

# Arbitration and Party Autonomy

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## Introduction

Arbitration is agreed upon and formed by agreement of the parties for resolution of disputes instead of filing at the court. As has been mentioned previously, arbitration is favored under the public policy of the U.S. with the enactment of the Federal Arbitration Act (FAA) in 1925 after a long history of being disfavored or despised by the court, traditionally by the courts of England then followed by the U.S. courts.

A party has a choice between litigation without agreement and arbitration by agreement. When the parties agree on arbitration, a court shall not proceed with a litigation filed by either party of the arbitration agreement

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at the court a claim which is the subject of the arbitration agreement. It is recognized that a court shall refer the disputes to arbitration, when an action is brought by one party to the court in a matter which is the subject of an arbitration agreement, if another party so requests.<sup>(1)</sup> A court respects the arbitration agreement.

As a final part of this dissertation, first, arbitration related issues will be reviewed briefly in order to understand the scheme of arbitration focusing on party autonomy with its technical terms, and then by summing up each issue discussed in the previous Chapters. Through the summing up, party autonomy as a core or central concept of arbitration will be focused on to recognize and understand as expanding its sphere in dispute settlement as a counter part of litigation by the court.

## **I. Arbitration by Agreement of the Parties**

1. Whereas the litigation proceeds under the laws and judge assigned by the court, arbitration is formed and proceeded by agreement of the parties concerned. In this sense, the core concept of the arbitration is party autonomy; the parties may decide the scheme of the arbitration by agreement.

The parties by agreement may choose and determine either institutional arbitration or *ad hoc* arbitration, place of arbitration, appointment of arbitrators, arbitration procedure, the authority of arbitrators, and the governing law.

The parties may agree on the governing law applicable to substance of disputes, to procedure of arbitration or to the arbitral award. *lex arbitri*, *lex fori*, *lex loci*. If the parties did not designate the governing law, the arbitrator or the arbitral tribunal decides the law. Regarding the governing

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1. See UNCITRAL Model Law on International Arbitration, Article 8. (1985)

law applicable to substance of disputes, it does not need to choose any national law but rules of law as a wider concept.<sup>(2)</sup> In addition, the arbitral tribunal decides the dispute in accordance with the terms of the contract and taking into account the usages of the trade applicable to the transaction.<sup>(3)</sup>

2. The parties may authorize the arbitrator to decide *ex aequo et bono* or as *amiable compositeur*.<sup>(4)</sup>

The arbitral tribunal usually has the power to rule on its own jurisdiction; it is called *Kompetenz-Kompetenz*.<sup>(5)</sup>

The arbitral tribunal usually decides the case by a majority.<sup>(6)</sup> Whereas the old English Arbitration Act had adopted an umpire system, the new English Arbitration Act adopts a majority decision system instead, unless the parties agreed otherwise.<sup>(7)</sup>

The arbitral tribunal may decide a case considering *Lex Mercatoria*, which is not clearly defined, but at least has been recognized as law merchant, customs and usages of trade, general principles of law and *pacta sunt servanda*.<sup>(8)</sup> When the arbitral award is rendered considering *Lex*

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2. See *id.* Article 28 — 1 (The arbitral tribunal shall decide the disputes in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.)
  3. See *id.* Article 28 — 4 (In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.)
  4. See *id.* Article 28 — 3 (The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.)
  5. See *id.* Article 16 — 1 (The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.)
  6. See *id.* Articles 29 and 31 — 1.
  7. Arbitration Act, 1950 (U.K.), (14 Geo.6.c.27), § 8 (umpire) ; UK Arbitration Act 1996, (1996 Chapter 23), § 22 (2) (decision by a majority).
  8. See O. Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 ICLQ 747 (1985). David W Rivkin, *Enforceability of Arbitral Awards Based on\**

*Mercatoria*, it is a crucial point whether it is recognized and enforced in a foreign country under the 1958 New York Convention.<sup>(9)</sup> This issue has reviewed in the last Chapter regarding the New York Convention.

As the arbitrability has been reviewed previously in many issues, generally speaking, the scope of party autonomy has been gradually expanded in such fields as are reviewed in the previous Chapters.

3. The arbitral award is final and binding on the parties,<sup>(10)</sup> and excluded to appeal to the court in connection with it, and the parties usually agree upon to the effect.

The doctrines of *res judicata* and collateral estoppel are applied at the court to the litigation after the arbitral award is rendered when a dispute has been resolved by the arbitration. These doctrines have been applied to the arbitration related case as a result of the expansion of arbitrability.

The term *res judicata* refers to the effect of a judgment on the merits in barring a subsequent suit between the parties or their privies that is

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\**Lex Mercatoria*, 9 Arb. Int'l 67(1993) (*Lex Mercatoria* ... exists as an amalgam of most globally-accepted principles which govern international commercial relations: public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contracts, and arbitral case law.)

9. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (June 10, 1958). 21 U.S.T. 2517, 330 U.N.T.S. 38, which the U.S. acceded on September 30, 1970.
10. See American Arbitration Association (AAA) International Arbitration Rules, Article 27-1 (Award shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties.); The London Court of International Arbitration, The LCIA Rules, Article 26-9 (All awards shall be final and binding on the parties...and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.); Rules of Arbitration of the International Chamber of Commerce (ICC), Article 28-6.; The Japan Commercial Arbitration Association, Commercial Arbitration Rules, Article 54-6.

based on the same claim, and under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case.<sup>(11)</sup>

The Restatement (Second) of Judgments provides the application of *res judicata* to arbitration award, as a judgment of a court.<sup>(12)</sup> Collateral estoppel is also applied to arbitration, but when an arbitrator does not express the reason of the award, it may be hard to identify the issue in the case.

