別紙 4

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主　論　文　の　要　旨

論文題目	A Resolution of the Conflict between Public and Private Interests in International Commercial Arbitration: Focusing on the Issues of Arbitrability and the Application of Internationally Mandatory Rules
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論　文　内　容　の　要　旨

International Commercial Arbitration has been considered as a common means for private dispute resolution. The parties to the arbitration are private parties, and seek for arbitration in order to settle their private disputes. The parties elect for arbitration also because arbitration allows the parties to maximize their autonomy in their dispute settlement. The increases of cases submitted to international arbitration include cases that concern public interests. These cases include, for instance, antitrust disputes, intellectual property disputes, and disputes relating to environmental issues or tax matters. Courts of several countries limit the disputes that concern public interests to the jurisdiction of its court whereas courts of other countries determine that commercial disputes that affect public interests can also be resolved by means of

international commercial arbitration. As a result, States entrust the arbitrators with the task to consider their public interests while solving private disputes.

The involvement of public interests in international arbitration leads to the issue of a conflict between public interests and private interests as represented by party autonomy. Although the parties intend to submit their commercial disputes to arbitration, due to public interests reasons, parties have to refer the dispute to a domestic court. Even in the case where the subject matter of the dispute is arbitrable, mandatory provisions that intend to protect the public interests also claim for application in the case regardless of the parties' choice of applicable law. Consequently, public interests appear to be in conflict with the parties' private interests in international arbitration, and the arbitrators have the task to resolve this conflict. Specifically, in the first case, the arbitrators have to determine whether or not the subject matter of the dispute, which involves public interests, can be resolved by means of arbitration. In the second case, the arbitrators have to decide the applicability of the mandatory provision that represents public interests although this provision is not chosen by the parties to be the applicable law.

Due to the increase of the involvement of public interests in international arbitration, the arbitral tribunal has no other choice, but to address the question, especially when the parties raise it during the arbitral proceeding. Specifically, the arbitrators are entrusted to try to find a balance between the two conflicting interests. Trying to strike a balance, nevertheless, is not an easy task. A careful consideration on the general principles underlying the two interests is necessary to find a proper balance. Thus, it would be helpful to develop a recommendation,

which could assist the arbitral tribunals in the work of trying to find a balance between the conflicting interests.

The issues concerning arbitrability and applicability of internationally mandatory rules illustrate that the arbitrators, in resolving private parties' dispute, also confront with the tasks to determine the relevance of public interests and resolve the conflict between the two interests. Having noticed this, the thesis sets out to discover the relevance of public interests in international commercial arbitration, and the methods that the arbitrators can adopt to strike a balance between the conflict between public and private interests in the question of arbitrability and internationally mandatory rules.

The two legal issues are not new legal problems. After a dispute arises and a party initiates an arbitration proceeding, another party may raise inarbitrability as a defense against the authority of the arbitrators to settle the dispute between the parties. In addition, during an arbitration proceeding, a party may also refer to internationally mandatory rules foreign to the applicable law to justify the non-performance of their contractual obligation. Much work has been done to tackle the two legal. Nevertheless, legal scholars generally tackle each legal question without first clarifying the relevance of public interests in international arbitration.

Since these legal issues involve the tasks of the arbitrators to address States' public interests, it is necessary to first conduct a background research to clarify an understanding about the legal nature of arbitration. Even though arbitration is a means for the settlement of private disputes, the arbitrators still face the challenge to address public interests due to the effect of the parties'

transaction on public interests. Therefore, the study about legal theories that define the relationship between international arbitration and State is necessary to identify the necessity for the arbitrators to address public interests as well as to identify which countries' public interests the arbitrators need to address. A resolution on the question concerning the relationship between international arbitration and State aids a more efficient way to solve practical legal issues. Moreover, in addressing the question from the perspective of legal theories, the finding of the research helps shed some lights on the general understanding about international arbitration and the relevance of public interests in international arbitration.

