

# A CRITICAL EXAMINATION OF THE ROLE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION AND AN ASSESSMENT OF ITS ROLE AND EXTENT

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## Introduction

International commercial arbitration is the most preferred alternative dispute settlement in recent years. One of the reasons behind this popularity is flexibility of the arbitral process. Basically, the principle which makes the arbitral process flexible is party autonomy.

The principle of party autonomy, in general sense, started to develop in the nineteenth century<sup>1</sup>. Actually, party autonomy is based on choice of law in a contract<sup>2</sup>. 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 process.

The parties to an arbitration agreement waive the right to bring an action in court and exclude the jurisdiction of courts by this arbitration agreement. At the same time, this agreement is accepted as a primacy resource of arbitration. In this sense, it is a guideline of the parties and arbitral tribunal during the whole arbitration process. Furthermore, the arbitration agreement is the strongest evidence of party autonomy, because the parties choose the law and conduct the arbitration process independently by an arbitration

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<sup>1</sup> Dicey, Morris and Collins, *The Conflict of Laws*, vol 2 (14th edn, Sweet&Maxwell 2010) para 32-004.

<sup>2</sup> ibid para 32-004.

agreement. However, it should not be overlooked that the principle of party autonomy is not always a rule in international commercial arbitration<sup>3</sup>. In some circumstances, it may subject to some restrictions.

Arbitration is an alternative dispute settlement based on the principle of party autonomy. 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 research paper. Firstly, party autonomy will be explained in the context of international commercial arbitration. Following that arbitration agreement as a reflection of party autonomy, applicable laws, composition of arbitral tribunal, other issues related to the conduct of arbitral proceedings and the role of national courts will be scrutinised separately.

### **I. Party Autonomy in International Commercial Arbitration**

Arbitration is quite popular method used for resolving international commercial disputes nowadays. Arbitration owes its reputation to the principle of party autonomy. This principle involves flexibility and confidentiality.

Flexibility is one of the advantages of arbitration. 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.

Confidentiality is another advantage of arbitration. The subjects of arbitration are international companies with huge budgets. In connection with this, they may have important trade secrets. When these companies make an international commercial contract, this contract usually contains an arbitration clause for future disputes. The main reason for this clause is to protect trade secrets, because all proceedings are confidential in arbitration process unlike proceedings in a court. Furthermore, the parties can add express provision in order to reinforce this confidentiality<sup>4</sup>. It should not be forgotten

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<sup>3</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) 256.

<sup>4</sup> Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitra-*

that all these are consequences of party autonomy.

The basic difference between litigation and arbitration is that arbitration is a private dispute settlement based on the will of the parties<sup>5</sup>. In this sense, according to party autonomy, the parties are free to choose applicable laws and conduct the arbitration process in consideration of the requirements of the dispute. In other words, the parties can control all details of arbitration<sup>6</sup>.

Arbitration is rooted in the principle of freedom of contract<sup>7</sup>, 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 that party autonomy is a reflection of freedom of contract and it is “key principle<sup>8</sup>” of arbitration.

The principle of party autonomy allows the parties choose applicable law to substance and arbitration, to conduct the arbitration process such as appointment of arbitrator, arrangement of timetable, choice of place and language of arbitration. Related to this, party autonomy ensures that arbitration will proceed in accordance with the aspirations of the parties<sup>9</sup>. However, this principle is not always unlimited. It may sometimes subject to mandatory rules of law of place or public policy rules of the law applicable to substance. These restrictions will be examined in detail later.

The principle of party autonomy has been accepted throughout the world. Related to this, it has been recognised by international conventions. For instance, according to UNCITRAL Model Law, “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen

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*tion*, (student edition, Oxford University Press, 2009) para 2.176.

<sup>5</sup> Anoosha Boralessa, “The Limitations of Party Autonomy in ICSID Arbitration” [2004] 15 *Am. Rev. Int’l Arb.* para 253, para 266.

<sup>6</sup> *ibid*, para 266.

<sup>7</sup> Thomas E. Carbonneau, “The Exercise of Contract Freedom in Making of Arbitration Agreements” (2003) vol. 36 *Vanderbilt Journal of Transnational Law* 1189, 1189-1196.

<sup>8</sup> *The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd.* [2001] UKPC 34, 16 July 2001, PC.

<sup>9</sup> C. Chatterjee, “The Reality of Party Autonomy Rule in International Arbitration” (2003), 20(6) *Journal of International Arbitration* 539, 540.

by the parties as applicable to the substance of the dispute<sup>10</sup>”. This principle can be found in New York Convention as well. For example, according to this convention, recognition and enforcement of the award can be refused if “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties<sup>11</sup>”. The Rules of International Chamber of Commerce (ICC) also includes some articles about party autonomy. As an illustration, “the parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute<sup>12</sup>”.

