdict. Such expediency by the other arbitrators incorporates the followings: non-elongation of the claim and non-acceptance of the arbitration from other judges (Mahdizadeh, 2002, no.44). The wage and salary of the arbitrators was usually calculated as a percentage of the mortgaged properties acquired from the parties before the arbitration initiation. Thus , arbitration in the ignorant Saudi Arabia was the dominant and common method of resolving the hostilities and it was based on some common regulations in regard of the arbitrator appointment, arbitrator's jurisdiction, arbitrator's place and wage and (see also, Javad Ali, 1971, Al-Mofassal fi Tarikh Al-Arab Qabl Al-Islam, v.5). However, with the entry of the prophet (may Allah bestow him and his sacred progeny the best of His regards) into Yathrib, the first religious government was founded in Hijaz and its power and domination was increased day by day. But, the formation of a central government did not discard methods like arbitration. Although the great apostle of Islam (may Allah bestow him and his sacred progeny the best of His regards) refuted Helf method for serving justice and preserving the wronged individuals' rights, arbitration was never denounced and proscribed despite the confirmation of "Helf Al-Fozul" treaty. It was even proposed by the Holy Quran that regarding some disputes, it can be seen as a trial method. Based on the continuation of arbitration, especially according to the holy Quran`s acceptance and rather being explicitly approved, it became a justifiable and completely common event. Some of the AYATs of the Holy Qoran as AYA 114 of SURAH AN'AM and AYA

65 of SURAH NISA'A affirm this issue: "shall you seek any other verdict than that issued by the God while He is the one who has revealed to you a book in details and those who have been granted the book should know that as it has been revealed to you by your God you may not be one of the doubters". Moreover, the notable point in the AYA "this is not so and, swear to the God, that they have not found faith unless they appoint you as an arbitrator in whatever the disputes they have and do not get unhappy in whatever the verdict you have ruled and prove a well obedience to it" is that, arbitration is not denounced or refused rather appointing individuals as arbitrator other than the God and His messenger, has been considered incorrect. Likewise, it becomes clear that the use of arbitration in resolving the disputes during the era of the great apostle of Islam (may Allah bestow him and his sacred progeny the best of His regards), despite the existence of a central government, has been quite ordinary and that arbitration has never been rejected by Islam rather the content and scales governing the verdict issuance by the arbitrator has always been considered and emphasized. In other words, Islam puts a special stress on the divinity of the issued verdicts without being too much sensitive to its issuance method. The important thing has been the Islamic nature of the verdict without any obligation and prohibition being posited in regard of arbitration's formalities so that there was no position for the ignorant verdicts (Mahdizadeh, 2002, 46). Thus, it becomes clear that Islam created a fundamental change in the content of one of the traditions and methods existent in Saudi Arabia's ignorant society without making it undergo any transformation which obliged the Muslims` rules be based on the Islamic verdicts and the divine book. Such an alteration was also followed by other effects like the change in the performance bond in such a manner that such verdict's performance bond found more strength and concreteness because a divine verdict had to be issued, on the one hand, and the lack of obedience of the divine verdicts was, on the other hand, interpreted as having no faith in the eminent God. So, the Muslims were made obliged and responsible for the enforcement of the issued verdicts. It was observed in AYA 65 of SURAH NISA'A that the sublime God realizes submission to the verdicts issued by the prophet (may Allah bestow him and his sacred progeny the best of His regards) as the precondition to being faithful which only originates from one source and that is the idea that the verdicts issued by the prophet (may Allah bestow him and his sacred progeny the best of His regards) were divine hence any verdict issued based on an Islamic foundation enjoyed this same performance bond and was supported to the extent that the Muslims were seeking awareness of the divine verdicts in many of occasions and then proved their obedience to them without being forced.

During the caliphate of the three caliphs, as well, arbitration was still being used as a method of resolving the disputes (to study examples of it please refer to Tabari, 1983, v.4, p.1423). But, it is necessary to take two points into account in this regard: the first is that the continuation of arbitration in this period is beyond a tradition and custom that has stemmed from the holy Quran's explicit teachings. In other words, not only the Quranic AYAT did not prohibit arbitration but also they even recommended and affirmed it in some of the cases. Thus, besides not considering arbitration as contradictory to religion, the Islamic society knew it as a necessary and compulsory item in some of the cases and the second point is that during the caliphates' periods, due to the solidification of the central government more than ever before, we can witness the expansion of the judge's and arbitrators' jurisdictions both in reality and in people's minds as well as in regard to the perfection of the trend commenced since the

era of the prophet (May Allah bestow him and his sacred progeny the best of His regards), i.e. replacement of trial for arbitration, in such a way that even arbitration was carried out under their supervision. Imam Ali (PBUH)'s government period, in contrast to the prior eras, was accompanied by the more solidification and establishment of the central government's role as a result of which the role and importance of trial became more accentuated and arbitration frequency was gradually decreased.