To achieve its objective, this thesis investigates into both theoretical discussions surrounding arbitration and practical matters that arise out of the conflict between public and private interests. As the dispute directly concerns the effect of international arbitration on public interest of a certain State, it is necessary to conduct a theoretical study to investigate the relationship between arbitration and State. This study allows the thesis to identify the relevance of public interests in international arbitration and the necessity for the arbitrators to address public interests when solving the parties' disputes. After a theoretical discussion, the thesis reviews previous discussions to determine the suggestions on how to solve the conflict of public and private interests in the issue of arbitrability and internationally mandatory rules.

In **Chapter 2**, the thesis presents four legal theories that define the relationship between arbitration and State in three different ways. International arbitration is perceived to be attached to the seat of arbitration under the

Jurisdictional Theory, but to be detached from any State under the Contractual and Autonomous Theories. In trying to reconcile the two contrasting views, the Hybrid Theory puts arbitration in between the seat of arbitration and the parties.

In the first theory, the jurisdictional theory considers that municipal law regulates international arbitration. This theory requires the arbitrators to refer to the law of the seat of arbitration when the arbitrators have to solve any legal issues. A drawback of the jurisdictional theory is the claim that only the law of the seat of arbitration regulates international arbitration. However, arbitration can actually be subject to more than one legal order. Moreover, the requirement for arbitration to refer to only the law of the seat of arbitration can weaken the efficiency of arbitration as a dispute resolution mechanism.

The second group of theory claims for a detachment of international arbitration from all legal orders. The contractual theory considers that the nature of arbitration is contractual, and the parties are the ones to regulate the conduct of arbitration. Another legal theory that claims for a detachment of arbitration from the national legal order is the autonomous theory. This theory considers claim that the unlimited autonomy of the parties is the controlling force in arbitration. It seems impractical to detach arbitration from national legal order under the both theories because the legitimacy of the parties' agreement is also based on national law. Moreover, arbitration cannot function on its own without the assistance from State courts.

The last theory, which is the Hybrid theory, claims that the nature of arbitration is a mixture of the contractual and jurisdictional theory. Thus, the conduct of arbitration has to be in accordance with the parties' agreement and the

law of the seat of arbitration. However, the flaw of the hybrid theory is that it does not specify how much importance the arbitrators should give to the law of the seat of arbitration or to the parties.

As the thesis notices the flaws in the above-mentioned theories, the thesis makes a recommendation on how to perceive the relationship between international arbitration and State. The thesis argues that international arbitration is bound to respect the parties' agreement as well as procedural rules and arbitration law of the seat of arbitration. However, international arbitration is not an organ of the parties or any State. In solving a dispute, the arbitrators have the authority to objectively evaluate the legal problem and adopt an appropriate mechanism that can efficiently solve the legal problem. In addition, due to the influence of the parties' transaction on public interests of countries other than the seat of arbitration, the thesis claims that the arbitrators have the role to consider public interests of other countries as well. The thesis further argues that the arbitrator has the authority to consider these pubic interests, which stem from States that have delegated the authority of the arbitrators to solve disputes that affect public interests and the parties who submit their dispute to the arbitrators for a settlement.

An implication from the above recommendation is that international public policy of the seat of arbitration binds the international arbitration. As the law of the seat of arbitration binds the arbitration, its international procedural public policy also binds the arbitration. Moreover, the importance of international public policy of the seat of arbitration is relevant because the court of the seat of arbitration can set aside an arbitral award that violates international public

policy of the forum.

Regarding rules protecting public interests of other countries, the thesis proposes that the arbitrators should evaluate the applicability of the rules. If the arbitration law of the seat of arbitration has any stipulation on this matter, the arbitrators should respect the law of the seat of arbitration. However, if the law of the seat of arbitration is silent, the thesis proposes that the arbitrators should adopt an autonomous choice of laws rules that can address the question.