On the other hand, in a labor arbitration case the U.S. Supreme Court has stated that as arbitration is not a judicial proceeding, 28 U.S.C. § 1738 does not apply to the arbitration award, because § 1738 provides that the “judicial proceedings” of any court of any State shall have the same full faith and credit in every court within the U.S. as they have by law or usage

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11. McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984), at 287 n 5.
  12. The Restatement (Second) of Judgments, Section 84 provides that:
    - (1) Except as stated in Subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.
    - (2) An award by arbitration with respect to a claim does not preclude re-litigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.
    - (3) A determination of an issue in arbitration does not preclude re-litigation of that issue if: (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in Section 83(2).
    - (4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

in the courts of such State from which they are taken. The U.S. Supreme Court concluded that a federal court should not afford *res judicata* or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement in order to protect federal rights.<sup>(13)</sup>

## II. The Court Supports Arbitration

When the parties agree on arbitration, a dispute is to be settled by arbitration, and the court may not touch the case to settle in substance or merits. The UNCITRAL Model Law on International Arbitration of 1985 states that in matters governed by this Law, no court shall intervene except where so provided in this Law.<sup>(14)</sup> However, the court may support the arbitration in certain respects.

1. Though there is an arbitration agreement between the parties, if either party files a dispute at the court, the court shall refer the case to arbitration.<sup>(15)</sup> By these means, arbitration becomes only one route to settle the disputes in substance. The agreement to arbitrate by the parties is respected as an authority to settle disputes of the parties.

2. The arbitrators are to be appointed by agreement of the parties; however, if the parties could not agree on the appointment, an arbitration institution or a court may appoint arbitrators upon request of a party.<sup>(16)</sup>

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13. *McDonald*, *supra* note 11. 709 F.2d 1505 (6th Cir. 1983), *rev'd*, 466 U.S. 284 (1984).

14. UNCITRAL Model Law, Article 5.

15. *See id.* Article 8. (A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests..., refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.)

16. *See id.* Article 11.

3 . The court may order the interim measures upon request by the parties if it is not incompatible with an arbitration agreement,<sup>(17)</sup> such as a case for protection, an object of the dispute is a perishable item and it is better to dispose of it to convert to money.

4 . The procedure for challenging an arbitrator may be agreed on by the parties, such as agreeing on using the arbitration procedure rules of a certain arbitration institution. If the parties failed to agree on it, an arbitral tribunal shall decide on the challenge upon request by the parties. If a challenge is not successful, a challenging party may request a court or other authority to decide on the challenge.<sup>(18)</sup>

5 . The jurisdiction of the arbitral tribunal may be ruled on by itself as mentioned above, *Kompetenz-Kompetenz*, and also a plea for not having jurisdiction of the arbitral tribunal may be ruled on by itself. Any party, however, may request the court to decide the matter if the arbitral tribunal rules as a preliminary question that it has the jurisdiction.<sup>(19)</sup>

6 . The court may assist in taking evidence within its competence upon request by the arbitral tribunal or a party with the approval of the arbitral tribunal.<sup>(20)</sup>

7 . If controversy remains concerning inability or failure of an arbitrator in performing his function *de jure* or *de facto*, upon request by the parties the court decides the termination of the mandate of the arbitrator.<sup>(21)</sup>

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17. *See id.* Article 9.

18. *See id.* Article 13. (...decision shall be subject to no appeal.)

19. *See id.* Article 16—3. (...decision shall be subject to no appeal.)

20. *See id.* Article 27.

21. *See id.* Article 14. (...decision shall be subject to no appeal.)

### III. Review, Confirmation, Annulment, and Recognition and Enforcement of Arbitral Awards

After rendering the award by arbitrators, there may be procedure for finalizing or effectuating the award. Previous Chapters refer to these issues as briefing these here.

1. Review of the Award: The arbitral award is final and binding on the parties. It is argued whether arbitral award is subject to the judicial review as in the case of *LaPine v. Kyocera*.<sup>(22)</sup> If judicial review is allowed, finality and independence of the arbitral award is not guaranteed and party autonomy is restricted, subjecting to the court.

2. Confirmation of the award: Confirmation of an arbitral award is purported to have the same force and effect as a judgment of a court. When the parties to arbitration apply to a court for an order confirming an arbitral award, the court must grant such an order unless the award is vacated, modified or corrected.<sup>(23)</sup>

3. Annulment of the Award: The arbitral award may be recourse to the court only by application by the parties for setting aside based on the grounds specified in the Law, such as grounds against due process of law, non-arbitrability of the subject-matter of dispute, or conflict with the public policy of the State.<sup>(24)</sup>

The purpose of this setting aside the arbitral award is to extinguish or cancel it at the place of arbitration before recognition and enforcement of

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22. *LaPine v. Kyocera*, 909 F. Supp. 697 (N.D. Cal. 1995), 130 F.3d 884 (9th Cir. 1997).  
*Kyocera v. Prudential-Bache*, 299 F.3d 769 (9th Cir. 2002), *reh'g*, 314 F.3d 1003 (9th Cir. 2002), 341 F.3d 987 (9th Cir. 2003), *cert. dismissed*, 124 S. Ct. 980 (2004).