On the other hand, there are numerous narrations, as well, regarding the prescription and delegation of arbitration. The majority of these narrations have been cited in Sunnis' books, including their substantiation to the practicing of Sa'ad Ibn Ma'az's verdict by the great apostle of Islam (may Allah bestow him and his sacred progeny the best of His regards) in the arbitration between him and Bani Qorizeh, and Nasa'ei's narration thereof (Haidar, 1923, v.4, 639). This has also been the basis of some Shiite jurisprudents' rulings (Najafi, 1976, v.40, 25; Shahid Sani, 1991, v.2, 283). Besides the abovementioned proofs, Sunnis resort to the assistors' consensus on the permissibility of arbitration, as a result they know arbitration permissibility proved based on the book, the tradition and consensus. Shiite jurisprudents, as well, have substantially based their reasoning on consensus for the prescription of arbitration (Najafi, 1976, v.40, 23).

The extent of the arbitration institution's jurisdiction can be inferred from the gist of the AYAT and narrations existing in this regard. One of the arbitration's jurisdictional domains pertains to the familial disputes as ordered in AYA 35 of SURAH NISA'A:"and if you were afraid of the disagreements and inconsistencies between the two (couples), appoint an arbitrator from the wife's family and another from the husband's family and, when they try making corrections between them, the God will establish cordiality between them; verily, the God is all-knowing and well-informed". The content of the AYA confirms the permissibility and influence of arbitration in familial discrepancies which can be generalized to other similar disputes with an induction of characteristics. Thus, the arbitration is affirmed at least in its essence by the Islamic laws. Another jurisdictional domain of arbitration was related to the resolving of the claims related to the transactions and bargains that have been mentioned in the history for several times. Another trait that can be expressed for arbitration during early Islam era is the restoration of relationships between two tribes of believers who were constantly engaged in battles (see also HOJORAT: 9&10).

It can be stated in summing this section that arbitration was a tradition of the ignorant times and a dominant method of trial and resolving of the disputes. This ignorant time`s arbitration tradition has been confirmed and recommended by Islam and, in the meantime, it has been subjected to serious substantive changes that have brought about effects on the form and quality thereof. Although this period marks the overly expanded nature of arbitration jurisdiction, it was downgraded to lower ranks in the course of time with the institutionalization of the central government's rank and position to the extent that it was denied in the end of this period at least in some grounds. However, this tradition and mores of the ignorant time were approved with a divine content and kept on being existent. The Islamic law experts have not reached a consensus about the arbitration's realm. Some jurists do not consider any limitations for subjects that can be arbitrated. For example, some Shiite jurisprudents reason that all disputable subjects by two or more parties from financial issues to marriage and retaliations and limits and others can be referred to arbitration because they

feature the expediencies of referral and they are included by all of the proofs and news of the arbitration's permissibility and influence. However, the sure thing is that all Shiite and Sunni jurisprudents have no doubts and agree on the fact that the financial and commercial claims are among the matters that can be arbitrated. These subjects, though, are the subjects of the current research paper.

2. *Arbitration Regulations in Iran's Legal System and the Comparative Law:*

Civil procedure has taken arbitration into consideration which has been stipulated from the article 454 on in the seventh chapter of the civil procedure. In this regard, cases can be pointed out that a lawsuit is taken by a person to an arbitrator and the dispute is resolved in an informal manner and the law considers the arbitrator's verdict as if it is ordered by a court and the thing that the formal branches of a country should carry out is the enforcement of the same arbitrator's sentence. It means that if an arbitrator issued a verdict and the convict refrained from its enforcement willingly, the other beneficiaries can take it to the justice department's sentence enforcement division following which a court qualified for trying the claim orders the enforcement and subsequently a writ of execution is issued exactly similar to the court's judgment.

As for the position of arbitration in the comparative laws, it has to be asserted that the people are presently referring to the arbitral institutions for resolving their claims and disputes in lieu of the courts in advanced countries. In the majority of these countries an institution is established which is comprised of elite and skillful jurists who provide special facilities in this regard and get involved in arbitration. Due to the same reason, few claims are taken to the courts in these countries because the people terminate their disputes outside the courts and under the supervision of these institutions. Of course, the existence of the cultural grounds and infrastructures in advanced countries has not been devoid of the effect with the explanation being that the people's interactions and transactions in these countries are less leading to the emergence of lawsuits' adjudication in courts because in the advanced countries the people prefer to refer to large arbitral institutions rather than courts for the termination of their legal disputes. Of course, the aforesaid claims are only pertinent to legal matters and the criminal claims cannot be referred to arbitration because they are related to the realm of general law. However, it can be deduced from the discussion that the dispute resolution system of arbitration is not contradictory to the frameworks and general principles of Islamic law rather it is completely matching with it, although there are differences in some of the details, particularly in issues related to the arbitrator's conditions. It is believed in Islamic laws that all of the conditions considered for the appointed job also hold for the arbitrator; such general conditions like maturity and wisdom and such specific conditions like Islam, justice, maleness and exegesis (knowledge) are but some of these prerequisites.

