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Critically evaluate the restrictions on the principle of party autonomy in international commercial arbitration

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ABSTRACT

With the development of international economy and commerce, commercial arbitration has become the most effective alternative dispute resolution method. One of the most important elements which contribute to the success of arbitration is the principle of party autonomy. Generally, party autonomy principle gives parties the right to determine all essential factors of arbitration, in both procedural and substantive matters. Nonetheless, this principle is not absolute, under modern international commercial arbitration context, it is restricted in various aspects. The restrictions may come from subjective factors such as the capacity of the parties to enter into an arbitration agreement or objective components like the arbitrability of the dispute, the rules of the arbitration institution, the law of the seat of arbitration or the decision of the arbitral tribunal. It does not matter what form it may be, all of these limitations negatively influence the ability of parties to decide the conduction of arbitration in accordance with their desire. Consequently, they may affect the result of the arbitration and the attractiveness of arbitration to businesses.

Towards a further development of international commercial arbitration, this thesis will critically analyse the principle of party autonomy and its limitations under international commercial arbitration law. In doing so, the international law on commercial arbitration (such as the UNCITRAL Model Law on Arbitration, the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards) as well as national law of some developed countries will be taken into account. In the conclusion, the author will examine the advantages and disadvantages of these restrictions on the principle of party autonomy in the current context in order to predict the development trend of the principle as well as the international commercial arbitration in the coming time. Giving these considerations, the research in this thesis will make a contribution to the effort of the business community and the legislators to harmonise the international commercial law in general and international commercial arbitration law in particular.

TABLE OF CONTENT

INTRODUCTION

Resolving international disputes is never easy due to the involvement many 'international characteristics'. It will insist of at least two parties who come from different countries with different nationalities, legal status and governing legal systems. Therefore, the selection of an appropriate and effective method of dispute resolution can be regarded as an important factor which will ensure and promote the strong development of the international trade.

In some recent years, arbitration is always considered the most preferred alternative method of dispute settlement[1]. Additionally, in comparison to litigation – the traditional method of dispute resolution, arbitration is proven to have some great advantages. They are flexibility, confidentiality and fairness. All these characteristics are results of the most significant principle of arbitration: the principle of party autonomy. This principle is a distinctive feature of arbitration from other method of alternative dispute resolution[2] and plays a very important role in the arbitration proceedings. However, this principle is not an absolute power, it has some limitations. These restrictions are imposed by different factors, both objective and subjective, and cause the parties not able to fully exercise their autonomous rights. Under modern international commercial arbitration context, these limitations make the business community as well as the academics begin to suspect the effectiveness and success of arbitration. Therefore, this issue becomes a special concern of many scholars. A question has been raised as whether these restrictions really have bad effect on the development of the principle of party autonomy as well as international commercial arbitration.

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[1] Dursun, 'A critical examination of the role of party autonomy in international commercial arbitration and an assessment of its role and extent', 161 [available at <www.yalova.edu.tr/Files/UserFiles/83/8_Dursun.pdf> accessed 13/08/2013]

[2] ibid 185

Sharing this concern, this dissertation is aiming at analysing these restrictions, evaluating the good and bad sides of the effect of these restrictions to the principle of party autonomy and making some predictions of the development trend of party autonomy rule as well as international commercial arbitration. The purpose of the thesis will be reached by examining the regulations on the principle of party autonomy in some famous international sources of international commercial arbitration law such as the UNCITRAL Model Law on Arbitration, the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Furthermore, in order to deeply research on the issue, some national law on international commercial arbitration will also be considered and analysed.

The thesis will be divided into 3 chapters:

- **Chapter 1 - Introduction to the principle of party autonomy in international commercial arbitration:** this chapter deals with the definition and concept of party autonomy as well as its role in the arbitration process.
- **Chapter 2 - The restrictions to the principle of party autonomy in international commercial arbitration:** this chapter focuses on analysing the restrictions to the principle of party autonomy imposed by different factors in international commercial arbitration.
- **Chapter 3 - Evaluating the current situation and making a prediction of the development trend in the future:** this chapter evaluates the good side and bad side of the current situation of restrictions imposed on the principle of party autonomy and then making a prediction of the

development trend of this principle and international commercial arbitration in the coming time.

CHAPTER 1:

Introduction to the principle of party autonomy in international commercial arbitration

The arbitration has a long development history and in its evolutional story, the principle of party autonomy has always been a key point. Therefore, this principle is dubbed as a fundamental element of international commercial arbitration and has very important role in every stage of the arbitration process. In order to deeply analyse the limitations of this principle, it is essential to understand its evolutional history as well as its content in the international commercial arbitration. Furthermore, evaluating the role of the party autonomy principle to the international commercial arbitration will be helpful for the prediction of the principle's development trend in the future. This chapter will respectively deal with these issues.

1. The history and evolution of the principle of party autonomy

The principle of party autonomy is always regarded as the foundation stone of international commercial arbitration. Hence the history of this principle cannot be detached from the history of arbitration.

It is not easy to determine the historical development of arbitration since it varied from country to country. The author of a famous arbitration book judges that writing the history of arbitration is like 'trying to put together an immense jigsaw puzzle, with many of the pieces missing and lost forever'[3]. Consequently, to give a brief and general history of international commercial arbitration in some few pages is almost impossible. However, in order to figure out the developing process of autonomy principle, the author will only take into account some landmarks in the evolution of international commercial arbitration.

[3] Nigel Blackkaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 4

It is suggested that arbitration existed thousands of years ago, since the time of Egypt, Roman and Greek[4]. Besides, another author argues that arbitration had appeared as a method of dispute resolution since 'the dawn of commerce', even before the existence of the court[5]. According to Derek Roebuck, a scholar who has a great research in the history of arbitration[6], arbitration is used popularly in the antique Egypt with the purpose of finding a settlement for both private and public disputes[7]. Consequently, although the exact time of the commencement of arbitration is still unclear, it can be concluded that arbitration has been used as a popular method of dispute settlement for a very long time.

In the ancient time, parties sought to arbitration in order to avoid the delay, high cost and congestion of the litigation[8]. Generally, at that time, the arbitration was conducted with a simple process: parties in disputes submitted their conflicts to an arbitrator who would hear both sides and makes a fair award. The parties had to accept the award and the loser would have to pay the fee to the arbitrator[9]. Therefore, the arbitration was run by the willing of parties and the court had no responsibility to intervene in this process. However, the decision of the award is not always completely fair and satisfactory to both sides. Hence, the need for a body to control and support the proceeding of arbitration started to appear. At first, with a principle which was described as 'you've made your bed so you must lie in it', parties in arbitration were not able to call for support from the national court

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[4] ibid

[5] Andrea Marco Steingruber, *Consent in international arbitration* (Oxford University Express 2012) 16

[6] Derek Roebuck, 'Sources for the History of Arbitration (1998) 14 Arb Int'l

[7] Derek Roebuck, 'Cleopartra Compromised: Arbitration in Egypt in the First Century BC' (2008) 74 Arbitration 3 263

[8] Samuel Marful-Sau, 'Can International Commercial Arbitration Be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration' 4, [available at <http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_4_635429854.pdf> accessed 27/09/2013]

[9] R. H. Christie, 'Arbitration: Party autonomy or curial intervention: The historical background' (1994) 111 S.African L.J 138, 143

and the court also stayed outside the autonomy of the parties[10]. However, the situation changed over time. The freedom of the parties to decide how their arbitration would be conducted has evolved along with the development of the arbitration.

The principle of party autonomy had been improved through the appearance of the law of arbitration. Although having its root in the ancient time, arbitration had only started having major development since the Roman Empire[11]. Before the commencement of the modern international commercial arbitration in the nineteenth and twentieth century, the arbitration is strictly controlled by the national court[12]. Under the Roman law, the control of the court over the arbitration based on a rule which was included in the submission agreement providing that a fee must be paid if one party wanted to challenge the award (the penalty clause). However, there were some modifications under the Roman-Dutch law. In this era, the court was able to supervise the arbitration whether the penalty clause was included or not[13]. The court could challenge the arbitral award when corruption was detected in the arbitration proceeding or the arbitrators were unfair to one party or the dispute in question was not arbitrable[14]. These examples indicate that in the past, even though parties were able to choose arbitration as an alternative dispute resolution method outside the court, their autonomy was severely limited by the intervention of the national court.

The modern international commercial arbitration started developing in the late nineteenth century and the early twentieth century. Nonetheless, it was just the morning

[10] ibid 144

[11] Thomas Clay, *L'arbitre* (Paris: Dalloz 2001) 6-7; A M Steingruber (n 5) 18

[12] Jullian D. M. Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative international commercial arbitration* (Kluwer Law International 2003) 18

[13] Christie (n 9) 146

[14] ibid; *Groenewald v Smith* (1838) 3 Menz 158; *Kimberly Town Council v The London and South African Exploration Co* (1884) 1 Buch AC 385 at 405; *De Villiers v Diering (*1899) 6 Off Rep 1 at 3

dawn of the developed international commercial arbitration and its foundation was laid in the law of some big commercial nations[15]. In consequence, depending on the attitude of their national courts, these laws were not in favour of arbitration in spite of the recognition of arbitration as an alternative method of dispute resolution outside the court. Furthermore, the court even treated arbitration as their rival[16]. It led to the fact that the national court wanted to strictly supervise the arbitration and gave a very little space for party autonomy[17].

