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A Brief Analysis of Party Autonomy in International Commercial Arbitration

Yifang Gao[1,2,*]

[1] *School of Law, Guangzhou College of Commerce, Guangzhou, Guangdong 511363, China*
[2] *School of Law, The University of Manchester, Manchester M13 9PL, The United Kingdom*
[*] *Corresponding author. Email: yifang_gao@sina.cn*

ABSTRACT
The party autonomy principle is critical, especially in international commercial arbitration where it is widely and fully applied. However, since this principle has certain limits and weaknesses, it is not absolutely advantageous to the parties involved in disputes. It can thus be considered that the party autonomy principle is a double-edged sword. This paper aims to contribute to the growth and development of international commercial arbitration by conducting a shallow analysis of the party autonomy principle, which allows parties to freely select the applicable rules for dispute resolution.

Keywords: *Party autonomy, International commercial arbitration, Domestic law, Public international law, Transnational law.*

1. INTRODUCTION

In international transactions, if the parties select to settle a dispute through arbitration via the arbitration agreement or the arbitration clause before or after the dispute, then the parties can often apply the party autonomy principle as part of the arbitration process. The party autonomy principle can be very helpful to the parties; however, the application of this principle is not absolute, and in many cases, its value cannot be realised nor its due advantages given full play. Therefore, this paper will be structured as follows: first, it will explain the meaning of the party autonomy principle before listing the rules that parties can select to resolve disputes; next, the paper will clarify the positive significance of this principle in international commercial arbitration; this is followed by an analysis of some disadvantages and limits of the principle; finally, the conclusion will suggest that by allowing the parties to freely select and apply the rules for resolving disputes, the principle in international commercial arbitration is a double-edged sword.

2. DEFINITION OF PARTY AUTONOMY AND THE SELECTION OF RULES FOR RESOLVING DISPUTES

2.1 Definition of Party Autonomy

The party autonomy principle permits parties to any international commercial agreement to determine which laws apply to their agreement.[2] The party autonomy theory was initially proposed by academics, but now enjoys wide acceptance in domestic law. This principle is recognized on a voluntary basis in many countries. It is forced neither by alliance nor by international bodies. Despite obvious differences in the nature and application of case law and statutes, each nation is impacted in a similar way by the notion of party autonomy since it permits parties to opt for relevant laws when encountering commercial relations.

2.2 The Selection of Rules for Resolving Disputes

It is possible to divide the regulations which parties employ to determine disputes into five groups, the first comprising domestic legislation, whereby specific laws are frequently selected as the

law to be applied to a contract in the context of any potential international commercial dispute where one party is a state entity or a state.[3] This principle is critical because when parties opt for domestic legislation to address contract disputes, they usually opt for autonomous legal systems. Such systems comprise amalgams of rules and laws devised by a state or interpreted by its judiciary, as opposed to a mere series of detached laws or regulations. Moreover, the domestic legal system can be effectively understood by veteran practitioners. Hence, this approach can address most necessary legal queries.

The second group of regulation which parties employ to determine disputes comprises public international legislation, the general principles of law included.[3] The relevance of public international law is generally confined to states, but it cannot be said that it is completely limited to states, being regarded as a dynamic rather than stationary decision-making process in which multiple participants are involved. Hence, participants are only participants without subjects or objects, including private non-governmental organisations, international organisations such as the International Labor Organization, transnational companies, states and individuals.

The third element is parallel legislation. Reputable security initiatives can moderate the possibility of contracting states implementing unjust or capricious action wherein the state's legislation becomes application solely to the remit of general principles of law, public international law, or other minimum standards.[3]

