ন ৬৭৭৭

ISSN 1991-8976

Rajshahi University Law Journal

Volume 09 2014

Faculty of Law
University of Rajshahi

ISSN 1991-8976

Rajshahi University Law Journal (RULJ)

Volume 09 2014

Published by

Dean

Faculty of Law

University of Rajshahi

Rajshahi - 6205

Bangladesh

Faculty of Law

University of Rajshahi

Rajshahi University Law Journal (RULJ) Volume 09 2014

Rajshahi University Law Journal (RULJ) 2014
Faculty of Law
University of Rajshahi

Volume 09 2014

Published by
Dean
Faculty of Law
University of Rajshahi
Rajshahi - 6205, Bangladesh

Cover Design & Printed by
Md. Ariful Islam
Text Dot Com (TDC)
Farmgate, Motihar, Rajshahi-6212
Cell: 01711-951377

Subscription Rates
For Individuals : Tk200.00 US$ 20 (excluding postage)
For Organisation : Tk300.00 US$ 30 (excluding postage)

[Published in January 2016]

Rajshahi University Law Journal (RULJ) Volume 09 2014

THE IMPACT OF *ORDRE PUBLIC* ON PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION: NATIONAL AND INTERNATIONAL PERSPECTIVES

Parvez Ahmed[*]
Rehena Parvin[α]

ABSTRACT *The parties of an international sale contract have the absolute autonomy to choose the operating laws for the transaction. They have the right to choose the law of arbitration and arbitrators in case of international commercial disputes. The states generally comply with arbitral award but the state can ignore it on the excuse of public policy. This article analyses the concept of party autonomy and ordre public (public policy) and tries to find out the superiority between the two with the help of statutory provisions and judicial decisions of different countries including Bangladesh. It is found that though the concept of ordre public jurisprudentially varies from country to country nonetheless the party autonomy must not supersede it.*

KEYWORDS: *International commercial arbitration, ordre public, party autonomy, UNCITRAL model law.*

1. INTRODUCTION

The study area of this article relates to party autonomy in international commercial arbitration, *ordre public* or public policy and the relationship between them. Party autonomy is a core and backbone of arbitration. In structuring the arbitration, the parties agree on an institutional arbitration or ad hoc arbitration, appointment of arbitrator, the arbitration rules of an arbitration institution or the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) Arbitration Rules, for example, arbitration procedure, place of arbitration, governing law, etc. Thus, the parties may form and structure the arbitration as agreed upon by them (Kazutake 2005: 23).However, the issue is what are the limits to party autonomy, if any? Can the parties agree on any matters they please, or are there restrictions? In international commercial arbitration parties by virtue of their party autonomy control the whole arbitration process. But violation of *ordre public*by the enforcing state has long been a ground for refusing recognition/enforcement of

[*]Assistant Professor, Department of Law at Green University of Bangladesh, Dhaka; parvez_siu@yahoo.com.

[α]Assistant Professor, Department of Law and Muslim Jurisprudence, Islamic University, Kushtia; rehena_siu@yahoo.com.

foreign judgments and awards. The public policy exception to enforcement is an acknowledgement of the right of the state and its courts to exercise ultimate control over the arbitral process. Party autonomy does not get preference when the issue of *ordre public* arises. However, the concept of *ordre public* varies from country to country. Is it justifiable to refuse the enforcement of the arbitral award on the basis of such a variable concept which has no predictability?

This article is an initiative to find out the answers of those issues. To do this, the article proceeds chronologically. In first part, it defines some of the commercial terms like commercial disputes, international arbitration and so on in order to make the whole concept clear. Then it mentions in brief international conventions and treaties on commercial arbitration. It also focuses on arbitration laws of Bangladesh.

The core part of this study discusses party autonomy, public policy, the judicial application of the public policy and the relationship between them. It is revealed that the judiciary of most of the countries consider the concept of *ordre public* narrowly and weigh this according to national perspective. Nonetheless, this article explores the supremacy of *ordre public* over the party autonomy.

2. MEANING OF 'COMMERCIAL DISPUTE'

Generally, the dispute where an amount of money, goods or services is claimed by one party and denied by the other under an agreement can be considered as a commercial dispute. The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not. As per article 1 of the UNCITRAL Model Law 1985:

> Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement, commercial representation or agency, factoring , leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road:

This would exclude political, territorial or diplomatic disputes between sovereign nations, or between nations and individuals (Mo 2003: 693).