3. *The Advantages of Arbitration in Regard of The Trial Formalities:*

The prevalent belief of the past was that arbitration brings about exclusions in the general jurisdiction of the courts and that it is against the country's general order. In fact, all of the business disputes should be resolved by the courts. In courts' rationale, arbitration and judicature are against one another. But, nowadays, the tendencies towards substitution of the judicature by arbitration are undergoing a daily increase expansion and obtaining a precise statistic of such tendencies is a difficult task. Essentially, the reason for the attentions paid to the court and arbitral institution is based on the reality that arbitration has been currently

replaced widely for the national courts at least in international levels (Sadeghi, 2007, 28). Based on Iran's laws, the arbitral authority has been completely separated from the formational structure of the justice department. It can be stated regarding the nature of such a formational distinction that the courts try the cases rather formally. The issue has also been forecasted in the act 159 of Islamic Republic of Iran's constitution. Based on the foresaid act, the formal authority qualified for the trying of the claims and lawsuits is justice department. But, arbitral institution is an informal authority meaning that individuals take their lawsuits to the individual whose job does not feature formality. This arbitrator can be anyone, legal or real. If the appointed arbitrator is a real person, the arbitration is termed a case-specific arbitration and if the arbitrator is a legal person, like ICC or Iran's arbitrators' center which is established in the chambers of commerce, the arbitration is termed organizational, meaning that the aforesaid legal personality should organize the trial of the case. Of course, in this case, it is eventually the legal person who should arbitrate, but the arbitrator is appointed by the foresaid legal person. Put differently, the arbitration by a real person is supervised by a legal person. The question that is raised in this regard is that why the arbitral institution is applied more frequently in the other countries rather than Iran? In response to the aforementioned question, it can be stated that the existence of the considerable merits of the arbitration institution have made many of the countries apply it as a surrogate for the long trials. The following parts present some of the noteworthy benefits of the arbitration:

A) **Ease of Investigation:** one of the advantages of arbitration is that the investigation of the disputes is carried out more smoothly because the arbitrators are not constrained by the special regulations of the civil procedures and they can resolve the disputes more easily.

B) **Speeding of the Arbitration:** according to the vast and often long formalities of the courts, the high speed of the arbitrator's investigation of the disputes can be pinpointed as another benefit of the arbitrations. As an example, the problems resulting from notifying the claim parties and being unable to precisely identify them and finding their addresses and the non-returning of the second copy of the notification and/or the problems arising from the appointment of a formal specialist and referral of the lawsuit to him all cause the elongation of the process of trying the lawsuits in the courts.

C) **Precision in Arbitration:** another advantage of arbitration institution is its precision in the investigation of the controversies. It can be stated possibly that while investigating the cases, the judge or attorney's accuracies are declined occasionally which is due to the presentation of numerous files to them.

D) **Low Cost of Arbitration:** the other advantage of arbitration is the less costly nature of referring the legal affairs to the arbitrator; the costs of trial are most often very high in courts and such a high cost of trial does not feature a certain specified limit which means that the costs can even peak to tens of million rials whereas the arbitrations, besides being constrained by the given enacted procedures, are also specified of their costs according to the arbitrators who demand much lower wages. As a specimen, in Iran's chamber of arbitrators, the arbitration cost takes a scalar form meaning that the percentage wages are lower for lawsuits with claims over lower amounts of money and higher for lawsuits with claims over higher amounts of money. Therefore, the people are more willing to refer their legal affairs to the arbitral institutions.

E) **Flexibility:** the next advantage of arbitral institutions is their flexibility. Unlike arbitral institutions, trial is often strict and rigid in courts.

F) **Trustworthiness:** it can be figured out in an investigation of the referrals to the courts and arbitral institutions that people trust the latter more, because the claim parties have appointed their selected arbitrator hence they themselves find him more reliable.

G) **Conventionality:** based on some definitions, arbitration is merely a conventional institution and the arbitrator's authorities stem from this same convention while the arbitration can be legal based on some of the other definitions.

H) **People-Driven Nature of Arbitration:** some jurists knew arbitration as a completely people-driven institution whereas, as believed by some others, arbitration is governmental or semi-governmental. Other advantages have also been expressed for arbitral institution, including "its being more specialized , being more confidential and it is keeping the secrets of the investigation of the disputed subject from the public, arbitrator's impartiality and lesser formalities".