As to English Law, the principle of party autonomy has been embodied in English Arbitration Act 1996. The basic article regarding party autonomy is “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest<sup>13</sup>.” Actually, this expression incorporates a number of issues<sup>14</sup> such as composition of arbitral tribunal and procedure of arbitration, in other words, conduct of arbitration. In addition to these, it is possible to find other reflections of the principle of party autonomy in English Arbitration Act 1996. They will be scrutinised in relevant parts of this work.

## **II. The Role and Extent of Party Autonomy in International Commercial Arbitration**

### **a) Arbitration Agreement**

It is important to assess the position and importance of the arbitration agreement in order to assess the role and extent of party autonomy, since arbitration agreement is core element of arbitration and it reflects the autonomy of the parties<sup>15</sup>. Firstly, the parties exclude jurisdiction of the courts by

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<sup>10</sup> 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.”

<sup>11</sup> 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention (hereinafter “New York Convention”) art V (1(d)).

<sup>12</sup> ICC Rules Of Arbitration, art 17.1.

<sup>13</sup> English Arbitration Act 1996 (hereinafter English Arbitration Act), s 1(b).

<sup>14</sup> Chatterjee, 542.

<sup>15</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books, 1994) 30.

an arbitration agreement. Moreover, they can conduct the arbitration process however they want by means of arbitration agreement. In other words, it has a significant role in all stages of arbitration.

Arbitration agreement is an agreement in which at least two parties decide to resolve their dispute through arbitration<sup>16</sup>. English Arbitration Act also states that the meaning of arbitration agreement is “an agreement to submit to arbitration present or future disputes<sup>17</sup>”. There are two types of arbitration agreement: submission agreement and arbitration clause. Submission agreement is separate agreement from the main commercial contract. The subject matter of submission agreement is existing disputes. In other words, when a dispute arises, if there is no provision regarding dispute settlement method in the main contract, the parties can make a submission agreement. Contrary to this, arbitration clause is a part of main commercial contract. The subject matter of the arbitration clause is future disputes. When the parties make a commercial contract; in general, the contract contains an arbitration clause. Both of them have some advantages and disadvantages. For instance, as abovementioned, the subject matter of submission agreement is existing disputes; hence the parties can make arbitration agreement by taking into account requirements of dispute<sup>18</sup>. This is the main advantage of submission agreement. On the other hand, once dispute arises, it is difficult to agree on anything even dispute settlement method. In this sense, arbitration clause is more favourable for the parties.

The parties can obtain the best result from arbitration if they have a well-drafted arbitration agreement. In this context, the parties should reflect their aspirations in arbitration agreement and this agreement should meet some validity requirements.

- As the first requirement, not only New York Convention<sup>19</sup> but also Model Law<sup>20</sup> requires that arbitration agreement shall be in writing. Actually the reason behind this requirement is self-evident<sup>21</sup>. According to Model Law, arbitration agreement is regarded as being in writing if the content of

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<sup>16</sup> Tweeddale and Tweeddale, 97.

<sup>17</sup> English Arbitration Act 1996, s 6.

<sup>18</sup> Redfern and Hunter, para 2.03.

<sup>19</sup> New York Convention, art II (1).

<sup>20</sup> Model Law, art 7 option I.

<sup>21</sup> Redfern and Hunter, para 2.13.

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<sup>22</sup>. As to signature requirement, “the UNCITRAL Model Law could be used as a tool interpretation of the New York Convention<sup>23</sup>”.

- As the second requirement, the dispute must arise out of a legal relationship whether contractual or not<sup>24</sup>. Actually, there must be a contractual relationship between parties as a basis of arbitration.<sup>25</sup> However, the dispute may sometimes be based on tort liability. In this context, the problem of whether arbitration agreement covers tort liability or not should be solved by taking into account intention of parties and content of arbitration agreement.

- As the third requirement, not only New York Convention<sup>26</sup> but also Model Law<sup>27</sup> 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 private method with public consequences<sup>28</sup>. In this sense, some disputes cannot be resolved by arbitration because of “national legislation or judicial authority.<sup>29</sup>” merely national courts. According to reference of the courts, the issue of arbitrability is based on public policy<sup>30</sup>. Public policy of a country depends on social, political and economic situations of the country, thus public policy varies from country to country. 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 arbitra-

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<sup>22</sup> *ibid*, para 2.16.

<sup>23</sup> Tweeddale and Tweeddale, 103:*Robobar Ltd v Finncold sas* (1995) XX Ybk Comm Arbn739-41.

<sup>24</sup> New York Convention, art II (1).

<sup>25</sup> Redfern and Hunter, para 2.22.

<sup>26</sup> New York Convention, art II (1) and V (2).

<sup>27</sup> Model Law, art 36 (1) (b) (i).

<sup>28</sup> Redfern and Hunter, para 2.113.

<sup>29</sup> Laurence Shore, “Defining ‘Arbitrability’”, *New York Law Journal* (15 June 2009) < <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf> > accessed 10 March 2011.