2.1 Meaning of 'International'

The term 'international' is used In the Article to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international (Redfern et al. 2004: 12).'International' means that the relevant arbitration involves a foreign element. A foreign element is material or significant if it can result in the parties' submission to the courts of another country, or the application of the laws of another country.

UNCITRAL Model Law 1985 clarifies the term international arbitration stating that:

Art. 1(3): An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states; or

(b) one of the following places is situated outside the state in which the parties have their places of business:
 (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 (ii) any place where the substantial part of obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

So international arbitration means

> [E]specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators in accordance with procedures, structures and substantive legal or non-legal standards chosen directly by the parties (Lew et al. 2003: 1).

3. INTERNATIONAL CONVENTIONS AND TREATIES OF INTERNATIONAL COMMERCIAL ARBITRATION

Major trading nations have entered into international treaties and conventions designed to facilitate the international enforcement of arbitration awards and agreements. The first such arrangement in the contemporary era was the Montevideo Convention signed in 1889 by various Latin American states (Born 2001: 19). Later on many international conventions have been adopted to speed up international commercial arbitration, such as:

i. The Geneva Protocol on Arbitration Clause of 1923,
ii. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,
iii. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention),
iv. Washington Convention or the ICSID Convention 1966,
v. Inter-American Convention on International Commercial Arbitration, 1975(The Panama Convention),
vi. The European Convention on International Commercial Arbitration 1961,
vii. The Model Law adopted by the UNCITRAL on 21 June 1985.

3.1 International Commercial Arbitration under the Law of Bangladesh

The primary source of Bangladeshi arbitration law is now the Shalish Ain 2001. The new legislation on arbitration has been enacted for the purpose of international commercial arbitration, recognition and enforcement of the award of foreign arbitration and enactment of other arbitration related rules. The general principles on which this legislation is based are (i) to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, (ii) to impart freedom to the parties to agree on how their disputes are resolved, and (iii) to restrict the extent of intervention by courts.

The existence of a *'seat'*, the place where the arbitration has its juridical base, not necessarily the place where it is geographically based, is vital to arbitration. The Arbitration Act 1996 is triggered when the seat of the arbitration is in Bangladesh (Shalish Ain 2001 s 3(1)).

As per section 9(2) of the Shalish Ain 2001 this Act only applies to written arbitration agreement but there is no need for the agreement to be signed by the parties. In case of international commercial arbitration, parties have the autonomy, subject to the provision of this Act, to appoint arbitrator (Shalish Ain 2001 s 12(1)). This Act authorises the arbitrator to determine questions relating to the initial validity of the main contract. An arbitrator is therefore not deprived of jurisdiction under an arbitration clause simply because it is alleged that the contract in which the clause appears was void, voidable, illegal or did not come into existence (Shalish Ain 2001 s 17). The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal (Shalish Ain 2001 ss 25, 30). The tribunal is obligated to act fairly and impartially giving each party reasonable opportunity to present their case (Shalish Ain 2001, 23). Arbitrators can be removed from their office because of their partiality and non-qualification (Shalish Ain 2001 ss 13, 15)).

4. PARTY AUTONOMY

First of all it is necessary to know the meaning of autonomy. Literally, autonomy means 'total independence of parties in organising but not conducting an arbitration' (Chatterjee 2003). Autonomy could be said to exist 'when an individual has the capacity to make a choice among real alternatives and can make the choice for reasons with which he or she is comfortable' (Matz 1994).

Party autonomy can be defined as the 'freedom of the parties to construct their contractual relationship in the way they see fit' (Abdulhay 2004). It is the self arrangement of legal relations by individuals according to their respective will. This means that parties have the right to self arrange their arbitration agreement free from outside control.

A basic principle in international commercial arbitration is that of party autonomy. It is described by the authors Redfern and Hunter (2004: 315) in the following terms:

> Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition.

In various national laws, international treaties on arbitration and arbitration rules, party autonomy is recognised and incorporated.

In Bangladesh, the Shalish Ain 2001 upholds the concepts of party autonomy. Parties have the autonomy to select the arbitrator, place of arbitration and the procedure of arbitration. Moreover, the provisions of the Act will be applicable when 'the parties agree' or 'unless the parties otherwise agree'.

