

Parties' autonomy in international commercial arbitration

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Abstract- The Author has critically examined the parties' autonomy in international commercial arbitration in every aspect like parties autonomy in formation of arbitration agreement, in law applicable to arbitration, before the arbitrator and during the arbitration in hypothetical view.

INTRODUCTION

Arbitration is quite popular method used for resolving international commercial disputes now a day. The parties to an international commercial contract do not want to resolve their disputes through litigation, since the court which is national for a party may be foreign for another party. In addition to this, the parties do not want to deal with procedural formalities. Consequently, the parties choose arbitration as a private dispute settlement and thus, they can conduct all proceedings of arbitration by taking into account their needs and desires such as they can arrange timetable of hearings, choose anyone as an arbitrator who have relevant expertise on specific requirements of the dispute. The basic difference between litigation and arbitration is that arbitration is a private dispute settlement based on the will of the parties.¹ In this sense, according to parties' autonomy, the parties are free to choose applicable laws, conduct the arbitration process and control all details of arbitration.² Arbitration is rooted in the principle of freedom of contract,³ because the parties can exclude the jurisdiction of courts and choose arbitration as dispute settlement method by means of arbitration agreement. Moreover, the freedom of contract enables the parties to plan all aspects of arbitration. On the basis of these arguments, it is undoubtedly clear that parties' autonomy is a reflection of freedom of contract and it is "key principle"⁴ of arbitration. Parties' autonomy ensures that arbitration will proceed in accordance with the aspirations of the parties.⁵ When parties draft an arbitration agreement they enjoy broad freedom to construct a dispute resolution system of their choice. It can provide for ad hoc or institutional arbitration, the parties can designate the number of arbitrators, their qualifications and matters relevant to the procedure to be followed. After the arbitration agreement has been concluded, and before arbitration has been commenced, the parties are free to modify their agreement in any way they deem fit.

The principle of parties autonomy has been accepted throughout the world. It has been recognized by international conventions, UNCITRAL Model Law,⁶ New York Convention,⁷ Rules of International Chamber of Commerce (ICC),⁸ English Arbitration Act 1996. The basic principle regarding parties' autonomy is that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."⁹ The principle of parties' autonomy, in general sense, started to develop in the nineteenth century.¹⁰ Actually, parties autonomy is based on choice of law in a contract.¹¹ However, this principle has broader meaning in international commercial arbitration. In other words, the parties to the arbitration agreement are free not only to choose laws but also to conduct the arbitration proceedings. However, it should

¹ Anoocha Boralessa, "The Limitations of Party Autonomy in ICSID Arbitration" [2004] 15 Am. Rev. Int'l Arb. para253, para 266.

² *ibid*, para 266.

³ Thomas E. Carbonneau, "The Exercise of Contract Freedom in Making of Arbitration Agreements" (2003) vol. 36 Vanderbilt Journal of Transnational Law 1189, 1189-1196.

⁴ *The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd.* [2001] UKPC 34, 16 July 2001, PC.

⁵ C. Chatterjee, "The Reality of Party Autonomy Rule in International Arbitration" (2003), 20(6) Journal of International Arbitration 539, 540. *Yalova Üniversitesi Hukuk Fakültesi Dergisi* (2012/1) 164.

⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (hereinafter "Model Law"), art 28.; This principle can be found in UNCITRAL Arbitration Rules (as revised in 2010) as well. According to art 35, "The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute."

⁷ 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention (hereinafter "New York Convention") art V (1(d)).

⁸ ICC Rules Of Arbitration, art 17.1.

⁹ English Arbitration Act 1996 (hereinafter English Arbitration Act), s 1(b).

¹⁰ Dicey, Morris and Collins, *The Conflict of Laws*, vol 2 (14th edn, Sweet&Maxwell 2010) para 32-004.

¹¹ *ibid* para 32-004.

not be overlooked that the principle of parties' autonomy is not always a rule in international commercial arbitration.¹² In some circumstances, it may be subject to some restrictions. It is important to examine this principle in order to understand arbitration as a whole. Thus, the role and extent of party autonomy will be dealt in this work.

RESEARCH QUESTIONS

1. What is the limitation of parties' autonomy, if any?
2. Can the parties agree on any matters they please, or are there any restrictions?
3. Is the tribunal always bound to follow the agreement of the parties?
4. What is the limit of parties' autonomy in the situation prior to the commencement of an arbitration and post-commencement of arbitration?
5. Whether the role of national courts imposes restrictions on parties' autonomy?

HYPOTHESIS

The parties in international commercial arbitration have broad freedom in every aspect, like, freedom to choose the type of arbitration, law applicable to the arbitration, number of arbitrators, the place of arbitration and procedure of arbitration, etc. but not the absolute autonomy.

Restrictions are imposed by the law and judicial authority on the basis of public interest, public policy, bonafideness, legality and natural justice.

1. PARTIES AUTONOMY IN FORMATION OF ARBITRATION AGREEMENT

It is important to assess the position and importance of the arbitration agreement in order to assess the role and extent of parties' autonomy, since arbitration agreement is a core element of arbitration and it reflects the autonomy of the parties.¹³ It has a significant role at all the stages of arbitration. Arbitration agreement is an agreement in which at least two parties decide to resolve their dispute through arbitration.¹⁴ English Arbitration Act also states that the meaning of arbitration agreement is "an agreement to submit to arbitration present or future disputes".¹⁵ There are two types of arbitration agreement:

1. Submission agreement¹⁶
2. Arbitration clause.¹⁷

As to the *first* requirement, not only New York Convention¹⁸ but also Model Law¹⁹ requires that arbitration agreement shall be in writing. According to Model Law, arbitration agreement is regarded as being in writing if the content of agreement is recorded in any form; for instance, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. New York Convention requires that arbitration agreement must be in writing and signed by the parties. As to being in writing requirement, exchange of letters or telegrams is acceptable. However, if the modern communication devices are considered, this requirement should be interpreted in terms of Model Law.

