



RESEARCH ARTICLE

**LOW CREDIBILITY BETWEEN THE COMMERCIAL COMPANIES AND ARBITRATION
TRIBUNAL OF KOSOVO AS OBSTACLE FOR A MODERATE APPROACH**

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ABSTRACT

Arbitration in today's society is a common method of resolving the contests in the area of national and international trade. The Tribunal of Arbitration is constituted as private mean of resolving possible disputes, based on the preliminary agreement of parties to refer the case to the arbitration of a private tribunal. This form is preferred because of procedural and financial reasons. The Tribunal of Arbitration must fulfill the requests of the justice in accordance with the law and in this function it must follow flexible and fast procedures of preceding the cases. The arbitration can be more expensive than a judicial process in a regular tribunal but the entities are interested and basically agree to proceed with the Tribunal of Arbitration in way to gain time and procedural simplicity. In Kosovo the Tribunal of Arbitration is a new institution. Until now the primary legislation has been completed but is necessary to be completed also the secondary legislation. Despite the establishment of this association and the advantages it offers, national business entities do not trust because of their traditional approach. The paper offers some opinions which are the causes of the mistrust between the two actors. To identify the problems, dilemmas and opinions we are based on empirical data obtained from the survey with 82 respondents. Has been proved that a big number of commercial companies do not have sufficient knowledge or hesitate to contract the arbitration tribunal. Until now this association has judged a small number of cases. Professional institutions should be engaged in increasing the confidence and the image of Arbitration Tribunal of Kosovo. This will increase the awareness of entities about the favors and safety this method provides.

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INTRODUCTION

Arbitration since the early time is known as one of the specific ways to resolve the disputes of social life. As an important institution, mainly due to its essential priorities and his authority gained a general social dimension and its accepted as one of the most safe forms of resolving disputes presented in legal -economic relations. In the present time as for countries and business entities the priorities offered by the arbitration in relation to basic courts are not any more questionable.

National arbitrations in more frequent cases are related to the chamber of commerce of a certain countries although there are arbitrations that develop their activities within any local and international professional organization. Institutional arbitrations are permanent institutions which have a list of arbitrators by whom provide permanent operation of this court. These institutions have their own regulations.

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In this way facilitate the contracting parties that with their willingness contact the arbitrators and apply the regulations in question. Among the most popular arbitration institutions are

the International Commercial Arbitration located in Paris, Regional Centre for Commercial Arbitration in Kuala Lumpur, etc. In our country is the Kosovo Permanent Tribunal of Arbitration located in Prishtina.

Arbitration procedure as equivalent to judicial procedure for a relatively short time has started to function in Kosovo within the Kosovo Chamber of Commerce. The special of this association is that the parties can nominate candidates for arbitrators even they are not included in the list of arbitrators of the Tribunal. Tribunal of KCC currently in its permanent list has 27 arbitrators of different fields. The list is dominated by lawyers, university professors, former judges and lawyers. In this tribunal are included except the national arbitrators also arbitrators with international reputation. Until now the arbitration has settled disputes from different field of economic law, mainly disputes for sales and construction disputes. The number of issues presented to the tribunal is very small. Through a survey done with businesses in Kosovo we can see that there is a big gap between the respondents and the association. The reason are different but the most dominant is the long coexistence with the tradition of the socialist economy and secondly the "fear" of new methods although they are considered more efficient and safe.

The arbitration procedure under the law of arbitration of the Republic of Kosovo

According to Law on arbitration in Kosovo the Arbitration Agreement shall mean an agreement between two or more persons to submit to arbitration all or certain legal disputes, which have arisen or which may arise between them". (art.2). One dispute can be settled by the arbitration only if it exists in the party's agreement, whereby they accept the dispute to be settled by the arbitration e (art. 5.1).