<sup>30</sup> *ibid*.

tion. Furthermore, the issue of arbitrability is discussed in the case of intellectual property disputes. In general, a dispute regarding grant and validity of intellectual property right is regarded as a matter of public policy; thus they are outside of the scope of arbitration<sup>31</sup>. However, a licence agreement may be subject matter of arbitration agreement<sup>32</sup>. In essence, the intellectual property disputes should be resolved by arbitration, because arbitration is a confidential and flexible way. Moreover, the parties can choose arbitrators who have relevant experience<sup>33</sup>. Another issue about arbitrability is antitrust and competition disputes. In early cases, the approach of courts was that antitrust disputes were not capable of settlement by arbitration. In the landmark *Mitsubishi*<sup>34</sup> case, the court confirmed this approach. However, in this case the US Supreme Court found that antitrust disputes were arbitrable under Federal Act. On the other hand, the court added that the enforcement or recognition of the award could be refused on the ground of public policy<sup>35</sup>. According to the later cases, for instance *Eco Swiss China Time Ltd v Benetton International NV*<sup>36</sup>, the courts should address this kind of issues. In other words, the courts should warn the parties that the recognition and enforcement of the award may be refused on the basis of public policy. Apart from these issues, the issue of arbitrability may arise in insolvency disputes, bribery and corruption disputes, and the disputes as to natural resources.

- As the fourth requirement, the parties to the agreement must have legal capacity to enter into the agreement<sup>37</sup>.
- As the fifth requirement, arbitration agreement must not be null and

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<sup>31</sup> Redfern and Hunter, para 2.118.; M.A. Smith, M. Cousté, T. Hield, R. Jarvis, M. Kochupillai, B. Leon, J.C. Rasser, M. Sakamoto, A. Shaughnessy, J. Branch, "Arbitration of Patent Infringement and Validity Issues Worldwide" (Spring 2006) 19 (2) Harvard Journal of Law & Technology 299.

<sup>32</sup> Redfern and Hunter, para 2.118.

<sup>33</sup> Jacques Werner, "Intellectual Property Disputes and Arbitration - A Comment on a Recent ICC Report", (September 1998) 1(5) The Journal of World Intellectual Property 841, 860(Final Report of The Commission on International Arbitration-A Report of ICC Commission, para 5. )

<sup>34</sup> *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).

<sup>35</sup> *ibid*, at 628.

<sup>36</sup> Case-C 126/97 (1999).

<sup>37</sup> New York Convention, art II (3) and V (1); Model Law art 8(1) and 36(1).

void, inoperative and incapable of being performed<sup>38</sup>.

In addition to these validity requirements, the arbitration agreement should contain some basic elements in order to obtain best result from arbitration. In this context, the parties should agree upon number of arbitrators and composition of arbitral tribunal, place and language of arbitration, the applicable law to the substance and arbitration, type of arbitration such as ad hoc or institutional arbitration. It should not be overlooked that only a well drafted arbitration agreement can reflect the aspirations of the parties.

The last thing to be mentioned in this part is the doctrine of separability. Apparently, arbitration agreement is a part of main commercial contract. However, according to this doctrine, arbitration clause is separate agreement. In other words, main commercial contract is primary contract and the arbitration clause is secondary contract<sup>39</sup>. Related to this, the invalidity of the main contract does not affect the validity of arbitration clause<sup>40</sup>. The main aim of this doctrine is to provide sustainability of arbitration of arbitration clause<sup>41</sup>. In this sense, the doctrine of separability preserves the autonomy of the parties. This doctrine is accepted by international rules such as UNCITRAL Rules<sup>42</sup>, UNCITRAL Model Law<sup>43</sup>. Furthermore, separability of arbitration agreement is endorsed by English Law<sup>44</sup> as well.

It should be borne in mind that arbitration agreement is the first step of the arbitration process. A well drafted arbitration agreement can exclude the jurisdiction of the courts and reflect the real needs and desire of the parties. In this sense, as long as the parties fulfil 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. It should not be overlooked the principle of party autonomy can reach greater extent provid-

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<sup>38</sup> New York Convention, art II (3).

<sup>39</sup> Redfern and Hunter, para 2.91.

<sup>40</sup> Adam Samuel, "Separability of Arbitration Clauses - Some Awkward Questions About the Law on Contracts, Conflict of Laws and The Administration Of Justice", 16 <<http://www.adamsamuel.com/pdfs/separabi.pdf>> accessed 12 March 2011.

<sup>41</sup> *ibid* 16.

<sup>42</sup> UNCITRAL Rules (as revised in 2010), art 23.

<sup>43</sup> Model Law, art 16 (1).

<sup>44</sup> English Arbitration Act 1996, s 7.; Furthermore see, *Fiona Trust & Holding Corp v Privalov* (2007) UKHL 40.

ed that if the parties obtain whatever they expect from arbitration.

