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論　　説

Party Autonomy and the Protection of Weak Parties in International Litigation and Arbitration Through the Lens of Comparative Law and Behavioral Economics:
Lessons for Thailand

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1. Introduction

The principle of party autonomy is widely recognized worldwide and is one of the core pillars of international litigation and arbitration. It is based on the presumption that rational individuals can maximize their own welfare.[1)] The parties are allowed to calculate their own risks and design their most suitable dispute settlement mechanism to meet their needs. Some of the critical benefits of party autonomy are that it brings certainty and predictability into cross-border contracts and allows the parties to properly reduce their transaction and litigation risks.[2)] However, in reality, not all parties are rational or have the capacity to make informed choices. Some weak parties, especially consumers and employees, often suffer from systematic misperceptions, imperfect information, and unequal bargaining power. Granting these weak parties an unrestricted right to party

1)　Friedrich Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," in *Limits to Party Autonomy in International Commercial Arbitration*, ed. Franco Ferrari (Huntington, NY: JurisNet, 2016), 419.
2)　Alex Mills, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press, 2018), 76.

autonomy may conversely impair their welfare and risk unfair contracts as it may allow the stronger party to exploit the weak parties' vulnerability for its own benefits.

This paper aims to examine an appropriate legal framework for promoting party autonomy and the protection of weak parties in international litigation and arbitration in Thailand. The following sections will first describe Thailand's current international litigation and arbitration systems (*See* 2). Then it will examine theoretical justifications for party autonomy in choice of forum on one hand (*See* 3), and the needs for limits to party autonomy based on behavioral economic analysis on the other hand (*See* 4). Next, it will illustrate current state practices and various regulatory techniques used to limit party autonomy for the protection of weak parties in international litigation (*See* 5) and arbitration (*See* 6). Subsequently, it will analyze legal tools and regulatory techniques from the behavioral economic perspective and describe general trends of the weak party protection policies (*See* 7). Finally, it will suggest a new legal framework for Thailand in international litigation and arbitration, which attempts to strike a balance between the benefits of party autonomy and weak party protection (*See* 8). The last section will offer a brief conclusion of this paper (*See* 9).

2. Overview of the International Litigation and Arbitration Systems of Thailand

Thailand has a civil law legal system with strong influences from common law traditions. The primary sources of Thai law are statutes or written laws passed by the parliament.[3] In general, the Thai legal system follows the pattern of continental European countries, especially France, Germany, and Japan. For example, the Civil Code of Thailand was drafted around the 1920s by using the Japanese Civil Code as a general model and transplanted some legal principles

3） For an overview of the Thai legal system, *see* Joe Leeds, "UPDATE: A Summary of the Thailand Law and Legal System," GlobaLex, March/April 2020, accessed December 1, 2020, https://www.nyulawglobal.org/globalex/ Thailand1.html.

from France, Germany, and England.[4] Common law tradition is most notable in the use of Supreme Court decisions as the persuasive authority in lower court cases, although they are not legally binding. In the context of private international law, the Act on Conflict of Laws, B.E. 2481 (1938) seems to be a prime example of a mixture between civil law and common law traditions.[5]

With respect to international litigation, Thailand has not ratified any of the major international conventions regarding international litigation, including the Convention of 30 June 2005 on Choice of Court Agreements (hereafter referred to as "Hague Convention on Choice of Court Agreements"), the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. There is no specific provision prescribing international jurisdiction under Thai laws. The Thai Civil Procedure Code (hereafter referred to as "CPC")[6] provides various grounds of domestic territorial jurisdiction in civil and commercial matters for Thai courts such as general jurisdiction based on the "actor sequitur forum rei" principle and special jurisdiction based on the place of the cause of action.[7] The same rules also apply to the questions of international

4）*See* Chanchai Sawaengsak and Wannachai Boonbumrung, *Codifications of Laws in Foreign Countries and Thailand* [Sara Naru Kiewkub Karnjudtum Pramuan Khodmai Kong Thangprathed Lae Thai] (Bangkok: Nithidham, 2000), 151-55.

5）The English translation of the Act on Conflict of Laws, B.E. 2481 (1938) is available at http://web.krisdika.go.th/ data//document/ext809/809769_0001.pdf. For a detailed discussion of the Thai conflict of law rules, *See generally,* Chin Kim, "The Thai Choice-of-Law Rules," *International Lawyer* (ABA) 5, no. 4 (October 1971): 709-721; Kanung Luchai, *Explanations on Conflict of Law Rules* [Kam Athibai Waduay Karn Kudkun Haeng Khodmai] 8th ed. (Bangkok: Vinyuchon, 2019).

6）The first version of CPC, enacted in 1935, was highly influenced by French law because the drafters of the CPC were French nationals (Riviere and Charles L' Evesque). *See* Chanchai Sawaengsak and Wannachai Boonbumrung, *Codifications of Laws in Foreign Countries and Thailand*, 164-65.

7）CPC Section 4:
"Except otherwise provided by law:
(1) the complaint shall be submitted to the Court in which the defendant is domiciled within its territorial jurisdiction, or to the Court in which the cause of action occurs within its territorial jurisdiction, whether the defendant would have a domicile in Thailand or not."

jurisdiction when the case involving foreign elements is brought before Thai courts.

However, the statutory provision on choice of court agreements was deleted from the CPC in 1991 because of the concern over the abuse of choice of court agreements by financial institutions and traders in choosing the courts closed to their headquarters or principal places of business, which were often detrimental to consumers.[8] Due to the absence of a choice of court provision, the validity of a choice of court agreement under Thai laws is highly uncertain, and party autonomy in choice of court is severely restricted. In 1996, the Thai Supreme Court held in its decision no. 951/2539 (1996) that a choice of foreign court agreement as the exclusive forum for litigation was contrary to Section 4 of the CPC[9] and was therefore null and void. More recent Supreme Court decisions such as decisions no. 3537/2546 (2003), no. 583/2548 (2005), and no. 3281/2562 (2019) seem to confirm the validity of a non-exclusive choice of court agreement designating foreign courts, which still allowed an option for the parties to bring an action before Thai courts. The Court held that a non-exclusive choice of court agreement was permitted under the general principle of international law and was not contrary to Thailand's public policy.

Nonetheless, it is difficult to conclude that universally accepted principles for a choice of court agreement have emerged internationally, especially under the current circumstance in which few countries have ratified the Hague Convention on Choice of Court Agreements.[10] Therefore, the general principle of international law cannot afford a realistic solution in Thailand. Furthermore, none of the Thai

8) Vichai Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," *Law Journal of the Thai Bar* 52, no. 3 (1996): 44.

9) *See supra* note 7.

10) As of December 2020, the Hague Convention on Choice of Court Agreements has become effective in only 31 countries and 1 region, and most of which are the European Union member states. *See* "Status Table," Convention of 30 June 2005 on Choice of Court Agreements, Hague Conference on Private International Law, accessed December 1, 2020, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98. *But cf.*, Andreas F. Lowenfeld, "Party Autonomy: the Triump of Practical Considerations" in *International Litigation and the Quest for Reasonableness* (Oxford: Claren Press, 1996), 208-09. ("party autonomy—both for choice of law and for choice of forum, including an arbitral forum—is now part of an international customary law of dispute settlement.")

Supreme Court judgments has clarified the scope, formality, and validity requirements of choice of court agreements, which are to be permitted under Thai laws. This uncertainty over the effectiveness of choice of court agreements has undoubtedly been a severe hurdle for using such agreements in Thailand. As a result, an arbitration clause is more prevalent in both domestic and international transactions, while a forum selection clause is rarely used in Thailand.

In addition, the Thai legislature enacted the Consumer Case Procedure Act, B.E. 2551 (2008) and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) to ensure the effective protection for consumers and employees whom are generally viewed as especially vulnerable. These laws also provide protective rules for weak parties in the jurisdictional dimension. As for a consumer dispute, the Consumer Case Procedure Act, B.E. 2551 (2008) Section 17[11] requires a business operator[12] to file an action against a consumer[13] only in the court in which a consumer is domiciled, while a consumer has options to sue the other party either in the place of the cause of action or the business operator's domicile.[14] With respect to a labor dispute, the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 33 stipulates that all labor claims must be filed with the labor court for the place of work of the employees.[15]

11） The Consumer Case Procedure Act, B.E. 2551 (2008) Section 17:
"In the case where a business operator is going to take a legal action against a consumer as a consumer case, and the former is entitled to submit a case to the court within the territorial jurisdiction of which the consumer is domiciled or to other court as well, the business operator shall submit the case only to the court within the territorial jurisdiction of which the consumer is domiciled."

12） The Consumer Protection Act, B.E. 2522 (1979) Section 2 defines a business operator as "a seller, a producer for sale, a person ordering or importing the goods into the Thailand for sale or a person purchasing goods for resale or a person providing a service and also includes a person operating an advertising business."

13） The Consumer Protection Act, B.E. 2522 (1979) Section 2 defines a consumer as "a person who purchases or receives a service from a business operator or a person who receives an offer or a solicitation from a business operator for purchasing goods or receiving a service and includes a person who duly uses goods or receives a service from a business operator despite no payment of remuneration on his part."

14） *See* Section 4 (1) of the CPC.

15） The Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 33:
"A labor plaint shall be filed with the labor court within the territorial jurisdiction of which the cause of action arose. If the plaintiff intends to file the plaint with the labor court within the territorial jurisdiction of which the plaintiff or the defendant has domicile, the

These legislations have adopted a general policy that legal proceedings may be brought against a consumer or employee by the stronger party only in the courts of the consumer's domicile or the employee's place of work, respectively. Although there have been no reported Supreme Court decisions directly examining the effects of these legislations on choice of court agreements in international transactions, it is generally viewed that these jurisdictional rules constitute overriding mandatory rules and significantly restrict party autonomy to select the court, which is inconsistent with these rules.[16)]

Although the CPC and other procedural laws do not provide room for choice of court agreements, there is a particular area in which party autonomy in choice of court is explicitly permitted. The Multimodal Transport Act, B.E. 2548 (2005) Section 65 provides that the parties to the multimodal transport contract may insert a forum selection clause in their multimodal transport bill of lading or contract of multimodal transport. Nonetheless, the agreed foreign court must have jurisdiction over claims arising out of multimodal transport contract or tort under the law of that country.[17)] This Act aims to facilitate international business transactions in international multimodal transport, which are highly competitive.[18)] Therefore, it intends to bring uniformity to international business practices in multimodal transport by recognizing frequently used choice of court agreements.[19)] However, it should be noted that if the carriage of goods is

labor court may, when the plaintiff has proved that the trial in such labor court will be convenient, allow the plaintiff to file such plaint as requested.
For the purpose of this Section, the place of work of the employees shall be deemed as the place where the cause of action arose."

16) *See* Pichanun Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases," (Master's thesis, Thammasat University, 2014) 79-87.

17) The Multimodal Transport Act, B.E. 2548 (2005) Section 65:
"The parties to the multimodal transport contract may, by providing in the multimodal transport bill of lading or contract of multimodal transport, agree that a Court in any country which, according to the law of that country, has jurisdiction over civil claims arising out of multimodal transport contract or tort shall be the competent Court having jurisdiction to try and adjudicate the case."

18) *See* the legislative remark (legislature's intent) accompanying the Multimodal Transport Act B.E. 2548 (2005).