23. FAA §9.

24. *See id.* Article 34.

the arbitral award in the place of enforcement.

4 . The Recognition and Enforcement of the Award: After rendering an arbitral award, if the losing party does not pay nor fulfill the obligation under the award, the winning party may file at the court to enforce the award, such as by garnishment. Recognition and enforcement of the award by the international commercial arbitration is principally guaranteed with some exceptions under the bilateral treaty or multilateral conventions such as the 1958 New York Convention.<sup>(25)</sup> As self-help by the winning party for collecting money or compelling to fulfill obligation is not allowed even to it, the winning party has to file at the court to enforce the award, which has the same validity as the judgment of the court. Support by the court is indispensable in this field for the recognition and enforcement of the award.

#### **IV. Consolidation of Arbitration**

1 . An arbitration agreement is agreed upon by two parties in many cases; however, there are also cases for agreeing by more than two parties. For example, in the case of a construction contract for a building, there are two-party agreements between an owner and a contractor, a contractor and a subcontractor, a contractor and a vendor. If a dispute arises, it may relate not only to the two-party but to all parties in the project. As the arbitration clause is provided in each contract, it may be a problem to include all parties for referring the dispute to a single arbitration, though where the facts and the law are common to the cases.

A typical case for considering this issue is *United Kingdom v. The*

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25. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (June 10, 1958)

*Boeing Co.*<sup>(26)</sup> UK Government had separate contracts with Boeing and Textron for development of helicopter devices. After an accident occurred, UK Government asked the two companies to consolidate arbitration, which Boeing refused. The U.S. Court of Appeals for the Second Circuit held that the District Court may not consolidate arbitration arising from separate arbitration clauses, where there was no clause permitting consolidation of arbitration. By this decision, the Second Circuit changes its case law which compelled consolidation of arbitration by a court even if there was no agreement by the parties to consolidate. The Court respects the parties' agreement.

The Commonwealth of Massachusetts has its Arbitration Act, which allows a court to consolidate arbitration. Other Circuits have held the same as the Second Circuit.

2. Classwide arbitration is a type of multiparty arbitration but the number of parties is larger than the multiparty arbitration. As in the franchise agreement, franchisees which are under the same contract terms may become a class. In *Keating v. Superior Court*,<sup>(27)</sup> there were 800 franchisees, the California Supreme Court ordered the trial court to consider the request for class certification, though there was no such agreement on classwide arbitration in the arbitration clause. The California courts have decided that classwide arbitration is enforceable by California statute.<sup>(28)</sup> On the other hand, the U.S. Court of Appeals for the Seventh Circuit requires parties' agreement on classwide arbitration in *Iwoa Grain v. Brown*.<sup>(29)</sup>

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26. 998 F.2d 68(2nd Cir. 1993).

27. 645 P.2d 1192(1982).

28. California Code of Civil Procedure § 1282.3.

29. 171 F.3d 504(7th Cir. 1999).

Thus, there are two lines; as in State of California, Commonwealth of Massachusetts and Pennsylvania based on the statute to consolidate, and as in the U.S. Circuit Courts for the Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh require parties' agreement on classwide arbitration.

The U.S. Supreme Court granted *certiorari*, and vacated and remanded, in *Green Tree Financial Corp. v. Bazzle*,<sup>(30)</sup> stating that the question whether the agreement forbade class arbitration was for the arbitrator to decide. The parties seemed to have agreed that an arbitrator, not a judge, would answer the relevant question, and any doubt about the scope of arbitrable issues should be resolved in favor of arbitration. The Court remanded the case so that the arbitrator could decide the question of contract interpretation, thereby enforcing the parties' arbitration agreement according to their terms.

## V. Arbitrability

1. An arbitration agreement of the parties is a type of alternative dispute resolution (ADR) in contrast to court litigation. Whether any kind of dispute is available in the arbitration under the arbitration agreement agreed on by the parties? In former times, arbitrability of disputes related to regulatory statute has been denied; an arbitrator as private person was not eligible to decide such a regulatory related dispute, it must be litigated at the court, a state organ.

Contract disputes which are related to regulatory statutes such as the Securities Act, the Securities Exchange Act, such as *Wilko v. Swan*,<sup>(31)</sup> and the Antitrust Laws, such as *American Safety Equipment v. Maguire*,<sup>(32)</sup> the

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30. 498 S.E.2d 898 (S.C. App. 1998), *aff'd*, 569 S.E.2d 349 (S.C. 2002), *vacated and remanded*, 123 S.Ct. 2402 (2003).

31. 346 U.S. 427 (1953).

32. 391 F.2d 821 (2nd Cir. 1968).

U.S. courts held that the public interests of the Securities Act could not be secured by arbitration, in the former, and that the rights conferred by the antitrust laws were of character inappropriate for enforcement by arbitration, in the latter.