## **b) Applicable Laws**

### **1. The Law Applicable to Arbitration Agreement**

The law governing the arbitration agreement is one of the crucial points in determination of the extent of the party autonomy. Generally it is assumed that the law applicable to the substance chosen by parties will also govern the arbitration clause<sup>45</sup>. However, the doctrine of separability enables the arbitration clause to be governed by different law which applicable to substance. As abovementioned, there are a number of validity requirements for arbitration agreements and all these requirements can be subjected to different laws<sup>46</sup>. 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 role<sup>47</sup> (which will be scrutinised in another part), because each country wants to govern the conduct of arbitration within its boundary<sup>48</sup>. For 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<sup>49</sup>. 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"<sup>50</sup>.

### **2. The Law Governing the Arbitration**

The principle of party autonomy allows the parties to design arbitration process however they want. Actually, this advantage is one of the attrac-

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<sup>45</sup> *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48.

<sup>46</sup> Klaus Peter Berger, "Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?"

(From Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* IC-CA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) pp. 301 – 334), 2 <http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlines/commercialArbitration2010/Berger2006.pdf> > accessed 13.04.2011.

<sup>47</sup> *ibid* 20. Also see *C v D* [2007] EWCH 1541.

<sup>48</sup> Redfern and Hunter, para 3.40.

<sup>49</sup> *ibid*, para 3.43; Berger, 20-21.

<sup>50</sup> Berger, 21.

tive points of the arbitration. The parties to international arbitration expect by choosing arbitration as the dispute settlement method that they would not subject to formal and strict requirements of national courts<sup>51</sup>. In other words, they want to resolve their disputes through flexible method and thus, they choose arbitration. The principle of party autonomy is endorsed by Model Law<sup>52</sup>. 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<sup>53</sup>. English Arbitration Act contains some rules regarding party autonomy on arbitral proceedings<sup>54</sup>.

The principle of party autonomy enables the parties to choose any place as the seat of arbitration. As mentioned above, each country wants to control the conduct arbitration within its territory and thus, in some situations, the law of the place of arbitration, in other words *lex arbitri*, has some mandatory rules. Even if the parties have express choice of law, the law governing the arbitration should be analysed by taking into account the choice of the parties and *lex arbitri* together.. In this context, the place of arbitration and *lex arbitri* should be examined in detail.

### **i) The Place of Arbitration**

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<sup>55</sup>, Model Law<sup>56</sup> and English Arbitration Act<sup>57</sup>.

The law of the place of the arbitration has a significant impact on 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 arbitra-

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<sup>51</sup> Chukwumerije, 78.

<sup>52</sup> Model Law, art 19.

<sup>53</sup> New York Convention, art V (1) (d).

<sup>54</sup> English Arbitration Act, s 15(1), 16(1), 103 (2) (e)

<sup>55</sup> UNCITRAL Rules, art 18 (1).

<sup>56</sup> Model Law, art 20.

<sup>57</sup> English Arbitration Act, s 3.

tion<sup>58</sup>.

## ii) Lex Arbitri

Basically, the meaning of lex arbitri is the law of the place of arbitration. An English judge answered the question of lex arbitri by referring to the second edition of Redfern and Hunter's book. He stated that "a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration"<sup>59</sup>.

As mentioned in the definition, lex arbitri is a body of rules external to the wishes of the parties. In this sense, lex arbitri determines the extent of party autonomy. For instance, even if the parties have an express choice of law governing the arbitration, this choice may be subject to mandatory rules of lex arbitri. In other words, the choice of the parties is applicable as far as lex arbitri permits. 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"<sup>60</sup>. Similarly, in English Arbitration Act, there are some mandatory and non-mandatory provisions and these rules are applicable where the seat of arbitration is England and Wales or Northern Ireland<sup>61</sup>.

In general, the parties do not choose lex arbitri directly. In other words, they choose lex arbitri indirectly by choosing the place of arbitration<sup>62</sup>. However, in recent years, the parties choose the place of arbitration by taking into account the law of this country, because lex arbitri has a significant role in every stage of arbitration. For example, arbitration agreement binds only the parties of this agreement, thus the arbitral tribunal has no power to order and compel the attendance of third party as a witness. In this context, the arbitral tribunal needs the assistance of the court of place of arbitration. Even if the parties confer such powers on the arbitral tribunal, the

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<sup>58</sup> Tweeddale and Tweeddale, 256.

<sup>59</sup> Paul Smith Ltd -v- H & S International Holdings Inc [1991] 2 Lloyd's Rep 127 < <http://www.swarb.co.uk/lisc/Arbit19911991.php> > accessed 14 March 2011.

<sup>60</sup> Model Law, art 19(1).

<sup>61</sup> English Arbitration Act s 2 and 4.

<sup>62</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2<sup>nd</sup> Edition, Sweet&Maxwell, 2007) para 113.

arbitrators may not exercise this power unless *lex arbitri* allows<sup>63</sup>.