As to the *second* requirement, the dispute must arise out of a legal relationship whether contractual or not.²⁰ Actually, there must be a contractual relationship between parties as a basis of arbitration.²¹

As to the *third* requirement, not only New York Convention²² but also Model Law²³ requires that, the subject matter of arbitration agreement must be capable of being settled by arbitration. The reason behind this requirement is that arbitration is

¹² Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 256.

¹³ Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books, 1994) 30.

¹⁴ Tweeddale and Tweeddale, 97. , referred in C. Chatterjee, "The Reality of Party Autonomy Rule in International Arbitration" (2003), 20(6) *Journal of International Arbitration* 539, 540. Yalova Üniversitesi Hukuk Fakültesi Dergisi (2012/1) 164. by Ar. Gor Sedya Dursun.

¹⁵ English Arbitration Act 1996, s 6.

¹⁶ Submission agreement is separate agreement from the main commercial contract. The subject matter of submission agreement is existing disputes.

¹⁷ Arbitration clause is a part of main commercial contract. The subject matter of the arbitration clause is future disputes.

¹⁸ New York Convention, art II (1).

¹⁹ Model Law, art 7 option I.

²⁰ New York Convention, art II (1).

²¹ Redfern and Hunter, para 2.22. , referred in C. Chatterjee, "The Reality of Party Autonomy Rule in International Arbitration" (2003), 20(6) *Journal of International Arbitration* 539, 540. Yalova Üniversitesi Hukuk Fakültesi Dergisi (2012/1) 164. by Ar. Gor Sedya Dursun.

private method with public consequences.²⁴ In this sense, some disputes cannot be resolved by arbitration because of “national legislation or judicial authority.”²⁵ The issue of arbitrability is based on public policy.²⁶ In general, the disputes about family law and criminal law are regarded as a matter of public policy; hence these are not capable of settlement by arbitration.

As to the *fourth* requirement, the parties to the agreement must have legal capacity to enter into the agreement.²⁷

As to the *fifth* requirement, arbitration agreement must not be null and void, inoperative and incapable of being performed.²⁸ For example article 11(2) provides that *the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5). Thus paragraphs (4) and (5) of article 11, are mandatory.* It provides that *“the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”*. Hence if the parties agreed that only the claimant would be heard in the arbitration, this agreement would be struck down as invalid on account of article 18 of the Model Law.²⁹ Other restrictions on parties’ autonomy might arise where the parties select institutional arbitration but attempt to alter the rules of the administering body in a way which is unworkable or is not accepted by the administering body. In this sense, as long as the parties fulfill the validity requirements of arbitration agreement and also agree on the basic elements of the agreement, they can achieve the best outcome from the arbitration.

2. PARTIES AUTONOMY REGARDING LAW OF ARBITRATION

2.1 The Law Applicable to Arbitration Agreement

Basically, when the parties choose a law applicable to arbitration agreement, this law will be applied firstly. However, in some circumstances, the law of the place of arbitration (*lex arbitri*) has a dominant role³⁰(which will be scrutinized in another part), because each country wants to govern the conduct of arbitration within its boundary.³¹For instance, when a dispute arise from the issue of arbitrability, form and validity of the arbitration agreement, the arbitral procedure (i.e. hearings, court assistance, equal treatment of the parties etc.), in general, *lex arbitri* has a significant effect on the parties’ choice of law.³² Other than these, when there is a dispute about capacity of the parties, in general, the dispute resolved by “the law of the country where the party has its residence, domicile or permit”.³³

2.2 The Law Governing the Arbitration

The principle of parties’ autonomy allows the parties to design arbitration process whatever they want. The principle of parties’ autonomy has been endorsed by Model Law.³⁴ Furthermore, according to New York Convention, *if the composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement of the parties, recognition and enforcement of the award may be refused*.³⁵ English Arbitration Act contains some rules regarding parties’ autonomy on arbitral proceedings.³⁶The principle of parties’ autonomy enables the parties to choose any place as the seat of arbitration. Each country wants to control the conduct arbitration within its territory and thus, in some situations, *lex arbitri*, has some mandatory rules. Even if the parties have express choice of law, the law governing the arbitration should be analyzed by taking into account the choice of the parties and *lex arbitri* together.

2.3 The Place of Arbitration

²² New York Convention, art II (1) and V (2).

²³ Model Law, art 36 (1) (b) (i).

²⁴ *Ibid* 21, para 2.113.

²⁵ Laurence Shore, “Defining ‘Arbitrability’”, *New York Law Journal* (15 June 2009) <<http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>> accessed 10 April 2016.

²⁶ Public policy of a country depends on social, political and economic situations of the country, thus public policy varies from country to country.

²⁷ New York Convention, art II (3) and V (1); Model Law art 8(1) and 36(1).

²⁸ New York Convention, art II (3).

²⁹ Holtzmann and Neuhaus, “A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary” p. 583

³⁰ *ibid* 20. Also see *C v D* [2007] EWCH 1541.

³¹ Redfern and Hunter, para 3.40. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedy Dursun.

³² *ibid*, para 3.43; Berger, 20-21.