Modern international commercial arbitration has experienced a remarkable transformation with the establishment of the International Chamber of Commerce (ICC) in 1919 and especially the creation of the Court of International Arbitration in 1923. International business community has made a great effort to complete the legal framework for an independent and neutral arbitration system to resolve the commercial disputes between parties from different countries all over the world[18]. Furthermore, in another effort to internationalise the commercial arbitration law, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[19] was enacted in 1958[20]. Despite some difficulties in interpretation and enforcement as well as its 'old age', this convention is still regarded as one of the most important sources of international commercial arbitration law and a landmark in the development of modern international arbitration.

[15] Lew, Mistelis and Kroll (n 12) 18

[16] ibid

[17] ibid

[18] Steingruber (n 5) 19; Lew, Mistelis and Kroll (n 12) 19

[19] 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards' was done in New York on 10 June 1958 *United Nation Treaty Series* (1959), Vol 330, 3, No 4739. Hereinafter the New York Convention 1958.

[20] Jullian D. M. Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179, 189

Article II.1 of this document has recognised the principle of party autonomy though it is not directly mentioned[21].

In the end of twentieth century, with the support from the United Nation, the United Nation Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration[22]. This development is considered as recognising the 'fundamental influence of party autonomy in international arbitration' and limiting the interference of the national court with the freedom of choice of the parties[23].

In the recent time, national as well as international law on international commercial arbitration tend to uphold and maximise the effect of party autonomy principle. Nevertheless, these efforts have not been entirely successful due to some restrictions posed by different elements which will be considered in the next chapter.

2. The concept and content of the principle of party autonomy

The principle of party autonomy has always played a key role to the international commercial arbitration. However, the concept of this principle is not just simple as the term 'party autonomy'. In spite of owning its origin to the ancient times with the advent of arbitration, this principle was actually defined in the nineteenth century and based on the rule of freedom of choice in the law of contract[24]. In the most limited sense, the term refers to the choice of the applicable law in the conflict of laws. However, in terms of arbitration, this phrase has a broader meaning.

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[21] Peter Nygh, *Choice of Forum and Law in International Commercial Arbitration* (The Hague: Kluwer 1997) 2. This issue will be further analysed later.

[22] The UNCITRAL Model Law on International Commercial Arbitration was adopted by the UNCITRAL on 21 June 1985. The Model Law was revised and approved by United Nations in December 2006. Hereinafter the Model Law.

[23] Lew, Mistelis and Kroll (n 12) 27

[24] Dicey, Morris and Collins, *The Conflict of Laws*, vol 2 (14th edn, Sweet & Maxwell 2010) para 32-004

In arbitral sense, party autonomy is relating to the right of the parties to conclude a contract (the arbitration agreement[25]) to resolve their disputes by arbitration; to decide the law governing the arbitral proceeding as well as the law to deal with the merit of the conflict; to choose the number of arbitrators as well as the language of arbitration, etc. In general, the principle of party autonomy allows parties in international commercial arbitration to decide the form, the procedure and other important elements of arbitration[26].

The consent to bring the case to arbitration, instead of litigation, is recorded in the arbitration agreement which is believed to be a primary source of arbitration and the 'strongest evidence of party autonomy'[27]. Moreover, this agreement is also a guideline to the arbitral tribunal while operating the arbitration[28] since it is provided the choice of the party in applicable law, the place of arbitration and other components of the arbitration. In order to express their mutual consent, parties to arbitration often realises these following factors in their arbitration agreement: the consent to arbitrate of the parties; the subject matter which the arbitral tribunal will deal with; and other elements indicating the guidelines of how the arbitration would be conducted[29].

The first element will confirm that the case would be resolved by arbitration, not litigation, mediation or other methods of dispute resolution. In other words, with the parties' clear statement of choosing arbitration, all other means of dispute settlement will be avoided[30]. This can be considered as the most original expression of party autonomy which has been available at the first onset of the arbitration. Article II.1 of the New York

[25] Arbitration agreement can be in the form of a clause in the main contract (arbitration clause) or a separate contract (submission agreement). See Blackkaby and others (n 3) 86-87.

[26] Lew, Mistelis and Kroll (n 12) 4

[27] Dursun (n 1) 161

[28] ibid

[29] Steingruber (n 5) 114-118

[30] Poudret and Besson, *Comparative Law of International Arbitration*, 2nd edn (translated by Berti SV and Ponti A) (Zurich: Schulthess 2007) para 155

Convention 1958 also acknowledges this point. According to this provision, all member states will have to recognise the effect of a valid arbitration agreement[31].

Secondly, parties are free to decide which dispute would be determined by arbitration and which one would be solved by litigation or other methods. It is the basement to confirm the competence of the arbitral tribunal.

Furthermore, parties to international commercial arbitration can also consider other relevant issues which will decide the success of the arbitration. However, depending on the form of the chosen arbitration (ad-hoc[32] or institutional arbitration[33]), different elements should be included. Generally, regardless of different types of arbitration, parties can choose the seat of arbitration, the number and qualification of the arbitrators, the language using in the arbitration, the law governing the proceeding procedure, the law applicable to the merit of the dispute; the timetable and the form of the hearing as well as the time for the award to be issued as well as other procedural issues[34]. Nonetheless, in terms of institutional arbitration, the freedom of choice of parties is somehow limited by the general rules of the institution (often relating to the procedure)[35]. Besides, party autonomy principle also allows parties to change their mind even after their agreement is concluded. That means parties can modify their agreement due to their need, it would be the alternation of the arbitrators, the time limits or other matters which they have agreed before[36].

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[31] Nygh (n 21) 2

[32] Ad-hoc arbitration is a tribunal which is activated in order to deal with specific dispute. See Lew, Mistelis and Kroll (n 12) 33-35; Blackkaby and others (n 3) 52-55

[33] Institutional arbitration is when parties submit their dispute to an existing arbitration institution. See Lew, Mistelis and Kroll (n 12) 35-37; Blackkaby and others (n 3) 55-57

[34] Steingruber (n 5) 115

[35] This limitation will be further discussed later.

[36] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' 2 [available from the ICCA website at <http://www.arbitration-

The Model Law has recognised the party autonomy rule in many provisions. Almost every articles in the Model Law support these rights of the parties with the expression like 'party are free to agree on...' or 'unless agreed by the parties...'. It is completely true to say that the concept of party autonomy is the basis of this Model Law[37]. Furthermore, New York Convention 1958 shares the same approach. For example, Article V(1)(d) of the convention states that the national court of a member state can refuse to recognise or enforce an arbitral award if 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties'.

Last but not least, the autonomy rule also allows parties to decide to keep their case private or open to public. That means parties can ask the arbitral tribunal to keep all the arbitral proceeding confidential and no-one else would be able to know about their issues without the permission of parties.

In summary, the concept of the rule of party autonomy refers to the right of parties in a dispute to choose arbitration as their resolution method and their freedom to decide the fundamental elements of this arbitration. In short, it can be said that the autonomy principle allows party to 'control all details of arbitration'[38].

3. The importance of party autonomy rule in international commercial arbitration

As mentioned before, the party autonomy principle is regarded as the backbone of international commercial arbitration. It plays a very important role in resolving dispute

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icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf> accessed 29/08/2013]

[37] Lew, Mistelis and Kroll (n 12) 27

[38] Anoosha Boralessa, 'The Limitations of Party Autonomy in ICSID Arbitration' (2004) 15 Am. Rev. In'l Arb. para 253, para 266

through arbitration. This part will scrutinise the influence of the principle of party autonomy to international commercial arbitration.

Firstly, party autonomy is a fundamental element of international commercial arbitration. It can be said that there would be no arbitration without party autonomy[39]. As being analysed in the previous part, the consent of the parties is recognised in the arbitration agreement which is the basement to determine the jurisdiction of the arbitral tribunal. Additionally, party autonomy decides the conduction of arbitration and provides it all the details that would be needed to resolve the dispute.

Secondly, this principle provides parties an opportunity to build their own dispute settlement merchandise which will best fit their mutual need and best serve their interest as well[40]. On the other hand, holding in their hands the right to choose arbitration as their dispute resolution method and also how their arbitration would be conduct, parties would be more easily agree on a mutual beneficial agreement which will speed up the process of solving their conflict.

Thirdly, one of the advantages of arbitration over litigation is the confidentiality and party autonomy is the factor which makes the arbitration process confidential. The confidentiality is considered as 'a cornerstone of arbitration law'[41] and this characteristic is supported by the principle of party autonomy. On the point of view of businessmen, this characteristic is very important because it helps them to keep their trade secrets[42]. Unlike

[39] Karl-Heniz Bockstiegel, 'Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator' 1 [available at ICCA website <http://www.arbitration-icca.org/media/1/13644850393080/bckstiegel_party_autonomy.pdf accessed 27/09/2013>

[40] Elizabeth Shackelford, 'Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration' (2005-2006) 67 U. Pitt. L. Rev. 897, 901

[41] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: International and English Law and Practice* (Oxford University Press 2005) 349. See also Hans Bagner, 'Confidentiality - A Fundamental Principle in International Arbitration' (2001) 18(2) J. Int'l Arb. 243

[42] Dursun (n 1) 162

the litigation proceeding which is usually open to public, all proceedings of arbitration can be made private due to the mutual desire of parties.