3.1. Arbitration's Disadvantages:

According to the advantages enumerated above for arbitral institution in consideration of the trial formalities, it is now deemed more appropriate to remind the point that the insertion of a condition indicating the referral of the contingent disputes to the arbitrator has become one of the sure practices exercised by the jurists and lawyers in arranging the contracts; of course, certain precise and delicate points have to be taken into account in this regard. The foremost point is that the sole sufficiency to the resolution of the dispute via arbitration causes certain problems to emerge because it has been seen in the cases of the parties' disagreement about the arbitrators that the appointment of an arbitrator by the court has last several years due to the problems existent in the courts. Therefore, it is better to appoint an arbitrator in a specific manner in the very arbitration contract in case of which the court would not be allowed to investigate the lawsuit and even if it is presented with the lawsuit, it has to return it to the arbitration due to the existence of an in-contract condition indicating the referral of the contingent disputes to the arbitral institutions. Thus, it is recommended that jurists or retired judges should be definitely appointed as arbitrators in the contracts between the parties. In regard of the technical aspects of the subject, the arbitrator can refer the case like a court to the specialists and reach an arbitration based thereon. Disregarding some guarantees of the form and withdrawing from the prediction of some ways of filing a lawsuit are amongst the arbitration disadvantages. Furthermore, it has to be noted that arbitration does not always cause acceleration of the hostility settlement because arbitration commencement is delayed more than required in many of the negotiation cases pertinent to arbitration agreements. In the majority of domestic arbitration cases, the arbitrator's verdict is not willingly enforced by the defeated party and the work is taken to the compulsory enforcement of the arbitrator's verdict. Of course, more than ninety percent of the arbitration verdicts are willingly enforced in international cases. More importantly, the defeated party is always naturally willing to object to arbitrator's verdict and try filing the case in a state court. This is why the more precise organizing of the complaints of the arbitrator's verdicts is being felt increasing day by day and this per se sets the ground for more delay in hostility settlement. It has also been frequently seen even in cases of the parties' agreement to arbitration that one of them does not make any effort for the resolution of the dispute through arbitration when a discrepancy of a type comes

about and even claims invalidity of the arbitration agreement for counteracting the actions of the opposite party for referring to arbitration. This latter disadvantage of arbitration guides us to a more precise investigation of a new topic which will be dealt with in details in its right place but the main discussion in the current research paper is the investigation and validation of arbitration condition in banking contracts that has been conducted through making searches in the existent banking rules and regulations and performing interviews with some experts in banking area.

4. Validation of Arbitration Condition in Bank Contracts:

This section ,that is indeed a turning point of the current study, deals with the feasibility and application of arbitration condition in Iran's banking contract and an answer would be found to the question as to whether the arbitral institution, with all its abovementioned advantages, can be given a stance in the country's bank contracts or not?

Nowadays, in the majority of the countries worldwide, a large deal of attention has been paid to the use of an institution under the title of "arbitral institution" for some financial banking transactions, especially guarantees, asking for respite and the public sector's loan contracts. For instance, arbitration condition has paved its way in the US into contracts related to the consumer loans and underwriting contracts of securities, as well. Nowadays, many of the American financial institutions predict arbitration condition for avoiding the heavy and extravagant verdicts issued by the courts regarding the credit card contracts. The financial institutions assume that the arbitrators, as compared to judges whose credit issues might instigate them pay a greater deal of attention to the debtors' position are less influenced by the worries and concerns of the borrowers (Mohebbi, 2003, 45). But, the issue has not been much welcomed in Iran's banking system and the opponents come up with a diverse array of ideas that sometimes happen to be good ones for not using arbitration. Corresponding to the law on the non-usurious banking operations, one duty of the banking system is signing payment agreements for the implementation of monetary and commercial and transit contracts between the government and the other countries in adherence to the related rules and regulations. Now, if a dispute appears following the conclusion of the agreements and contracts, which authority is qualified to investigate and try it? Is it possible to refer the dispute to an arbitral institution or not? Some of the Iranian banks are still administrated by the government not to refer the dispute cases to the arbitration; however, it has been sometimes seen that the arbitration condition is set in the agreements between the bank and clients and/or between the bank and contractors and service companies, but arbitration is practically devoid of efficiency and topicality in our banking system. Two theories can be posited in this regard: the first is that referral of the dispute to the arbitration institution is useful and it is sometimes preferred to judicial cases and the other theory holds that referring of a dispute to arbitration is necessary and required, in addition, requesting settlement of dispute from judicial authorities is also necessary, required and, of course, sufficient. The corresponding regulations, as well, have preferred to adopt a silent position and no explicit naming of arbitration is seen in the texts of any of these regulations rather some of them have implicitly pointed thereto. Those who believe that arbitration is of no use in resolving of bank disputes claim that the banking contracts are per se adequately definitive and that they are enforceable in case that discrepancies emerge, hence there is no need for referring the case to arbitration and measures can be directly taken through qualified judicial authorities. Two articles in two separate rules

