

**PUBLIC POLICY IN THE JUDICIAL ENFORCEMENT OF  
ARBITRAL AWARDS:  
LESSONS FOR AND FROM AUSTRALIA**

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A thesis submitted to Bond University in fulfillment of the requirements  
for the Degree of Doctor of Legal Science (SJD).

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## **CERTIFICATE**

This thesis is submitted to Bond University in fulfillment of the requirements for the Degree of Doctor of Legal Science (SJD).

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at Bond University or any other institution, except where due acknowledgement is made.

Winnie (Jo-Mei) Ma

14 December 2005

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Winnie (Jo-Mei) Ma

# CONTENTS

<b>Thesis Abstract</b> .....	9
<b>Table of Legislative Materials</b> .....	11
<b>Table of Cases</b> .....	12
<b>Abbreviations</b> .....	21
<b>INTRODUCTION</b> .....	23
Thesis statement .....	27
Terminology .....	29
1    International commercial arbitration & foreign arbitral awards.....	29
2    State, nation, country, place & law area .....	31
3    Recognition, enforcement, annulment.....	31
(a)    Judicial proceedings & decisions .....	31
(b)    Enforcement vs Supervisory State, court & jurisdiction .....	32
4    National law, private international law, public international law.....	32
5    Public policy .....	33
(a)    Categories of public policy .....	34
(b)    Public policy & mandatory rules .....	35
(c)    Public policy & lex mercatoria.....	35
6    The ‘public policy exception’ .....	36
Thesis structure, scope & significance .....	37
<b>CHAPTER 1</b> .....	43
<b>The Public Policy Exception to the Enforcement of Foreign Arbitral Awards</b> .....	43
1.1    Introduction .....	43
1.2    Australian law on enforcement of arbitral awards.....	43
1.2.1    Mechanics of enforcement.....	44
(a)    IAA, New York Convention & Model Law .....	45
(b)    IAA & CAA .....	46
(c)    IAA & FJA .....	47
1.2.2    Relevant features of the Australian legal system .....	48
1.3    The narrow approach to the public policy exception .....	51

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1.3.1	Stages in the application of the public policy exception .....	52
(a)	Stage one: Is there an applicable ‘public policy’?.....	52
(b)	Stage two: Would enforcement ‘be contrary to’ the applicable public policy? .....	53
(c)	Stage three: Should enforcement be allowed notwithstanding the public policy exception?.....	55
1.3.2	Conclusions .....	55
<b>CHAPTER 2.....</b>		<b>57</b>
<b>Meeting the Unruly Horse – Characterisation of Public Policy .....</b>		<b>57</b>
2.1	Introduction .....	57
2.2	Narrowing the meaning of public policy .....	58
2.2.1	Relativity .....	59
(a)	Public policy of the enforcement State.....	59
(b)	Public policy at the time of enforcement.....	60
(c)	Narrowing the sources of public policy?.....	61
2.2.2	Extra-territoriality .....	62
2.2.3	Fundamentality .....	63
(a)	Case illustrations .....	65
(b)	International public policy? .....	68
2.3	Substantive & procedural public policies.....	69
2.3.1	Refining the substance-procedure distinction.....	69
2.3.2	Public policy vs <i>Ordre public</i> .....	71
2.3.3	Public policy & due process exceptions to enforcement.....	73
2.4	Conclusions .....	74
<b>CHAPTER 3.....</b>		<b>75</b>
<b>Greeting the Unruly Horse – The ‘International Public Policy’ Exception.....</b>		<b>75</b>
3.1	Introduction .....	75
3.2	Deciphering the current categorisation of public policy .....	76
3.2.1	Why international public policy? .....	78
3.2.2	ILA’s categories of international public policy.....	79
3.3	International vs Domestic public policies .....	80

