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# THE ESSENCE AND SOURCES OF THE INTERNATIONAL PARTY AUTONOMY

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**Annotation:** This article explores the issues of the formation of legal regulation of the principle of autonomy of the will of the parties in international commercial arbitration. The main purpose of the article is to reveal the historical factors in the development of the principle of autonomy of the will of the parties, as well as the main sources of the party autonomy in international party autonomy. Given the fact that today there is an active development of international commercial relations, the need for alternative dispute resolution is increasing, the most popular of which is arbitration. Given the flexibility of the arbitration process due to the principle of autonomy of will, this article examines actively using sources of the principle of party autonomy and the prospects for developing the implementation of this principle by international standards and the legislation of the Republic of Uzbekistan..

**Keywords:** principle of autonomy, commercial arbitration, alternative dispute resolution, arbitration process, arbitration agreement, ad hoc arbitration, institutional arbitration.

## Introduction

Trade and international investment, combined with rapid technological progress, have increased international private relations. According to many academics and lawyers, this phenomenon contributes to growth in both developed and developing countries. This is primarily expressed by the fact that international production and trade lead to the better provision of goods and services, and greater global economic integration through large-scale supply. As a consequence, the opportunities for economic relationships are expanding, which also contributes to an increase in the need of people in developing countries for an objectively developed law and judicial system that will facilitate their relationships. Since the parties cannot predict the obstacles or the final result of the cooperation with another party in a commercial relationship, there is an increase in demand for alternative dispute resolutions. In addition to serving as a potential means of avoiding the expense, delay, and uncertainty associated with traditional litigation, it is preferable to choose alternative dispute resolution instead of litigation.

All the above-mentioned factors promote the requisition for alternative dispute resolution and its methods. Especially, arbitration becomes one of the most popular ways of alternative dispute resolutions. There are two types of arbitration: domestic and international. With the advent of the industrial revolution, significant breakthroughs in world science in various fields are associated, which, in turn, led to the rapid growth of trade between different countries. This significant growth in the volume of trade turnover inevitably led to many complex disputes between the parties both within one state and between residents of different countries. The most admired type of arbitration and its principle will be discussed in the current work – international commercial arbitration.

The Republic of Uzbekistan also does not remain outside the development of international commercial relations. Thus, one of the priorities of Uzbekistan's foreign policy has become multifaceted cooperation, including in the field of international trade and economic relations, which are becoming not only a means of transnational exchange of material goods but also a powerful factor in integration into the world economic space. Our country also attaches great importance to the development of international commercial relations. This is evidenced by the Decree of the President of the Republic of Uzbekistan "On the Development Strategy of the Republic of Uzbekistan for 2022-2026"[1]. Moreover, to integrate into international commercial relations, as well as to resolve disputes arising from such cooperation, the Republic of Uzbekistan also adopted the Law "On international commercial arbitration" dated August 18, 2021,[2]. This Law is aimed at establishing a separate legal regime applicable to international commercial arbitration, maximizing the effectiveness of arbitration proceedings, and minimizing judicial interference. Hence, the Republic of Uzbekistan also recognizes the importance and value of international commercial arbitration.

The relevance of the problem under study is large because it is very hard to imagine modern entrepreneurial relationships without a dispute resolution clause in their commercial contracts. Mostly, entrepreneurs prefer to address the arbitration to solve their disputes upcoming from their contract. Here is the question that arises: what makes arbitration so popular and convenient for the parties of the dispute? The reason for such demand is the principles that are fundamental in international commercial arbitration – party autonomy, for instance.

These principles allow parties to the disputes to make the way to achieve fairness in the case maximally comfortable and affordable for all parties. The expansion of international trade and international commercial relations is usually considered an increase in economic prosperity, even those who advocate economic development recognize that every coin has a downside. That is, the development of international trade and commercial relations creates not only winners, but also losers, and has an unintended adverse side when the choice of law is wrong. While arbitration– namely the doctrine of party autonomy in international commercial arbitration - permits parties to formulate dispute settlement rules on specific situations in their case or needs.

This study analyses the types and main sources of party autonomy in international commercial arbitration.