but with a single content confirm this issue. The first is the article 7 on the facilitation of granting bank loans that stipulates "all the contracts concluded between the bank and client when executing the non-usurious banking operation are considered to be as formal documents hence enjoying all the advantages of the business deeds, including needlessness of the compensation of the contingent losses via first mortgaging a guarantee. In enforcing this article, the judicature has specified specialized court divisions for investigating the banking lawsuits". Also, the article 15 of the non-usurious banking operation points to the following issue: "all of the contracts that are exchanged parallel to the enforcement of this law are to be considered as formal deeds based on the contract signed by the parties and they are indispensable in case of the parties' agreements on the contents thereof hence ruled by the executive procedures of the formal documents"[1]. According to the two aforementioned articles, no position can be found for arbitration in the related regulations. As it can be seen, the first article places the trying of the banking files within the jurisdiction of the specialized judicial divisions and the other article, as well, considers the bank contracts the same as the indispensable formal deeds. Therefore, due to the nature of the banking activities that is substantially credit-based and considering the fact that contracts are signed with the individuals before granting loans to them and for the purpose of receiving the claims and the fact that these contracts are definitive and regarded as formal deeds, it can be stated that arbitration gains no topicality here and the parties' disputes, if any, are resolved via sending the decisive contracts for enforcement to the executive branch of the notary public offices. Of course, some experts believe that the contingent disputes are referred to the arbitration in banks' internal contracts for the performing of the tasks and offering banking services as well as in rent agreements; of course, provided that the justice department's authorities are to be the second sources of taking measures in case of arbitration's failure. It is worth mentioning that the aforesaid statement has not been mentioned in any procedures or special laws and it is solely considered as a common convention (Rahimi, law specialist of Iran's National Bank). Some of the other experts believe that arbitration agreement is based on ethics and banks usually decide whether to refer the case to an arbitral institution or not though it is not mentioned as an in-contract condition (Taheri, the head of Kerman's Pasargad Bank). It is perhaps due to the fact that the opposite party of a bank may decide to abuse the arbitration contract's content in case of being decisively convicted in a court and use it as an excuse for dodging the conviction by, for example, saying that the disputes should be referred to arbitration as stated in the contract and not to a judicial authority. Moreover, another reason that causes the banks not to be willing to use arbitral institution is the indecisiveness of the arbitrations; so, the banks prefer investigation in a court for its being characterized by more deterrence.

5. Arbitration Independence of the Main Contract:

After investigating and validating arbitration contract in Iran's banking system and assuming the acceptance of arbitral institution for resolving of the disputes that may arise in banking transactions, this is the time for an important jurisprudential discussion, as well. Claiming the invalidity of the main contract, revocation and termination are amongst the cases of denying

[1] According to the procedures of the formal deeds, the indispensable deed is a formal or ordinary document for which writ of execution can be issued for the enforcement of the deed's signification without it being ordered by the court.

the credibility of the arbitration agreement. The party claiming that the arbitration agreement is invalid infers that the arbitration condition is invalid because the main contract is invalid so the arbitration condition is not accepted or because the main contract has been revoked the arbitration condition has also been annulled hence the arbitrator is not qualified to investigate the dispute between the parties. The question raised here is that can the invalidation and revocation of the main contract be generalized to the arbitration agreement or is it that the arbitration agreement features an independent originality and it is not to be envisioned as an in-contract condition that can be cancelled or invalidated by the revocation or invalidation of the main contract? The use of posing such a question lies in the idea that if the invalidation of the main contract can be considered as the cause of invalidating the arbitration agreement, as well, therefore, the arbitrator is not qualified to judge the lawsuit because the invalidation of the main contract causes the invalidation of the arbitration agreement and this is an example of vicious circle. Iran's law has not predicted a solution for resolving this case. The solution turns out to be the acceptance of arbitration agreement's independence as explicitly mentioned in the article 16 of Iran's international business arbitration law by stating that "the arbitration condition as a part of a contract is to be considered by this law as an independent agreement hence the arbitrator's decision on invalidating and revoking the effects of this contract is per se not equal to the annulment of the arbitration condition set in a contract". Of course, the interesting point is that the same case has been explicitly negated elsewhere by the legislator. The article 461 of the civil procedure points to the issue: "when the parties are found having disagreements about the main transaction or the arbitration condition, the case has to be seminally adjudicated to a court". This is suggestive of the arbitration agreement's dependence on the main contract. Such a contradictory solution has been criticized by some jurists but, anyway, one of these two ways should be preferred to the other. It can be seen in an investigation of the legal systems that the other countries have accepted the theory indicating the arbitration condition's independence (see also Eskini, 2004, 45-47). The solution in the article 461 of the civil procedure is not supported by many. Therefore, it is better to deal in the present study with the arbitration agreement's independence, as well. But, before that, answering to a question helps us to clarify the topic: is arbitration the objective of a contract or is this condition predicted for resolving of the disputes stemming from the contract? It is evident that the parties do not conclude a contract to refer to arbitration rather they set the arbitration condition for the resolving of the disputes stemming from the main contract. In other words, the arbitration condition should not be realized as a part of the contract that can be flawed in case of the condition's flaw rather arbitration condition is separate from the body of the main contract (Eskini, 2004, 52). Although today's legal systems around the globe have accepted the independence of the arbitration, the jurists are still found having disagreements about it because no straightforward path has been defined by the legislator in this regard and/or the road has been paved always for the court's interference in arbitration due to the conflict of the two aforesaid articles. Some experts deploy the theory of the arbitration's judicial nature before the theory of arbitration agreement's independence. A brief reference to this issue seems worthwhile. Based on this theory, the judicial element plays an important role in various stages of arbitration. The proponents of the theory believe in the perfect qualification of the court`s supervision on all of the arbitrations taking place inside a territory due to the great similarity between the justice department's trial and arbitration in terms of