In England, section 1 (b) of the Arbitration Act 1996 provides that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. The first part of the Act confirms the party autonomy principle as parties are free, for example, to agree on the choice of law, seat of arbitration and the procedure to be followed. One can see that this principle is evident in this act because words like 'the parties are free to agree' or 'unless the parties otherwise agree' or 'unless otherwise agreed by the parties' demonstrate party autonomy (Arbitration Act 1996, ss 15-17).

The New York Convention 1958is regarded as the most important treaty relating to international commercial arbitration. It recognises party autonomy in the agreement made in writing by the parties where they agree to submit to arbitration all or any of their differences, whether presently or in the future.

When the UNCITRAL Model Law was formulated in 1985, the principle of party autonomy was adopted without opposition.[1] This is further confirmed where it stated that 'subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings' [UNCITRAL Model Law art 19 (1)] and that 'in matters governed by this law, no court shall intervene except where so provided in this law' confirming the principle of party autonomy.

As it is said, with the aid of autonomy, parties may agree on institutional arbitration or ad hoc arbitration. When parties choose the arbitration institution, the institution will supervise the conduct of the arbitration with its wide-ranging experience [ICC Bulletin, vol 7(1)]. It will assist in the appointment of arbitrators and will give practical guidance on how to interpret its procedural rules. In *ad hoc* arbitration parties simply agree to arbitrate, without designating any institute to administer their arbitration. The arbitrator resolves the dispute without institutional supervision or assistance. Parties will sometimes also select a pre-existing set of procedural rules designed to govern ad hoc arbitration. It is possible to have an ad hoc arbitration with an institution designated as the appointing authority. This can solve one of the difficulties associated with ad hoc arbitration – namely, constituting the tribunal itself. In such circumstances parties can also choose, once the tribunal has been constituted, to have the arbitration administered by the institution as well.

In fact, the theory of party autonomy gives the parties ultimate power to formulate the agreement and resolve the dispute in the way they choose. But this power has been curtailed by *ordre public.* Public policy is a check-valve for the autonomy of parties.

5. DEFINITION OF *ORDRE PUBLIC*

Public policy which is also called *ordre public* is a sociological concept, it is so because it is made and enforced by members of the society. It comprises of different types of cultures and social and moral values. It is very dynamic in nature as it changes with time and place (Tamara 2007). This leads to uncertainty and unpredictability, which encourages the unsuccessful party in the arbitration to resist enforcement of the award or at least delays the payment.

There is no universal definition of public policy but there have been many attempts. It has been defined as 'the fundamental principles of a system... it is not the rules of positive legislation that constitute *ordre public*, but the principles that inspire these

[1]*See* UN Doc. A/CN.9/207, Para. 17: 'probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitrations according to their expectation'.

rules' (Moss 2003).This means, for instance, that where an award is brought to the judges' attention, it is only when it is against the spirit behind the rules in a judge's social system and not the rules of positive legislation, will the judge refuse enforcement based on public policy.

Public policy can be a 'double-edged sword' in international commercial arbitration, 'helpful as a tool, dangerous as a weapon' (Mistelis 2000). Judicial perceptions of public policy have changed from time to time. According to the rather pessimistic English view expressed in the case of *Richardson v Mellish* (1824)[2], 'public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail'.

Optimistic views emerged 150 years laterin the case of *Ender by Town Football Club Ltd v The Football Association Ltd* (1971)[3]: 'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice'.

Ordre public or public policy generally means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award, either domestic or foreign. In the case of *Egerton v Brownlow* (1853) 4 HLC1the House of Lords described public policy as 'that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good'.

It is observed that the term *ordre public*, in most places, has been defined narrowly and indicates the moral, social and economic values of the country where the arbitral award is set to be implemented. But it is expected that in international commercial arbitration the courts should broaden the concept of *ordre public* and consider the definition of truly international public policy which can be defined as follows:

> The concept of 'transnational public policy' or 'truly international public policy' is said to comprise fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilised nations' (Buchannan 1988).

5.1 Public Policy under International Conventions

Under the New York convention 1958, there are laid down grounds for the non-recognition and non-enforcement of arbitral awards and one of them is public policy. As it states:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

---

[2](1824) All ER 258, 266.

[3]Ch 591, 606-607.

