Party autonomy and justice in international commercial arbitration

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Abstract

Purpose – Party autonomy is a core tenet of the arbitral process which bestows certain contractual freedoms upon the disputing parties. This paper aims to utilise both doctrinal analysis and theoretical conceptualisation to examine the principle of party autonomy in international commercial arbitration. It examines the extent to which certain exceptions to this principle, such as public policy and natural justice, where autonomy impedes on matters of justice and delocalisation, have restricted the principle in practice.

Design/methodology/approach – Party autonomy is a core tenet of the arbitral process, which bestows certain contractual freedoms upon the disputing parties. However, in spite of its appeal as an unfettered right, it has been challenged by an array of exceptions that have rendered it largely unqualified in international commercial arbitration. This paper utilises both doctrinal analysis and theoretical conceptualisation to examine the principle of party autonomy in international commercial arbitration. It examines the extent to which certain exceptions to this principle, such as public policy and natural justice, where autonomy impedes on matters of justice and delocalisation, have restricted the principle in practice. Furthermore, approaches to party autonomy in two distinct legal systems, the Common law system in England and *Sharia* law in Saudi Arabia, are examined to ascertain the extent to which party autonomy has been hindered by these exceptions.

Findings – Arbitration continued to grow throughout the forgone centuries, with key philosophers, such as Aristotle, advocating the advantages of arbitration over litigation. In addition, the emergence of party autonomy occurred in the sixteenth century, with Dumoulin proposing that the parties' will in contracts is sovereign. Thus, party autonomy began to develop into a significant aspect of contract law, which plays a pivotal role in arbitration. This is because the principle has its roots in the autonomous will of the parties to conduct the arbitral process as they wish. The paper explored the debate regarding party autonomy and its development into the contemporary world of arbitration. It examined its origins and how it has grown into the core fabric of arbitration today. Emphasis was provided in relation to the nature of the principle, which was highly relevant to the debate. This is because it is vital to appreciate issues such as freedom of contract to have a deeper insight into the principle and what it entails. The limitations of party autonomy were extensively examined, and the public policy exception was found to construe narrowly by a vast number of States. As a result, it was suggested that the exception should be more than merely a theoretical defence. Thus, it should be exercised where enforcement of an arbitral award would disregard unjust or improper results. Furthermore, the natural justice principle was observed as a double-edged sword that protected the parties in the arbitral process. However, it also hampered the effectiveness of party autonomy by impeding upon the parties' freedom to contract, which ultimately limited the principle. Thus, it is concluded that the principle of party autonomy is not absolute. While it would be desirable if it was, certain issues cannot be resolved so easily. Limitations to party autonomy have existed since its inception and are most likely to continue. Although this is not the ideal situation for proponents of autonomy, it nevertheless appears to be the case. However, it is proposed that limitations to party

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This work is dedicated to my mother Mrs Goldcoast Dickson, who took the pains to build the lifetime values in me, and His Excellency, Hon. Seriake Dickson for his fatherly guidance.

autonomy should be chipped away as much as possible. This would enable the autonomy of the parties to be upheld at a much higher rate.

Originality/value – This paper utilises both doctrinal analysis and theoretical conceptualisation to examine the principle of party autonomy in international commercial arbitration. Secondary sources were also used.

Keywords Arbitration, Autonomy, Judicial

Paper type Research paper

1. Introduction

In spite of the principle of party autonomy being expressed as an "unfettered" right, it is nevertheless subject to both judicial and academic criticism (Tamara, 2008). Party autonomy is the guiding principle that governs the arbitral process when faced with a commercial dispute. The principle grants contracting parties the power to establish how their dispute should be resolved and further endorses arbitration as an alternative and private means of dispute resolution (Blackaby *et al.*, 2015). A principle motive for selecting arbitration is the right to choose a substantive law to govern the contractual relationship (Carlquist, 2007). This right is conferred by party autonomy, which is viewed as the core fabric of the arbitral process. It allows parties to fashion their contractual relations based on their personal preferences (Dursun, 2012; Born and Beale, 2010; Abdulhay, 2004). In addition, the ability of the parties to exclude the jurisdiction of the courts and instead opt for arbitration portrays it as being embedded in the principle of freedom of contract (Zhang, 2008). Furthermore, States often recognise and enforce arbitral award, which again reaffirms the importance of party autonomy and the growing popularity of international arbitration[1].

However, in spite of the inherent benefits, there are many exceptions to party autonomy. One such exception is public policy, which constitutes a privilege afforded to each State to exercise complete and permanent sovereignty over itself in dispute settlement processes[2]. In addition, international arbitration engages a number of States, which indicates that the public policy of each State involved should be considered (Engle, 2002; Clarkson and Hill, 2011). However, there is no universal definition of what constitutes "public policy", largely because the approach to public policy varies between States. For instance, the UK takes a *pro-enforcement* stance[3]. This is evidenced in *R* v. *V*[4], where the applicant sought to challenge the enforcement of an arbitral award on the basis that it was contrary to English public policy. However, the court held that the award was not inconsistent with public policy; thus, the tribunal upheld the award (Merkin and Flannery, 2014; Hill and Chong, 2010). Notwithstanding the UK's pro-enforcement stance, in *Soleimany* v. *Soleimany*[5], the UK made an exception and refused to enforce an award on the basis of public policy. This was because the act of smuggling carpets was regarded as a criminal act in Iran. Thus, by declining to enforce the award, the court made a wise choice as otherwise a decision to the contrary could be deemed harmful to the values of the English legal system. Thus, in the event a contract infringes on the core values of a State, national courts can refuse to enforce the offending contract.

A further limitation to party autonomy is the principle of *natural justice*, which is composed of two limbs (Gaffney, 1998; Greenberg *et al.*, 2010). First, each party has the right to be given a fair and impartial hearing that is free from bias. Second, each party must have the opportunity to present its case before an arbitral tribunal. Thus, the principle of natural justice bestows a right upon parties to be dealt with equally. The two limbs of the natural justice principle are enshrined under Article 18 of UNCITRAL Model Law on Commercial Arbitration 1985 (with amendments as adopted in 2006): "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case" [United Nations Commission on

International Trade Law (UNCITRAL) (1985)]. As the two principles overlap considerably because of their unique characteristics, it is important that they are kept apart (Caron *et al.*, 2006). This is to ensure that each party is granted the ability to have a fair trial, and bias does not pervade the arbitral process. For instance, if one party is restricted from presenting its case but is nonetheless treated "equally" in all other respects, it will still constitute a breach of the natural justice principle. This is because the party would not have been accorded the opportunity to present its case as an opposing party.