## Materials and methods

An international commercial contract is one of the types of the deal, however, it differs from other deals because of the international elements it is complicated. Moreover, counteragents usually are from different countries, their entities are located in different states. Thus, it becomes very popular to sign arbitration clauses or agreements. Such agreements are signed to refer any dispute or disagreements arising from their commercial contract to arbitration. At the same time, the arbitration clause/agreement excludes the jurisdiction of the courts while giving the power to arbitration. Redfern and others provide that an arbitration agreement requires the parties' consent to submit to arbitration, which means that the key element is the willingness and consent of the parties. Consent is indispensable to any process of dispute resolution outside the national courts[3]. When it comes to the consent of the parties, party autonomy comes out to the pedestal, since the principle which makes the arbitral process flexible is party autonomy.

There is a variety of explanations for the principle. According to Ansari, party autonomy is the backbone of the arbitration proceeding[4]. Redfern and Hunter described party autonomy in the

[1] Decree of the President of the Republic of Uzbekistan "On the Development Strategy of New Uzbekistan for 2022-2026" dated January 28, 2022. Available at: https://lex.uz/pdffile/5841077

[2] Law of the Republic of Uzbekistan "On international commercial arbitration", dated August 18, 2021.

[3] Allan Redfern and others, Law and Practice of International Arbitration, 4th edition, London: Sweet and Maxwell, 2004. P. 131

[4] Jamshed Ansari, "Party Autonomy in Arbitration: "A critical analysis", Researcher, (ISSN: 1553 – 9865). P. 53

following words: "Party autonomy is guiding principle in determining the procedure to the followed in international commercial arbitration. It is a principle that has been endorsed not only in national laws but by international arbitral institutions and organizations"[5].

Almost all international arbitration laws include the provision of party autonomy. Thus, parties without any doubt exercise party autonomy, since it is implemented in the mandatory laws of international commercial arbitration and public policy of most countries all over the world. Furthermore, the principle of party autonomy also appears in:

a) Institutional arbitration rules;

b) International arbitration conventions;

c) National arbitration legislation;

d) Lex mercatoria or general principles of law

e) Parties can also incorporate the principle into their arbitration agreement [6].

**Results of the Study**

International commercial arbitration influenced numerous national legislation systems. Most countries all around the world desire to become arbitration-friendly and the Republic of Uzbekistan is also on the list. As mentioned above the Republic of Uzbekistan adopted the law "on international commercial arbitration" dated February 16, 2021. Uzbekistan became the 85th country and 118th jurisdiction to enact legislation based on the UNCITRAL Model Law on February 16, 2021,[7].

It means that by ratification of the UNCITRAL Model Law countries aim to apply the provisions of the UNCITRAL Model Law to their national legislation. Taking into account that the UNCITRAL Model Law recognizes the principle of party autonomy as the core principle of international commercial arbitration, many countries have modified their national legislation to implement more freedom for parties to construct the aspects of their arbitration process[8]. Consequently, nowadays party autonomy is reflected in both national legislation and the international law system.

The next popular source of party autonomy is the United Kingdom Arbitration Act (**hereinafter** – Arbitration Act). The Arbitration Act is distinct from other norms with the division of the norms to arbitration into mandatory and non-mandatory provisions. The doctrine of party autonomy is underlined as non-mandatory provisions of the arbitration. Under this Arbitration Act, it means that party autonomy shall be exercised by the parties in determining the aspect of arbitration in the arbitration agreement, otherwise the Arbitration Act provides applicable rules[9]. For instance, Article 46(1) of the Arbitration Act provides that the arbitral shall decide the dispute according to the law chosen by the parties and this law shall apply to the merits of case[10].

The very first convention with the establishment of international commercial standards was the Geneva Protocol on Arbitration Clauses in Commercial Matters (**hereinafter** – the Geneva Protocol), 1923, and the Geneva Convention for the Execution of Foreign Arbitral Awards[11] (**hereinafter** – Geneva Convention). The Geneva Protocol put the foundation of the recognition of arbitral agreements, while the Geneva Convention implemented the enforcement and recognition of arbitral

[5] Redfern and Hunter, with Blackbaby and Part sides, Law and Practice of International Commercial Arbitration, 4th Edition, P 326

[6] Sunday A. Fagbemi, The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality? Sustainable Dev. L & Poly's, 2015.

