



**A CRITICAL EXAMINATION ON PARTY AUTONOMY IN
INTERNATIONAL COMMERCIAL ARBITRATION**

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***I dedicate this dissertation to my dearest father, Cihangir KÖSE. Thank you for always
being there and believing in me.***



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ABSTRACT

Party autonomy is one of the principal characteristics of arbitration and additionally, it is one of the greatest advantages of this dispute resolution system. According to the party autonomy, parties are free to decide every single detail of the arbitration and for this reason, it plays a significant role in international arbitration.

Different countries adopt different views on international arbitration. While some countries allow the interpretation of the national courts; the others support independency of the arbitration from the national jurisdictions. When parties get into arbitration process, they demand for superior autonomy, however each country's courts have some limitations for the party autonomy. These limitations generally come up at the recognition and enforcement stage of the arbitral award.

That is to say party autonomy is unlimited to a certain extent since national courts might become involved with the arbitration process at the recognition and enforcement stage, thus it is not possible for parties to have absolute autonomy even in the light of different legal theories of international commercial arbitration.

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I. CHAPTER I: INTRODUCTION

In a world of rapid globalization, international business transactions demand is increasing. As international commerce activities increase in numbers, it almost makes it a common practice throughout the world. National boundaries are now less of a problem whereas the problem of providing a legal solution to the dispute is now the most substantial issue that requires further studies.¹

In international sense, disputes can be resolved in various ways such as with cross-border litigation, alternative dispute resolution, and online dispute resolution mechanisms.² The most frequent resolution system used is the cross-border litigation system.³ Cross-border litigation is a method of resolving disputes where the parties' actions occurred in different countries and are abounding with issues that require consideration of a foreign jurisdiction's law.⁴ However, sometimes, litigation is not sufficient enough to meet the expectations since an action in courts, especially if it involves foreign jurisdictions, will take considerable amount of effort, time as well as money.⁵ It is an expensive and long-term process. This is the reason why a new resolution system is needed, thus in addition alternative dispute resolution mechanism has been developed.

¹ Oreste Pollicino, 'The New Relationship Between National And The European Courts After The Enlargement Of Europe: Towards A Unitary Theory Of Jurisprudential Supranational Law?' (2010) 29 Yearbook of European Law.

² Faye Fangfei Wang, *Law Of Electronic Commercial Transactions* (Routledge 2010) 25.

³ Directorate General For Internal Policies, Policy Department C: *Citizens' Rights And Constitutional Affairs, Civil Judicial Experts in Cross-Border Litigation: The Common Law Perspective*, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519212/IPOL_IDA\(2015\)519212_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519212/IPOL_IDA(2015)519212_EN.pdf) accessed 24 May 2015.

⁴ Cedric Chao, Mark Danis, *Navigating Cross-Border Litigation Practical advice to help guide your next international dispute to a problem-free resolution*, The Recorder www.mofo.com/files/.../100809-Navigating-Cross-Border-Litigation.pdf accessed 24 May 2015.

⁵ Michael A. Helfand, 'Arbitration's Counter-Narrative: The Religious Arbitration Paradigm' (2015) 24 The Yale Law Journal <http://www.yalelawjournal.org/article/the-religious-arbitration-paradigm> accessed 24 May 2015.

Alternative dispute resolution (ADR) is a voluntary alternative for resolving disputes as a substitute of litigation.⁶ Mediation, negotiation and arbitration are the types of ADR.⁷ Arbitration is a procedure in which a dispute is submitted, with parties' agreement, to an arbitral tribunal, who will make a binding decision about the dispute, and also in choosing arbitration, the parties would rather have a private dispute resolution procedure instead of going to court.⁸ Arbitration has numerous definitions but all of them are analogous. Even though cross-border litigation is well known, arbitration presents easiness, which gives an opportunity to have effective, simple and fast out-of-court resolution, for people to solve their disputes.⁹ Arbitration is a mainstream procedure and substantial for business and trade transaction disputes.¹⁰ Arbitration is a process that parties submit their dispute to a non-governmental decision-maker with their own free will.¹¹ Arbitration agreements or arbitration clauses are integrated with the main agreements for global businesses to guarantee that they choose a certain dispute resolution process.¹² It relies on the consent of the parties so the main difference between litigation and arbitration is that arbitration is a private dispute resolution mechanism based on the free will of the parties.¹³

So party autonomy, which is the principal characteristic of arbitration plays an important role in international commercial arbitration. Arbitration agreement records the mutual consent of parties for submitting the disputes to arbitration instead of taking it to national courts. This element of mutual consent is essential, as without it there will not be

⁶ Richard Delgado and others, 'Fairness And Formality: Minimizing The Risk Of Prejudice In Alternative Dispute Resolution' 1985 Wisconsin Law Review, 1360.

⁷ Harry T. Edwards, 'Alternative Dispute Resolution: Panacea Or Anathema?' (1986) 99 Harvard Law Review.

⁸ <http://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 24 May 2015.

⁹ Alexander J Bělohávek, *B2C Arbitration* (Juris 2012) 100.

¹⁰ Christian Bühring-Uhle, *Arbitration And Mediation In International Business* (Kluwer Law International 1996).

¹¹ Gary B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, page4.

¹² Tony Cole, 'Authority And Contemporary International Arbitration' (2010) 70 Louisiana Law Review, 843.

¹³ Anoosha Boralessa, "The Limitations of Party Autonomy in ICSID Arbitration" [2004] 15 Am. Rev. Int'l Arb, 253-266.

any valid arbitration.¹⁴ Hence, party autonomy is in the center of each and every arbitration agreement. Yet, this autonomy is not unrestrained. There are different limitations for party autonomy, for instance the applicable laws, mandatory rules of different nations and public policies provide the restrictions to party autonomy, and also institutional rules limit the autonomy of parties.¹⁵ Furthermore in some cases courts' intervention becomes essential and courts also interfere at the stage of recognition and enforcement or setting aside an international arbitral award.¹⁶

Thus, arbitration is an ADR mechanism based on the party autonomy principle.¹⁷ It is significant to examine the party autonomy principle and its limitations in order to understand arbitration as a whole. Therefore, the role and extent of party autonomy, with its limitations, and the relationship between party autonomy and different arbitral legal theories will be dealt in this study.

First of all party autonomy; its scope and the limitations on this principle will be analyzed in the light of selected countries' regulations; England, France, Switzerland, Turkey, also with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the UNCITRAL Model Law. Secondly, the legal theories of international arbitration such as; the jurisdictional theory, the contractual theory, the hybrid (mixed) theory and the delocalization (autonomous) theory will be compared and their link with party autonomy will be examined. Thirdly the limitations on party autonomy at the stage of recognition and enforcement of international commercial arbitral awards in the

¹⁴ Andrea Marco Steingruber, *Consent In International Arbitration* (Oxford University Press 2012) 2.

¹⁵ Carlo Craff, 'The Applicable Law In An International Commercial Arbitration: Is It Still A Conflict Of Laws Problem?' (1982) 16 *The International Lawyer*, 613-645.

¹⁶ Alan Redfern, 'Arbitration And The Courts: Interim Measures Of Protection-Is The Tide About To Turn' (1995) 30 *Texas International Law Journal*, 72.

¹⁷ Jean R. Sternlight, 'Is Binding Arbitration A Form Of ADR?: An Argument That The Term "ADR" Has Begun To Outlive Its Usefulness' (2000) 2000 *Journal of Dispute Resolution*, 99.

context of role of different national courts and various regulations of states for exceptions of recognition and enforcement of these awards that restrict party autonomy will be explained. As a final point the main discussion on party autonomy and its existence and more importantly the argument about which theory more comprehensive and which reflects party autonomy in real sense will be made.

II. CHAPTER II: PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

A. WHAT IS PARTY AUTONOMY?

International arbitration is a specifically established mechanism for the final and binding resolution of disputes, regarding a contractual or other relationship with an international element, by impartial arbitrators in accordance with procedures, structures and substantive legal or non-legal standards chosen straight by the parties.¹⁸ Arbitration has advantages when it is compared to the litigation system.¹⁹ In this sense party autonomy plays a significant role in international arbitration. The major point of the arbitration is that the parties have the autonomy to agree on arbitration and almost everything that is related to the resolution of the dispute.²⁰

The facts of the party autonomy rule proceed from the ethos in which commercial arbitration systems were developed and established and the maintained autonomy of

¹⁸Julian D. M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 1.

¹⁹Ferdinando Emanuele and Milo Molfa, 'Arbitration Versus Litigation' (*Financier Worldwide*, 2015) <http://www.financierworldwide.com/arbitration-versus-litigation/#.VdiwJlu4k6U> accessed 5 June 2015

²⁰Born (n11)

parties relates in general to the following: appointment of arbitrators; the choice of the forum and the governing law; appointment of experts; the determination of the timetable, especially in respect to ad hoc arbitrations and the choice of the language of the arbitration, where necessary.²¹ The modern view is that the parties have the freedom to choose any substantive laws or rules of law even if these do not have any connection to the parties or the specific dispute.²² Also parties are free to choose whether they will go to litigation or arbitration.²³ Even though the right to arbitration is not as yet accepted as a fundamental human right, the arbitral freedom is stated as a universally accepted principle of dispute resolution.²⁴ In other words, the whole arbitration mechanism is based on the autonomous party agreement. The principle of party autonomy forms the arbitral tribunal and the arbitration process. Party autonomy is one of the greatest advantages of the arbitration and this principle includes flexibility and confidentiality.²⁵

Flexibility is one of those advantages.²⁶ The parties agree on taking their disputes to arbitration in their contract in order to resolve their disputes not through litigation, since it is highly likely that the court might be foreign to one party while domestic to the other. Furthermore, the parties also are not willing to handle the procedural requirements. Subsequently, the parties choose arbitration as a private alternative dispute resolution rather than litigation and therefore, they can manage all the proceedings of arbitration

²¹ Charles Chatterjee, *The Reality Of The Party Autonomy Rule In International Arbitration* (Kluwer Law International 2003) 540.

²² Wolfgang Kühn, *Expressed and Implied Choice of Substantive Law in the Practice of international Arbitration*, (1999) 384.

²³ Lucian Arye Bebchuk, 'Litigation And Settlement Under Imperfect Information' (1984) 15 *The RAND Journal of Economics*.

²⁴ Fali S. Nariman, 'Recent Developments In The World Of International Commercial Arbitration' (2004) XXXIX *Indian Council of Arbitration Journal*, 4-8.

²⁵ Harold Crowter, *Introduction To Arbitration* (LLP 1998) 9.

²⁶ *ibid.*

taking into consideration their wishes and requirements for instance, the possibility for parties to choose arbitrators on specific expertise, language, place of arbitration and etc.²⁷

The other advantage is premised on confidentiality.²⁸ And this is really important for parties, who are generally large companies or conglomerates in international commercial arbitration.²⁹ In order to keep trade secrets hidden, confidentiality plays an important role unlike in litigation whereby matters will be under public scrutiny.³⁰ As it can be understood from these explanations these are the effects of the party autonomy principle.

Party autonomy can be defined as the freedom of the parties to construct their contractual relationship in the way they see fit.³¹ The greater importance of the will of the parties is best described as the guiding principle in defining the process to be followed in an international commercial arbitration and it is a principle that has been authorized by international arbitral institutions as well as in national laws.³² So according to this point of view party autonomy plays a significant role in international commercial arbitration and it is recognized both by national laws and international arbitral institutions and organizations and the Model Law accept the principle without any conflicts.

Furthermore it has been stated that the idea that arbitration agreement is based on party autonomy is one of the foundations of every arbitration process. There can be no arbitration between parties if the parties will not agree on taking their disputes to

²⁷ Lcia.org, 'Arbitration And Mediation - The Basics'

http://www.lcia.org/Dispute_Resolution_Services/Arbitration_and_Mediation_The_Basics.aspx accessed 5 June 2015.

²⁸ Crowter (n25).

²⁹ Patrick Neill, 'Confidentiality In Arbitration' (1996) 12 *Arbitration International*, 288.

³⁰ *ibid.*

³¹ Sayed Abdulhay, *Corruption In International Trade And Commercial Arbitration* (Kluwer Law International 2004) 159.

³² Alan Redfern, *Law And Practice Of International Commercial Arbitration* (Sweet & Maxwell 2004) 315.

arbitration so the nature of arbitration requires the consent of each party for arbitration to occur.³³ Also according to Lew civil law, common law and socialist countries have equally been affected by the freedom of parties' to choose the law to govern their contractual relations despite their differences.³⁴

Nearly all international arbitration laws, rules, and conventions recognize the major principle that party autonomy underlies arbitration now.³⁵ As it is supported in The Report of the Institute of International Law, party autonomy is one of the fundamental principles of private international law as it is a significant requirement that provides certainty, predictability, and uniformity whether substantive or choice of law.³⁶

Party autonomy guarantees that arbitration will proceed in accordance with the will of the parties. And party autonomy principle has some primary advantages such as: the parties can choose a law that they are familiar with.³⁷ The parties can further avoid the application of a law with a close connection to the transaction, and by making a clear choice of law the parties will know what they can expect from each other and the arbitral tribunal. However, as will be discussed in below chapters, the scope of party autonomy is limited and subject to restrictions, for instance it may possibly be subjected to mandatory rules of the seat of arbitration law or public policy rules of the law applicable to substance.