trial procedures and issuance of the indispensable verdicts by stating that the parties' wills can make no interference in arbitration and it is the law of arbitration location that can only guide and control it (Sadeghi, 2003, 28). This perspective can be objected from the case that the interference and supervision of the courts in arbitration causes uncertainty in arbitration. Of course, it is worth mentioning that the interference and the effect of the courts does not solely take place in the arbitration's verdict issuance stage rather the courts can interfere in and supervise on the arbitration in three stages. The court can assist the arbitration process with its initiation in some cases as the identification of arbitration contract and issuance of temporary order before the formation of the arbitration committee. Furthermore, the court's interference in the course of arbitration, as well, is for effective accomplishment of arbitration and it includes installing and substituting of the arbitrators, issuance of temporary orders in the course of arbitration, verifying the termination of the arbitrators' authorities, revision of the arbitrator's decision on his jurisdiction and providing assists by offering proofs. In the last stage of arbitration and following the issuance of verdict, as well, the court's interference can be seen and this holds in a place where the arbitration verdicts are found in opposition to the public order or essentially where the dispute is found non-referable in case of which the judicial authority invalidates the verdict via intervening therein (Sadeghi, 2003, 32). It is necessary to remind that the court is qualified for intervening in the arbitration that can resolve the problems existent in the arbitration course; enforce the correct verdict and prevent the improper verdicts from being implemented or annul it.

Besides the aforementioned issues, a look at the arbitration agreement's independence in Iran's laws is also useful. Arbitration in Iran was first proposed in the law on the legal courts' principles. Since then, numerous regulations have been enacted about arbitration. In the regulations related to arbitration, the legislator has occasionally made use of both "mediation" and "arbitration" and regulations have been enacted at any time in proportion to the day's conditions and expediencies. The study and comparison of the regulations related to arbitration in Iran signify the extreme vastness of the changes. It was in 1927 that the legislator approved the mediation law for the first time. In this law, a sort of compulsory mediation had been predicted. But, two years later in 1929, the aforesaid law was amended and the referral of some lawsuits to the arbitral institutions was prohibited[2]. The legislator in the civil procedure passed in 1939, has expressed detailed regulations about arbitration. Additionally, the law on the house of fairness was enacted in 1977 following another law named the law on arbitration council. The realm of the activity of the arbitration councils expanded over cities and their activity domain was the houses of fairness and villages and, unlike the arbitration councils, their jurisdictions also covered the familial disputes. After the magnificent Islamic revolution, the law on the formation of special civil courts, passed in 1980, dealt with arbitration. Finally, it was in the law on civil procedure in chapter seven, the articles 454 to 501, that all the discussions related to arbitration were proposed. But, the law that seems to be more practical to the topic of the present study is the law on international business arbitration that was enacted by the legislator at 09/26/1997. Until before the enactment of the civil procedure in 1939, there was no discussion about the idea that whether

[2] It is stated in article 2 of the amendment to this law that "the reference to the arbitration is prohibited for the following cases even if it has been agreed by both parties: 1) in lawsuits related to the conjugal rights and familial affiliations and 2) in lawsuits related to ceasing working and bankruptcy"

there is a relationship between arbitration agreement and the main contract in terms of accuracy and invalidity or not? This might have been due to the fact that the arbitration agreement was only considered true up to that date, in both the law on the principles of courts passed in 1911 and the mediation law, and this was in case that the discrepancy and dispute happened to have taken place at a prior time following which the parties could refer to arbitration for resolving it (see also the article 757 of the law on the principles of courts and the articles 1 and 13 of the mediation law passed in 03/29/1927) and relating the arbitration contract signed for settlement of the discrepancies stemming from the main contract to the main contract is naturally rendered meaningless when the parties reach a separate agreement for the resolving of their discrepancies about the main contract. As it was mentioned, the arbitration issue was for the first time mentioned in civil procedure and it was also accepted that the parties of a contract can reach agreements not only after the dispute but also before that and such an agreement can be mentioned in the main contract in the form of a condition and/or in separate. Now, the question is whether the arbitration agreement is independent in Iran's laws from the contract for the resolving of the disputes of which it has been concluded or not? To answer this question, distinction has to be made between the cases of disputes related to domestic arbitration and the cases of disputes related to international arbitration as they do not propose identical solutions.

5.1. Investigation of Independence Principle in Domestic Arbitration:

In the civil procedure law passed in 1939, the article 635 stipulates that "in case of the parties' not specifying the arbitrator(s) within the process of transaction or contract conclusion and the following emergence of the dispute, a party can specify an arbitrator and issue a formal declaration to the other party and demand his appointment of his arbitrator of choice. In this case, the opposite party is obliged to specify and announce his arbitrator of interest within ten days since the receipt of the declaration with the distance considerations and if s/he falls short of doing so till the expiration of the aforesaid period, the party who has specified an arbitrator requests a court qualified for the trial of the dispute subject to appoint an arbitrator for the other party" and, immediately, the article 636 of this same law stipulates which says that "in regard of the aforesaid article, whenever there is a discrepancy between the parties about the main body of the transaction or contract in respect to arbitration, a court initially investigates the case and specifies an arbitrator for the neutral (party) after verifying the transaction and contract of the arbitrator. But, the neutral party can specify and introduce an arbitrator so long as the court-appointed arbitrator has not been announced". The important question that is posited in this regard is that whether arbitration condition is considered as an in-contract condition or a subordinate agreement from the perspective of the civil procedure. Or, in the case of the invalidation of the main agreement, the arbitration condition should be considered devoid of the effect or should it be considered apart from the main contract? To reach a clear-cut answer, it is worthwhile to investigate some of the perspectives offered in this regard. Of course, the ideas existent in this regard have been mostly posited with the centrality of the article 636 of the civil procedure passed in 1939. But, they can also be posited about the civil procedure passed in 2000, as well, because the article 461 of the former law repeats the same concept of the article 636 of civil procedure with some expressional differences and stipulates that "when there is a discrepancy between the parties regarding the main transaction or contract, the court can seminally try the case and come up with a judgement". The aforesaid

