

# EXAMINING THE PROVISIONAL ORDER IN ARBITRATION IN DOMESTIC LAW, EXPLAINING THE NEEDS, GAPS, AND HARMS OF THE CURRENT SITUATION

<sup>1</sup>ALIREZA ABIN, <sup>2</sup>ZEINAB HAGHTALAB, <sup>3</sup>HADI GHORBANI

<sup>1</sup>Assistant Professor, Department of theology and religious studies, University of Sistan and Baluchestan, Zahedan, Iran; [Alireza\\_abin@theo.usb.ac.ir](mailto:Alireza_abin@theo.usb.ac.ir)

<sup>2</sup>Masters in private law, Neyshabur Branch, Islamic Azad University, Neyshabur, Iran; [zynabhaghtalb@gmail.com](mailto:zynabhaghtalb@gmail.com)

<sup>3</sup>Department of law, Birjand Branch, Islamic Azad University, Birjand, Iran; [dr.hadi1363@yahoo.com](mailto:dr.hadi1363@yahoo.com)

**Abstract:** *Iran's legal system is encountering numerous ambiguities and gaps due to evident and unavoidable weaknesses in the field of legislation and the existence of a dual structure of laws, which has caused inadequacies and challenges for the arbitration institution. As a result, the public desire to refer claims to arbitration has decreased. One of the most critical legal weaknesses in arbitration can be the failure to determine the independence and impartiality of the exclusive arbitrator, conflict in jurisdiction and arbitration, and the creation of an arbitration institution in the case of divorce in a faraway from the existing conditions. The current conditions of the philosophy of arbitration, the gaps about the law regarding the expert opinion issued by the arbitrator, and the legal ambiguity regarding the issuance of a provisional order and the fulfillment of the request, at the same time, many laws seem obsolete and old when it comes to arbitration. In addition to the legal system's weaknesses regarding the arbitration institution, the educational system does not work properly to improve the level of knowledge of the people and law students, especially lawyers and judges, and the judicial system deals with the content of any protest with many interventions. In this way, it has taken the strength of the arbitration institution and its votes. On the other hand, it has caused the accumulation of arbitration votes in the judicial system, while this possibility exists in most of the world's legal systems. A kind of judicial supervision of the arbitration award is foreseen in the form of the possibility of protesting the arbitration award. This is only limited attention to a part of the decision issued by the arbitrator. Also, on the other hand, courts, in many cases prevent the implementation of arbitration decisions for many reasons, and all these issues have caused the lack of development of arbitration.*

**Keywords:** *Provisional Order, Arbitration, Legal Challenges, Arbitrator's Arbitration Rights, Judicial Procedure, Gaps and Harms.*

## 1. INTRODUCTION

One of the significant issues that has always been raised as a gap in civil procedure law is the probability of issuing a provisional order from the arbitral tribunal. In the current situation, it is simply not possible to issue a provisional order from both the court and the arbitral tribunal, and the arbitration authorities and courts, if not, at least overwhelmingly, refuse to respond to the request for issuing a provisional order, due to a legal gap.<sup>1</sup> The failure of the court to issue a provisional order is due to their common interpretation of Article 311 of the Civil Code, which considers the processing of the request for a provisional order within the jurisdiction of the court where the main case is raised<sup>2</sup>. Failure to issue an order by arbitral tribunals is due to considering it as sovereign and believing that there is no such authority by private authorities to resolve the

<sup>1</sup> Nahrini, *Temporary Order in Iranian Law and Research in Comparative Law*, Ganj Danesh Publications, first edition, 1989, p. 65.

<sup>2</sup> Arbitration Rules of Tehran Regional Arbitration Center, *Legal Magazine, Journal of International Legal Affairs Center of Legal Deputy and Presidential Assembly Affairs*, No. 36, Spring and Summer 2016, Pages 329-356.



dispute in the assumption of the lack of clarification by the legislator. This belief is further strengthened in arbitral tribunals in cases where the issue has been kept silent by the parties. However, the issuance of a provisional order is one of the requirements and requirements for dealing with lawsuits and disputes, and the law must propose a solution to meet this need. Arbitration is one of the peaceful ways of resolving disputes. The reason for favoring arbitration is the presence of advantages such as speed in proceedings, low cost, and the ability to exercise the will of the parties in its elements. With this definition, maintaining the status quo requires that precautionary measures be taken before the final arbitration verdict is issued. One of these measures is the request to issue a provisional and transitory measure under the title of provisional order; Provision of a provisional order is an exceptional matter and is issued in terms of assignment in urgent matters and after determining the urgency of the matter. In domestic arbitration included in the Civil Procedure Law, there is no provision regarding the issuance of a provisional order by the arbitrator.

## 2. RESEARCH BACKGROUND

### 2.1. Internal Background of the Research

Elham Katulinejad (2016), in this research, the researcher tried to express the necessity of the existence of this institution and its harms. Also, by examining the laws of eleven different countries worldwide, he will express the ways out of existing harms inspired by foreign laws.

Athena Amozad Mehdirdji (2016) Examining the possibility of issuing an order to satisfy demands and provisional orders in Iran's arbitration system and international arbitration: The purpose of compiling this research was to examine the possibility of issuing a provisional order and an order to satisfy the demand in the Iranian arbitration system and international arbitration. An issue that has always been raised as a gap in Iran's civil procedure law is the possibility of issuing a provisional order or an order to satisfy the demand by the arbitral tribunal. In the current situation, it is simply not possible to issue security orders from both the court and the arbitral tribunal, and arbitration authorities refuse to respond to requests for these orders.