A core principle of the arbitration is to ensure that parties are granted equal treatment, which in turn certifies that they are conferred with the power to agree on the execution of the arbitral process. However, Dursun states that provisions which conflict with equal treatment must not be utilised because they go against the principles of natural justice[6]. The International Chamber of Commerce Rules on Arbitration (ICC Rules) Article 15(2) states that an arbitral tribunal should operate "fairly and impartially"[7]. Academic commentators such as Derains and Schwartz are of the opinion that the reason why Article 15(2) makes use of the abovementioned terms rather than "equal treatment" is because the latter may create unfairness in some cases (Greenberg *et al.*, 2010, p. 229). Thus, it is more useful to treat the parties fairly and impartially, as suggested above, avoid any inequality.

Supplementary principles which underpin the arbitral process include *nemo judex in causa sua*, meaning that no man can be a judge in his own case, no party shall be condemned unheard and each party is entitled to know the reasons for their decisions (Ansari, 2014). Thus, in the event any principle of natural justice is breached, the arbitral award will be annulled. An award will also be annulled where there is evidence of arbitrators' bias. Critics argue that a party having boundless freedom is a source of "moral hazard", especially when selecting arbitrators (The Legal 500, 2014). They claim that parties, who are companies, may be influenced by their own commercial interests. As such, it is highly likely that the selected arbitrator will favour that party as opposed to solving the dispute impartially (The Legal 500, 2014). Ultimately, this impinges on the effectiveness of the arbitral process.

2. Theoretical underpinning

Party autonomy is a central pillar of arbitration because it grants the contracting parties the liberty to form their contractual relationship as they wish. However, this freedom is qualified. Autonomy inhabits a significant position in Western liberal philosophy. It forms an integral part of Western law and culture. The writings of Immanuel Kant (1724-1804) are pivotal to the concept of autonomy, which marked a fundamental step in the growth of freedom as the predominant value of Western culture (Taylor, 1984, p. 100). Scholars trace the foundations of the Kantian concept of autonomy to the contributions of Plato and Aristotle. The Platonic notion of the ability of theoretical spirit for logical self-rule (Treiger-Bar-Am, 2008) and Aristotle's recognition of choice and rational consideration as components of the benefits and the righteous life are elements mirrored in Kant's model (Bartlett and Collins, 2011; Reeve, 1992). Furthermore, the foundations of Kant's concept of autonomy are established in the literature of renaissance humanists and political scholars (Wood and Giovanni, 1996; Schneewind, 1998).

Advancing from the writings of his predecessors, Kant viewed autonomy as a moral concept. He was of the opinion that individuals possessed the capacity to reason; thus, on this basis, individuals have the competence to decide. Furthermore, Kant viewed autonomy as an amalgamation of freedom and reason. Thus, he observed that this enables individuals to impose reason liberally on themselves (Korsgaard, 2012). In the contemporary world, the impact of Kant's concept is widespread across a range of areas, such as philosophy and political notions. Consequently, the Kantian theory of autonomy is frequently quoted as the

foundation for a number of primary rights in English, US and European law (Haemmerli, 1999; Strauss, 1991).

Furthermore, autonomy is an asset of the "will" of adult human beings. This is to the extent that they are viewed as model ethical legislators, imposing common principles upon themselves rationally, unbound from moral determinism and not stimulated by aesthetic desires (Hill, 1991). Furthermore, Kant expressed that it is essential that free will is ascribed to each rational individual. Ultimately, free will is a universal ability and is unqualified. Autonomy, on the other hand, is an unqualified narrative of the circumstances of an individual's life. Therefore, it is universal and unrestricted (Korsgaard, 2012). Thus, autonomy denotes independence. Kantian autonomy depends on independence in making choices, specifically from heteronomous features (Warren and Brandeis, 1890). However, according to Kant, this remains the sole negative interpretation of autonomy. Thus, autonomy in the guise of positive freedom is the ability to self-legislate (Treiger-Bar-Am, 2008). Nevertheless, while Kant perceives autonomy as independence from all other factors excluding reason, his dependence on it is not reciprocated by the vast majority notions of autonomy today.

Treiger-Bar-Am states that the contemporary notion of autonomy ought not to be viewed as one of independence. Rather, the central feature of autonomy upon which independence depends on is comprehended as the capability for choice (Treiger-Bar-Am, 2008). Nevertheless, Kantian autonomy entails the promotion of others. Kant expressed this as a duty imposed upon every rational individual to not only prevent from "intentionally withdrawing anything from the happiness of others, but also to try [. . .] to further the ends of others" (Korsgaard, 2012, pp. 46, 96). Rawls (2005) writes that Kant's moral doctrine results in an ethic of common respect and confidence. As such, for Kant, autonomy is viewed as "do as we must" as opposed to "do as we like". However, his ethic does not comprise care in the respect of feelings. Rather, the Kantian duties of positive freedom are satisfied when action is taken not by inclination but as a result of moral obligation. In contradiction, the duty of respect is a moral sentiment, self-wrought by reason (Glasgow, 2007).

Furthermore, according to Kant, autonomy interpreted as positive freedom indicates an individual's capability to self-legislate. It is the capacity to enable an individual to view himself as the creator of a moral law, which restricts him. Thus, the principle of autonomy is seen as the definite imperative. Kant justifies that "will" is what leads to an individual to act. Consequently, free will bestows law unto itself, which must be universal (Treiger-Bar-Am, 2008, pp. 548, 565). However, Glendon and Post slate autonomy for being narcissistic and subsequently depict Kant in this manner (Post, 1986; Glendon, 2008). Nevertheless, Dworkin places Kant in the region of duty-based morality, even though Kantian thought is perceived to view the priority of the right above the good (Dworkin, 1977). As such, the criticisms directed towards Kantian autonomy are counteracted by the essential social obligations that positive freedom enforce. Nonetheless, Murdoch criticises Kant's dependence on rationality with regards to his moral structure (Murdoch, 2001). Kant is criticised for theorising that right action is deficient in moral worth, where it is stimulated by inclination or sentiment, as opposed to obligation stemming from reason (West, 1997). As a result, rationality is not merely individual, but universal. However, Beck is of the view that the paradox of individualism and universality is not detrimental to Kant's theory. Instead, it is the disposition of the human predicament (Beck, 1960).

Post-Kantian philosophers advanced the notion of autonomy. Hegel (1770-1831) utilised the Kantian concept of autonomy and similarly developed a notion of self-determination as freedom (Hegel, 2001; Reyburn, 2002). He adapted the notion of autonomy into a theory of self-development; therefore, for Hegel, "all necessarily strive to realise conceptions of freedom inherent in their self-consciousness, through self-development" (Taylor, 1984). Furthermore, expression is a vital component of Hegel's concept of self-development. Hegel took it upon

himself to amalgamate freedom and expression, fostering upon the expressivist concept devised in the writings of Herder (Taylor, 1984). However, Siep remarks that Hegel fails to comprehend autonomy in the strict Kantian respect. For Hegel, autonomy can be acknowledged only in and as a determinate manner of coexistence in a society (Williams, 1997). Therefore, Hegel views autonomy as inter-subjective and communal from the initiation.