The principal issue of the arbitration is that parties willfully agreed to use the arbitration and waive their right to judicial review in the courts of the country. Determining whether the parties have agreed for arbitration is a requirement covered in Article 6 of the Kosovo Law on Arbitration which discussed below. Law on Contested Procedure contains similar dispositions (art 511.1). Law on Arbitration requires that the arbitration agreement shall be concluded in writing (art.6.1). The law incorporates amendments to the UNCITRAL model law on arbitration, 2006, which stipulate that the arbitration agreement is deemed to be in writing if it is documented through(art.6.2). This eliminates the need for signature and enables the documentation to be done through modern methods of communication (telecommunications, electronic communication, etc. If a consumer is a party to an arbitration agreement, the arbitration agreement is considered to be concluded in writing only if all parties to the arbitration agreement personally sign the document containing the arbitration clause (art.6.3).

The Law on Arbitration also determines that if there is any non-compliance with the form requirements shall not be considered by arbitration (art 6.4). In accordance with the UNCITRAL Model Law on Arbitration, the arbitration agreement may be in the form of the inclusion of an arbitration clause in the main contract or as a separate arbitration agreement. While this is not explicitly defined in the Kosovo Law on Arbitration, it implies referring to the arbitration clause in Article 6. Law on Contested Procedure requires that the arbitration agreement shall be included in writing and enable to do this through modern methods of communication (art. 511)

It also states that the arbitration agreement is valid if it is included for any country in the contract (art. 512).

Parties involved in the agreement

The agreement on arbitration shall include natural and legal persons. The term "legal persons" shall include legal persons of private law and legal persons of public law (art.2)

Arbitration field

Law on arbitration in Kosovo is applied for all disputes related to the civil-judicial and economic-judicial requests may be the subject of an arbitration agreement, unless prohibited by law (art.5.2). Disputes which do not belong to these two categories (civil - legal and business - legal) may not be submitted to

arbitration. The broad scope of the Law on Arbitration in Kosovo is in accordance with the UNCITRAL model law on arbitration (art.1) which states that the term "commercial" should be interpreted so as to cover matters arising from all relationships of a commercial nature, regardless of whether they are or are not contractual nature. Only for the cases determined by this law, the court has the power to settle the claim for which the contentious party was not enabled to make a statement (Art. 5.2).

The division of the arbitration clause

Article 14.1 of Law on Arbitration in Kosovo determines that the arbitral tribunal shall determine whether it has jurisdiction over the dispute presented to it and whether the arbitration agreement is valid. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the terms of the contract. As a result, the decision of the arbitral tribunal that the contract is void does not imply the invalidity of the arbitration agreement.

Effect of agreement

In accordance with the UNCITRAL Model on Law on Arbitration, the Law on Arbitration requires as follow: a court before which an action is brought concerning a matter that is the subject of an arbitration shall reject the action as inadmissible if the defendant in his statement of defense invokes the arbitration agreement, unless the court finds that the arbitration agreement is null and void or that the disputed subject matter is not covered by the arbitration agreement (art.7). Before the beginning of arbitration procedure, the tribunal of arbitration decides on the competences to resolve the dispute which has been submitted and on the validity of the arbitration agreement (art.14). *Law on Contested Procedures has similar dispositions* (art.514 and 520). If the parties have not declared about the jurisdiction, until the jurisdiction dispute is settled, the court which has received the case shall proceed with those actions which could be damaged by the delay, the appeal against the decision which settles the jurisdiction dispute shall not be permitted (art.26).