Finally, party autonomy is also essential for the operation and development of the private economy system of both national and international commerce[43]. The reason for this necessity is that the business community gains a great benefit in setting their own framework in order to make their trade relations meet their needs and advantages. Therefore, by giving them the right to form their own system of dispute resolution, the party autonomy encourages the parties to maximise their interest in trading activities. This has contributed to strengthen the development of domestic as well as international sale transactions.

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In summary, the arbitration can be regarded as a private court where parties can set their own rules and the principle which gives them this power is party autonomy. All the arbitral proceedings are seen as the expression of the will of parties on the basis of their mutual consent. Parties to arbitration is likened as a tailor who measure their own needs in order to design for themselves the most suitable and fashionable shirt. Therefore, the role of the principle of party autonomy is very important or it would be exact to say that it is an indispensible factor in resolving a dispute through arbitration. In principle, the party autonomy rule is superlative in arbitration. Nevertheless, in practice, it is still restricted by some other factors. To what extent does the party autonomy principle is restricted in international commercial arbitration? The main part of this thesis will critically criticise and find the answer for this question.

[43] Bockstiegel (n 39) 1

CHAPTER 2:

The restrictions to the principle of party autonomy in international commercial arbitration

As being analysed above, in theory, parties in arbitration can exercise their autonomy rights in every stage of arbitration regardless of whether the arbitral proceedings has started or not. However, practice has shown that the principle of party autonomy is not unlimited and it has some restrictions which are caused by many different factors. This chapter will critically evaluate these restrictions in some specific circumstances in the dispute settlement process of international commercial arbitration.

1. Restrictions imposed by the arbitration agreement

Arbitration is based on the will of parties which is invisible and can only be 'seen' in the arbitration agreement. This agreement can only be valid if it can satisfy certain requirements. Article II of New York Convention 1958 stated that:

> 'Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'

Under this provision, a arbitration agreement is only valid if it is an agreement in writing which express the consent of parties to submit their dispute to arbitration[44]; it can be an existing conflict or one that may arise in the future but has to be 'in respect of a defined legal relationship'; and the subject matter has to be capable of resolved by arbitration. Furthermore, Article V of this Convention also provided that the arbitral award will not be

[44] With the development of technology, the written form requirement is now broadened in the meaning. Article 7 of the Model Law has given a new interpretation trend for this requirement. According to this provision, the written agreement can be proven by any means which can be recorded (including oral conversation).

able to be recognised or enforced if the parties do not have the capacity to enter the arbitration agreement.

Among these requirements, the capacity of the parties and the arbitrability of the dispute are factors which can limit the consent to arbitration of the parties. These matters will be critically considered in this part.

1.1.Restrictions imposed by the capacity of the parties

In general, capacity refers to the ability of a person or a legal entity to enter into a contract, it includes the capacity to have rights as well as exercise these rights[45]. However, in arbitration, the capacity of the parties is not only the capacity to enter into the arbitration agreement but also the capacity to act as a party in the arbitral proceedings[46]. Both of these two aspects impose restrictions to the principle of party autonomy. They will be further discussed in the following parts.

1.1.1. The capacity to enter into an arbitration agreement

According to New York Convention 1958 and Model Law, one of the requirements for the arbitral award to be recognised and enforced is that parties to arbitration must have the capacity to enter into the arbitration agreement 'under the law applicable for them'[47]. The international commercial arbitration law is silent about the capacity to enter into an arbitration agreement of the parties[48]. Likewise, almost every national law on arbitration do not mention about what element would constitute the lack of capacity but they still agree that the incapacity to enter into the arbitration agreement is a ground for refusing the

[45] Poudret and Besson (n 30) para 269

[46] Z. Abdulla, 'The Arbitration Agreement', in G. Kaufmann-Kohler, B. Stucki (eds), *International Arbitration in Switzerland, A Handbook for Practitioners* (The Hague: Kluwer Law International 2004) 24

[47] Article V(1)(a) of the New York Convention and Article of the Model Law

[48] Steingruber (n 5) 32; Poudret and Besson (n 30) para 270

recognition and enforcement of the arbitral award[49]. Nevertheless, the general rule accepts that 'any natural or legal person who has the capacity to enter into a valid contract also has the capacity to conclude a valid arbitration agreement'[50].

The parties to international commercial arbitration may be a natural person, a corporation or even a State or a State agency. Each category has its own applicable law which may cause different restriction to their party autonomy.

1.1.1.1.Natural persons

In the context of international commercial arbitration, the capacity of a natural person to enter into an arbitration agreement may be influenced by more than one law[51]. It might be the law of that individual's nationality or the law of his or her place of residence or domicile. In some cases, even the law of which governs the contract might also decide the capacity of the person who is a party of that contract[52]. For example, an eighteen-year-old man has full capacity to enter into a contract under the law of his place of residence but under the law of the contract he does not. The problem arises when the other party wants to deny the effect of the arbitration agreement with the reason of incapacity. This is such a dilemma since they cannot answer which law will prevail. The Rome I Regulation on the Law Applicable to Contractual Obligations[53] has a solution for that matter, Article 13 of the Regulation provided that:

> In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his

[49] Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International 2009) 628

[50] Lew, Mistelis and Kroll (n 12) 140

[51] Blackkaby and others (n 3) 95 para 2.30

[52] ibid 96 para 2.31

[53] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence[54].

Though the scope of this rule is quite narrow, it should be considered as a reference to deal with the problem of capacity in the international commercial arbitration.

1.1.1.2.Corporations

The capacity to enter into a contract of corporations varies from state to state. However, generally, it is usually governed by the corporations' institution and the law of the place of the business registration (the place of incorporation)[55]. The corporation's capacity is exercised through its legal representatives in accordance with its institution and its governing law. The problem of incapacity of a corporation arises when it enters into a contract which is out of its power (an *ultra vires*[56] transaction). In this case, the corporation may not be bound by this contract and the arbitration agreement may be invalid. Consequently, many States have established the rules to deal with this situation and to protect the other party in dispute. These regulations are often based on the principle of good faith[57].

Besides, under some national law, the incapacity of a corporation is even caused by the lack of foreign trade licence[58]. For example, in a Germany case[59], a party was held

[54] This rule is only applied for 'persons who are in the same country' and is not a general rule of the Regulation for question relating to the status or legal capacity of natural persons.

[55] Blackkaby and others (n 3) 96 para 2.32

[56] The Latin word *ultra vires* means beyond the powers. It describes an activity of the company which goes beyond the limits of the powers conferred on it [Oxford Dictionary of Law (7th edn Oxford University Press 2009) 564]

[57] Blackkaby and others (n 3) 96 para 2.32

[58] This situation usually happens in state-controlled economies. See Lew, Mistelis and Kroll (n 12) 140-141 para 7-33

lacking of capacity due to the fact that it did not have the foreign trade permission. Therefore, the arbitration agreement was invalid.

1.1.1.3.States or State agencies[60]

This group meet the most serious restrictions while entering into an arbitration agreement. Because of the sovereignty issue, the national law of many states do not permit the State or State agencies to resolving its dispute with other private parties by arbitration[61]. For instance, French Civil Code does not allow conflicts relating to public collectives and public establishment to be referred to national arbitration. In other countries such as Venezuela, Iran or Syria, in order to enter into an arbitration agreement, the state entities must be approved by the relevant authorities[62]. Therefore, in some cases, the State or State agencies try to invoke their national law in order to get out of the arbitration agreement.

However, in the current international commercial context, with the great support from the national court as well as arbitral tribunal, international convention and domestic legislation have found solutions to overcome these restrictions. A significant example is Article II(1) of European Convention of 1961[63] which provided that 'persons considered by the law applicable for them to be legal persons of public law should have the right to

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[59] German Bundesgerichtshof, 23 April 1998, XXIVb YBCA 928 (1999)

[60] Some authors argue that the capacity of State and States agencies to enter into arbitration agreement should be regarded as the matter of arbitrability. Both views are acceptable but in the context of modern commercial law, it is more accurate and appropriate to qualified it as the matter of capacity. See Steingruber (n 5) 36 para 3.19 – 3.22; Fouchard, Gaillard and Goldman, *Traite de l'arbitrage commercial international* (Litec 1996) para 539; Lew, Mistelis and Kroll (n 12) 735 para 27-7; Blackkaby and others (n 3) 97 para 2.37

[61] Blackkaby and others (n 3) 97 para 2.34

[62] Lew, Mistelis and Kroll (n 12) 734 para 27-5

[63] European Convention on International Commercial Arbitration of 1961 done at Geneva, April 21, 1961 [United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964)]

conclude valid arbitration agreement[64]. Although the Convention was not really successful, the concept of this provision is adopted by some member states such as Switzerland[65] or Sweden[66].