Abrishmi and Mehboob (2015), in their article "The legal structure of the arbitration system", in this article they have highlighted the weaknesses of the legislative and judicial system in this article by describing the conflicts and weaknesses of the legislative and judicial system. In such a way, they believe in the dual system of arbitration in Iran's legal system. In other words, the non-compliance of the international commercial arbitration law with the arbitration rules contained in the civil procedure has been criticized as a factor for the lack of development of the arbitration system. Also, the legislator's changes in the UNCITRAL model regulations have been considered as factors for the lack of development of arbitration. are

Khazaei (2007) in the article "Arbitrator's Opinion in Domestic and international law", Dr. Khazaei has examined the arbitrator's opinion from the substantive and formal angles. Therefore, by comparing and considering the laws of other countries, we can reach the weaknesses in this chapter in Iran's laws. In other words, they consider the arbitrator's decision to be binding everywhere, but in Iran, for any reason, including the judicial interference of the courts in the nature of the decision, the implementation of the arbitrator's decision is prevented, which shows the lack of development of arbitration in Iran.

Taghipour (2012) in his article "Arbitrator's Responsibility in the Laws of Iran and Some Countries" in this article, through a comparative study between the responsibility of arbitrators in different countries, he found out the weaknesses of the legislative system regarding the responsibility of arbitrators. In the mentioned article, they have considered the responsibility of the arbitrator as the same as a judge, and they complain about why the arbitrator is not in the position he should be; It has no value in Iran and his opinion does not guarantee the implementation of the certainty of the case and dispute.

### 2.2. External Background of the Research

Paul Sayeri (1928), in his article "Advancement of Arbitration Laws" in this article, he examines the history of arbitration laws and studied its legal developments and the achievement of the desired



goals of arbitration. At the same time, they have stated the advantages and disadvantages of arbitration. They have introduced the lack of judicial intervention of the courts as a factor for the development of arbitration. Also, giving executive powers to arbitration, such as the authority to issue provisional orders and satisfy demands, have been considered as other factors in the development of arbitration.

Frank (2005), in his article "Legal Criticisms of Arbitration Agreements" in this article, he examined all standard arbitration agreements and made some objections to them. Since Iran's International Commercial Arbitration Law originates from UNCITRAL Law; in this way, the defects of this law, which have led to the lack of encouragement for arbitration in Iranian law, become clear. They have considered the necessity of formal conditions in UNCITRAL regulations to be contrary to the arbitration philosophy.

### 3. THEORETICAL FOUNDATIONS

When we study the history of arbitration, we realize that arbitration dates back to before judgment through the court. This is despite the fact that according to the definition of Rene David, it is a technical arbitration whereby the parties submit a dispute to a person called an arbitrator by virtue of an arbitration agreement so that he has a firm and binding opinion on the nature of the dispute<sup>3</sup>. However, even though arbitration is a professional technique to reduce judicial disputes, specialization, faster processing, impartiality of arbitration authorities and their justice-centeredness, as well as avoiding the disclosure of secrets related to arbitration parties, have been used in advanced countries. For example, despite the current trend in new arbitration laws, the prescription of limited court proceedings due to violations of fairness and justice has been accepted in advanced countries. Still, in Iran's legal system, the challenges related to legislation and the educational and judicial system have led to the lack of persuasion of individuals to arbitrate.

It is only acceptable to monitor the quality of arbitration opinions that the norms of public order have not been ignored and ignored by the arbitrators. But in Iranian law, there is a lot of interference in arbitration<sup>4</sup>. Also, from the point of view of legislation, there are various gaps regarding the appointment of experts by the arbitrator, as well as the issuance of provisional orders and the fulfillment of demands, although they have been given such powers.<sup>5</sup> Also, from the aspects of Iran's international arbitration, there is no good space for arbitration for businessmen and individuals in such a way that in addition to the legal weaknesses of the legislator, conflicts can be seen in many laws, which also cause the dissatisfaction of the audience. For example, regarding the conflict of Article 311 of the Civil Code, which considers the obligations arising from the contract only subject to the place of the contract. While Article 27 of the International Arbitration Law stipulates that the arbitrator is subject to the law that the parties have chosen as the governing law.<sup>6</sup>

### 4. CONCEPTS

#### Concept of Arbitration

Arbitration in the word means judgment, arbitration, trial, rule, and sentence. It has been said that the arbitrator was originally a litigant, meaning the owner of the litany, which was later removed over time due to the frequency of use and ease in pronunciation and reduction in writing, and became the referee. An arbitrator is a person who judges the matter referred to him and gives an

<sup>3</sup> Fallah, Mohammad Reza (2015), lectures on international arbitration, master's course, Shahid University, Faculty of Humanities p. 3

<sup>4</sup> Mafi, Homayoun, Parsafer, Javad (2013), the intervention of courts in arbitration proceedings in Iranian law, the scientific-research quarterly of perspectives on judicial law, pp. 130-105.

<sup>5</sup> Nahrini, Fereydoun, Haqparast, Reza (2012), Gaps in the Civil Procedure Law regarding expert opinion issued by an arbitrator, Private Law Quarterly, Faculty of Law and Political Science, Volume 10, Number 1, pp. 33-58

<sup>6</sup> Nikbakht, Hamidreza, (20104) International Commercial Arbitration, Arbitration Rules, Tehran, Institute of Business Studies and Research, first edition, p. 126.



opinion about who is right. One of the attributes and names of God is to be a judge because God will judge and rule on the actions of his servants on the Day of Judgment.<sup>7</sup>

#### **Definition of Provisional Order**

Considering that the legislator has mentioned the provisional order under the title of urgent proceedings, it is obvious that in reality, it is a matter that is issued or rejected following the urgent proceedings, depending on the case. From a legal point of view, proceedings have two meanings:

1- In the general sense: which is a field of law whose purpose is to determine the rules about judicial organizations, determine the regulations about the types of lawsuits and implement the decisions of the courts. In jurisprudence, it is called hap.

