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The Lack Of Special And General Uzanses A Weakness For The Normal And Reliable Function Of Kosova Permanent Tribunal Of Arbitration

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Abstract: Business relations of economic entities operating in Kosovo have begun to be regulated similarly to those of modern countries, in accordance with the spirit of globalization. In this segment the local institutions recently succeeded in completing the primary legislation and partially the secondary one. Within this activity has been done also the reforming of judicial system, have been redefined the competencies of judicial authorities for disputes in the field of economy and above all within the Chamber of Commerce is established the Permanent Tribunal of Arbitration as a specialized agency for solving disputes of contractual business relations. With all these achievements it is estimated that this court cannot be efficient and functional because starting from 1989 the Uzanses as juridical resources which are contracted by parties do not only exist but no one has identify, collect and publish them in the official newspaper. Based to this situation there are problems that actually do not have answers and confused situation is creating legal uncertainty. For a long period we have been part of Former Yugoslavia and question arise: are the special and general Uzanses issued in 22 March 1989, considering the fact that UNIMK Regulation for Applicable Law in Kosovo in the Point 2 allows to implement the Serbian laws after March 1989 if not discriminatory, applicable in Kosovo? No regulation determines the competence of any institution that issue Uzanses. On the other side we are aware of the fact that the most business relations in the modern world are regulated by contracting Uzanses and in Kosovo we do not have regulate this segment and the Permanent Tribunal of Arbitration cannot be in the level of its duty.

Key words: usance, legislation, contract, tribunal, arbitration

1 Introduction

Arbitration is the most common and contemporary method of resolution of disputes that come as a result of operational development at international market. It is a private mean to solving the conflicts based on a reached agreement of parties in order to refer the eventual context to a private court. Developing a case in such way is usually a preferable method for certain reasons. The procedure of arbitration tends to be faster rather than a contested issue to be addressed and executed beyond a national court. A contracted arbitration court – determined to hear or solve a disagreement should obviously pay a full and continuous attention to a contested issue. Ordinary courts have usually a limited time, or long and different court files that require a particular commitment for. Despite the fact that arbitration courts should act in accordance with the law, they should also approve some flexible and faster procedures. Even if the arbitration court process costs more than an ordinary court process, it is more convenient to the merchants because of its simplicity procedure. Above all, arbitration's expenditures should generally be afforded by parties.

The Republic of Kosova established in June 2008 the "Tribunal of Arbitration in Kosova". The foundation and functioning of this institution, backed by the USAID, is being positively evaluated by Kosova's judicial system. Its proper way of functioning is a pure reflection of development of judicial pledge for Kosova's and international economic operators and investors, since it guarantees an alternative and efficient way of resolving different contexts. Contemporary business operators, due to

the globalization, prefer non-bureaucratic resolution of contexts. Therefore, arbitration is a procedure that is ultimately dominating amid businesses.
There is no doubt that the creation of tribunal helps directly in saving the principles, habits and good business norms. This practice should obviously be implemented by all subjects involved with foreign business partners. In this way, they save economic interests of their enterprise and of our democratic society: they create a mutual understanding to business foreign partners, and contribute positively in the creation of a good reputation of our country.
Among other problems that the Arbitration Tribunal could face are tied with the existence or implementation of different and general "Uzanses" as a judicial source to reaching contractual agreements between contracted parties. Until now, no state institution has taken any step in order to draft a law related to competencies of different institutions in identifying, systemizing, codifying and publication of Uzanses.

2 Tribunal of Arbitration in Kosovo

The Tribunal of Arbitration in Kosova has been established in June 2008, when the Law on Arbitration Nr. 02/L – 75 entered into force (Law for Arbitration- Official Gazette). The establishment and functioning of this institution is considered as Kosova's biggest achievements in terms of judicial system. Today, the most complicated contests in the world are being resolved by arbitration tribunals. In formal and procedural plan, the Tribunal of Arbitration in Kosova has acquired arrangements for rational activities of this institution by guarantying transparency and by offering means to controlling procedures by parties. According to the law, this procedure is determined in accordance with the regulations of arbitration. Nevertheless, the duration and administration of evidences are determined by parties involved in the contest. The parties have the right to propose an arbiter whose professional and ethic capacities are unbiased. Other part has the right to contest the selection of arbiter proposed by arbiters' tribunal.
All operators, whether local or foreigners, could resolve their disagreements at the Permanent Tribunal of Arbitration, which acts within the office of Kosova's Economic Chamber. This could be achieved if the parties involved in the process agree to introduce the case at our institution or by incorporating the model of arbitration's clause in their contract. Arbitration's clause model on contracts foresees that any disagreement, dispute or any infraction on contract, could be resolved by the arbitration under Kosova's Economic Chamber supervision in accordance with the Regulations of Arbitration of the Permanent Tribunal of Arbitration (Law for Arbitration Nr. 02/L-75) In this context, the regulations of "Arbitration KOSOVA 2011" are compiled in a very flexible way in order to serve to both parties and tribunal in the best way they could. The legislative legal framework of arbitration in Kosova is completed. The legislations that currently are in vigor are the followings:
Ligji për Arbitrazhin nr. 02/L – 75