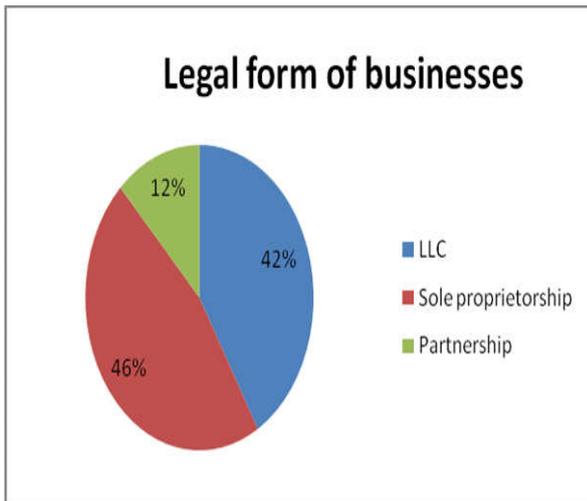
Preparation of the survey

The Arbitral Tribunal in the Republic of Kosovo is established as a specialized association in the Chamber of Commerce in Pristina. The purpose, competences and procedures are regulated by the Law on Arbitration No. 02 / L-75 dated 26 January 2007. Since its establishment until now the number of cases addressed to arbitration is only four¹. The small number of cases presented and the law level of interest of businesses to address the disputes to the Tribunal of Arbitration urged me to analyze the opinion of business entities and to find out which are the factors that influence on their decision for not choosing the Tribunal of Arbitration to resolve their disputes. With the support and advice of officials of the Tax Administration of

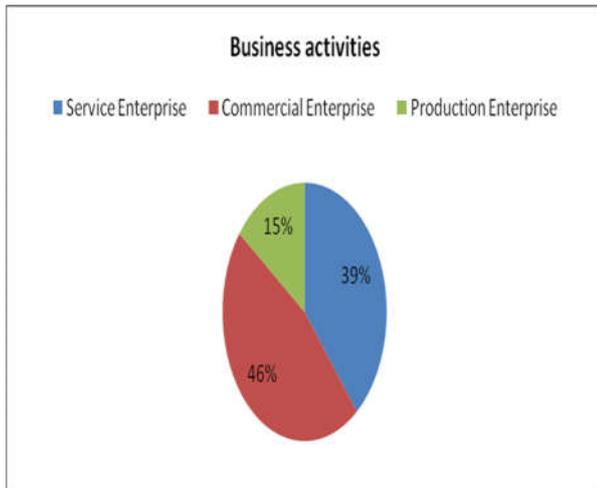
¹ For more see: <http://www.kosovo-arbitration.com/en/case-law>

Kosovo and Kosovo Customs on the matter we have come to the conclusion that the sample of respondents would be more credible if we manage to incorporate top 100 respondents respectively 100 active business entities within the country and abroad. Based to the plan 91 questionnaires has been delivered to business entities and 9 of the questionnaires are not valid. After analyzing the questionnaires the results are as follow:

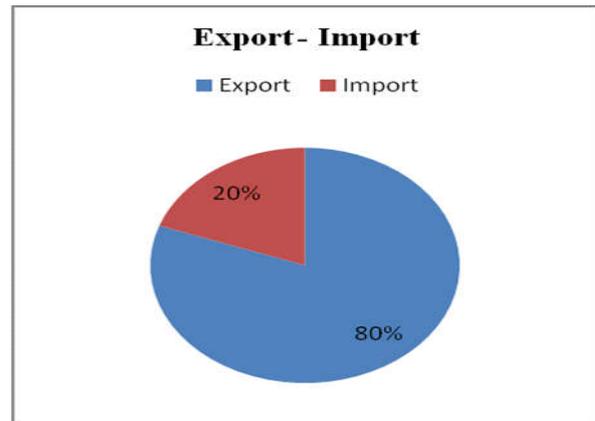
Of the total number of business entities surveyed 42% had the legal form of limited liability, 46% sole partnership and 12% partnership.



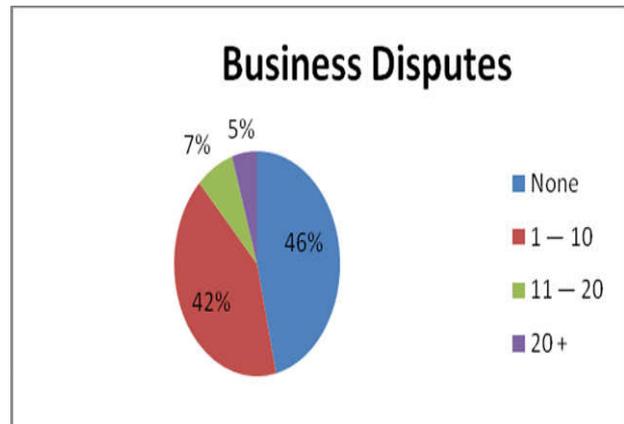
From all the entities abovementioned 46% of them are commercial enterprises, 39% service enterprises and 15% production enterprises.