19) The Multimodal Transport Act, B.E. 2548 (2005) Section 4 defines muitimodal transport as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the multimodal transport operator is in charge of the goods to a place designated for delivery situated in a

executed by only one mode of transport, for example, by sea, it will be subject to the Carriage of Goods by Sea Act, B.E. 2534 (1991), which contains no provision for choice of court agreements. As a result, the general jurisdictional rules under the CPC will apply to determine international jurisdiction in such case.[20)]

On the contrary, as for international arbitration, Thailand is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as "New York Convention"). Also, the Arbitration Act, B.E. 2545 (2002) adopted most of the provisions in the UNCITRAL Model Law on International Commercial Arbitration (1985) to meet international standards.[21)] The Arbitration Act enshrines the principle of party autonomy, which allows the parties to an arbitration agreement to enjoy extensive freedom to decide on their dispute resolution mechanism, including the place of arbitration, the appointment of arbitrators, the language to be used in arbitration, and other arbitral proceedings. Nonetheless, there is no statutory provision that grants special protection for weak parties such as consumers and employees under the Thai arbitration law.

In conclusion, Thai laws provide a wide degree of party autonomy in international arbitration, subject to certain limitations commonly seen in the New York Convention and the UNCITRAL Model Law. There is also no particular statutory framework that affords extra protection for weak parties in arbitration. On the contrary, party autonomy in international litigation is minimal. Furthermore, special procedural laws lay down protective jurisdictional rules in consumer and employment contracts in which the parties are not allowed to opt-out. Although some choice of court agreements may be valid in the context of international transactions, according to recent decisions of the Thai Supreme Court, the effectiveness and enforceability of such agreements are still far from certainty. There is no statutory law that governs the formal requirements and validity of a choice of court agreement. The main reason for the restriction of

different country."

20）*See* Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases," 106-08.

21）The English translation of the Arbitration Act, B.E. 2545 (2002) is available at https://www.krisdika.go.th/ data//document/ext825/825530_0001.pdf.

party autonomy in choice of court is to strengthen the protection of weak parties who generally suffer from the inequality of bargaining power and the lack of information.

3. Theoretical Justifications for Party Autonomy in Choice of Forum

The notion that parties to a transnational contract should be allowed to agree in advance on a forum or which national court will adjudicate their dispute, namely party autonomy, has been globally recognized as a universal principle of private international law.[22] Party autonomy is extensively used to increase legal predictability, satisfy the specific needs of the litigants, and mitigate the risk of multi-forum litigation. As a result, the use of choice of court and arbitration agreements, which reflects the principle of party autonomy, has become more common business practices in cross-border transactions. Also, major jurisdictions and trading partners of Thailand, such as Japan, China, the United States, the European Union (hereafter referred to as "EU"), Australia, and Southeast Asian countries, are all members of the New York Convention[23], and most of them enforce a choice of court agreement concluded by the parties.[24]

In order to delineate the scope of party autonomy and its limitations, it is necessary to analyze the foundations and objectives of party autonomy. However, it is usually pointed out that the theoretical foundations of party autonomy remain elusive, and there is no single, widely accepted theory of why party autonomy ought to be given effect.[25] In this regard, Alex Mills categorizes normative

22) *See* Peter Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1999), 13.

23) For the status and contracting states of the New York Convention, *see* "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards," United Nations Commission on International Trade Law (UNCITRAL), accessed December 1, 2020, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

24) *See generally*, Mary Keyes, *Optional Choice of Court Agreements in Private International Law* (New York: Springer, 2020).

25) Jurgen Besedow, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations: General Course on Private International* Law (Leiden/Boston:

foundations of party autonomy into two groups: private-unilateral justifications and public-systematic justifications. While the former focuses on party expectations and benefits of party autonomy at the individual level, the latter justifies party autonomy through the beneficial effects on the society or legal system as a whole.[26)]

3.1 Private-Unilateral Justifications

Party expectation is often viewed as a justification for party autonomy in choice of forum. Enforcement of choice of court and arbitration agreements will offer substantial partisan advantages to the parties and correspond with party expectations. The recognition of party autonomy also appears to be a natural consequence of freedom of contract.[27)] For example, without agreements on a jurisdiction, parties are exposed to two possible litigation risks. One is a venue risk, which is the risk that parties may be demanded to commence or defend legal proceedings in an unfavorable forum. The other risk is an enforcement risk, which is the risk that any obtained judgment may be unenforceable due to the difficulties in enforcing national court judgments aboard.[28)] Choice of court and arbitration agreements can offer an optimal forum for dispute resolution to the parties. Even if a party cannot obtain its preferred forum, at least an excessively unfavorable forum for one party can be avoided through the negotiation of such agreements. Also, an exclusive choice of court and arbitration agreements can preclude the risk of parallel litigation of the same dispute in multiple fora. Moreover, they can materially reduce the risk of jurisdictional challenges and the difficulties in enforcing judgments aboard. In particular, an arbitration agreement provides significant advantages in this matter because of the effective recognition and enforcement framework under the New York Convention. In addition, party autonomy in choice of forum enhances predictability in the parties' contractual

Brill-Nijhoff, 2013), 164.
26）Mills, *Party Autonomy in Private International Law*, 66-84.
27）Ibid, 68.
28）Richard Fentiman, *International Commercial Litigation*. 2nd ed. (Oxford: Oxford University Press, 2015), 42.

relationship and enables the parties to tailor their dispute resolution mechanism based on their specific needs. The parties will be in better positions to evaluate their rights and liabilities, as well as minimize litigation risks that accompany international dispute resolution.[29)]

Similarly, Willis L.M. Reese, the Reporter for the Second Restatement of Conflicts of Laws[30)], argued that party autonomy "is the only practical device for bringing certainty and predictability into the multi-state contract."[31)] The United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.* also recognized the need for party autonomy in choice of forum. It stated that "*[m]anifestly, much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting*."[32)] For all of these reasons, party autonomy reflects the parties' wishes or reasonable expectations in international disputes. Thus, it can be justified on the basis of beneficial consequences on the parties.

Furthermore, party autonomy can also be viewed as a natural expression of human rights or inherent individual autonomy.[33)] The parties have the individual

29) Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. 4th ed. (Alphen aan den Rijn: Kluwer Law International, 2013), 3-4.

30) The Second Restatement of Conflicts of Laws Section 187, comment (e):
"Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations."

31) Willis L.M. Reese, "Power of Parties to Choose Law Governing Their Contract," *American Society of International Law Proceedings* 54, no. Third Session (1960): 51.

32) *M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co*., 407 US 1 (1972).

33) *See generally*, Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws," *Vanderbilt Journal of Transnational Law* 41, no. 2 (March 2008): 417; Besedow, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations*, 196.

right to arrange their economic activities and private lives, including the freedom to select their desired choice of forum or arbitration. The constraints of such party autonomy emerge only when the parties exercise their rights in a manner that conflicts with public order or overriding mandatory rules such as a public policy to prohibit the exploitation of weak parties.[34] Under this view, individual freedom is seen as the foundation of party autonomy in choice of forum.

3.2 Public-Systematic Justifications

Besides arguments focusing on the beneficial consequences of party autonomy on individuals, it is also argued that party autonomy can be justified through its effects on the public or society. The parties' exposure to litigation risks and uncertainties in international business transactions have substantial economic implications.[35] According to the Survey on Jurisdictional Certainty conducted by the International Chamber of Commerce in 2003, forty percent of leading companies in a survey had occasions when a significant business decision had been determined by jurisdictional uncertainty.[36] Such risks may inhibit transactions and overall economic activities. Therefore, the adoption of party autonomy in choice of forum will encourage cross-border activity and lead to the greater public welfare by providing more predictability to the parties' contractual relationship and reducing litigation risks.[37]

Horatia Muir Watt also argued that the freedom to select a forum creates "a competitive market for legal products and judicial services."[38] Several states have revised their tax and corporation law regulations to attract more investments and businesses. Party autonomy will similarly encourage global regulatory competition

34）*See* Nygh, *Autonomy in International Contracts*, 258-59.
35）Fentiman, *International Commercial Litigation*, 42.
36）"Survey on Jurisdictional Certainty (April, 2003)," International Chamber of Commerce, accessed December 1, 2020, https://iccwbo.org/media-wall/news-speeches/jurisdictional-certainty-is-essential-in-international-contracts/.
37）Besedow, *The Law of Open Societies – Private Ordering and Public Regulation of International* Relations, 194.
38）Horatia Muir Watt, ""Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance," *European Review of Contract Law* 6, no. 3 (October 2010): 258.

between legal institutions and systems of different countries, which leads to greater efficiency and attractive legal frameworks for economic activities.[39] For instance, the EU's private international law rules are highly influential on the international level. They have pushed many states to compete in the modernization of their private international law rules to widely recognize party autonomy and provide more attractive rules for the parties in multi-state transactions.[40]

Furthermore, it is argued that party autonomy in choice of forum may lead to favorable forum shopping, which realizes the most efficient allocation of dispute. Party autonomy enables the parties to mutually agree on the forum where it is not excessively detrimental to any party. It may also prevent the negative effects of forum shopping by limiting dispute resolution to a predictable, single forum.[41] The increase in the efficiency of the litigation process resulted from the adoption of party autonomy generates beneficial effects on the global economy.

As summarized above, there is a variety of theoretical foundations of party autonomy. Each of them focuses on different aspects to justify the adoption of party autonomy in choice of forum. Therefore, they may offer slightly distinct views on the scope of a party's choice of forum, the enforcement of such agreement, and the circumstances in which it should be limited. Proponents of private-unilateral justifications may argue that party autonomy should be given effect as long as it brings benefits to the parties. In contrast, advocates of public-systematic justifications may opine that party agreements on a forum should not be enforced if they contradict the public welfare. However, despite the various views on the foundations of party autonomy, none suggests that party autonomy should be respected without any limitations. The next section will explore the limits on party autonomy in choice of forum, especially in the context of weak

39） Mills, *Party Autonomy in Private International Law*, 83.

40） For example, Japanese and Korean legislators considered the jurisdictional rules of the Brussels I Regulation in revising their rules on international jurisdiction under the Japanese Code of Civil Procedure and the Private International Law Act of Korea. *See* Working Group on International Judicial Jurisdiction (国際裁判管轄研究会), "Report of Working Group on International Judicial Jurisdiction (1)" [国際裁判管轄研究会報告書 (1)], *NBL*, no. 883 (2008): 38; Hyun Suk Kwang, "Introduction of Detailed Rules of International Adjudicatory Jurisdiction in Korea: Proposed Amendments of the Private International Law Act," *Japanese Yearbook of Private International Law* 19, (2017): 3.

41） Mills, *Party Autonomy in Private International Law*, 80.

parties, from the economic viewpoint.

4. Limits on Party Autonomy: A Behavioral Economic Perspective

The previous section has illustrated various normative foundations of party autonomy and its benefits. Economic analysis also confirms the efficacy of party autonomy. It is generally accepted that granting the parties the freedom to select a forum will increase economic efficiency in dispute resolution.[42] This is based on the presumption that individuals are rational and can maximize their own welfare. They also have knowledge about their unique preferences, which anybody else cannot assess.[43] Accordingly, as a matter of economic theory, they do not enter into a choice of court or arbitration agreement unless they believe that it will bring mutual benefits to them. With a wide degree of party autonomy, the parties are entitled to calculate their own risks and design their most suitable dispute settlement mechanism to meet their specific needs, which leads to greater efficiency in transactions.

