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Contract law as an alternative possibility for investments in transition economies

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Abstract

Each country which has gone through or is in the process of transition and social-economic transformation, in normal circumstances has its rational objectives to create the conditions for active participation in initial or advanced operations of the international business. Depending on the level of development and international business environment they adopt and execute specific investing strategies.

Every responsible government has its duty to evaluate the importance and cost of investments and to create legal possibilities for a safe environment. In practice, entrance and operation of particular enterprises in countries emerging late from economic transition but also in those which will emerge, in the conditions of scale economy, is evaluated to be difficult, if not to say impossible. In this case there is not much left to be chosen except that governments should seriously engage to approximate the legislation with well known international standards by applying international contract principles.

It is believed that in the phase of initial operation development, economic progress in the country can be easier, safer, and with low economic cost basing on well known alternative strategies of the entrance type through certain contracts internationally recognised. Alternative possibilities of entrance in trade, guaranteed by contract law of every country and which could be on the licence form, franchises, etc. should be evaluated by all means and possibly executed in order to be a part of international business environment.

Key words:

Contract, contract law, alternative investments, trade economy, franchise, license, business, environment, transition economies.

1. Introduction

Intensive development of engineering and economy has been necessarily followed and determined by the development and legal instruments and techniques the roles of which are to enable uninterrupted and safe execution of business activities. Due to rapid growth and complicated economic activities classic law institutes could not respond to these new economic relations.

Business practice, within the existing legal order, has created new legal instruments which will respond to the newly created situation in channelling values. As a consequence, it has come to the creation of a new contract series, which starting from some general principles and obligatory law premises, and by improving the situation until now inexistent, but in fact created in practise, in a wide range begin to be distinguished from the so called classical contracts of civil rights. These contracts, very often similar with the classic ones, with content and purpose are so different that now you cannot tell for their belonging in one of the existing groups but for contracts of a new independent kind sui – generis.

The flow of economic life from which we have come to the constitution of the new contract type, even of institutes and new legal fields, first of all are: investing construction, financing, credit, operation, joint investments (domestic and outside), transport, insurances, tourism, researches, etc. In this way contracts on engineering, factoring, franchising, leasing etc have been created and applied. These contracts are modern legal creations of business practice which has emerged from the necessity for the economical development to be created-to be legally performed. “Economical” and ‘legal’ elements are deeply combined defining the essence of each contracting work. Since there is a high number of contracting works in practice, through them analogically there is the possibility to create some new alternative strategies which could insure foreign investments in all respects of social-economic life.

2. Briefing on the progress of investment process and economical development in Central and Eastern Europe

Until the 80’s – of XX century most of the Central and Eastern Europe countries were isolated from the international capital flows due to nature and planned economy. After this phase with the beginning of the transition process they manage to become members of important financial institutions and thus help and their financial support becomes one of the main resources of financing for these economies. With the mentioned progress in the reform process, private financial flows rashly become an important part of capital income. Within this flow in most cases private capital has penetrated through direct foreign investments and portfolio investments.

The purpose of every government was to ensure the involvement of foreign partners relating employment, additional investments and further more development of the sold company. Thus by excluding prices which certainly make up one of the important criteria of foreign investor bids, selection of investors was supposed to be oriented in the respect of continuous engagement as a very important concept for the interests of the national economy in the expecting country. The task to select a reputable foreign partner was done only after a detailed analysis of the proposed business plan. It has been proved as important and government responsibility that the selecting process, as sensitive as complicated, to be based not only on the success or model of

the privatisation process, but also on a range of other determinant political, economical and legal factors.

Given the experiences in countries successful in privatisation process, based on the basis of sale price, they are considered as accurate indicators of foreign investor targeting. The motive of all these countries was the aspiration that through these investments to achieve more rapid and effective results. In most countries the investment process should also be observed by the willingness of investors showing interest that despite the high risk rate and impact of unpredictable and predictable factors, to successfully operate and to gain high profit at the same time.