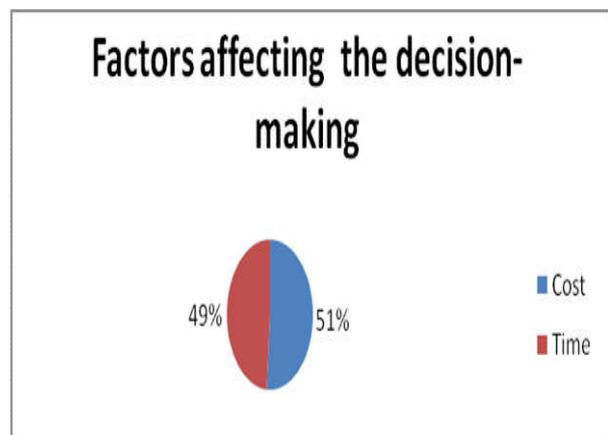
Of all the surveyed entities 80% of them are registered and have the right for export/import, meanwhile 20% are not registered for these activities.



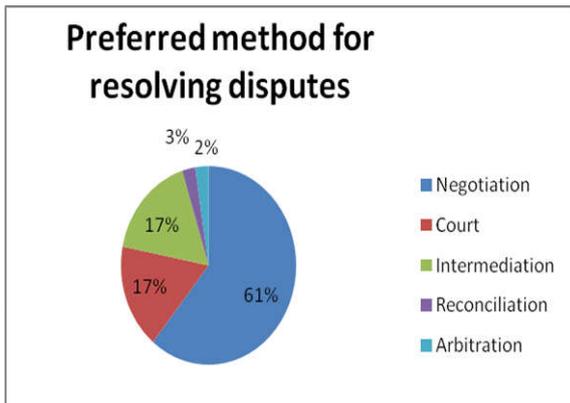
In terms of the number of trade disputes faced by commercial companies in the past 5 years, it has emerged that: 46% of them did not have any dispute, 42% have from 1-10 disputes, 7% of them faced with 11-20 disputes and only 5% had more than 20 disputes.



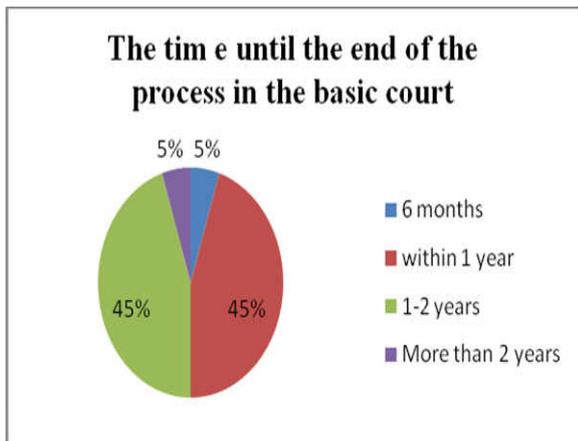
Among the factors which affected in the decision of entities to the dispute resolution method, it showed that: 51% think that the costs are the dominant factor, 49% think that the time has an relevant impact.



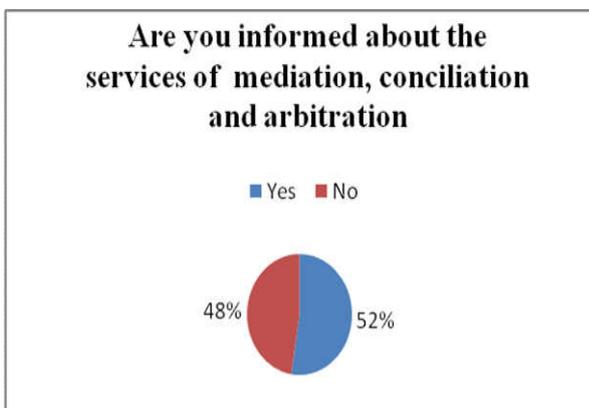
On this question, 61% of subjects preferred the negotiation procedure, 17% court procedure, 17% intermediation, 3% reconciliation and only 2% of them the arbitration.