2- It means a set of operations that are used for the purpose of finding a judicial solution, such as a set of regulations that are used to obtain a decision in a certain lawsuit.<sup>8</sup>

Some professors have also defined the urgent proceedings as a type of summary hearing of pleadings with light proceedings. The result of that decision is not a judgment in substance, but an order that is interpreted as a provisional order. This order is provisional and the court can rule against the provisional order during its subsequent hearing on the nature of the lawsuit.<sup>9</sup>

#### **Concept of Provisional Order**

"speedy trial", the first of which means justice and the Persian word "dadarsi" is composed of two words "dad" and "rasi" fairness and the second one means to reach and deal with. To take is a type of court decision in the form of an order, which dictates the act or omission of the act or confiscation of property

#### **5. The second issue: explaining the necessity of a provisional order in arbitration, the harms and gaps of the current situation and examining the ways out**

Then, in this section, we will first discuss the necessity of the existence of this institution in arbitration, its damages and gaps will be examined, and at the end, the feasibility and the ways out of these damages will be discussed.

##### **5.1. Clarifying the Necessity of a Provisional Order in the Arbitration Institution**

In 5-1, we will explain the necessity of the provisional order.

##### **5.2. Possible Delay of Arbitration Proceedings**

Although the process of arbitration is much faster than the process of court proceedings, it is possible for reasons such as the suspension of the arbitration process, objection to the competence of the arbitrators, the death or replacement of the arbitrator, or even after the issuance of the decision, for reasons such as research on the subject of the decision and cancellation or annulment. If the arbitration proceedings lasted for a long time, in this case, it is necessary to think of a measure to prevent the loss caused by the failure to implement the verdict in the future.

##### **5.3. Reduction in Cases in Courts**

Today, the ever-increasing congestion of cases in the courts has made thinkers to think that in order to replace other methods and resolve disputes, considering the existing conditions, the arbitration institution seems to be the best option. But in order to achieve this, up-to-date and appropriate laws should be provided with the challenges in this field.

##### **5.4. Being Confidential and Non-public**

Due to the public nature of the proceedings in the courts, in this way, respect may be violated, the credibility of the parties may be destroyed, and the future business relations of the parties may be challenged. In order to prevent this, arbitration, which is a suitable alternative to resolving the dispute by the court, should be expanded.

##### **5.5. Saving Time**

<sup>7</sup> Shiravi, Abdul Hossein, *International Commercial Arbitration*, 2nd edition, Tehran: Printing and Publishing Organization affiliated to Awqaf and Charitable Affairs, 2013, p. 8.

<sup>8</sup> Jafari Langroudi, Mohammad Jaafar, *Legal Terminology*, Ganj Danesh Publications, 1983, p. 23.

<sup>9</sup> Jafari Langroudi, Mohammad Jaafar, previous source, p. 273.



Wasting time in all the judicial systems of the world is a distasteful and at the same time widespread thing, and in many cases the parties who are aware of the precise legal frameworks use these legal deadlines as a way of delaying the implementation of justice. In the strategies of designing methods, quickly achieving the solution of a dispute is considered one of the components of economic development. In banking disputes, privatization, property, the use of economic opportunities and the management of the labor community are very influential in the implementation of non-arbitrary methods, there is no time to achieve results. Sometimes just an urgent and informal meeting between the two parties can lead to the resolution of the dispute. A study in the state of Alaska judiciary indicates a 60-80% reduction in the length of the dispute resolution period in the system of non-arbitration methods of judicial dispute resolution. <sup>10</sup>

#### **5.6. Lack of Expenses**

Filing a lawsuit in the courts causes the petitioner to bear a lot of expenses, which sometimes people may not be able to pay. Now, with the issuance of new laws in some cases and the impossibility of filing lawsuits, it has become difficult for poor people to pay the fees. Considering the costs that may be incurred in this way, people may refrain from filing lawsuits in the courts of law, and this is a way for most deceitful and profit-seeking people to escape. Low cost in non-arbitration methods of dispute resolution, in principle, there are no mandatory and binding procedures such as legal deadlines, detailed formalities, expert settlement, etc., and the amount of work is greatly reduced. In a country like the United States, the average cost of litigation is \$12,000, but in most non-arbitration methods, dispute resolution is generally free of charge or is done only with costs included. <sup>11</sup>

A large number of commercial disputes are related to issues that only a technical expert can be the judge of, such as the characteristics of delivered goods, services, and work performed. If these issues are referred to judges, they have no choice but to refer to the reports of average experts. Therefore, it is easier to refer to these experts and ask them not for expertise, but for a decision on the disputed issue. The vast majority of arbitrations in the field of commerce are of this type. In arbitrations, it is said that the arbitrator is selected based on his technical competence. He gives an unobjectionable opinion about the description of the delivered goods and declares whether the goods comply with the characteristics mentioned in the contract or not and, if necessary, revises the section provided in the contract. The desire to choose someone other than a government judge to resolve a dispute is not exclusive to a case where the lawsuit has multiple technical and industrial aspects. Otherwise, you can look for a judge who is familiar with business customs or who is more prepared than lawyers to understand the psychology of businessmen in order to interpret their contracts and obtain rules that can be adapted to their needs. <sup>12</sup> Also, the interpretation of type contracts should be done by a person or persons who are trusted by the parties and also have education and technical knowledge, which cannot be expected from new judges. <sup>13</sup>

#### **5.8. No Need to Follow Formal Rules**

Adhering to strict rules of form has hindered the creation of quick proceedings in courts, while in arbitration claims, compliance with formal rules is not mandatory, <sup>14</sup>and arbitrators can conduct proceedings according to the rules of arbitration determined by themselves and the parties.