However, in reality, not all parties are perfectly rational or have the capacity to make informed choices. In particular, some weak parties, such as consumers and employees, often suffer from imperfect information, unequal bargaining power, as well as systematic misperceptions and cognitive biases. It is impractical to expect that consumers or employees can always make perfectly rational choices without any difficulties. Furthermore, in a fully competitive market, the economic principles on supply and demand secure that overall social utility is maximized when each individual enhances his own welfare. In a real world, such a perfectly competitive market rarely exists due to externalities, monopolies, information

42）For a detailed discussion on the economic benefits of party autonomy, *see*, Andrew T. Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* 90, no. 4 (April 2002): 883-940; Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" (2007). *Comparative Research in Law & Political Economy. Research Paper No. 4/2007*. https://digitalcommons.osgoode.yorku.ca/clpe/227.

43）Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, 32-33.

problems, and bounded rationality.[44] Therefore, economic theory suggests that party autonomy in the context of choice of forum should be limited in the market failure situation.[45]

Nonetheless, the standard economic analysis assumes that individuals are rational maximizers of their own welfares. It does not explain how people's preferences are created, nor does it deal with the reality that some may have bounded rationality, which also leads to market failure situations.[46] Hence, this section uses behavioral economic analysis to explain human judgment and decision-making processes in a real world and identifies cognitive biases that cause behavioral market failure. It also illustrates common contract designs resulting from consumers' psychology and behaviors, which underline the need to limit party autonomy.

4.1 Behavioral findings

The in-depth psychological studies of human judgment and decision making have identified numerous cognitive biases that help explain human behaviors in a real world, and provide significant implications for legal policy, especially in relation to party autonomy. These include (a) overoptimism, (b) myopia, (c) ambiguity aversion, and (d) the certainty effect, which may affect the exercise of party autonomy in choice of forum.

(a) Overoptimism

Overoptimism, commonly referred to as the above-average-effect, is the phenomenon that people tend to believe that they are better than their peers or others.[47] A significant amount of research finds that a vast majority of people

44） Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018): 163.
45） Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, 34.
46） *See* Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018): 11.
47） Sean Hannon Williams, "Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect," in *The Oxford Handbook of Behavioral Economics and the Law*, ed.

believe that they are above average when they are asked to compare themselves to their peers.[48] Overoptimism can cause people to overestimate the likelihood of positive events and underestimate the risk of harmful incidents, which leads to overconfidence and erroneous judgment. People may also misinterpret ambiguous data in a way that supports their overestimated outcome due to overoptimism.[49]

(b) Myopia

Human behavior is the outcome of an interaction between an affective system that cares primarily about short-term payoffs and the deliberative system that assesses both short-term and long-term results with a broad perspective.[50] When people face an intertemporal choice, they are often motivated by an affective system to take myopic actions, such as preferring immediate benefits, even though they may have to pay more significant expenses in the future.[51] In the context of consumer contracts, myopia may lead consumers to care more about the present benefits from the contracts at the expense of future costs associated with choice of court or arbitration agreements.

(c) Ambiguity Aversion

Ambiguity aversion refers to the people's preference for known risks over unknown risks. It describes a tendency that people would prefer to choose an alternative where the risk of the outcome is known over the ambiguous option.[52] In the context of contract law, Omri Ben-Shaher and John Pottow have used

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Eyal Zamir and Doron Teichman (Oxford: Oxford University Press, 2014): 336.

48）*See* Mark D. Alicke and Olesya Govorun, "The Better-Than-Average Effect," in *The Self in Social Judgment*, ed. Mark D. Alicked et al. (New York: Psychology Press, 2005), 85-106.

49）Sean Hannon Williams, "Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect," 335.

50）For a detailed discussion on myopia, *see* George Loewenstein and Ted O'Donoghue, *Animal Spirits: Affective and Deliberative Processes in Economic Behavior* (May 4, 2004). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=539843.

51）Oren Bar-Gill, "Consumer Transactions," in *The Oxford Handbook of Behavioral Economics and the Law*, ed. Eyal Zamir and Doron Teichman, (Oxford: Oxford University Press, 2014), 474.

52）Sean Hannon Williams, "Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect," 344.

ambiguity aversion to explain why the parties tend to stick to the default terms under contract law. For example, if one party offers a new contractual term that deviates from the default terms, the other party will be exposed to unknown risks, and ambiguity aversion will influence that party to suspect the new ambiguous option. As a result, a nonstandard contractual term that differs from the known default one is less likely to be agreed upon.[53)]

(d) The Certainty Effect

The certainty effect is the phenomenon that people tend to focus more on the outcomes that are considered certain rather than the consequences that have a potential low probability.[54)] Several studies show that people overvalue certainty due to the certainty effect.[55)] It also suggests that people may prefer to irrationally or disproportionately allocate valuable resources to eliminate the risk in order to gain psychological certainty.[56)]

4.2 Behavioral Market Failure

To remain in the market profitably, sellers will have to adapt their products, contracts, and pricing schemes to customers' psychology. When consumers are perfectly rational, sellers design their products to maximize customers' actual net benefits[57)]. However, in reality, consumers are imperfectly rational and insufficiently informed due to consumers' cognitive biases such as overoptimism. Accordingly, they may misperceive the benefits that they gain from the products. Market forces demand sophisticated sellers to design their products, contracts, and pricing schemes in response to consumers' cognitive biases and misperceptions by

53） Omri Ben-Shahar and John A. E. Pottow, "On the Stickiness of Default Rules," *Florida State University Law Review* 33, no. 3 (Spring 2006): 651-82.
54） Zamir and Teichman, *Behavioral Law and Economics*, 34.
55） *See generally*, Manel Baucells and Franz H. Heukamp, "Common Ratio Using Delay," *Theory and Decision* 68 (2010): 149-58.
56） Sean Hannon Williams, "Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect," 344-49.
57） The actual net benefits are equivalent to the actual benefits which a consumer receives from the seller's product minus the actual price that a consumer pays for it.

maximizing the perceived net benefits[58] to the consumers.[59] The imperfectly rational consumers may not be aware that they are imperfectly informed or realize a divergence between actual and perceived net benefits and prices.

Moreover, competition cannot resolve the behavioral market failure problem. When consumers are perfectly rational and fully informed, sellers compete to offer lower prices to attract consumers, which leads to the maximization of consumers' actual benefits. On the other hand, when consumers are imperfectly rational, sellers may choose a bias-exploiting strategy to create an appearance of product and pricing scheme that increases perceived benefits and reduces perceived prices to consumers without increasing actual net benefits.[60] Therefore, in addition to externalities and information asymmetries, systematic misperception and bias can cause market failure, or so-called the "behavioral market failure," where only a free market is not able to correct itself.[61]

4.3 Contract Designs

Market forces require sellers to design their product features, pricing schemes, and contractual terms in response to consumers' psychology. Oren Bar-Gill argues that the interaction between market forces and consumers' imperfect rationality results in two common contract design features: complexity and cost deferral.[62]

(a) Complexity

Sellers can deliberately design a consumer contract to be extremely complex, containing a long list of contractual terms and technical legal languages. For instance, it may include multi-dimensional pricing schemes, complex dispute resolution clauses, as well as various fees and interest rates. Complexity hinders

58） The perceived net benefits are equivalent to the benefits which a consumer believes he or she will receive from the seller's product minus the price that a consumer thinks he or she will have to pay for it.
59） Oren Bar-Gill, "Consumer Transactions," 467.
60） *See* Edward L. Glaeser, "Psychology and the Market," American Economic Review 94, no. 2 (May 2004): 408-13.
61） Oren Bar-Gill, "Consumer Transactions," 469.
62） Ibid, 471.

the ability of the imperfectly rational consumer to accurately evaluate the total cost and benefits of the products, especially nonsalient price dimensions and contractual terms. Forum selection clauses and arbitration agreements also add more complexity to consumer contracts.[63] The imperfectly rational consumer may deal with contract complexity by merely ignoring it or overlooking the nonsalient price dimensions.[64] Thus, sophisticated sellers are able to manipulate the consumer's total perceived prices and benefits by reducing salient prices and increasing nonsalient prices.[65] Furthermore, consumers may not even read contracts that are long and complex, for example, standard form contracts.[66] Therefore, nonsalient contractual terms are likely to be disadvantageous to consumers.

(b) Cost Deferral

Imperfectly rational consumers tend to underestimate future costs. They also often wrongly perceive contingent and long-term costs, such as contingent fee arrangements and a late fee in credit card contracts. This phenomenon can be explained by myopia and overoptimism, which cause consumers to pay more attention to the present and think that adverse events are unlikely to happen. Therefore, sellers can reduce the perceived net prices of their products to imperfectly rational consumers by deferring costs into long-term price dimensions. Moreover, dispute resolution provisions such as forum selection and arbitration clauses can be seen as deferred costs. As a result, imperfectly rational consumers tend to underestimate the probability of contractual breach and enforcement of such terms, which causes them to overlook the importance of dispute resolution clauses during the contract negotiating process.[67]

63） Ibid, 472.
64） *See* Richard H. Thaler, "Mental accounting matters," *Journal of Behavioral Decision Making* 12 (July 1999): 183-206.
65） Oren Bar-Gill, "Consumer Transactions," 472.
66） *See* Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, "Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts," *NYU Law and Economic Research Paper no. 09-40* (2009), http://www.netinst.org/Bakos_Marotta-Wurgler_Trossen_09-04.pdf.
67） Oren Bar-Gill, "Consumer Transactions," 474.

These contract design features do not only appear in the context of consumer contracts but also other types of contracts where contracting parties' cognitive biases can be easily manipulated. For example, modern employment and insurance contracts tend to be much more complex and contain complicated dispute resolution clauses, which may cause employees or insured persons to misperceive their total actual benefits and underestimate some critical contractual issues.[68)]

The insights from the behavioral economic analysis have shown that individuals are not always rational. They have certain systematic misperception and cognitive biases in their decision-making processes, which lead to behavioral market failure. In particular, weak parties such as consumers and employees tend to be more susceptible to misperception and manipulation by the stronger parties. Recognizing these problems, policymakers in many countries use several legal tools and regulatory techniques to protect weak parties and help them to overcome cognitive biases. The next two sections will outline the current trend of legislation aiming to protect weak parties in the context of international litigation and arbitration.

5. Limits to Party Autonomy for the Protection of Weak Parties in International Litigation

Since party autonomy in international litigation is most notable in the context of choice of court agreements, this section specifically focuses on limits to party autonomy in choice of court. Several jurisdictions have addressed the issue of the protection of weak parties by putting limits on party autonomy and imposing some special requirements upon a choice of court agreement relating to weak parties in deferent levels ranging from the access to the choice of court agreement to the validity and enforceability of such agreement. Several regulatory techniques are discussed below in (5.1) the law on formality requirements, (5.2) the law

68）*See generally*, OECD—Organisation for Economic Co-Operation and Development, *Awareness and Education on Risk and Insurance Revised Analytical and Comparative Report*, 7-8, http://www.oecd.org/finance/insurance/ 38962007.pdf; Christine Jolls, *Behavioral Economics Analysis of Employment Law* (2007), https://pdfs. semanticscholar. org/8f7c/2441b4c11a5302f65af8ab2d0a66e9d51a5a.pdf.

excluding a choice of forum for certain disputes, (5.3) special jurisdictional regimes, and (5.4) the mandatory law and public policy on the formation and substantive validity of the choice of court agreement.

5.1 The Law on Formality Requirements

Most countries and international instruments require that a choice of court agreement must be in writing or comparable electronic means. For example, the Japanese Code of Civil Procedure (hereafter referred to as "JCCP") Article 3-7[69], the Chinese Civil Procedure Law Article 34[70], the Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereafter referred to as "Brussels I Regulation (recast)") Article 25 (1)[71], and the Hague

69) JCCP Art. 3-7:
"(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.
(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.
(3) If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply."