Regarding the question: if previously you have submitted cases in court, how long did it take to the end of the process, 45% of the surveyed entities stated that the process took 1-2 years, 45% reported within 1 year, 5% within six months and 5% more than two years.

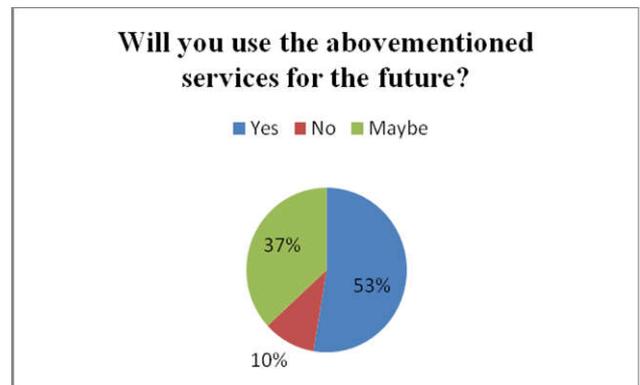


In this question 52% of respondents are aware of the services of mediation, conciliation and arbitration provided in Kosovo, while 48% are not aware of these services.

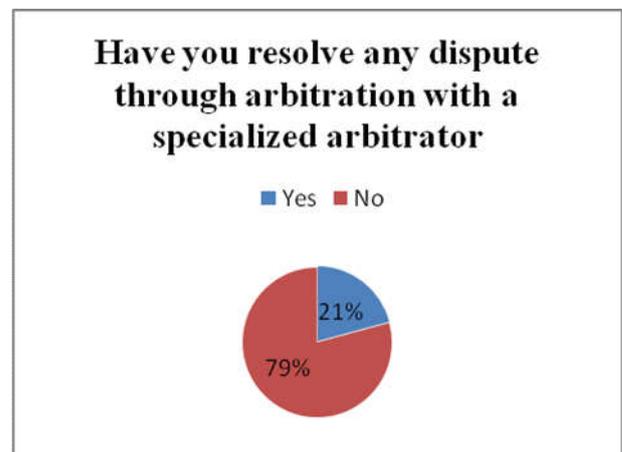


The business entities that answered to the question 8 that they are not informed about the abovementioned services to the question if they will use those services for the future 53% of

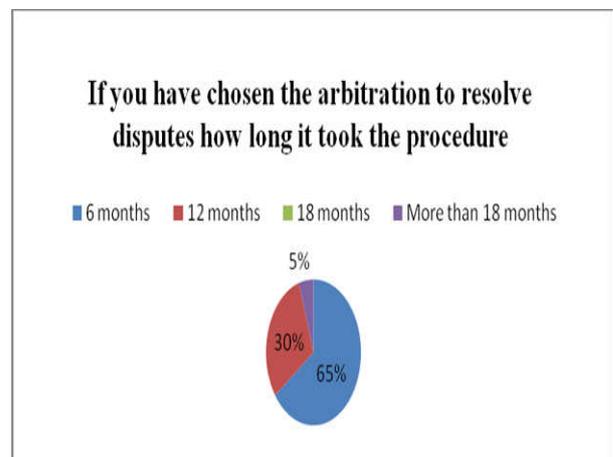
them gave a positive answer, 37% have a negative answer and 10% have answered with yes.



In this question, 79% of entities have no resolve their disputes through the arbitration and only 21% of the surveyed entities stated that the dispute case is taken from a specialized arbitrator.

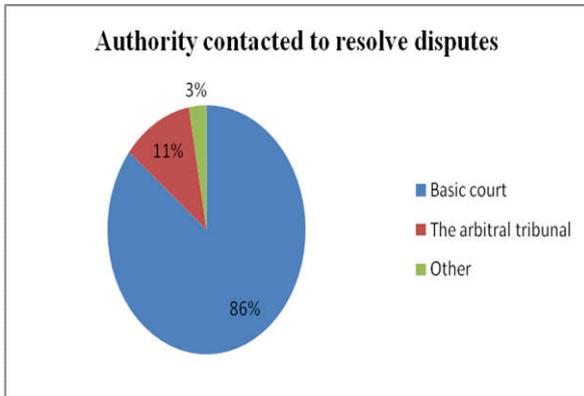


In this question the entities that have chosen arbitration to resolve their business dispute and the time required to solve these disputes 65% of them declared that the process has taken 6 months, for 30% of them has taken 12 months and for only 5% of them has taken more than 18 months.