³³ Lew (n18) 129-153.

³⁴ Julian D. M Lew, *Applicable Law In International Commercial Arbitration* (Oceana Publications 1978) 75.

³⁵ Emmanuel Gaillard, *The Role Of The Arbitrator In Determining The Applicable Law* (Juris Publishing 2008) 185, 199.

³⁶ Report of Institute of International Law, *Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities*, (64 II Yearbook 1992), 383.

³⁷ Ziya Akıncı, *Arbitration Law Of Turkey: Practice and Procedure* (Juris 2011) 5.

B. PARTY AUTONOMY AND IT'S LIMITATIONS AS PROVIDED UNDER STATUTORY PROVISIONS

In different national laws, international arbitration rules, laws and conventions, party autonomy is recognized and incorporated. Besides the separability doctrine, which argues that an arbitration agreement that forms part of a contract shall be treated as an independent agreement from the main contract, it also supports the party autonomy principle since this principle has its own ability to endure the arbitration agreement when the leading contract is not valid any more.³⁸ Since it is universally accepted it would be better to examine some of these laws, rules and conventions to have a better understanding on party autonomy.

1. PARTY AUTONOMY UNDER THE UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law (UNCITRAL) is the central legal body of the United Nations system in the international trade law ground that directs the harmonization and unification of the international trade law progresses.³⁹

The UNCITRAL Model Law is intended to assist States in reorganizing and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration and it covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.⁴⁰

³⁸ Thomas E Carbonneau, *Carbonneau On International Arbitration* (Juris 2011) 186.

³⁹ <http://www.newyorkconvention.org/uncitral> accessed 7 June 2015

⁴⁰ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html accessed 7 June 2015.

The UNCITRAL Model Law approach underlines the will of the parties as the governing principle. According to the model law, parties are free to determine the composition of the arbitral tribunal, to select the rules to govern appointment and challenge procedures, and to choose the rules of law applicable to the substance of the dispute.⁴¹ However this freedom has limitations under the Model Law according to the mandatory provisions also limited by the model's link with national law, particularly at the post-award stage, though also where the court may render assistance at specific points in the proceedings.⁴²

Article 19(1) of the UNCITRAL Model Law (Model Law) provides⁴³:

"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 provision shows that parties have the freedom to agree on the procedural rules for arbitral tribunal to follow in proceedings. Furthermore in Article 2(d)⁴⁴:

"(d) Where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination"

Since it allows the parties to select or adapt the rules according to their specific demands and needs, unimpeded by traditional and possibly conflicting domestic concepts, autonomy

⁴¹Mary E. McNerney and Carlos A. Esplugues, '*International Commercial Arbitration: The UNCITRAL Model Law*', (9 B.C. Int'l & Comp. L. Rev. 47 1986), 47.

⁴² Ibid 48.

⁴³ The UNCITRAL Model Law (1985), Art 19(1).

⁴⁴ Ibid Art 2(d).

of the parties in determining the rules of procedure has a special importance in international cases thus preventing the risk of frustration or surprise.⁴⁵

2. PARTY AUTONOMY UNDER THE NEW YORK CONVENTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention," is one of the fundamental instruments in international arbitration and the New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.⁴⁶ The New York Convention was the creation of internationalism in arbitration.⁴⁷

In New York Convention in Article I field of application is defined. In Article III the general obligation for the Contracting States to recognize and enforce the arbitral awards is regulated. The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement that are limitedly listed in Article V(1). The court may refuse enforcement of the arbitral award with the reasons of public policy as provided in Article V (2).

In Article II (2) of this convention:

“The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

This article shows that New York Convention recognizes party autonomy in the written agreement made by the parties where they agree to take their cases to arbitration when the

⁴⁵ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> accessed 11 June 2015

⁴⁶ <http://www.newyorkconvention.org> accessed on 11 June 2015

⁴⁷ Julian D. M. Lew, 'Achieving The Dream: Autonomous Arbitration' (2006) 22 Arbitration International 189.

disputes are arisen between them in present or future.⁴⁸

Also New York Convention accepts party autonomy principle in Article V (1). Under this article, the reasons of non-recognition and non-enforcement grounds lay down⁴⁹. The major reason is the public policy; this principle limits the party autonomy.

3. PARTY AUTONOMY UNDER THE ENGLISH ARBITRATION ACT 1996

The English Arbitration Act 1996 is mainly based on the party autonomy principle.⁵⁰ In the English Arbitration Act, directly or indirectly it is referred to the party autonomy rule. According to the Arbitration Act 1996 Section 1 (b):

“The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”⁵¹

The first part of Section 1 (b) provides that, in accordance to the party autonomy principle, parties are free to agree on the choice of law, the seat of arbitration and the procedural law. It can be seen that the party autonomy principle is adopted with the words “the parties should be free...” and also other words like “the parties are free to agree” or “Unless the parties otherwise agree” or “Unless otherwise agreed by the parties” establish party autonomy under the Arbitration Act.⁵²

⁴⁸ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) (1958), Art II (2).

⁴⁹ Ibid Art V (1).

⁵⁰ Hege Elisabeth Kjos, *Applicable Law In Investor-State Arbitration* (Oxford University Press 2013) 68.

⁵¹ The English Arbitration Act (1996), s1.

⁵² Ibid s 15,16,17.

However the final part of Section 1(b) shows that freedom of parties' has limitations to protect the public interest. It is clear that mandatory rules has a power on the party autonomy as it can be seen in Section 4(1) of the Act, which provides that:

“The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.”

Therefore, the party autonomy rule is dependent to the mandatory rules of a legal system. The English Courts are also allowed to refuse to recognize and enforce the international arbitral award when the award is against public policy.⁵³

4. PARTY AUTONOMY UNDER FRENCH ARBITRATION LAW

One of the first states that adopted an arbitration law was France; the arbitration law was adopted in 1981.⁵⁴ France adopted a new arbitration law back in 2011, with this reform, rules applicable to international and domestic arbitration and the principles are developed and the aim was the enhancement of the trust of parties who want to adopt French law in their dispute in international arbitration.⁵⁵

As it is also has been supported by the French courts; the separability of the arbitration agreement, the recognition and the enforcement of international arbitral

⁵³Ibid s 103(3).

⁵⁴ Reed Smith, *France Revises Arbitration Law*, <http://www.lexology.com/library/detail.aspx?g=58c7c72c-6929-42ff-acdb-86b8107b2dd4> accessed 2 July 2015.

⁵⁵ Jean de la Hossieraye, Stéphanie de Giovanni and Juliette Huard-Bourgeois, *Arbitration in France*, https://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_FRANCE.pdf accessed 2 July 2015.

awards, very restricted court intervention and party autonomy are some of main principles of French law on international arbitration.⁵⁶

The scope of parties' freedom has been extended with the new French law, which has adopted in 2011, with respect to all features of the arbitration.⁵⁷ In French Arbitration Law Article 1446;

“Parties may submit their dispute to arbitration even where proceedings are already pending before a court.”⁵⁸

This article shows that parties are free to choose in submitting their disputes to arbitration so under French arbitration law party autonomy principle is accepted. Also with French arbitration laws interference of courts are very limited as it is regulated under Article 1448;

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”⁵⁹

According to this regulation French courts have very limited powers to intervene this also one of the indications of the party autonomy, which means that French laws adhere to the principle of party autonomy. However it also shows that freedom of the parties' are restricted in some situations.

⁵⁶ Ibid 333.

⁵⁷ Emmanuel Gaillard, 'France Adopts New Law On Arbitration' (2011) 245 New York Journal <http://www.shearman.com/~media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-article-France-Adopts-New-Law-On-Arbitration/FileAttachment/IA012411FranceAdoptsNewLawOnArbitrationegaillard.pdf> accessed 12 July 2015.

⁵⁸ The French Arbitration Law Act Art 1446.

⁵⁹ ibid Art1448.

5. PARTY AUTONOMY UNDER SWISS PRIVATE INTERNATIONAL LAW ACT

Since 1989 Switzerland has a modern and liberal international arbitration law regulated under Swiss Private International Law Act⁶⁰ (hereafter SPILA) in Chapter 12, which supports broad party autonomy principle.⁶¹ Chapter 12 of the SPILA contains essential provisions that ensure accurate constitution and functioning of the arbitral tribunal and provide the parties to have a flexible and fair arbitral proceeding, which meets with the parties' expectations.⁶²

According to SPILA Chapter 12 Article 182;

"The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice."⁶³

Which shows that the parties are free to choose procedural law that will be applied to the arbitration procedure.

And Article 187 provides that,

"The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected."⁶⁴

⁶⁰ The Swiss Private International Law Act (1987)

⁶¹ Matthias Scherer and Martin Dawidowicz, *Arbitration Guide* ^{ICC} IBA Arbitration Committee, Switzerland (2012), 1.

⁶² Ibid.

⁶³ SPILA Art 182.

⁶⁴ *ibid* 187.

These articles are based on the party autonomy principle and it is provided that the arbitral tribunal shall decide the dispute according to the laws chosen by the parties. The party autonomy principle is accepted to the greatest possible scope.⁶⁵ However also in Swiss law there are some restrictions for the party autonomy also. As it is mentioned in above sections public policy is the main restriction of the party autonomy under Swiss law.

6. PARTY AUTONOMY UNDER TURKISH ARBITRATION ACT

Party autonomy principle is also accepted under Turkish Arbitration Act and The Istanbul Chamber of Commerce Arbitration Institution Rules. In Turkish law party autonomy, also regard as the principle of freedom of contract, which means that parties are independent to agree on the rules, choosing their own rules or referring to the institutional rules that will be applied in arbitration proceedings.⁶⁶ Article 424 of the Code on Civil Procedure (CCP) and Article 15 of Turkish International Arbitration Code (TIAC) regulates the principle of party autonomy directly.⁶⁷ And if the parties do not agree on the procedural rules of arbitration the arbitrator or the tribunal leads arbitration in accordance of the CCP and TIAC regulations.⁶⁸

Nevertheless under Istanbul Chamber of Commerce Arbitration Institution Rules (ITOTAM) Article 20 it is mentioned that, if there is no regulation provided by ITOTAM the parties are free to choose the procedural rules.⁶⁹ It is clear that party autonomy principle is

⁶⁵ Swiss Arbitration Association, Switzerland is arbitration-friendly, <http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/switzerland-is-arbitration-friendly/index.html> accessed 15 July 2015

⁶⁶ Assoc. Prof. Dr. Seda Özmumcu, *The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100*, (2013) www.journals.istanbul.edu.tr/iuafdi/article/download/.../5000111736 accessed 15 July 2015

⁶⁷ The Code on Civil Procedure Art 424, Turkish International Arbitration Code (2001) Art 15

⁶⁸ Gökben Erdem Dirican, Erdem Atilla, *Arbitration procedures and practice in Turkey: overview*, <http://us.practicallaw.com> accessed 15 July 2015

⁶⁹ Istanbul Chamber of Commerce Arbitration Institution Rules (2015) Art 20.

also accepted with Turkish laws. On the other hand there are some limitations of this principle, which remains with the recognition and the enforcement of the arbitral awards; such as public policy, lack of standing of a party and if the subject matter of the dispute is not suitable for arbitration under Turkish law and so on.⁷⁰

As it is mentioned above party autonomy is accepted directly or indirectly under International Conventions, rules and laws and it plays a significant role in international arbitration. However, party autonomy principle is not unlimited. It has different limitations, which are regulated under these conventions, rules or laws. The main limitation for this principle is public policy that is accepted by the international community and even if the public policy principle is common, different countries have different restrictions for the principle of party autonomy. These limitations, generally, arise in the recognition and enforcement process, which will be discussed below under Chapter IV.

C. THE ROLE AND THE SCOPE OF PRINCIPLE OF PARTY AUTONOMY IN PRACTICE OF INTERNATIONAL COMMERCIAL LAW

1. PARTY AUTONOMY IN ARBITRATION AGREEMENT

The arbitration agreement is considered as the main issue of international commercial arbitration and it covers the mutual consent of the parties, which is taking their dispute resolution process out of the national courts, to resolve their disputes with arbitration.⁷¹ Since the agreement of arbitration is the main issue of arbitration and the principle of party autonomy, it is significant to consider the point and significance of the

⁷⁰ Özmumcu (n66).