70) The Chinese Civil Procedure Law Art. 34:
"Parties to a dispute over contract or any other right or interest in a property may…choose the court for the place where the defendant is domiciled, or where the contract is performed or signed, or where the plaintiff is domiciled, or where the subject matter is located or any other place that has actual connection with the dispute as the court having jurisdiction over their dispute by a written agreement."

71) The Brussels I Regulation (recast) Art. 25 (1):
"The agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

Convention on Choice of Court Agreements Article 3 (c)[72] impose similar formal requirements. A purely oral agreement on jurisdiction is often precluded in these jurisdictions. Although this requirement intends to protect contracting parties in general and applies to all kinds of choice of court agreements, it particularly warns weak parties to pay greater attention to the potential consequences and implications of choice of court agreements.[73] It also ensures that party autonomy will not be abused for the benefit of the stronger party.

5.2 The Law Excluding a Choice of Forum for Certain Disputes

In many legal systems, even a choice of court agreement related to presumptively weak parties in civil and commercial matters can be enforceable with certain restrictions. However, some jurisdictions reserve specific categories of disputes involving weak parties to be adjudicated only by national courts. For example, in Canada, the Civil Code of Québec Article 3149 provides that "*Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.*" It can be inferred that the needs for the protection of the presumptively weak parties trump the benefits of party autonomy in some jurisdictions. As a consequence, a choice of court agreement involving consumers and workers are completely unenforceable in Québec. Any choice of court agreement that designates different courts would be held invalid.[74]

Also, some states in the United States enact special legislations that invalidate

72） The Hague Convention on Choice of Court Agreements Art. 3 (c):
"an exclusive choice of court agreement must be concluded or documented –
i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;"

73） *See* Trevor C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*. 2nd ed. (Cambridge: Cambridge University Press, 2015), 182-83.

74） *See* Mary Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer, 2020), 34.

choice of court agreements in certain categories of contracts involving the risk of unequal bargaining positions for the protection of weak parties such as franchisees.[75] For example, Illinois's Franchise Disclosure Act Section 4 provides that "*any provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void*." Also, the Hawaii Motor Vehicle Industry Licensing Act Section 437-52 prohibits a manufacturer or distributor from requiring the dealer to bring an action against the manufacturer or distributor in a venue outside of Hawaii.

In addition, the Hague Convention on Choice of Court Agreements Article 2 (1) expressly excludes choice of court agreements involving consumer and employment contracts from its scope. It leaves this issue to be regulated by national laws.[76]

5.3 Special Jurisdictional Regimes

The Brussels I Regulation (recast) provides special protective regimes for economically weak parties. As noted in Recital (14), the Regulation recognizes the significance of ensuring the protection of weak parties and provides specific jurisdictional rules dealing with insurance contracts[77], consumer contracts[78], and employment contracts[79], which typically involve an imbalance of bargaining power and asymmetric information in the negotiation process.[80] The fundamental principle is that the proceedings may be brought against weak parties such as a consumer or employee by the other party to the contract only in the courts in which the consumer or employee is domiciled. On the other hand, the weak parties

75) *See* Hannah L. Buxbaum, "United States: The Interpretation and Effect of Permissive Forum Selection Clauses," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer, 2020), 506.
76) *See* Trevor Hartley and Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (Hague Conference on Private International Law, 2007), 41, https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf.
77) *See* Art. 10-16 of the Brussels I Regulation (recast).
78) *See* Art. 17-19 of the Brussels I Regulation (recast).
79) *See* Art. 20-23 of the Brussels I Regulation (recast).
80) Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 84.

have an option to sue the other party to a contract either in the place of the counterparty's domicile, the place of the consumer's domicile in consumer disputes, or the place of employee's habitual employment in case of labor disputes. Furthermore, party autonomy in choice of court in these categories of disputes is also limited in order to protect the interests of the weak parties according to Articles 15, 19, and 23 of the Regulation. In general, a choice of court agreement involving the weak parties is prohibited except in situations where it is wholly beneficial to the weak parties or where the agreement is concluded after the dispute has arisen.[81)]

Being influenced by European legislation, Japanese legislators amended its JCCP to provide special jurisdictional rules to protect weak parties in consumer contracts and labor relations.[82)] However, unlike the Brussels I Regulation (recast), holders of insurance policies are excluded from the scope of the protective regime. In general, the available court for an action brought by a business operator or an employer against a consumer or an employee is restricted to the Japanese court in which a consumer or an employee is domiciled, respectively.[83)] On the other hand, in addition to general jurisdiction and special jurisdictional rules pursuant to Articles 3-2 and 3-3, a consumer may file an action against a business operator with Japanese courts if the consumer is domiciled in Japan at the time the action is filed or at the time the consumer contract is concluded.[84)] Similarly, an employee may also file an action against an employer with Japanese courts when the place where the labor is to be provided under the labor contract (if such place is not fixed, the place of the office at which the employee was employed) is located within Japan.

Moreover, Article 3-7 (5) (6) of the JCCP limits the scope of party autonomy in choice of court to protect consumers and employees. A choice of court agreement covering a consumer contract or labor dispute which may arise in the future is

81）Ibid, 194.
82）*See* Working Group on International Judicial Jurisdiction (国際裁判管轄研究会), "Report of Working Group on International Judicial Jurisdiction (1)" [国際裁判管轄研究会報告書 (1)], 38.
83）Yuko Nishitani, "International Jurisdiction of Japanese Courts in a Comparative Perspective," *Netherlands International Law Review* 60, no. 2 (2013): 267.
84）Art. 3-4 (1) of the JCCP.

valid only when the agreement confers non-exclusive jurisdiction on the court of a country where the consumer was domiciled at the time the consumer contract was concluded[85] or the court of a country where the labor was being provided at the time of the termination of a labor contract.[86] In addition, the agreement is also valid when the consumer or employee files an action with the chosen court, or invokes such agreement in his or her favor in the proceeding brought by a business operator or an employer.[87] However, when a choice of court agreement is concluded after the dispute has arisen, the party autonomy is widely respected. Thus, the parties are free to choose the forum because it would no longer conflict with the policy concerning weak party protection.[88]

5.4 The Mandatory Law and Public Policy on the Formation and Substantive Validity of the Choice of Court Agreement

Several legal systems do not provide protective jurisdictional rules in favor of weak parties. Especially, common law countries make no particular provision in the specific context of jurisdiction agreements. They generally allow a wide degree of party autonomy in consumer and employment contracts and reject weak parties' protection through the rules of private international law. The disputes concerning choice of court agreements involving weak parties are usually resolved by resorting to general contract laws, which are equally applicable to other contractual disputes.[89]

For instance, in the United States, the rules which govern choice of forum in commercial contracts will generally govern choice of forum in consumer contracts. There are some limits on party autonomy concerning choice of forum,

85） Art. 3-7 (5)(i) of the JCCP.
86） Art. 3-7 (6)(i) of the JCCP.
87） Art. 3-7 (5)(ii) and (6)(ii) of the JCCP.
88） Sato Tatsubumi and Kobayashi Yasuhiko (佐藤 達文・小林 康彦), *Questions and Answers Amendment to the Code of Civil Procedure, etc. in Heisei 23: Establishment of International Jurisdiction* [一問一答 平成 23 年民事訴訟法等 改正―国際裁判管轄法制の整備] (Tokyo: Shojihomu, 2012), 143.
89） Keyes, "Optional Choice of Court Agreements in Private International Law: General Report," 35.

but those limits are imposed in the form of overriding mandatory rules and public policy.[90] The US Supreme court established a principle of presumptive enforceability of a forum selection clause in *The Bremen v. Zapata Off-Shore Co.*[91], but it still retained the possibility that enforcement of such clause might be refused if it would violate a strong public policy of the forum.[92] The parties often challenge the validity of a choice of court agreement on the basis of the unconscionability doctrine, contending that such agreement resulted from oppression due to unequal bargaining powers or the contractual term had not been freely negotiated.[93] However, in *Carnival Cruise Lines, Inc. v. Shute*[94], the US Supreme Court honored a forum selection clause printed on a cruise ticket, which required all disputes relating to the cruise to be litigated in Florida, even for the consumers who were residents of the State of Washington. Although the Court in a majority opinion acknowledged unequal bargaining powers between a merchant and a consumer, it still enforced a forum selection clause against the consumer because doing so would be more beneficial for (1) the merchant's special interest in limiting the fora, (2) the merchant and consumer interests in predictability, and (3) the interests of all potential consumers which will receive lower prices reflecting the savings that the merchant enjoys by limiting the fora for litigation.[95]

90）Ronald A. Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* (Maubeuge: Brill, 2014), 260.

91）*M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The US Supreme Court ruled that "in the light of present-day commercial realities and expanding international trade, we conclude that the forum clause should control absent a strong showing that it should be set aside…The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."

92）*See* Hannah L. Buxbaum, "The Interpretation and Effect of Permissive Forum Selection Clauses under US Law," *American Journal of Comparative Law. Suppl.* 66 (2018): 129.

93）*See, e.g., Armendariz v. Foundation Health Psychcare Servs, Inc* 24 C 4th 83 (2000). The Supreme Court of California described unconscionability that it has "both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results. … The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability."; Section 2-302 of the Uniform Commercial Code.

94）*Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

95）Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and*

Therefore, the Court concluded that the forum selection clause was not unconscionable. Under this ruling, the unconscionability doctrine has little applicability to the enforceability of choice of court agreements. As a result, contrary to the positions in the EU and Japan, choice of court agreements in the United States are presumptively valid even in the context of consumer contracts.

On the other hand, in some legal systems such as Japan, weak parties may receive multiple protections from protective jurisdiction rules, general contract law, and consumer protection legislation. For example, where Japanese law governs the validity of a choice of court agreement in a consumer contract, the choice of court agreement may be found null and void under Article 10 of the Consumer Contract Act[96] if it unilaterally harms the interests of the consumer in contravention of the fundamental principle enshrined in the principle of good faith under the Civil Code.[97] Similarly, where the governing law of the formation of a jurisdiction agreement is Japanese law, a jurisdiction agreement in a standard form contract will be subject to new Article 548-2 of the Japanese Civil Code[98], which

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Enforcement of Judgments, 262-63.

96) The Consumer Contract Act Art. 10:
"A consumer contract clause is void if it deems a consumer's inaction to constitute the manifestation of an intention to be bound by the offer of a consumer contract or by the acceptance of an offer for such a contract, or if it otherwise restricts a consumer's rights or expands a consumer's obligations beyond as when legal or regulatory provisions unrelated to public order are applied, unilaterally prejudicing the interests of the consumer in violation of the fundamental principle provided in Article 1, paragraph (2) of the Civil Code."

97) Koji Takahashi, "Japan: Quest for Equilibrium and Certainty," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer, 2020), 270-71. *See also*, Kato Shiho (加藤紫帆), "An Example of International Exclusive Jurisdiction Agreements Concerning Consumer Contracts Which was Held Valid" [消費者契約に関する国際的専属的管轄合意が有効とされた事例], *Jurist* 1462 (January 2014): 128- 131.