The fourth classification refers to transnational law, such as trade usage, international development law, merchant law (the *lex mercatoria*), and codified terms.[3] Interestingly, the 1979 Sale of Goods Act comprises an amalgam of defined legal rules pertinent to disputes, rather than a broad legal system. International construction projects falling within the remit of Dutch law merely consider Dutch construction contract law. Furthermore, international contracts related to the sale of goods which fall under English law principally concern defined aspects of the sale of goods. Hence, It is necessary for the law to be divided into different departments, because it is too closely connected with society and involves too many fields, such as property law, tort law, labour law, company law and contract law. Not only are the fields and contents covered by each law limited but also individual energy levels are also limited, so there are lawyers who are proficient at handling disputes in different fields. The rules of most systems oblige the judiciary to give adequate consideration to pertinent commercial practices, wherein trade usage comprises any custom or practice deemed typical of a business transaction in any given context, location, or occupation. The International Chamber of Commerce (ICC) and similar bodies have been engaged in attempts to formulate mutually agreed upon definitions for terms such as CIF in the context of the international sale of goods and the international carriage of goods, thereby allowing the expectation of all parties concerned to be clarified in short form. In relation to the *lex mercatoria*, the legal sources already discussed in this paper such as both the general principles of law and public international law, are employed. In addition, the *lex mercatoria* also falls within the remit of both the 1998 Principles of European Contract Law and the UNIDROIT Principles.[3] The UNIDROIT Principles seek to harmonize the interests of both parties in respect of their rights and responsibilities, thereby comprising a consistent collection of universally applicable precepts with no preference for any particular legal system. Furthermore, the UNIDROIT Principles only apply under circumstances where both parties consent to the contract being determined in accordance with either general principles of laws or the *lex mercatoria*.

The fifth classification consists of equity and good conscience, therein arbitrators must resolve disputes in accordance with that which is deemed to be just and judicious, rather than on purely legal grounds.[3] They are accorded the power to do so by equity clauses which specify that arbitrators must reach their decisions using notions of fairness not through rigid clarifications of the law. In other words, the emphasis is on the amicable implementation of decisions. It has been suggested that this should be interpreted to mean that arbitral tribunals have the power to overlook formal regulations, such as those obliging contracts to be performed in a specific manner or rules that appear to function in an unfair manner. Thus, under these circumstances, tribunals reach decisions in accordance with the merits of each case, both functioning as autonomous sources of authority and representing the independent employment of the party autonomy precept.

3. THE IMPORTANCE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

The reasons why party autonomy is significant in the context of international commercial arbitration are outlined below.

3.1 The Merits of Party Autonomy

The party autonomy precept favours the creation and evolution of a commercial arbitration ethos.[2] Thus, the lawyers involved in effect are the ones who employ the precept of party autonomy as they offer their professional expertise, wherein they determine the most appropriate legislation and arbitration approaches for their clients, in addition to the most apt manifestation of arbitration. For instance, only when the precise institutional arbitration form has been selected can the party autonomy principle manifest its true worth in institutional arbitration. Therefore, using the principle in its most appropriate manner allows parties to engage in arbitration to the best possible effect.

The 1996 Arbitration Act contains several clauses impacting the party autonomy principle. For example, it permits parties to manage the arbitration process. Hence, it permits the matter to be resolved in the absence of lawyers, not least when no point of law is at stake and the matter can be resolved via documents. Thus, the party autonomy precept empowers the parties with the knowledge that they are in control of the arbitration process. Moreover, it empowers parties to forsake the arbitration process at any point, either because a compromise or consensus has been reached or because the arbitrator has been stymied by the raising of an objection to the overall process. All these reflect the value and significance of the party autonomy principle.

3.2 The Advantages of Party Autonomy

The conclusions of most international contract disputes can be shaped by the selection of legal system.[5] Contract disputes become protracted, capricious, and costly when no law is chosen. Thus, it is essential that parties demonstrate a willingness to opt for arbitration as a conflict resolution mechanism. Moreover, they must also be entitled to choose arbitration to resolve the dispute in order for legal system section to be an option.[6] This is because the selection of substantive law applicable to arbitration is dependent upon the decision to select arbitration to resolve the issue. In other words, the party's decision to select arbitration as the method of dispute resolution is the prerequisite for its selection of substantive law applicable to arbitration. Arbitration is a form of dispute settlement determined by a contract, that is, parties can use arbitration to resolve disputes only when both parties have agreed in the arbitration clause as part of the contract or in a separate arbitration agreement before or after the dispute occurs.[7] Therefore, once arbitration is selected as the way for both parties to settle international commercial disputes and thus the substantive law applicable to arbitration is selected, the settlement of disputes will become more efficient and easier to a certain extent, and the advantages of the party autonomy principle will be brought into full play here.