In summary, it is necessary to say that even though international as well as national arbitration law are trying to reduce the restrictions to the capacity of States or State organs to enter into an arbitration agreement, these limitations still exist. That is the reason why private parties while concluding an arbitration agreement to a State or State agency should take it into consideration.

1.1.2. The capacity to be a party in the arbitral proceedings

The capacity to be a party in the arbitral proceedings is also governed by the law applicable for them. Nevertheless, the national law on the capacity of the party may distinguish between the capacity to enter into the arbitration agreement and the capacity to sue and to be sued (to be a party in the arbitral proceeding)[67]. For example, an unincorporated body may be able to enter into an arbitration agreement but not able to sue or to be sued[68].

The restrictions to the capacity of party to be a party in the arbitral proceedings can appear before the commencement of the arbitration or during the arbitration proceedings. In other words, the lacking of capacity party may not entitle to take part in the arbitration

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[64] However, this provision is open for reservation and member states of the Convention can make a reservation when signing, ratifying or acceding the Convention [Article II(2)]

[65] See Article 177(2) of the Swiss Private International Law Act 1987

[66] See Court of Appeal, Stockholm, 19 June 1980 (1981) 20 ILM 893

[67] A. Tweeddale and K. Tweeddale (n 41) 128 para 4.64

[68] ibid

proceedings from the start of the arbitration or continue a pending arbitration[69]. In the first case, parties may be restricted to begin the arbitration due to its operation status. For instance, under the law of some states in the United States, the corporation which is 'not in good standing' may be inhibited from initialising the arbitration proceedings[70]. In the second situation, some corporations may also be restricted from continuing a pending arbitration because of its status. In some jurisdiction, the capacity to arbitrate of a corporation terminates when it goes into the bankruptcy[71].

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After this analysis, it can be said that the autonomy of party in international commercial arbitration is significantly affected by the capacity. The capacity can restrict the parties from both entering into an arbitration agreement and taking part in the arbitral proceedings as a party. In other words, due to the lacking of capacity, parties may incapable of choosing arbitration as their dispute resolution. However, the level of impact varies depending on the status of the party. Among all, natural persons are the least affected while States and State agencies are the most seriously influenced.

1.2.The arbitrability of the dispute

The arbitrability, in the most common sense, refers to the possibility of a dispute to be settled by arbitration or not[72]. In other words, the arbitrability decides which type of

[69] Steingruber (n 5) 34

[70] Blackkaby and others (n 3) 97 para 2.32

[71] A. Tweeddale and K. Tweeddale (n 41) 128 para 4.65. See *Andra Insurance Co Ltd (Bermuda) v James P Corcoran Superintendent of Insurance of the State of New York*, (1992) XXVII Ybk Comm Arbn 666. See also Article 142 of the Polish Law on Bankruptcy and Reorganisation.

[72] The arbitration law of the United State has a different approach to the term 'arbitrability'. Under this law, 'arbitrability' also covers the issue of whether the arbitral tribunal or the court would have the jurisdiction to decide which matter would be able to be resolved by arbitration. See Steingruber (n 5) 42 para 3.41-3.48

conflict would be able to be submitted to arbitration[73]. According to Article II(1) and Article V(2)(a) of New York Convention 1958 and Article 34(2)(b)(i) and Article 36(1)(b)(i) of the Model Law, the concerning dispute has to be 'capable of settlement by arbitration'. This is one of the requirements to make the arbitration agreement valid and make the arbitral award recognisable and enforceable. It is suggested that 'arbitrability is the fundamental expression of freedom to arbitrate'[74]. Furthermore, it defines the limitations to the parties' power to go to arbitration[75]. In consequence, the inarbitrability is regarded as one of the restrictions to the principle of party autonomy.

While the autonomous principle gives parties a huge power to opt out of the national court and submit any of their disputes to arbitration, the national law imposes restrictions upon this power by stipulating which matter could be settled by arbitration and which could not[76]. Since arbitration is a private method of dispute resolution with public consequence (for example: the recognition and enforcement of arbitral award)[77], the problem of arbitrability is founded on the protection of the public policy of the country[78].

The issue of arbitrability differs from state to state and there is not any international rule to determine the arbitrability or inarbitrability. Each country decides which dispute would be arbitrable base on the domestic political, social and economic policy[79]. Additionally, the intensity of the inarbitrability is also varied. There are issues which are totally inarbitrable under every law system but there are some others which have different

[73] Blackkaby and others (n 3) 123 para 2.111

[74] K. Youssef, 'The Death of Inarbitrability', in L. A. Mistelis, S. L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 47-68 para 3-6

[75] ibid

[76] Lew, Mistelis and Kroll (n 12) 187

[77] Blackkaby and others (n 3) 123 para 2.113

[78] Laurence Shore, 'Defining 'Arbitrability'', New York Law Journal (15 June 2009) <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf> accessed 06/09/2013

[79] Blackkaby and others (n 3) 124 para 2.114

answers from different national law[80]. Therefore, a conflict which may be arbitrable in one country may be inarbitrable in another. For example, the conflict of matrimonial proceedings is not able to be solved by arbitration under English law but under Libyan law it is[81].

The areas which are completely inarbitrable are regarded as 'the hardcore of inarbitrability'[82]. The most typical example of this group is criminal issues. This field of law is never accepted by any national law to be referred to arbitration, it belongs to the exclusive jurisdiction of the national court. Besides, some field of family law is also forming a part of the hardcore of inarbitrability. For instance, Article 2060 of the French Civil Code stated that: 'It is not permissible to submit to arbitration matters of civil status and capacity of individuals, or relating to divorce or judicial separation of spouses'. According to this provision, the issues which relate to the status or capacity of individuals such as the change of name, change of relationship status or change of nationality, etc are not able to be solved by arbitration. This approach is also obtained by many other jurisdictions.

Beside the issues which fall into the hardcore of inarbitrability, the arbitrability of some other issues is variable and different from state to state. Furthermore, the question of arbitrability is not raised in every field of commercial law. Among all, the arbitrability issue often arises in intellectual property right (patents, trade mark and copyright), antitrust and competition law; insolvency; securities transactions; fraud, bribery and corruption and dispute relating to natural resources. Within these areas, the decision is made on the case-by-case basis with regard to the balance between the public policy of the country and the

[80] Steingruber (n 5) 45 para 3.55

[81] Article 740 and 772 of Document IV, Lybia 2.a (Code of Civil Procedure) allows arbitrators to be appointed to influence in the conciliation between husbands and wives. See Andrew Tweeddale and Keren Tweeddale (n 41) 107 para 4.23

[82] Steingruber (n 5) 45 para 3.56

commercial characteristics of the cases and the rights of relevant parties. For example, in terms of intellectual property law, the issue of granting a patent or trademark falls within the exclusive power of the public authorities and can only be done by state agencies. Nevertheless, in order to protect the trade secrets, the disputes arising out of the intellectual property rights between the licensor and licensee can be arbitrable[83].

As the scope of international commercial arbitration is wider than that of national one, the answer for the problem of inarbitrability in domestic dispute is also different from that in international cases[84]. The US Supreme court in the case of *Mitsubishi*[85] in this case held that:

> '... we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context'[86].

Therefore, the Court decided that antitrust conflicts arising out of international contracts were able to be resolved by arbitration in accordance with Federal Arbitration Act even though in a previous case, the Court had held that claims under the antitrust laws in the domestic context were inarbitrable[87]. This approach is widely recognised and indicates a trend which is now a 'prevailing view'[88]. Likewise, the arbitrability of each

[83] Jullian D. M. Lew, 'Intellectual Property Disputes and Arbitration', Final Report of the Commission on International Arbitration (ICC Publication 1997) 7-15

[84] Lew, Mistelis and Kroll (n 12) 199 para 9-35

[85] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985)

[86] ibid

[87] *American Safety Equipment Corp v JP Maguire Co*, 391 F 2d 821 (2nd Cir 1968)

[88] Lew, Mistelis and Kroll (n 12) 199 para 9-36. See Secretariat Study on New York Convention, A/CN9/168 (20 April 1979), para 45; Kaplan, 'A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting

field and each case is varied in different countries depending on their own national laws as well as public policies.

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Parties voluntarily come to arbitration and select it as their dispute resolution method. This willingness is expressed on the arbitration agreement. However, it is also this agreement which may restrict the autonomy to arbitration of the parties. The lacking of capacity as well as the inarbitrability of the disputes may prevent the parties from resolving their conflict by arbitration. The knowledge on their capacity and the arbitrability of their disputes is the prerequisites in order to draft an appropriate arbitration agreement which may help the parties to effectively exercise their autonomous rights in arbitration.