*Mitsubishi Motors v. Soler Chrysler-Plymouth*<sup>(33)</sup> focusing on its international transaction, the U.S. Supreme Court allowed arbitration to settle the dispute about an alleged violation of antitrust laws, holding that concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that the Court enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Two years after the *Mitsubishi*, in *Shearson/American Express, Inc. v. McMahon*<sup>(34)</sup> for the Securities Exchange Act of 1934, the U.S. Supreme Court discarded the distinction between international and domestic transactions regarding arbitration and rejected the considerations of the *American Safety*. Then, *Rodriguez de Quijas v. Shearson /American Express, Inc.*<sup>(35)</sup> overruled the *Wilko*, the U.S. Supreme Court stated that the *Wilko* was wrongfully decided, the court's characterization of the arbitration process in the *Wilko* was pervaded by the old judicial hostility to arbitration. That view has been steadily eroded over the years.

Antitrust laws related disputes in domestic transactions were decided in the lower courts. In *Nghiem v. NEC Elec., Inc.*<sup>(36)</sup> the Ninth Circuit changed its decision, which followed the *American Safety*, stating that the Court was persuaded that the decision of the *Mitsubishi* was not

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33. 473 U.S. 614 (1985).

34. 482 U.S. 220 (1987).

35. 490 U.S. 477 (1989).

36. 25 F.3d 1437 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994).

restricted to the international context, and the *Mitsubishi* effectively overruled the *American Safety*. In *Kotam Elec., Inc. v. JBL Consumer Products, Inc.*<sup>(37)</sup> the Eleventh Circuit also changed, after rehearing *en banc*, its decision, which followed the Fifth Circuit case *Cobb v. Lewis*,<sup>(38)</sup> citing the *American Safety*, stating that in light of the *Mitsubishi* and its progeny, as well as the persuasive authority from our sister circuits, the *Cobb* was no longer the controlling precedent in this circuit and that arbitration agreements concerning domestic antitrust claims were enforceable. The Circuit Courts of the Second,<sup>(39)</sup> Seventh<sup>(40)</sup> and Tenth<sup>(41)</sup> held that domestic antitrust claim may be arbitrated. The U.S. Supreme Court sometimes quotes the *Mitsubishi* for their recognition of agreeing to arbitrate a statutory claim<sup>(42)</sup>

Statutory regulated area in securities control and antitrust regulations are opened to arbitration, though the U.S. Supreme Court has not yet decided in the domestic antitrust claim, but has repeatedly recognized its arbitrability. Party autonomy in arbitration expanded in these areas.

2. Punitive damages and the RICO include civil sanctions for wrong doing, not a criminal penalty. In former times in England, the concept of civil and criminal was not divided. This nature of sanction was a reason why punitive damages were decided by courts, as a state organ. Especially

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37. 59 F.3d 1155 (11th Cir. 1995), *rev'd*, 93 F.3d 724 (11th Cir. 1996), *cert.denied*, 519 U.S. 1110 (1997).

38. 488 F.2d 41 (5th Cir. 1974).

39. *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283 (S.D.N.Y.), *aff'd*, 946 F.2d 883 (2nd Cir. 1991). In re Currency Conversion Fee Antitrust Litigation, 265 F. Supp. 2d 385 (S.D.N.Y. 2003).

40. *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir. 1988). *Cindy's Candle Co. v. WNS, INC.*, 714 F. Supp. 973 (N.D. Ill. 1989).

41. *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995).

42. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89. (2000).

in the State of New York, punitive damages were not arbitrable as shown in the *Garrity* rule (named after *Garrity v. Lyle Stuart, Inc.*).<sup>(43)</sup> In 1995, the U.S. Supreme Court decided in *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>(44)</sup> arbitrability of punitive damages when the parties agreed on the authority of arbitrators clearly to include decision of punitive damages or to vest wider power as in the arbitration rules of the NASD, the National Association of Securities Dealers.

The RICO, Racketeer Influenced and Corrupt Organization, is the public policy nature as this was enacted as a part of the Organized Crime Control Act.<sup>(45)</sup> The RICO is not only to regulate criminal offence but to cover widely fraud in commercial activities. Because of this nature the RICO was not arbitrable but to be decided by the court.

In 1987, the U.S. Supreme Court decided in *Shearson/Lehman Express, Inc. v. McMahon*<sup>(46)</sup> arbitrability of the RICO considering the legislative history and contents of the RICO, civil claims of the RICO were not excluded from the scope of the FAA. Its nature of civil remedy modeled treble damages of the Clayton Act.

Thus, the public policy nature of these punitive damages and the RICO allowed arbitrability. Party autonomy is expanded in these areas.

3. Arbitrability of disputes relating to the Patent Act and Bankruptcy Act are allowed by amendment of the Acts. As the Patent Act and the Bankruptcy Act have a public policy nature, disputes relating to either Act was under the jurisdiction of the court.

The Patent Act grants the patent for an invention and a novel technology for a monopoly for a limited term. The validity and infringement of a

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43. *Supra* note 1 of Chapter II-III. 353 N.E.2d 793(S.D.N.Y. 1976).

44. *Supra* note 2 of Chapter II-III. 514 U.S. 52(1995).

45. *Supra* note 66 of Chapter II-III.

46. *Supra* note 18 of Chapter II-II.

patent are matters of public interest, and a licensing agreement on a patent or technology is a matter of contract between the parties. The court had jurisdiction on both matters because a claim presents issues too intertwined with Federal law and policy to be arbitrable. The former is surely in the hand of the State to solve the problem if some dispute occurs; however, the latter may be settled by a non-court system. In 1982 and 1984, the Patent Act was amended<sup>(47)</sup> to afford arbitration on the latter matter. The Act authorizes voluntary arbitration to settle a patent-related dispute, subject to the reservation by the Director of the Patent and Trademark Office (PTO) for determination of patentability.