⁷¹Steingruber (n14) 2.

arbitration agreement in order to reflect the role and scope of party autonomy.⁷² By choosing arbitration the parties indicate their intentions to exclude national court jurisdictions.⁷³

Arbitration agreement is a contract between two or more parties that decide to bring their disputes in arbitration instead of national courts.⁷⁴ It is possible to have an arbitration agreement as an arbitration clause or a separate agreement. Arbitration agreement should provide main requirements in accordance to have a valid arbitration such as the arbitration agreement should be in writing⁷⁵; also the subject matter of arbitration agreement must be arbitral.⁷⁶

To apply for arbitration, as a basis of arbitration, there must be a contractual relationship between parties.⁷⁷ Arbitration agreements should refer to “arbitration” expressly.⁷⁸ It is obvious that to resolve disputes in arbitration, parties’ consent must exist. Also parties can decide which kind of disputes that they would want to resolve using arbitration. The arbitration agreement may cover all or any disputes that have arisen between parties as well as any particular provisions of that agreement. Nevertheless this

⁷² Okezie Chukwumerije, *Choice Of Law In International Commercial Arbitration* (Quorum Books 1994) 30.

⁷³ Swiss International Arbitration Decisions, *Judgment of November 7, 2011, 14A_246/2011* <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s> accessed 17 July 2015.

⁷⁴ Born (n4).

⁷⁵ The New York Convention Art II (1), The UNCITRAL Model Law Art 7.

⁷⁶ The New York Convention Art II (1), V (2), The UNCITRAL Model Law Art 36 (1) (b)

⁷⁷ Redfern (n32).

⁷⁸ Born (n4) 35.

arbitration processes depends on the existence of the arbitration agreement therefore mutual consent is essential to have a valid arbitration.⁷⁹

2. PARTY AUTONOMY IN ARBITRAL PROCEEDINGS

a) PARTY AUTONOMY ON CHOICE OF APPLICABLE LAW

One of the fundamental points of the context of the party autonomy is choosing the law governing the arbitration. So not only do the parties agree in submitting disputes to arbitration but also the parties are free to choose the applicable law.

(1) LAW GOVERNING THE ARBITRATION

The principle of party autonomy allows the parties to subscribe to the arbitration process on their own method to provide the main desires of the parties' and this is one of the main reasons that parties choose arbitration instead of national courts. Parties want to solve their disputes with using a flexible and confidential method and hence, they prefer international arbitration process.

Party autonomy principle allows parties to choose the law governing the arbitration. However in some circumstances this autonomy is restricted. Every country wants to take control of the arbitration in different situations so the law of the place of arbitration (lex arbitri) has a leading role in international arbitration.⁸⁰

⁷⁹Kinga Timar, 'The Legal Relationship Between The Parties And The Arbitral Institution' [2013] Elte Law Journal <http://eltelawjournal.hu/the-legal-relationship-between-the-parties-and-the-arbitral-institution/> accessed 17 July 2015.

⁸⁰Redfern (n32) 3.40.

(a) *THE SEAT OF ARBITRATION*

The seat or place of arbitration is a vital element of the international arbitration.⁸¹ Choosing the seat of arbitration will designate the country where the arbitration has its juridical seat and where the arbitral award will be made.⁸² In international arbitration parties are free to decide the place of the arbitration.⁸³ As it is mentioned above freedom to choose the seat of arbitration of parties is accepted under UNCITRAL Model Law and different country regulations. As it can be understood from here party autonomy principle includes choosing the seat of arbitration.

(b) *LEX ARBITRI*

The lex arbitri is a body of mandatory rules of law applicable to the arbitration at the place of the arbitration.⁸⁴ Lex arbitri is a set of rules external to the desires of the parties, so in this context party autonomy is not within the scope of lex arbitri.⁸⁵ As it is discussed above, party autonomy is the main principle of the international arbitration. In this sense parties are allowed to choose the law applicable to their contract.⁸⁶ However, if parties did not choose the applicable law to the arbitration then the law of the seat of arbitration (lex arbitri) will become the applicable law.⁸⁷ According to Geneva Protocol Article 2, “the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes

⁸¹ Born (n4) 37.

⁸² Ibid.

⁸³ Julian Lew, 'Contemporary Problems In International Arbitration' (1987) 2 Arab Law Quarterly, 37.

⁸⁴ Andrew Tweeddale and Keren Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2005) chap7.39.

⁸⁵ Redfern (n32) 3.50.

⁸⁶ D.J. Sutton, J. Gill, *Russell on Arbitration* (Thomson/Sweet&Maxwel 2003) 70.

⁸⁷ LCIA Arbitration Rules (2014) Art 16.4, *Sulamérica CIA Nacional de Suguros SA and others v Enesa Engenharia SA and others* [2012] The Court of Appeal, 42 EWHC (The Court of Appeal).

place.”⁸⁸This article proves that there is a significant connection between the lex arbitri and the law of the country where the arbitration takes place and also arbitral tribunal will be governed by parties’ will and the lex arbitri.

As it can be understood, party autonomy is restricted in the wake of that lex arbitri allows interfering of national jurisdictions to arbitration process. While some national jurisdictions permit parties to have extensive freedom, by limiting only in abuse circumstances, other legal systems restrict this autonomy.⁸⁹

Thus, the seat of arbitration is one of the major features of the arbitration, and with deciding the seat of arbitration parties also decide lex arbitri implicitly. So parties should choose the seat of arbitration, which has the least restriction of party autonomy since the lex arbitri controls the scope of the party autonomy.⁹⁰And the concept of lex arbitri refers to the national judges’ lex fori for arbitrators in international commercial arbitration.⁹¹

(2) LAW GOVERNING THE SUBSTANTIVE ISSUES

Parties can choose the law governing the substantive issues as they can choose the law governing the arbitration so one of the considerations of the party autonomy principle is that both parties is allowed to decide the applicable law to the substance.⁹² In accordance to the party autonomy principle parties are permitted to choose any law that meet the certain necessities of the dispute such as mandatory law, national law, international law or

⁸⁸ The Geneva Protocol on Arbitration Clauses of 1923, Art 2.

⁸⁹ Nigel Blackaby and others, *Redfern And Hunter On International Arbitration* (Oxford University Press 2009) 181.

⁹⁰ Michael Pryles, 'Limits To Party Autonomy In Arbitral Procedure' (2007) 24 *Journal of International Arbitration* 327-339.

⁹¹ Alain Hirsch, 'The Place Of Arbitration And The Lex Arbitri' (1979) 34 *Arbitration Journal* 43.

⁹² P. M North, J. J Fawcett and G. C Cheshire, *Cheshire And North's Private International Law* (Butterworths 1992) 449.

transnational law.⁹³ Furthermore there is also party autonomy principle in arbitral proceedings.

b) PARTY AUTONOMY ON ARBITRATORS

Arbitration is a private resolution of a dispute by an independent third party.⁹⁴ Arbitration is a process that parties can exercise their autonomy.⁹⁵ For instance in arbitration parties have freedom to choose arbitrators unlike in litigation as they are free to choose the law governing the arbitration that is mentioned above.⁹⁶ However if parties cannot agree on arbitrators, it is the national courts' duty to appoint arbitrators in the event there are no other authority empowered to do so.⁹⁷ This means that if parties do not agree on arbitrators they will not have the autonomous power and national courts will have the jurisdiction as to where the arbitration process takes place (*lex arbitri*). While choosing arbitrators parties also may have their own criteria for arbitrators to have. Furthermore, parties have the right to challenge arbitrators' jurisdiction if the arbitrators are not independent and impartial during the arbitration process.⁹⁸

Party autonomy on choosing arbitrators provides jurisdictional powers to arbitrators. However the powers of the arbitrators that are given by parties are restricted with the *lex arbitri*.⁹⁹ The reason parties choose arbitration over litigation is because they are free to

⁹³ Chukwumerije (n72) 108.

⁹⁴ Seth Liper, *An Arbitration Start to Finish* (2009), <http://www.forbes.com/2009/08/06/commentary-arbitration-finra-intelligent-investing-court.html> accessed 24 July 2015.

⁹⁵ R. Davis Kenneth, 'A Model For Arbitration: Autonomy, Cooperation And Curtailment Of State Power' (1999) XXVI *Fordham Urban Law Journal* 169.

⁹⁶ Redfern (n32) 4-22.

⁹⁷ *Ibid.*

⁹⁸ Yu Hong-Lin and Laurence Shore, 'Independence, Impartiality, And Immunity Of Arbitrators—Us And English Perspectives' (2003) 52 *ICLQ* 935-967.

⁹⁹ William W. Park, 'The *Lex Loci Arbitri* And International Commercial Arbitration' (1983) 32 *Int Comp Law Q.* 21-52.

conduct arbitration while the national courts have stricter rules.¹⁰⁰ Yet it does not prevent courts to intervene in the arbitration process. In this sense, national courts play an important role in arbitration.

c) THE ROLE OF NATIONAL COURTS

As it is all discussed above, it is possible for parties to decide every detail about arbitration. However it is well known that national courts plays significant role in arbitration. National courts are able to interfere with the arbitral tribunal when they find it necessary to do so. Courts are also able to intervene in the arbitration process in each stage of arbitration, if a party brings the dispute to the courts instead of arbitral tribunal or if parties fail to appoint arbitrators.¹⁰¹ Courts can also involve to the arbitration during the process if they find it necessary such as taking interim measures.¹⁰² And furthermore at the end of the arbitration process for the recognition and enforcement of or setting aside the arbitral award national courts are needed.¹⁰³ So courts can be involved in the arbitration process and even though there are different point of views in this subject, it can be said that intervention of national courts mainly restrict the autonomy of the parties' since it is difficult to control the balance of power of the courts.¹⁰⁴

To have a better understanding of the party autonomy principle and the national court interventions' the examination of the theories of arbitration is indispensable.

¹⁰⁰ Lew (n18) 355.

¹⁰¹ Redfern (n32)

¹⁰² J. D. M. Lew, 'Does National Court Involvement Undermine The International Arbitration Process?' (2008) 23 ICSID Review 497.

¹⁰³ Ibid 498.

¹⁰⁴ Michael Kerr, 'Arbitration And The Courts: The UNCITRAL Model Law' (2008) 34 International and Comparative Law Quarterly 5.

III. CHAPTER III: PARTY AUTONOMY IN THEORY

There are different theories on arbitration. It is accepted that fundamentally philosophical notions of freedom and autonomy are the main points of international arbitration law field.¹⁰⁵

International arbitration is a private form of dispute resolution over national jurisdiction, which is founded upon party autonomy. The existence and the validity of arbitration arise from the consent and the will of the parties.¹⁰⁶ Parties are free to choose their judges (arbitrators), to determine the law that will be applied to the dispute even where the chosen laws are not the part of a given legal system and they are also free to accommodate procedure, as they consider applicable.¹⁰⁷ For the legal theorists international arbitration should be considered as a privileged ground of interest.¹⁰⁸

In international arbitration there are different theories that are mainly accepted. There are four legal theories of international arbitration now leading in international arbitration, which are the jurisdictional theory, the contractual theory, the hybrid (or mixed) theory and the autonomous theory.¹⁰⁹

According to the jurisdictional theory representation arbitrators are equal to national court judges and also they are binding with the national laws and legal institutions of the place of arbitration like for national judges.¹¹⁰ The contractual theory defends that the party autonomy is the essence of the international arbitration and the nature of

¹⁰⁵ Emmanuel Gaillard, *Legal Theory Of International Arbitration* (Martinus Nijhoff Publishers 2010) 2.

¹⁰⁶ Kenneth S. Carlston, 'Theory Of The Arbitration Process' (1952) 17 *Law and Contemporary Problems* 631.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Adam Samuel, *Jurisdictional Problems In International Commercial Arbitration: A Study Of Belgian, Dutch, English, French, Swedish, Swiss, U.S. And West Germany* (Schulthess Polygraphischer Verlag 1989) 33.

¹¹⁰ Steingruber (n14) .

arbitration is contractual so the seat of arbitration loses its importance.¹¹¹ And in hybrid theory the main purpose is to reconcile the jurisdictional and the contractual theories so this theory basically argues that the international arbitration cannot be completely detached from the national legal systems.¹¹² Finally, with autonomous representation, it is supported that the arbitrators are independent from national courts and are not bound with national jurisdiction as a consequence of the internationalized arbitration.¹¹³

In this chapter different views on the theory of arbitration will be discussed and mainly the differences between four different theories in international arbitration will be emphasized. Also the relationship between the theories and party autonomy will be examined.

A. THE JURISDICTIONAL THEORY

This jurisdictional theory relies on the state power to control and regulate that takes place within its jurisdiction.¹¹⁴ Supporters of this view adopt the idea that arbitrators are simply national judges, who exercise their functions within a single national legal order, which depends on the seat of the arbitration.¹¹⁵ At this point it is important to understand what seat of arbitration refers to.

In general the seat of arbitration (or the place of arbitration) determines the law, which will govern the arbitration procedure and more importantly, the process and the issues related to recognition and enforcement of arbitral awards, also the seat will

¹¹¹ Professor David A. R. Williams QC, *Defining The Role Of The Court In Modern International Commercial Arbitration*, Herbert Smith Freehills - SMU Asian Arbitration Lecture, Singapore, 2012, http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_williams_Defining_the_Role_of_the_Court_in_Modern_Intl_Commercial_Arbitra.pdf accessed 27 July 2015.