2. Restrictions imposed by the rules of the arbitration institutions

As abovementioned, in comparison to ad-hoc arbitration, the autonomy of parties in institutional arbitration will have some certain restrictions due to the rules of the arbitration institutions. Though the arbitral tribunal is appointed by the parties, the institutional arbitration is under the administration of the arbitration institution. Each arbitration institution has its own arbitration rules which provide some procedural and other regulation applying for all dispute settled by arbitration in that institution. These rules are set out for the purpose of providing the control and assistance of the institution with the arbitration. Consequently, by choosing an institutional arbitration, parties have acquiesced in this institution's arbitration rules. Parties cannot alter the rules without the permission of the administering body[89]. For example, if parties select solving their conflict by the ICC

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with Domestic Dipsutes. Is There a Worldwide Trend towards Supporting an International Arbitration Culture' in Van den Berg (ed), *ICCA Congress series no 8* (The Hague: Kluwer Law International 1998) 191

[89] Pryles (n 36) 3

International Court of Arbitration (ICC Court) and agree with the ICC Rules of Arbitration but they want to exclude Article 27 of the Rules (which relates to scrutiny of awards by the ICC Court), the ICC Court may not administer the arbitration and refuse to realise the case as an ICC case[90]. It is suggested that:

> '[t]he ICC Court will refuse to administer an arbitration with party agreed modification to the Rules only when a fundamental characteristic of ICC arbitration (such as Court scrutiny of the award) is omitted.'[91]

Accordingly, the desire to waive this significant characteristic of the ICC Court of the parties will be denied. Likewise, fundamental characteristics of other arbitration institutions which ensure the administrative power of the institution to the arbitration will not be disregarded by the consent of the parties.

Apart from the rules of the arbitration institution, the right of the parties in prescribing the procedural matters is also limited by the law of the place where the arbitration taking place. This issue will be discussed in the following part.

3. Restrictions imposed by the law of the seat of arbitration

One of the advantages of arbitration in comparison with the litigation is that parties are free to design their procedural proceedings and they can avoid the formal and strict procedures of the national court[92]. This benefit is recognised in the New York Convention 1958 as well as the Model Law. Article V(1)(d) provided that the recognition and enforcement of the award may be refused if 'the composition of the arbitral authority or the

[90] ibid 4

[91] Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana TM 2000) 295

[92] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books 1994) 78

arbitral procedure was not in accordance with the agreement of the parties'. Same approach can be found on Article 19 of the Model Law.

Nonetheless, this autonomy is not unlimited, it is affected by the law of the seat of arbitration (*lex arbitri*). Although parties are able to choose the seat of arbitration, they cannot control the arbitration law of the seat. These restrictions will be examined in this part through the consideration of the *lex arbitri* as well as the intervention of the national court in the arbitral proceedings.

3.1.The place of arbitration and the lex arbitri

Public international law provides that every nation has full and permanent right to exercise its sovereignty within its boundary[93]. Therefore, any arbitration taken place in the territory of a country will be governed by its national law[94]. Hence, in addition to the autonomy of the parties, the arbitral proceedings will also be governed by the law of the seat of arbitration (*lex arbitri*). According to an English judge, *lex arbitri* is:

> '... a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of arbitration. The law governing the arbitration comprises the rules governing interim measures [...], the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties [...] and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations [...]'[95]

In accordance with this definition, *lex arbitri* is a set of rules which provides the arbitration with the support from national court, supplements what is missing in the

[93] Dursun (n 1) 181

[94] ibid

[95] *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 at 130. This judgement referred to the 2nd edition of the book *Redfern and Hunter on International Arbitration* (n 3)

procedural rules[96] and expresses the control of the Court to arbitration. This set of rules is absolutely out of the arbitration agreement and the wishes of parties. Consequently, if the autonomy of the parties expressed in the arbitration agreement contradicts to the mandatory rules of the law of the place of arbitration, it will not be recognised and exercised. The judgment in the case of *Diagnostica Inc v Centerchem Inc*[97] pointed out that the party autonomy might be restricted by 'the legislative applies to the parties and their conduct of arbitration' which cannot be excluded by agreement. Furthermore, the arbitral award would be set aside on public policy reasons (in accordance with Article V(2)(b) of the New York Convention) if the arbitral tribunal had not applied the mandatory rules of the seat of arbitration[98]. An example of a mandatory rule which is recognised in almost every country is the equal treatment. Article 18 of the Model Law (which is adopted by many countries in the world) provided that: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. Therefore, if parties mutually agree that only the claimant can present his case, the arbitration agreement shall be invalid due to the violation of Article 18 of the Model Law[99] and the arbitral award may not be recognised or enforced on based on the public policy grounds. Nevertheless, the mandatory rules of each state are different due to its cultural, economic and social policy. Hence, the application of mandatory rules of the law of the seat should be determined case by case by taken into consideration the link between each circumstance and the applicable rule[100].

[96] The procedural rules may be decided by the parties (in terms of ad-hoc arbitration) or defined by the arbitration institution (in terms of institutional arbitration)

[97] *Diagnostica Inc v Centerchem Inc* (1999) XXIVa Ybk Arbn 574

[98] Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Schulthess 1989) 235-236

[99] Holzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law 1995) 583

[100] A. N. Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1985) 42 Netherlands International Law Review 81, 106

According to the above definition, the *lex arbitri* also governs the role of the national court in the arbitral proceedings. This matter again falls out of the autonomy of parties. The following part will further examine the role of the court in the arbitral proceedings as well as the limitations that it may cause to the autonomous rights of parties.

3.2.The intervention of the national court in the arbitral proceedings

Though arbitration is a dispute resolution method outside the court, the national court of the seat of arbitration still has an important role in the arbitral proceedings. Parties in international commercial arbitration have the autonomous right to appoint the arbitrators and form the arbitral tribunal to resolve their dispute. However, arbitral tribunal and even arbitration institution are only private bodies, they do not have the power to summon the witnesses or take the interim measures relating to third party, etc. These actions belong to the jurisdiction of the national court and can only be exercised by them.

Although the modern international commercial arbitration tends to minimise the interference of the court in the arbitral proceedings, in fact, the intervention as a supportive element of the court of the place of arbitration can be evidenced from the beginning until the end of the arbitration. Article 5 of the Model law states that: 'In matters governed by this Law, no court shall intervene except where so provided in this Law'. However, Article 6 of this Law recognises the assistance and supervision function of the court in the arbitration. Furthermore many other provisions provide the court with the power to take action in every step of the arbitration[101]. For example, in the beginning of the arbitration, the court could enforce the arbitration agreement (if a party in arbitration submits his dispute to the court) or assist the parties with the appointment of arbitrator. During the

[101] More than 10 over 36 articles of the Model Law recognise the role of the court in arbitral proceedings. See Blackkaby and others (n 3) 441 para 7.06

arbitral proceedings, the court has the power to take interim measures, call for the attendance of the witnesses or preservation of evidence, etc. Finally, after the arbitration finishes, the court has the jurisdiction to recognise or enforce the arbitral award.

The intervention of the court is sometimes the mandatory rule of the seat of arbitration in order to ensure the legal proceeding taking place in a good manner[102] and achieving the best outcome of arbitration. Consequently, parties cannot exclude the jurisdiction of the court in some situation by their agreement. Finally, it is important to note that despite being out of the consent of parties, the intervention of the national court in some stages of arbitration is with the supportive purpose rather than disruptive manner or supervisory[103].

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The tension between the control of court of the seat of arbitration and the rights of parties to determine the arbitral process has been happening throughout the years[104]. This situation keeps going on now without the sign of termination. However, there is an undeniable truth that without the intervention of the court, the goal of a fair and effective arbitration will not be achieved. This intervention is regarded as support the arbitral process or interference in it depends on the personal opinion of different judges and authors[105]. The most important thing that should be taken into account is how to balance the autonomy of party to decide their arbitration conduction against an appropriate level of

[102] ibid 463 para 7.64

[103] Claude Reymond, 'The Channel Tunnel Case and the Law of International Arbitration' (1993) 109 LQR 337, 341

[104] Jullian D. M. Lew, '2005 Freshfields Arbitration Lecture, Achieving the Dream: Autonomous Arbitration' (2006) 22 Arbitration International 179, 181

[105] John Lurie, 'Court intervention in arbitration: support or interference?' (2010) Arbitration 76(3) 447, 453

control of the court over the arbitral proceeding process[106]. This issue will need a further discussion in the future.

4. Restrictions imposed by the decision of the arbitral tribunal

Before commencing the arbitration, it is essential for the arbitral tribunal to determine the law applicable for the arbitral proceedings as well as the merit of the disputes. As abovementioned, the principle of party autonomy allows parties not only to design their own procedural rules but also to choose the law governing their dispute that the arbitral tribunal are obliged to follow. However, this autonomy is not absolute. In the context of international commercial arbitration, the choice of law of the parties can be sometimes be disregarded by the arbitral tribunal. This section will focus on these limitations.

4.1.Limitations imposed by the arbitral tribunal's determination regarding to the procedural matters

In principle, according to the party autonomy rule, parties are free to decide the arbitral proceedings that the arbitral tribunal has to follow. Moreover, parties can exercise these rights in every stage of the arbitral process whether the arbitral tribunal has been established or not. That means they can change their mind and redesign anything at anytime. In fact, the autonomy of parties is not that wide. When the arbitral tribunal has been constituted, the determination of parties on the arbitral proceedings can be affected by the decision of the tribunal.