In trademark and copyright as another kind of intellectual property, no amendment of the Acts were made like the Patent Act but case law gradually follows the patent dispute resolution mechanism; as they are weaker public policy rather than the Patent Act, considering the gravity of the public policy, trademark and copyright disputes may be able to be settled in the same way as patent dispute.

The Bankruptcy Act purports to keep the assets of a debtor and to give the debtor and the creditor a full, fair, speedy and unhampered chance for reorganization. In order to handle a case in a speedy and expeditious manner, centralization of all disputes concerning the debtor's assets in the bankruptcy court was required. Amendment of the Bankruptcy Act in 1984, especially, divides core and non-core for bankruptcy proceedings: core is proceedings arising under title 11 or arising in a case under title 11, and non-core is proceedings related to bankruptcy case. The court has jurisdiction in core, and it may have in non-core. Even in a core case, a court has discretion to allow arbitration depending on the particular proceedings and facts involved. Arbitration is

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47. Aug.27, 1982, P.L. 97-247, § 17(b)(1), 96 Stat.322; as amended.

Nov.8, 1984, P.L. 98-622, Title I, § 105, Title II, § 202, 98 Stat.3385, 3386.

available in a non-core case. The distinction between core and non-core thus affords an availability of arbitration in the bankruptcy issue basically, and it will be considered further depending on the necessity of expertise of the arbitrator.

Disputes relating to the Patent Act and the Bankruptcy Act thus by amendment of the Acts afford arbitration to settle in the areas related to public policy. Party autonomy expanded in these areas.

4. International transactions for the carriage of goods by sea have a long history and are covered by the convention. International Conference and the Conventions were held and made in 1882, 1885, 1921, 1924, 1968 and 1980<sup>(48)</sup> to establish uniform bills of lading to govern the rights and liabilities of carriers and shippers. The U.S. enacted the Carriage of Goods by Sea Act of 1936 (COGSA) followed the Hague Rules of 1921 as amended in 1924, in addition to the Harter Act of 1893.

The COGSA provides to prohibit “relieving and lessening of liability” of a carrier or ship. The U.S. Courts had held that such clauses as imposing potentially prohibiting costs on the cargo owner in a forum selection clause or a foreign arbitration clause “lessen, reduce or relieve” the carrier’s liability. The courts understood that there could be no assurance that the foreign arbitrator or the court would apply the COGSA in the same way as would an American tribunal. Arbitration had been practiced in maritime transactions at least as early as the eighteenth century; however, after the enactment of the COGSA, there arose some confusion for allowing arbitration by applying its provision as above, and international fora for the settlement of disputes were limited. In 1995, the U.S. Supreme Court granted *certiorari* to resolve divided decisions of the Circuit Courts on the

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48. *Supra* note 1 of Chapter II-VII. The Liverpool Conference Form of 1882, the Hamburg Rules of Affreightment of 1885, the Hague Rules of 1921, the Brussels Convention of 1924, the Visby Rules of 1968, the Hague/Visby Rules of 1980.

enforceability of the foreign arbitration clause in the bill of lading in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,<sup>(49)</sup> and affirmed to compel arbitration in Tokyo under an arbitration clause of the bill of lading. Arbitration to be held abroad under the parties' agreement is enforceable. Party autonomy is recognized and expanded in the sphere of maritime transactions.

## VI. Arbitration under the Institutional Rules

The Rules of the National Association of Securities Dealers (NASD) as a self-regulatory organization, is taken up to consider relationships between a provision of the rules and a provision of an Act. A provision of the time limitation of submission to arbitration under the Code of Arbitration Procedure of the NASD and the statutory time limitation is reviewed in Chapter III.

The decisions of Circuit Courts had divided as to whether the arbitrator or court has the jurisdiction to decide the time limitation. Division was first made in interpreting it either as a case of substantial arbitrability, which was to decide by the court, or as a case of procedural arbitrability, which was to decide by arbitrator. Next issue was the interpretation of the provisions of the NASD Code.

In 2002, the U.S. Supreme Court granted *certiorari* to solve the issue in *Howsam v. Dean Witter Reynolds, Inc.*<sup>(50)</sup> concluding that the NASD Code's time limitation rule fell within the procedural disputes that did not present what the court cases had called a "question of arbitrability." The Court added that the NASD arbitrators, comparatively more expert about the meaning of their own rule, were better able to interpret and apply it.

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49. *Supra* note 3 of Chapter II-VII. 515 U.S. 528(1995).

50. 537 U.S. 79(2002).

In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding.

The securities arbitration is a special field of settling disputes to which the U.S. Supreme Court respects and trusts in private disputes settlement. Under these circumstances, party autonomy is respected in the securities arbitration.

## **VI. Investment Disputes Settlement – the ICSID Arbitration**

1. This theme is picked up to consider arbitration between a state party and a private party as imbalanced in power for disputes settlement.

Under the auspices of the International Bank for Reconstruction and Development (IBRD, the World Bank), The International Centre for Settlement of Investment Disputes (ICSID) was established under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Any Contracting State may choose the class or classes of disputes to be submitted to the Centre.

The award is binding on the parties and shall not be subject to appeal or to any other remedy. It is recognized and enforced in the territory of a Contracting State under the Convention. Annulment of award is also proceeded within the scheme of the ICSID by appointing a new *ad hoc* Committee without relying on the court outside.