**5.9.** People's participation in their disputes, since the arbitrators are selected in the arbitration institution and the parties are able to determine the terms and principles of the arbitration by mutual agreement, they have a high participation in resolving their disputes. This over time introduces people to a kind of maturity

<sup>10</sup> Seif Elahi, Arman, Jam, Farhad (2009). Non-judicial methods of resolving administrative disputes. Khorsandi Publications, p. 60

<sup>11</sup> Seif Elahi, Arman, Jam, Farhad (2009). Non-judicial methods of resolving administrative disputes. Khorsandi Publications, p. 60

<sup>12</sup> Safai, Seyyed Hossein (1986). International law and international arbitration. Publication of Mizan p. 92

<sup>13</sup> Mohammadi Sohri, Mohammad (2011). Arbitration in Iranian law. Behnam Publications, p. 130

<sup>14</sup> Ibid., p. 131



#### **5.10. Raising the level of people's legal information as a result of this partnership<sup>15</sup>**

Since people have a significant contribution in determining the conditions of arbitration proceedings and in this regard, they need to increase their legal information, the development of the arbitration institution contributes to the increase of legal information of people.

#### **5.11. High Level of Individual Persuasion**

The decision taken at the end of the non-judicial arbitration proceedings is basically consensual and based on the consensus of both parties, and for this reason, the commitment to its implementation has increased and they do not see themselves condemned to a conflict. . On the other hand, the development of disputes between the people and the administration, which is mostly petty and its accumulation due to the high costs of litigation, can lead to a decrease in the legitimacy of the government, is greatly reduced and reduces the latent tensions of the society. These methods increase the high level of persuasion in non-arbitrary methods of dispute resolution, the possibility of implementing the vote. Because the result is the result of mental and voluntary creativity, so that the condemnation in this way is not the result of the defeat of one of the parties, but the victory of both parties, and in practice, the process of addressing the needs is more important than the facts and positions.<sup>16</sup>

#### **5.12. Development of Social Understanding**

Non-arbitrary dispute resolution methods are very suitable for resolving deep-rooted and sensitive disputes and different aspects, political, family, ethnic, racial, environmental, etc. In such cases, these methods work much better than the application of inflexible judicial regulations. The judicial method can make the situation worse because one person's victory always leads to the dissatisfaction of the other party. But non-arbitrary methods of dispute resolution are basically based on dialogue and development of communication with the other party. Institutions offering non-arbitrary methods of dispute resolution can easily be specialized. While the judicial organization has a rigid and inflexible organizational system, in this regard, dispute resolution institutions have been established in the United States in matters of environmental construction, copyright, and environmental inventor. In the developing countries, specialized business dispute resolution methods are developing rapidly, and in a country like South Africa, a variety of non-arbitrary dispute resolution methods have been established in labor affairs.<sup>17</sup>

#### **5.13. The Expansion of Ethics**

Appealing to the judicial system, even as a plaintiff, is not very pleasant for many people of the society with high civility, but the use of non-arbitrary methods of dispute resolution will never lead to such a moral impasse. On the one hand, processes such as forgiveness, adaptation, compromise... also help to develop ethics in the society, and the confidential and non-public atmosphere of the methods also prevents negative feedback and controversy created by the news of the public judicial system.<sup>18</sup>

#### **5.14. Voluntary and Consensual**

Non-arbitration methods of dispute resolution are voluntary and the parties agree to its application with mutual consent and they can withdraw from it.<sup>19</sup>

#### **5.15. Few Ceremonies**

Basically, due to the lack of time and cost in non-arbitrary dispute resolution methods, all frameworks are free from the imposition of formal rules such as completing special forms for documenting the proceedings and exchange of bills.<sup>20</sup>

#### **5.16. Increasing the Penetration Level of the Principle of Access to Justice**

<sup>15</sup> Rafiei, Ali (2012). General principles of arbitration in Iranian law. Fakhazan Publications, p. 137

<sup>16</sup> Seif Elahi, Arman, Jam, Farhad (2009). Non-judicial methods of resolving administrative disputes. Khorsandi Publications, p. 61

<sup>17</sup> Ibid(62)

<sup>18</sup> Seif Elahi, Arman, Jam, Farhad (2009). Non-judicial methods of resolving administrative disputes. Khorsandi Publications, p. 61

<sup>19</sup> Ibid., p. 61

<sup>20</sup> Ibid., p. 63



In cases such as poverty and specific social restrictions, some groups such as the disabled, women and children are deprived of access to justice due to the lack of judicial assistance. Non-arbitrary methods of dispute resolution are much more appropriate and influential when the judicial system does not have a very optimistic position towards a social group.