Having provided a historical account of autonomy by tracing the work of Kant, it is relevant to determine the impact of autonomy where it encroaches on matters of justice. Thus, the debate will turn to critical legal thinkers who are of the view that party autonomy should not be the paramount factor when determining the conduct of the parties. Rather, they argue that justice should override everything, even the rules of contract law. This is especially in cases where autonomy results in injustice; which in turn endorses intervention by the courts.

A key critical legal thinker in this debate is Bentham. Regarded as the founding father of utilitarianism, he coined the phrase "the greatest amount of happiness for the greatest amount of people" (Davies, 1995). This is the case where once an individual has understood the outcomes of his actions, he should take it upon himself to make a decision that would fulfil the utilitarian principle aforementioned (Milo, 1974). Furthermore, Bentham enabled the principle to operate as the foundation of a cohesive and inclusive ethical model that theoretically applies to all aspects of life (Dardenne, 2010). Singer accounts that prior to this, there existed no comprehensive or absolute system of ethics unswervingly formed as a result of a solitary fundamental ethical principle (Singer, 1985). Thus, Bentham's objective of utilitarianism was to reform the conventional moral views, not to clarify or justify them.

Furthermore, Bentham's utilitarianism can be viewed as a more self-indulgent one, with its chief objective being to increase the happiness and pleasure of individuals. Singer, a more recent proponent of utilitarianism, adopted a different approach. He advocated preference utilitarianism, which is inclined towards maximising the fulfilment of personal preferences (Singer, 1993). This is evidenced in Singer's introduction of the uniform consideration of interests' precept, in contrast to Bentham's traditional utilitarian principle. Singer expressed that best outcomes under his thinking of utilitarianism is acknowledged as signifying what, on balance, advances the welfare of those affected. This is opposed to simply what enhances happiness and decreases pain (Singer, 1993).

In addition, supporting the constructivist approach, Bentham advocated legal positivism, which fails to protect autonomy or personal rights. Instead, it is of the view that the authority of the legislature should not fall short of anything less than absolute. Subsequently, restrictions to legislative authority should not exist (Davies, 1995). Also, with regards to Bentham's stance towards law, an analysis of his observations on morality provides relevant knowledge. Bentham had very little tolerance for the vast majority of moral dialogue. As a result, with typical acidity, Bentham writes "while Xenophon was writing History, and Euclid teaching Geometry, Socrates and Plato were talking nonsense, on pretence of teaching morality and wisdom" (Louden, 1996; Parekh, 1993). This approach widened to include debates on natural law and natural rights. Again, Bentham's view on natural rights can be perfectly summarised in his well-known sentence "natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts" (Bentham *et al.*, 2002). This view was espoused by Bentham as he was of the opinion that governments were ineffective in maintaining the criteria required by the principles of natural rights (Smith, 2012). Similarly, natural law was depicted in a comparable manner by Bentham in his evaluation of Blackstone; defining it as a "phantom" and a "formidable non-entity" (Bentham, 1996). Further, Bentham's issue with natural law was not based on natural lawyers attempting to construct legal theory of philosophical foundations; rather, it

was that the foundations natural lawyers postulated simply did not exist (Barzun and Priel, 2015).

However, these views do not encapsulate those of modern legal positivists. Undoubtedly, Bentham's observations of the law are a part of his wider utilitarian stance. Bentham took the view that laws were needed to obtain happiness and to prevent a degree of pain[8]. As such, Bentham, similar to natural lawyers, but contrasting from modern legal positivists, forms his views on law from a fundamental theoretical viewpoint. In addition, when Bentham endorsed the positivist concept that unjust law is law regardless, he did not express that this would mean that unjust law would remain valid. Rather, Bentham claimed that as a consequence of natural law being no less than a phrase, various individuals would always regard it as repugnant to a text or scripture (Bentham, 1996). Thus, Bentham observed that such a concept will result in the natural inclination to compel a man to rise up in opposition of any law that he disapproved of. As such, Bentham observes that the outcome would not be jurisprudential or theoretical misconception but a political and practical debacle (Barzun and Priel, 2015).

When applying Bentham's observations to arbitration and all that it entails, serious issues arise. How can the arbitral process achieve the ability of maximising everyone's happiness? Who must endorse this view? Is it the arbitrators? If so, how are they able to carry out what Bentham proposes? For instance, if the arbitrators adopted Bentham's views and attempted to maximise the happiness of each party, how will they measure this? While it would be highly appealing, at least to the disputing parties, it is very impractical. The law is constructed on purely justice. This is very different to taking into account the parties' happiness. Thus, it seems illogical and unfeasible to deliver what is advocated by Bentham.

Karl Marx is another critical legal thinker relevant to the autonomy debate. He proposed that bourgeois or civil rights are indicative of a profound social division (Marx, 1844). This exists between civil society, with its widespread material discrimination and narcissistic self-assertion, and the political state in which inhabitants are lawfully free and equal (Baynes, 2000). Additionally, the alleged rights of people are privileges individuals enjoy as long as they are observed in abstraction from their specific identities. Furthermore, for Marx, the expression of rights does not simply mirror the social division, but it also concurrently operates to endorse it. Thus, while the State obtains its legality exclusively as the guarantor of the rights of man, its existence and rights develop into a source of endorsement of civil society and narcissistic man (Tucker, 2001).

However, a critic of Marx argued that his criticism of bourgeois rights is hardly inherent. It advances, instead, on the roots of its specific normative beliefs (radical egalitarianism) and distinguishing "binarisms" (formal vs substantive freedom) (Baynes, 2000). These beliefs are subsequently placed in a teleological notion of history which, in contemporary times, is decreed to be principally suspect. Consequently, in a bid to evaluate the modern significance of Marx's critical analysis of rights, it is questionable what happens in the circumstances in which his critique is distanced from the liberal historiography in which it was initially placed (Elster, 1986).

Overall, a considerable number of commentators have debated autonomy and justice. While some argue that parties' autonomy should be the paramount factor, others such as Bentham disagree. Where matters of justice are hindered by autonomy and especially instances where autonomy results in injustice, court intervention is necessary. This appears to be a feasible outcome. However, it cannot be ignored that it ultimately limits party autonomy. The essence of arbitration is restricted in such matters. On that background, from the point of view of an advocate of autonomy, it will be regarded as an intrusion of the freedom of parties. On the other hand, advocates of justice will argue that court intervention is a necessary outcome of autonomy impeding on issues of justice. Therefore, as the law is

concerned with justice, should matters such as the autonomy of the parties being affected be a serious concern? To answer this question, it must be ascertained what party autonomy means in the arbitral process. As aforementioned, party autonomy is the core fabric of the arbitral process. Thus, where this is affected by matters of justice, then a fundamental aspect of arbitration is placed in danger.

