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Limits to Party Autonomy in International Commercial Arbitration

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Party autonomy is one of the most attractive features of international arbitration. However, parties do not have absolute freedom to determine the arbitration process. As this article will show, the extent of the parties' freedom to structure the proceedings depends on the respective stages of the arbitration proceedings.

Introduction – Party Autonomy in International Arbitration

The principle of party autonomy, in a general sense, started to develop in the eighteenth century [1] and has been widely accepted throughout the world. It has been recognised by international conventions, arbitration rules and regulations, eg, the UNCITRAL Model Law, New York Convention, the Arbitration Rules of the International Chamber of Commerce (ICC), the English Arbitration Act 1996 [2] etc.

The freedom of the parties to consensually execute an arbitration agreement is rooted in the principle of party autonomy. The arbitration agreement is the strongest evidence of party autonomy. This agreement is accepted as a primacy resource of arbitration. In the arbitration agreement parties are free to choose arbitration as their preferred form of dispute settlement, ie, parties can chose the venue of arbitration, conduct and tailor all proceedings according to their needs and specific requirements including the setting of procedural rules, the choice of arbitrators and the tribunal's competence and powers, agreeing on procedural aspects for the conduct of the hearings, arranging the procedural time-table and the language used during proceedings etc. Furthermore, parties are free to choose the applicable laws and control all major aspects of the arbitration.

However, parties do not have absolute freedom to determine the arbitration process. The parties' autonomy is not without limitations and may be subject – among others – to certain safeguards as are necessary in the public interest

and other restrictions. From the moment of negotiating an arbitration agreement up to the receipt of an arbitral award, the extent of the parties' autonomy differs substantially. This article will try to outline some of the aspects of the limits of party autonomy.

The Four Different Arbitration Stages and the Different Levels of Party Autonomy in Each Stage

Major limitations to party autonomy can follow from the arbitration agreement itself, implications of applicable mandatory rules or laws, rules of arbitral institutions, intervention of courts in cases of bias of arbitrators, misconduct of proceedings etc. Important restrictions can additionally follow from "public policy". This restriction owes its existence to the concept of state sovereignty, thus every state can demarcate the boundaries within which arbitration can take place. This concept depends on the cultural, social and economic tradition of each country.

Public policy can influence party autonomy in three ways: first, the freedom of the parties can be limited by the rules governing the arbitrability of the arbitration agreement, second, an award can be set aside if it violates public policy and third, if the award infringers public policy its recognition and enforcement can be refused.

In considering the specific limits to party autonomy it is necessary to distinguish the various stages of arbitration and evaluate the impact in each stage of the arbitration. With the ongoing process from stage to stage, the limits to party autonomy are clearly gradually increasing.

First Stage: Negotiation of the Arbitration Agreement Between the Parties

At no other stage do parties enjoy as much autonomy as during the first stage of the proceedings where usually the arbitration agreement is drafted. The arbitration agreement plays a significant role in all stages of the arbitration as it reflects the autonomy of the parties. In the agreement the parties have the power to exclude the jurisdiction of the courts, choose particular arbitrators and lead the arbitration in whatever way they want. The parties can opt for either ad hoc or institutional proceedings. This first choice obviously has a tremendous impact regarding the degree of autonomy and control by the parties.

With regard to the arbitration agreement, the "party autonomy" is not synonymous with "unlimited power" or "complete autonomy". Already at this stage party autonomy is limited despite the widespread opinion that contracts are self-sufficient and together with arbitration they create a "closed circuit" that eliminates national laws. Disputes about family and criminal law, grant of patents etc. however, cannot be subject to an arbitration agreement, as these are matters of public policy and can only be resolved by national courts even if the parties wish otherwise. [3]

Although the parties are free to agree on the law applicable to arbitration and the arbitration agreement, this choice may be subject to the restrictions of law at the place of arbitration, the "*lex arbitri*", based on every state's right to regulate any legal activity within the boundaries of their own country. The "*lex arbitri*" may confer freedom of the parties to establish

the relevant procedural rules (as for example does article 19(1) of the UNCITRAL Model Law). But this may be further regulated by institutional rules which the parties may have incorporated in their arbitration agreement. [4]

Also, this choice of law must not be against "*bona fide*" and "public policy". Whether this choice is in breach of "*bona fide*" or "public policy" is again defined by national law. Therefore, the choice of law is not completely unrestricted.