³³ Berger, 21. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent”Ar. Gor Sedy Dursun.

³⁴ Model Law, art 19.

³⁵ New York Convention, art V (1) (d).

³⁶ English Arbitration Act, s 15(1), 16(1), 103 (2) (e).

In international commercial arbitration, the parties are free to choose place of arbitration. In general, the parties choose a neutral place, since the place which is national for one party is foreign for another party. This freedom of the parties is accepted by UNCITRAL Rules,³⁷ Model Law³⁸ and English Arbitration Act.³⁹ The law of the place of the arbitration has a significant impact at every stage of arbitration such as the laws governing the substance and arbitration, court intervention, hearings and interim measures etc. Thus, the parties to arbitration choose a place whose law has minimum effect on the arbitration.⁴⁰

2.4 Lex Arbitri

Basically, the meaning of *lex arbitri* is the law of the place of arbitration. *lex arbitri* is a body of rules external to the wishes of the parties. The parties have an express choice of law governing the arbitration, this choice may subject to mandatory rules of *lex arbitri*. As an illustration for this, Model law states that “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”.⁴¹ In general, the parties did not choose *lex arbitri* directly but indirectly by choosing the place of arbitration.⁴² The *lex arbitri* mostly deals with general issues for \ equal treatment, fair dealing, arbitrability, court intervention and the constitution of the arbitral tribunal.⁴³ Furthermore, sometimes, it contains some detailed procedural law. Even if the *lex arbitri* includes some detailed procedural provisions, it should not be confused with procedural rules.⁴⁴ In essence, the procedural rules contains rules to be followed during the course of arbitration. When the parties agree on institutional arbitration, the rules of the institution are applied as procedural rules. As another option, they can adopt some detailed procedural rules in the first meeting.⁴⁵ The place of arbitration is a “connecting factor” between arbitration and arbitration law.⁴⁶ According to Model Law, the parties are free to choose place of arbitration. Unless they agree otherwise, the arbitral tribunal can meet at any place for hearing witnesses or the parties, or for inspection of the goods or other relevant things.⁴⁷ *Lex arbitri* determines the role of national courts in the arbitration process as well. As a general view, the place of arbitration is one of the fundamental elements of the arbitration, since once the parties choose the place of arbitration, at the same time they choose the law of that country indirectly as *lex arbitri*.⁴⁸

2.5 The Law Applicable to the Substance

One of the reflections of parties’ autonomy is that the parties are free to choose the law applicable to the substance. The main attractive point of this principle is that the parties can choose any law which meet the specific requirements of the dispute.⁴⁹ The parties can choose any national law, mandatory law, public international law and general principles of law, concurrent law, combined laws and the *trunc commun doctrine*, and transnational law as the applicable law to the substance. The principle of parties’ autonomy is recognized by Model Law⁵⁰ and UNCITRAL Rules.⁵¹ In addition to this, according to English Arbitration Act, *the arbitral tribunal shall apply the law chosen by parties as applicable to substance of the dispute*.⁵² In essence, the parties should choose the law applicable to the substance at the time of formation of the contract.⁵³ However, in some circumstances, the arbitral tribunal can abandon this duty⁵⁴ if the parties’ choice of law is contrary to public policy or is not bona fide.⁵⁵ Sometimes,

³⁷ UNCITRAL Rules, art 18 (1).

³⁸ Model Law, art 20.

³⁹ English Arbitration Act, s 3.

⁴⁰ Tweeddale and Tweeddale, 256. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedy Dursun.

⁴¹ Model Law, art 19(1).

⁴² Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration (2nd Edition, Sweet&Maxwell, 2007) para 113. Yalova Üniversitesi Hukuk Fakültesi Dergisi (2012/1) 172,

⁴³ ibid, para 3.43 and 3.48.

⁴⁴ Redfern and Hunter, para 3.48; Poudret and Besson, para 113. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedy Dursun.

⁴⁵ Ibid 46, para 3.49.

⁴⁶ Claude Reymond, “Where is an Arbitral Award Made?” (1992) 108 LQR 1 at 3.

⁴⁷ Model Law, art 20.

⁴⁸ Redfern and Hunter, para 3.61 , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedy Dursun.

⁴⁹ Chukwumerije, 108. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedy Dursun.

⁵⁰ Model Law, art 28 (1).

⁵¹ UNCITRAL Rules, art 35(1).

⁵² English Arbitration Act, s 46 (1) (a).

⁵³ Redfern and Hunter, para 3.98 and 3.99.

⁵⁴ Rachel Engle, “Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability” (2002) 15 Transnat’l Law 323, 341.

the parties can choose a law in order to avoid mandatory rules of another law. In this context, the basic aim of these restrictions is to prevent this kind of behaviors.⁵⁶As to public policy, it depends on social, economic and cultural situations of each country; hence, an issue which is in the scope of public policy in a country may not be a public policy issue for another country. In addition to this, public policy is a ground for refusing the recognition and enforcement of the award.⁵⁷ At this point, the well-known case is *Soleimany v Soleimany*⁵⁸ in which English Court of Appeal refused application for enforcement of award on the ground of public policy and stated that public policy did not allow the enforcement of an illegal contract.⁵⁹ In general, the autonomy of the parties is subject to some restrictions on the ground of bonafideness and public policy. Actually, these grounds are not clear; hence these should be assessed case by case and by taking into account the applicable laws.

3. PARTIES'S AUTONOMY IN CONDUCT OF ARBITRATION

3.1 Composition of the Arbitral Tribunal

The parties can exercise their autonomy in the appointment and organization of arbitral tribunal. In this part, firstly, the appointment of the arbitral tribunal will be examined. Following that, powers and duties of the arbitrators will be scrutinized in the terms of the parties' autonomy.