It is suggested by English court that after accepting the appointment, the arbitrators become a party in the arbitration agreement and their rights and obligations are bound by

[106] ibid

this agreement[107]. Hobhouse J in the case of *Compagnie Européene de Cerelas SA*[108] held the view that:

> 'It is the arbitration contract that the arbitrators become parties to by accepting appointment under it. All parties to the arbitration are a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.'[109]

The same point of view is shared by Mr Justice Phillips in *KS Najari A/S v. Huyndai Heavy Industries Co. Ltd*[110]. This conclusion resulted in a restriction to the autonomous rights of parties to modify the arbitration agreement. Accordingly, after the arbitral tribunal establish and become a party of the arbitration agreement, the unilaterally change to the terms of this agreement of the parties without the consent of the tribunal is not allowed[111]. For example, if the parties agree a certain time to submit the memorial in the arbitration agreement, they cannot extend that time without the acceptance of the arbitral tribunal.

4.2.Limitations imposed by the arbitral tribunal's decision about the applicable law

Another case when the autonomy of the parties will be influence by the arbitral tribunal's decision is relating to the application of the law governing the merit of the dispute. The substantive law will be determined by the selection of the parties or decision of the arbitral tribunal by taking into consideration the conflict of law rules[112]. The

[107] Pryles (n 36) 5

[108] [1986] 2 Lloyd's Rep. 301

[109] ibid 306

[110] [1991] Lloyd's Rep. 260 (Commercial Court)

[111] Pryles (n 36) 5

[112] This rule is recognised in Article 28 of the Model Law

problem arises when the parties exclude the mandatory rules of the substantive law and when the arbitral tribunal apply another law apart from the law chosen by the parties (when the choice of law of the parties is against the public policy or overriding mandatory rules).

4.2.1. The application of the mandatory rules of the substantive law

In the first case, it is commonly accepted that the arbitral tribunal will apply the mandatory rules along with other regulations of the law governing the merit of the dispute[113]. However, the things become more complicated when these mandatory rules are excluded by the parties in their agreement. Will the arbitral tribunal follow the consent of the parties or have another decision? This problem has not been turn up yet in any published arbitral award, however, it is suggested that there would have been a negative answer for this question and the arbitral tribunal would not be able to accept this violation and follow the will of the parties in this case[114]. Usually, effect is given to the mandatory rules irrespective the will of parties[115]. Therefore, in order to decide whether to apply a mandatory rule or not, the arbitrators should consider all relevant elements such as the intention of the parties in the excluding the mandatory rule, the content of this rule and other related issues then balance these factors and make their decision independent of the desire of the parties[116].

[113] M. R. Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration' (1992) 10(1) Int. Tax & Bus. Lawyer 59, 71-72; P. Mayer, 'Mandatory rules of Law in International Arbitration' (1986) 2(4) Arb. Int 274, 280-281

[114] Zhilsov (n 100) 109

[115] Baniassadi (n 113) 74

[116] Zhilsov (n 100) 110

4.2.2. The application of the law not chosen by the parties

Parties to international commercial arbitration can choose any law to govern the substantive issues of their conflict if they find it suitable for their relationships[117]. In principle, the arbitral tribunal has the duty to follow the choice of the parties no matter it is national law, public international law, concurrent law or transnational law, etc. Nonetheless, in the case when this choice contradicts their contractual relations or goes against the public policy or not *bona fide*[118], the duty of the arbitral tribunal can be abandoned[119].

In terms of *bona fide* requirement, it is a rule that is recognised universally; hence almost every law system has similar definition for this term[120]. Under contract law, the *bona fide* requires parties to treat each other equally, honestly and in good faith so as all parties would gain their benefit of the contract[121]. However, the application of this rule must be considered separately case by case and there is not any general rule for applying it[122]. With regard to the public policy, as mentioned before, this concept is approached differently in different states depending on the domestic conditions and policies. Therefore, the arbitral tribunal also needs to analyses each case separately to decide whether the applicable law is contrary to the public policy or not. Moreover, following the choice of parties which is contrary to the public policy can cause the award unrecognisable or

[117] Chukwumerije (n 92) 108

[118] *Bona fide* (Latin) means good faith. In this circumstance, it refers to the choice of law of the parties. For example, it can be a choice that may avoid an unfavourable term or a regulation for one of the parties.

[119] Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 Transnat'l Law 323, 341

[120] Dursun (n 1) 174

[121] 'Good faith' in Legal Dictionary <http://dictionary.law.com/Default.aspx?selected=819&bold=> accessed 17/09/2013

[122] Dursun (n 1) 174

unenforceable[123]. For example, in the famous case of *Soleimany v Soleimany*[124], an award was refused to be enforced due to the contradiction of the contract to the public policy. In this case, a man and his father made a contract to smuggle some carpets out of Iran. However, under the Iranian law, this activity is illegal. After a dispute arose between the father and the son, they decided to submit their conflict to the Beth Din with the Jewish law as the applicable law. Under Jewish law, the fact that a contract was unlawful did not affect the rights of the parties. Accordingly, the Beth Din made the award enforcing the contract and resolving the dispute. However, the English Court of Appeal declined to enforce the award with the reason that the contract is illegal and therefore it contradicted to the public policy[125].

The arbitral tribunal's decision on the application of the law not chosen by the parties can be justified by the idea that 'the fact that the parties have chosen a certain governing law does not exclude the relevance of all rules of any other laws'[126]. Therefore, the arbitral tribunal can still apply the law chosen by the parties along with other law such as transnational law or private international law in order to supplement the omission from the choice of parties. By such way, they can prevent the award from being unrecognised or unenforced on the ground of public policy. Additionally, the judge commonly has no jurisdiction to review the arbitral tribunal's discretion of the choice of parties or the law application[127], therefore, the arbitral award will also not be challenged with the reason of the excess of power[128].

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[123] According to Article V(2)(a) New York Convention 1958; Article 36(b)(ii) Model Law

[124] [1999] QB 785

[125] ibid at 800

[126] Giuditta Codero Moss, 'Can an arbitral tribunal disregard the choice of law made by the parties?' (2005) Stockholm International Arbitration Review 8

[127] One exception is section 69 of English Arbitration Act 1996 which allows the court to challenge the arbitral award on a question of law. However, the section has very strict limits to the appeal on a point of law. Furthermore, the question of law is appealed should be one of English law, not other laws. See Lew, Mistelis

4.2.3. The application of overriding mandatory rules

The previous parts have mentioned and analysed how the mandatory rules in the national law of one country (ordinary mandatory rules) affect the party autonomy. Nonetheless, the consent of the parties in international commercial arbitration is even more severely restricted by the application of some other rules called 'overriding mandatory rules'. Before dealing with this issue, this part will firstly make a comparison and distinguish between the ordinary mandatory rules and overriding mandatory rules.

4.2.3.1. Ordinary mandatory rules and overriding mandatory rules

The above parts have already mentioned about the mandatory rules in the law of the seat of arbitration and the substantive law chosen by the parties. In order to distinguish it with another type of mandatory rules, this type is called 'ordinary mandatory rules' or 'common mandatory rules'[129]. The other type is 'overriding mandatory rules'. Overriding mandatory rules is also called the international mandatory rules. This term indicates that these rules have the 'international' characteristics. These features are reflected in the fact that the overriding mandatory rules are the rules being applied universally in the private international law (while the ordinary mandatory rules are only applied in one country)[130]. Article 9(1) of the Rome I Regulation defines the 'overriding mandatory rules' as:

> '[...] provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling

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and Kroll (n 12) 679. See also *Reliance Industries Ltd v Enron Oil & Gas India Ltd [2002] 1 All ER (Comm) 59 (QBD).*

[128] Moss (n 126) 20

[129] Monika Pauknerová, 'Mandatory rules and public policy in international contract law' (2010) Vol.11(1) ERA Forum 29, 39

[130] ibid

within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

According to this definition, international mandatory rules aim at safeguarding the political, economical and cultural public interest of the country[131] (such as import and export regulations, price control polices, etc)[132]. Meanwhile, the ordinary mandatory rules focus on protecting the weaker party in a contract (such as labour protection, consumer protection, etc)[133]. Furthermore, the overriding mandatory rules will be applied under any circumstance falling within their scope, regardless of the law chosen by the parties.

In addition, with regard to the question how the overriding mandatory rules should be applied, paragraph (3) of this article also indicates that:

> 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.'

Although it is still regarded as a problematic provision[134], Article 9(3) has actively assisted the court as well as the arbitral tribunal in deciding how to apply the overriding mandatory rules of a third country (not the law of place of arbitration and not the law governing the

[131] In this respect, the definition of overriding mandatory rules is very close to that of public policy. Nevertheless, there has not been any clear distinction between these two concepts. See A.N. Zhilsov (n 100) 100-115

[132] Adeline Chong & Jonatha Hill, *International Commercial Disputes: Commercial Conflict of Laws in English Court* (4th edn, Hart Publishing 2010) 352. See also C. Tillman, 'The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention' [2002] JBL 45, 49

[133] ibid

[134] For further analysis, see Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?' (2009) Vol.5 Journal of Private International Law 447

contract). This guideline has indicated that the overriding mandatory rules of the law of the country 'where the obligations arising out of the contract have to be or have been performed' should be taken in consideration. Moreover, in order to decide to apply or not apply these rules, the arbitral tribunal should refer to the nature and purpose of the rules as well as the consequence of their decision.