It achieves the self-completed or self-contained function.

Though there are some reservations to the State, such as the exhaustion of local remedies<sup>(51)</sup> and the state immunity,<sup>(52)</sup> arbitration may proceed

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51. The 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article 26.

52. *Id.* Article 55.

almost the same as commercial arbitration. The ICSID allows the decision *ex aequo et bono* if the parties so agree.

The ICSID arbitration scheme is a hopeful and typical arrangement for party autonomy considering the parties, a State and a private party, within the self-contained scheme by the ICSID Convention. By the ICSID arbitration scheme, the sphere of party autonomy has expanded in a desirable direction in one typical area, considering the traditional international law, where the state was immune from it.

2. Considering arbitration between a public party and a private party, another arrangement was originally planned to consider, that is, the Iran-U.S. Claims Tribunal, which was established by the Algiers Accords of 1981,<sup>(53)</sup> to settle disputes arising from or in connection with transactions including investment by American parties in Iran. Arbitration is to proceed with the UNCITRAL Arbitration Rules. The author researched and studied cases settled in the Tribunal; however, those were found not attractive or useful for considering party autonomy. Some cases were settled through strong conflicts. Several cases are referred to in a relevant Chapter. Only suggested point is that this scheme uses the UNCITRAL Arbitration Rules aiming to attain party autonomy.

## **VIII. Labor and Tax Arbitration**

1. Labor arbitration is one of the specialized fields. The FAA provides that it does not apply to labor contracts.<sup>(54)</sup> The Supreme Court decided on

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53. *Supra* note 16 of Chapter VI.

54. The FAA § 1: Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

the same day in 1960 on three United Steelworkers cases called the Steelworkers Trilogy,<sup>(55)</sup> pointing out the distinction between commercial arbitration and labor arbitration; whereas the former was the substitute for litigation, the latter was the substitute for industrial strife.<sup>(56)</sup> The Court also referred to a previous case, which held that the arbitration agreement being the “*quid pro quo*” for the agreement to avoid strife.<sup>(57)</sup>

The U.S. Supreme Court held in 1989 that the unequal bargaining power of employer and employee was not a sufficient reason to hold that arbitration agreements were never unenforceable in the employment context.<sup>(58)</sup> And then in 1991, the U.S. Supreme Court affirmed a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be subject to arbitration pursuant to an arbitration agreement in a securities application,<sup>(59)</sup> to which Section 1 of the FAA<sup>(60)</sup> was not applicable.

Labor arbitration is thus a changing and interesting area under the

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55. United Steelworkers of Am. v. American Manufacturing Co., 363 U.S. 564(1960).  
United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574(1960).  
United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593(1960).

56. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. at 578. (The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.)

57. Lincoln Mills of Alabama v. Textile Workers Union of America, 230 F.2d 81(5th Cir. 1956), *rev'd*, 353 U.S. 448, 455.(1957). (*quid pro quo* : something for something. Used in law for the giving one valuable thing for another. Black's Law Dictionary.)

58. Rodriguez de Quijas v. Shearson/American Express, Inc, 490 U.S. 477, 484(1989).

59. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20(1991).

60. *Supra* note 54.

public policy of social welfare and human rights. It may be worth researching further and studying this field; however, considering that the theme of this paper is to focus on party autonomy in commercial arbitration, the author does not include this issue here at this time.

2. Levying, assessment and collecting taxes and duties are exercised by a strong state power. They are the resources for bases of and indispensable for maintaining a state. Taxing is a fundamental basis of a state. No taxation without representation. Taxing, for example, was one of the key elements for the move toward independence to become a state.

Taxing should be fair and just, and needs equal treatment for procedural protection and substantial justice. In case of Federal tax disputes, the U.S. Internal Revenue Services (IRS) has jurisdiction. A taxpayer may appeal to the Appeals Office with 44 regional offices, which is a neutral decision maker. Alternatively, a taxpayer may file in a regional court or the U.S. Claims Court with its headquarters in Washington, D.C. By the Tax Reform Act of 1969, the procedure in a Small Tax Case was set up in the Tax Court.<sup>(61)</sup> Considering the nature of tax, dispute resolution on tax is a supplement to the tax procedure, not a replacement, and is limited to factual issues.

Transfer pricing in international transactions is another issue. Transfer pricing disputes arise from international commerce by sales, service or license between related companies, such as between a parent company and a subsidiary company. As the basis of transfer pricing disputes is

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61. See Kirsten J. McDonough, *Resolving Federal Tax Disputes Through ADR*, Arb. J. 38, June 1993 (A.A.A.). Stephen C. Miller, *Real Estate Tax Disputes*, Disp. Resol. J. 52, July 1995 (A.A.A.) (In State case, assessor's decision on property may be appealed to the county board of equalization (BOE). The determination of the BOE may be appealed to one of three options; the State Board of Assessment Appeals, the District Court or an arbitration panel. Only about five States allow arbitration.)

commerce, arbitration may be available pursuant to international income tax treaty; however, there are some complicated problems when two sovereign States are involved in disputes in addition to a private party concerned in a tax dispute, and when tax systems and legal concepts may be different in two States. These are different from an investment dispute between a State and a private investor,

Professor Park comments on the differences between commercial disputes and transfer pricing disputes on finality.<sup>(62)</sup> Professor Carbonneau states that the resolution of statutory claims involving tax issues is unsuitable for arbitral determination.<sup>(63)</sup>