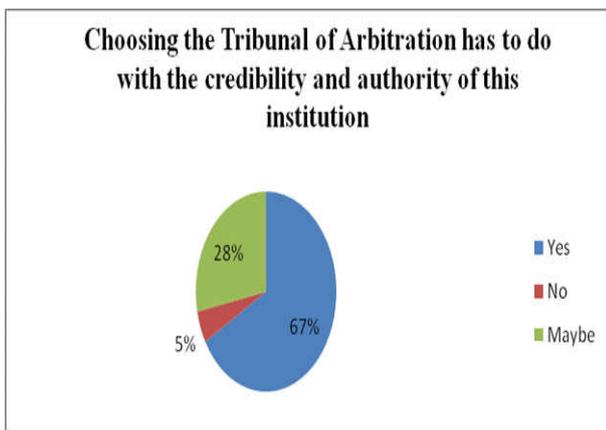


In this question 86% of business entities declare that the authority contacted by them to resolve the disputes is the Basic

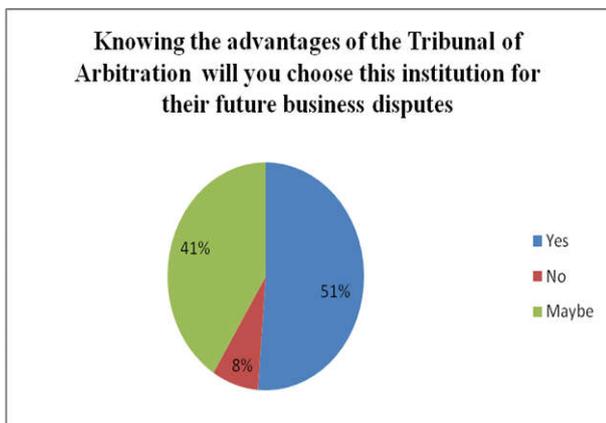
Court, 11% of them contact the Tribunal of Arbitration and 3% other competent authorities.



In the question if choosing the Tribunal of Arbitration has to do with the credibility and authority of this institution, 67% of the respondents answered with Yes, 28% with Maybe and 5% of them with No.

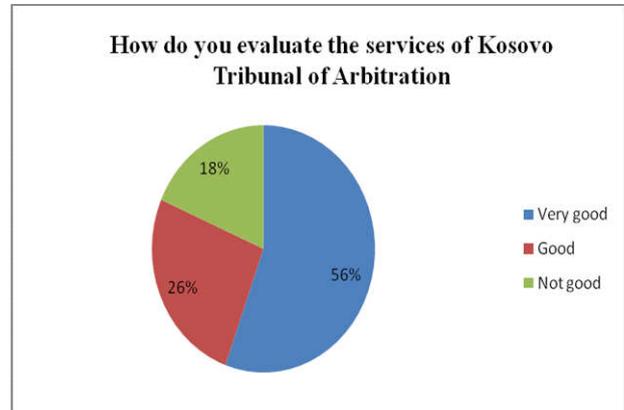


Knowing the advantages of the Tribunal of Arbitration in the question if the entities will choose this institution for their future business disputes 51% of entities answered positively, 41% of them negatively and 8% of them are neutral.