Though these guidelines are only applied for member states of the European Union, it is still a helpful reference source for all judges and arbitrators worldwide while considering which rules should be regarded as overriding mandatory rule and how to apply it.

Under international commercial arbitration context, the application or non-application of the overriding mandatory rules depends on the decision of the arbitral tribunal. Additionally, the application of these rules will impose some restrictions to the autonomous rights of parties. This issue shall be examined in the following part.

4.2.3.2.The application of the overriding mandatory rules

Sometimes, parties to international commercial arbitration choose another applicable law for their contract, rather than the law that should be applied in order to avoid some unfavourable conditions. Nonetheless, it would be immoral and impractical to perform a contract which is unlawful under the law of the place where it is performed[135]. Therefore, the overriding mandatory rules of that law should be applied or the award will be at risk of being challenged on the ground of public policy. Additionally, the public interests are always protected by the judges in national courts, consequently, being a

[135] D. Hochstrasser, 'Choice of Law and 'Foreign' Mandatory Rules in International Arbitration' (1994) 11(1) J Int. Arb. 57, 86

substitute for the court, there is no reason for the arbitration to disregard the provisions aiming at safeguarding these interests[136].

The case-law have shown that in many cases, the arbitral tribunal showed their positive attitude in considering the overriding mandatory rules of a third country with which the case had a close connection to[137]. For example, in ICC Award 6500/1992[138], the arbitral tribunal stated that the mandatory rules of a third State should be taken into account whether the applicable law was the *lex mercatoria* or any other law system. Hence, in this case, the Lebanese mandatory rule was invoked even though the proper applicable law had been the *lex mercatoria*. In another case, the arbitrators made a suggestion that the law chosen by the parties should give way to the mandatory rules of the legal system which had a connection with the case[139]. Moreover, in some cases, the arbitral tribunal even actually applied the mandatory rules of the law of the place of performance[140].

In general, although the power of the arbitral tribunal to disregard the choice of law of the parties in order to give way to the overriding mandatory rules of a third country is not widely recognised in international as well as domestic sources of international commercial arbitration, practices have shown that the arbitrators have the power to do so. This power of the arbitral tribunal to apply the international mandatory rules has placed some restrictions on the autonomy of parties to choose their applicable law.

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[136] Zhilsov (n 100) 111

[137] ibid 117

[138] 119 Clunet (1992) No.4, 1015

[139] ICC Award 3356/1983 (unpublished). See A. N. Zhilsov (n 100) 117

[140] See ICC Award 1859/1973 [Mayer (n 113) 286]; ICC Award 2136/1974 [Jarvin and Derains, *Collection of ICC Arbitral Awards 1974-1985* (Kluwer Law International 1990) 456]

The analysis in this part has pointed out that the decision of the arbitral tribunal can restrict powers of parties to design the procedure of the arbitration and choose the applicable law. After accepting the appointment to be the arbitrators, the arbitrators become a party of the arbitration agreement. Hence, the parties in international commercial arbitration cannot unilateral change their mind in some matters relating to the procedure of the arbitration without permission of the arbitral tribunal.

Furthermore, as some rules of private international law is always a part of the national law or the transnational law chosen by the parties, the arbitral tribunal has the freedom to interpret the parties' instruction and apply the private international law that they find appropriate without the fear of exceeding their power. Finally, the key point should be noted after these parts is: the mandatory rules (whether of the law of the seat of arbitration or the substantive law or the overriding mandatory rules of a third state) has imposed a serious restriction on the autonomy of parties to design and conduct their arbitration. Though parties are still able to choose their applicable law, their choice is sometimes disregarded by the arbitrators if it contradicts to the mandatory rules or public policy.

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In summary, it is necessary to emphasise that: although the principle of party autonomy is an indispensable element of arbitration and plays a very important in every stage of the arbitral proceedings, this principle is not absolute. In fact, the autonomous rights of the parties are restricted by various factors - both subjective and objective ones. In terms of the parties themselves, the freedom to choose arbitration as their dispute resolution is limited by their capacity. It leads to the fact that even though parties want to resolve their conflict through arbitration, their legal status and incapacity prevent them from doing so. Besides, there are also some objective restrictions to the party autonomy

principle such as the arbitrability of the dispute, the rules of the arbitration institution, the law of the seat of the arbitration along with the intervention of the competence court of the seat and the decision of the arbitral tribunal. After analysing all of these limitations, mandatory rules (both ordinary and international ones) emerge as a high-light which may cause the parties some difficulties in designing their arbitral procedures as well as choosing the substantive applicable law. Despite the effort to maximise the autonomy of the parties in international commercial arbitration of the UNCITRAL and other organisations, the practices have shown that these restrictions still exists. Is this circumstance good or bad? And will it needs to be changed in the future in order to support the development of international commercial in general and international commercial arbitration in particular? The next chapter will provide the answers for these questions.

CHAPTER 3: Evaluating the current situation and making a prediction of the development trend in the future

As being examined in the previous chapter, the principle of party autonomy in international commercial arbitration has to face up to many restrictions imposed by different factors. In the modern context, are these restrictions good or bad for the development of international trade as well as international commercial arbitration? Will the party autonomy be upheld or more restricted in the future? This chapter will deal with these questions.

1. Evaluating the good side and bad side of the current restrictions on the principle of party autonomy in international commercial arbitration

As they often say 'Every coin has two sides', this issue is not an exception. The restrictions imposed on the principle of party autonomy may be bad in one sense but good in another one. In order to predict the developing trend of the current situation in the future, it is essential to consider both sides of these limitations. This part will respectively deal with reasons for anti-restriction and pro-restriction.

1.1.Anti-restrictions: the limitations are bad for the development of international commercial arbitration

The introduction of the Model Law is regarded as a great effort of the UNCITRAL to actualise the 'fundamental influence' of the principle of party autonomy[141]. However, this effort has not reached its greatest success since the principle still meets some restrictions in many stages of the arbitral proceedings. Therefore, it is not wrong to identify that these limitations are bad and they prevent the development of the international commercial arbitration. This section will point out some reasons for that evaluation.

[141] Lew, Mistelis and Kroll (n 12) 27 para 2-39

Firstly, since party autonomy is the keystone of the arbitration, limiting it is limiting the development of arbitration. An author suggests that: 'When we imagine international commercial arbitration as a drama, the principle of party autonomy is the director of this drama'[142]. In accordance with this comment, the drama could not be interesting and attractive if the ability of the director was limited. He cannot choose the actors and actresses that he wants, hence, he is not able to create a good play. Likewise, arbitration could not achieve the best result if the ability of the parties to determine the conduction of arbitration was restricted.

Secondly, these restrictions have increased the interference of the national court in the arbitral proceedings and decreased the independence of the arbitration. In the dawn of arbitration, the arbitral tribunal enjoyed full authority to determine the cases which were submitted to them. With the principle 'you've made your bed so you must lie in it'[143], parties to arbitration voluntarily accepted the effect of the arbitral award and the court was not able to interfere in any stage of the arbitral proceedings. However, in the modern time, every nation wants to take control of the arbitration through the intervention of the court. The arbitral tribunal is not granted the authority to exercise the interim measures which belongs to the exclusive jurisdiction of the national court. The arbitration is more and more dependent to the court and cannot deal with the case on their own from the beginning until the end of the proceedings. With the existing limitations, arbitration will not be able to get out of the shadow of the court and cannot independently develop.

Thirdly, arbitration is chosen as a preferred method of dispute resolution due to its flexibility which is granted by the party autonomy principle. Furthermore, this principle also gives party the right to keep their dispute as well as its resolution confidential. All of

[142] Dursun (n 2) 184

[143] Christie (n 9) 144. See n 10

these features attract the businesses and traders to choose arbitration as their dispute resolution method. Nonetheless, the current situation may cause them to reconsider this idea. On the one hand, the predictability of the arbitration which parties bargained for and voluntarily chosen will be lost[144]. On the other hand, the arbitrators' failure to follow the choice of the parties (by applying the mandatory rules) will make the parties lose their belief in arbitration[145]. In the modern context, how would the arbitration survive without that confidence?

For these reasons, the author thinks that the current restrictions on the party autonomy principle may slow down the development of the international trade in general and the international commercial arbitration in particular. Nevertheless, in another side, will these limitations become an encouragement for the advancement of arbitration? The coming part will give the answer for this question.

1.2.Pro-restriction: the restrictions is beneficial to the development of international commercial arbitration

To some extent, the restrictions to the principle of party autonomy are not as bad as people usually think. From a positive point of view, the intervention of the court and the application of mandatory rules somehow have good effects.