From the view point of party autonomy, the availability of arbitration even in a limited area of factual issues in the tax dispute procedure is a favorable movement toward the expansion of its sphere; however, it is a part of the procedure administered by the tax authority. The decision of

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62. William W. Park, *Finality and Fairness in Tax Arbitration*, 11 J. Int'l Arb. 2 (1994). (In contrast to commercial disputes, where arbitration or settlement usually takes place in the shadow of potential court actions, differences arising under tax treaties will be subject to no adjudication in neutral courts with compulsory jurisdiction over the two States. While the arbitrator's decision on the merits of a transfer-pricing dispute should be final, this does not mean that international tax awards should be completely free from review.) William W. Park, *Income Tax Treaty Arbitration*, 31 Tax Management Int'l J. 219, 248 (May 2002). (... in the widespread hesitation of tax treaty to adopt mandatory binding arbitration, notwithstanding the inadequacy of current dispute resolution mechanism. At present neither taxpayers nor government possess any reliable way to resolve tax treaty disputes. National judicial proceedings lack political neutrality, and efforts at mutual agreement among competent authorities are fraught with delays, uncertainty and gamesmanship.)

63. Thomas E. Carbonneau and Andrew W. Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. Transnat'l L. & Pol'y 23 (1992). (Basic familiarity with tax regulations reveals such regulations and the problem they raise have a truly *sui generis* character. The resolution of tax problems is a specialty. Often, the provisions of the tax laws are ambiguous; it is always a challenge to determine even whether they apply. The content of provisions usually gain real meaning only in the context of the IRS process.)

the tax authority may be appealed to a court for review; as the judicial review is final as against an administrative decision in a modern democratic society.

Arbitration as an alternative dispute resolution has been considered with its core concept of party autonomy as against litigation at the court. Party autonomy is to consider its sphere or border against the jurisdiction of the court in this dissertation. As arbitration in the tax dispute procedure will be different from the purpose of this dissertation, research and study of tax arbitration is not included, though tax arbitration itself is an interesting area *vis-à-vis* the procedure taken by the tax authority.

## **IX. Arbitration and Party Autonomy**

1 . Party autonomy is a core and a backbone of arbitration. Arbitration is selected and structured for authority and procedure by an agreement of the parties. If contractual parties do not select arbitration, their contractual disputes are to be settled by the court. It is the fundamental right of the parties or nationals to invoke at the court. The proceeding at the court is originally to protect human rights under the constitution, and the hearing at the court is open to the public. The reason why parties prefer arbitration to litigation at the court is that arbitration is conducted by confidential and speedy proceedings, and by an expert on the matter in question appointed by the parties. In structuring the arbitration, the parties agree on an arbitration institution or *ad hoc* arbitration, appointment of arbitrator, the arbitration rules of an arbitration institution or the UNCITRAL Arbitration Rules, for example, for arbitration procedure, place of arbitration, governing law, etc. Thus, the parties may form and structure the arbitration as agreed upon by themselves. These are the example of items of party autonomy for arbitration.

2. The issue is as to whether the parties may agree on everything for arbitration. They could not, and they still cannot agree on everything. However, the sphere of party autonomy has been expanded by amendment of Acts or changing the case law in the United States. How and which fields of law have been changed or are changing? This is the starting point of the author to begin researching and studying case law in commercial arbitration. In order to actually prove the changing or development of the sphere of party autonomy, it is necessary to research decisions of the courts, and many and various cases have to be researched and studied to analyze developments. Not all cases researched are referred to here; however, cases typically and basically addressed are included to show development. Through cases referred to in the previous Chapters, the author believes that development and expansion of party autonomy is shown, especially in the field of regulatory law, such as disputes related to antitrust laws, securities regulations, punitive damages, the RICO, Patent Act, Bankruptcy Act and the COGSA. Consolidation, securities arbitration and investment disputes arbitration are another scheme for settlement of disputes by party autonomy.

The field of law in which party autonomy is expanding is one of objectives for research and study, and a more important matter is to know the thought or philosophy of courts for deciding cases. Therefore, key words and sentences of the courts' decisions for allowing party autonomy are referred to in the text including footnotes of this dissertation. Through it, expansion and reason of party autonomy could be understood.

The initial stage when the author noticed the expansion of party autonomy in one of the cases was *Mitsubishi Motors Corp. v. Soler-Chrysler, Plymouth, Inc.*<sup>(64)</sup> in which the U.S. Supreme Court stated in the final part of the decision that as international trade has expanded in recent

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64. 473 U.S. 614, 638-9(1985).

decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration,” and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. The *Mitsubishi* was influenced by *The Bremen et al. v. Zapata Off-shore Co.*,<sup>(65)</sup> in which the U.S. Supreme Court stated that the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, ... We cannot have trade and commerce in world market and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

These statements by the U.S. Supreme Court sound fresh to our industry during the period of trade friction by claiming to be “fair” politically at that time.

Based on these philosophies, the U.S. Supreme Court has begun to expand and allow party autonomy in arbitration, especially since around the 1980s granting *certiorari* to solve divided decisions by the Circuit Courts in many cases as are referred to in the previous Chapters.

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65. 407 U.S. 1, 9(1972).