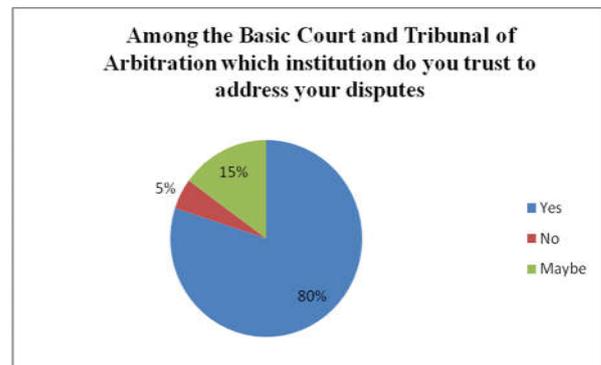


This question relates to entities that use the services of the Tribunal of Arbitration and evaluation of these services has

come that: 56% of subjects consider the services as very good, 26% consider the services as good and 18% of them as not good.



What proves that our business entities traditionally do not take initiative to increase the confidence for the Tribunal of Arbitration in relation to Basic Courts was confirmed in a high percentage. Specifically 86% of them declare that they trust the authority of basic court, 12% of them declare to trust the Tribunal of Arbitration and the other percentage trust other institutions.



Analysis of results

From the data elaborated is founded that the sample and the number of respondents has been in a real relation with the number of active business entities that deal with business operation within national and international trade. From this perspective comes out that the sample was representative and above all reliable. For the preparation of the questionnaire and distribution techniques I had the support of Tax Administration and Kosovo Customs officials. By analyzing the legal status and activities of entities surveyed has come that 46% of them are individual enterprises, 42% of the limited liability corporation and only 12% partnership. From this come out an interesting insight that the greater number of entities are individual enterprises of legal entities as individual enterprise. This for Kosovo circumstances is real because the greater part are registered in this form even this type of enterprises is for

individual subjects for individual, handicrafts and entrepreneurship, etc.²

The participation of business entities as Limited Liability Company comes out as the biggest in percentage in relation to their registered number in the country. What is important to underline is that 80% of the respondents are entities dealing with export and imports activities and 20% operate only in national market.

Taking into the consideration the structure of commercial companies comes out that they do not trust the Tribunal of Arbitration of Kosovo to address their business disputes. From the survey 46% of entities have not been part of court processes meanwhile 44% of them from their foundation faced 1 to 20 court cases. From this emerge that business entities do not take into consideration to contact the Tribunal of Arbitration for their business disputes. This show that the Tribunal of Arbitration is the most not preferred institution.

The data has given indications that 52% of respondents have the information that their disputes can be solved by the intermediation, reconciliation and arbitration, meanwhile 48% of them have declare that they have no information. Meanwhile from the total number of entities that are aware for services offered by the Tribunal of Arbitration 53% of them declare that will take into consideration for the future disputes, 37% of them are not interested for these services. Indubitably for a big number of the entities surveyed the Tribunal of Arbitration is not their preferred form and even has not thought to solve disputes through this Tribunal.

CONCLUSION

Arbitration is one of the alternative and efficient methods to resolve the business disputes. The businesses in the condition of the global economy are convincingly interested to solve their disputes fast and in non-bureaucratic way. Therefore, currently the arbitration is a procedure that dominates in resolving business disputes. There are two arbitration centers in the Republic of Kosovo that function within the Kosovo Chamber of Commerce and American Chamber of Commerce. These institutions are founded as new associations. Local legislative institutions have issued a legal framework moderately completed to functionalize the institutions in institutional plan. At first sight it seems that this gap created between the regular courts methods and alternative methods is temporary and superficial but the issue is more complex. The gap has the genesis somewhere between traditional socialist outdated perceptions of Kosovo society about the role of regular courts and the difficulties to establish confidence in the Tribunal of Arbitration in Kosovo respectively advantages offered by this association with its capacity. Part of this study

was to verify mistrust gap between business entities and alternative means of solving disputes.

It is interesting that one of the most popular legal forms is the individual enterprises which do not have legal subjectivity but by law are classified as natural persons. This legal form is offered to entrepreneurs - natural persons to exercise any handicraft activities or some kind of households.

In our country the biggest number of business entities are individual enterprises and on the other side they perform different business activities, have a big number of employees and their annual turnover is high. In reality, the founders of these companies are not aware that the registration of such enterprise they are charged with full individual responsibility for enterprise obligations. In fact, this phenomenon has no other explanation but that of ignorance of the founder regarding the disadvantages and advantages that bring certain legal forms of business entity, on the other hand a problem is the mistrust in the Tribunal of Arbitration.