3. Judicial interference and party autonomy

The principle of party autonomy is limited where it impedes on issues relating to justice. Some commentators are of the opinion that autonomy should override everything else, in that the parties should be granted power to act as they see fit, as ultimately, the contract belongs to them. However, critical legal thinkers such as Bentham (1748-1832) argued that under all circumstances, justice should triumph and supersede contractual jurisprudence (Davies, 1995). This is especially in situations where autonomy leads to injustice, thus justifying court intervention. Considered as the founding father of utilitarianism, Bentham claimed that once the consequences of one's actions are borne in mind, one should then make a decision which would lead to "the greatest amount of happiness for the greatest amount of people involved" (Milo, 1974). Bentham championed a philosophy of law, legal positivism, which does not safeguard autonomy or individual rights. Rather, it provides that the sovereignty of the legislature should be absolute, and consequently, limitations to legislative authority should not be allowed (Davies, 1995).

In addition, natural rights were considered "anarchical fallacies" in Bentham's eyes, because of his belief that governments were incompetent in upholding the benchmarks necessitated by the natural rights principles (Smith, 2012). As such, he refused to endorse human rights and instead remarked that the notion of justice was merely an inferior characteristic of utility (Hart, 1982). Thus, pronouncing natural rights as "nonsense on stilts", Bentham preferred to view the value of the law on its proficiency (Martin, 2014). However, it is questionable whether Bentham's view on maximising the happiness of everyone can be applied to arbitration. Should arbitrators maximise the benefit of each party and take into account all their needs? Ideally, this would be the best approach. However, the law is not structured to ensure that each individual's happiness is maximised. Rather, it is structured on the notion of justice, which has little to do with happiness. Therefore, it appears impossible for arbitrators to deliver what Bentham advocates.

Furthermore, the theory of delocalisation underpins the principle of party autonomy. As arbitration is developed into a dispute resolution mechanism and independent of the national legal systems, it possesses a number of new qualities. Primarily, it becomes "delocalised", indicating that it glides on the surface of legal systems of various States, without actually attaching itself to any or fulfilling the interests of international trade (Janićijević, 2005). Delocalisation acts as a shield, ensuring that the arbitral process is detached from the national legal system at the seat of arbitration (Pryles, 2008). Roy Goode claims that the hostility to the "excessive judicial interference with party autonomy" (Goode, 2001) resulted in the growth of delocalisation, which has its roots entrenched in party autonomy. However, while the concept of delocalisation is becoming progressively more popular in arbitration, the idea of having completely delocalised arbitration still remains a far-fetched reality (Park, 1983; Mustill, 1988; Mustill and Boyd, 1989). Critics such as Mann and Collins argue that in practical terms, opposition to delocalisation, to an extent, is a common phenomenon that is prevalent in the majority of legal systems (Mann, 1983; Collins, 1986). In addition, Redfern and Hunter argue that delocalisation fails to have any useful function. They propose that the arbitral process would be more effective if it was controlled

by the national legal system of the seat of arbitration and the laws of the State where the award is being enforced (Blackaby *et al.*, 2015).

As a result, this can be justified as a consequence of party autonomy affording various freedoms to the contracting parties. In this respect, it is vital to ensure that a balance is struck between contract law jurisprudence and party autonomy. Failing to do so and separating the arbitral process totally from national laws would be unreasonable. Furthermore, the autonomy conferred upon the parties is not absolute and is consequently regulated by compulsory rules and regulations of the State, along with its public policy (Tweeddale and Tweeddale, 2007). Several issues may crop up before, during or after the arbitral process, necessitating help from the national courts. These include circumstances where a party may bring court proceedings in spite of the agreement to arbitrate. In such situations, the court will be required to intervene to determine whether there is an arbitral agreement and if so, whether it is valid (Lew, 2009). In addition, where an arbitral clause creates uncertainty, the parties can ask the court for clarification, as portrayed in *Dalimpex Ltd and Janicki*[9]. The selected arbitral institution was no longer in operation at the time of the dispute. Clarification on whether the arbitral clause could also be interpreted as allowing the successor-body of the initial institute to hear the dispute was presented before the court. The court permitted the parties to begin arbitral proceedings.

Thus, the support offered by courts is important as they can make use of their exclusive powers, which are not afforded to the arbitral tribunals. Essentially, the courts can guarantee that a successful hearing takes place and that the awards are appropriately enforced, especially once the tribunal has ceased to exist after granting the award. Therefore, judicial intervention is frequently called for to save the arbitral process and to prevent any miscarriage of justice (Alvarez *et al.*, 2003). With this background, it may be deduced that while pure delocalisation does not exist, a more adulterated and practical form does. In this adulterated form, national laws and courts have given in to legislative and/or practitioner pressure to adopt a more relaxed approach to arbitrations taking place in their jurisdiction (Greenberg *et al.*, 2010, p. 79). However, this outcome has a detrimental impact on the key principles of arbitration, in particular, party autonomy. Can the principle survive in the face of judicial interference?

4. Limitations to party autonomy

After a party is granted an arbitral award by a tribunal, the successful party must then overcome another hurdle to enforce the award. Only national courts of a State are able to enforce arbitral awards. Under Article III NYC, each contracting State is obliged to recognise arbitral awards as binding. The State must also enforce the award in accordance with their rules of procedure[10]. Thus, the enforcing party is obliged to request the courts in the place where the losing party has its assets to grant an order to seize their property to the same value of the award (Tweeddale and Tweeddale, 2007).

Furthermore, the party seeking to enforce the award must, under Article IV NYC, provide the court with the arbitral award and arbitration agreement[11]. However, the award can be refused recognition and enforcement. This is conditional to the party against whom enforcement is sought being able to present evidence on one of the exhaustive grounds listed under Article V(1) NYC[12]. In addition, the court may reject enforcement on the grounds of arbitrability of the award, as provided under Article V(2)(a) NYC[13].

The award can also be refused recognition on the ground of public policy, under Article V(2)(b) NYC[14] (Van den Berg, 2014). The disposition of public policy is not a novelty. In *Richardson* v. *Mellish*, it was expressed that "public policy [. . .] is a very unruly horse, and [. . .] once you get astride it you never know where it will carry you [. . .] It is never argued at

all but when other points fail"[15]. Thus, public policy is a very important weapon that enables national courts to decline enforcement of an arbitral award, which is otherwise valid (Sattar, 2011). In addition, public policy has also been criticised as "one of the most elusive and divergent notions in the world of juridical science" (De Enterria, 1990). Public policy is a national phenomenon which is made up of a substantive and a procedural aspect. The precise substance of the concept differs according to the individual legal, social and moral customs of a specific place at a certain time (Perloff, 1992).

Furthermore, contracting parties are provided various freedoms when selecting arbitration. Many States accommodate the parties' wishes to arbitrate by bestowing upon them the freedom to create a remedial procedure customised to their requirements. Nevertheless, the State supporting the arbitration may have the desire to maintain the dignity of its legal order or to safeguard the privileges of non-parties (Park, 1983). Therefore, party autonomy is continuously subjected to matters of public policy articulated by the heteronomous stipulations of certain arbitration law or *lexarbitri* (Perloff, 1992).