Within this process in this space, at least until now, we can conclude that market economies cannot develop without implementing the privatisation process in transition economies. Moreover, this process is successful only if it is composed with nature and way of investments. Central and Eastern European countries have become more aware for the responsibilities to create an environment for specific and potential foreign investors due to negative effects in particular cases has had the foreign direct and portfolio investment process. Therefore the vital sectors, being those considered as healthy and competitive in the family, legal and institutional frameworks to encourage investment, "without discrimination", a liberal foreign exchange system, flexible labor market, regulation of advanced public sector and insurance physical and human infrastructure are determinant in order to create a comfortable place within this environment.¹

However, we are witnesses of the fact that the economic integration process, started in the beginning of the 50' of XX century has distinguished the countries with a positive development dynamic which cannot be remembered in the history of humanity. The 80' of this century are characterised with increase of competition and scale economy² which according to our opinion has narrowed and seriously hampered the interest of particular business subjects for real investments, capital investments, financial investments which appear in direct or portfolio form.³ In some countries, as with Kosovo and some other countries, the transition process is prolonged and configuration of regional market from foreign investors is stabilised and we consider the alternative foreign investment strategy through regulating the wide legislative frame by providing the appropriate place to the contract law, especially by compiling alternative investment strategies through licenses, franchises and other internationally recognised contracts.⁴

3. Regulating businesses and international trade with international business contracts

Almost all authors in the scientific and practical field dealing with the phenomenon occurring in the international market and environment agree that international business is a set of transactions which develops outside national borders with the aim that the interested enterprises will achieve their goal for growth and profit. Transactions of this kind are developed in different ways and they usually are connected to each other. Initial international business forms were the exports and imports of goods which over time have changed in the respect of quality and were reflected

¹ Omari, L., (2002). State of Law. Tirana.

² Kristo, I., (2004). International Business. Second edition, Tirana.

³ Brumbulli, S., (1998). Investments. Tirana.

⁴ Kristo, I., (2004). International Business. Second edition, Tirana.

as investments directly in companies abroad, business cooperation through licensing, franchising, timesharing, KNOW HOW, managing contracts, etc. Private enterprises develop these transactions to increase profit, whereas the public ones develop business due to certain motives and circumstances.

The fact that these transactions and operations are developed abroad, they essentially differ from those developed within the country. International business environment is complex and heterogenic which for the managers means handling and facing with many new macroeconomic factors, conflict situations arising from customs, cultural and social elements, etc. entirely different from those domestic. Basic business principles are still traditional objectives, but implementation, complexity and intensity are variable.

Three main objectives which motivate an enterprise to be part of international business operations are: extend of their own sale, finding sources and decrease of risk. Traditionally, extend of sale is considered as main motive to penetrate in international business transactions. Finding resources from production, capital, technology and information point of view and analysing them from the competition plan, make up engagements which seriously increase profit.⁵

International business has impacted in strengthening global connections through though the world, which connect enterprises, countries, institutions and individuals. Forming such relations impacts in market connections, financial trade, technology and improving the living standard.

International business has also strongly impacted in reorienting production strategies. Several decades ago e.g. there was not the idea that parts of cars could be produced in a country and mounted in another country and also sold in other continents. Today such global strategies are frequent regulated and combined through contracts for production and joint distribution. Enterprises are connected with each other through global cooperation contracts in the field of researches and developments.

In the juridical respect, the tasks of foreign markets are those connected with trade of goods and services between physical and legal subjects which have settlement or offices of the enterprise in different countries. Tasks of foreign markets usually can be listed in three big groups: regular market exchange through export and import, specific-special works such as: re-export, compensation tasks, elaboration and sublimation task, transit, arbitrage, engineering, mediating etc. customs agencies work, goods and passenger transportation, tasks in international travelling – agencies, international tourism, representation of foreign enterprises, etc.

Turnover in foreign trade in specific sense includes exchange of goods between different countries whereas in a wide sense it includes exchange of technology, capital and money services. With the growth of international market development, classical market of goods transactions, services production factors is being transformed and more implemented through business-technical cooperation as a modern and complex form of business. Thus, based on this dimension it could be said that modern structure of foreign trade includes:

- Circulation of goods;

⁵ there

- Circulation of service;
- Technology transfer;
- Capital and money turnover;
- Labour and migration, and
- Production with business-technical cooperation;

Contract is usually defined as a voluntary agreement between two or more parties and it is created, changed or ended based on a certain report. In recent conditions contracts are formed on the basis of contracting discretion principle and consensus meaning execution of these dispositions without a limitation. Contracting discretion or willingness autonomy means the right for the parties to bound or not contracts, the right to chose the partner who they want to bound the contract with, the right to adjust all issues with the partner relating contracting relations, and the right to determine the source of right with the partner on the basis of which the contract will be bounded. The consensus principle means that the contract creates juridical effects only when there is willingness from the contracting parties bounding the contract.

Based on the nature of obligations, actions, forms, objects, content, bounding techniques, their execution, etc. there is a certain number of contracts. In all these theoretical respects which is not the case here, the analysing subject is international contracts regulating relations related to international market of certain subjects.