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3.3.1	Challenging the domestic-international dichotomy.....	81
(a)	International public policy is national not international.....	81
(b)	International public policy is part of or narrower than domestic public policy .....	82
(c)	International public policy is overriding or more important .....	83
3.3.2	Challenges arising from the domestic-international dichotomy.....	84
3.4	International vs Transnational public policies.....	87
3.4.1	International public policy is national and may also be transnational.....	88
3.4.2	Fusion of international & transnational public policies caused by fusion of private & public international law? .....	89
3.4.3	When does transnational public policy apply? .....	92
(a)	Application through the lex mercatoria.....	92
(b)	Application through national legal system .....	95
3.4.4	Is transnational public policy supranational? .....	96
3.5	Multinational public policy .....	97
3.5.1	<i>Eco Swiss case</i> .....	97
3.5.2	Multinational public policy is national, international & even transnational? .....	100
3.6	Why not international public policy? Departing from the current categorisation of public policy.....	101
3.6.1	Avoiding misnomers .....	102
3.6.2	Disparity in the judicial approach to international public policy .....	103
3.6.3	Revisiting ILA's approach to international public policy .....	105
3.6.4	Overlapping categories of public policy.....	108
3.6.5	Conflict (& choice) of public policies .....	112
(a)	Enforcement State's public policy vs Foreign public policy.....	112
(b)	Enforcement State's public policy vs Transnational public policy .....	113
3.6.6	Revisiting transnational public policy .....	114
(a)	An alternative perception of transnational public policy .....	114
(b)	Applying transnational public policy additionally or alternatively to the enforcement State's public policy .....	115
3.7	Conclusions .....	116

<b>CHAPTER 4</b> .....	118
<b>Saddling the Unruly Horse – Public policy &amp; Mandatory Rules</b> .....	118
4.1 Introduction .....	118
4.2 Public policy vs Mandatory rules .....	119
4.2.1 ‘ <i>Ordre public</i> ’ – public policy and/or mandatory rules?.....	120
4.2.2 ILA’s distinction between ‘public policy rules’ & ‘(mere) mandatory rules’ .....	121
4.2.3 Defining ‘mandatory rules’ .....	122
4.2.4 Distinction & interaction between public policy & mandatory rules.....	124
4.3 The ‘mandatory rules of public policy’ exception?.....	127
4.3.1 Defining ‘mandatory rules of public policy’ .....	127
4.3.2 Why ‘mandatory rules of public policy’?.....	130
4.4 Narrow approach to the public policy exception for Australia?.....	131
4.4.1 Australian cases concerning the public policy exception to the enforcement of foreign judgments.....	131
4.4.2 An alternative approach to defining the scope of the public policy exception .....	134
4.5 Conclusions .....	135
<b>CHAPTER 5</b> .....	137
<b>Harnessing the Unruly Horse – The Public Policy Paradox of the New York Convention</b> .....	137
5.1 Introduction .....	137
5.2 Why a narrow approach to the public policy exception? .....	138
5.2.1 Why a pro-enforcement policy? .....	138
5.2.2 Why a public policy exception? .....	140
5.3 Article V of the New York Convention.....	142
5.3.1 Article V(1) vs V(2): Parties’ challenge vs Judges’ own motion.....	142
5.3.2 Discretionary nature of Article V .....	144
5.3.3 Exhaustive nature of Article V .....	145
(a) <i>Resort Condominiums case</i> : Residual discretion to refuse enforcement? 145	
(b) Additional exceptions to enforcement by implication?.....	150
5.4 The public policy exception & other exceptions to enforcement.....	151
5.4.1 Article V(2)(b) & (2)(a): Public policy & Arbitrability .....	151
(a) Enforcement State’s laws & public policies.....	152
(b) Enforceability of arbitration agreements & arbitral awards .....	153
(c) Narrow approach to both limbs in Art V(2) .....	153