The *lex arbitri* mostly deals with general issues for example equal treatment, fair dealing, arbitrability, court intervention, the constitution of the arbitral tribunal<sup>64</sup>. 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<sup>65</sup>. During the course of arbitration, the arbitrators can conduct the arbitration in terms of some detailed procedural rules. Moreover, the parties need to know these rules in order to defend himself better. For instance, the parties need to know when they must submit their written statements, how they can submit their evidence, which rules to be applied to evidence of the witness etc<sup>66</sup>. On the basis of these arguments, it is obvious that the *lex arbitri* should be distinguished from procedural rules<sup>67</sup>. In essence, the procedural rules contain which rules to be followed during the course of arbitration. When the parties agree on institutional arbitration, the rules of the institution are applied procedural rules. As another option, they can adopt some detailed procedural rules in the first meeting<sup>68</sup>.

It should not be overlooked that the place of arbitration does not refer merely a geographical location. When the parties choose England as the place of arbitration, it means the arbitration is conducted in terms of English Arbitration Law. In this context, the place of arbitration is a “connecting factor” between arbitration and arbitration law<sup>69</sup>. In related to this, 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<sup>70</sup>.

*Lex arbitri* determines the role of national courts in the arbitration process as well. This subject will be examined in the next part of this research paper.

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<sup>63</sup> Redfern and Hunter, para 3.43.

<sup>64</sup> *ibid*, para 3.43 and 3.48.

<sup>65</sup> Redfern and Hunter, para 3.48; Poudret and Besson, para 113.

<sup>66</sup> Redfern and Hunter, para 3.46.

<sup>67</sup> Poudret and Besson, para 113.

<sup>68</sup> Redfern and Hunter, para 3.49.

<sup>69</sup> Claude Reymond, “Where is an Arbitral Award Made?” (1992) 108 LQR 1 at 3.

<sup>70</sup> Model Law, art 20.

As a general review, 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 this country indirectly as *lex arbitri*<sup>71</sup>. As mentioned before, *lex arbitri* determines extent of the party autonomy, thus the parties should make a conscious choice of the place of the arbitration. In other words, the parties should choose a country as the place of arbitration in which the autonomy of the parties will subject to minimum restriction.

### **3. The Law Applicable to the Substance**

Party autonomy is the fundamental principle of international commercial arbitration. One of the reflections of party autonomy is that the parties are free to choose the law applicable to the substance. The origin of this principle dates back to old times that in a case, the Victorian Judges respected the intentions of the parties in regulating their contractual relationship<sup>72</sup>.

The main attractive point of this principle is that the parties can choose any law which meet the specific requirements of the dispute<sup>73</sup>. 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 party autonomy is recognised by Model Law<sup>74</sup> and UNCITRAL Rules<sup>75</sup>. 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<sup>76</sup>.

In essence, the parties should choose the law applicable to the substance while they are making the contract<sup>77</sup>. However, today, the parties can make the choice of the law applicable to the substance when the dispute

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<sup>71</sup> Redfern and Hunter, para 3.61.

<sup>72</sup> P. North and J.J. Fawcett, *Cheshire and North private international law* (11<sup>th</sup> ed., 1987), 449.

<sup>73</sup> Chukwumerije, 108.

<sup>74</sup> Model Law, art 28 (1).

<sup>75</sup> UNCITRAL Rules, art 35(1).

<sup>76</sup> English Arbitration Act, s 46 (1) (a).

<sup>77</sup> Redfern and Hunter, para 3.98 and 3.99.

arises<sup>78</sup>.

As mentioned above, the arbitral tribunal shall apply the law chosen by parties as the applicable to the substance. In this sense, this is the duty of the arbitral tribunal. However, in some circumstances, the arbitral tribunal can abandon this duty<sup>79</sup>. In other words, the principle of party autonomy is not always unlimited. It may subject to some restrictions. If the parties' choice of law is contrary to public policy or not *bona fide*, this choice of law may be ignored<sup>80</sup>. Actually both of these grounds are not clear<sup>81</sup>. Sometimes, 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 behaviours<sup>82</sup>.

*Bona fide* is one of the universal rules, thus it has similar definitions in most countries. On the contrary, there is no general application of this principle. On the basis of these arguments, *bona fide* should be assessed in every case separately. As 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<sup>83</sup>. At this point, the well-known case *Soleimany v Soleimany*<sup>84</sup> should be mentioned. In this case, a father and a son smuggled some carpets out of Iran under a contract. Actually, this smuggling was unlawful according to Iranian revenue laws. A dispute arose between them and then they decided to resolve this dispute through arbitration. They submitted their dispute before the Beth Din which applied Jewish Law. According to Jewish Law, even if the contract was illegal, it had no effect the rights of the parties. After the award was made, one of the parties applied to English Court of Appeal in order to obtain the enforcement of the award. However,

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<sup>78</sup> *ibid*, para 3.98.

<sup>79</sup> Rachel Engle, "Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability" (2002) 15 *Transnat'l Law* 323, 341.

<sup>80</sup> Chukwumerije, 109.

<sup>81</sup> *ibid*, 109.

<sup>82</sup> A. E. Anton, *Private International Law* (Second Edition, The Scottish Universities Law Institute, 1990), 267.

<sup>83</sup> New York Convention, art V (2) (a); English Arbitration Act, s 103(3); Model Law, art 36 (b) (ii).

<sup>84</sup> *Soleimany v Soleimany* [1999] QB 785.