3.1.1 Appointment of Arbitral Tribunal

One of the considerable advantages of the arbitration is that the parties can choose the arbitrators.⁶⁰ The subject matter of international commercial arbitration is disputes of international companies with huge budgets and having some specific requirements. Thus, this kind of disputes should be resolved by people who have relevant expertise. Arbitration and the principle of parties autonomy enable the parties to select any person who have relevant expertise as arbitrators. "The court is in our view is concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. The parties can select the arbitrators in their arbitration agreement or by separate agreement. In these agreements, the parties agree on the number and appointment procedure of the arbitrators⁶¹ Model Law and English Arbitration Act have provisions for composition of arbitral tribunal and they state that the parties are free to agree on number and appointment procedure of the arbitrators.⁶² Furthermore, according to New York Convention, "if the composition of the arbitral tribunal is not in conformity with the agreement of the parties, enforcement or recognition of the award may be refused".⁶³ The parties can nominate a third party and this person can appoint the arbitral tribunal on behalf of the parties.⁶⁴ The parties can expressly agree on the arbitrators in arbitration agreement or another separate agreement.⁶⁵ As another option, they can use list system. In other words, each party can make a list which involves possible arbitrators and their brief qualifications.⁶⁶ Other than these methods, in the case the arbitral tribunal consists of three people, each party can choose one arbitrator and these arbitrators can choose the third

⁵⁵ Chukwumerije, 109. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁵⁶ A. E. Anton, Private International Law (Second Edition, The Scottish Universities Law Institute, 1990).

⁵⁷ New York Convention, art V (2) (a); English Arbitration Act, s 103(3); Model Law, art 36 (b) (ii).

⁵⁸ *Soleimany v Soleimany* [1999] QB 785.

⁵⁹ *ibid* at 800 "The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it. In the present case the parties were, it would seem, entitled to agree to an arbitration before the Beth Din. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex fori*".

⁶⁰ Redfern and Hunter. para 4.30. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁶¹ Emilia Onyema, "Selection of Arbitrators in International Commercial Arbitration" (2005) International Arbitration Law Review, at 46.94 Onyema, at 47.

⁶² Model Law, art 10 and 11; English Arbitration Act s 15 and 16; also see UNCITRAL Rules, art 6.

⁶³ New York Convention, art 5 (1) (d).

⁶⁴ Redfern and Hunter, para 4.30.; Onyema, at 47. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁶⁵ Onyema, at 47. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁶⁶ *ibid* 66, para 4.34.

arbitrator. It should not be overlooked that all of these methods are possible for ad hoc arbitration.⁶⁷ In the case the parties cannot reach an agreement on appointment of the arbitrators, the national court can make that appointment if there is no other empowered authority.⁶⁸ In that situation, that appointment is within the jurisdiction of the national court of the place of arbitration. As to arbitral institutions, each arbitral institution has its own rules about appointment of the arbitrators. In general, arbitral institutions appoint arbitrators if the parties cannot agree on the arbitrators.⁶⁹ The arbitrators should have some qualifications. The parties can agree on some criteria in the arbitration agreement. However, firstly, the arbitrator should be a neutral person. Other than this, the arbitrators should be good at the language of the arbitration and the arbitrators should have relevant expertise, education and experience. In addition to these qualifications, the arbitrators should be independent and impartial during the course of arbitration. The meaning of independence is that the arbitrators should not have any social, economic and personal relationship with the parties.⁷⁰ As to impartiality, the arbitrators should not be biased towards the parties.⁷¹ The last thing to be mentioned in this part is challenge of the arbitrators. Basically, if the arbitrators are not independent and impartial during the course of arbitration, the parties can challenge them. In this aspect, challenge of the arbitrators can be accepted guarantee of the party autonomy, because a dependent and partial arbitrator does not fulfill the expectations and wishes of the parties. If the arbitration is conducted by a set of rules (UNCITRAL Rules or rules of arbitration institutions), this set of rules is applied in challenging the arbitrators. If there is no such set of rules, the challenge process takes place in the court of the place of arbitration in accordance with local arbitration law.⁷² According to UNCITRAL Rules, if the parties have some doubts about independence and impartiality of the arbitrators, they may challenge these arbitrators.⁷³

3.1.2 Powers and Duties of the Arbitrators

3.1.2.1 Powers of the Arbitrators

The main source of the powers of the arbitrators is the arbitration agreement. The parties may have conferred some powers upon the arbitrators expressly in the arbitration agreement.⁷⁴ As another option, if the parties adopt set of rules (i.e. UNCITRAL Rules, rules of the arbitration institutions) for conduct of the arbitration, it is needed to consider these rules in order to understand the powers of the arbitrators.⁷⁵ The powers which are granted by the parties or any set of rules are valid within the boundaries of *lex arbitri*.⁷⁶ The arbitral tribunal can exercise these powers directly or by assistance of national courts.⁷⁷ For example, according to Model Law “*unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*”.⁷⁸ In general, the arbitral tribunal have the powers for the conduct of arbitration “in such manner as it considers appropriate”,⁷⁹ determination of place and language of the arbitration if the parties fail to agree on⁸⁰ and appoint experts.⁸¹ Actually, in order to determine the powers of the arbitral tribunal properly, at first instance, it is needed to examine the arbitration agreement. Following that the law governing the arbitration agreement should be examined. Finally, the law governing the arbitration and *lex arbitri* should be considered.⁸² Even though the arbitration agreement is the main source of the powers of the arbitral tribunal, in essence, *lex arbitri* determines the limits of the powers of the arbitral tribunal.