#### **5.17. Second: Providing Equality**

Non-arbitrary methods of dispute resolution are more than having the duty of ensuring the rule of law, they are obliged to ensure the equality of people before the law. In this case, the lawsuit is based on the person's decision with bilateral negotiations and relying on the principles and conditions of agreement, and it does not seek to achieve an effective resolution of the lawsuit against the provision of formal justice.<sup>21</sup>

#### **5.18. The possibility of dismissing the arbitrator due to the lack of necessary expertise in the disputed matter**

Often, in international lawsuits, the most important criterion for the selection of an arbitrator by the disputing parties is having the necessary and sufficient expertise and information on the part of the arbitrator regarding the subject of the dispute. Because it will be possible to issue a proper and competent decision by the arbitral tribunals only if the arbitrators chosen by the parties have expertise and skills regarding the disputed issue. Of course, it seems that the selection of knowledgeable and expert arbitrators in the disputed issue by the parties before the dispute arises, considering the parties' lack of knowledge and anticipation of the nature of the future litigation, is a difficult and exhausting task. Therefore, despite the freedom and authority of the parties in choosing the members of the arbitral tribunal and determining the qualifications and characteristics of the relevant arbitrators before the dispute occurs, since the nature of the future dispute may not be within the competence of the arbitrator chosen by the parties to the dispute. In fact, after the dispute, the parties came to the conclusion that the arbitrator appointed by them does not have the competence and necessary and sufficient information on the subject of dispute, for this reason, the possibility of dismissing the relevant arbitrator will be the best solution. This is one of the advantages of arbitration in order to specialize the handling of disputed matters. As mentioned above, the possibility of dismissing an arbitrator in the absence of the necessary expertise in the principles of arbitration proceedings creates flexibility, which helps in advancing its goals. In the same way, this matter is considered one of the advantages and necessities of the existence of this institution in today's growing society.

#### **5.19. Better Provision of Citizenship Rights**

Administrative proceedings are basically a complaint that reflects an administrative decision, and the plaintiff is actually claiming a violation of his citizenship rights. By creating an alternative procedure system, a better window is created to ensure citizenship rights against the administrative organization, which always considers administrative action as its right.<sup>22</sup>

#### **5.20. The Active Role of the Parties in the Proceedings**

The aim of non-arbitrary methods is to resolve disputes and create a suitable space for interaction and compromise between the parties to ensure mutual benefits. For this reason, the main and most obvious form of it is direct bilateral negotiations or its facilitation by a mediator. In this method of arbitration, it is the last option to resolve the dispute because this method, like judicial proceedings, puts the parties in a position of inaction from the decision taken.<sup>23</sup>

#### **5.21. Lack of Competent Court**

Arbitration is not the only way to settle a lawsuit by people other than government judges or by considering principles other than the guiding principles of government judges. It is also possible to resort to arbitration to resolve a dispute that cannot be referred to the courts due to its nature.<sup>24</sup>

#### **5.22. Limited Jurisdiction of the Courts**

<sup>21</sup> Leila Razavi Tusi, *Divans of the Impaired Arbitration*, p. 41

<sup>22</sup> Rafiei, Ali (2012). *General principles of arbitration in Iranian law*. Fakhazan Publications, 63

<sup>23</sup> Idid p(65)

<sup>24</sup> Safai, Seyyed Hossein (1996). *International law and international arbitration*. Publication of Mizan page 107



Is it possible to request the intervention of a court in such a case? The old opinion maintained in most countries is that the courts can resolve problems regarding the interpretation or enforcement of contracts, but they cannot create contracts for the parties or revise the contracts concluded by the parties. It should also be noted that despite the provisional order and security measures in the arbitration, in many cases, it is possible to preserve the emirates and the evidence of the right and avoid mistakes in the recognition of rights in the future. Therefore, these measures should help arbitration and ultimately facilitate the implementation of the decision, which is one of the benefits of arbitration; For example, where the immediate implementation of such measures by the arbitral tribunal is not possible for any reason, or the implementation of arbitration decisions in this regard, such as the implementation of security orders and provisional orders in another country (Like a country where the addressee has property), is not possible, court action is necessary and will help the arbitration. ; Otherwise, the arbitration institution will be weakened or will lose its efficiency in general. Therefore, if the exercise of the court's authority in these cases makes the arbitration difficult; For example, if the purpose of going to the court to apply such measures is to weaken or deny the credibility of the arbitral tribunal, or to take an action that the arbitral tribunal refuses to implement, the court should not allow its authority to be misused in such a clever way. In this case, the positive aspects of both mentioned views will be observed.<sup>25</sup>

## **6. DAMAGES OF THE CURRENT SITUATION AND WAYS OUT**

In this speech, in two paragraphs, we will examine the harms and gaps of the existing situation and the ways out of it.

### **6.1. Examining the Damages and Gaps in the Existing Situation**

In this section, we will examine the damages caused by the current situation.

#### **6.1.1. Differences in the Jurisdiction of the Court and the Arbitral tribunal in Issuing Provisional Orders**

The principle of the simultaneous jurisdiction of the court and the arbitral tribunal in issuing a provisional order in terms of comparative law, especially in international commercial arbitrations, is that courts and arbitrators have the same jurisdiction to issue protective measures; This means that the parties are free to ask both the court and the arbitral tribunal for their request to issue a provisional order, of course, if the parties have not agreed otherwise. Otherwise, what has been agreed upon will be considered as the arbitration procedure. This principle is widely recognized in the arbitration laws of international conventions and arbitration awards, which shows the growing acceptance of the principle of concurrent jurisdiction. As mentioned, the law of procedure has been completely silent in this regard and this has practically caused the request to issue a provisional order from both the court and the arbitral tribunal to face difficulties. In the current situation, the problem in issuing such measures is that when the parties present their disputes before the arbitral tribunal, the main dispute is actually under the jurisdiction of the arbitral tribunal. In this situation, due to the lack of clarification, the arbitrator does not have the authority to issue such an order. On the other side, when the parties present their request in the court, they are faced with the obstacle that Article 311 of the Civil Code, as a general rule, considers the issuance of a provisional injunction within the jurisdiction of the court where the main claim is raised or has the jurisdiction to deal with the main claim. As they said in the definition of jurisdiction, jurisdiction is a legal right by which judges exercise their discretion. Issuing a provisional order is not exempted from this rule of principle and related to public order, and claims must always be handled by authorities that legally have the inherent and relative authority to handle it. However, explain when each of the parties goes to the court to request a provisional order, as it was said, the courts do not consider themselves competent to hear based on Article 311 of the Civil Code. Because this article deems the inherent jurisdiction of handling the