However, the inclusion of an independent public policy exception is unsettling, as the six exceptions provided under Article V are founded on public policy notions. Thus, if the public policy exception simply repeats the previous defences, then it is an unnecessary provision. Consequently, a number of scholars have expressed that the objective of this defence is to operate as a residual escape clause in circumstances where other defences are not applicable (de Enterria, 1990, pp. 289-416). In addition, such a catch-all stipulation may have led to boundless judicial intervention, weakening the primary objective of the Convention and further decreasing the effect of domestic legislation.

Nevertheless, the exception has been interpreted rather narrowly. The decisional law of participating States indicates that domestic courts almost consistently construe the public policy exception and the other six defences narrowly. This is in reference to the fundamental purpose of the Convention (Carbonneau, 1989). Nonetheless, the breach of rules of public policy is a ground for setting aside awards in each State. In spite of this, a review of case law looking at enforcement of arbitral awards found that the public policy exception seldom leads to a rejection of enforcement (van den Berg, 1999). This is because a large number of States treat domestic and international public policy differently[16]. Thus, only in situations where courts make this distinction will they decline enforcement. Rationale behind this is that conflict would otherwise be created. This would be between the desire to enforce international awards and the need to not provide court powers to the enforcement of awards which breach domestic public policy (Tweeddale and Tweeddale, 2007, p. 425).

Furthermore, there must be something gravely incorrect with the arbitral procedure or the actual award for national courts to decline enforcement based on public policy reasons. For example, in *German Seller* v. *German Buyer*[17], the arbitral award was declined enforcement by the Munich court of First Instance because the tribunal had failed to enquire into its own jurisdiction before settling the dispute. One of the parties claimed that as the limitation period ceased to exist, the tribunal no longer possessed jurisdiction to handle the dispute. Therefore, the court found that this amounted to a "serious procedural violation" and the award was declined enforcement based on the public policy exception (Tweeddale and Tweeddale, 2007, p. 425).

However, as there is no universally accepted definition of public policy, it creates the danger of a widening net for declining enforcement of an award. Nonetheless, many national courts have considered the public policy defence narrowly. Ultimately, this is in accordance with the Convention's pro-enforcement objective (Moses, 2012). In addition, a recognised explanation of the concept was provided in *Parsons & Whittemore Overseas Co*[18]. The US Second Circuit Court of Appeals, in confirming the enforcement of an arbitral award in opposition of an American business, declared that:

> [. . .] the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice[18].

While the vast majority of States interpret the public policy defence in a restricted manner, there remains scope for it to be utilised parochially to safeguard domestic political interests. Where a State adopts this approach, it challenges the usefulness of the Convention. For instance, the Turkish Supreme Court declined to enforce an ICC award in 1995. The tribunal in Zurich had utilised Turkish substantive law and the procedural law of the region of Zurich (Kerr, 1997). It was thus argued by the Turkish Court that as the arbitrator failed to apply both Turkish substantive and procedural law, Turkish public policy had been breached. However, in addition to this being a flawed argument, there was no material discrepancy between the procedural law of Turkey and the procedural law of Zurich. Nevertheless, the Turkish court refused enforcement on a matter of law on the ground of public policy. However, this seems to be an adverse exercise of the public policy defence to arrive at a conclusion more preferred by the Turkish court (Moses, 2012). Nonetheless, numerous national courts have construed Article V(2)(b) as permitting judicial intervention only where matters of international public policy are at risk (van den Berg, 1981). Thus, the Convention symbolises the triumph of consistency and party autonomy above parochialism and diversity (Perloff, 1992).

Having provided an examination of the public policy defence and the pro-enforcement stance of a wide variety of States, it is now relevant to turn attention to how the defence limits party autonomy. The next part will explore the position certain States take towards utilising the exception. This is highly relevant to the debate as it will provide a view of how the approach of certain States impacts party autonomy and whether the exception truly limits the principle in practice.

5. The public policy exception in England

English courts have portrayed a reluctant approach towards declining enforcement of an arbitral award on the ground that it is in conflict with public policy (Blackaby *et al.*, 2015). Therefore, the courts have impliedly accepted the principle of international public policy by providing a narrow construal of the exception (Ozumba, 2009). This is illustrated in a number of cases. For instance, Colman J, in the English Commercial Court in *Westacre Investments*[19], maintained that a foreign arbitral award, which was legal under the law of the contract and under the *lexarbitri* but illegal in the State of enforcement, could nevertheless still be enforced (Tweeddale and Tweeddale, 2007, p. 426). The court found that based on the facts of the case, the public policy of dissuading international commercial corruption was overshadowed by the public policy of maintaining international arbitral awards. Subsequently, Colman J declared that "it is entirely inappropriate in the context of the [. . .] Convention that the enforcement Court should be invited to retry that very issue in the context of a public policy submission".[19] The Court of Appeal agreed with the analysis of Colman J where Waller LJ, referring to *Lemenda Trading Co Ltd*[20], affirmed that it was problematic to view why acts beyond the remit of universally denounced activities should attract the interest of English public policy. This was especially in circumstances where the contract was not executed within the English court's jurisdiction.

Furthermore, where the courts are presented with foreign arbitral awards, they adopt a different approach than when presented with domestic awards. As such, a domestic award that is established on an illegal act will be refused enforcement by the English courts, as it is in conflict with public policy[21]. However, with foreign arbitral awards, the courts take into account the disposition of the illegality or violation of public policy. Under certain circumstances, the courts will also look at how the illegality or violation impacts the curial

law, the law of the place of execution or the proper law of the contract. Consequently, the English courts have dealt with the public policy issue according to the particular facts of each case; thus, they have not always been consistent in their approach[22]. For instance, the court in *Soleimany* v. *Soleimany*[5] took a rare step and declined an arbitral award. To understand why it is imperative to understand the facts of the case, a father and son contracted to illegally export Persian rugs from Iran. Jewish Law was selected as the applicable law and the arbitration commenced in England. The victorious party sought to enforce the arbitral award through the English courts. However, English law does not allow a contract which has its foundations rooted in an illegal act. Jewish law, on the other hand, acknowledges such agreements and does not enable a party to avoid accountability merely because the main agreement is corrupt or unlawful (Cohen, 1991).