¹¹²Lew (n18) 78-79.

¹¹³ Margaret L. Moses, *The Principles And Practice Of International Commercial Arbitration* (Cambridge University Press 2012) 61.

¹¹⁴ibid 74.

¹¹⁵Gaillard (n105).

determine which national court will involve to the arbitral process.¹¹⁶ According to the theorists the seat is a forum that the award takes its power from the law of the State where the arbitration takes place.¹¹⁷

One of the leading supporters of this theory is F. A. Mann, who criticizes the internationalist conception of arbitration in his article in 1967.¹¹⁸ Mann highlighted the importance of the laws that are related to the arbitration particularly the law where arbitration takes place, the seat of arbitration (*lex arbitri*).¹¹⁹ So in accordance with this view the arbitration is matter of the law where it takes place.

Furthermore, arbitrators are regarded as the national judges of the place of arbitration and hence, it is assumed that arbitral tribunals are just one of the different types of courts.¹²⁰ So arbitrators pursue the arbitration with the consent of the parties' with the scope of *lex fori*.¹²¹ Moreover, arbitrators take their power from the local law the only difference is that even though the arbitrators derive their power from the national laws their nomination is a matter for the parties and this theory is based on the quasi-judicial role of the arbitrator alternative to national judges.¹²² The actions taken by arbitrators have to be parallel with the mandatory rules and the public policy of the place of arbitration in order to be regarded as justified.¹²³

¹¹⁶ Laura Warren, 'The Seat Of Arbitration - Why Is It So Important?' <http://www.mondaq.com/x/153932/Contract+Law/The+Seat+Of+Arbitration+Why+Is+It+So+Important> accessed 2 May 2015.

¹¹⁷ Gaillard (n81).

¹¹⁸ Francis A. Mann, *Lex Facit Arbitrum*, 2(3) ARB. INT'L 245 (1983).

¹¹⁹ *ibid*.

¹²⁰ Gaillard (105) 16.

¹²¹ Yu Hong-Lin, 'A Theoretical Overview Of The Foundations Of International Commercial Arbitration' [2008] 1 *Contemp.AsiaArb.J.* 255 259.

¹²² Lew (n34).

¹²³ Francis A. Mann, 'State Contracts And International Arbitration' [1967] 42 BRIT. Y.B. INT'L L, 1-16.

With this theory it is accepted that there is a relationship between the national courts where arbitration takes place and arbitration and the national courts have strong supervisory power over arbitration in this sense, as it is also established by the New York Convention.¹²⁴ This supervisory power also covers the recognition and enforcement process. In article V of the New York Convention the courts have the power to refuse recognition and enforcement of an arbitral award if the dispute is not capable of resolving or against the public policy of the law of the place of arbitration.¹²⁵ This approach is also accepted by the US Supreme Court, in Mitsubishi case where the court decided that the national courts have the right to refuse to recognize and enforce the arbitral award at the recognition and enforcement stage of an award.¹²⁶

In addition the arbitral award should be counted as judgment since the arbitrators assumed the role of national court judges and the awards have to be recognized or enforced by the national courts where the arbitration takes place.¹²⁷ According to the supporters of this theory the arbitral awards have the same outcome with judgments and the arbitration agreement is a must to give arbitrators their competence, yet, the arbitration does not take its jurisdiction from the agreement.¹²⁸

The parties may choose the substantive law that will be applied to the contract. However they do not have the control of the seat. They may only control it indirectly by choosing the place of arbitration.¹²⁹ In this context, it is difficult to mention about party autonomy, parties do not have the freedom they suppose to have, instead the state, where

¹²⁴ The New York Convention, Art V.

¹²⁵ *ibid* Art V (2).

¹²⁶ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* [1985] 473 US 614.

¹²⁷ Hong-Lin(n98) 262.

¹²⁸ Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrines Of Separability And Competence De La Competence' (1993) 17 *Fordham International Law Journal*.

¹²⁹ Samuel (n109).

the arbitration takes place, has the power.¹³⁰ Also with this theory party autonomy on choosing the law, which will govern the arbitration is rejected and found “impracticable.”¹³¹

Consequently, Mann and other defenders of this theory represent that *lex arbitri* plays a significant role to constitute the basis of arbitration¹³² and, arbitrator’s power is based on a national legal order.¹³³ What is more, it is not possible to talk about an international arbitration since every arbitration proceeding becomes national with the important role of the seat of arbitration.¹³⁴

B. THE CONTRACTUAL THEORY

The origin of every arbitration agreement is a contract between parties. Without any influence or control of any state parties both decide to submit their disputes to arbitration.¹³⁵ With the contractual theory it is accepted that party autonomy is the main principle of the international arbitration and the law of the place of arbitration is irrelevant to the arbitration itself.¹³⁶ Also the ground of this theory argues that the arbitration begins and concludes with the arbitration agreement that is made by the parties.¹³⁷

The contractual theory defends that in international arbitration, the role of national laws is very little, yet indeed arbitration is influenced by the national laws, where the arbitration takes place, but it also emphasises that the state has no controlling power over

¹³⁰Riccardo Luzzatto, 'International Commercial Arbitration And The Municipal Law Of States' (1981) 52 *Collected Courses of The Hague Academy of International Law*.

¹³¹ *ibid* 162.

¹³² Jean-François Poudret and others, *Comparative Law Of International Arbitration* (Sweet & Maxwell 2007) 83.

¹³³ Mann (n118) 161.

¹³⁴ *ibid* 245.

¹³⁵ Lew (n18) 78.

¹³⁶ Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules Of Law In International Commercial Arbitration' [2005] *MJIL*, 205, 209.

¹³⁷ Emilia Onyema, *International Commercial Arbitration And The Arbitrator's Contract* (Routledge 2010) 36.

arbitration.¹³⁸ So basically states cannot interfere in any international arbitration proceeding showed within its territory.¹³⁹ Thus, mainly the significance of the *lex fori* is rejected and it is accepted that international arbitration is based on the arbitration agreement.¹⁴⁰

This theory of international arbitration is an illustration of autonomy of contract and practically unrestricted party autonomy.¹⁴¹ The contractual theory efficiently clarifies the greater features of the party autonomy.¹⁴² With this party autonomy the jurisdiction of the arbitral tribunal in international arbitration is exclusively originated.¹⁴³ So the nature of international arbitration is the sovereignty of the party autonomy principle, which is demonstrated by the arbitration agreement. With the arbitration agreement parties have the right to decide the language, place and time of arbitration, choosing the law that will govern the substantive and procedural issues in international arbitration and selecting the arbitrators or tribunal.¹⁴⁴

Arbitration is mainly intentional; the arbitration agreement expresses the parties' will and consent. For parties to make an arbitration agreement no law is required, yet with the exceptions of arbitrability and the public policy principle, *lex fori* has some impact on the arbitration.¹⁴⁵ In most jurisdictions, also in the well-known ones, the contractual theory is the underlying principle of the international commercial arbitration, such as English courts

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ Morris Stone, 'A Paradox In The Theory Of Commercial Arbitration' [1966] 21 ARB. J. 156, 182.

¹⁴¹ Rene David, *L'arbitrage dans Le Commerce International* (Economica 1982) 85.

¹⁴² Matthew Gearing, 'The Relationship Between Arbitrators And Parties: Is The Pure Status Theory Dead And Buried?' <http://kluwarbitrationblog.com/blog/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/> accessed 20 July 2015.

¹⁴³ Katherine L Lynch, *The Forces Of Economic Globalization* (Kluwer Law International 2003) 66.

¹⁴⁴ Hong-Lin (n98) 265.

¹⁴⁵ Frances Kellor and Wesley A Sturges, *Arbitration In Action* (Harper 1941).

that have a very supportive attitude.¹⁴⁶ In the case of *Cereals S.A. v. Tradax Export S.A.*, the English court held that there is a contractual relationship between the parties and the arbitrators and arbitrators become a party when they accept to be the arbitrator.¹⁴⁷ This case is important to understand that the English courts are one of the supporter jurisdictions of the contractual theory in international arbitration. This is also proved in Hyundai case, whereby the court came up with similar judgment mentioning that there is a contract between arbitrators and the parties.¹⁴⁸ So not only there exists a relationship between the parties, this theory also supports that there is a contractual relationship between parties and arbitrators.

As a result, since the theory is based on contractual relation, to have a binding arbitration the arbitration agreement has to be valid.¹⁴⁹ And, as it is mentioned above, with contractual theory the parties have an unlimited autonomy in choosing both the procedural law governing the arbitration and the proper law governing the main agreement. Party autonomy is the main principle under this theory with the influence of the national courts and jurisdictions.

C. THE HYBRID (MIXED) THEORY

The hybrid theory tries to reunite the jurisdictional theory and the contractual theory; this theory primarily argues that international arbitration cannot be entirely separated from all legal systems.¹⁵⁰ The origin of the international arbitration is influenced by its contractual basis where the parties have the power to choose the law governing

¹⁴⁶ Mann (n118) 38.

¹⁴⁷ *Cie Europeene de Cereals SA v Tradax Export SA* [1986] UK, 2 Lloyd's Rep 301 (UK).

¹⁴⁸ *K/S NorjarlA/S v Hyundai Heavy Industries Co Ltd*, [1991] UK, 3 All ER 211 (CA) (UK).

¹⁴⁹ 'International Commercial Arbitration', , *United Nations Conference on Trade and Development, Dispute Settlement*, (2005) http://unctad.org/en/Docs/edmmisc232add39_en.pdf accessed 26 July 2015.

¹⁵⁰ Onyema (n137) 39.

arbitration, arbitrators and by the jurisdictional process, in order to decide powers of parties and the validity of the arbitration agreement and also the recognition and enforcement of arbitral awards, it entangles.¹⁵¹

So according to this theory international commercial arbitration is a mixture. To have a valid arbitration there must be a valid arbitration agreement that shows the parties' consent to arbitrate. Without an arbitration agreement, arbitration cannot occur.¹⁵² Thus, the starting point of arbitration is the arbitration agreement and this agreement leads to the contractual theory.¹⁵³ In addition, arbitration is a judicial process that is subject to the jurisdictional theory.¹⁵⁴ International arbitration starts with the parties' private agreement and continues with private proceedings and finally ends with a binding award that can and will be recognized and enforced by most of the countries.¹⁵⁵

The hybrid theory also recognizes the importance of the controlling power of the national courts of the seat of arbitration while it includes the contractual relationship between parties and arbitrators.¹⁵⁶ Therefore, this theory includes some point of both the jurisdictional and contractual theories of international commercial arbitration.

D. THE DELOCALIZATION (AUTONOMOUS) THEORY

The autonomous theory raises a challenge to the traditional jurisdictional theory.¹⁵⁷ Under the autonomous theory the idea of the independency of arbitrators from national courts and being not bound with national jurisdiction as a consequence of the

¹⁵¹ Pieter Sanders, 'Trend In The Field Of International Commercial Arbitration' (1975) 145 *Collected Courses of the Hague Academy of International Law*, 233-234.

¹⁵² Martin Domke, 'Commercial Arbitration' [1972] *Ann. Surv. Am. L.*, 292.

¹⁵³ Robert L. Hunter, *The Law Of Arbitration In Scotland* (Edinburg:Clark 1987).

¹⁵⁴ *ibid.*

¹⁵⁵ Redfern (n14)

¹⁵⁶ Hong-Lin (n96) 277.

¹⁵⁷ Lew (n34) 590.

internationalized arbitration is supported.¹⁵⁸ So according to this view international arbitration is established in a different transnational legal order, it is also named as the arbitral legal order, out of the national legal system of the country of the seat of arbitration, the place of enforcement.¹⁵⁹ The jurisdictional and the contractual theories both are disapproved since they do not suit to reality and there is a conflict between each other, the hybrid theory is also rejected because of its uncertain application area.¹⁶⁰ International arbitration is a sui generis proceeding hereunder in the autonomous theory.¹⁶¹

This theory advocates that international arbitrators do not apply justice on behalf of any national jurisdiction, but plays a judicial role for international community's favor.¹⁶² Primarily, this autonomous theory is based on the principle of party autonomy, parties' own wills and the connection with the place of arbitration is not that powerful anymore, furthermore it is not possible to integrate the arbitrators to national courts of the country of the place of arbitration.¹⁶³

The delocalization theory has its background in the sovereign immunity doctrine that defends the states in the international system immune from the national jurisdictions of the foreign courts.¹⁶⁴ However there are also different point of views under the delocalization theory such as Jan Paulsson's view and Emmanuel Gaillard's.

Jan Paulsson, one of the greatest supporters of the delocalization theory, defends that in the international commercial arbitration there should be no limitations of the

¹⁵⁸ Jacqueline Rubellin-Devichi, *L'arbitrag: Nature Juridique: Droit Interne Et Droitinternationalprivt* (In LIBRAIIE GENERALE DE DROIT ET DE JURISPRUDENCE 1965) 365.