98) The Japanese Civil Code Art. 548-2:
"(1) Those who have made an agreement to engage in a standard transaction…shall be deemed to have agreed to individual clauses contained in the standard form…if:
(i) they have agreed to make the standard form the content of their contract; or
(ii) the party who has prepared the standard form has indicated beforehand to the opposite party that it shall become the content of the contract.
(2) Notwithstanding the provision of the preceding paragraph, any clause falling within the description of the preceding paragraph which purports to restrict the rights or add to the obligations of the other party shall be deemed not to consented to it if it is considered to harm the interests of that other party unilaterally in contravention of the fundamental principle enshrined in Article 1(2), having regard to the manner and

recently became effective on April 1, 2020.[99] Furthermore, the Japanese Supreme Court has established the public policy test in the *Chisadane* case[100] that the effect of a choice of court agreement might be denied if it was extremely unreasonable and contrary to the law of public policy. Additionally, in some exceptional circumstances, a choice of court agreement designating foreign courts that explicitly intends to circumvent Japan's fundamental, overriding mandatory rules or public policy involving consumer protections[101] may be found to be against public policy of Japan.[102]

Furthermore, in the EU, besides the protective regime under the Brussels I Regulation (recast), there is a possibility that a valid choice of court agreement in a consumer contract may become ineffective because it violates the EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts. This Directive applies to contracts of adhesion between consumers and traders, aiming to protect the interests of consumers against unfair contract terms. In particular, Article 3 of the Directive provides that "*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*." The consequence of this provision is that, unless individually negotiated, a jurisdiction agreement may be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the consumer's

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actual circumstances of the standard transaction as well as the social norms relevant to the transaction."

99） Takashishi, "Japan: Quest for Equilibrium and Certainty," 270-71.

100）Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975].

101）Art. 10 of the Consumer Contract Act may be considered as an overriding mandatory rule of Japan. *See* Sawaki Takao and Dougauchi Masahito (澤木敬郎・道垣内正人), *Introduction to Private International Law* [国際私法入門] 7th ed. (Tokyo: Yuhikaku, 2012), 213.

102）*See* Yokomizo Dai (横溝大), "Exclusive Jurisdiction Agreements designating Foreign Courts and Overriding Mandatory Rules" [外国裁判所を指定する専属的管轄合意と強行的適用法規], *Hosojiho* [法曹時報] 70, no. 11 (2018): 1-39. *See also*, Dougauchi Masato (道垣内正人), "Effectiveness of International Jurisdiction Agreements – Focusing on the Interim Judgment of the Tokyo District Court on February 15, 2016" [国際裁判管轄合意の有効性―東京地裁 平成 28 年 2 月 15 日中間判決をめぐって], *NBL* 1077 (2016): 25-34.

detriment.[103]

In addition, although China does not provide protective jurisdictional rules as seen in the European and Japanese legal regimes, it affords special protection to consumers in the context of choice of court agreements by requiring a business entity to give a proper notice to a consumer. Article 31 of the 2015 Supreme People's Court Interpretation on the Chinese Civil Procedure Law stipulates that a choice of court agreement will be held invalid if a business entity inserts a forum selection clause into a consumer contract by the use of standard clauses without giving a proper notice to the consumer.[104] This notice requirement is designed to warn a consumer before entering into a choice of court agreement with a business entity that has superior bargaining power.

In conclusion, most major jurisdictions and the Hague Convention on Choice of Court Agreements impose formal requirements on choice of court agreements. Such agreements are usually required to be in writing or comparable electronic means. China even requires a merchant to give a proper notice concerning the use of choice of court agreement to a consumer. The most notable difference among various policies for protecting weak parties is the use of protective jurisdictional rules. While the European and Japanese approach appears to restrict party autonomy in choice of court through special jurisdictional rules, the American approach seems to favor the autonomous choices made by weak parties, subject to only certain legal safeguards in the form of overriding mandatory rules and public policy. Nonetheless, in some regions such as Québec, party autonomy of certain groups of weak parties, including consumers and workers, is severely restricted. They are not allowed to agree on choice of forum other than their domicile or residence.

103）Richard Fentiman, *International Commercial Litigation*, 74.

104）Guangjian Tu and Zeyu Huang, "People's Republic of China (PRC): Optional Choice of Court Agreements in the Vibrant Age," in *Optional Choice of Court Agreements in Private International Law*, ed. Mary Keyes (New York: Springer, 2020), 162.

6. Limits to Party Autonomy for the Protection of Weak Parties in International Arbitration

Arbitration agreements between parties of unequal positions and information raise similar legal problems to those arising in the context of litigation. Although the parties in international arbitration generally enjoy a higher degree of party autonomy to tailor their dispute resolution mechanism for their best interests, there remain the needs for the protection of weak parties since they can also suffer from unequal bargaining powers, asymmetric information, and systematic cognitive biases. Furthermore, an arbitration agreement may pose barriers for the weak party to enforce its rights under the contract due to the costs related to arbitration, in which the legal aid is not usually available in the arbitral proceedings, unlike litigations in national courts.[105)]

Several countries have reacted to this problem with different policies varying from the paternalistic approach that restricts a certain degree of party autonomy to a more liberal approach that maximizes party autonomy. The legal instruments used in several jurisdictions to protect weak parties are discussed in (6.1) the law on formality requirements, (6.2) the law on arbitrability, and (6.3) the law on the formation and substantive validity of arbitration.

6.1 The Law on Formality Requirements

Article II of the New York Convention and most national arbitration laws require that an arbitration agreement must be in writing. This formal requirement helps to warn weak parties about the potential consequences of concluding arbitration agreements and prevent them from entering into such agreements lightly. Some European countries, such as the Czech Republic, impose stricter formal requirements in consumer contracts. For example, previously, Article 2

105) Tilman Niedermaier, "Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic," *ZDAR*: *Zeitschrift fur Deutsches und Amerikanisches Recht* 39, no. 1 (March 2014): 13.

paragraph 5 of the Arbitration Act[106] required that arbitration clauses in consumer contracts must contain certain information on the arbitral proceedings such as the place of arbitration, the arbitrator and his remuneration, other expected expenses in the course of arbitration, and the delivery of arbitral award in order to advise the consumer of the consequences before entering into an arbitration agreement.[107] However, currently, disputes arising out of consumer contracts are no longer arbitrable in the Czech Republic. The aforementioned provision concerning consumer arbitration under the Czech Arbitration Act was canceled in 2016.[108]

6.2 The Law on Arbitrability

The law on arbitrability can be used to protect weak parties from the presumed risks of arbitration. It can exclude certain categories of disputes involving presumptively weak parties from arbitration. Another way is to deny access to arbitration to specific groups of people considered as especially vulnerable such as consumers and employees.[109] However, there are conflicting views on the arbitrability of consumer and individual labor disputes between the European states, the United States, and Japan.

In Germany, certain disputes involving weak parties such as employees cannot be submitted to arbitration, according to the German Code of Civil Procedure Section 1030 paragraph 3 and the Labor Court Act Articles 2, 4, 101.[110] Belgian legislators also limit the scope of arbitrability in labor disputes but considerably lessen the restriction by creating an exception for arbitration of employment

106) Art. 2 para. 5 of the Act No. 216/1994 Coll., on Arbitration Proceedings and on Enforcement of Arbitration Awards (prior to 2016).
107) Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 430.
108) Martin Hrodek and Martina Závodná, "Czech Republic," *The Baker and Mckenzie International Arbitration Yearbook: 10th Aniversary Edition 2016- 2017*, 142, https://globalarbitrationnews.com/wp-content/uploads/2017/06/ Czech-Republic.pdf.
109) Niedermaier, "Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic," 14.
110) Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 423.

disputes concerning higher-ranking employees with a certain income. The Belgian approach presumes that high-ranking employees are sophisticated and informed enough to settle their disputes through arbitration.[111)]

On the other hand, in the United States, the Federal Arbitration Act does not contain any limitation on the arbitrability based on the inequality in bargaining powers. The US Supreme Court also adopts an arbitration-friendly approach and continuously expands the scope of disputes, which are to be considered arbitrable in many international and domestic cases. For instance, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[112)] and *Shearson/American Express, Inc. v. McMahon*[113)], the US Supreme Court held that claims based on the Sherman Act (antitrust claims), the Securities Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act were arbitrable. As a result, arbitration clauses have been widely used in commercial contracts, including consumer and employment ones in the United States.

As for Japan, the Japanese Arbitration Act attempts to strike a balance between the paternalistic and liberal approaches in arbitrability. Article 13 paragraph 1 provides that all civil disputes that private parties can settle can also be submitted to arbitration, except certain family matters. Similar to the American approach, the Act does not preclude arbitration between a consumer and a business operator. However, Article 3 paragraph 2 of the supplementary provisions to the Act allows a consumer to unilaterally cancel an arbitration agreement concerning a civil dispute which may arise in the future, except when a consumer is a petitioner for arbitration. This favorable treatment for the consumer aims to reduce the harmful consequences of concluding an arbitration agreement with the trader who has superior bargaining power.[114)] On the contrary, the Act invalidates all arbitration agreements between individual employees and their employers in relation to labor disputes which may arise in the future.[115)]

111）Ibid, 424.
112）*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 605 (1985).
113）*Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987).
114）*See* Kojima Takeshi and Inomata Takashi (小島武司・猪股孝史), *Arbitration Act* [仲裁法], (Tokyo: Nihon Hyōronsha, 2014), 155-59.
115）Art. 4 of the supplementary provision of the Japanese Arbitration Act.

6.3 The Mandatory Law on the Formation and Substantive Validity of Arbitration

Many jurisdictions have designed special mandatory rules on the formation and substantive validity of arbitration agreements for the protection of weak parties. For instance, the EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts sets up the core framework for the protection of consumers in the EU and prevents consumers from entering into unfair standard contract terms imposed by traders. Article 3 and the Annex to the Directive, which contain an indicative list of the terms which may be regarded as unfair, classifies contractual terms "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions" as unfair.[116] Thus, it creates a presumption that pre-dispute arbitration clauses in consumer contracts are unfair and, therefore, invalid.[117] Although this Directive does not exclude a standard arbitration clause in general, it depends on the individual circumstances of the case and the content of the arbitration clause in a consumer contract whether its terms are to be considered unfair.[118] Moreover, the European Court of Justice adopts the approach that arbitral awards against consumers cannot be enforced if the arbitration clause is unfair within the meaning of Article 3 of the Directive.[119] In addition, some EU member states have implemented the Directive in a more paternalistic way. For example, French law prevents consumers from concluding

116) Art. 1 (q) of the Annex to the EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts.

117) Pablo Cortes and Tony Cole, "Legislating for an Effective and Legitimate System of Online Consumer Arbitration," in *Arbitration in the Digital Age: The Brave New World of Arbitration,* ed. Maud Piers and Christian Aschauer (Cambridge: Cambridge University Press, 2018), 226.

118) Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 426.

119) Niedermaier, "Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic," 18.

any pre-dispute arbitration agreements[120], while English law[121] invalidates pre-dispute arbitration clauses in a consumer contract for claims not exceeding £5,000.[122]

Furthermore, as previously explained, the Japanese Arbitration Act especially grants a consumer the right to repudiate a pre-dispute arbitration agreement in a consumer contract unilaterally.[123] Also, the Brazilian Arbitration Law Article 4 paragraph 2 places conditions on the formal validity of an arbitration agreement by requiring that an arbitration clause in a standard contract be separately signed by a consumer or the clause be printed in bold letter.[124]

On the other hand, the US Supreme Court places arbitration agreements on the same footing as other commercial contracts, similar to the approach of reviewing choice of court agreements. There are no special rules for arbitrations concerning weak parties. The US courts use the doctrine of unconscionability, which is a general contract law principle, as a tool to protect weak parties against abusive arbitration agreements.[125] In general, the United States adopts an arbitration-friendly approach and allows wide freedom to incorporate an arbitration clause into a consumer contract unless it is unconscionable. The consumer then has the option of either accepting the clause or rejecting the entire contract.[126]

120) Art. 2059 of the French Civil Code provides that "all persons may make arbitration agreements relating to rights of which they have the free disposal." The rights that cannot be disposed of, which are nonarbitrable, include rights of weaker parties such as consumers and employees. *See* Eric Loquin, *L'arbitrage du commerce international* (Issy-les-Moulineaux: Joly Editions, 2015), 104.