International contract relations, respectively contract relations with foreign elements are those relations that contain an element on the basis of which it is considered that at least two countries are interested on it, based on sovereignty, respectively an element on the basis of which rises the conflict of national juridical systems. The foreign element could be found either on the credit relation subject (if the contract subject is abroad), or on rights and obligations (e.g. if bounding act and execution act of contract is in different territories). The existing of external element, respectively foreign element, in contracting relation leads to the result that in these reports the regulations of national right obligations will be implemented through international private rights or at least some specific uniform international legal rights will be implemented on them. While regulating international contract relations, respectively relations with foreign element it could lead to types of legal regulations such as: regulations of international private rights; regulations of internal rights (civil, trade, obligatory), and uniform regulations of international business law.

Since there are many transactions and international operations and often appear in similar forms, special juridical practices have been established for their legal adjustment. For the existing and regulation of international business relations most frequently standardised contracts are used and type ones like for transaction business of goods and up to those which regulate the character of services in economy.

Except type and standardised contracts by which transport of goods and investment preparation or adjustment of service activities of international format are regulated, there are also type or standardised documents through which business transactions are followed. Type or standardised contracts are not only practical and rational but they speed facilitate advanced growth of the international market.

International business contracts, depending on their economical activity, can be separated in:

- International contracts in the subject of goods turnover (sale contracts, exchange contracts, etc);
- International contracts in the subject of service turnover (intercession contracts, representative contracts, commission contracts, customs agents, contracts, transport contracts, etc);
- International contracts regulating relations for intellectual property and technology transfer (contracts on patent, contracts on licence, contracts on technology transfer, etc);
- International contracts of status sort (contracts for establishment of business subjects);
- Other international business contracts (contracts on credit, contracts on leasing, contracts on franchising, contracts on forfeiting, etc);

Based on data of most of countries turns out that classical business works of transactions are dominant transactions in the exchange scope in foreign trade. If we check specific data for the balance sheet of Kosovo trade in years, a wide known fact, it clearly turns out that the country has more than 90% of international economical transactions are those of goods purchase.

4. Functioning of contract law-possibilities for investing alternative strategies

Specific social-economic relations which have impacted in creating and codifying international business law have gone through a long way. In this viewpoint specific procedures to make codification and unification formal have been quite tangled and slow so that economical processes could not wait. Spontaneously, through the practice in international business scope, habits, general business rules, type and form contracts, there was a professional law gradually created which was not created by the state, but by different business organisations. From the international business practises in the theory of rights it was designated as an international autonomous business law. Unification through international contracts has chronologically impacted in the process of spontaneous unification. It can be ascertained that codification of the law and material regulations in the scope of international business law except main purposes of regulating specific reports in this scope, they have also created the possibility for the transition countries to use contracts in order to improve their economical growth without direct state interference.

5. Functionality on the basis of international business practice

Autonomy principle to show willingness by the parties is affirmed from all the legal systems in the subject of obligatory relations. So all the legislators start from the assumption that parties themselves will regulate their relations in the best and proper way, based on the joint interest and specific circumstances for each juridical work. The principle of party willingness has played the main role in creating legal uniform regulations of international business. Using these possibilities, international businessmen have positively deepened their relations almost to the end regulating them with a contract. These relations have been further strengthened by predicting and including in details all elements in the contract with which they regulate different issues dealing also with eventual contests, national applied law, etc. Continuous repetition of clauses with the same content in these contracts attain to be transformed in regulations of international business, which in practice direct the old national legal system and relativism of state impact in economical relations.

In the process of unifying the international market law through practises which now create great chances of growth and investments, an important role was played by big strong professional organisations and associations which were in the position to influence typing of regulations in a particular field of international business law. With their type and form contracts practically even the tiniest elements were regulated in conformity with the clause for “execution of activities with facility and safety’. Parties which want to bind a contract with members of these organisations do not have any other possibility except to accept entirely or entirely refuse the contract conditions, and exactly from this contracts are designated according to acceptance or adhesion contract. Unified form of contract typing are also general conditions or business conditions which are provided by the above mentioned professional organisations regarding the regulation of contracting relations in a particular scientific field.

With the general conditions and form contracts also international business principles have been created which exclude execution of national legislation and bring in to practise new techniques for contract binding. In this function the process and alternative strategy procedures for investments become easier and with extremely low cost. They are established in the way that parties without hard work and in a little time bind contracts by which they regulate their relations in detail. The law created as a product of these relations, in the juridical theory, is called *law form*.⁶ Thanks to these contracts in different scientific fields of international business there was created a new legal regulation which excludes use of national legal system. In this way it is achieved to absolutely exclude the possibility of court intervention in specific contesting cases. International business subjects predict in advance the competence of particular mechanisms, respectively arbitrages or selected courts, which in a wide range increase the safety of investments.