Nevertheless, it was held that English courts would refuse enforcement of a foreign arbitral award validly granted in circumstances where the contract was unlawful, both under English law and the law of the State of execution. The fact that the contract was valid and legal under the applicable law was beside the point. Subsequently, the arbitral tribunal granted an award that was in actual fact unenforceable in the State where enforcement was most possibly to be sought[23]. The High Court reviewed the circumstances in which public policy factors annulling the main agreement could also impeach the arbitration clause *Beijing Jianlong*[24]. Furthermore, the issues in *Beijing Jianlong* also touched on the application of the doctrine of separability, which provides that the arbitral clause should be regarded as completely independent from the main contract[25]. The matter before the courts was to consider whether the arbitral clauses could be regarded as separate of the unlawful contract. It was also considered whether applying the arbitral clauses would endorse the continuance or concealment of unlawful behaviour (Carter and Kennedy, 2013). The claimants presented their case on the basis of the public policy rule expressed in *Foster* v. *Driscoll*[26]. It was held that a contract could not be enforced under English law where the common objective of the parties was to assume activities that were unlawful under the domestic laws of the foreign State where the acts were occurring.

The claimants in *Beijing Jianlong* argued that as the arbitral clauses were an essential feature of the transaction, to grant and conceal illegal guarantees, this meant that they were also contaminated by the unlawful activities. They maintained that on this ground, the arbitral clause should be regarded as unenforceable, in the same way as the various supplementary contracts in *Foster*. However, the defendants disputed and stated that the separability doctrine, as confirmed in *Harbour Assurance*, should be used[27]. Thus, the question for the court was whether the public policy rule, annulling the main agreement, also led to the annulment of the arbitral clause.

The English court, unsurprisingly, took a pro-arbitration stance. It was found that by applying the doctrine of separability, the arbitral clause was independent of the main agreement. Thus, the illegality of the contract did not impinge on the arbitral clause. This shows that English courts are willing to enforce arbitral clauses in spite of a violation of public policy, resulting in the invalidity of the main agreement (Carter and Kennedy, 2013).

Since the mid-twentieth century, the approach of England towards the public policy exception has remained almost the same. The pro-enforcement stance English law adopts portrays how serious a violation of public policy must be to utilise the exception. This perhaps indicates that as the exception is very rarely used, its impact upon party autonomy is minimal, thus indicating that the public policy defence is not a major limitation to party autonomy as first perceived. While it cannot be said that this is definitely the way forward, the pro-enforcement of arbitral awards nevertheless upholds party autonomy. This is welcomed as it enables the core fabric of arbitration to be respected to an extent.

However, not all States adopt a pro-enforcement stance. This then leads to the next part of the debate, which is to examine States that have used the public policy exception frequently. Thus, the approach of Saudi Arabia will be examined as it enables a detailed account of how the exception can limit party autonomy. This is relevant to the debate, as it provides an insight into why Saudi Arabia makes frequent use of the exception, as opposed to the UK.

5.1. The public policy exception in Saudi Arabia

Saudi Arabia became a signatory to the New York Convention in 1994. It has frequently been considered as espousing a rather hostile approach towards the recognition and enforcement of foreign arbitral awards. As a result, many arbitral awards in the 1950s were refused, as they were considered to be disrespectful to Islamic custom and laws (Roy, 1994). Furthermore, because of the absence of a codified civil and commercial law code in Saudi Arabia, it remains problematic to reach an unambiguous definition of public policy. Therefore, awards may be subject to certain bias as there appears to be no apparent explanation or test to determine the public policy exception, which in turn can be extensively abused (Saleem, 2012).

In addition, Beaumont and Al-Hashim (2004) expressed that for an arbitral award to be enforced in Saudi Arabia, it must fulfil two criteria. First, the applicant must demonstrate that the foreign jurisdiction also enforces awards granted by Saudi courts. Second, the applicant must demonstrate that the provisions of the award are not in conflict with Islamic law. However, it is imperative to note that awards frequently fail to satisfy the second requirement. This is because many commercial procedures in both civil and common law States comprise insurance and interest, which are prohibited under Islamic law (Ghazwi, 2014). For example, in *Ninivo Company* v. *The Redec Company*[28], the Saudi court refused to enforce a UK award in spite of the applicant supplying the Saudi court with an official letter from the UK authorities declaring that the UK courts would implement foreign awards. The decision to refuse enforcement was on the basis that the letter fell short of certifying reciprocity. However, it is vital to bear in mind that the Grievances Board of Saudi Arabia considers matters of reciprocity on each case separately without precedence[28]. Furthermore, the approach adopted by Saudi Arabia illustrates how the public policy exception can be used to limit party autonomy. While it is true that many States take a pro-enforcement stance, others do not. This means that the public policy exception is utilised regularly but inconsistently.

In spite of the sporadic instances of misuse of the public policy defence, in a large number of States, national courts have been unwilling to decline enforcement of arbitral awards. As a matter of fact, awards are infrequently declined enforcement on the basis of public policy, so much that critics have advocated to the courts to reassess the application of the defence. Bouzari recommended that the public policy defence should be more than simply a theoretical exception. On that background, the defence should be utilised more flexibly as a ground for declining enforcement when enforcing that an arbitral award would condone unfair or improper outcomes (Bouzari, 1995). Thus, the future of the public policy exception needs to be revised for it to retain and cement its usefulness around the world.

After providing an examination of the public policy exception, it is clear that a large number of States have adopted a pro-enforcement position. While there still remain a few States, such as Saudi Arabia, that adopt a different approach for the reasons explained above, it is apparent that public policy does not have a major impact on party autonomy. This is because of the very narrow interpretation that States have espoused. It is now vital to explore the next limitation of party autonomy, the natural justice principle.

5.2. The natural justice principle

Throughout the paper, international commercial arbitration has been portrayed as a popular means of alternative dispute resolution. However, it has also been demonstrated that national courts are often appointed to reconsider arbitral awards, especially in the context of recognition and enforcement. Thus, a fundamental purpose of the review by courts is to certify that the arbitral process is consistent with the primary principles of natural justice. These principles are rooted in the general principle of law, customary to civilised States (Brady, 2013). Their application is also authorised by the UNCITRAL Model Law and the New York Convention[29].

The notion of natural justice originated from the custom of English common law and is encapsulated in the following Latin maxims: *nemojudex in causasua* and *audialterampartem*. These limbs of the natural justice principle have been explained by Marks J in *Gas and Fuel Corporations of Victoria*[30]. "The first is that an adjudicator must be [. . .] unbiased [. . .] The second [. . .] is that the parties must be given adequate notice to be heard"[31]. Marks J further expressed that the two limbs may have sub-branches. Consequently, an amplification of the first is that it is fundamental that justice must not only be done but must be seen to be done. In addition, sub-branches of the second limb relate to the fact that each disputing party must be provided with a fair hearing and a fair opportunity to present their case[32]. In addition, Fisher J in *MethanexMotunui Ltd* v. *Spellman* opined that where the contracting parties select arbitration but then in the same breath express they do not wish to implement natural justice, this would create inconsistency[33]. Consequently, arbitration is a procedure by which a dispute is settled in agreement with enforceable principles of natural justice (Brady, 2013).