¹⁵⁹ Gaillard (n105) 35.

¹⁶⁰ Hong-Lin (n98) 278.

¹⁶¹ Alexandre Belohlavek, 'The Legal Nature Of International Commercial Arbitration And The Effects Of Conflicts Between Legal Cultures' (2011) 2 Law of Ukraine Legal Journal, 26.

¹⁶² Emmanuel Gaillard, 'The Representations Of International Arbitration' [2010] Journal of International Dispute Settlement, 1–11.

¹⁶³ Gaillard (n105) 36.

¹⁶⁴ Okezie Chukwumeriie, 'ICSID Arbitration And Sovereign Immunity' (1990) 19 Anglo-American L.R, 166.

procedural law of the seat of arbitration, it should be free of public policy and mandatory rules and before the enforcement of the arbitral award it should not be supervised by any judicial system since the arbitral tribunal does not take its power from the law of the seat of arbitration.¹⁶⁵ Moreover, parties are free to decide to have arbitration at the transnational level thus; arbitration will not be subjected to local laws unless the transnational minimum standards are not complied with.¹⁶⁶ The purpose of this theory is not to be considered completely independent from any legal order but the acceptance of the delocalized award's enforcement so it is mainly supported that, for arbitration, there should be strictly restricted interference of the national courts at the stage of enforcement of the arbitral award instead of a total independency.¹⁶⁷

On the other hand the main intention of delocalization or the idea of an independent arbitral legal order is that of applying a transnational rule method instead of the choice of law method.¹⁶⁸ The term 'arbitral legal order' is used for describing the autonomy of arbitration and its transnational system.¹⁶⁹ However, this term is only acceptable where it can describe a system that autonomously accounts for the source of the jurisdiction of the international arbitration.¹⁷⁰ Moreover there are two developments about arbitral legal orders. One of them is the jusnaturalist trend and the other one is the transnational positivist trend. According to the jusnaturalist trend arbitral legal order has a close relationship with natural law.¹⁷¹ This view supports that the reason parties choose

¹⁶⁵ Jan Paulsson, 'Arbitration In Three Dimensions' (2011) 60 International and Comparative Law Quarterly.

¹⁶⁶ Jan Paulsson, 'Delocalisation Of International Commercial Arbitration: When And Why It Matters' (1983) 32 Int Comp Law Q, 53-61.

¹⁶⁷ Jan Paulsson, 'Arbitration Unbound: Award Detached From The Law Of Its Country Of Origin' (1981) 30 ICLQ, 358.

¹⁶⁸ Gaillard (n105) 51.

¹⁶⁹ Thomas Clay, *L'arbitre* (Daloz 2001) 211-218.

¹⁷⁰ Gaillard (n105) 39.

¹⁷¹ *ibid.*

arbitration is mainly because they want to resolve their disputes without any national courts' involvement.

Moreover, the transnational positivist trend arbitration is based on the normative activity of States as a whole and according to this trend, States agree that, the arbitral award has to be validly enforced to deliberate arbitration as a binding dispute resolution method.¹⁷²This representation defends that with combining different states' laws it is accepted that the arbitral legal order relies on the idea that to create the common rules of arbitration.¹⁷³This representation is not defined in opposition to national laws but it is exclusively based on the activity of States.¹⁷⁴However it does not mean that it has to be formed from the all States' laws and this principle is also called 'transnational rules method'.¹⁷⁵

The idea of transnational rule method prevails from the national laws and the main point of this idea is to segregate rules that are widely recognized from those which are sui generis or outdated.¹⁷⁶ And also it is specified that the whole philosophy of transnational rules rest on avoiding the situation where solutions of comparative law is not enough and prevail over views that are more commonly accepted by the international community.¹⁷⁷As in *Primary Coal Inc. v. Compania Valenciana de Cementos Portland* case, which is an ICC case, arbitral tribunal decided to apply transnational rules in the absence of the choice of

¹⁷²Gaillard (n105) 46.

¹⁷³ibid 47,48.

¹⁷⁴ Ibid.

¹⁷⁵Thomas Schultz, *Transnational Legality: Stateless Law And International Arbitration* (Oxford University Press 2014) 105.

¹⁷⁶ E. Gaillard, 'Thirty Years Of Lex Mercatoria: Towards The Selective Application Of Transnational Rules' (1995) 10 ICSID Review, 208; E. Gaillard, 'Transnational Law: A Legal System Or A Method Of Decision Making?' (2001) 17 Arbitration International, 9.

¹⁷⁷ ibid 229.

law.¹⁷⁸This case shows that transnational rules play an important role in international commercial arbitration and instead of national laws arbitrators' have power to apply transnational rules according to this theory. Furthermore, it can be argued that the transnational rules method's outcome is stronger than the traditional choice of law approach and parties will not have any trouble about choosing the law, which will apply to their disputes.¹⁷⁹ And also there is a fact that States have the power on the enforcement of arbitral awards does not undermine the judicial function and the autonomy of the arbitrators'.¹⁸⁰

It is clear that the different approaches adopted by the different countries and unlike many other State courts, French courts have embraced the view about the delocalization theory of arbitration.¹⁸¹ Arbitral legal order is recognized by the case laws, especially in French courts such as in *Hilmarton*¹⁸² and *Göteverken*¹⁸³ cases. These cases are important since the Court of cassation accepted that the seat of arbitration does not affect the award's nationality and the arbitral legal order has been spoken of for the first time.

1. HILMORTAN CASE

In this case *Hilmarton* had provided *Omnium de Traitement et de Valorisation (OTV)* with various consultancy services to secure construction contracts in Algeria.¹⁸⁴ The contract was governed by Swiss law and provided for arbitration under the ICC Rules and agreed on to have tribunal in Geneva. A dispute arose between the parties and the arbitrator decided

¹⁷⁸ *Primary Coal Inc v Compania Valenciana de Cementos Portland* [1988] ICC, Case No5953 (ICC).

¹⁷⁹ Gaillard (n105) 58.

¹⁸⁰ *ibid* 59.

¹⁸¹ Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA)' [1998] 18 (1) Bull 9.

¹⁸² *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* [1994] Cour de cassation (France), 92-15137 (Cour de cassation (France)).

¹⁸³ *General National Maritime Transport Company v Société Gotaverken Arendal AB* [1980] Cour d'appel de Paris (France) (Cour d'appel de Paris (France)).

¹⁸⁴ *Hilmarton* (n182)

that it was illegal under Algerian law to use agents to protect government contracts and it was against Swiss public policy.¹⁸⁵ Hilmarton then challenged the award in the Swiss courts, which annulled the arbitral award on the grounds that enforcing the award was contrary to Swiss public policy and French courts recognized the award even though the Swiss courts had already set aside the award.¹⁸⁶ The Court de Cassation recognized the internationality of the award and the possible influence of the seat of arbitration on the award is expressly rejected and held that the recognition of the arbitral award, which is set aside in a different state, is not contrary to the international public policy of France since the arbitral award is not integrated in the national legal system of other State.¹⁸⁷

Moreover, according to this autonomous theory States would not have the power to review the arbitral awards rendered on their territory unless parties request for the enforcement of the award in that State.¹⁸⁸ And in this sense it is clear that delocalized theory of international arbitration is accepted by the French courts as it can be seen from the case, which is called Götaverken.

2. GÖTAVERKEN CASE

In Götaverken case, Libyan General National Maritime Transport Co (LG) made an agreement with Götaverken Arendal AB (Götaverken), which is a Swedish shipbuilder, for the construction of three oil tankers for LG by Götaverken.¹⁸⁹ However, taking the delivery of the tankers was refused by LG, claiming that Götaverken breached the contract between them.¹⁹⁰ LG also stated that the tankers were not alike as it is agreed.¹⁹¹ According

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Gaillard (n105) 64.

¹⁸⁹ Götaverken (n183)

¹⁹⁰ *ibid.*

to the arbitration agreement, the parties started an arbitral tribunal in Paris under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ICC Rules).¹⁹² The tribunal decided in favor of Götaverken and LG took action to the Court of Appeals of Paris to set aside the tribunal's award.¹⁹³ It is alleged that the arbitration is controlled by French law and therefore it is within the grasp of French courts' jurisdiction. Götaverken applied to the Swedish courts to enforce its award.¹⁹⁴

The Court of Appeals dismissed LG's challenge of the award and decided that award was international and not French in nationality. As a result, the French courts did not have the power to set aside the award. And showed that what is significant in arbitration is not the place where arbitral award has been made but the seat of arbitration. The Court's judgment shows that the place of arbitral proceedings is important only for assuring the neutrality, so the place of arbitration does not play an important role in international arbitration.¹⁹⁵

So the French Court of Appeal's decision is really important to show that even though parties choose France as the seat of arbitration, it does not make the award's nationality French, since both parties were foreign. This decision can be understood as the acceptance of the delocalization theory.

To summarize the discussion above, the autonomous theory deny the controlling and supervisory power of the courts of the seat of arbitration over the international arbitration and on the grounds of parties' will to submit their disputes to arbitration, which has supra national nature, arbitration agreements and arbitral awards

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

should be enforceable in any country.¹⁹⁶ As it is mentioned above party autonomy is the main principle of the autonomous (delocalization) theory. It is important for parties to have more flexible and easily controlled method to resolve the disputes arisen between them and complete party autonomy should be provided for the parties.¹⁹⁷ With party autonomy, parties will have right to decide the arbitration procedures, such as the law governing the procedural matters and the time and place of arbitration as well as the ability to choose the law to govern the substantive matters.¹⁹⁸ When the principle of party autonomy takes control over the whole of the arbitration procedure without any interpretation of national laws, and when international regulations provide that no national courts can interfere in the arbitral process then it can be said that international commercial arbitration is recognized as delocalized arbitration.¹⁹⁹ With this autonomous theory, party autonomy principle is adopted so delocalization theory plays a significant role in international arbitration since the main purpose of international arbitration is to emphasize the freedom of parties.

Different countries adopt different views on international arbitration, while some of the countries allow the interpretation of the national courts; the others support independent arbitration from the national jurisdictions. Each country's courts have some limitations for the party autonomy. These limitations generally come up at the recognition and enforcement stage of the arbitral award. So recognition and enforcement stage of arbitral awards has a huge impact on arbitration. Thus the limitations of party autonomy, with different countries' regulations and conventions at the recognition and enforcement of the awards will be examined in detail.

¹⁹⁶ Hong-Lin (n98) 280.

¹⁹⁷ Lew (n34) 68.

¹⁹⁸ Joshua Karton, 'The Arbitral Role In Contractual Interpretation' (2015) 6 Journal of International Dispute Settlement, 4-41.

¹⁹⁹ Luzzatto (n130) 52.

IV. CHAPTER IV: LIMITATIONS ON PARTY AUTONOMY: RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

As it is explained above principle of party autonomy has an important role in international arbitration. The autonomous theory of international arbitration presents party autonomy best. The international arbitration starts with the free will of parties to submit their disputes to arbitration. Parties are free to choose the seat, arbitrators, the law will govern the arbitration, language, basically everything in international arbitration. However party autonomy is not absolute as there are some limitations. Different countries have different restrictions on this principle. These restrictions emerge mainly with the recognition and enforcement stage of international arbitration.

To have a better understanding the recognition and enforcement process of arbitral awards should be studied carefully. Firstly the recognition and enforcement of arbitral awards, secondly the limitations of the party autonomy in enforcement stage with different country regulations will be examined with case study.

A. RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

The purpose of the arbitration is to have a binding decision on the arisen dispute, since parties choose arbitration instead of the litigation.²⁰⁰ When the arbitral tribunal has made the decision, the parties will perform the award.²⁰¹ After an award has been made, the courts may become involved in two circumstances. Firstly when a party challenges and

²⁰⁰ <http://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 2 August 2015.

²⁰¹ Michael J Mustill, Stewart C Boyd and Michael J Mustill, *Commercial Arbitration* (Butterworths 2001) 47.

seeks to set aside the award at the seat of arbitration or secondly when the successful party requests the recognition and enforcement of the award, at the place of enforcement.²⁰² So, generally, once the award has been made, the arbitral tribunal has nothing else to do and the courts play a central role with regards to the recognition and enforcement stage of an arbitral award after the tribunal renders its decision.²⁰³

Recognition and enforcement of arbitral awards is an important subject for international arbitration. In order to apply the recognition or enforcement process to an award some requirements must be fulfilled. First of all there should be an arbitral award, secondly this arbitral award should arise from a commercial relationship and a defined legal relationship and the award should be foreign or non-domestic.²⁰⁴ If these requirements are satisfied, it can be said that there is an international commercial arbitration award, which may be recognized and enforced. So as to understand the perception of recognition and enforcement of arbitral award two main segregations must be underlined.

Firstly it is significant to discriminate recognition and enforcement of arbitral awards at the place of arbitration and the recognition and enforcement of foreign awards that are made outside the territory where recognition is required.²⁰⁵ While recognition and enforcement of an arbitral award at the seat of arbitration has the same easy process with the enforcement of the domestic arbitration award, recognition or enforcement of the foreign arbitral awards are more complex.²⁰⁶

Secondly recognition and enforcement of an arbitral award is not the same procedure. Recognition is a process that is shielding; the aim is to block the ways to bring

²⁰²Lew (n83) 498.