5.4.2	Article V(2)(b) & (1)(b): Public policy & Due process .....	155
5.4.3	Article V(2)(b) & (1)(e): Non-enforcement & Annulment of arbitral awards .....	157
(a)	Article V(1)(e): Annulment as an exception to enforcement .....	158
(b)	Article VII(1): Enforcement under the more pro-enforcement law .....	159
5.5	Conclusions .....	160
<b>CHAPTER 6.....</b>		<b>163</b>
<b>Riding the Unruly Horse – Applying the Public Policy Exception in Enforcement Proceedings .....</b>		<b>163</b>
6.1	Introduction .....	163
6.2	Revisiting the stages of applying the public policy exception .....	164
6.3	No merits review?.....	167
6.4	Case study 1: Illegality .....	171
6.4.1	<i>Westacre case</i> : Disagreement between English judges.....	173
(a)	The pro-enforcement majority vs The less pro-enforcement minority.....	174
(b)	Questions for discussion.....	175
6.4.2	Illegality & the ‘scale of opprobrium’ .....	176
(a)	Categories or degrees of illegality .....	176
(b)	Is corruption within the public policy exception? .....	178
6.4.3	Enforceability of awards based on illegal contracts – Limits on separability .....	179
(a)	Non-enforcement of domestic awards on the basis of public policy.....	180
(b)	Non-enforcement of foreign awards under the public policy exception ..	182
(c)	Lessons for Australia .....	184
6.4.4	Reopening arbitral finding on illegality – Limits on judicial inquiry.....	186
(a)	<i>Westacre case</i> : Preliminary inquiry before estoppel? .....	187
(b)	Crystal-gazing the Australian approach .....	190
6.4.5	Applying the public policy exception to awards based on illegal contracts... ..	192
(a)	<i>Westacre case</i> : Revisiting corruption & the scale of opprobrium.....	192
(b)	Critique: Unruly application of the public policy exception? .....	194
6.4.6	Admissibility of new evidence of illegality.....	197
(a)	<i>Westacre case</i> : Pursuit of local supervisory remedies?.....	197
(b)	Predictions & recommendations for Australia .....	200

6.5	Case study 2: Due process .....	203
6.5.1	Due process violation may constitute public policy violation.....	204
(a)	Cases decided solely on Art V(1)(b) .....	205
(b)	Cases involving both Art V(1)(b) & (2)(b) .....	208
(c)	<i>Hebei case</i> : Disagreement between Hong Kong judges.....	211
6.5.2	Waiver of due process violation may waive public policy violation .....	214
(a)	Failure to object before arbitrator .....	214
(b)	Failure to object before supervisory court.....	216
6.5.3	Enforcement notwithstanding violations of due process and/or public policy .....	220
(a)	<i>Hebei case</i> : Waiver of public policy violation based on due process violation .....	220
(b)	Other bases for discretionary enforcement .....	222
6.5.4	Supervisory court's decision against annulment .....	223
6.5.5	Predictions & recommendations for Australia .....	225
(a)	Joint application of the public policy & due process exceptions .....	225
(b)	Waiver, estoppel & discretionary enforcement .....	228
6.6	Other issues in applying the public policy exception .....	231
6.6.1	<i>Ex officio</i> consideration of public policy .....	231
(a)	Uncontested enforcement proceedings.....	232
(b)	Illegality, arbitrability & public policy .....	232
(c)	Due process & public policy .....	232
(d)	Foreign annulment or non-enforcement .....	233
6.6.2	Severance & partial enforcement .....	235
6.6.3	Discretion to refuse enforcement?.....	237
6.7	Conclusions .....	238
6.7.1	Balancing public policies when applying the public policy exception ....	238
6.7.2	An alternative perception of the public policy paradox .....	240

<b>CHAPTER 7</b> .....	241
<b>Chasing the Unruly Horse – Public Policy &amp; Annulment of Arbitral Awards</b> ....	241
7.1 Introduction .....	241
7.2 Uniform approach to public policy in enforcement & annulment proceedings? ... .....	243
7.2.1 Revisiting the distinction between annulment & non-enforcement .....	244
7.2.2 Case study: Arbitrator’s disregard or error of law.....	246
(a) The US approach .....	247
(b) The Indian approach .....	249
(c) Other countries .....	252
7.2.3 Crystal-gazing the Australian approach .....	256
(a) Foreign awards: IAA, New York Convention & Model Law .....	257
(b) Domestic awards: CAA & IAA.....	259
(c) Public policy & arbitrator’s error of law .....	261
7.3 Enforceability of foreign annulled awards .....	263
7.3.1 Judicial disagreement on the extra-territorial effect of annulment.....	265
(a) French approach – Enforcement notwithstanding foreign annulment.....	265
(b) Unsettled US approach – More likely to be non-enforcement following foreign annulment? .....	267
7.3.2 Debates within the never-ending debate.....	270
(a) The main issues or contentions.....	270
(b) The competing approaches or theories .....	273
7.3.3 Enforcement of annulled awards under New York Convention Art VII(1) ... .....	275
7.3.4 Discretionary enforcement of annulled awards under New York Convention Art V(1)(e) .....	277
7.3.5 Predictions & recommendations for Australia .....	282
(a) Art VII(1) – An unlikely basis for enforcement in Australia? .....	283
(b) Art V(1)(e) – A more likely but challenging basis for enforcement? .....	284
(c) Joint application of Arts V(1)(e) & (2)(b)? .....	288
7.4 Conclusions .....	290
7.4.1 Harmonising judicial approaches to public policy in enforcement & annulment proceedings .....	290
7.4.2 Harmonising judicial approaches to determining the enforceability of annulled awards .....	291
7.4.3 Chasing the unruly horse of public policy? .....	294