3.1.2.2 Duties of the Arbitrators

⁶⁷ Ibid 67.

⁶⁸ Ibid 66, para 4.41 and 7.11.

⁶⁹ ICC Arbitration Rules, art 8.3 and 8.4; ICDR Rules art 6.

⁷⁰ M. Scott Donahey, “The Independence and Neutrality of Arbitrators” (1992) 9 J. Int'l Arb. 31.

⁷¹ Redfern and Hunter, para 4.77. ; Donahey, 32.; Donahey uses “neutrality” in his article instead of “impartiality.” He states that “neutrality” is used in cultural and political sense. In this context, if the arbitrator is from different nationality from the party, the arbitrator is “neutral”. As to impartiality, it is “lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute.”

⁷² Redfern and Hunter, para 4.94. Yalova Üniversitesi Hukuk Fakültesi Dergisi (2012/1) 178

⁷³ UNCITRAL Rules, art 12.; also see Model Law, art 12 and 13.

⁷⁴ Ibid, para 5.08 and 5.09.

⁷⁵ Rokison, at 222.; Redfern and Hunter, para 5.09. , referred in “A critical examination of the role of party’s autonomy in international commercial arbitration and its role and extent” by Ar. Gor Sedyu Dursun.

⁷⁶ Ibid, para 5.06.

⁷⁷ Ibid. 109 Ibid.

⁷⁸ Model Law, section I art 17(1).

⁷⁹ UNCITRAL Rules, art 17 (1).

⁸⁰ UNCITRAL Rules, 18 and 19; Model Law, art 20 and 22.

⁸¹ UNCITRAL Rules, art 29(1); Model Law, art 26; English Arbitration Act, s 37 (1).

⁸² Ibid 78, para 5.13.

The parties can confer some specific powers and impose some specific duties upon the arbitral tribunal in order to obtain an enforceable award. These specific duties can be imposed before the appointment of the arbitral tribunal by the arbitration agreement. As another option, the parties can impose the duties upon the arbitral tribunal during the course of the arbitration process. However, in this option, they generally consult the arbitral tribunal.⁸³ As an illustration for specific duties, the parties can agree on a time limit for making the award.⁸⁴ In addition to this, there are some duties imposed by law. These are duty to act with due care, duty to act promptly and duty to act judicially.⁸⁵ According to English Arbitration Act, "the tribunal shall act fairly and impartially".⁸⁶ As mentioned above, the principle of parties' autonomy is applicable to the powers and duties of the arbitrators. However, the applicable law determine the limits of party autonomy in this area.

3.2 Other Issues Relating to Conduct of the Arbitral Proceedings

In arbitration, the parties are free to conduct the arbitral proceedings. The arbitral tribunal must conduct the hearings in accordance with the agreement of the parties. This principle of parties' autonomy is widely accepted such as by Model Law and New York Convention.⁸⁷ However, this acceptance does not show that party autonomy is unlimited. The principle of party autonomy is subjects to some restrictions. The most commonly encountered restriction on party autonomy is public policy. This restriction is derived from the principle that every State has the right to exercise full and permanent sovereignty over its territory. Thus, each state can govern any arbitration process in within the boundary of its territory. The concept of public policy depends on the social, economic and cultural conditions of each country; hence the content of this concept should be determined case by case. Generally, the arbitrators consider that public policy is taken into account in the country where the award is likely to be enforced.⁸⁸ International arbitration implicates more than one nation, thus the public policy of all interested nations should be considered.⁸⁹ For instance, Public policy can be considered during the arbitral proceedings prior to the recognition or enforcement of an award. As an illustration, in an ICC case,⁹⁰ arbitral tribunal sitting in Switzerland, denied claim for punitive damages on the grounds that punitive damages were contrary to Swiss public policy. In addition to these, if the parties confer some powers upon the arbitral tribunal which are against the public policy of the seat of the arbitration, these powers are "not capable of being performed" by the arbitrators.⁹¹

Another restriction on party autonomy is equal treatment.⁹² Equal treatment is one of the fundamental principles of law. In the scope of the arbitration, as a matter of principle, the parties are free to agree on the conduct of the arbitration. However, this agreement must not include any provisions against equal treatment. This is widely accepted like public policy as well. According to New York Convention and English Arbitration Act, the recognition or enforcement of the award may be refused "if the party against whom the award is invoked was unable to present his case".⁹³ In addition to this, Model Law includes a provision for equal treatment.⁹⁴

The issues relating to third parties constitute a restriction on party autonomy. Actually, the arbitration agreement binds only the parties. In other words, the parties cannot agree on anything which can affect the third parties directly.⁹⁵ For instance, even if the parties have conferred such power upon the arbitral tribunal, the arbitrator cannot compel the third parties to attend the hearings as witnesses.⁹⁶ At that point, the arbitral tribunal needs to seek assistance of national courts.

Article 19(1) states that "subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". This issue was discussed during the drafting of the Model Law.⁹⁷ In an

⁸³ *ibid*, para 5.39 and 5.40.

⁸⁴ *ibid*, para 5.39.

⁸⁵ *ibid*, para 5.44, para 5.65 and para 5.67.

⁸⁶ English Arbitration Act, s 33; also see Model Law, art 18.

⁸⁷ Model Law, art 19 (1) and New York Convention, art V (1)(d).