The first point is: although arbitration is a private dispute resolution method, it is not a self-executive body and has to seek for the support from national court in every stage of the arbitral proceeding in order to ensure its efficacy[146]. In fact, the arbitration cannot come to an end with a good result without the assistance from the court. This assistance is

[144] Shackelford (n 40) 901

[145] ibid

[146] Marful-Sau (n 8) 11

regarded as support rather than interference and taking control. Furthermore, under the modern arbitration law of almost every nation nowadays, the court is not allowed to interfere in the substantive matters of the dispute which is being resolved by arbitration. The decisions of the court in any stage of arbitral proceedings only relate to procedural issues. Therefore, it would be too negative to say that the court is interfering and taking control of the arbitration. The national courts only fulfil their responsibility to support the arbitration and make arbitration become their effective substitution. In other words, the support from national court makes arbitration become clearer, more legal and more efficient.

Besides, the intervention of the court and the application of mandatory rules ensure that the freedom of choice of parties is consistent with the law, protect the weaker party and prevent unlawful commercial activities. The judgment of *Soleimany v Soleimany*[147] is an evidence for that comment. Smuggling is illegal under commercial law of every nation. It would be harmful for the development of the international as well as domestic trade. Consequently, by disregarding the award of Beth Din, English court had created a good precedent and contributed to prevent this illegal activity to happen again. Not every businessman has good behaviour in doing their business, some are doing illegal activities to earn huge profit. Therefore, controlling the freedom of choice of parties in international commercial arbitration is an attempt to avert these unlawful trade activities which may have bad influence on the international and national economy.

According to these reasons, it can be seen that the limitations to the party autonomy principle is not only good for the development of the international commercial arbitration but also beneficial for the stability and improvement of international trade as well as international and national economy. Balancing the good side and bad side of the

[147] [1999] QB 785

restrictions, the final part will make some prediction of the development trend of the principle of party autonomy and international commercial arbitration in the future.

2. A prediction of the development trend in the future

As being examined above, the restrictions on the party autonomy principle may have both bad and good effects on the development of international commerce as well as international commercial arbitration. Whether the good side is overwhelming the bad side or vice versa, it is the matter of different point of views. Nevertheless, there is an undeniable fact that the world economy and commerce is still developing and so do international commercial arbitration. In this part, the author will suggest the trend of the change of the limitations on the principle of party autonomy in the modern and upcoming time.

A common trend that can be easily seen is: the restrictions are less serious nowadays. In other words, national as well as international commercial arbitration law are trying to 'loosen the ties' on party autonomy principle. One typical example is that the list of inarbitrable issues is being shortened down. For instance, the approach in the *Mitsubishi* case[148] has been widely recognised and created a 'prevailing view'[149] trend of changing the view on the arbitrability of an issue under international context. As being suggested by the authors of the famous arbitration book: *Redfern and Hunter on International Arbitration*, 'in broad term most commercial disputes are now arbitrable under the laws of most countries'[150].

[148] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985)

[149] Lew, Mistelis and Kroll (n 12) 199 para 9-36

[150] Blackkaby and others (n 3) 135 para 2.144

Besides, the delocalisation theory is being developed and accepted in many legal systems. The delocalisation theory maintains that the arbitration should be absolutely detached from the law of the seat of arbitration (*lex arbitri*) and then there is no place for the intervention and control of the national court[151]. Furthermore, the international commercial arbitration should not be controlled by the national legal system of the place where the award is rendered and only the law of the place of recognition and enforcement should be referred to[152]. This approach has been recognised in a number of cases from different law systems. For example, the Court of Appeals in the case of *Gotaverken Arendal AB v Libyan General National Maritime Transport*[153] stated that:

> 'The place of the arbitral proceedings, chosen only in order to assure the neutrality, is not significant; it may not be considered an implicit expression of the parties' intent to subject themselves, even subsidiary, to the 'loi procedural francaise''

The same support for the delocalisation theory can be found on many other cases in different jurisdiction[154]. These practices indicate that countries are trying to modernise their international commercial arbitration law by enhancing the importance of the principle of party autonomy and cut down the restrictions on this principle as well as minimise the interference of the court in the choice of parties.

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[151] Lew, Mistelis and Kroll (n 12) 65 para 4-49

[152] Masood Ahmed, 'The Influence of The Delocalisation and Seat Theories upon Judicial Attitudes towards International Commercial Arbitration' (2011) Arbitration 77(4) 406, 408. For more information on the Delocalisation theory, see also Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 I.C.L.Q 358.

[153] *Gotaverken Arendal AB v Libyan General National Maritime Transport* Co cour d'Appel de Paris (1980) XXII Ybk Comm

[154] See Cour de cassation, *Pabalk Ticaret Limited Sirketi v Norsolor SA* (1984) 112 Clunet 679 (1985); Cour de cassation, *Polish Ocean Line v Jolasry* (1993), Rev Arb 258 (1993), Cour de cassation, *Hilmarton Ltd v Omnium de traitement et de Valorisation* – OTV, Rev Arb 327 (1994), XX YBCA 663 (1995); *The Arab Republic of Egypt v Chormalloy Aeroservices Inc* (1997), 939 F. Supp. 907 (D.D.C 1996); CA Paris, *Société PT Putrabali Adyamulla v SA Rena Holding* (2007), C.cass, 1 ère civ.

Nevertheless, the application of the mandatory rules is still a controversial problem. Since it stands between the protection of the public interest and the encouragement of commercial development, this restriction is still difficult to get over. The disregard of the mandatory rules by the arbitrators may affect the arbitrability of this kind of dispute in the future. In other words, the development of international commercial arbitration will also be influenced by the attitude of the arbitrators to the mandatory rules. It is such a tough decision for the arbitrators. Therefore, in recent time, the arbitral tribunal is still very careful in considering the application or non-application of these rules.

In general, in the coming time, the principle of party autonomy will still stand as the backbone of international commercial arbitration. The modern arbitration law will move toward removing the restrictions on the autonomous rights of parties to manage their arbitration. Nonetheless, the limitations imposed by the mandatory rules and public policy will stay as a means of the States to maintain an effective arbitration and legal commerce in their countries. In addition, the role of the national court in arbitral proceedings, though being reduced under delocalisation theory, still cannot be completely eliminated, especially in recognition and enforcement of the arbitral award[155]. With the goal of ensuring 'minimum levels of fairness and justice and finality of the dispute'[156], this intervention of the national court is still considered as encouraging actions to arbitration. Finally, in the future, international commercial arbitration will reach to a higher level of uniformity and predictability in every stage of arbitral procedure.

[155] Nygh (n 21) 27

[156] Ahmed (n 153) 422

CONCLUSION

Under international commercial arbitration context, from the past to present, the principle of party autonomy has always been regarded as a keystone and the basis of arbitration. This principle plays an extremely important part in every stage of the arbitration process. It allows parties to decide all fundamental components of the arbitration such as the place of arbitration, the applicable law, the number of arbitrators, etc.

Nevertheless, this principle is not absolute. In fact, it is restricted by many factors. Firstly, the autonomous rights of the parties are affected by the arbitration agreement, particularly, the capacity conclude the arbitration agreement and the arbitrability of the dispute. The incapacity of one of parties will prevent them from solving their dispute through arbitration. Likewise, parties also cannot submit a conflict to arbitration if it is inarbitrable. Secondly, in institutional arbitration, parties cannot unilaterally change the rules of the institution. Thirdly, the rights to determine the arbitral procedures of the parties are restricted by the *lex arbitri* and the intervention of the national court at the seat of arbitration. Last but not least, the consent to arbitration of the parties is limited by the decision of the arbitral tribunal relating to the applicable law, especially the mandatory rules. Among all of these restrictions, the mandatory rules are regarded the most formidable barrier to the exercise of the autonomy of parties. This might be the mandatory rules of the place where the arbitration is taken place or of the substantive law applicable for the dispute or even the international mandatory rules of a third place which has connections to the case. Regardless of the type of the mandatory rules, the application of these rules will cause the choice of law of parties be disregarded by the arbitral tribunal or if the arbitrators still apply the law chosen by parties which is against the mandatory rules,

the arbitral award will have the chance of being challenged and unenforceable or unrecognisable.

Toward the future, national as well as international law on international commercial arbitration tend to maximise the effect of the principle of party autonomy by removing these restrictions. Many actions have been taken, two among them are strengthening the list of arbitrable issues and applying the delocalisation theory. Though these practices have not been successful in all over the world, they are good signs for the development of the international commercial arbitration in general and party autonomy principle in particular. Nevertheless, in the recent time, there is still no effective way to eliminate the application of mandatory rules as well as the role of the national court in enforcement and recognition of the arbitral award. In the opinion of the author, it is better to keep these restrictions and balance them with the autonomous rights of parties rather than entirely remove them. These regulations should be kept as a safeguard to the public interest and a method to supervise the arbitration and keep it in the fairness and legal control. In the future, arbitration will still be the most preferred method of alternative dispute resolution methods. It even goes further and attracts more business and traders if the international commercial arbitration law does a good job in harmonising the autonomy of party with the supervision of the States through national courts without interfering and imposing too many restrictions on the autonomous rights of party in conducting their arbitration.

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