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<sup>25</sup> Ibid., p. 108





said issue, due to the fact that the main dispute is raised in the arbitral tribunal, in the jurisdiction of the same authority.<sup>26</sup>

On the other hand, the authority of the arbitrator to issue a provisional order is not provided for either in the old law or in the new law of civil procedure. In this matter, definitely, one of the clear gaps in the law of procedure is in the arbitration section.<sup>27</sup> However, professors who believe in the theory of concurrent jurisdiction of the court and the arbitration tribunal do not consider the request of one of the parties to the court to issue a provisional order as waiving the arbitration agreement. Also, national courts are not prohibited from granting such measures despite the arbitration agreement, and the parties cannot object to the jurisdiction of the court hearing the request, but they believe that granting the authority to issue such provisional orders is to support the arbitration and is based on the interest of the parties to the lawsuit. Another type of conflict of jurisdiction occurs when a claim is filed at the same time before an international arbitral tribunal and a state court. Theoretically, such a conflict may occur as a result of the application of two different theories (a) the theory that believes in the sovereignty that "before it is recognized as a legislator, the authority to execute justice is delegated. This authority to administer justice can be so intrinsic and fundamental that if it is left out, the principle of the theory of sovereignty will be affected. (b) The theory that believes that choosing one's own judge is a natural human right and therefore such a right should be protected against any interference and violation by the legislator. These two opinions have given way to another theory that contains a combination of the two. According to the second theory, it is true that the government has the authority to administer justice, however, this means that in all situations, it should administer justice itself through its courts. If the government retains the ability to control how justice is administered by other institutions, including arbitral tribunals, the right to justice will be served. The issue of the relationship between arbitration and court, which has been discussed by various writers and jurists, ends with the conclusion that arbitration and court justice should not be considered as competitors who have no destiny other than enmity with each other. Rather, they should be considered as two institutions whose goal is to cooperate for the sake of justice. A persuasive system for arbitration cannot be imagined without a degree of cooperation with the courts. The courts that have been asked to both assist in arbitration and exercise control over it. Despite this conclusion and despite accepting the fact that the understanding and cooperation of domestic court judges is a vital and necessary element in creating and maintaining an effective international commercial arbitration system. However, sometimes it is possible that the use of different bases for jurisdiction will lead to a conflict between the jurisdiction of an international arbitral tribunal and the jurisdiction of a domestic court.<sup>28</sup>

### 6.1.2. Urgent Diagnosis

To explain the discussion, we will first express the concept of urgency, which the legislator has been silent about. There are two types of urgency in the science of principles: 1. Conventional urgency 2. Rational urgency

1. Urgency: Urgency in the term of science, Urgency is the meaning of the understanding of the custom of haste in complying with the order of the master. Customary urgency is one of the types of photography and it means the perspective and understanding of the custom of the concept of urgency of complying with the speed in carrying out the master's command - and determining the amount of time and the amount of speed of the agent (obliged) in carrying out that order. For example, if the master says to his slave, bring me water, and the slave does the master's request with a delay of a few minutes, it shows that the customs approve of his work and consider him obedient, because according to the custom, a delay of a few minutes is not considered a delay.<sup>29</sup>

<sup>26</sup> Laia Junadi, the loopholes in the civil procedure law in the issuance of a temporary injunction in arbitration", *Journal of Private Law*, pp. 413 and 414

<sup>27</sup> *Ibid.*, p. 415

<sup>28</sup> Mohammad Hasan, *Tolerance of Jurisdiction in International Arbitration Courts*, pp. 107 and 108

<sup>29</sup> Isfahani, p. 75; *Dictionary of principles of jurisprudence*, p. 606



2. Intellectual urgency Intellectual urgency is the opposite of conventional urgency and it means the intellect's understanding of the concept of immediate compliance with the ruler's command. For example, when the master says to his slave: Bring me water, according to the intellect of the slave, he is obliged to do the order immediately and at the earliest possible time. As a result, if the obligee hesitates for a moment in performing the task, his intellect considers him guilty and deserving of condemnation. Contrary to the customary urgency, where compliance is according to the understanding of the custom and the custom ignores a small amount of delay.<sup>30</sup> Usulians who believe in urgency regarding orders, intend to use conventional urgency, not rational, because in Shari'i addresses, conventional understanding is the criterion. Urgency in the provisional order also has a customary concept, but another question is whether the urgency in the provisional order is subject to general custom or special custom?<sup>31</sup> As mentioned above, the urgency in the provisional order should be checked on a case-by-case basis and according to the nature of the order, according to which the urgency in some cases is subject to common law. In some cases, the subject of special custom in judicial appeals for issuing a provisional order is very frequent, and a procedure has been established regarding them. In these cases, judges, unlike arbitrators, have great skills, such as requesting a provisional order prohibiting the transfer of another's property. However, in some cases and examples, the subject is assigned and subject to special custom. For example, regarding a technical issue regarding a device in a manufacturing plant, if it is not stopped immediately, urgency and sensitivity are not required. Something that may have happened many times. Some jurists in this field are of the opinion that in cases where the matter is subject to special custom, it should be done by referring to an expert, but the question that arises here is whether referring to an expert is not against the urgency?