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<b>CHAPTER 8</b> .....	295
<b>Taming the Unruly Horse</b> .....	295
The problems & their sources.....	295
The lessons & recommendations.....	297
Alternative perception of the New York Convention’s public policy paradox.....	297
Alternative approach to delimiting the scope of the public policy exception .....	298
Merits review under the public policy exception .....	299
Restraint on discretionary enforcement notwithstanding the public policy violation .....	300
Support for ex officio consideration of public policy .....	301
Relevance or significance of foreign judgment on annulment or enforcement....	301
Recommendations for the Australian Judiciary.....	303
Recommendation 1: Scope of the public policy exception .....	303
Recommendation 2: Enforceability of awards based on illegal contracts.....	303
Recommendation 3: Judicial inquiry into the arbitral decision.....	304
Recommendation 4: Admissibility of evidence of alleged public policy violation .....	304
Recommendation 5: Public policy exception & due process exception.....	305
Recommendation 6: Discretionary enforcement – the general rule .....	305
Recommendation 7: Discretionary enforcement – waiver or estoppel as an exception to the general rule.....	305
Recommendation 8: Ex officio consideration of public policy.....	306
Recommendation 9: Partial enforcement of arbitral award.....	306
Recommendation 10: Relevance or significance of foreign judgment on annulment or enforcement.....	307
<b>Appendix 1 – Excerpts from ILA Resolution</b> .....	308
<b>Appendix 2 – Excerpts from the IAA</b> .....	310
<b>Appendix 3 – Excerpts from the New York Convention</b> .....	313
<b>Appendix 4 – Excerpts from the Model Law</b> .....	315
<b>Appendix 5 – Excerpts from the CAA</b> .....	318
<b>Bibliography</b> .....	320

## THESIS ABSTRACT

### **Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons For and From Australia**

Judicial enforcement of arbitral awards is necessary where there is no voluntary compliance by the relevant parties. Courts world-wide may refuse to enforce arbitral awards if such enforcement would be contrary to the public policy of their countries. This is known as ‘the public policy exception to the enforcement of arbitral awards’. It is enshrined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (*New York Convention*)<sup>1</sup> and the UNCITRAL Model Law on International Commercial Arbitration 1985 (*Model Law*),<sup>2</sup> which are two of the most prominent international instruments in promoting and regulating international commercial arbitration.

The public policy exception is one of the most controversial exceptions to the enforcement of arbitral awards, causing judicial inconsistency and therefore unpredictability in its application. It is often likened to an ‘unruly horse’, which may lead us from sound law.<sup>3</sup>

The International Law Association’s Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (*ILA Resolution*)<sup>4</sup> endorses a narrow approach to the public policy exception – namely, refusal of enforcement under the public policy exception in exceptional circumstances only. The ILA Resolution seeks to facilitate the finality of arbitral awards in accordance with the New York Convention’s primary goal of facilitating the enforcement of arbitral awards. The courts of many countries refer to this as the New York Convention’s ‘pro-enforcement policy’, which demands a narrow approach to the public policy exception.

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<sup>1</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

<sup>2</sup> *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN Doc A/40/17.

<sup>3</sup> *Richardson v Mellish* [1824-34] All ER 258, 266 (Burrough J).