This limits party autonomy as awards are reached based on the arbitration agreement made by the parties. However, it refers to 'the public policy of that country'. Thus, the drafters of the 1958 Convention did not seek to establish a common international standard of *ordre public*.

The 1927 Geneva Convention stated that an award would be enforceable unless 'contrary to the public policy or to the principles of the law of the country in which it is sought to be reliedupon' [Geneva Convention 1927 article 1(e)]. Article 2(h) of the 1979 Montevideo Convention goes further saying that the award be 'manifestly contrary to the principles and laws of the public policy [*orden publico*] of the exequatur state'.

Article 37 of the1983 Riyadh Convention[4] provides that enforcement may be refused if the award is 'contrary to the Moslem Shari'a, public policy or good morals' of the signatory state where enforcement is sought.' On the other hand, the 1987 Amman Convention refers simply to public policy.[5]

Thus, the New York and other enforcement conventions leave open the possibility for enforcement courts to apply public policy widely or narrowly, although the drafters of the New York Convention preferred a narrow application.

The 1965 Washington (ICSID) Convention does not expressly refer to public policy. Article 52 sets out various grounds for annulment, which includes: corruption on the part of a member of the tribunal; serious departure from a fundamental rule of procedure; and failure to state the reasons on which the award is based. The first two of these would generally fall within the scope of domestic and international public policy.

The 1985 UNCITRAL Model Law includes public policy as a ground for setting aside an award by the courts at the seat of the arbitration [article 34 paragraph 2 (b) (ii)] and as a ground for refusing recognition and enforcement of a foreign award [article 36 paragraph 1 (b)(ii)]. This poses to be a limit to party autonomy as parties' freedom is restricted.

5.2 State Legislations on Public Policy

The terminology used in referring to public policy in national legislation varies considerably, from expressly stipulating 'international public policy' through to referring to national norms.

The enforcement legislation in France (by title V of the New Code of Civil Procedure (1981), article 1498 and 1502), Portugal by the Code of Civil Procedure (1986), article 1096(f), Algeria by Decree No. 83.09 (1993), article 458 bis 23(h) and

---

[4] The 1983 Convention was intended to replace the 1952 Convention of Arab Leagues. The earlier Convention is still in force in many countries because they have not yet ratified the 1983 Convention.

[5] This Convention has not come into force, because it has not yet been ratified by the stipulated minimum requirement of seven states.

Lebanon by Decree-law No. 90 (1983), article 817(5)[6] make references to 'the principles of international public policy'. The legislation of a number of countries refers simply to 'public policy'.

Most countries, however, refer to public policy of 'Country X', which is the wording of the New York Convention and the UNCITRAL Model Law, or else they have simply adopted the New York Convention. Some countries refer to public policy (or public order) and good morals, for example: Japan by the Code of Civil Procedure (1996) article 118(3); Libya by the Code of Civil and Commercial Procedure, articles 407(4) and 408; Oman by the Arbitration Act 1997, article53; Qatar by the Code of Civil and Commercial Procedure, article 380(4); the United Arab Emirates by the Code of Civil Procedure (1992), article 235(vi) and Yemen by the Code of Civil Procedure, article 285 make reference to public order and the Islamic *Shari'a.*

A number of countries do not refer to public policy *per se*, and provide that enforcement of a foreign award should be refused if it goes against social and public interest. Australia (in 1989) and New Zealand (in 1996) have both enacted modified versions of the UNCITRAL Model Law. The Australian legislation refers simply to public policy (International Arbitration Act 1974 sec 8(7)(b)) whereas the New Zealand legislation refers to the 'public policy of New Zealand' [Arbitration Act 1996, article 36(1)(b)(ii)].

In the UK, The latter part of section 1(b) of the Arbitration Act 1996 shows that the freedom of party autonomy is limited to protect the public interest and one of the safeguards is public policy. The English courts are also allowed to refuse recognition and enforcement of an arbitral award where it is against public policy [s 103 (3)].

Bangladesh has taken the narrower view of *ordre public* and declares that an arbitral award may be refused if it is contrary to public policy of Bangladesh [Shalish Ain 2001, s 43(1)(b)(iii)].