[7] https://gratanet.com/publications/law-uzbekistan-international-commercial-arbitration

[8] Pieter Sanders, Unity and Diversity in the Adoption of the Model Law,1995. P. 11

[9] The UK Arbitration Act, 1996. Para. 4(2)

[10] The UK Arbitration Act, 1996. Art. 46(1)

[11] Geneva Protocol on Arbitration Clause, July 28, 1924, 678 L.N.T.S. 27; Geneva Convention on the Execution of Foreign Arbitral Awards, September 26, 1927 92 L.N.T.S. 302

awards. The growth never stops and these norms required modernization. Under these circumstances, the Geneva Protocol and the Geneva Convention were elaborated by the New York Convention.

From the title of the New York Convention, it seems like the Convention is dedicated only to the provision for recognition and enforcement of the arbitral awards. Whereas, the New York Convention highlighted the importance of party autonomy, namely, with the respect to choice of law[12]. As of November 2020, the New York Convention has 166 State Parties[13]. This statistic proves the wide usage of the standards of the New York Convention together with the growth of the demand for international arbitration.

The next source of party autonomy is the European Convention on International Commercial Arbitration (**hereinafter** – the European Convention)[14]. The European Convention provides for a set of minimum standards for the conduct of an arbitration. With the attention to provisions on procedures for the appointment of arbitrators in case the parties cannot agree on this matter; the procedure determining the jurisdiction of arbitration or the applicable law if it is not defined in the arbitration agreement. Even though some of these provisions are already enshrined in other international arbitration rules, for instance – UNCITRAL Model Law, the European Convention remains the unique international legal instrument that codifies such rules, insofar as it provides consistency in international commercial arbitration procedures[15]. The scope of application of the European Convention is not limited to Europe.

Article VII (1) of the European Convention "embodies" the principle of party autonomy[16]. Accordingly, parties have the freedom to choose which law will apply to the substance of their dispute:

*"(1) The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases, the arbitrators shall take account of the terms of the contract and trade usages.*

*(2) The arbitrators shall act as amiable compositors if the parties so decide and if they may do so under the law applicable to the arbitration"*[17].

Parties shall determine what kind of arbitration they want to address – ad hoc or institutional arbitration[18]. Mostly, parties choose in favor of institutional arbitration, to use pre-established norms to organize the proceedings. These institutional rules are also considered a source of party autonomy since it is enshrined in them.

The London Court of International Arbitration rules (**hereinafter** – LCIA Rules) adopted party autonomy under Article 22.3 as follows:

*"The Arbitral Tribunal shall decide the parties' dispute by the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law that it considers appropriate"* [19].

Article 21 of the arbitration rules of the International Chamber of Commerce (**hereinafter** – ICC Rules) stipulates that:

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[12] Born B. Gary, International Commercial Arbitration, Second Edition, Kluwer Law International, 2015. P. 26

[13] https://www.acerislaw.com/near-global-enforceability-of-arbitration-awards-sierra-leone-becomes-the-166th-state-party-to-the-new-york-convention/

[14] European Convention on International Commercial Arbitration, 1961. Art. X

[15] Dominique T. Hascher, Commentary on the European Convention on International Commercial Arbitration of 1961, 2011.

[16] European Convention on International Commercial Arbitration, 1961. Art. VII (1)

[17] *Ibid.*

[18] Margaret L. Moses, The Principle and Practice of International Commercial Arbitration, 1st edition, 2008. P. 17

[19] LCIA Arbitration Rules, 2014. Art. 22.3

*"1. The parties shall be free to agree upon the rules of law to be applied by the arbitral to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law that it determines to be appropriate.*

*2. The arbitral tribunal shall take into account the provisions of the contract if any between the parties and of any relevant trade usages.*

*3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give such powers"*[20].

Besides the aforementioned institutional rules, there are a lot of institutions that are established party autonomy in their rules, mostly they are similar to the provision of UNCITRAL Model Law.