<sup>4</sup> *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association’s 70<sup>th</sup> Conference held in New Delhi, India, 2-6 April 2002.

This thesis explores the main controversies and complexities in the judicial application of the public policy exception from an Australian perspective. It is a critical analysis of the prevalent narrow approach to the public policy exception. It examines the extent of the ILA Resolution's suitability and applicability in Australia, considering past problems experienced by the courts of other countries, the distinctive features of the Australian legal system, and future challenges confronting the Australian judiciary. It examines when and how the Australian judiciary may need to swim against the tide by departing from the narrow approach to the public policy exception. For instance, such departure may be appropriate for ensuring that their application of the public policy exception neither causes nor condones injustice, and thereby preserves the integrity and faith in the system of arbitration.

The author's perspective throughout this thesis is that of an academic lawyer, as she has not had the benefit of practical experience in this area of the law.

The recommendations throughout this thesis are tailor-made for the Australian judiciary. They are Australian in perspective yet international in character. They canvass certain issues not addressed in the ILA Resolution, encouraging the Australian judiciary to participate in the ongoing debate and the ultimate resolution of those issues. In doing so, this thesis contributes to refining the judicial application of public policy in determining the enforceability of arbitral awards.

The public policy exception to the enforcement of arbitral awards, or its application, need not be an unruly horse in Australia.

The law is stated as known to me on 31 August 2005.

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*European Convention on International Commercial Arbitration*, 21 April 1961, 484 UNTS 364.

*European Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001, entered into force 1 March 2002).

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**ABBREVIATIONS**

Annulment exception	New York Convention Art V(1)(e); Model Law Art 36(1)(a)(v); IAA s 8(5)(f)
Arbitrability exception	New York Convention Art V(2)(a); Model Law Art 36(1)(b)(i); IAA s 8(7)(a)
CAA	Commercial Arbitration Act 1990 (Qld)
CIETAC	China International Economic and Trade Arbitration Commission
CLOUT	Case Law on UNCITRAL Texts
Due process exception	New York Convention Art V(1)(b); Model Law Art 36(1)(a)(ii); IAA s 8(5)(b)
ECJ	European Court of Justice
EC Treaty	Treaty Establishing the European Community 1957
EU	European Union
Enforcement provisions	New York Convention Arts IV-V; Model Law Arts 35-36; IAA ss 8-9
FJA	Foreign Judgments Act 1991 (Cth)
IAA	International Arbitration Act 1974 (Cth)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ILA	International Law Association
ILA Final Report	‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) <i>Arbitration International</i> 249

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ILA Interim Report	‘Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) <i>Arbitration International</i> 217
ILA Resolution	Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Non-enforcement provisions	New York Convention Art V; Model Law Art 36; IAA ss 8(5) and (7)
Public policy exception	New York Convention Art V(2)(b); Model Law Art 36(1)(b)(ii); IAA s 8(7)(b)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
WTO	World Trade Organisation

## INTRODUCTION

Public policy can be a ‘double-edged sword’ in international commercial arbitration – ‘helpful as a tool, dangerous as a weapon’.<sup>5</sup> Judicial perceptions of public policy have changed from time to time. According to the rather pessimistic English view in the 1820s:

“[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.”<sup>6</sup>

Optimistic views emerged 150 years later:

“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.”<sup>7</sup>

Judicial perceptions of arbitration have also changed, especially since the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (*New York Convention*)<sup>8</sup> and the UNCITRAL Model Law on International Commercial Arbitration 1985 (*Model Law*).<sup>9</sup> For instance, the US courts have expressed the necessity to ‘shake off the old judicial hostility to arbitration’, and to subordinate parochial concerns to ‘the international policy favouring commercial arbitration’.<sup>10</sup>

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<sup>5</sup> Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 *International Law Forum Du Droit International* 248, 248.

<sup>6</sup> *Richardson v Mellish* [1824-34] All ER 258, 266 (Burrough J).

<sup>7</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 606-607 (Lord Denning MR).

Similarly, according to Justice G N Williams, ‘Importance of Public Policy Considerations in Judicial Decision-Making’ (2000) *International Legal Practitioner* 134, 134: “If Burrough J thought in 1824 he was putting an end to the significance of the notion of ‘public policy’ in the development of the common law then he was sadly mistaken.”