article is expressive of the idea that when parties are found having disputes regarding the main transaction (to wit the authenticity and invalidity of the transaction), the court should firstly investigate the dispute and issue verdicts about the case`s nature. So, it can be stated that the article 461 of the civil procedure law encompasses the independence or otherwise of the arbitration contracts from the main transaction.

Experts and jurists have expressed notable notions in this regard one of which confirms the idea that the subject of the article 636 of civil procedure law is connected with the arbitrator's qualification for making decision about his own jurisdiction and it is not related to the arbitration agreement's independence of the arbitration agreement. In other words, "the contents of the article 636 of the civil procedure law solely signify that whenever the qualifications of the arbitrator (including every individual arbitrator or the arbitral institution) are questioned, the arbitrator cannot deal with his qualifications hence the aforesaid article is not at all related to the independence of the arbitration agreement from the main contract" (Ja'afariyan, 1994, 133). This ideation cannot be followed.

In fact, it is true that the article 636 of the former civil procedure law as well as the current article 461 is somehow related to the arbitrator's qualifications for investigating his own jurisdiction (meaning that the arbitrator is not qualified for trying the case if it becomes clear that the arbitration agreement is invalid hence a qualified judicial court should investigate it), the aforesaid articles additionally seek expressing the dependence of the arbitration condition on the main contract, as well, because if the court figures out following investigations that the main contract is not credible, the arbitration condition may be disregarded hence the arbitrator appointment is not done so that the arbitrator can investigate, saying, the effects originating from the main contract's invalidation. The basis on which the arbitration is neglected becomes the fact that the arbitration agreement is rendered invalid by the invalidation of the main contract but, if the authenticity of the transaction is verified, trying the discrepancy resulting from such a transaction should be delegated to arbitration unless the arbitration agreement is in itself found invalid in which case the effects originating from the announcement of the authenticity of the main contract are investigated by a court as requested by one or two of the parties. Based on this opinion, it cannot be objected that "the arbitration referral condition, set inside a main contract, is a subordinate one and its observance is necessary when the main contract is influential and credible. So, discrepancies about the authenticity of the contract cannot be referred to arbitral institutions" (Katouzian, 1989, v.3, p.139).

5.2. The Realm of Arbitration Condition's Obedience of the Main Contract:

This part is commenced by a question as to whether or not the supervision introduced in the article 461 of the civil procedure law solely pertains to the contents posited in the article 460 indicating the assumption that a party proposes the invalidity of the arbitration agreement due to the invalidation of the main transaction to a trying arbitrator and not to a judge? To answer the foresaid question, the idea previously opined for the article 636 of the civil procedure law can be generalized to this discussion that "the foresaid article (636) does not imply a general rule rather it embraces the contents of the article 635 and this article is related to a case that the parties have not specified their arbitrator(s) in the course of transaction or contract and, when the dispute arises, one part falls short of appointing an arbitrator and court, on behalf of the neutral party, becomes the place of resort for the specifying of an arbitrator in which case

whenever there is a discrepancy about the main transaction or the arbitration agreement, it is more logical if the court determines an arbitrator on behalf of the neutral party following the verification of the accuracy of the transaction and contract. But, when the parties happen to have appointed their arbitrators or after an arbitrator was determined by the judicial authority and a court was formed to judge the dispute on the accuracy of the transaction or contract, the aforementioned article is not much of a binding nature (Safa'ei, 1998, p.18). Rabi'a Eskini has the following statement in response to this perspective: "the opinion seems objectionable. In fact, if such a distinction can be accepted, it can be objected that whether arbitration condition would have different destinies depending on the idea that a party has disagreements about the originality of the transaction and also that the dispute is referred to an arbitrator or a judge meaning that, in case of the dispute over the arbitrator, the condition is correct and the arbitrator can even rule the invalidation of the main transaction whereas if the arbitration condition is posited in a justice department court, it will announce the invalidity of the condition for the invalidation of the main contract. The result of accepting such an idea is that, in the first assumption, even if the invalidation of the main transaction is verified, the arbitration condition can remain authentic and, in the second assumption, the invalidation of the main transaction can render the arbitration condition invalid. In other words, arbitration condition is invalid but not at the same time with the conclusion of the main contract but at a time later than that and the evaluation will be rendered authentic or invalid based on the idea that it happens to be assigned to an arbitrator or a judge" (Eskini, 2004, 54).