3. When we consider the sphere or border of party autonomy in arbitration for disputes relating to the regulatory law, the concept for allowing arbitration by the Bankruptcy Act and the Patent Act is helpful. Distinction between core and non-core in bankruptcy cases, and patentability and patent related issues in patent cases set a line for non-arbitrability and arbitrability, thus sphere or border of party autonomy is set by it.

The reason why the author researches and analyzes party autonomy instead of just considering arbitrability simply is that even if some fields of law allow arbitrability, some procedures in the field may be subject to court decision, certification or review. For example, where classwide arbitration is allowed as agreed upon by the parties, class certification may be subject to court decision, thus limiting party autonomy in the area.

4. Party autonomy *versus* jurisdiction of the court was focused on in *LaPine Tech. Corp. v. Kyocera Corp.*,<sup>(66)</sup> where the parties agreed in an arbitration clause that the court may enter judgment upon any award either by vacating, modifying or correcting the award where the arbitrator's findings of fact are not supported by substantial evidence, or the arbitrator's conclusions of law are erroneous.<sup>(67)</sup>

As it was considered in Chapter V, this case was purely a commercial matter, there was no doubt about arbitrability. The issue was whether the

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66. *Supra* note 22.

67. Arbitration clause: The arbitrator shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The U.S. District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrator's findings of fact are not supported by substantial evidence, or (iii) where the arbitrator's conclusions of law are erroneous.

court has jurisdiction based on this arbitration clause. On petition by the parties, the U.S. District Court for the Northern District of California confirmed the award but denied the judicial review based on this arbitration clause, holding that the parties may not by agreement alter by expansion the provisions for judicial review contained in the FAA.<sup>(68)</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the court must honor the agreement of the parties without disregarding it by limiting review by the court to the FAA grounds.<sup>(69)</sup> (*LaPine I*) The case was remanded to the District Court to apply the parties' expanded standard of review. Four years later, the District Court confirmed the arbitrator's Phase II award. Kyocera appealed to the Ninth Circuit, which affirmed the District Court's confirmation.<sup>(70)</sup> The Court then granted rehearing *en banc*, which Kyocera requested,<sup>(71)</sup> and corrected the law of the Circuit regarding the proper standard for review of arbitration decisions under the FAA. The Court holds that because Congress has specified the exclusive standard by which Federal courts may review an arbitrator's decision, the Court holds that private parties may not contractually impose their own standard on the courts.<sup>(72)</sup> (*LaPine II*) The U.S. Supreme Court dismissed *certiorari*.<sup>(73)</sup>

The conclusion of the Ninth Circuit in *LaPine II* is satisfactory to the author. Expansion of party autonomy through allowing the judicial review as agreed upon by the parties as was decided in *LaPine I* may be desirable in a limited sense to respect the parties' agreement; however, in a wider sense, if the judicial review in the arbitration agreement is allowed, final and binding arbitral award as a fundamental nature of arbitration results in

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68. 909 F. Supp. at 705 (N.D. Cal. 1995).

69. 130 F.3d at 888 (9th Cir. 1997).

70. 299 F.3d 769 (9th Cir. 2002).

71. 314 F.3d 1003 (9th Cir. 2002).

72. 341 F.3d at 994 (9th Cir. 2003).

73. 124 S. Ct. 980 (2004).

ineffective action, and arbitration becomes merely one of the steps before filing at the court to get a final decision. It may be something like “Wanting to make right the eyebrow, he pulled out his eye.”

Thus, party autonomy, not by simple arbitrability, has been researched and considered in this dissertation in relation to the jurisdiction of the court.

5. There is freedom in making a private contract. Party autonomy was originally recognized in the selection or decision of governing law in the contract. The principle of freedom in making a private contract has a close relationship with party autonomy. As a contract is regulated by laws, party autonomy is also influenced by regulatory laws. Party autonomy is in particular recognized in relation to regulatory laws to control a contract. Party autonomy has thus existed or been recognized in conflict with or interaction with regulatory laws.

In the old case of the U.S. Supreme Court, Chief Justice Marshall delivered the opinion in *Wayman v. Southard*, 10 Wheat 1, 23 U.S. 1, 48(1825), that “recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made.” This statement was cited later in the decision of the U.S. Supreme Court in *Pritchard v. Norton*, 106 U.S. 124, 136(1882). These statements prove that party autonomy has been recognized for about one hundred and eighty years in the U.S. as a principle of law.

Through research and study as shown in the previous Chapters, party autonomy in arbitration has developed and expanded particularly since around the 1980s in many fields of law by interacting with public policy.

When the author considered arbitrability in dispute settlements decided by courts case-by-case according to the individual field of law, it was critical to find whether the decisions were made at random or by an under-

lying principle. Through researching and considering cases such as the ones mentioned in the previous Chapters, the author finally found that it was possible to understand the developments or changes of decisions under a certain uniform concept, “party autonomy”. As party autonomy is a core concept of commercial arbitration, it is matter of course to be reminded of it, and the author tried to apply it to cases decided by courts. When the developments or changes in case decisions are considered from the view point of party autonomy, it is possible to follow and understand them uniformly. As research and review of cases by this method from the view point of party autonomy have been shown in the previous Chapters, the author believes that one of the aspects of these developments or changes, in particular, relating to regulatory law, can be explained uniformly in contrast with the gravity of public policy.

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This article is the final part of my dissertation on *International Commercial Arbitration – To Focus on the Party Autonomy –*, which has been researched by taking opportunity of the research abroad program provided by Seinan Gakuin University.

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