Natural justice is a further limitation to party autonomy, because if the parties' agreement violates natural justice it cannot be enforced. Another restriction is imposed by the role of national courts because they follow the procedural law of the country concerned even if not agreed to by the parties.

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> A special case to consider are also third parties that may constitute another restriction on party autonomy. Third parties are parties who have not signed the arbitration agreement. The parties cannot agree on issues which can affect third parties directly, because the arbitration agreement binds only the parties.

However, this freedom of the parties to tailor proceedings to their needs has also other restrictions, eg, when parties attempt to alter the rules of the administering body in a way which is unworkable or is not accepted by the administering body. Further, the arbitration agreement must be a valid one according to the law which governs it. In addition, the arbitral procedure itself should comply with the mandatory rules of law of the "*lex arbitri*", which usually is the law of the place of the seat of the arbitration. [5]

Another essential feature of party autonomy in international commercial arbitration is that the parties have chosen that courts shall not interfere in arbitral proceedings. However, in the following circumstances, courts would interfere to assist the parties in the arbitral process:

First, a court that is faced with an action regarding an arbitration should, before submitting its first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Second, parties must agree as to the appointment of arbitrators. In case of a disagreement, an arbitration institution or a court may appoint arbitrators upon demand of a party. Third, the court may order any interim measures upon appeal by the parties if it is suitable with the arbitration agreement and where it is determined that the object of the dispute is a perishable

item and it is better to dispose of it to convert to money.

Special Case: Party Autonomy Under Expedited Procedures

Special restrictions to party autonomy apply during expedited procedures provided under the rules of various arbitration institutions. As an example, the ICC, HKIAC and SIAC Rules shall be reviewed in this respect.

Similarities regarding party autonomy

The “expedited procedure” provisions under the rules of the SIAC, the HKIAC, and most recently, the ICC, have the following aspects in common:

- power of the institution to shorten the time limit to constitute the arbitral tribunal;
- discretion of the arbitral tribunal to determine the dispute on the basis of documentary evidence; and
- requirement for rendering the award within six months by the arbitral tribunal. [6]

Differences regarding party autonomy

Even between arbitral institutions such as the ICC, SIAC and HKIAC, there are key differences in their rules and their approach to administering cases that can affect users with regard to their autonomy significantly. Where the arbitration agreement provides for three arbitrators, the institutions have taken different approaches when applying the “expedited procedure”.

The SIAC Rules (Rule 5.2) provide that the case shall be referred to a sole arbitrator, unless the President of the SIAC determines otherwise.

These provisions imposing a sole arbitrator appear to override party autonomy. Although worded differently, the ICC rules have the same effect.

In particular, the ICC’s press release dated 4 November 2016 states that: *“Under the Expedited Procedure Rules, the ICC Court will normally appoint a sole arbitrator, irrespective of any contrary term of the arbitration agreement.”*

The HKIAC has opted for a somewhat different approach. Under the HKIAC Rules the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators (Article 41.2(a) of the HKIAC Rules) and, in particular: *“If the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators”* (Article 41.2(b) HKIAC Rules). [7]

Second Stage: Arising of the Dispute

Appointment of the Tribunal

As soon as the arbitration proceedings are initiated, the parties lose at least part of their autonomy, and the issue arises of who really owns the arbitration proceedings. The further the arbitration proceeds, the more limits party autonomy encounters.

The appointment of the arbitral tribunal may be one of the most important stages in the arbitration and also for the parties’ autonomy. To begin with, whether an arbitrator has a common law or civil law background will have also an influence how the arbitrator will conduct the proceedings and also what view an arbitrator takes on party autonomy.