²⁰³Redfern (n32) 510.

²⁰⁴Born (n4) 369.

²⁰⁵ Herbert Kronke, *Recognition And Enforcement Of Foreign Arbitral Awards* (Kluwer Law International 2010) 7.

²⁰⁶Redfern (n32) 515.

new actions raising the same issues.²⁰⁷ However enforcement is another stage. In enforcement process one of the parties apply to the courts in order to ensure that the award is complied with.²⁰⁸ So an award, which is enforced is also recognized but a recognized award is not enforced by itself, parties should also apply to enforce the award.

If a party is unwilling to perform the tribunal's decision, there are different methods of enforcement of the arbitral awards. First of all the award may be enforced as if it is a court judgment, if the award is registered.²⁰⁹ Secondly the arbitral award may be enforced without any registration, if the laws of the country of enforcement allow doing so.²¹⁰ Thirdly in some situations there might be a preliminary step, recognition process, for enforcement of the awards.²¹¹ These methods may change from country to country.

B. GROUNDS OF REFUSING THE RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS AND THEIR LIMITATIONS ON PARTY AUTONOMY IN DIFFERENT COUNTRIES

Each country has its own enforcement procedures as it is mentioned above. However, before mentioning about different countries' regulations, it would be better to examine the New York Convention in order to have a better understanding on recognition and enforcement of international arbitral awards.

²⁰⁷Kronke (n205).

²⁰⁸ Ibid.

²⁰⁹ The English Arbitration Act (1996), s 66.

²¹⁰ Ibid.

²¹¹ The French Code of Civil Procedure (1981), Art 1498.

1. RECOGNITION AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

The Convention on Recognition and Enforcement of Foreign Arbitral Awards, which is also known as the New York Convention, was adopted in 1958.²¹² This Convention applies to the recognition and enforcement of foreign arbitral awards.²¹³ According to the New York Convention Article III:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”²¹⁴

So countries that have signed the New York Convention have settled to recognize and enforce international arbitration awards. Nevertheless this recognition and enforcement process is not absolute; as it is regulated under the New York Convention Article V there are also some restrictions on this ground. Pursuant to Article V, if one of the parties to the arbitration agreement indicated under some incapacity, under the law applicable to it or the arbitration agreement was invalid under the governing law, or the parties have no appropriate notice of the appointment of the arbitrator or of the arbitration proceedings, or were otherwise unable to present its case, or furthermore if the award deals with an issue not considered by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration, or the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place or the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority,

²¹² <http://www.newyorkconvention.org> accessed 7 August 2015.

²¹³ Ibid.

²¹⁴ The New York Convention, Art III.

either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement the subject matter of the award was not capable of resolution by arbitration, and finally if the enforcement would be contrary to public policy, the recognition and enforcement of the arbitral awards may be refused.²¹⁵ Likewise, according to the Convention Article V (1) recognition and enforcement of the award may be refused at the request of the parties though in V (2) refusal basis on the decision of competent authority in countries.²¹⁶ Yet the main purpose of this dissertation is to discuss whether party autonomy is limitless or the intervention of courts will restrict the parties' autonomy.

As it appears, the New York Convention has some refusal grounds for recognition and enforcement of the international arbitration awards, though each country that adopted the Convention is free to apply reasons of refusal since the Article V specifies it "may be" refused. So every country may have different regulations on this field.²¹⁷ Moreover the main question should be; do these regulations on the ground of refusing recognition and enforcement of the international arbitral awards limit the party autonomy principle? To have a detailed answer to this question, public policy and arbitrability under Article V (2) of the Convention and different national regulations of various countries' and their limitation effect on party autonomy principle should be observed.

²¹⁵ The New York Convention, Art V

²¹⁶ Ibid.

²¹⁷ Phillip Capper, 'Refusing The Enforcement Of Awards – Where Discretion 'May' Be Exercised' <http://kluwerarbitrationblog.com/blog/2009/07/23/refusing-the-enforcement-of-awards---where-discretion-'may'-be-exercised/> accessed 8 August 2015.

2. PUBLIC POLICY

a) IN GENERAL

Public policy is one of the main reasons for non-recognition and non-enforcement of the international arbitral awards as it is regulated under the New York Convention and national laws. Public policy differs on the enforcement states. Public policy of an enforcement state occurs from the moral values or justice related regulations or economic and socio-political interests of the state.²¹⁸ Such as the disputes about criminal and family law cannot be resolved by arbitration as these are public policy issues that can be only resolved by national laws.²¹⁹ So each state has its own notion on public policy.

b) PUBLIC POLICY IN ENGLAND

England is a country that is party to the New York Convention, with some other 145 countries, and the English Arbitration Act 1996 regulates some specific rules to ensure the enforcement of foreign awards in England.²²⁰ Under Section 66 of the Act permission of the national court is compulsory for an international arbitral award to be enforced in the UK.²²¹

It can be said that English Courts adopt a supportive position whereas arbitration is an efficient alternative dispute resolution mechanism and they have refused enforcement of international awards only in few cases.²²² For this reason English Courts are not willing to refuse recognizing and enforcing an international arbitral award. Nonetheless there are

²¹⁸ Jessica R Adolino and Charles H Blake, *Comparing Public Policies: Issues and Choices in Six Industrialized Countries* (CQ Press 2001).

²¹⁹ Andrea Dahlberg and Angeline Welsh, 'Arbitration Guide IBA Arbitration Committee, England And Wales' (2012) <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D49BD82B-83AA-47C3-A238-F7E165D03891> accessed 12 August 2015.

²²⁰ <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 12 August 2015.

²²¹ The Act s 66.

²²² May Lu, 'The New York Convention On The Recognition And Enforcement Of Foreign Arbitral Awards: Analysis Of The Seven Defenses To Oppose Enforcement In The United States And England' 23 *Arizona Journal of International & Comparative Law*, 782.

some limitations on recognition and enforcement of these awards, which are regulated in section 103 of the Act.²²³ One of these restrictions is public policy and English courts have developed a narrow interpretation of public policy.²²⁴

At this point a well-known case *Soleimany v. Soleimany*²²⁵ should be examined. In this case, a father and a son smuggled some carpets out of Iran under a contract, which was unlawful according to Iranian laws. A dispute arose between the contractors and a decision to submit arbitration has been made. According to Jewish Law, which applied to the arisen dispute, even though the contract was not legal, it will not affect the parties' rights. After the tribunal made an award, one of the parties applied to the English Court of Appeal in order to enforce the award. However, the English Court of Appeal refused this application on the ground of public policy and the Court stated that public policy did not allow enforcing a contract that is not legal.

So the English public policy may be violated if there is serious irregularity or an award that is obtained contrary to the natural justice regulations or with the existence of illegality.²²⁶

c) PUBLIC POLICY IN FRANCE

France is one of the countries that signed the Convention and The French Code of Civil Procedure contains regulations on recognition and enforcement of international arbitration awards.²²⁷ The provisions on international arbitration are regulated in Articles between 1502-1527. However it has to be noticed that France has different regulations for domestic and international commercial arbitration. While the Article 1488 of the code

²²³ The Act s 103.

²²⁴ *Vervaeke v Smith* [1983] Court of Appeal, 1 AC 145/164 (Court of Appeal).

²²⁵ *Soleimany v Soleimany* [1999] Court of Appeal, QB 785 (Court of Appeal).

²²⁶ Anton Georg Maurer, *The Public Policy Exception Under The New York Convention* (Juris 2012), 89-94.

²²⁷ The French Code of Civil Procedure (CCP)

regulates that if there is an award manifestly contrary to public policy no enforcement order may be granted for domestic arbitration decisions, for international arbitration the arbitral award shall be recognized and enforced if the party relying on it can prove its existence and not manifestly contrary to the international public policy.²²⁸

With Article 1502 of this code international public policy and its effect on recognition and enforcement of foreign arbitral awards has been regulated.²²⁹ According to this article if recognition or enforcement is against international public policy (*ordre public*), courts may refuse to recognize and enforce the international arbitral award. If there is lack of impartiality of arbitrators and failure to comply with the time limit that will cause the violation of the international public policy.²³⁰

Such as in *Dubois & Vanderwalle v. Boots Frites BV* case, Cour d'Appel, which is the Court of Appeal of France, held that the time limit set by the parties for arbitrators to render an award may not be extended by arbitrators and if the award is not made within that time limit, the arbitrators will have violated the international public policy. Therefore, with regards to the public policy exception enforcement of the award has to be refused.²³¹

d) PUBLIC POLICY IN SWITZERLAND

Switzerland is another country, which signed the New York Convention and pays a lot of importance to the international commercial arbitration.²³² The Swiss Private International Law Act regulates international arbitration law in Switzerland. According to Article 194 of the SPILA, the recognition and enforcement process applies to any arbitral

²²⁸ Ibid Art 1488 and Art 1514.

²²⁹ Ibid Art 1502.

²³⁰ Lu (n222) 102-103.

²³¹ *Dubois & Vanderwalle v Boots Frites BV* [1998] Cour de Cassation, 640 C No 30 (Cour de Cassation).

²³² Elliott Geisinger, Nathalie Voser and Angelina M. Petti, *International Arbitration In Switzerland* (Kluwer Law International 2013).

awards rendered by an arbitral tribunal seated in a different country than Switzerland, even if that country is not a party to the Convention.²³³

Swiss Courts' application of the public policy exception of the New York Convention is more limited than SPILA Article 190 (2) (e), so under Swiss law the public policy exception is described narrowly. Furthermore only violations of very fundamental principles is to be regarded as breach of the public policy and the Swiss Supreme Court held that international public policy is the main principle and not recognizing it would be against the basic values.²³⁴ But still there is public policy exception for non-recognition and non-enforcement of foreign arbitral awards.

Such as can be seen in an extreme Swiss case a violation of public policy was found when the contract was drafted by Turkish claimant's lawyer, he also nominated as a sole arbitrator and the contract contained a clause that the sole arbitrator could not be removed under any circumstances. Moreover the arbitrator who was also claimant's lawyer at that time rendered an award in favor of the claimant and the award is refused to be enforced by the Swiss courts on the grounds of absence of arbitrator's independency, which is also against to Swiss public policy.²³⁵

Since Switzerland is an arbitration friendly country, intervention by the state courts is only possible in support of an arbitration and it provides for only very narrow grounds for

²³³Domitille Baizeau, *Enforcement Of Foreign Arbitral Awards: The Swiss Pro-Enforcement Framework And Judicial Approach, Litigation, Arbitration & Dispute Resolution* (2010) <<http://www.lalive.ch/data/publications/DAB.pdf>> accessed 21 August 2015.

²³⁴*Tensaccia SPA v Freyssinet Terra Armata RL* [2006] Swiss Federal Court (Swiss Federal Court).

²³⁵*Bezirksgericht* [1998] Affotern am Albis, XXIII YBCA 754 (Affotern am Albis).

possible challenge of the award: a displeased party cannot delay the enforcement of an award easily.²³⁶ However, still the courts apply public policy exception.

e) PUBLIC POLICY IN TURKEY

Since 1992 Turkey has been the contracting state of the New York Convention. For the awards, which are rendered by the contracting state, are subjected to the New York Convention regulations. On the other hand other arbitral awards recognition and enforcement is mainly regulated under Private International Law and International Civil Procedure Act (the PILA) in Turkey between Articles 60-62.²³⁷

In Turkey only awards, which are final and binding can be enforced also it is exercised that only foreign arbitral awards under New York Convention and the awards that have commercial nature will be recognized or enforced under Turkish law as an international commercial arbitration award.²³⁸ Pursuant to the New York Convention Article V, the Turkish Courts have a right to refuse recognizing or enforcing a foreign award if it is contrary to the Turkish public policy.²³⁹ With public policy the boundary between party autonomy in the resolution of disputes and the enforcing states' concern in protecting their primary principles is described, so violation of main social, legal, ethical principles may cause a breach of public policy.²⁴⁰

As in Keban case, a French company (CCI) and the State Water Supply Administration (DSI) of Turkey had an agreement that indicates if a dispute arises between them, it will be resolved by ICC Institution in Paris and with its rules. After the award has rendered parties

²³⁶ Swiss Arbitration Association, Switzerland is arbitration-friendly, <http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/switzerland-is-arbitration-friendly/index.html> accessed 24 August 2015.

²³⁷ Private International Law and International Civil Procedure Act Art 60-62.

²³⁸ Dirican (n68).

²³⁹ The New York Convention, Art V (2) (a).

²⁴⁰ Akinci (n37) 196.

submitted their awards to ICC Courts and Turkish Supreme Court did not enforce the award on account to the fact that submitting the arbitral award to ICC is against to Turkish Procedural Law, so it is contrary to Turkish public policy.²⁴¹

Even though public policy is one of the grounds of refusal of recognition and enforcement of the international arbitral awards, it is not the only one. There are also other reasons for instance; arbitrability and further reasons that can be change one country to another.