From the data obtained from questionnaires it reaffirmed that Kosovo has a relatively large number of disputes between business entities. In most cases, they addressed their disputes to regular courts. The survey shows that only 11% of respondents prefer to address their disputes to the Tribunal of Arbitration although both categories have relatively good knowledge about the role and advantages of arbitration. It is interesting that most of respondents expressed their willingness to implement various forms of alternative dispute resolution. 61% of the subjects preferred the negotiation procedure, 17% court procedure, 17% mediation, 3% reconciliation and only 2% of them prefer the arbitration. From this we can see that the trust on arbitration is in a very low level. This is argued with the small number of business entities that address their disputes to Kosovo Tribunal of Arbitration.

Interesting and controversial results has emerged in the opinion of respondents in terms of convincing them that a process in the tribunal is not cheaper and is not resolved in faster time that the process in the Tribunal of Arbitration in Kosovo. This opinion corresponds to the reality and comes out that the representatives or business entities administrators are not interested to compare these factors. Given the domination of the traditional logic for addressing disputes in the regular courts, to a certain extent, we believe that Kosovo the word "tribunal" do not sounds good and it creates uncertainty and fear. This is because the term "tribunal" has not been popular and is rarely used in our dictionary. For the first time the term "tribunal" for random people is used for the International Criminal Tribunal of war in former Yugoslavia located in Hague. Certainly this is not the only reason but one of the most important. The founding of Kosovo Arbitration Tribunal within the Chamber of Commerce is assisted by USAID. The support of the US organization has been outstanding in our country to start working the associations that offer alternative solutions to business disputes. But the use of the term "Court of Arbitration" instead of the term "Tribunal of Arbitration" for the mentality in Kosovo would be more acceptable and the institution will be more

² In the statistical report of the Agency of Statistics in the Republic of Kosovo (TM3-2015) is reconfirmed the phenomenon of domination of the legal form of individual companies in relation to other business forms. According to this report 2286 of total enterprises 1722 of them are individual enterprises, 17 Partnership, 529 limited liability companies, 2 Joint Stock Companies etc.

reliable. From this perspective probably business entities will create a different perception. There is a need to undertake necessary measures to sensitize the business entities and explaining to them that the tribunal of arbitration is a reliable method of solving disputes.

It can be concluded that in the Republic of Kosovo today exist a legal framework to establish and functioning of the Tribunal of Arbitration. Independently on which stage the procedure is it includes the Law on Arbitration, Law on Contested Procedure and the Law on Executive Procedure.

In order to improve the image and increase the trust of the Tribunal of Arbitration there are three issues to be considered. First, issuing and completing of secondary legislation. Second, promote the existence and functionality of the tribunal. Third, increase the trust of business entities to address their disputes to Kosovo Tribunal of Arbitration. If the legislative institution in cooperation with Chamber of Commerce and Tribunal of Arbitration collaborate to complete and amend the Law on arbitration and change the term "Tribunal" in the term "Court"

Literature used and consulted

1. Gautron Claude J., European Law, Shkup 2006
2. Jarrosson CH., The concept of arbitration, Paris 1987
3. Ndreca M., Dictionary of foreign words and phrases, Prishtina, 1986
4. Mire Le Pierre., European Union Law and common policies, Shkup 2006
5. Glossary of today's Albanian language;
6. Peter Gillies & Gabriël Moens; International Trade and Business: Law, Policy and ethics, Cavendish Publishing (Australia) Pty Limited Sydney , London 1998;
7. Law Glossary, Modern Administration, Beograd, 1964
8. Admission and execution of the decisions of tribunal of arbitration. Summary of graduate studies at the Faculty of Law in Belgrade. International trade contracts, Belgrade, 1987
9. <http://www.kosovo-arbitration.com>
10. <http://www.adr-ks.org>
11. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html
12. <http://www.kosovo-arbitration.com/uploads/files/uncitral-rules.pdf>

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