- Law on Arbitration nr. 02/L – 75
- Law on Contested Procedure nr. 03/L – 006
- Law on Executive Procedure nr. 03/L – 008
- Conventions (*Convention of New York of 1968; Regulations UNCITRAL)*

Therefore, we could consider that the above mentioned legislation could technically be considered as a completed one. Notwithstanding, if revised by important judicial sources such legislation gives the impression that is not completed, since it is tied with the lack of particular and general Uzanses.

3 Market Uzanses

The Uzanses refer to complex market and other systemized Uzanses published by any competent authorized organ which has an economic character, or by any corporation or professional society, like stock – market is. Before, for general Uzanses in our country was in charge the Economic Court, whereas for particular Uzanses, it was Chamber of Commerce (Savremena Administracija, 1964, pg.1012). Despite the fact the Uzanses are considered as a mean to stabilizing the current market

practices, through them could be modified and revised those Uzanses that weren't treated as such until now. The Uzanses could be: general ones (worth for all economic/market activities), and particular ones (worth only for particular kind of markets and services). The hierarchy of norms gives the priority to those contracts that are tied with particular Uzanses rather than to those tied with the general ones (Savremena Administracija, 1964, pg.1012). The Uzanses are considered as *lex contrtactus* – as complex regulations that act in accordance with the reached contract agreement between parties, respectively. In countries where different kind of Uzanses exist, the parties should preliminarily reach an agreement and, of course, to respect it (Alishani, Prishtinë 1986 pg. 124). That means, in such country both general and particular Uzanses are worth for the entire territory of. The Uzanses are viable only if parties sign a contract. Thus, the parties are considered to have been agreed to employ Uzanses on a contest only when such Uzanses are précised in the contract, and when agreed to give competences to economic competent court. Contracted parties have also the possibility to exclude the implementation of Uzanses only if they agreed to fix some issues differently of the Uzanses. The contracted parties are considered to have been agreed on judicial effect of Uzanses only if such agreement is under economic court competencies. The contracted parties have the possibility to exclude the implementation of economic Uzanses only if it is arranged through any of dispositions of the contract. General Uzanses are worth for both bargaining and circulation of different goods. According to regulation, particular Uzanses, before being implemented, should be evaluated whether they are compatible with general norms of Uzanses by competent economic court or not. Particular Uzanses could, in a way, arrange standards, parities and qualities of goods and services. In this case, we are not speaking about multiplicative norms that are implemented in identical particular cases, but about those obliged norms that fix a particular issue. Uzanses could be: merchandise Uzanses, i.e., those that fix the circulation of goods; non-merchandise goods, i.e. those that fix the businesses on securities, and Uzanses of services, i.e. those that fix the sphere of services (Savremena Administracija, 1964, pg. 1013) Independently if the Uzanses are general or particular ones, the dispositions of the Law on Obligations should be taken into consideration.

4 Particular Uzanses

The classic judicial theory qualifies Uzanses as a fixed business practice that stabilizes, modifies and develop any unstable specific agreement by respecting the procedure and competencies of state or business organs. Taken into account the role and importance the Uzanses have in arranging different agreements between businesses, we could obviously stress that their position has a particular importance in, since the perspective of this economic activity is merely based in contractual agreements.

Particular Uzanses back firmly the principle of the autonomy of good will of parties to reaching contractual agreements. The legislatives suppose that parties would arrange their mutual agreements based on their mutual interest. This principle of will of parties played an important role in creation of judicial uniform regulations of international touristic business. Taking advantage of these possibilities, both local and international business operators have deepened their relations by reaching mutual agreements – contracts. In this case the parties involved all necessary elements in the contract by which they fixed different issues tied with eventual contests, national applied law, etc. Constant repetition of clauses that have the same content has converted both local and international regulations into Uzanses that, in practice, are, more and more, derogating the old national judicial system.