In case the parties do not wish to use all the above-listed sources, the parties may address the "law of merchants" or in other words the "soft law". This is a judicial process of selecting rules independent of domestic law and generally accepted rules in international trade[21]. This process means the application of the lex mercatoria[22].

Besides the elements of the lex mercatoria, there are provisions of the UNCITRAL Arbitration, which are recognized as a soft law[23]. But to say that soft law rules are quasi-legal is simply to beg the question of what separates the quasi-legal from the nonlegal, on the one hand, and the legal, on the other hand. The discomfort of legal commentators with soft law stems in significant part from this ambiguity. Soft law is a residual category, defined in opposition to clearer categories rather than on its terms[24]. Thus, soft law is most commonly defined to include hortatory, rather than legally binding, obligations. The focus of this definition is usually on whether or not something that looks like a legal obligation in some ways (e.g., it is a written exchange of promises between states) nevertheless falls short of what is required to formally binds parties[25]. This definition, then, is a doctrinal one-things that fall short of international law are called soft law.

Such soft laws in international commercial arbitration are enhanced in UNCTIRAL Arbitration Rules and Model Law. The UNCITRAL Arbitration Rules are optional and apply only if the parties have referred to them in writing in the arbitration agreement[26]. These laws are more convenient for the parties who organize the ad hoc arbitration, as they have to create the framework of their proceeding. The principle of party autonomy is adopted in article 35 of the UNCITRAL Arbitration Rules[27].

However, arbitrators can also address the provisions of UNCITRAL Arbitration Rules and Model Law. Courts may have adopted differing approaches in the determination of the non-mandatory character of certain provisions of the Model Law[28]. For instance, in the case *[Grandeur Electrical Co. Ltd. v. Cheung Kee Fung Cheung Construction Co. Ltd.,]* where the court added in that case that "in the light of the emphasis given to party autonomy about dispute resolution by arbitration, a clause in a contract providing for disputes to be settled by arbitration should not readily be construed as giving a choice between arbitration and litigation unless that is specifically and spelled out"[29]. On the contrary, the Court of Appeal of Quebec in *[C.C.I.C Consultech International v. Silverman]* case has also ruled

[20] ICC Rules of Arbitration, 2017. Art. 21
[21] Ole Lando, The Lex Mercatoria in International Commercial Arbitration 34 Int'l & Comp L.Q, 1985. P. 747
[22] *Ibid* P. 748
[23] Emmanuel Gaillard, General Principles of Law in International Commercial Arbitration – Challenging the Myths, World Arbitration, and Mediation Review, 2011. P.161
[24] James H. Carter, The International Commercial Arbitration Explosion: More Rules, More Laws, More, More Books, So what?, 1994. P. 787.
[25] *Ibid*.
[26] UNCITRAL Arbitration Rules, 1976. Art. 1
[27] *Ibid.* Art. 35
[28] UNCITRAL Digest of Case Law on the Model Law International Commercial Arbitration, 2012.
[29] *Grandeur Electrical Co. Ltd. V. Cheung Construction Co. Ltd.*, High Court – Court of Appeal, Hong Kong Special Administrative Region of China, 25 July 2006, [2006] HKCA 305, available at: http://www.hklii.hk/eng/cases/hkca/2006/305.html

that similar language entailed that the parties had not undertaken to resort to arbitration[30]. With this in mind, we can conclude that in the case of the usage of party autonomy as a soft law courts' approaches may vary.

## Conclusion

To summarize, the choice to arbitrate is determined by the consensual mutual decision of the valid fixed in an arbitration agreement. Arbitrators bring their power from the valid arbitration agreement. Therefore, the party autonomy is ubiquitous in all international arbitrational legislation and national law system, so that the parties could without any doubt exercise the flexibility of the arbitration established by party autonomy.

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[30] *C.C.I.C. Consultech International v. Silverman*, Court of Appeal Quebec, Canada, 24 May, 1991 Can LII 2868 (QC CA), available at: http://www.judgments.qc.ca./php/decision.php?liste=53365293&doc=E4DA59C7A17BF2492B07BCA86534262FE0FI1219570C7F13782CA6067823146F6&page=1

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