English Court of Appeal refused this application on the ground of public policy and the Court stated that public policy did not allow the enforcement of an illegal contract<sup>85</sup>.

As a general review, the parties are free to choose the law applicable to the substance. However, this freedom is not always a rule. In some circumstances, it may be restricted. In general, the autonomy of the parties subject to some restrictions on the ground of *bona fide* 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.

### **c) 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 this, powers and duties of the arbitrators will be scrutinised in terms of the party autonomy.

#### **1. Appointment of Arbitral Tribunal**

One of the considerable advantages of the arbitration is that the parties can choose the arbitrators<sup>86</sup>. In litigation, the parties have no chance to select the judges, thus an international commercial dispute may be resolved as a usual compensation case in a national court. However, the subjects of international commercial arbitration are international companies with huge budgets and in general; disputes between international companies have some specific requirements. Thus, this kind of disputes should be resolved by people who have relevant expertise. Arbitration and the principle of party autonomy enable the parties to select any people who have relevant expertise as arbitrators.

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<sup>85</sup> *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*”.

<sup>86</sup> Redfern and Hunter. para 4.30.

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 arbitrators<sup>87</sup>. 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<sup>88</sup>. Furthermore, according to New York Convention, “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”<sup>89</sup>.

The parties can exercise this freedom through a third party. In other words, the parties can nominate a third party and this person can appoint the arbitral tribunal on behalf of the parties<sup>90</sup>.

The parties can expressly agree on the arbitrators in arbitration agreement or another separate agreement<sup>91</sup>. 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<sup>92</sup>. Following that, the parties can exchange the lists and they can reach the agreement<sup>93</sup>. Other than these methods, in the case of the arbitral tribunal consists of three people, each party can choose one arbitrator and these arbitrators can choose the third arbitrator. It should not be overlooked that all of these methods are possible for ad hoc arbitration<sup>94</sup>.

In the case of the parties cannot reach an agreement on appointment of the arbitrators, the national court can makes this appointment if there is no another empowered authority<sup>95</sup>. In this situation, this appointment is within the jurisdiction of the national court of the place of arbitration. Actually, this option is one of the effects of *lex arbitri* on arbitration process.

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<sup>87</sup> Emilia Onyema, “Selection of Arbitrators in International Commercial Arbitration” (2005) *International Arbitration Law Review*, at 46.

<sup>88</sup> Model Law, art 10 and 11; English Arbitration Act s 15 and 16; also see UNCITRAL Rules, art 6.

<sup>89</sup> New York Convention, art 5 (1) (d).

<sup>90</sup> Redfern and Hunter, para 4.30.; Onyema, at 47.

<sup>91</sup> Onyema, at 47.

<sup>92</sup> Redfern and Hunter, para 4.34.

<sup>93</sup> *ibid*, para 4.34.

<sup>94</sup> Onyema, at 47.

<sup>95</sup> Redfern and Hunter, para 4.41 and 7.11.

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<sup>96</sup>.

The arbitrators should have some qualifications. The parties can agree on some criteria in the arbitration agreement. However, firstly, the arbitrator should be a natural 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, economical and personal relationship with the parties<sup>97</sup>. As to impartiality, the arbitrators should be biased towards the parties<sup>98</sup>.

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 fulfil the expectations and wishes of the parties. In other words, this arbitrator does not respect the autonomy of the parties.

If the arbitration is conducted by a set of rules (UNCITRAL Rules or rules of arbitration institutions), this set of rules are applied in the challenge of 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<sup>99</sup>. According to UNCITRAL Rules, if the parties have some doubts about independence and impartiality of the arbitrators, they may challenge

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<sup>96</sup> ICC Arbitration Rules, art 8.3 and 8.4; ICDR Rules art 6.

<sup>97</sup> M. Scott Donahey, "The Independence and Neutrality of Arbitrators" (1992) 9 J. Int'l Arb. 31, 31.; Redfern and Hunter, para 4.77.

<sup>98</sup> 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."

<sup>99</sup> Redfern and Hunter, para 4.94.

these arbitrators<sup>100</sup>. As to English Law, according to English Arbitration Act<sup>101</sup>, the parties can apply the court to remove an arbitrator if the arbitrator is not impartial, or does not possess the qualifications in the arbitration agreement, or is not capable of conducting the proceedings, or refused or failed to conduct proceedings or to make an award. In addition to these, the challenge process is resulted in the rules which have been adopted<sup>102</sup> (The rules of arbitration institutions or local arbitration law).

## **2. Powers and Duties of the Arbitrators**

### **i) Powers of the Arbitrators**

The main difference between an arbitrator and a judge is that the parties to arbitration can confer some additional powers upon the arbitral tribunal. However, this is not possible for the judges. This distinction is one of the reflections of the principle of party autonomy in arbitration.

In essence, the main source of the powers of the arbitrators is the arbitration agreement, thus, as first, it is needed to examine the arbitration agreement in order to determine the powers of the arbitrators. The parties may have conferred some powers upon the arbitrators expressly in the arbitration agreement<sup>103</sup>. However, it is very rare<sup>104</sup>. 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<sup>105</sup>.