However, in spite of arbitration being a private mechanism and, to a great extent, being a creature of contract, the legality of its results continues to be subject to basic concepts of procedural fairness. Therefore, a policy conflict between the supposed autonomy of the arbitral organisation and the need to certify by judicial supervision conformity with the primary obligations of due process exists. Resolution of this conflict requires deliberation on the theoretical foundations for arbitration and natural justice (Brady, 2013). Furthermore, according to Blackaby and Partasides, if the main feature of international commercial arbitration is the application of party autonomy, then a close second is equality of treatment (Blackaby *et al.*, 2015, p. 366). However, while the natural justice principle and what it entails are fundamental prerequisites of the various arbitral institutions, they, nevertheless, function as a restriction on party autonomy. In addition, parties cannot deviate from the natural justice principle by drafting their contract in such a manner as to reject it (Dogimont, 2010). For instance, if the parties have stipulated in the agreement that only one party should have the opportunity to be heard by the arbitral tribunal, this may be regarded as void by an enforcement court (Blackaby *et al.*, 2015, p. 366).

However, this is in contradiction to the parties' wishes, exercised by virtue of party autonomy. It acts as a limitation on party autonomy and impinges on its effectiveness. This issue was acknowledged by the UNCITRAL Secretariat in its report culminating in the Model Law:

> [. . .] [i]t will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto[34].

It also appears that the construal of the natural justice principle is very narrow, as expressed by the House of Lords in *London Borough of Hounslow*:[35] "the principles of natural justice are of wide application and great importance, but they must be confined within proper limits and not allowed to run wild"[36]. Essentially, this means that natural justice is only relevant in a

restricted number of circumstances. Nevertheless, the natural justice principle is one of the core elements of the arbitral process, and thus, any violation will result in a void arbitral award.

However, where national courts are sought to review violations of natural justice, they should reconsider the merits of the challenge. For instance, in *Kyocera Corp*[37]. the Federal Court of Appeals for the Ninth Circuit expressed that the basis for disputing an arbitral award under the US Federal Arbitration Act[38] was "designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures"[37]. In this respect, while the contracting parties can consent to rule out the right to a public hearing, they cannot rule out their right to a fair hearing. This was considered in *Jakob Boss Sohne KG*[39], where the former European Commission of Human Rights reviewed the conditions for a fair hearing. It was found that as the parties had selected arbitration, they had subsequently relinquished their privilege to have their disagreement settled in the civil courts and thus publicly. However, the Commission further expressed that this did not result in the duties of a State under the European Convention of Human Rights being absolutely excluded (Council of Europe, 2015). Thus, Germany was required to carry out its obligations of recognising and enforcing the award. As such, the national courts retain a degree of control and security in relation to the equality and correctness of the arbitral procedure. An award that disregards a party's right to a fair hearing is unlikely to be enforced by a national court and consequently would be subject to challenge (Tweeddale and Tweeddale, 2007, p. 386).

The majority of contemporary legislation and rules necessitate that the arbitral tribunal should conduct its proceedings fairly and impartially[40] or ensure that the parties are treated with equality[41]. These requirements are a mirror image of what is regarded as "natural justice" in England and "due process" in the USA. In *Petroships Pte Ltd of Singapore*[42], the English High Court reviewed whether a technical violation of the due process requirements is an adequate ground for refusing an award. The court expressed that Section 68 of the Arbitration Act 1996[43] mirrored the globally recognised view that the court should possess the ability to amend grave failures to abide by the due process of the arbitral procedure. However, the court further stated that a technical violation of the due process requirement was not necessary. Thus, the presence of substantial injustice must exist before the court is able to take action (Tweeddale and Tweeddale, 2007, p. 386).

Furthermore, Sun argues that it is far easier to understand the notion of natural justice than it is to apply it (Sun, 2011). For example, in *Koh Bros Building*[44], the applicant sought an interim award and the respondent opposed it on the basis of *res judicata*. At the initial hearing, the respondent raised additional objections which the arbitrator consented to, without granting the applicant an opportunity to respond. The court held that the arbitrator had violated the principle of natural justice by failing to provide the applicant an opportunity to present its case (Shahdadpuri, 2014). Similarly, in *Raoul Duval*[45], the applicant claimed that the respondent had engaged the chairman of the tribunal in employment once the arbitral award had been granted. The Courd'appel of Paris looked into the matter and found that the arbitrator was not absolutely independent. As a result, it rejected the award on the basis of the unlawful formation of the tribunal. However, while it has been established that a party has a right to a fair hearing and to be treated without any bias, it is of great importance to consider how the natural justice principle impacts party autonomy.

As aforementioned, the principle impinges upon party autonomy and limits its application. This is evidenced in cases where the parties cannot opt out of the limbs that make up natural justice. For instance, in *Jakob Boss Sohne KG*, it was held that parties were not permitted to exclude their right to a fair hearing but were able to eliminate their right to a public hearing. Ultimately, this raises certain issues. The core fabric of arbitration is to

grant parties certain freedoms that arise from party autonomy; however, when this freedom is being limited by declining parties. This means the freedom is not absolute.

On that background, the natural justice principle is a double-edged sword. On the one hand, it serves to safeguard parties by ensuring that they are treated without any bias and have the opportunity to present their case (Greenberg *et al.*, 2011). On the other hand, it limits the parties' freedom by enabling the aforementioned limbs of the principle to be central features of the arbitral process. This creates certain tension.

Having provided an examination of the natural justice principle and what it constitutes, it can be concluded that in spite of its significance, it limits party autonomy. Thus, for this reason, its effectiveness is hampered. The autonomy of the parties remains an integral feature of arbitration. In fact, it is the express choice of the parties to select arbitration over litigation. However, while the parties have this freedom, it is contested by many critics who argue that autonomy should not override all else. Rather, justice should prevail, especially in cases where autonomy results in injustice.

6. Conclusion

Arbitration continued to grow throughout the forgone centuries, with key philosophers, such as Aristotle, advocating the advantages of arbitration over litigation. In addition, the emergence of party autonomy occurred in the sixteenth century, with Dumoulin proposing that the parties' will in contracts is sovereign. Thus, party autonomy began to develop into a significant aspect of contract law, which plays a pivotal role in arbitration. This is because of the principle that has its roots in the autonomous will of the parties to conduct the arbitral process as they wish. The paper explored the debate regarding party autonomy and its development into the contemporary world of arbitration. It examined its origins and how it has grown into the core fabric of arbitration today. Emphasis was provided in relation to the nature of the principle, which was highly relevant to the debate. This is because it is vital to appreciate issues such as freedom of contract to have a deeper insight into the principle and what it entails. The limitations of party autonomy were extensively examined, and I found that the public policy exception was construed narrowly by a vast number of States. As a result, it was suggested that the exception should be more than merely a theoretical defence. Thus, it should be exercised where enforcement of an arbitral award would disregard unjust or improper results. Furthermore, the natural justice principle was observed as a double-edged sword, which protected the parties in the arbitral process. However, it also hampered the effectiveness of party autonomy by impeding upon the parties' freedom to contract, which ultimately limited the principle. Thus, it is concluded that the principle of party autonomy is not absolute. While it would be desirable if it was, certain issues cannot be resolved so easily. Limitations to party autonomy have existed since its inception and are most likely to continue. Although this is not the ideal situation for proponents of autonomy, it nevertheless appears to be the case. However, it is proposed that limitations to party autonomy should be chipped away as much as possible. This would enable the autonomy of the parties to be upheld at a much higher rate.