After the tribunal is constituted, the parties themselves cannot unilaterally change the terms of the arbitration agreement without the consent of the arbitral tribunal. [8]

Lex Arbitri

Another limitation to party autonomy after the establishment of a tribunal is the "*lex arbitri*". It is the law of the seat of arbitration which can have great influence over certain procedural issues in arbitral proceedings as well as the conflict of laws rules applicable to an international arbitration. [9]

Under the "*lex arbitri*" the parties can confer some powers upon the arbitral tribunal as may be allowed by the "*lex arbitri*", because some powers could not be exercised by the arbitral tribunal. They can be exercised by national courts only. The role of the national courts is another restriction on party autonomy.

Third Stage: The Arbitration Hearing

At the hearing stage the parties lose a big part of their autonomy and the tribunal acquires paramount autonomy.

Regarding the parties' contract which forms the core of each dispute there are usually terms in a contract that is rooted in the applicable law and that are beyond the parties' autonomy. There is a tension between the will of the parties in arbitration and the necessity to act within the framework set by national laws and eventually also international conventions, if the enforceability of the arbitral award is to be reserved. Ie, contract terms do not always have an absolute meaning with legal effects flowing directly from the words, and recourse to a (national) legal framework may be required to interpret the terms and to define their legal effects.

In addition, even plain words under the contract may acquire different meanings, depending on the culture and tradition of the interpreter.

The understanding of arbitration as an autonomous system, based on the will of the parties and detached from national law. However, both the New York Convention and the UNCITRAL Model Law refer to national, non-harmonised legislation in a number of instances and thus reduce in few, but significant, respects the detachment of arbitration from national laws.

Fourth Stage: Post-Award Stage

After the tribunal delivers the award, it ceases to have any legal control, except for minor rectifications. It is now for the parties to take up the autonomy from here, and they have to either opt to comply with the award or resist enforcement by seeking to annul it.

And also, at this stage the parties' autonomy may be restricted through the applicable law in case the award is refused enforcement, if the award violates public policy of the country where the award is going to be enforced.

Conclusion

The principle of party autonomy is based on the freedom to contract. The legal framework for arbitration ensures that arbitration enjoys a significant autonomy, but this autonomy is not unlimited. The extent of this autonomy depends upon the stage in which the proceedings are, staring from negotiating the agreement until the passing of the award.

Limitations to party autonomy are due to the number and variety of stakeholders, who range from the parties themselves, the arbitrators, the arbitral institutions, and, last but not least, the public at large.

As arbitration is a private dispute settlement method, it therefore has to comply with the law and public policy of the place of arbitration. The parties can only exercise their party autonomy as far as public policy and the "*lex arbitri*" allow. National law defines what may be subject to arbitration, when an award is deemed to conflict with public policy, what the criteria are for an arbitration agreement to be binding on the parties, what mandatory rules of procedure apply, and when an award is valid.

Furthermore, the arbitration agreement binds only the parties to this agreement, so that third party involvement may be another limitation.

Depending on the situation, different restrictions to the party autonomy may result before the establishment of the arbitral tribunal and after that. Before the beginning of the arbitration, some restrictions regarding the drafting of the agreement may apply. The freedom of choice can be restricted, among others, by the provisions of the "*lex arbitri*" or a prescribed number of arbitrators in expedited procedures of certain arbitrational institutions.

After the establishment of the tribunal, further restrictions like the rules of the "*lex arbitri*", general provisions of the arbitration proceedings and the necessity of the consent of the arbitral tribunal in some circumstances, must be heeded.

Hence, party autonomy in institutional arbitration is a fundamental principal, but not without restrictions.

Endnotes

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2.	Rajveer, Parties' autonomy in international commercial arbitration, International Journal of Scientific & Engineering Research Volume 9, Issue 10, October-2018 1204 ISSN 2229-5518 https://www.ijser.org/researchpaper/Parties-autonomy-in-international-commercial-arbitration.pdf, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006(hereinafter "Model Law"), Art 28.; UNCITRAL Arbitration Rules (as revised in 2010) as well. According to Art 35, "The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute."71958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York" Convention (hereinafter "New York Convention") Art V (1(d)). 8 ICC Rules of Arbitration, Art 17.1.9; English Arbitration Act 1996 (hereinafter English Arbitration Act), S. 1(b).

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