⁸⁸ Model Law, art 36 (1) (b) (ii); New York Convention, art V (2) (b); English Arbitration Act, s 103 (3).

⁸⁹ Engle, 342. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁹⁰ ICC Final Award in Case No: 5946 of 1990.

⁹¹ Redfern and Hunter, para 6.16. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

⁹² *ibid*, para 6.11

⁹³ New York Convention, art V (1) b, English Arbitration Act, s 103 (2) c.

⁹⁴ Model Law, art 18.

⁹⁵ *ibid* 93, para 6.18.

⁹⁶ *ibid*, para 6.19.

⁹⁷ one matter that was considered at some length during the drafting of article 19 was whether there should be a limitation on when the parties could agree on a procedural point. The Working Group rejected this idea, finding instead that the freedom of the parties to agree on a procedure "should be a continuing one"; the Working Group interpreted paragraph 1 to provide for such a continuing freedom.

arbitration conducted under the Model Law, the parties have freedom to agree on the procedure even after the tribunal has entered into its contract with the parties. As noted by the Working Group, the freedom of the parties under paragraph (1) to agree on the procedure is a continuing one throughout the arbitral proceedings and not limited, for example, to the time before the first arbitrator is appointed.⁹⁸ It is submitted however, that the parties themselves may in their original agreement limit their freedom in this way if they wish their arbitrators to know from the start under what procedural rules they are expected to act.⁹⁹ Where the arbitration agreement deals with the procedural point in question the parties cannot unilaterally change their agreement without the consent of the tribunal. Where the arbitration agreement is silent and does not deal with the procedural point article 19 of the Model Law enables the parties to make an agreement at any time during the arbitral proceedings. There is an implied term that any agreement the parties may come to on matters of procedure will be within usual or common parameters for commercial arbitrations of the type and nature of the arbitration before the arbitral tribunal.

If the time periods are stated in the arbitration agreement, these would apply and any modification of these dates could not be agreed by the parties alone but would have to be agreed by the arbitral tribunal as well. Paragraph 33(1)(b) requires the arbitral tribunal to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense. In circumstances where the parties have made an agreement on the procedural point in question, fairness would generally be served by adhering to the agreement which the parties have reached. In the case where there was no applicable mandatory rule of the *lex arbitri*, the relevant principles were to be found in the applicable arbitration rules. The hierarchy of rules to govern the arbitral proceedings are as follows:

1. Institutional rules
2. Parties agreement
3. Arbitral tribunal determination

Under the UNCITRAL Arbitration Rules it would appear that the arbitral tribunal is not bound to accept an agreement of the parties as to a period of time. Article 15(1) provides as follows:

"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

In addition to this article 23 provides that *the periods of time fixed by the arbitral tribunal for the communication of written statements should not exceed 45 days; however "the arbitral tribunal may extend the time limits if it concludes that an extension is justified"*.

Further it should be noted that under the UNCITRAL Arbitration Rules, while it is the arbitral tribunal, rather than the parties, which is charged with the responsibility of determining the procedure in the arbitration, a number of rules expressly confer powers on the parties such as article 16(1) (Place of Arbitration), Article 17.1 (Language of the Arbitration) and so on.¹⁰⁰ The International Arbitration Rules of the International Centre for Dispute Resolution are similar to the UNCITRAL Model Arbitration Rules. Article 16(1) is in the same terms as article 15(1) of the UNCITRAL Arbitration Rules.

In the first place if the parties' agreement is inconsistent with a mandatory rule of law then the parties' agreement may not be accepted. An instance of such a legal rule is article 18 of the Model Law. This requires that the parties be treated with equality and that each party be given a fair opportunity of presenting his case. There are other obligations which are imposed on arbitrators. *Redfern and Hunter* stated that "an arbitral tribunal has an obvious moral obligation to carry out its task with due diligence; justice delayed is justice denied".¹⁰¹ The authors refer to various national laws and arbitration rules (such as the ICC Rules) which impose a time-limit on the rendering of an award. Article 14(1) of the Model Law provides, inter alia, that if an arbitrator *"fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination"*.

If the parties themselves agree on the long time period for the provision of a submission or memorial than in deciding whether to accept the parties' agreement, or reject or modify it, the arbitral tribunal should evaluate the parties' request in the light of the arbitral tribunal's own obligations and duties and after considering the position of the arbitral tribunal itself. The primary duty of the arbitral tribunal is to proceed with diligence and expedition. Where the parties' agreement for extra time is predicated on substantial and significant considerations such as pending settlement negotiations or the results of a related arbitration or court proceedings, then it might well be thought that the duty of the arbitral tribunal to proceed with expedition should take second

⁹⁸ Holtzmann and Neuhaus take the same view referred in Limits to Party Autonomy in Arbitral Procedure by Michael Pryles.

⁹⁹ Holtzmann and Neuhaus, p. 583 referred in Limits to Party Autonomy in Arbitral Procedure by Michael Pryles.

¹⁰⁰ Limits to Party Autonomy in Arbitral Procedure by Michael Pryles P 10.

¹⁰¹ Redfern and Hunter with Blackaby and Partasides, at p290 referred in Limits to Party Autonomy in Arbitral Procedure by Michael Pryles.

place. After all, the obligation to proceed with expedition largely exists for the benefit of the parties themselves and if the parties have good reason for not wishing to proceed quickly, it is difficult to see why the arbitral tribunal should force them to do so. Apart from mandatory provisions of the law governing the arbitration agreement and the *lex arbitri*, and subject to "unacceptable" amendments to institutional rules, the parties enjoy very broad freedom in selecting the arbitration regime they desire and in prescribing the procedure to be followed.