121) *See* Section 91 of the English Arbitration Act 1996.

122) Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 428.

123) *See* Art. 3 para. 2 of the supplementary provisions to the Japanese Arbitration Act.

124) *See* George A. Bermann, *International Arbitration and Private International: General Course on Private International Law* (Leiden/Boston: Brill-Nijhoff, 2017), 175. *See also*, Deborah Alcici Salomao, "Effective Methods of Consumer Protection in Brazil - An Analysis in the Context of Property Development Contracts," *Revista de Derecho Privado* 29 (2015): 194.

125) *See e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); David Horton, "The Shadow Terms: Contract Procedure and Unilateral Amendments," *UCLA Law Review* 57, no. 3 (February 2010): 605-68; David Horton, "Unconscionability Wars," *Northwestern University Law Review Colloquy* 106 (2011-2012): 13-33.

126) *See* David Restrepo Amariles and Gregory Lewkowicz, "Global Contract Governance : Selden v. Airbnb," in *Global Private International Law : Adjudication without Frontiers*, ed. Horatia Muir Watt et al., (Cheltenham: Edward Elgar, 2019), 429-30.

In summary, formal requirements for arbitration agreements are globally unified in the same direction, thanks to the widely adopted New York Convention. However, some countries such as Brazil impose a higher formality standard for protecting weak parties by requiring that an arbitration clause in a standard contract be separately signed by a consumer or the clause be printed in bold letter. The most significant discrepancy in policies towards weak party protection in arbitration is the scope of party autonomy accorded to weak parties. While the European approach appears to limit party autonomy of weak parties through the laws on arbitrability and overriding mandatory rules, the American approach seems to put a greater emphasis on party autonomy. Consumer and labor disputes are arbitrable despite the weakness of individual consumers or employees. The American legal system places arbitration on the same footing as choice of court agreements and gives certain protection to weak parties in the form of overriding mandatory rules and public policy. On the other hand, Japanese policymakers adopt a unique approach aiming to strike a balance between party autonomy and the protection of weak parties. Instead of making consumer arbitration non-arbitrable, Japanese law allows consumers to arbitrate and confers them the right to withdraw from arbitration agreements.

7. Analysis of Policies for the Protection of Weak Parties

The previous discussion reveals that the protection of weak parties in international litigation and arbitration varies among countries, and it is difficult to find a consensus on how party autonomy should be limited to protect weak parties. Section 7.1 utilizes behavioral economics to analyze various legal tools and regulatory techniques that can be useful for protecting weak parties in international litigation and arbitration. The general trends of policies towards weak party protection currently adopted in major jurisdictions are also examined in section 7.2 below.

7.1 Behavioral Policy Implications

The insights from behavioral economics provide significant implications for legal policy. The behavioral studies have shown that even without asymmetric information problems, inequality of bargaining power, and other external obstacles, people can sometimes fail to maximize their own welfare due to systematic cognitive biases.[127] Therefore, behavioral economics can contribute to enhance the efficiency of legal policy to correct behavioral market failure, preclude the exploitation of weak parties' cognitive biases by their stronger counterparts, and shelter them from their own fallibility.[128] Some legal tools are discussed below to show several alternative solutions for correcting behavioral market failure and enhancing the protection of weak parties.

(a) Legal Paternalism and Mandatory Rules

Legislators may intervene in party autonomy to restrict the use of specific contractual terms or practices which they deem unfair and excessively unfavorable to weak parties. Legal tools under this category range from hard to soft paternalism. Hard paternalism entirely excludes or imposes substantial limitations on the permissibility of party autonomy, while soft paternalism examines the exercise of party autonomy in specific circumstances and potentially limits the effect of a choice of court or an arbitration agreement.[129] As for hard paternalism, for instance, the European and Japanese regimes provide mandatory rules to prevent weak parties such as consumers and employees from entering into a choice of court or arbitration agreement in certain circumstances.[130] Also, the EU's Unfair Commercial Practices Directive sets forth unfair commercial practices that should be prohibited between traders and consumers.[131] On the other hand,

127) Zamir and Teichman, *Behavioral Law and Economics*, 168.
128) Ibid, 163.
129) *See* Giesela Rühl, "The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy," Journal of Private International Law 10, no. 3 (December 2014) 346-56.
130) *See supra* Sections 5.3, 6.2-6.3.
131) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

with respect to soft paternalism, the United States allows weak parties to exercise their party autonomy but uses overriding mandatory rules to limit the effect of a choice of court or arbitration agreement.[132)]

However, a legal paternalistic approach is hotly debated from the behavioral economic perspective because it directly interferes with the operation of market forces and infringes on people's freedom.[133)] The preferences and needs of weak parties are diverse. Furthermore, there are different degrees of sophistication among weak parties. All consumers or employees are not necessarily equal in terms of education, information, and economic status. Protective mandatory rules aiming to benefit one weak party may harm another with a higher degree of sophistication.[134)] Therefore, a one-size-fits-all mandatory rule may not always satisfy the distinct needs, preferences, and degree of sophistication of weak parties. Policymakers need to carefully consider the cost and benefit of legal intervention and pinpoint weak parties who truly deserve preferential treatments.

(b) Disclosure Duties

Legislators can use a disclosure regulation to obligate sellers or employers to disclose certain important information about their products or contracts, especially the nonsalient features or total prices and benefits, in which weak parties are incapable of accurate calculation. For example, the United States' Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 imposes a disclosure duty of certain information concerning consumer financial products or services.[135)] As for a choice of forum, China's Civil Procedure Law lays down a notice requirement for a trader to notify a consumer of the existence of a forum selection

132) *See supra* Sections 5.4, 6.3.

133) For a detailed discussion on legal paternalism from a behavioral economic perspective, *see* Zamir and Teichman, *Behavioral Law and Economics*, 165-71.

134) Oren Bar-Gill, "Consumer Transactions," 478.

135) Public Law 111-203, Title X, Section 1033 (a):
"IN GENERAL.—Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers."

clause in standard consumer contracts.[136] However, if the disclosed information is too complicated or too long for imperfectly rational consumers to understand, they may deal with information overload problems by ignoring the disclosures.[137]

(c) Nudges by Default Rules

Instead of legal paternalism and mandatory duties, policymakers may provide default rules for the best practices in particular contracts involving weak parties. The behavioral studies indicate that default rules can direct people's behavior in desirable ways by setting a point of reference from which people are hesitant to depart.[138] As explained elsewhere, ambiguity aversion will influence the parties to stick to the default rules, making them almost as effective as mandatory rules.[139] However, there is a concern over the effectiveness of default rules in the context of consumer or employment contracts. Even a regulator provides protective default rules, a seller or an employer can opt-out of these rules by using standard form contracts or demanding weak parties to deviate from the default terms due to the superior bargaining power.[140]

(d) The Right to Withdraw

Lawmakers may establish the right of weak parties to withdraw from the transaction, especially in consumer contracts. One of the most well-known forms of this approach is "cooling-off periods," which allow consumers to cancel the transaction within a specified timeframe. This regulation can be seen in many consumer protection laws around the world.[141] Furthermore, in the context of

136) *See* Art. 31 of the 2015 Supreme People's Court Interpretation on the Chinese Civil Procedure Law.
137) Oren Bar-Gill, "Consumer Transactions," 479.
138) Zamir and Teichman, *Behavioral Law and Economics*, 180.
139) *See supra* Section 4.1 (c).
140) *See* Michael S. Barr, Sendhil Mullainathan, and Eldar Shafir, "The Case for Behaviorally Informed Regulation," in *New Perspectives on Regulation*, ed. David Moss and John Cistrenino (Cambridge: The Tobin Project, 2009), 25-61.
141) *See, e.g.,* Art. 9 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, the United States' Federal Trade Commission Rule Concerning Cooling-Off Period Made for Sales at Homes or at Certain Other Locations, 16 C.F.R. pt. 429 (2008), Japan's Act on Specified Commercial Transactions.

choice of forum, the Japanese Arbitration Act uniquely confers a consumer the right to withdraw from an arbitration agreement.[142] Nonetheless, the right to withdraw entails risks of being abused by opportunistic consumers. Also, a seller may shift the burden to a consumer in the form of higher prices because a seller could anticipate the possibility of the additional expenses incurred by the withdrawal of the transaction.[143]

7.2 Two General Approaches in Limiting Party Autonomy

The above survey shows that legal paternalism and mandatory rules appear to be the most frequently used legal tools by lawmakers in major jurisdictions to limit party autonomy in international litigation and arbitration for the protection of weak parties. Some states also deploy other legal tools such as the right to withdraw and disclosure regulation to protect consumers. For instance, the Japanese Arbitration Act grants a consumer the right to withdraw from an arbitration agreement.[144] The Chinese Procedure Law requires a trader to disclose the existence of a forum selection clause in a standard consumer contract by giving a proper notice to a consumer.[145] As well, the Czech Arbitration Act used to require that arbitration clauses in consumer contracts must contain certain information on the arbitral proceedings.[146] Furthermore, legal paternalism in policies towards weak party protection can be subsumed under two broadly conceived approaches.

A first approach – a hard paternalistic approach – provides multiple-layer protections and special protective rules in favor of weak parties. Regulatory techniques used in the EU and Japan in the context of choice of court and arbitration agreements are based on the presumption that "the weaker party should be protected by rules of jurisdiction more favorable to his interests than the

142) *See* Art. 3 para. 2 of the supplementary provisions to the Japanese Arbitration Act.
143) *See* Oren Bar-Gill, "Consumer Transactions," 485.
144) *See* Art. 3 para. 2 of the supplementary provisions to the Japanese Arbitration Act.
145) *See* Art. 31 of the 2015 Supreme People's Court Interpretation on the Chinese Civil Procedure Law.
146) *See* Art. 2 para. 5 of the Act No. 216/1994 Coll., on Arbitration Proceedings and on Enforcement of Arbitration Awards (prior to 2016).

general rules."[147]

A second approach – a soft paternalistic approach – places both choice of court and arbitration agreements on the same footing as other commercial contracts and subject them to the limitations under general contract laws. The United States adopts this approach, which is based on the economic principle that granting party autonomy, even in the context involving weak parties, would enhance the overall public welfare.[148] General contract law principles can prevent any excessive abuse of party autonomy.

8. Implications for Thailand

Thailand adopts different approaches concerning party autonomy in litigation and arbitration. While party autonomy in litigation is substantially limited, it is broadly recognized in arbitration without any concrete protection mechanism for weak parties. Section 8.1 points out inconsistencies in the Thai legal policy towards this issue. Then, section 8.2 suggests a path to the reform of choice of court agreement and arbitration systems in Thailand based on comparative law and behavioral economic perspectives.

