# Private Autonomy in Dispute Settlement (Summary)

Dai YOKOMIZO
Professor of Law, Nagoya University

The objective of this paper is to examine the question of how conflict of laws should deal with arbitration, in particular reflecting on whether or not arbitral awards should be considered "legal" norms.

The claim that arbitral awards are legal norms is often based on the idea that arbitral awards belong to a (state or non-state) legal order. This paper will consider this claim first by examining the traditional view with regard to the relation between arbitration and the state of the place of arbitration, in particular the views of F. A. Mann. Then, two different views which consider arbitration to be a constituent of a non-state legal order will be analyzed: lex mercatoria and arbitral legal order. In contrast to these views, Teubner claims that lex mercatoria constitutes an autopoietic system, based on his system theory. His view will therefore be examined separately.

The conclusion reached through this examination is that the above-mentioned views are all unconvincing and arbitral awards should be considered private acts or simple legal facts such as contracts or torts, which do not belong to any legal order. Accordingly, it is not necessary to consider arbitral awards as decisions of the state of the place of arbitration or of a non-state legal order.

Finally, the question of how conflict of laws should regulate arbitral awards will be discussed. While recognizing the many advantages of arbitration, three of its defects are pointed out: the trend of arbitrators attaching more importance to equitable solutions for the parties than to the effects of awards on third parties; the decrease in the authority of state law as a result of actors in transnational transactions gradually losing their motivation to respect it and instead resorting to arbitration; and the confidentiality of arbitration depriving the public of access to valuable information and affecting the development of state law through case law. Considering these concerns about the negative externalities of arbitration, a deliberate review of the possible negative effects of arbitral awards seems desirable at the stage of recognition and enforcement of foreign awards, using public policy as a condition. Also examined in respect of these concerns will be the question of whether disputes in certain sectors which concern the public interest, such as finance, should be considered unarbitrable.