### 6.1.3. Objection to the Provisional Order

The question raised in this section is whether the decision to reject the request for a provisional order is objectionable or not? What emerges from Article 325 of the Civil Code is that the decision to reject the request for a provisional order is absolutely not appealable, neither independently nor in addition to the appeal against the original decision. However, regarding the appeal of this article, it is mentioned that it cannot be appealed independently. However, he can also appeal the original content of the lawsuit. On the other hand, since judges, like other human beings, do not have access to the arguments of the parties to the proceedings and the facts of the case under consideration, there is always the possibility that they may make a mistake in the position of correctness and enmity. Therefore, in order to reach a fair judgment, rules and regulations have been established that court judges are required to follow. One of the rules to protect the rights of individuals against the possible mistakes of judges is the appeal at higher stages to comply with the interests that have been stated that the appeal of the decisions of the Tali courts is accompanied by a transitional effect. That is, the dispute with all thematic and ruling issues was transferred from the first court to the appeals court. In this case, the objection to the arbitrator's decision will be considered in the first court authority, considering its transfer effect. Therefore, in the absence of the authority to issue a provisional order by the arbitrators, and assuming the existence of this authority for the courts when the case has been referred to arbitration, there is a harm as follows: when the case is before the arbitration, the non-existence of the authority to issue a provisional order for the arbitrators to request this, on the assumption of acceptance by the courts, it is necessary to submit their request to the competent court. In this case, regardless of accepting or rejecting this request, the objector can also object to the provisional order along with the arbitrator's decision. Since the authority of the appeal is the decision of the arbitrator of the first court, the appeal against the request for a provisional order is also sent to the first court together with it. The judge commenting on the request for a provisional order will deal with it again at the

<sup>30</sup> Mohammad Hossein, Isfahani, *Al-Fusul al-Gharwih in al-Asul al-Faqih*, p. 75

<sup>31</sup> Dictionary of Principles of Jurisprudence, p. 606



appeal stage, which is a violation of the general principles of proceedings and grounds for violating the rights of individuals in line with justice.<sup>32</sup>

## **6.2. Examining Ways Out**

Since the stability of the human society depends on the implementation of justice among the members of the society, in the world of development, the sense of justice and the tendency to the right has been deposited in the human institution as a divine gift. From the beginning of the most recent periods of history, public opinion and especially the thinkers of every nation have tried to discover and present the most just judicial standards to resolve enmity between people. In this regard, legislative gaps will also be filled with the help of thinkers over time. However, the research, which has been compiled with the aim of eliminating one of these gaps in order to establish more order and justice in today's civilized society, examines ways to go and a proposal regarding the legislator's silence in the issue of provisional injunctions in domestic arbitration and the resulting confusions. It deals with the judicial procedure, because in the absence of such an institution, it will end up with the ineffectiveness and unphilosophical nature of the judicial institution and the direct referral of claims to the court.

### **6.2.1. Agreement of the Parties**

It seems that if the parties have agreed on granting the authority to issue a provisional order to the arbitrator according to Article 10 of the Civil Law, this gap is lifted to some extent and the authority granted as part of the arbitration regulations agreed by the parties can be accepted by the arbitrator. Although some consider the provisional order to be outside the scope of the arbitrator's authority due to its sovereign aspect. However, since the basis and origin of the arbitration was the agreement of the parties, therefore these wills should also be able to grant such powers to the arbitrators.

### **6.2.2. The Principle of Simultaneous Competence**

In Article 8 of the Arbitration Law and the Model Law, it is stated that in the court where the dispute on the subject of the arbitration agreement has been filed, it must refer the dispute of the parties to arbitration if requested by one of the parties until the end of the first hearing, unless he verifies that the arbitration agreement is null and void or unenforceable. Filing a lawsuit in court will not prevent the initiation or continuation of arbitration proceedings and issuance of arbitration award. According to both articles, the decision of the court on the existence of a valid arbitration agreement does not cause lack of jurisdiction, but the objection of lack of jurisdiction must be raised by one of the parties. International conventions and arbitration organizations have gone beyond this and believe in the principle of simultaneous jurisdiction of the court and the arbitral tribunal;<sup>33</sup> this means that the parties are free to request their request for the issuance of a provisional order from both the court and the arbitral tribunal. Of course, this is if the parties have not agreed to the contrary, otherwise what has been agreed upon will be subject to the validity of the arbitrator as an arbitration procedure. According to the relevant cases, the principle of concurrent competence can be suggested as one of the suggestions and ways out of the current situation. However, this may also have obstacles and problems on its way.<sup>34</sup>

### **6.2.3. Granting the Authority to Issue a Provisional Order to the Arbitrator**

Now that the legislator has correctly created an arbitration institution according to the needs of human society, it is appropriate to remove its shortcomings and gaps so that it can be recognized as an efficient and usable institution for those who refer to it. It is worth mentioning that these defects and gaps give the arbitration institution many advantages.<sup>35</sup>

<sup>32</sup> Katulinejad 2016, p. 13

<sup>33</sup> Leia Junadi, the loopholes of the civil procedure law in the issuance of a temporary order in arbitration", *Journal of Private Law*, p. 49

<sup>34</sup> Leia Junadi, the loopholes in the civil procedure law in the issuance of a temporary order in arbitration", *Journal of Private Law*, p. 412

<sup>35</sup> Leia Junadi, the loopholes of the civil procedure law in the issuance of a temporary order in arbitration", *Journal of Private Law*, p. 413