5.3 Approaches of the Courts on Party Autonomy and the Effect of Public Policy

In the history of party autonomy, it was not readily accepted or approved by the courts because they saw arbitration which was based on party autonomy as a threat to their jurisdiction; and so closely regulated and supervised it. They also feared that party autonomy would restrict the powers of the judge to the arbitration agreement(Tamara 2007). Judges in England in the case of *Re Missouri Steamship Company* (1889)[7] favoured party autonomy, while other judges in other states like Switzerland, for example, limited the parties' freedom to choose the rules governing performance of the contract and they did not allow parties to choose the applicable law with regards to the validity of the contract (Ruhl 2007).

---

[6]It is notable that this was enacted at a time when Lebanon had not yet ratified the New York Convention. See El-Ahdab. (1996). The Lebanese Arbitration Act. *Journal of International Arbitration* 13: 39.

[7]42 Ch. D 321, 326.

The Swiss Federal Tribunal in *W v F and V* (1995)[8] favoured universal conception of public policy and declared that 'an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognised in all civilised countries'.

As noted above, the legislation of France and Portugal prescribes the application of international public policy. The courts of several other European civil law countries expressly apply international public policy, for example: Germany; Italy and Switzerland. Commentators from other countries state that their courts apply public policy restrictively, for example: Denmark; the Netherlands; Norway; Spain; and Sweden (Sheppard and Chance 2004).

In France, the Paris Court of Appeal in the case of *Fougerolle v Procofrance* (1990) Rev. Arb. 892has expressed a degree of scepticism in relation to applying such a concept[9] although, in later case of *European Gas Turbines SA v Westman International Ltd* (1994) Rev. Arb. 359 it has noted that certain activities, such as corruption, violate both French public policy and international business ethics.

When commenting on the French approach, it is noted that (Gaillard and Savage 1999):

> The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases.

Earlier in the US, the American courts regularly invalidated arbitration agreement, they saw it as an encroachment on the judicial province and hence contrary to public policy. In *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l' Industrie du Papier RAKTA and Bank of America* (1974),[10] the court held that 'enforcement of a foreign arbitral award may be denied on public policy grounds'. In the same year (1974), the Supreme Court of the USA in *Scherk v Alberto-Culver Co* (1974)[11] differentiated between international and domestic public policy and the freedom of parties to their choice of law was established.

Furthermore, the Supreme Court of the US in *Volt Information Science, Inc. v Board of Trustees of Leland Stanford Junior University* (1989)[12] confirming the party autonomy principle stated that 'the court's role is to ensure that private agreements to arbitrate are enforced according to their terms'.

The English courts have also endorsed a restrictive concept of public policy (Sheppard and Chance 2004). A classic case supporting party autonomy is *Vita Food Products Inc v Unus Shipping Co. Ltd* (1939)[13], where Lord Wright stated:

---

[8] Bull. ASA 217.

[9] See also *Republique de Cote d'Ivoire v Norbert Beyrard,* 12 Jan. 1993, (1993) Rev. Arb. 685.

[10] 508 F. 2d 969 (2nd Cir. 1974).

[11] 417 U.S. 506.

[12] 489 US 468,479.

[13] AC 277, 270.

> [T]he express choice of law by the parties would be regarded as conclusive, even if the law chosen by the parties is not connected to the parties or the transaction, ...and there is no basis for avoiding the choice of the grounds of public policy.

In *D.S.T. v Ras Al Khaimah National Oil Company* (1987)[14], the Court of Appeal stated that 'considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown ... that the enforcement of the award would be clearly injurious to the public good.'

In India, the Supreme Court, in *Renusagar Power Co. Ltd v General Electric Co.* (1994)[15] interpreted public policy more restrictively than it had done previously. The Court held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase 'public policy' must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice and morality.

In *Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte.ltd* (1996)[16],Justice Judith Prakash of Singapore, observed that, 'the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist'.

A recent decision of the Hong Kong Court of Final Appealin *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* (1999)[17] highlights the issues faced by many courts the world-over and gives a dynamic guidance. The Court addressed whether the applicable public policy was that of Hong Kong or some shared public policy, and to what extent a national court could or should look at the practice of other courts. The Court rejected the suggestion that public policy under the New York Convention meant some 'standard common to all civilised nations'. Nevertheless, it construed public policy narrowly. It stated that in order to refuse enforcement of a New York Convention award on public policy grounds, 'the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection' and the Court accepted that, in many instances, the relevant public policy of the forum would coincide with the public policy of other countries, and that it would be appropriate to examine how far the courts of other jurisdictions had been prepared to go in enforcing Convention awards made in circumstances that did not meet their domestic standards.