Without doubt, huge powerful and professional organizations, associations, business chambers or touristic operators, played an important role in the process of unifying both merchant international right and touristic services' sphere that were able to apply proper regulations of international business law based on Uzanses. Through their standardized contracts they preliminarily arrange even the trivial elements in accordance with the clause on "fixing easily and properly the activities".

The parties that want to reach a contract with the members of these operators have no other possibilities but to totally accept or refuse the conditions of the contracts based on Uzanses.

Through particular (special) Uzanses and contract forms, international business principles in tourism that exclude the implementation of national rights and bring in practice new techniques to reaching contracts, have been created. Such principles are created in order that parties could easily and by not

wasting too much time, reach contracts. The right that was created as a product of these relations - agreements is qualified by the judicial theory as *the right of the form* (Krasniqi, 2004 pg.32).
Thanks to Uzanses and to their proper implementation in contracts, a new judicial regulation which excludes the use of national judicial system has been created. In this way, the possibility of courts to intervene in particular contested cases is excluded. National and international touristic operators foresee, in advance, competences of particular mechanisms – arbitrations or selected economic courts, respectively. Generally, both national and international touristic operators avoid to apply in their contracts the national rights and courts, since, in this way, they create a particular system of sanctions that could be employed toward those parties that refuse to implement the decisions of arbitration.
Basic attentions that are reasonably paid toward "the right of the form" are merely based in facts that the Uzanses regularly fix in different ways touristic agreements-relations; or because they are in contradiction with the law; that do not offer judicial insurance to touristic operators; that have no basic principles of positive judicial system which could fill possible gaps; that do not properly determine issues of national right; and that, finally, are converted into a instrument of pressure in the hands of huge business partners. Independently of positive and negative elements the "right of the form" has, in practice it is being developed by arranging issues in details, and based on the clauses of the autonomy of the will of parties that reach contracts.
The role of special Uzanses is primary in the contractual right because the Uzanses with competence and professionalism regulate the most part of the business operators' activities for juridical – business issues e.g. the hotel services contract; tourist agency contract when providing hotel services; contract for the supply of food and drinks; good faith agreements to resolve disputes etc. The implementation of the Uzanses in business field have influenced in the creation of professional right that is not established by the government but the different business organizations or potential touristic operators. From the international business practices in the theory of the right is nominated as autonomous tourism right. The unification through national and international contracts chronologically has influenced in the spontaneous process of unification.

5 The Beginning Of Uzanses As A Source Of Law In Kosovo Autonomous Trade

Uzanses are regulations and for these reasons are implemented only when the parties agree for the specific relation and the contract is regulated according to this. These rules are considered *lex contractus*, respectively as a set of rules that the interested parties will apply in a particular case if the contract is not specified differently. In the hierarchy of rules that are implemented for contracts, the specific Uzanses are listed after the contracts, then are the good habits and in the end the general Uzanses. In the case when for a contractual issue exist two or more Uzanses then the parties must agree which one they want to implement.

The history of the Uzanses, as an important juridical resource for contractual relations in Kosova, as well as the legislation, dates back to the early 50th of the XX century, when the country was part of the former Yugoslavian Federation. Since then, the publisher of the general Uzanses, with legal competences has been the Supreme Court, respectively its professional college; meanwhile the Federative Chamber of Commerce was responsible for the specific Uzanses. In the former Yugoslavia the special and general Uzanses were valid for the entire state territory. So, the Uzanses' compilers were the non governmental bodies or state agencies closely related with the businesses and independently by who were issued the Uzanses have been treated as a part of autonomous commercial right. These institutions codified the best practices in the field of business function (*Savremena Administracija, 1964, pg. 1012*). Based on an autonomous right of traders established in the former Yugoslavia, the Uzanses were considered valid only if there was the will of the parties and the approval for their implementation in a contractual relationship has been possible in one of the following ways:

a) Voluntary membership of the operator within an organization where the contractual relations are regulated based to the Uzanses. This means the fact that the membership declares the willingness that the parties wish to apply uzances. So, the operators, members of the organization agree to apply the Uzanses.

b) Persons, respectively the operators that are not members of the organization are not obligated to implement Uzanses but this will be possible only if have expressly agreed or clearly stated to adapt these practices (operations within the organization that brings the commercial use)

The public bodies have limited control over the Uzanses if with a decision have transfer the authorisation to any body for their formulation and publication. The aim of the control is to protect the public (Velimir, 2003). The special and general Uzanses have been into force from the moment they are published in the Official State Gazette.