## 7. CONCLUSION

Considering the topics raised in this article, it can be clearly understood that arbitration is the best and most efficient way to resolve disputes between the parties due to its peacefulness, confidentiality, the impartiality of the authority, specialization of the proceedings, high speed in the proceedings and the realization of justice in a more favorable way. However, due to the dual structure of laws, ambiguities, loopholes, etc., the arbitration institution in Iran has become a cause of inadequacies and challenges in this area and public unwillingness to refer claims to arbitration. Issues such as the conflict of jurisdiction and arbitration and the creation of an arbitration institution in a category such as divorce are far from the philosophy of arbitration, which can be the basis of fraud by the arbitration parties. Also, the ambiguous nature of Article 477 of the Civil Procedure Law does not consider the arbitrator subject to the provisions of the law mentioned above in the proceedings and issuing the decision. It can be a reason for violating the principles of proceedings by stating its formality, legal loopholes regarding the appointment of experts in arbitration, provisional orders, fulfillment of demands, outdated and old laws, lack of attention to procedural defects in arbitration, the existence of wide ambiguities regarding the determination of the law governing arbitration which has become a cause of widespread protest and annulment of arbitration opinions in the courts of justice. It can be considered one of the legal challenges and objections faced by this institution.

Also, arbitration by removing the obstacles to hearing the lawsuit and creating a suitable environment for equal treatment of the parties, and using judicial assistance in the form of accepting the debt claim to help the poor and economically weak people to prevent the violation of the fundamental rights of the people. Such as the right to file a lawsuit, defend it, and file a counterclaim, it can overcome the inadequacies and challenges in this field.

On the other hand, the involvement of the judicial system in arbitration decisions, entry into substantive proceedings, the accumulation of objectionable arbitral awards in the judicial system, the possibility of substantive revision of arbitral awards and the obvious conflicts between the judicial system of Iran and the judicial system of advanced countries in the field of arbitration regarding the amount and manner of intervention in the arbitration matter, which is mostly raised by the possibility of some kind of supervision and that too in a limited manner. Also, preventing Iranian courts from implementing arbitration awards for many reasons, including the pretext of its opposition to public order and good morals, which has not been given a clear and correct interpretation so far, and has provided the ground for the application of tastes and extensive interpretations. While in many advanced countries in the field of arbitration, simply the non-compliance of the arbitration agreement with the mandatory laws of that country can be a reason for the non-implementation of such decisions, including cases of judicial challenges of the lack of development of arbitration in Iran.

Of course, it should be noted that the intervention of the judicial system does not only disrupt the process of arbitration, but it can also have a supportive aspect. However, it should act within certain frameworks and criteria so that it does not conflict with the goals of referring the dispute to arbitration, and from this point of view, it does not cause injustice, damage the rights of the parties, delays in proceedings, and delays in the implementation of the decision.

Therefore, the courts can play a role in the development of arbitration as much as possible, only as a reference to identify votes in order not to conflict with public order and mandatory laws in a superficial and formal proceeding and not to enter into the content of the dispute. According to the principle of speed in proceedings and the appropriate measures taken about some precautionary activities, many principles governing judicial and non-judicial proceedings are changing and evolving. This can be considered one of the loopholes in the procedure system, that speed should be considered a principle in any type of procedure. Many people seek refuge in the arbitration system to avoid the delay of proceedings. Therefore, day by day, the arbitration facilities and powers of this institution are increased. However, in many fields, arbitration remains an unchanging approach. National systems are also not very interested in reflecting new developments in the field of arbitration. Of course, these developments cannot be applied in arbitration contracts



only in situations that conflict with public order and domestic laws. For this reason, it seems that the absence of some principles in the arbitration system and its difference with judicial proceedings is that the application of some orders and their implementation must be done through the mandatory law and with the intervention and supervision of the judiciary. Therefore, it can be said that the legislator has neglected the provisional order according to this approach, and there is no provision mentioned in the rules related to arbitration in the civil procedure regarding the provisional order and arbitration proceedings. This is although in Iran's commercial arbitration law, articles 9 and 17 implicitly refer to the authority of arbitrators in issuing a provisional order and the position of the judicial system about this order.

The need to issue a provisional order can be seen as a result of the arbitrator's intervention in some matters because it seems that arbitration, as a method of handling, tries to resolve disputes. These disputes can intensify after some movements of the parties and face many problems in the arbitration process. Therefore, the arbitrator must have the authority to intervene in matters where he can prevent some radio actions of one of the parties. On the other hand, the expansion of the boundaries of arbitration to the field of international trade and the expansion of this institution in international relations has made it incorporate the principles governing arbitration into national frameworks and establish its own rules in the international arena. Granting authority to the arbitrator to intervene in some areas is a result of the arbitration agreement. Therefore, the arbitration agreement can be relied upon as a legal source for the litigants. In other words, the parties to the arbitration agreement should consider this option for the arbitrator as a condition and provision, that he can issue a provisional order under certain circumstances. However, in this regard, the most important issue is the guarantee of implementation resulting from the issuance of a provisional order. In this regard, the courts should give legitimacy to the arbitration proceedings and consider the rulings issued by the arbitrator as well as his orders as mandatory orders and use the guarantee of legal enforcement.


### Suggestions

According to the investigations, the following suggestions seem necessary:

- The law of civil procedure regarding arbitration should be adapted to the day's needs since arbitration is specialized in laws such as family protection, international commercial arbitration law, etc. It seems that removing arbitration from the civil procedure can prevent the inflation of laws and is considered a useful move to deregulation.
- Various arbitration rules and rules that establish arbitration contracts should be established so that orders issued by arbitrators are enforceable and guarantee legal and judicial enforcement.
- The scope of arbitrators' powers in issuing a provisional order should be carefully explained so that, like legal cases, the necessity and urgency of the provisional order in arbitration proceedings should be clarified with legal standards. This will cause many arbitration agreements to consider the authority to issue provisional orders to arbitrators in light of legal principles.

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