3.3 The Role of National Courts

In appearance, the parties to arbitration agreement can agree on everything about arbitration. Nevertheless, in some circumstances, the choices of the parties do not make any sense without support and supervision of the national courts. In this context, the role of national courts is one of the factors which determine the extent of party autonomy. However, the courts should not intervene in arbitration process at any time. In order to prevent this situation, Model Law states that "In matters governed by this Law, no court shall intervene except where so provided in this Law".¹⁰²

3.3.1 At the beginning of the arbitration

Firstly, One of the parties to arbitration agreement may bring an action before the court instead of arbitration.¹⁰³ In this situation, the court shall decide the enforceability of the arbitration agreement at the request of one of the parties.¹⁰⁴

Secondly, if the parties have failed to appoint the arbitrators and there is no applicable rules, they can apply the court for appointment of the arbitrators.¹⁰⁵

Thirdly, if there is a problem about jurisdiction of the arbitral tribunal, this problem can be solved by the support of the court at the place of the arbitration.¹⁰⁶

3.3.2 During the arbitration process

The national courts perform its real role during the arbitral proceedings. Sometimes, the arbitral tribunal needs to take interim measures. In general, the arbitral tribunal has the power to take interim measures.¹⁰⁷ However, if the arbitral tribunal has not been appointed, or the arbitral tribunal has not such power or the interim measures are about the third parties, the court intervention may be necessary.¹⁰⁸ Sometimes, the application for interim measures to the court may be accepted "not incompatible with the arbitration agreement".¹⁰⁹ However, according to Model Law and UNCITRAL Rules, this kind of application is not incompatible with the arbitration agreement. In order to clarify this ambiguity, the best solution is to look at relevant law.¹¹⁰ Nonetheless, in some circumstances, judicial assistance of the courts is acceptable in most legal systems. These are:

3.3.2.1 Preservation of the evidence

As a general rule, evidence should be preserved as soon as possible,¹¹¹ because destroyed evidence cannot indicate the truths. In this sense, the arbitral tribunal may preserve the evidence. However, if the arbitral has not been established or the evidence is related to third parties, the judicial assistance of the court is needed. This assistance of the court covers all types of evidence such as documentary, photographic and magnetic.¹¹² According to English Law, the court has power for the preservation of evidence.¹¹³ Model Law includes similar provision.¹¹⁴

¹⁰² Model Law, art 5.

¹⁰³ Redfern and Hunter, para 7.10; David St John Sutton and Judith Gill, *Russell on Arbitration* (Twenty-Second Edition, Sweet&Maxwell, 2003) para 7-005.

¹⁰⁴ New York Convention, art II (3); Model Law, art 8.

¹⁰⁵ English Arbitration Act, s. 18; Model Law, art 11.

¹⁰⁶ Redfern and Hunter, 7.12; Sutton and Gill, para.7-005 and 7-097.

¹⁰⁷ *ibid*, para 7.15

¹⁰⁸ *ibid*, para 7.17, 7.16 and 7.19.

¹⁰⁹ *ibid*, para 7.25. 141 Model Law, art. 9; UNCITRAL Rules, art. 26 (3).

¹¹⁰ Redfern and Hunter, para 7.27. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedya Dursun.

¹¹¹ *ibid*, para 7.38.

¹¹² Sutton and Gill, para 7-135. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedya Dursun.

¹¹³ English Arbitration Act, s. 44.

3.3.2.2 The attendance of witnesses

In general, the arbitral tribunal has no power to compel the attendance of witnesses. Thus, the judicial assistance of the courts is needed. According to English Law, the court has power for the taking of the evidence of witnesses.¹¹⁵ Model Law includes similar provision.¹¹⁶

3.3.2.3 Documentary disclosure

When one of the parties requested, the arbitral tribunal has the power to order for documentary disclosure from other party.¹¹⁷ However, if the requested party does not disclose the relevant document is in possession of third party, the arbitral tribunal has no power to compel them.¹¹⁸ In this context, the judicial assistance of the courts may be needed.

3.3.2.4 Preserving the status quo

Sometimes, monetary compensation is not adequate remedy for parties. For instance, the subject matter of the dispute may be about patents and this dispute may damage to the reputation of the companies. In these circumstances, the specific performance of contract is the best remedy. Thus, the judicial assistance of the courts may be needed.¹¹⁹

At the end of the arbitration process, the judicial assistance of the courts is needed for the recognition and enforcement of the awards.

4. ANALYSIS OF DATA

When we imagine international commercial arbitration as a drama, the principle of party autonomy is the director of this drama. Normally, a director can determine actors and actresses, the scenario and the other issues about drama. Similarly, in the context of party autonomy, the parties can choose applicable laws and conduct the arbitration process such as the determination of the composition of the arbitral tribunal, language of arbitration, place of arbitration etc. In other words, the principle of party autonomy allows the parties to determine all the essential elements of the arbitration. Thus, party autonomy is the fundamental principle of the arbitration. At the same time, this principle is the distinctive aspect of arbitration from other alternative dispute settlements, because the presence of parties autonomy is the *sine qua non* for international commercial arbitration. On the basis of these arguments, the principle of party autonomy plays the most important role during the whole arbitration process. As to the extent of party autonomy, it is a principle based on the freedom of contract. The parties can exercise this freedom on every stage of international commercial arbitration. Nonetheless, the principle of party autonomy is not unlimited. In some circumstances, it may subject to some restrictions.

The parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations. Even from the wording of the Model Law it is obvious, that the parties' ability to be master of the proceeding is not absolutely boundless. Such limits or restrictions are established in several levels and to certain extent depend on time factor. In other words, from the moment of negotiating an arbitration agreement and up to receipt of an arbitral award, the extent of the parties' autonomy could substantially differ. For instance, in order to ensure validity, operability and capability of being performed of an arbitration agreement, the parties shall comply with respective mandatory requirements established by law governing arbitration agreement in respect of both, form and content of the latter. The arbitration agreement must be a valid one according to the law which governs it. This will usually be the law governing the substantive contract, in which the arbitration clause is embedded, but is not necessarily that law. In addition to this, the arbitral procedure itself should comply with the

¹¹⁴ Model Law, art 27.

¹¹⁵ English Arbitration Act, s. 44.

¹¹⁶ Model Law, art 27.

¹¹⁷ Redfern and Hunter, para 5.17. , referred in "A critical examination of the role of party's autonomy in international commercial arbitration and its role and extent" by Ar. Gor Sedy Dursun.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, 7.46; also see; Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334.

mandatory rules of law of the *lex arbitri*. The *lex arbitri* is often the law of the place of the seat of the arbitration, but not invariably so. For example, in Model Law some of provisions are mandatory and cannot, therefore, be excluded or modified by the parties.

The *first restriction* is about the arbitration agreement. In this sense, some disputes are not capable of being resolved by arbitration and this is also one of the validity requirements of arbitration agreement. Thus, as mentioned above, the disputes about family and criminal law, grant of patents etc. are not resolved by arbitration, because, these are public policy matters and can be resolved by merely national courts.

The *second restriction* is about the applicable laws. Basically, the parties can choose any system of law as the applicable to the substance. However, this choice must not be against bona fide and public policy. In general, this kind of issues arises during the enforcement or recognition of the awards.

The *third restriction* is of natural justice because if the agreement of parties is against the natural justice it can't be enforced.

The *fourth restriction* is imposed by role of national courts because they follow the procedural law of the concerned country not as agreed by the parties.

Moreover, the parties are free to agree on the law applicable to arbitration and arbitration agreement. Nevertheless, this choice may subject to the restrictions of law at the place of arbitration, *lex arbitri*, since every state wants to regulate any legal activity within the boundaries of their own country.

The *lex arbitri* may confer freedom of the parties to establish the relevant procedural rule (as for example does article 19(1) of the Model Law). But this may be circumscribed by institutional rules which the parties may have incorporated in their arbitration agreement.

Another reflection of *lex arbitri* is that the parties can confer some powers upon the arbitral tribunal as possible as *lex arbitri* allows, because some powers could not be exercised by the arbitral tribunal. They can be exercised by merely national courts. In relation to this, the role of the national courts is another restriction on party autonomy.

Furthermore, the parties can conduct the arbitration process in any way they want. Nevertheless, the conduct of arbitral proceedings must not be against public policy and this conduct may be limited on the ground of third parties. In addition to this, the arbitration agreement binds the parties to this agreement; hence, involvement of the third parties in the arbitration process may be another restriction.

In cases where the parties do not have an unfettered right to establish the applicable procedural rule but require the consent of the arbitral tribunal, the arbitral tribunal should be cautious before it seeks to impose a rule at variance with to that agreed upon by the parties. In deciding whether to make an order in terms of the parties agreement the tribunal should carefully consider the reasons underlying the parties agreement, insofar as it is aware of them, and the position of the arbitral tribunal itself.

5. CONCLUSION

As a conclusion, the principle of party autonomy is fundamental principle of international commercial arbitration. However, it is not unlimited. In other words, the parties can exercise this autonomy as possible as public policy and *lex arbitri* allows, because arbitration is a private dispute settlement method and, thus arbitration process should be compatible with law system of the place of arbitration and public policy. Briefly, party autonomy is unlimited to a certain extent. After this point, it may subject to restrictions. This extent should be determined case by case. Where the arbitration agreement is silent on the procedural rule, the parties freedom to adopt a procedural rule during the course of the arbitration will be dependent on the *lex arbitri* and the institutional rules chosen by the parties to govern the arbitration (if any).

The parties in international commercial arbitration has very wide autonomy because arbitration proceeds as they desires but it does not means that they have absolute power to do everything which they want. Some restrictions are imposed on the parties by considering public policy, sovereignty of state, natural justice, fairness, *lex arbitri* and bonafideness.

As far as arbitral tribunal has been concerned it is bound to follow the agreement of the parties but if that agreement is against the natural justice, for example, if it gives opportunity to be heard to only one party and not to the other, then the arbitral tribunal is not bound to follow such agreement. The tribunal is also not bound to follow agreement of the parties which are illegal and against the public policy.

Prior to the commencement of arbitration the parties have almost complete autonomy because at that time parties have freedom to choose applicable law, arbitrator, place of arbitration. At that time the role of national courts also does not come in to the scene. Prior to the commencement of arbitration the only restriction on the parties' autonomy is the restriction imposed by them by the arbitration agreement.

The role of national courts imposes restriction on the parties' autonomy as regarding the law because it acts according to the law of the country not according to the law agreed between the parties. Though the role of national courts imposes some restrictions but it also help in the process of arbitration because where the powers of arbitrator ends the powers of these courts starts.

At last we can say that subject to public policy, bonafideness, legality and lex arbitri and natural justice the parties in international commercial have autonomy to control almost all the aspect of the arbitration and these restrictions are necessary for maintaining the balance between parties' autonomy and nation's sovereignty and public policy.

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