In the beginning of 50th of the past century until 22 March 1989 in the time when the Republic of Serbia violently suspend the autonomy of Kosova living the country out of the juridical system, have been effective the Uzanses for the movement of goods, the special Uzanses for the retail goods, special Uzanses for potatoes, legumes, rice, vegetables, flour product commerce, special Uzanses for hospitality, construction materials, blocks, marble and granite (Velimir, 2003). It should be noted that some of these Uzanses are complemented by several times before and after March 1989.

With the establishment of Kosovo under UNMIK administration - based to the Regulation nr. 2000/59 Article 1, paragraph 1.1 determines that applicable law in Kosovo that includes: paragraph (a) Regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder and paragraph (b) applicable Law in Kosovo on 22 March 1989 . In the article 1. Paragraph 1.2. also this situation is regulated, citing… *" If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law*."... end citation.

Since the UNMIK administration – June 1999 and after the declaration of the Independence 2007 and until now the legislative and executive institutions of the Republic of Kosova have not taken initiatives to authorise any governemental and non governmental institution to review the special and general Uzanses issues in our country.

We are aware that the country economy is operating on the basis of free principles trade and the operation of the foreign subjects is big. Until now we have a completed juridical system although the delays are noted in its implementation. However, we are aware that the majority of these relations are contractual and therefore realized according to businesses standards and Uzanses.Since these Uzanses are very important for the contractual right how should act the business entities? When concluding the contract to which Uzanses should be referred? Is it possible to recall uzances issued by the former Yugoslavia and if so to which year? Why with the Law for Chamber of Commerce of the country is not regulated the way and the competences to issue general uzances? Should the Supreme Court mandate - authorize a team of experts to handle, gather, edite and publishe uzances that are with juridical security interest? Should Kosovo Government, respectively the Ministry of Trade and Industry together with the Ministry of Justice support a law that would regulate this issue in defining the institutional responsibilities?

6 Conclusions

Kosova is passing a completion process of the primary and secondary legislation and building institution that will guarantee for social and economical development as the other countries of Europe. In this function with the help of USAID has been created the Permanent Tribunal of Arbitration with the competences to resolve the possible disputes in the field of trade and economy in general. Despite these advantages, there are gaps and ambiguities regarding the existence or juridical formal resources that will guarantee to the operators the qualitative implementation of their contractual duties. Until now, no national competent institution has not handle the role and function of general and specific Uzanses, which are an indispensable resource of trade contractual transactions.

The Uzanses rapresent collected and sistemized trade habits, codified and published by the competent bodies or professional associations (Chamber of Commerce and other international specialized institutions that deal with international exchange). The Uzanses represent the rights of the contractual

parties (*lex contractus*) and have made of those an integral part of their contracts. If the contracting parties do not want to apply these Uzanses during the contract execution the same can be removed from the contract. The competent body that brings, sistemize, modify the existing trade habits, the general conditions of commerce and the commercial practices by adapting to the economy needs and the movement of goods creating in this way clear and effective rules which enable the all the trade partecipants (internal and external) to resolve different unclear cases that can be presented during the contractual period, especially if it is about business transactions in foreign trade and international exchange of goods and services. The Uzanses can be general and specific. The general Uzanses include trade habits which regulate all forms of goods and services exchange. The specific Uzanses include commercial habits which regulate specific business relations and others during the contracting of different forms of goods and services exchange.

Is necessary that the Government of the Republic of Kosova, through relevant ministries sponsor the Law that which will initially determine which institutions will be responsible for the identification, collection, codification and publication general and specific Uzanses. Another issue is the granting of essentials responses if the general and specific Uzanses published in former socialist Yugoslavia until 22 March 1989 are effective or not? Also, referring to Regulation no. 2000/59, paragraph 2, of the applicable law in Kosovo, promulgated by UNMIK, how will handle the implementation of Uzanses issued after this date.

From this work it comes out that the situation in this sphere is not only regulated but it can be concluded that the existence of a permanent Arbitration Tribunal without formal legal Uzanses resources will be insufficient. This is because the majority of commercial contractual transactions explicitly or implicitly regulated by Uzanses. Therefore, national claim to adapt to global trade trends and European integration appears to be not serious and that ultimately reflects the lack of legal uncertainty for operators and potential investors in our economy.

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