The powers which are granted by the parties or any set of rules are valid within the boundaries of *lex arbitri*<sup>106</sup>. In other words, while the arbitrators derive their powers from the parties, the courts derive their powers from the States<sup>107</sup>. On the basis of this argument, the courts have some coercive

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<sup>100</sup> UNCITRAL Rules, art 12.; also see Model Law, art 12 and 13.

<sup>101</sup> English Arbitration Act, s 24.

<sup>102</sup> Redfern and Hunter, para 4.107.

<sup>103</sup> *ibid*, para 5.08 and 5.09.

<sup>104</sup> Kenneth S. Rokison, "The sources and limits of the arbitrators' powers in England" (1986) *Arbitration*, at 222.

<sup>105</sup> Rokison, at 222.; Redfern and Hunter, para 5.09.

<sup>106</sup> Redfern and Hunter, para 5.06.

<sup>107</sup> *ibid*, para 5.10.

powers on the property and people. However, the parties cannot confer such power upon the arbitral tribunal. Even if the parties confer this kind of powers upon the arbitrators, it is not valid. Such powers can be granted merely by operation of law<sup>108</sup>. In this context, the arbitral tribunal can exercise these powers directly or by assistance of national courts<sup>109</sup>. As an illustration, according to English Arbitration Act<sup>110</sup>, “the arbitral tribunal may give directions to a party preservation for the purposes of the proceedings of any evidence in his custody or control and may order a claimant to provide security for the cost of the arbitration<sup>111</sup>”. Furthermore, the arbitral tribunal may take witness evidence; preserve the evidence; sale any goods the subject of the proceedings by the assistance of court<sup>112</sup>. For another example, according to Model Law “unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures<sup>113</sup>”.

In general, the arbitral tribunal have the powers for the conduct of arbitration “in such manner as it considers appropriate<sup>114</sup>”, determination of place and language of the arbitration if the parties fail to agree on<sup>115</sup>, appoint experts<sup>116</sup>.

Actually, in order to determine the powers of the arbitral tribunal properly, at first, 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<sup>117</sup>. Even though the arbitration agreement is the main source of the

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<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

<sup>110</sup> English Arbitration Act, s 38.

<sup>111</sup> According to English Arbitration Act s 38 (3), This power shall not be exercised on the ground that the claimant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

<sup>112</sup> English Arbitration Act, s 44.

<sup>113</sup> Model Law, section I art 17(1).

<sup>114</sup> UNCITRAL Rules, art 17 (1.)

<sup>115</sup> UNCITRAL Rules, 18 and 19; Model Law, art 20 and 22.

<sup>116</sup> UNCITRAL Rules, art 29(1); Model Law, art 26; English Arbitration Act, s 37 (1).

<sup>117</sup> Redfern and Hunter, para 5.13.

powers of the arbitral tribunal, in essence, *lex arbitri* determines the limits of the powers of the arbitral tribunal.

## **ii) Duties of the Arbitrators**

The subject matter of the dispute may be very specific. In this context, as mentioned above, the parties can confer some specific powers on the arbitral tribunal. In related to this, the parties can 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<sup>118</sup>. As an illustration for specific duties, the parties can agree on a time limit for making the award<sup>119</sup>.

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<sup>120</sup>. According to English Arbitration act, “the tribunal shall act fairly and impartially<sup>121</sup>”.

As mentioned above, the principle of party autonomy is applicable to the powers and duties of the arbitrators. However, application of this principle is not unlimited. The role of the applicable laws should not be overlooked as well. In other words, the applicable law determine the limits of party autonomy in this area.

## **d) Other Issues Relating to Conduct of the Arbitral Proceedings**

International commercial arbitration is a flexible dispute settlement method. The main difference between arbitration and litigation, the parties subject to the strict rules of national courts in litigation on the contrary, in arbitration, the parties are free to conduct of the arbitral proceedings. Actually, the basis of this freedom is the principle of the party autonomy. For example, the parties can agree on dates of the hearings. The arbitral tribunal

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<sup>118</sup> *ibid*, para 5.39 and 5.40.

<sup>119</sup> *ibid*, para 5.39.

<sup>120</sup> *ibid*, para 5.44, para 5.65 and para 5.67.

<sup>121</sup> English Arbitration Act, s 33; also see Model Law, art 18.

must conduct the hearings in accordance with the agreement of the parties.

This principle of party autonomy is widely accepted such as by Model Law and New York Convention<sup>122</sup>. However, this acceptance does not show that party autonomy is unlimited. The principle of party autonomy subjects to some restrictions.

- The most commonly encountered restriction on party autonomy is public policy. This restriction is derived from that every State has the right to exercise full and permanent sovereignty over its country. Thus, each state can govern any arbitration process in within the boundary of their country.