3. ARBITRABILITY

The arbitrability of a dispute is all about whether a dispute is capable of being resolved by arbitration under the applicable law.²⁴² Arbitrability is adopted in the last part of Article II (1) of the Convention by saying that the arbitration agreements have to contain disputes that are capable of being settled by arbitration.²⁴³ Also it is regulated under Article V (2) (a) as one of the grounds of refusing recognition and enforcement of the international arbitral awards.²⁴⁴

As the main principle of arbitration any dispute may be resolved by arbitration with the consent of parties'.²⁴⁵ However, there are some disputes that are not capable of being

²⁴¹ *Compagnie de Constructions Interhationales, Compagnie Française d'Entreprise v DSI* [1976] Supreme Court of Turkey (Supreme Court of Turkey). [However, it should be noted that in years Turkish Supreme Court changed their interpretation of the public policy and held that this situation is not against to public policy.]

²⁴² Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview' http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf accessed 25 August 2015.

²⁴³ The New York Convention, Art II (1).

²⁴⁴ *ibid* Art V (2) (a).

²⁴⁵ Georgios I Zekos, *International Commercial And Marine Arbitration* (Routledge-Cavendish 2008) 205.

settled or resolved by arbitration. Each State has its own notion about the disputes that will be resolved by national courts or by arbitration.²⁴⁶

Such as in the well-known case in Belgium, a German company terminated a distributorship agreement between the Belgian company and him and then submitted the dispute to arbitration, the tribunal held that the agreement was duly terminated and damages will not cover, nevertheless the Belgian Cour de Cassation decided that the dispute was not arbitrable since the Belgian laws gave exclusive jurisdiction to Belgian courts.²⁴⁷

Furthermore, in a famous Mitsubishi case the US Supreme Court held that, in US claims under the antitrust laws were not arbitrable and these disputes must be resolved by the courts.²⁴⁸ Also under French Civil Code Article 2059 people are allowed to agree on the application of arbitration with regards to any disputes but for Article 2060 which specifies that parties may not agree to arbitrate in specific fields such as family law.²⁴⁹

As it is mentioned each country has its own restriction on the subject matters that can be arbitrated. Additionally countries have other regulations that cause the refusal of the recognition and enforcement of international arbitral awards as will be mentioned next.

4. OTHER NATIONAL REGULATIONS

Some States have their own specific regulations on refusing the recognition and enforcement of foreign arbitral awards. Such as in Nigeria, the Supreme Court of Nigeria held that a foreign arbitral award could only be enforced by suing upon the award and also

²⁴⁶Redfern (n32) 23.

²⁴⁷ *Audi-NSU Auto-Union AG (Germany) v Adelin Petit & Cie (Belgium)* [1980] Belgian Cour de Cassation (Belgian Cour de Cassation).

²⁴⁸ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 614, 105 S Ct 3346 (US Supreme Court).

²⁴⁹ French Civil Code, Art 2059-2060.

the plaintiff must prove the existence of the arbitration agreement and validity of the award and furthermore the arbitral awards that are not related to legal issues or not arise from a contractual relationship may be refused to recognize and enforce.²⁵⁰

Furthermore, in Qatar, the Qatar Court of First Instance refused to enforce an arbitral award rendered in Paris and the reason for refusing this award was that the award was not issued in the name of His Highness the Emir of Qatar, as according to Article 69 of Civil Procedure Law of Qatar any award concerns Qatar law will be affected by this decision.²⁵¹

And as a final example in *Astro Nusantara v. Ayunda Prima Mitra* case, the Supreme Court of Indonesia held that as the award intervened with the state's judicial process, and the anti-suit award the sovereignty of the Republic of Indonesia has been violated and since the award is not considered as commercial under Indonesian Law it cannot be enforced.²⁵²

Consequently recognition and enforcement of foreign arbitral awards is a significant issue for international commercial arbitration. The national courts get involved to the recognition and enforcement process. However the main point was the role of recognition and enforcement stage in party autonomy principle. The principle of party autonomy is based on the freedom of contract and parties are free to use this freedom in every stage of arbitration. Nonetheless the principle of party autonomy is not unlimited. In some circumstances, as it is all mentioned above, it may be subjected to some restrictions, such as:- public policy and arbitrability exceptions. So it is not possible to say that international

²⁵⁰*Toepher Inc of New York v Edokpolar* [1965] The Nigerian Supreme Court, All NLR 307 (The Nigerian Supreme Court).

²⁵¹ *Decision No2216* [2013] The Qatar Court of First Instance (The Qatar Court of First Instance).

²⁵² *Astro Nusantara International BV and others v Ayunda Prima Mitra and others* [2012] The Supreme Court of Indonesia, SGHC 212 (The Supreme Court of Indonesia).

commercial arbitration is indeed free from State's control. The quest on existence of party autonomy will be discussed in the following chapter.

V. CHAPTER V: AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION: PROPERLY UNDERSTOOD

The party autonomy principle makes international commercial arbitration more desirable.²⁵³ International commercial arbitration is a flexible and self-sufficient procedure to resolve disputes between parties unlike litigation.²⁵⁴ Since international arbitration relies on party autonomy, parties are allowed to decide every single detail such as, procedural law, law governing the substance, the place of arbitration, arbitrators, language and so on.²⁵⁵ As indicated above chapters party autonomy principle is recognized by the New York Convention as well as various States' national laws, and presently many state accept party autonomy by national regulations or within case law, with some restrictions.²⁵⁶

Parties choose arbitration not only because of the party autonomy principle but also with other reasons. One of the other reasons that parties choose arbitration instead of litigation is that in arbitration, foreign awards may be enforced easily, so the utmost importance is that parties can enforce the awards in foreign jurisdictions.²⁵⁷ However their autonomy to enforce the award is not unlimited, at the stage of recognition and enforcement of a foreign arbitral award national court intervention is inevitable since the national courts are the one who decides whether the award will be recognized, enforced or

²⁵³ Giuditta Cordero-Moss, *International Commercial Arbitration* (Cambridge University Press 2013) 37.

²⁵⁴ Saul Perloff, 'The Ties That Bind: The Limits Of Autonomy And Uniformity In International Commercial Arbitration' 13 U. Pa.J. Int'l Bus. L., 326.

²⁵⁵ Kyriaki Noussia, *Confidentiality In International Commercial Arbitration: A Comparative Analyze Of The Position Under English, US, German And French Law* (Springer Science & Business Media 2010) 176.

²⁵⁶ Craff (n15), 617.

²⁵⁷ Hon. Mr. Justice Kerr, 'International Arbitration And Litigation' [1980] J. BUS. L. 197.

annulled, so they mainly have the right to refuse recognize or enforce the award that is rendered by arbitral tribunal.²⁵⁸ Even though these grounds of refusing are limited it can vary from one country to another. Thus, mainly parties do not have the absolute autonomy as the Supreme Court of New South Wales in Australia embraces the view in *American Diagnostica v. Gradipore* case, the party autonomy does not mean complete freedom to exclude a system of law from the relationship between the parties.²⁵⁹ Correspondingly it is accepted that the arbitration does not confer unlimited freedom to parties.²⁶⁰

Therefore, as previously noted, a national court may refuse to recognize and enforce arbitral awards when they decide the subject matter to arbitration is not arbitrable or against the public policy or with some other reasons. Hence, there are limited numbers of exceptions to the party autonomy principle just to ensure that parties do not ignore the public policy and natural justice by submitting their disputes to arbitration. Furthermore, although, international arbitration is assumed as an independent and self-sufficient process, it mainly relies upon the involvement of national courts.²⁶¹ Assistance of the national courts is needed in order to enforce the final award so that it is a fact that arbitration could not exist without the national courts, while national courts could exist without arbitration.²⁶² For this reason, parties cannot exclude the procedural law of the place of arbitration and have delocalized arbitration and stop recourse to the courts, so in this sense it could be said

²⁵⁸ The New York Convention, Art V.

²⁵⁹ *American Diagnosticalnc v Gradipore Ltd* [1998] Australia (New South Wales), 44 NSWLR 312 (Australia (New South Wales).

²⁶⁰ Gerald Herrmann, 'The UNCITRAL, Arbitration Law: A Good Model Of A Model Law' [1998] 3 UNIFORM L. REV. 483.

²⁶¹ Lew (n83) 496.

²⁶² Blackaby (n89) 439.

that party autonomy principle does not provide freedom in the sense that it is defended in delocalization theory in arbitration.²⁶³

Delocalized arbitration is a type of international arbitration that is not based on a national legal order.²⁶⁴ Delocalized theory was developed in 1960s, just to differ international arbitration from national laws and fundamental feature of delocalized arbitration is based on parties' agreement for the award to be suitable for enforcement.²⁶⁵ Therefore delocalized arbitration is a form of arbitration independent from national legal regulations and it reduces the impact of the seat of arbitration that could have on international arbitration.²⁶⁶ Actually the notion of delocalized arbitration is a part of the much broader principle of party autonomy.²⁶⁷ The delocalized arbitration fulfills the demands of parties and since parties choose arbitration because of its flexibility and freedom that is provided, the parties should be able to benefit fully and should not be bound with mandatory national laws.²⁶⁸ Thus, delocalized arbitration related to the importance of party autonomy.²⁶⁹ The delocalization theory defends that international arbitration has no nationality and thus, parties should be permitted to choose all elements of their agreement, including choice of law.²⁷⁰

²⁶³Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 306.

²⁶⁴Olankunle Olatawura, 'Delocalized Arbitration Under English Arbitration Act 1996: An Evolution Or Revolution' [2003] 30 Syracuse J. Int'l L&Com, 49.

²⁶⁵ *Beafort Developments NI Ltd v Gilbert-Ash NI Ltd* [1998]House of Lords, 2WLR 860 (House of Lords).

²⁶⁶Katarzyna Piatkowska, 'The Concept Of "Denationalization" (Or The Equivalent "Delocalization")' <http://www.bibliotekacyfrowa.pl/Content/42403/003.pdf> accessed 31 August 2015.

²⁶⁷DejanJanićljević, *Delocalization In International Commercial Arbitration, Law And Politics*, Vol.3 No.1, 2005, Page 66-71

²⁶⁸Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, *Journal of International Arbitration*, 2011, Page 457

²⁶⁹Redfern (n32) 315

²⁷⁰ Friedrich K. Juenger, 'Conflict Of Laws, Comparative Law And Civil Law: The Lex Mercatoria And Private International Law' (2000) 60 LA. L. Rev, 1141.

However, even though some supporters of party autonomy, generally, accept delocalization theory, many countries do not take this view kindly.²⁷¹ For instance the delocalization theory has been rejected by England, in *Coppee-Lavalin v. Ken-Ren* case the House of Lords held that recourse to the national courts could never be removed.²⁷² Or moreover in another case, in *Naviera Amazonica Peruano S.A. v. Compania Internacional de Seguros del Peru*, the court highlighted that the English laws do not accept the concept of a delocalized arbitration and in every arbitration there must be a seat.²⁷³

Most national laws do not adopt the view of delocalized arbitration that is why the law of place of arbitration and the place of enforcement keeps playing a significant role in international arbitration.²⁷⁴ So, most countries accept that the courts will need to contribute to the arbitration process at least in some circumstances. Still the relationship between arbitration and national courts differs from country to country. Such as it varies between the civil and common country law systems; the common law legal systems based on precedent and have no codified set of laws such as England and US therefore judges play an important role with affecting the law.²⁷⁵ On the other hand civil law system is codified and judges do not shape the laws, they apply the laws, which are enacted before, to the facts.²⁷⁶ So as a civil law system based country, the French courts, unlike the UK and US courts, traditionally adopt the delocalization view in international commercial arbitration.²⁷⁷ By

²⁷¹ Jan Paulsson, *Delocalisation of International Commercial Arbitration: Why and When It Matters*, 32 INT'L & COMP. L. Q.53, Vol.32 Issue 01, 1983, Page 53-61

²⁷² *Coppee-Lavalin S.A./N.V. v. Ken-Ren Chemicals and Fertilisers Ltd* [1994] 2 All E.R. 449, The House of Lords

²⁷³ *Naviera Amazonica Peruano S.A. v. Compania Internacional de Seguros del Peru* [1987] The Court of Appeal

²⁷⁴ Pippa Read, 'Delocalization Of International Commercial Arbitration: Its Relevance In The New Millennium' (1999) 10 *American Review of International Arbitration*, 178.

²⁷⁵ Caslav Pesovij, 'Civil Law And Common Law: Two Different Paths Leading To The Same Goal' [2001] *Victoria University Wellington Law Review*, 819.