8.1 Inconsistencies in the Thai Legal Policy Towards Party Autonomy

On the one hand, Thailand adopts a hard paternalistic approach in the context of choice of court agreements. The exercise of party autonomy in choice of court is extremely limited. In a purely domestic contract, the parties are not allowed to choose a forum other than the Thai courts stipulated in jurisdiction provisions under the CPC.[149] Although some choice of court agreements may be permitted in the context of international transactions, according to recent decisions of the Thai Supreme Court, the effectiveness of such agreements is still far from certainty and

147) *See* Recital (18) of the Brussels I Regulation (recast).
148) *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
149) *See* Prasit Pivavatnapanich, *Explanations on Private International Law* [Kam Athibai Khodmai Rawangprathed Panaek Khadeebukkon], 8th ed., (Bangkok: Thammasat University Press, 2018), 97.

predictability. There is no statutory law and sufficient case law that governs the scope, formal requirements, and validity of a choice of court agreement. The main reason for the restriction of party autonomy in choice of court is to afford protection for weak parties who generally suffer from the inequality of bargaining power and the lack of information.[150] Furthermore, there are special jurisdictional rules in favor of weak parties in consumers and labor disputes under the Consumer Case Procedure Act, B.E. 2551 (2008), and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), where the parties are unable to derogate. As a result, it is unlikely that Thai courts will enforce a choice of court agreement that is inconsistent with jurisdictional rules under these particular laws.[151]

On the other hand, a soft paternalistic approach is endorsed in the context of arbitration. Party autonomy in arbitration is much broader, reflecting the New York Convention and the UNCITRAL Model Law on Arbitration. In general, Thailand favors an arbitration-friendly approach and provides no special rules for the protection of weak parties in arbitral proceedings. It has been suggested that almost all civil disputes can be submitted to arbitration except certain family matters.[152] Also, a series of Supreme Court decisions have confirmed the arbitrability of consumer and labor disputes.[153] However, party autonomy in the arbitration context is not absolute. Some Supreme Court decisions reveal the possibility that an arbitration agreement is subject to the Unfair Contract Terms Act, B.E. 2540 (1997), and it may be held invalid if it constitutes unfair contract terms, similar to the American approach.[154]

The Thai approach towards party autonomy is different from both the

150) *See* Ariyanuntaka, "Problems Respecting Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective," 42-44.
151) *See* Koanantachai, "Problems Surrounding the Agreement on Jurisdiction in Civil Cases," 186.
152) Saowanee Asawaroj, *Legal Explanations on Commercial Dispute Settlement by Arbitration* [Kam Athibai Khodmai Waduay Witikarn Rangub Korpipat Tangturakij Doykarn Anuyatotulakarn], 3rd ed., (Bangkok: Thammasat University Press, 2011), 64-68.
153) *See, e.g.,* Supreme Court Case Dika no. 8335/2560 (2017), no. 8627/2550 (2007), no. 3530/2549 (2006).
154) *See, e.g.*, Supreme Court Case Dika no. 3368/2552 (2009).

European-Japanese and American types. Countries that adopt a hard paternalistic approach use similar legal tools and policies towards party autonomy in both choice of court and arbitration agreements. For example, the European and Japanese laws allow weak parties to enter into a choice of court agreement only in the situations where it is wholly beneficial to them. Also, consumer and employment arbitrations in these countries are likely to be non-arbitrable or permitted only under specific circumstances. On the other hand, countries that adopt a soft paternalistic approach tend to maximize party autonomy in both litigation and arbitration aspects, subject to certain limitations under general contract law.

As a result, Thailand's policies can be seen half-measures. The parties are unable to enjoy the benefits of party autonomy in choice of court due to substantial limitations. In contrast, weak parties in arbitration, who are equally vulnerable as those in litigation, receive no sufficient protection against their stronger counterparts. The lack of protection mechanisms may lead to the use of arbitration as a tool to circumvent the strong public policy of protecting weak parties, as seen in litigation. Therefore, policymakers in Thailand should reconsider the significance of party autonomy in litigation and strengthen safeguards for weak parties in arbitration.

8.2 Proposal for a New Framework for Thailand

This paper has examined important theoretical justifications as well as limits to party autonomy in international litigation and arbitration in various jurisdictions. Behavioral economic analysis and several legal tools adopted in these jurisdictions can provide valuable guidance for establishing a new legal framework in Thailand as follows:

(1) More Party Autonomy in the Context of Choice of Court Agreements

The insufficient recognition of party autonomy in litigation hinders the advantages of party autonomy at both private and public levels. As for the parties, they not only lose an opportunity to increase legal predictability and certainty in

their transactions but also face serious hurdles to manage their litigation risks, which may result in more costly and lengthy litigation. At the public level, the current Thai legal system may be seen as contrary to the modern cross-border activities, which leads to problems concerning the attractiveness of conducting trade and commerce in Thailand, the international reputation of Thai courts, and the non-recognition of Thai judgments.[155] Therefore, party autonomy in choice of court should be upheld in Thailand. The concern over the inequality of bargaining powers between the parties, which was one of the main reasons for the abolition of a statutory provision regarding a choice of court agreement, can be mitigated by employing legal tools and regulatory techniques for the protection of weak parties. However, the next question is how Thailand should establish an appropriate framework for the weak party protection.

(2) Hard Paternalistic Approach vs. Soft Paternalistic Approach

Thai lawmakers decided to eliminate a provision concerning choice of court agreements in the CPC to give protection to weak parties. However, this caused uncertainty and unpredictability in the validity of a choice of court agreement in Thailand. Instead of a full exclusion of party autonomy, more flexible solutions can be obtained by imposing certain limits and creating special protective rules in favor of weak parties. The better alternative view is that party autonomy should be broadly recognized as long as it does not offend weak parties who genuinely deserve the protection. For example, the hard paternalistic approach, represented by the Brussels I Regulation (recast) and the JCCP, allows consumers and employees to conclude a choice of court agreement in situations where it is wholly beneficial to them or where the agreement is concluded after the dispute has arisen.

On the other hand, the soft paternalistic approach, reflected in *Carnival Cruise*

155) The Thai government's National Reform Plan on Justice Administration, published in April 2018, recognized the lack of party autonomy in international litigation and suggested to establish clear rules on choice of court agreements. The Plan is available at https://www.nesdc.go.th/download/document/SAC/RF_Plan04.pdf. *See* Apipong Sarntikasem, "Rethinking the International Jurisdiction of Thai Courts in Civil and Commercial Matters through Comparative Analysis," *Dullapaha* [Thai Court of Justice Law Journal] 65, no. 3 (September – December 2018): 3.

Lines, Inc. v. Shute of the US Supreme Court, tends to maximize party autonomy in choice of court even in consumer contracts. This approach presumes that any savings to the traders by limiting choice of fora will be passed on to the consumer in the form of reduced prices. Thus, allowing party autonomy will benefit a greater number of consumers, not only those who pursue litigation.[156] However, from the behavioral economic viewpoint, this approach may not effectively prevent the exploitation of the weak party's systematic misperception based on cognitive biases. Consumers may underestimate the risk of choice of court agreements, or they may be manipulated to misperceive total prices and benefits in concluding a contract and forum selection clause with a trader. Furthermore, when the market is not fully competitive, there is no certainty that consumers in general will receive the benefits in the form of lower prices.[157]

Besides, unlike the soft paternalistic approach, which broadly allows autonomous choices to choose any court, the hard paternalistic approach appears to be more consistent with the current protective jurisdictional regime under the Consumer Case Procedure Act, B.E. 2551 (2008), and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) which restrict the available courts in consumer and labor disputes. For the above reasons, the hard paternalistic approach seems to be suitable for Thailand to establish a new framework for choice of court agreements.

(3) More Protection of Weak Parties in Arbitration

The current pro-arbitration regime of Thailand is not only incompatible with the

156) Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, 263.

157) *See* "Thailand: Promoting Market Competition, Reducing Monopoly Only Way to Close Income Gap," UTCC Asean Economic Community Strategy Center, accessed December 1, 2020, http://aec.utcc.ac.th/thailand-promoting-market-competition-reducing-monopoly-only-way-to-close-income-gap-study-shows/. (According to the study on 'peeking into Thai business structure via shareholder information' conducted by the Puay Ungphakorn Institute for Economic Research of the Bank of Thailand, "the researchers looked into 3.3 million items of shareholder information in more than 880,000 corporates and found that there were only 9,068 groups running businesses in [Thailand]. They also found that most of the businesses were concentrated among 13 business groups, each having more than 100 companies under its umbrella, while the remainder had only two or three companies in their group.").

weak party protection legislation, as seen in the litigation aspect, but also encourages the use of arbitration as a tool to circumvent the protection mechanism. In arbitration, weak parties such as consumers and employees may face more severe risks due to its characteristic as a private dispute resolution mechanism. For example, unlike litigations in national courts, any expenses incurred from the arbitral proceedings must be borne by the parties, and legal aid is not generally available in arbitration.[158] Therefore, the costs related to arbitration may pose serious barriers for the weak party to pursue its rights and remedies under the contract. Furthermore, the stronger party may systematically use arbitration to arrange more favorable proceedings and achieve results that cannot be normally obtained through litigations, for instance, the waiver of collective redress mechanism[159] and the choice of arbitrators.[160] Recognizing these risks, the European and Japanese legislators are more cautious about arbitration involving weak parties and restrict party autonomy in arbitration for the benefits of weak parties. As a result, pre-dispute arbitration clauses in consumer and employment contracts are generally unenforceable or permitted under limited circumstances.

However, the United States adopts the opposite approach. Arbitration is frequently used to resolve disputes between traders and consumers, as well as between employers and employees. The inclusion of arbitration agreements in consumer, employment, and financial contracts has become standard practice in the United States.[161] In general, pre-dispute arbitration clauses in consumer and employment contracts are enforceable unless they are unconscionable under the

158) The Consumer Case Procedure Act, B.E. 2551 (2008) Section 18 and the Act for the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) Section 27 waive court fees for consumers and employees.

159) Chapter 4 of the CPC provides class action mechanism in civil and commercial matters including consumer and employment disputes.

160) *See* Niedermaier, "Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic," 13-14.