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<sup>123</sup>. However, they should not restrict their opinions in such a way<sup>124</sup>. International arbitration implicates more than one nation thus, the public policy of all interested nations should be considered<sup>125</sup>. 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<sup>126</sup>, 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<sup>127</sup>.

- Another restriction on party autonomy is equal treatment<sup>128</sup>. 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 provi-

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<sup>122</sup> Model Law, art 19 (1) and New York Convention, art V (1)(d).

<sup>123</sup> Model Law, art 36 (1) (b) (ii); New York Convention, art V (2) (b); English Arbitration Act, s 103 (3).

<sup>124</sup> Fouchard, Gaillard and Goldman, *International Commercial Arbitration* (Kluwer Law International, 1999) 862.

<sup>125</sup> Engle, 342.

<sup>126</sup> ICC Final Award in Case No: 5946 of 1990.

<sup>127</sup> Redfern and Hunter, para 6.16.

<sup>128</sup> *ibid*, para 6.11.

sions 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<sup>129</sup>”. In addition to this, Model Law includes a provision for equal treatment<sup>130</sup>.

- 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<sup>131</sup>. 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<sup>132</sup>. In this point, the arbitral tribunal needs to seek assistance of national courts.

### **e) 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<sup>133</sup>”.

- At the beginning of the arbitration: Firstly, One of the parties to arbitration agreement may bring an action before the court instead of arbitration<sup>134</sup>. In this situation, the court shall decide the enforceability of the arbitration agreement at the request of one of the parties<sup>135</sup>. Secondly, if the par-

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<sup>129</sup> New York Convention, art V (1) b, English Arbitration Act, s 103 (2) c.

<sup>130</sup> Model Law, art 18.

<sup>131</sup> Redfern and Hunter, para 6.18.

<sup>132</sup> *ibid*, para 6.19.

<sup>133</sup> Model Law, art 5

<sup>134</sup> 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.

<sup>135</sup> New York Convention, art II (3); Model Law, art 8.

ties have failed to appoint of the arbitrators and there is no applicable rules, they can apply the court for appointment of the arbitrators<sup>136</sup>. 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<sup>137</sup>.

• **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<sup>138</sup>. 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<sup>139</sup>.

Sometimes, the application for interim measures to the court may be accepted “not incompatible with the arbitration agreement<sup>140</sup>”. However, according to Model Law and UNCITRAL Rules, this kind of application is not incompatible with the arbitration agreement<sup>141</sup>. In order to clarify this ambiguity, the best solution is to look at relevant law<sup>142</sup>. Nonetheless, in some circumstances, judicial assistance of the courts is acceptable in most legal systems. These are:

- **Preservation of the evidence:** As a general rule, evidence should be preserved as soon as possible<sup>143</sup>, 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<sup>144</sup>, the judicial assistance of the court is needed. This assistance of the court covers all types of evidence such as documentary, photographic and magnetic<sup>145</sup>. (Generally, the competent court is the court at the place of the arbitration).

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<sup>136</sup> English Arbitration Act, s. 18; Model Law, art 11.

<sup>137</sup> Redfern and Hunter, 7.12; Sutton and Gill, para.7-005 and 7-097.

<sup>138</sup> *ibid*, para 7.15

<sup>139</sup> *ibid*, para 7.17, 7.16 and 7.19.

<sup>140</sup> *ibid*, para 7.25.

<sup>141</sup> Model Law, art. 9; UNCITRAL Rules, art. 26 (3).

<sup>142</sup> Redfern and Hunter, para 7.27.

<sup>143</sup> *ibid*,para 7.38.

<sup>144</sup> *ibid*.

<sup>145</sup> Sutton and Gill, para 7-135.

According to English Law, the court has power for the preservation of evidence<sup>146</sup>. Model Law includes similar provision<sup>147</sup>.

- 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.<sup>148</sup>. Model Law includes similar provision<sup>149</sup>.

- Documentary disclosure: When one of the parties requested, the arbitral tribunal has the power to order for documentary disclosure from other party<sup>150</sup>. However, if the requested party does not disclose the document of the relevant document is in possession of third party, the arbitral tribunal has no power to compel them<sup>151</sup>. In this context, the judicial assistance of the courts may be needed.

- 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 this circumstance, the specific performance of other parties may be the best remedy. Thus, the judicial assistance of the courts may be needed<sup>152</sup>.

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

## **Conclusion**

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

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<sup>146</sup> English Arbitration Act, s. 44.

<sup>147</sup> Model Law, art 27.

<sup>148</sup> English Arbitration Act, s. 44.

<sup>149</sup> Model Law, art 27.

<sup>150</sup> Redfern and Hunter, para 5.17.

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*, 7.46; also see; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

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 party 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 be subject to some restrictions. 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. Moreover, the parties are free to agree on the law applicable to arbitration and arbitration agreement. Nevertheless, this choice may be 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. 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 however 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.

As a conclusion, the principle of party autonomy is fundamental prin-

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. 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. Briefly, party autonomy is unlimited to a certain extent. After this point, it may be subject to restrictions. This extent should be determined case by case.

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