Thus, international commercial arbitration comprises a neutral space in which neutral governing law can be selected, which means that the selected law can be autonomous of the law governing the transaction. Hence, this ensures that the selected law demonstrates no preference for either party.

3.3 Compared with Litigation, the Principle of Party Autonomy Can Be More Fully Reflected in International Commercial Arbitration

As a method of resolving disputes, arbitration benefits from its ability to fully employ the party autonomy principle.[1] Thus, it is possible for parties to engage in litigation in relation to federal claims and to only arbitrate contract claims. It is also possible that all claims are settled by arbitration based on arbitration agreement or arbitration clause. This renders arbitration more flexible than litigation.

4. GRANTING SUCH AUTONOMY TO PARTIES TO A DISPUTE CAN BE DANGEROUS

It can be dangerous to grant such autonomy to parties to a dispute. The limits and disadvantages of party autonomy are as follows.

4.1 The Limits of Party Autonomy

The effective application or full realization of the value of party autonomy as a concept is based on the premise that all parties to the dispute

understand the situation, master a certain professional foundation and have the responsibility and tolerance to apply this principle. Party autonomy is generally exercised by the legal teams representing both parties. Hence, it is circumscribed by the comparative knowledge of lawyers on both sides. However, this only refers to knowledge of relevant legal systems, not other knowledge areas. Furthermore, the party autonomy principle arose when the number of commercial nations was somewhat limited, after which the practices of these nations have been employed as references.[4] Typically, cases will accept the legal system from one of these nations as pre-eminent for the purposes of arbitration. However, sometimes the party autonomy principle does not apply when selecting the applicable law of international commercial arbitration for two reasons, the first being that the majority of the lawyers fail to comprehend the content of domestic law in other nations.[6] The second reason is that the majority of the nations with a longer history are unable to undoubtedly understand, unswervingly trust or reasonably and unambiguously explain the legislative background, legislative origin, legislative significance, legislative value, legislative principles, legislative ideas, legislative contents and legislative contributions of the laws in newer nations. As a consequence, in international commercial arbitration, the party autonomy principle is not necessarily applicable or effective under any circumstances. In other words, the party autonomy principle cannot apply in all commercial arbitration cases in international contexts. Its application is relative rather than absolute.

4.2 The Disadvantages of Party Autonomy

The costs and time involved in arriving at a consensus can be averted through the advance determination of relevant laws.[6] In this way, the most suitable outcome can be ensured to the greatest extent. On the contrary, if the applicable law for dispute resolution is not selected in advance before the dispute occurs, it may take a lot of time, energy, manpower and money to consult the data and find teams of experts to consider and decide to apply the law for dispute resolution, which will not only affect the speed and effect of dispute resolution, but may even bring serious unimaginable consequences. However, in general, it is a necessary and significant step to determine the applicable law to solve international commercial disputes. Therefore, it is an indispensable process to spend money and time to consider what kind of law to apply, that is to say, the investment of time and money is inevitable; which is a drawback of the party autonomy principle. In other words, since it is decided to apply the party autonomy principle, it is impossible not to invest time and money at all. In brief, it can be costly to select a relevant law when parties fail to reach an agreement.

In addition, if a party's judgment ability or knowledge level is limited, then the law he considered and decided to select for resolving disputes is probably not suitable for resolving certain types of specific disputes in the commercial field between the parties, which is one of the shortcomings of the party autonomy principle.

5. CONCLUSION

Conducting a brief analysis of the party autonomy principle in international commercial arbitration allows this researcher to believe that it is a double-edged sword. We must admit that the party autonomy principle is of great value in international commercial arbitration, but we cannot ignore the inherent shortcomings and limits of the party autonomy principle. Consequently, the parties involved in disputes should reasonably use the principle to protect their interests and efficiently resolve international commercial disputes through arbitration.

AUTHORS' CONTRIBUTIONS

This paper is independently completed by Yifang Gao.

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