---

[14] 2 Lloyd's Rep. 246 at 254.

[15] AIR 1994 SC 860.

[16] 1 SLR 34 at 46.

[17] 2 HKC 205.

6. CONCLUSION

In recent times international commercial transactions have been increased immensely and international arbitration is becoming the most favoured mechanism for dispute resolution. This is primarily because of the party autonomy principle whereby parties can mould their arbitration procedure according to their wills. There are, however, limits to this principle and one of them is public policy. The discussion above reveals that public policy is narrowly interpreted in various legislations, treaties and courts' decisions in order to encourage party autonomy and most of the Conventions and national legislations consider public policy in the context of the county where award is executed, they do not take the international view of public policy. Uncertainty and inconsistencies concerning the interpretation and application of public policy by state courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement. Nonetheless, it is still regarded as a strong weapon to prevent international arbitration from being abused. Due to the courts' appreciation of party autonomy a high standard is set and must be provided before an arbitration agreement reached. An award can be refused only where the fundamental principle of the state's public policy is violated and this ground can limit party autonomy. Therefore, it is recommended that parties have to seek professional advice from experienced and knowledgeable people when they draft an arbitration agreement concerning any limitation to party autonomy particularly that of public policy.

References

Abdulhay, S. 2004. *Corruption in International Trade and Commercial Arbitration.* London: Kluwer Law International.

Buchannan, M.A. 1988. 'Public policy and International Commercial Arbitration', *American Business Law Journal* 26: 511-531.

Chatterjee, C. 2003. 'The Reality of Party Autonomy in International *Arbitration', Journal of International Arbitration* 20(6): 540. [Online]. Available at<http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlines/commercialArbitration2010/Chatterjee2003.pdf>, accessed 20 April 2011.

El-Ahdab. 1996. 'The Lebanese Arbitration Act', *Journal of International Arbitration* 13: 39.

Gaillard and Savage (ed.), 1999. *Fouchard, Gaillard and Goldman on International Commercial Arbitration.* London: Kluwer Law International.

Gary, B. Born. 2001. *International Commercial Arbitration: Commentary and Materials* London: Kluwer Law International.

Kazutake, Okuma. 2005. 'Arbitration and Party Autonomy'. *The Seinan Law Review* 38 (1): 1-31.

Lew, D.M., Mistelis, L.A. and Kroll, S.M. 2003. *Comparative International Commercial Arbitration* London: Kluwer Law International.

Matz. D.E., 1994. 'Mediator Pressure and Party Autonomy: Are they Consistent with Each other?' *Negotiation Journal* 10(4): 361. Summary by Tanya Glaser.

[Online]. Available at http://www.colorado.edu/conflict/transform/matz.htm, accessed 20 April 2011.

McClendon, J.S., and R.E.E. Goodman, (ed.), 1986. *International Commercial Arbitration in New York.* New York : World Arbitration Institute New York, US.

Mistelis, Loukas. 2000. 'Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards', *International Law Forum Du Droit International* 2: 248.

Mo, John. 2003 .*International Commercial Law.* London: LexisNexis Butterworths.

Moss, G.C. 2003. 'Lectures on International Commercial Law', *Publication Series of the Institute of Private Law, University of Oslo, Norway* No 162: 130. [Online].Available at<http://folk.uio.no/giudittm/ICL_Vol14_3%5B1%5D.pdf>, accessed 13 March 2011.

Redfern, Alan., Mertin. Hunter, and et al. 2004. *Law and Practice of International Commercial Arbitration.* London: Sweet and Maxwell.

Ruhl, G. 2007. 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' *CLPE Research Paper Series* 3(1): 5. [Online]. Available at<http://ssrn.com/abstract=921842>, accessed 25 April 2011.

Sheppard, Audley and Clifford. Chance 2004. 'Public Policy and the Enforcement of Arbitral Awards: Should There be a Global Standard?' *Transnational Dispute Management*, Volume I(1) – February. [Online], available at<http://transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm>, accessed 3 June 2011.

Tamara, Egbedi. 2006/2007. 'An Analysis of the Effect of Public Policy on Party Autonomy in International Arbitration', *CEPMLP Annual Review (CAR)* 8. [Online], available from <http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11_6_508934278.pdf>, accessed 12 March 2011.