In the general aspect, in their contracts international business subjects easily manage to avoid application of the national legislation and courts, thus achieving to create a special system of sanctions which would be sentenced against those parties refusing to execute arbitration decisions. Except the positive and negative elements law form has in practice, it is being developed, even maybe in an anarchic manner, by regulating issues in detail, on the basis of clauses and the willingness autonomy of parties which bind contracts, at the same time being a form-alternative of attraction for foreign investment in the country.

6. Approximation task of domestic legislation with international conventions

Former unified actions are characterised with their vulnerable execution. This means that they were executed only on contracts where parties were invited or they were not excluded. Obligation of implementing unified regulations can provide only actions approved by competent state bodies through international conventions. The concept for official unification starts from law, judiciary and scientific doctrine, and the first results were found in the end of XIX century and in the beginning of XX century. The most important achievements in this field are related to industrial wealth, traffic, e bill of exchange and cheque laws International (state) organisations have also contributed to the tendencies to remain and to continue further in this field.

Studying and knowing well the positive multiple effect of business law unification in regional and global plan, The United Nations Organisation has pointed out the importance of this task.

⁶ Krasniqi, A., (2004). Law on Tourism and Catering Services. Business School Peje, Peja. pg.32

Within this special importance have the operations of UNO regarding the unification of law. An important step was the establishment of the special commission of this organisation for the international business law (UNCITRAL) in 1966. Approximately for about three decades the operations of UNCITRAL⁷ has given important results by bringing out these Conventions and regulations:

- UNO Convention on unpredictability before international sale;
- UNO Convention on contracts for international sale;
- UNO Convention on international bills of exchange
- Regulation on UNCITRAL arbitration;
- Convention on goods transportation; and
- The uniform rules on clauses for the contracted amount because of non-compliance

The second method, due to its uniform nature of the contract law, it is characterized with the regulation effects of some certain relations. With the approval of the similar laws enable regulation of certain relationships if they constitute an international character, whereas the national legislation, if it still remains into force, it only regulates the internal related relations. This means that the approval of the convention in the field will constitute two types of provisions:

- similar law regulation approved in the convention, which is applied in contractual relationship with the parties where one of them belongs to a foreign country with whom the convention was signed;
- national legislation laws which continue to be implemented within the contractual relations that contain foreign elements.

The uniform laws as sources of the law, although they are rare, are as an outcome of a long, difficult and complicated work which today produces positive effects on economic growth and to the forms and alternative strategies aiming to attract the foreign investments.

7. Conclusion

The transition process in Central and Eastern Europe countries was followed by interesting developments and the dominant role of the state for a recovery and an economic transformation through establishment of the conditions for foreign direct and portfolio investments. Since the timing, phases and the entire transformation process in these countries has not been the same, due to certain political influences, functioning of the state and the rule of law, resulted that the success was not obviously similar. Balkan countries due to the dominance of complicated political situation face difficulties in achieving the transformation of the economical system as well as in increasing the competitive advantage of their national enterprises.

Countries with sustainable economy have benefited within the scope of market reconfiguration by setting the basic terms based upon the economy of scale. Therefore these components assure economic growth only through cooperation in regional and global view. Usually countries regulate their economy and their activities on their national legal norms which often have become obstacles for an economic growth. Given this situation various economical organizations, companies, economic operators etc, the economic growth on legal terms, have

⁷ <http://www.uncitral.org>

supported the use of principles and business habits by ennobling these relationships with the principles of the contract law.

Challenging of the national legislation and the decrease of governments impact on regulation of the economy, to a large extent has contributed to an overall development of the international contractual relations under the principles that provide methods for overcoming difficulties that occur between national legal systems by providing recommendations that these reports need to be regulated by the business law. The dominant role for regulating these relationships is played by the “autonomous will” of the contractual relationship.

In general, in line with the international processes related to globalization and integration of the countries based on unification of the legal system, the business law and international business law are seriously attempting through legal instruments to unify the legal grounds through international forums, normalizing existing business practices and the unification throughout international conventions. All these activities are a guarantee for further development and a quality regulation of the international legal view. Above all the enhancement of these international relationships has led to the birth of a new series of contracts which not only enable a higher legal assurance but at the same time they provide an opportunity to the countries to revise their opportunities for drafting and implementing alternative strategies for attracting foreign investments in the country. These contracts have now proved that the autonomous contract law of the parties entering in this it provides the possibility to limit the role of the government and to increase legal security business, attracting foreign investments with a low economic cost, gain profit through business cooperation aiming to promote the image and competitive strength of domestic enterprises in international market.

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