The limit about the theoretical discussion in **Chapter 2** is that it cannot extend to making a specific recommendation on the choice of laws rules that the arbitrators can adopt because different legal issues require different treatment. The theories are helpful to delineate the role of arbitrators to address public interests. However, to solve a legal problem, the arbitrators have to seek for more specific solutions in each legal problem. Hence, the thesis proceeds to addressing specific legal issues that concern the conflict of public and private interests in **Chapter 3** and **Chapter 4**.

In **Chapter 3**, the thesis sought to find a solution for the arbitrators to determine arbitrability of a dispute. Arbitrators do not have the role to determine which subject matters are arbitrable and which are not. Whether or not a subject matter is capable of settlement by arbitration depends on the policy of each State. Thus, when dealing with the question of arbitrability, the arbitrators' task is to identify which country's law the arbitrators should apply.

From a review of scholarly discussions on this question, the thesis has discovered that scholarly opinions separate into two groups. The first group considers that the law governing arbitrability is the law that governs the

arbitration agreement between the parties. The second group characterizes arbitrability as a problem of conflict of jurisdiction, and seeks to find the governing law from the perspective of conflict of jurisdiction. In considering that the question of jurisdiction is a procedural question, the thesis rejects the application of the law governing validity of the arbitration agreement to govern arbitrability. The thesis argues that the law of the seat of arbitration, which binds the conduct of arbitration, determines arbitrability of the dispute. However, because there is a possibility that the law of countries other than the seat of arbitration may claim for jurisdiction of a court over the dispute between the parties, the thesis suggests that the arbitrators should also consider whether the law of the seat of arbitration extends to allowing the application of the rule that claims for compulsory jurisdiction of the foreign court.

In addition to arbitrability question, the issue regarding applicability of internationally mandatory rules ("IMR") also concerns how the arbitrators should address public interests that are in conflict the parties' private interests. **Chapter 4** looks further into the possibility of the arbitral tribunal to take into account IMR, which reflects a country's important interests. **Chapter 4** investigates this legal problem by assessing previous scholarly discussions and arbitral awards that address this question. The thesis argues that the arbitrators should evaluate objectively the applicability of IMR that claims for application, with an exception to the IMR of the law chosen by the parties. However, if the parties expressly agree to derogate from the applicability of the IMR of the law that the parties have elected, the arbitrators should also evaluate the applicability of the IMR rather than simply respecting the parties' agreement.

The thesis recommends four criteria for the arbitrators to adopt in order to evaluate the applicability of the IMR. Specifically, the arbitrators have to examine: 1) Nature of the IMR: the rules must be of international mandatory character; 2) Scope of application of the IMR: the rules must claim for extraterritorial application in the particular case; 3) Connection: the rules must have a close connection with the case; and 4) Consequences of Application or Non-Application of the IMR: the application or non-application of the rules must not be in contrary to international public policy of the seat of arbitration.

In addition, this research also contributes to solving practical issues in international arbitration. Specifically, the thesis will provide recommendations on how to solve the question of the arbitrability of a subject matter of a dispute as well as applicability of internationally mandatory rules.

The finding of this thesis serves as a contribution to international commercial arbitration academia as well as solving legal issues in international arbitration. The theoretical discussions contribute to clarify the debate on the juridical nature of arbitration and elaborate on the practical implications of the theoretical debate. The discussions and recommendation in **Chapters 3** and **4** are useful for the arbitrators when the arbitrators face with any of these legal issues.

As the thesis refers to the *UNCITRAL Model Law* and the *New York Convention* as a reference for the discussion, the finding of the research is applicable for international arbitration that is seated in a country whose arbitration law took the model from the *UNCITRAL Model Law* and the country is a party to the *New York Convention*. Moreover, the analysis of the research was limited to private disputes between two private parties in international

commercial arbitration. Thus, the application of the finding of the research is also limited to disputes that involve two private parties.