Notes

1. The New York Convention – at present – has 156 member states, with Andorra being the last state party acceding to the treaty in September 2015 (Born, 2014). For updates on the status of the New York Convention, see also: www.newyorkconvention.org/ (accessed 13 November 2015).
2. Dursun (2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Article V (2) (b) (New York Convention).

3. Tweeddale (2000); *Westacre Investments Inc* v. *Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401; [2000] QB 288; Harris (2007).
4. *R* v. *V* [2009] 1 Llyod's Rep 97.
5. *Soleimany* v. *Soleimany* [1998] 3 WLR 811.
6. Dursun (2012); New York Convention, Article V (1) (b); Arbitration Act 1996, s 103 (2)(c) and UNCITRAL Model Law, Art 18.
7. International Chamber of Commerce (ICC) Rules of Arbitration, Article 15(2).
8. Bentham (1996), "The business of government is to promote the happiness of the society, by punishing and rewarding". See also Dinwiddy (1992).
9. *Dalimpex Ltd v Janicki* [2003] 64 O.R (3d) 737 (Ont. CA).
10. New York Convention 1958, Article 3.
11. New York Convention 1958, Article 4.
12. Article V (1) New York Convention 1958. The grounds are found in Article V (1) (a) incapacity and invalidity (b) violation of due process (c) scope of jurisdiction (d) irregularity in the composition or procedure and (e) award set aside, suspended, or not binding.
13. Article V (2) (a) New York Convention 1958.
14. Article V (2) (b) New York Convention 1958.
15. *Richardson* v. *Mellish* [1824] All ER Rep 258, 266.
16. *Kersa Holding Co* v. *Infancourtage* (1996) 21 Yearbook of Commercial Arbitration, 617-626, CA.
17. *German Seller* v. *German Buyer* [1980] Yearbook of Commercial Arbitration 260.
18. *Parsons & Whittemore Overseas Co., Inc.* v. *Societe Generale de l'Industrie du Papier* 508 F 2d 969 (2d Cir 1974).
19. *Westacre Investments* v. *Jugoimport-SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111.
20. *Lemenda Trading Co. Ltd.* v. *African Middle East Petroleum Co* [1998] 1 QB 448.
21. *David Taylor & Sons Ltd.* V. *Barnet Trading Co* [1953] 1 WLR 562.
22. Tweeddale (2000, p. 163). See the approach taken in *Soleimany* v. *Soleimany* [1998] 3 WLR 811; *Westacre Investments* v. *Jugoimport-SDPR Holding Co Ltd* [1998] 2 Lloyd's Rep 111 and *Omnium deTraitment et de Valorisation SA* v. *Himarton Ltd* [1999] 2 All ER (Comm) 146.
23. Tweeddale and Tweeddale (2007, p. 426). Nevertheless, the narrow construal of the exception was once again reiterated in *Protech Projects Construction (Pty) Ltd.* v. *Al- Kharafi& Sons* [2005] EWHC Arb LR 671. Langley J emphasised that s 68(2)(g) of the Arbitration Act 199 could only be utilised in severe circumstances. Furthermore, he expressed that public policy under English law could only be evoked in cases where the suspected conduct is comparable to an act that is "unconscionable or reprehensible" and additionally where the applicant experienced "substantial injustice."
24. *Beijing Jianlong Heavy Industry Group* v. *Golden Ocean Griup Ltd &Ors* [2013] EWHC 1063.
25. *Harbour Assurance* v. *Kansa General International Insurance* [1993] 1 Lloyd's Rep 455. The doctrine of separability is also included under s7 Arbitration Act 1996: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." See also Article 16(1) UNCITRAL

Model Law and P Landolt, "The Inconvenience of Principle: Separability and Kompetenz-Kompetenz" [2013] *Journal of International Arbitration* 513.

26. *Foster* v. *Driscoll* [1929] I KB470.
27. *Harbour Assurance* v. *Kansa General International Insurance* [1993] 1 Lloyd's Rep 455.
28. *Ninivo Company* v. *The Redec Company* (Case No 185/2/Q/149).
29. UNCITRAL Model Law Article 18 and New York Convention Article V(1)(b): "Recognition and enforcement of the award may be refused [. . .] if [. . .] the party against whom the award was made was [. . .] unable to present his case".
30. *Gas & Fuel Corporations of Victoria* v. *Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385.
31. *Marks J. in Gas & Fuel Corporations of Victoria* v. *Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385 at 396.
32. *Marks J in Gas & Fuel Corporations of Victoria* v. *Wood Hall Ltd & Leornard Pipeline Contractors Ltd* [1978] VR 385 at 396; *SohBeng Tee & Co Pte Ltd.* v. *Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86.
33. *Methanex Motunui Ltd* v. *Spellman* [2004] NZLR 95 (HC) at 50.
34. UN Doc A/CN.9/207, para 21.
35. *Hounslow* v. *Twickenlaw Garden Developments Ltd* [1971] 3 All ER 326.
36. *Hounlow* v. *Twickenlaw Garden Developments Ltd* [1971] 3 All ER 326, The House of Lords, 346-7.
37. *Kyocera Corp. v. Prudential-Bache Trade Services Inc* 341 F 3d 987, 997 (9th Cir 2003).
38. United States Federal Arbitration Act 1925.
39. *Jakob Boss Sohne KG* v. *Federal Republic of Germany*, Application No 18479/91.
40. English Arbitration Act 1996, s 33(1) (a).
41. UNCITRAL Model Law, Articles 34 and 18. In *MethanexMotunui Ltd* v. *Spellman*, case no CL3/03, the High Court of New Zealand warned against ignoring the statutory safeguards that were encapsulated in the UNCITRAL Model Law. It was found that when the contracting parties had entered into a voluntary arbitration agreement, they had accepted all of the compulsory stipulations of UNCITRAL Model Law, as contained into New Zealand law, including Article 34. As such, the court understood that any contractual exclusion of a right to reconsider an arbitrator's award for violation of natural justice would be futile.
42. *Petroships Pte Ltd. of Singapore* v. *Petec Trading and Investment Corp of Vietnam* [2001] 2 Llyod's Rep 348.
43. English Arbitration Act 1996, s 68.
44. *Koh Bros Building and Civil Engineering Contractor Pte Ltd.* v. *Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063.
45. *Raoul Duval* v. *MerkuriaSucden* [1996] Rev Arb 411.

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