²⁷⁶ *ibid.*

²⁷⁷ Nikhil Suresh Pareek, 'International Commercial Arbitration In India, Governing Law Issues' [2012] *Unif.L.Rev.*, 2.

making segregation between national and international arbitration the French laws permit for delocalized arbitration in international process.²⁷⁸ Furthermore, national courts of France adopt that in international arbitration party autonomy and competence of tribunal has a superior standard.²⁷⁹ Nonetheless, even though UK, as a common law system country, has an arbitration friendly approach, it is accepted that internal procedural laws are the must of the arbitration procedures and as well, civil law countries, such as Switzerland and France adopt revolutionary view on international commercial arbitration while common law jurisdictions remain behind.²⁸⁰

So with the delocalization theory the concept of terminating the seat has not been approved, arbitration friendly countries are willing to enforce the foreign arbitral awards.²⁸¹ Even though this point of view is encouraging, it does not provide a delocalized arbitration in the sense that Jan Paulsson defends. Supporters of the delocalization theory do not suggest that arbitration should be detached entirely from the supervision of national laws, it is only suggested that the courts of the seat of the arbitration should not perform any role in arbitration.²⁸² So as it is mentioned in Chapter III, there are different views on delocalization theory.²⁸³ When the viewpoint of countries analyzed it is obvious that delocalized arbitration has not been succeeded to the scope as it is supported by Jan Paulsson, yet the initiating states such as France take the idea of international arbitration to another level and instead the view of delocalized arbitration adopted by Gaillard is more

²⁷⁸ Arthur Taylor von Mehren, 'International Commercial Arbitration: The Contribution Of The French Jurisprudence' (1986) 46 LA. L. REV, 1058.

²⁷⁹ Theodore C. Theofrastous, 'International Commercial Arbitration In Europe: Subsidiary And Supremacy In Light Of Delocalization Debate' (1999) 31 Case W. Rev. J. INT'L L, 480.

²⁸⁰ *Don v Lippmann* [1837] House of Lords, 5Cl & F1 (House of Lords).

²⁸¹ Joaquim T. de Paiva Muniz and Ana Tereza Palhares Basilio, *Arbitration Law Of Brazil: Practice and Procedure* (Juris Publishing 2006) 59.

²⁸² Lunch (n118) 182.

²⁸³ See Chapter 3.

realistic.²⁸⁴As mentioned above, different national laws and conventions have adopted the delocalization theory however it is also rejected by some of others.

On the other hand, unlike delocalization theory, jurisdictional theory relies on the state power to control and regulate arbitration matters that take place within its jurisdiction.²⁸⁵ Supporters of this view adopt the idea that arbitrators are simply as national judges, who exercise their functions within a single national legal order, which depends on the seat of the arbitration.²⁸⁶ Subsequently, with this theory it is accepted that international arbitration is a matter of the law where it takes place. The arbitrators take their power from the national laws and it is accepted that there is a strong relationship between national courts where the arbitration takes place and arbitration.²⁸⁷ Therefore, mainly *lex arbitri* plays a significant role under jurisdictional theory.²⁸⁸ According to this, simply, it is not possible to have an absolute party autonomy since the arbitration proceedings are bound with the national courts. So the international arbitration is not independent and it is not possible to talk about international arbitration, as each and every arbitration process is a national one, since it is subjected to one of the national laws.²⁸⁹

When it is compared with jurisdictional theory, delocalization theory has some advantages. It guarantees neutrality, limits the role of national courts in process and enables party autonomy unlike jurisdictional theory.²⁹⁰ It would be better to adopt the delocalization theory for international commercial arbitration for it suits the parties' demands and allow

²⁸⁴ Paulsson (n165) 11-15.

²⁸⁵ Lew (n18) 74.

²⁸⁶ Gaillard (n105).

²⁸⁷ Paul L. Sayre, 'Development Of Commercial Arbitration Law' (1928) 37 The Yale Law Journal.

²⁸⁸ *ibid.*

²⁸⁹ Mann (n118) 244-251.

²⁹⁰ Craig W. Laurence, 'Some Trends And Developments In The Laws And Practice Of International Commercial Arbitration' (1995) 30 Texas International Law Journal, 18.

them to have advanced party autonomy. The principle of party autonomy is recognized in nearly all international arbitration laws, rules and conventions.²⁹¹

It is realistically very difficult to detach the arbitral process from the legal system of the country where the proceedings take place.²⁹² It is unquestionable that any arbitration proceedings, stemming from private contractual relationships, are bound to have some sort of a national intervention and furthermore, anything in relation to the arbitration proceedings including the award, its legal effect, the arbitrator's power and the award that will be enforced at the end, are all depend on the enforcement mechanism of the State involved.²⁹³ And the award is essentially meaningless if it is not enforceable.²⁹⁴ As argued above, the struggle of the delocalization theory is that it limits the national regulations of the seat of arbitration chosen by the parties, which restricts the courts of the seat of arbitration to not have a supervisory power on the arbitral proceedings. Besides delocalization theory also have limitations such as mandatory rules and the public policy so in accordance party autonomy is always subjected to considerations of the public policy.²⁹⁵ Limitations such as public policy and mandatory rules play a very important role in international commercial arbitration at the stage of recognition and enforcement of arbitral awards.²⁹⁶

In other words, even with the supportive point of view of all theories on the idea of party autonomy, the jurisdictional, contractual and hybrid theories also highlight the

²⁹¹ Emmanuel Gaillard, *The Role Of The Arbitrator In Determining The Applicable Law* (Juris Publishing 2004) 185-199.

²⁹² Pierre Bellet, 'Paris, The City Of Arbitration?' [2015] 1 U. Miami Int'l & Comp. L. Rev. 17, 20.

²⁹³ Redfern (n32)

²⁹⁴ <http://www.adjudication.org/enforcement-arbitral-awards-uae-courts> accessed 30 August 2015.

²⁹⁵ Chatterjee (n21), 544.

²⁹⁶ *ibid* 546.

substantial function of the seat of arbitration. Thus, the delocalization theory fits best to international commercial arbitration by embracing party autonomy principle in real sense. Nevertheless, as it is discussed in previous chapters the principle of party autonomy cannot be unlimited. Since the public interest has a prior to the utility of individuals, it is not possible for courts not to intervene at the stage of the recognition and enforcement when the matter concerns public policy.²⁹⁷ Put into words the party autonomy can be exercised when the public policy and states' mandatory rules allow doing so. Therefore, it is not possible for international commercial arbitration to be completely autonomous from the national courts. If parties are allowed to avoid mandatory national laws or if the national courts may not review awards in the light of public policy or arbitrability matters, arbitration will have superiority over the laws.²⁹⁸ Taking into account that the main content of justice and morality vary from one state to another, so will the law of arbitration.²⁹⁹

When parties get involved in international business, they demand for superior autonomy and consistency in arbitration with the idea of delocalized arbitration, however national law pursues its importance in this process.³⁰⁰ Uncorrupted party autonomy provides further assurance to parties in international arbitration.³⁰¹ Briefly party autonomy is unrestricted to a certain point with the theories that are suggested, yet by the agency of delocalization theory the importance of the seat of arbitration has been reduced and this

²⁹⁷ ICAEW, 'Acting In The Public Interest: A Framework For Analysis' (2012) <http://www.icaew.com/~media/corporate/files/technical/ethics/public-int-rep-web.ashx> accessed 4 September 2015.

²⁹⁸ Jay R. Sever, 'The Relaxation Of Inarbitrability And Public Policy Checks On Us' (1991) 65 Tul. L.Rev, 1694.

²⁹⁹ Perloff (n254), 350.

³⁰⁰ *ibid.*

³⁰¹ Theofrastous (n279), 457.

provides parties to have a free arbitration.³⁰²

VI. CHAPTER VI: CONCLUSION

In a nutshell arbitration is a specific alternative dispute resolution mechanism as a substitute of litigation. International commercial arbitration is a typical procedure and considerable for business and trade matter disputes, it relies on parties' consent and is faster than the litigation. And the main principle of arbitration is party autonomy principle. This principle is center of the every arbitration process. According to this principle parties are free to decide every single detail of the arbitration such as; deciding on applying to the institutional or ad hoc arbitration, the law that will govern the arbitration, arbitrators, language of arbitration, the seat of the arbitration, or the place where the arbitral award will recognized or enforced and so on.

Thus, literally, the whole arbitration relies on the principle of the party autonomy. It is also known that the party autonomy principle is one of the greatest advantages of the arbitration and accepted under the Model Law and the New York convention as well as so many other countries examined previously.

To apply arbitration there must be a contractual relationship between parties, so the arbitration agreement is the main issue of international commercial arbitration. With consent of both parties' the commercial dispute that is arisen will be submitted for arbitration. As the arbitration agreement is the beginning of arbitration and thus party autonomy begins with this agreement.

³⁰² Matthew Barry, 'The Role Of The Seat In International Arbitration: Theory, Practice, And Implications For Australian Courts' (2015) 32 Journal of International Arbitration, 302.

As well as being free to agree on submitting the dispute to arbitration, parties are also free to decide the law governing the arbitration, the seat of arbitration (where arbitration will take place) and the mandatory rules which will apply to the arbitration. Moreover parties are also free on choosing the arbitrators and other issues that concerns arbitration. With regard to party autonomy it is possible to decide everything that matters to the arbitration proceedings, however with the intervention of national courts it is difficult to have an absolute autonomy.

Courts can interfere with the arbitration process according to various arbitral theories. In international arbitration there are four legal theories; the jurisdictional theory, the contractual theory, the mixed theory and the delocalization theory. Jurisdictional and delocalization theories are the most common theories that are accepted. The jurisdictional theory relies on the state power. According to this view, arbitrators are like national judges at the seat of arbitration. Also it is accepted that there is a relationship between international arbitration and national courts. Thus, the seat of arbitration plays a significant role in international commercial arbitration. Courts have the supervisory power on the arbitral tribunal; therefore, every arbitration process becomes part of national arbitration with the involvement of national courts.

In addition the contractual theory claims that the place of arbitration is not relevant with arbitration process. In fact the most important issue of this theory is the party autonomy, yet this theory relies on the contractual relationship and an express agreement in order to arbitrate is a necessity. It is not possible to have arbitration without a valid agreement. Additionally the mixed theory mixes the jurisdictional and the contractual theory. According to this theory international arbitration is based on contractual

relationship and it is a judicial process, which recognizes the controlling power of the national courts of the seat of arbitration.

Finally, the party autonomy is the main principle that underlies the delocalization theory. Mainly there are two different points of views, mentioned in previous chapters, in delocalization theory. First view defends that the delocalized arbitration should have no limitations and courts should have no supervisory power on arbitral tribunal until the stage of enforcement and also tribunal does not take its power from the national jurisdiction of the place of arbitration. Second view on the delocalized arbitration supports that the aim of this theory is to apply transnational rule method in order to oppose to the choice of law method, so the arbitrators will not restrict themselves with the laws of the seat. Therefore delocalization theory mostly reduces the importance of the seat of the arbitration.

Even though delocalization theory is founded on party autonomy principle, it is not unlimited. Different countries have different limitations on party autonomy. And the restrictions emerge, generally, at the recognition and enforcement stage of the international arbitration. Main restrictions are stated under the New York Convention Article V. This article allows national courts not to recognize or enforce the international awards. Article V (1) regulates that an award may not be recognized or enforced with the request of parties, nonetheless in V (2) refusal reasons basis on the decision of the national courts. So V (2) allows national courts to interfere with the arbitration process. Thus, party autonomy principle can be breached. The main reasons of refusing recognition and enforcement of the awards are the public policy and arbitrability exceptions. Public policy may vary from one country to another, as well as arbitrability.

Recognition and enforcement of an award is an important issue and in the light of these limitations the national courts are involved in the arbitration. According to the

delocalization theory involvement of the national courts limits the party autonomy, so to have an autonomous arbitration, courts must not intervene in the arbitration process. At this point each country has its own regulations and they adopt different views on the legal theory of international arbitration.

In conclusion, as it is examined in previous chapters the application of the party autonomy has been comprised ideally with delocalization theory. Even though other theories also support the idea of party autonomy they also emphasize the significant role of the seat of arbitration. Thus, the delocalization theory is the best way out for international commercial arbitration in the way of reflecting party autonomy principle. However, as it is discussed above the party autonomy principle cannot be absolute. Since the public interest is prior to the utility of individuals, it is not possible for courts not to intervene at the stage of the recognition and enforcement when the matter concerns public policy. In other words the party autonomy can be exercised as the public policy and states' mandatory rules allow. Therefore, it is not conceivable for international commercial arbitration to be totally independent from the national courts. Briefly party autonomy is unrestricted to a certain scope, with the theories that are suggested, yet by the agency of delocalization theory the importance of the seat of arbitration has been reduced and this provides parties to have a free arbitration.

To sum up, to have an absolute party autonomy, states should embrace the theory of delocalization and the independency of the arbitration should be provided with some improvements on the theory. Having a totally independent international commercial arbitration and the party autonomy is only possible if the courts are prevented from intervening in the arbitration proceedings but this will be realistically very difficult. Albeit

the notion of delocalized international arbitration has not reached to the expected level, it becomes more of an issue in every day.

Word count: 14,732



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