# **BOND UNIVERSITY**

# School of Law



# CHOICE OF LAW IN STATE CONTRACTS IN ECONOMIC DEVELOPMENT SECTOR - IS THERE PARTY AUTONOMY?

by

Candidate: Oyunchimeg Bordukh, LLM Supervisor: Emeritus Professor Mary Hiscock

A thesis submitted in partial fulfillment of the requirements for the degree of

Doctor of Legal Science (SJD)

CERTIFICATION

This thesis is submitted to Bond University in fulfillment of the requirement for the Degree of

Doctor of Legal Science.

This thesis represents my own work and contains no material which has been previously

submitted for a degree or diploma at Bond University or any other institution, except where due

acknowledgement is made.

Signature.....

Date.....

Oyunchimeg Bordukh SID: 12693816 .: 11 ACKNOWLEDGMENTS

The writing of this thesis has been the most unforgettable experience of my life. I have lived in a

foreign country over the last five years. At the same time, I was learning English too. As with all

such endeavours, it would not have been completed without the support of many other people

who have generously helped me.

First and foremost, I greatly appreciate my thesis supervisor, Emeritus Professor of Law, Mary

Hiscock for her invaluable advice, guidance and all of the time and consideration she has given

to my work. She gave me more confidence that maybe I can do this. I also want to thank the

Faculty of Law and its entire staff for their support and kindness.

The educational grant from the Mongolian Ministry of Education is gratefully acknowledged. It

was not just financial support, but also has been a primary motivator in finishing this challenge.

Many thanks go to my friend, Usha Adams for her indispensable moral support and

encouragement.

I dedicate this thesis to my family, especially in memory of my beloved father Bordukh who

inspired me and taught me how to work hard. I would like to thank my mother Badamgarav for

her love and allowing me go abroad in her old age. To my husband Baatarsukh, my daughter

Anooka and my infant son Jangar for hanging in there with me during the completion of this

thesis, thank you.

Oyunchimeg Bordukh

**June 2008** 

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THESIS ABSTRACT

Choice of Law in State Contracts in Economic Development Sector:

Is there Party Autonomy?

A state contract is a common mode of entry for foreign direct investment, especially in

developing states. It can form the legal basis of the investment relationship between a foreign

investor and a host government. But, like any other contract, it cannot stand itself covering all

aspects of the legal relationship. The contract thus must belong to a specific legal system or a

body of rules or principles which is usually called "applicable law "or "governing law".

Historically, a "concession contract" in the natural resources sector was the predominant

form of a state contract and it used to be governed by the domestic law of each host state.

However, since the 1950s, international investment arbitrations have abandoned the tradition

and advanced a theory subjecting state contracts in the foreign investment sector to an external

legal system, ie public international law. One of the bases of the theory of internationalisation

was the principle of party autonomy that allows parties to a state contract to select any law of

whatever country they like. Then, the 1965 Washington Convention on the Settlement of

Investment Disputes between States and Nationals of Other States (ICSID Convention)<sup>1</sup>

formally adopted the principle of party autonomy in Article 42 (1) as the primary choice of law

rule in disputes arising out a foreign investment contract concluded between a state and a

national of another state.

The object of this thesis is to prove that the fundamental problems of party autonomy in

foreign investment contracts involving considerations of public and private law issues remain

unsettled. It explores the main controversies and confusions in the theory of internationalising

<sup>1</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [hereinafter ICSID Convention].

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state contracts, looking at its historical context. It examines the extent of the application of party

autonomy in state contracts such as natural resource exploitation contracts and construction of a

plant and infrastructure contracts which reflect important economic development policies of

developing countries.

In considering past and current problems in the field of international investment law, the

thesis argues that arbitral tribunals resolving disputes between a state and a foreign private

individual should abandon the party autonomy approach because contractual freedom to choose

the law of the contract would disregard the objectives which host states normally pursue through

economic regulations such as development, environment and human rights concerns of foreign

investment. It suggests a consensus-based approach similar to the rule adopted in the Hague

Convention on the Law Applicable to Certain Rights in Respect of Securities (Hague Securities

Convention)<sup>2</sup> and which would produce the desired effect. It recommends that the choice of law

provisions found in Article 42 of ICSID Convention would need to be either modified or repealed.

In doing so, this thesis attempts to contribute to the positive development of international

investment law balancing state authority and private property rights.

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<sup>2</sup> Hague Convention on the Law Applicable to Certain Rights in Respect of Securities, opened for signature 5 July 2006, available at <a href="http://hcch.e-vision.nl/index\_en.php?act=conventions.text&cid=72">http://hcch.e-vision.nl/index\_en.php?act=conventions.text&cid=72</a> at 23 December 2007.

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# ABBREVIATIONS

BIT Bilateral Investment Treaty

**ECT** Energy Charter Treaty

GA General Assembly

**GATT** General Agreement on Tariffs and Trade

**ICC** International Chamber of Commerce

ICI International Court of Justice

IIT International Investment Treaty

**IMF** International Monetary Fund

Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 **ICSID** 

NAFTA North American Free Trade Agreement

New York Convention on the Recognition and Enforcement of **New York Convention** 

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**OECD** Organisation for Economic Co-operation and Development

**OPEC** Organisation of Petroleum-Exporting Countries

**TNC** Transnational Corporation

**TRIMs** Agreement on Trade-Related Investment Measures

UKUnited Kingdom

UNOrganisation of United Nations

United Nations Commission on International Trade Law UNCITRAL

**UNCTAD** United Nations Conference on Trade and Development

**UNIDROIT** International Institute for the Unification of Private Law

US United States of America

WTO World Trade Organisation