161) *See* Christopher R. Drahozal and Raymond J. Friel, "Consumer Arbitration in the European Union and the United States," *North Carolina Journal of International Law and Commercial Regulation* 28, no. 2 (Winter 2003): 357-58; Niedermaier, "Arbitration Agreements between Parties of Unequal Bargaining Power - Balancing Exercises on Either Side of the Atlantic," 12.

general contract law principle.[162] The differing approaches in arbitration regulations between the EU and the United States can be explained by distinct legal traditions concerning weak party protection and substantial differences between the litigation systems.[163] Christopher R. Drahozal and Raymond J. Friel argue that the different approaches between the United States and Europe lie deeply within the legal perspectives and ethos towards weak party protection, stating that "*whereas American law seems focused on the freedom of the parties to commercial transactions to arrange their affairs in accordance with their own needs, the European approach seeks to protect those whom it considers being the weak party to a commercial transaction*."[164] Furthermore, distinctive features in the American litigation system, such as jury trials in civil cases[165], class action systems[166], and the award of punitive damages[167], give stronger incentives for American businesses to oppose restrictions on consumer arbitration. Many American companies often perceive jury trials as sympathetic to consumers.[168] Also, class action and punitive damages systems pose the risk of unpredictable large damages awards against companies. For these reasons, American businesses would prefer to use arbitration in consumer contracts to reduce the above risks and increase predictability in their transactions. Their preferences and political clout have been reflected in the current pro-arbitration policy under the Federal Arbitration Act, which allows a higher degree of party autonomy, as compared to

162) *See supra* note 125.
163) *See* Drahozal and Friel, "Consumer Arbitration in the European Union and the United States," 384-93
164) Ibid, 386.
165) The United States Constitution Amendment VII (jury trial right in federal court):
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
166) *See, e.g.,* Federal Rules of Civil Procedure Rule 23. Class Actions.
167) *See, e.g.*, Section 908 of the Restatement (Second) of Torts 1979.
168) *Cf.* J. Mark Ramseyer, "International Dispute Resolution: Law and Economics," in *Dreams and Dilemmas in the Asia-Pacific: Economic Friction and Dispute Resolution*, ed. Koichi Hamada et al. (Singapore: Institute of Southeast Asian Studies, 2000), 470 ("Within the United States, arbitration essentially functions as a way for business partners to agree in advance to waive their Seventh Amendment jury trial right. ⋯The lower demand for arbitration in Japan thus probably reflects the fact that neither party could demand a jury trial *ex post* anyway").

the European counterparts.[169]

As for Thailand, the same concerns from the behavioral economic viewpoint in the litigation aspect still apply to the context of arbitration. This American approach may not effectively prevent the exploitation of the weak parties' systematic misperceptions since they tend to underestimate the risk of arbitration agreements. They are also more susceptible to manipulation by stronger parties to misperceive their transactions' total prices and benefits. Furthermore, Thailand's ethos towards weak party protection resembles those of the European states as reflected in its protective jurisdictional rules in consumer and employment cases, which notably differ from the American jurisdictional principles. Also, Thailand's Unfair Contract Terms Act, B.E. 2540 (1997) was drafted based on the British Unfair Contract Terms Act 1977.[170] Besides, there are substantial differences between the Thai and American litigation systems. For example, Thai laws do not provide the right to jury trials in any kind of dispute. Although the award of punitive damages exists in the Thai legal system, it is limited only in consumer cases, and the maximum sum of not exceeding two times the amount of compensatory damages is strictly set by the Consumer Case Procedure Act, B.E. 2551 (2008).[171] As a result, the conditions and circumstances surrounding businesses and consumers in Thailand are somewhat different from the United States. There are fewer needs for Thai companies to use arbitration as a means to avoid disadvantageous jury trials and unpredictable amounts of punitive damages. Therefore, the American styled pro-arbitration policy without special protective rules for weak parties may not suit the Thai context.

Thailand needs to reconsider its unduly arbitration-friendly approach, where the weak parties may suffer even more severe consequences than litigation. Certain limits to party autonomy in arbitration should be imposed to protect weak parties and close a loophole between litigation and arbitration. In this regard, the

169) Drahozal and Friel, "Consumer Arbitration in the European Union and the United States," 389-91.

170) Pichai Na Nakhon, "Law on Unfair Contract Terms: the New Comparative Analysis" [Khodmai Wadauy Korsunya Ti Maipendham: Naewwikrow Mai Cherngpreabteab], *Thammasat Law Journal* 30, (December 2000): 547.

171) *See* Section 42 of the Consumer Case Procedure Act, B.E. 2551 (2008).

European and Japanese legislations provide valuable guidelines for future reforms of the Thai arbitration law. For example, the validity of pre-dispute arbitration clauses in consumer contracts is limited in the EU under the EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts. Also, Japanese and German arbitration laws prohibit all pre-dispute employment arbitration agreements.

(4) Overcoming Weak Points of the Hard Paternalistic Approach

Although this paper suggests the adoption of the hard paternalistic approach for both choice of court and arbitration agreements in Thailand, it remains an important question from the behavioral economic analysis concerning how to deal with the diversity of preferences, needs, and sophistication degrees among weak parties. For example, the denial of arbitrability in labor disputes may exclude some knowledgeable, powerful, and high-ranking employees from their choices to pursue arbitration. A one-size-fits-all protective rule will give protection to strong persons even if they do not deserve or desire it.[172] It may also limit their options to select a dispute resolution method and litigation strategy. To overcome this problem, Belgian legislators provide a unique approach in employment arbitration by attempting to balance the risks and benefits of arbitration. The Belgian arbitration law permits only certain wealthy and powerful employees to submit their labor disputes to arbitration. The employees who have incomes below a certain threshold are presumed to be weak and precluded from arbitration.[173] The Belgian arbitration law assumes that high-ranking employees are in strong bargaining positions and need no special protection. Likewise, in the context of consumer contracts, the English arbitration law invalidates pre-dispute arbitration clauses in a consumer contract for claims not exceeding £5,000.[174] It assumes that consumers in transactions over £5,000 are not in weak positions that require preferential treatment. These approaches will generally protect presumptively weak parties in arbitration while allowing certain groups of persons with

172) Rosenfeld, "Limits to Party Autonomy to Protect Weaker Parties in International Arbitration," 424.
173) Ibid.
174) *See* Section 91 of the English Arbitration Act 1996.

knowledge and bargaining power to take the full benefits of party autonomy. Therefore, it is essential for policymakers in Thailand to carefully consider the definition and scope of weak parties who truly deserve special protection.

Furthermore, after the dispute has arisen, the risks of choice of court and arbitration agreements become salient. As a consequence, cognitive biases such as overoptimism are less likely to affect weak parties' judgments. Weak parties will be in better positions to gather information and make decisions with more knowledge to deal with their options of dispute resolution.[175] Therefore, in post-dispute situations, the benefits of legal paternalism for weak party protection seem to decrease significantly. In many jurisdictions, including the EU and Japan, post-dispute jurisdiction and arbitration agreements are generally enforceable even in consumer and employment contracts.[176] Accordingly, hard paternalistic legal tools may not be necessary for limiting party autonomy in a post-dispute stage.

(5) Using a Variety of Legal Tools and Regulatory Techniques

In addition to legal paternalism, lawmakers in Thailand may consider other legal tools such as disclosure regulation and the right to withdraw to strengthen the weak party protection in the context of choice of court and arbitration agreements. For example, the Chinese Procedure Law requires a trader to disclose the existence of a forum selection clause in a standard consumer contract by giving a proper notice to a consumer.[177] The previous Czech Arbitration Act required arbitration clauses in consumer contracts to contain certain important information on the arbitral proceedings.[178] The Brazilian Arbitration Act demands that a consumer must sign an arbitration agreement in a consumer contract

175) *See* Drahozal and Friel, "Consumer Arbitration in the European Union and the United States," 385-86.

176) *See* Art. 19 (1) and 23 (1) of the Brussels I Regulation (recast); Art 3 and Art. 1 (q) of the Annex to the EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts; Art. 3-7 (5) (6) of the JCCP; Art. 3 and 4 of the supplementary provisions to the Japanese Arbitration Act.

177) *See* Art. 31 of the 2015 Supreme People's Court Interpretation on the Chinese Civil Procedure Law.

178) *See* Art. 2 para. 5 of the Act No. 216/1994 Coll., on Arbitration Proceedings and on Enforcement of Arbitration Awards (prior to 2016).

separately, or the arbitration clause must be printed in a certain font.[179] These regulations, coupled with formal requirements, can warn weak parties against the transactions' risks and deter them from entering into such agreements lightly.

Moreover, the Japanese Arbitration Act gives a consumer a specified cooling-off period to unilaterally cancel an arbitration agreement.[180] However, it should be noted that the right to withdraw may cause uncertainty in a choice of court and arbitration agreement, which in turn undermines the main objectives of party autonomy. Weak parties may eventually have to pay the price for this uncertainty in the form of higher transaction prices.

(6) Overriding Mandatory Rules

Finally, overriding mandatory rules enshrined in weak party protection legislation can be useful legal tools to provide effective protection for weak parties, especially in the context of the formation and substantive validity of choice of court and arbitration agreements. The EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts, Japan's Consumer Contract Act, and its new Civil Code, as well as the American unconscionability doctrine, serve to protect weak parties against abuse of party autonomy by the stronger counterparts. Thailand can also actively use similar principles to limit party autonomy in choice of forum as safeguards for protecting weak parties, particularly in the absence of special protective regimes. For example, Thailand's Unfair Contract Terms Act, B.E. 2540 (1997) Section 4 paragraph 1 stipulates that the contractual terms between the consumer and the trader or in a standard form contract which render the trader an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.[181] In order to determine to what

179) *See* Art. 4 § 2 of the Brazilian Arbitration Law.

180) *See* Art. 3 para. 2 of the supplementary provisions to the Japanese Arbitration Act.

181) The Unfair Contract Terms Act, B.E. 2540 (1997) Section 4:
"The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the

extent the terms be deemed fair and reasonable, the Act requires judges to consider, among other things, good faith, bargaining power, economic status, and knowledge of the contracting parties.[182] If a choice of court or arbitration agreement renders a trader an unreasonable advantage over a consumer, it may become unenforceable. Likewise, labor protection laws may provide a safeguard for weak parties in labor disputes.[183] However, adjudicators should not frequently

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extent that they are fair and reasonable according to the circumstances.
In case of doubt, the standard form contract shall be interpreted in favor of the party that does not prescribe the said standard form contract.
The terms with characters or effects in a way that the other party is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance may be regarded as terms that render an advantage over the other party, such as:

1. terms excluding or restriction liability arising from breach of contract;
2. terms rendering the other party to be liable or to bear more burden than that prescribed by law;
3. terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;
4. terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;
5. terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;
6. terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus rate of interest exceeding fifteen percent per year;
7. terms in a hire-purchase contract which prescribe excessive hire-purchasing price or which imposes unreasonable burdens on the part of the hire-purchaser;
8. terms in a credit card contract which compels the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto;
9. terms prescribing a method of calculation of compound interest that cause the consumer to bear excessive burdens."

182) The Unfair Contract Terms Act, B.E. 2540 (1997) Section 10:
"In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:

1. good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition
2. ordinary usages applicable to such kind of contract;
3. time and place of making the contract or performing of the contract;
4. the much heavier burden borned by one contracting party when compared to that of the other party."

183) *See e.g.,* The Labor Protection Act B.E. 2541 (1998) and the Labor Relations Act B.E. 2518 (1975). *See also,*
Ratchaneekorn Larpvanichar, "Overriding Mandatory Rules" [Khodmai Pueng Bangkubshai Tantee], *Thammasat Law Journal* 41, no. 2 (2012): 262-79.

use these laws to invalidate choice of court or arbitration agreements because it may excessively restrict the exercise of party autonomy and undermine legal certainty and predictability. Overriding mandatory rules should only be resorted to granting special protection for weak parties in exceptional cases on a case by case basis.

9. Conclusion

The importance of party autonomy and the concern over unequal bargaining power of the parties are widely recognized worldwide. Many countries have adopted various policies and imposed limits to party autonomy to protect weak parties in several ways, ranging from a very paternalistic approach illustrated by the EU and Japan to a very liberal approach represented by the United States. Each of these approaches has pros and cons, and there is far from consensus to accommodate this problem. Thailand needs to learn lessons from the predecessors and creates its own regime, which best suits its unique social context and public policy. In this regard, behavioral economic analysis can provide useful legal implications for policymakers to establish protection mechanisms for weak parties. In conclusion, Thailand should broaden the scope of party autonomy in choice of court agreements. Several legal tools, especially a legal paternalistic approach, can be utilized to protect weak parties. On the other hand, party autonomy in arbitration should be limited to provide protection for weak parties, which are equally vulnerable as those in litigation. Moreover, overriding mandatory rules under the current consumer and labor protection legislation can serve as additional safeguards for weak parties.