Now, the question is that why it cannot be stated that the article 635 of the former civil procedure law (and the current article 461) is nothing more than the idea that arbitration condition had been and is being customarily considered as an in-contract condition (for further information about in-contract condition please refer to Safa'ei, 2003, 185) and that the aforesaid articles have done nothing more than emphasizing on this traditional rule? In case of accepting the existence of such a subjective history, then, it has to also be accepted that the basis on which arbitration condition is rendered invalid due to the invalidation of the main transaction assuming the referral of the case to a justice department's court, can also be a permit for the invalidation of the arbitration agreement assuming the adjudication of the dispute over the transaction to an arbitrator and parties' lack of discrepancy about the investigation of the case originally by an arbitrator. This is why, as the author thinks, the arbitration condition in the laws related to domestic arbitration in Iran, should be considered as an in-contract condition and the arbitration agreement's invalidity should be ordered wherever the invalidation of the main contract is ruled. Of course, the solution is not free of shortfalls. In fact, if an arbitrator trying the authenticity and invalidity of a main contract sentences the invalidity thereof, his judgment has been reached based on an invalid arbitration agreement hence his verdict indicating the invalidity of the main contract would be invalid due to his own disqualification in making a judgment based on an invalid arbitration agreement. It might have been this dimension of the issue that the aforesaid authors were encouraged to opine the limitedness of the foresaid article 636's area of action so as to modify the solution indicating the invalidity of the arbitration condition. But, it cannot be truly asserted if a difference can be made between the parties for the mere withdrawal of appointing an arbitrator in an assumption that a party refrains from appointing an arbitrator or not. The

assumption that the dispute over the main transaction is posited does not differ from the assumption that the same discrepancy is adjudicated in a justice department's court.

The worthy point to be mentioned in the end of this discussion is that the judicial system is confronted with the shortages of judicial cadre and human workforce. Under such circumstances, the country's legislating policies should not be adopted parallel to the increasing of the people's references to the judicial courts. The people's and the bank's contingent references to the justice department would be lowered if the arbitration realm is expanded in such a way that it can find rooms for being implemented in the banks' business contracts.

SUGGESTIONS:

Considering the trend of the banks' activities in the country, it seems that the existence of the arbitration institution in the area of the banking and business relations is an effective step for the advancement of the banking system's objectives. Thus, based on the findings of the present study, the following suggestions have been made and it is hoped that they might come out useful:

1) The resolving of the discrepancies stemming from the letters of credit are predominantly in need of experts' ideas and, of course, the experts of the field should be well aware of the identical regulations and procedures of the letters of credit so the judicial and justice department's courts are not good places for the referral of these technical discrepancies.
2) In order to make the banks more willing to use arbitration, a condition can be set in the contracts to free them of the fear of using arbitration and the condition could be the mentioning of the possibility of judicial trial and revising of the verdict in case of its being issued mistakenly. The condition ensures the parties that they enjoy the support of the law under any condition.
3) If the parties agree to refer their discrepancies to the arbitration under the influence of the regulations of the institutions having sufficient experience about the letters of credit, the current costs would be reduced and the delay in the lawsuits of the letters of credits would be prevented.

References

Eskini, Rabi'a, (2004), "the theoretical foundations of arbitration agreement's independence from the main contract in the comparative laws", seasonal journal of Mofid Letter, no.43

Haidar, Ali, (1923), "Dorar Al-Ahkam fi Sharh Majallah Al-Ahkam", Beirut, Dar Al-Mala'ein

Ja'afariyan, Mansour, (1994), "contemplations over the international business arbitration bill", journal of parliament and research, no.13

Javad, Ali, (1971), "Al-Mofassal fi Tarikh Al-Arab Qabl Al-Eslam", v.5, Baghdad, Maktabah Al-Nahzah

Katouzian, Naser, (1989), "general regulations of contracts", Tehran, Behnashr

Mahdizadeh, Mahdi, (2002), "mediation in the early Islamic era", journal of Andishey-e-Sadegh, nos.8&9

Mohebbi, Mohsen, (2003), "the governing law and the enforcement of verdicts in the arbitration subjects of the convention on resolving the discrepancies stemming from interstate investments made by and citizens of the foreign states", legal journal of the international law services office

Najafi, Muhammad Hassan, (1976), "Jawaher Al-Kalam", Tehran, Dar Al-Kitab Al-Eslamiyyeh.

Sadeghi, Mohsen, (2003), "courts' intervention in the international business arbitrations", journal of Danesh Pajoohan, Spring and Summer, no.3

Safa'ei, Sayyed Hussein, (1998), "some words about the innovations and shortcomings of international business arbitration law", journal of law and political sciences department, Tehran University, no.40

Safa'ei, Sayyed Hussein, (2003), "general regulations of contracts", Tehran, Mizan

Shahid Sani, Zain Al-Din Ibn Ali Ameli, (1991), "Masalek Al-Afham Ela Tanqih Shara'e'e Al-Islam", Qom, Mo'assessey-e-Al-Ma'aref Al-Eslamiyyeh

Tabari, Muhammad Ibn Jarir, (1983), "Tarikh-e-Tabari", v.4, tr. Abolghasem Payandeh, Tehran, Dar Al-Elm