<sup>8</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1989).

<sup>9</sup> *Model Law on International Commercial Arbitration*, UN Doc A/40/17, adopted by the United Nations Commission on International Trade Law on 21 June 1985 and recommended by the United Nations General Assembly to Member States on 11 December 1985.

<sup>10</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 638-639 and 661 (1985).

Similarly, according to *Qantas Airways Ltd v Dillingham Corp* [1985] 4 NSWLR 113, 118 (Rogers J): “The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created.”

Enforcement by proceedings in a national court is ‘the ultimate sanction’ against the recalcitrant party for non-compliance with an award.<sup>11</sup> It is a process whereby ‘a private act is being empowered by a public act’.<sup>12</sup> In this context, public policy has been regarded as one of the most significant and controversial bases for refusing the enforcement of arbitral awards.<sup>13</sup>

The changing perceptions of both public policy and arbitration have shaped the judicial approach to public policy as a legal basis for rendering arbitral awards unenforceable, and even invalid. This is known as the public policy exception to the enforcement of arbitral awards, or the public policy ground for non-enforcement of arbitral awards, abbreviated as ‘the public policy exception’ in this thesis.<sup>14</sup> The public policy exception ‘caused the most consternation’ among the drafters of the New York Convention, as it was considered both a ‘safety valve’ and ‘major potential loophole’.<sup>15</sup>

Many national courts acknowledge that the ‘pro-enforcement policy’ of the New York Convention requires a narrow approach to the public policy exception. The ‘pro-enforcement policy’ seeks to uphold the finality and enforceability of arbitral awards. It presumes arbitral awards to be enforceable as a general rule, subject to the specified exceptions to enforcement (including the public policy exception), which should be interpreted narrowly and strictly against non-enforcement. This attitude or approach is known as the ‘narrow approach’ to the public policy exception. For instance, some national courts would refuse enforcement only where such enforcement would violate ‘the most basic notions of morality and justice’,<sup>16</sup> or ‘be clearly injurious to the public

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<sup>11</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (first published 1986, 4<sup>th</sup> ed, 2004) 513.

<sup>12</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003), 689 para 26-6.

<sup>13</sup> See, eg, Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> ed, 2001) 815.

<sup>14</sup> The ‘public policy exception’ is embodied in Art V(2)(b) of the New York Convention, and includes the mirroring provisions in Art 36 (1)(b)(ii) of the Model Law and s 8(7)(b) of Australia’s *International Arbitration Act 1974* (Cth). See section 6 of this Introduction (Terminology – ‘The public policy exception’).

<sup>15</sup> David Stewart, ‘National Enforcement of Arbitral Awards Under Treaties and Conventions’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 189.

<sup>16</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 973-974 (2<sup>nd</sup> Cir, 1974).

good'.<sup>17</sup>

Continuing inconsistencies in the judicial approach to the public policy exception have nevertheless encouraged reliance on this exception to resist or delay enforcement of arbitral awards.<sup>18</sup> They have also encouraged 'enforcement shopping',<sup>19</sup> as more people become aware that the outcome of a public policy challenge may differ depending on the place of enforcement. Consequently in April 2002, the International Law Association adopted the Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards (*ILA Resolution*).<sup>20</sup> This recent endeavour confirms and clarifies 'international public policy' as the applicable test for determining the enforceability of foreign arbitral awards under the public policy exception.<sup>21</sup> 'International public policy' remains the prevailing test as it is commonly perceived as narrower than 'domestic public policy' and more appropriate than 'transnational public policy'.<sup>22</sup>

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<sup>17</sup> *Deutsche Schachtbau und Tiefbohrergesellschaft mbH v R'as Al Khaimah National Oil Co & Shell International Petroleum Co Ltd* [1987] 2 Lloyd's Rep 246, 254 (*DST v Rakoil*).

<sup>18</sup> Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 249, 255 (*ILA Final Report*).

<sup>19</sup> Albert van den Berg, 'Annulment of Awards in International Arbitration' in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 160.

<sup>20</sup> *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association's 70<sup>th</sup> Conference held in New Delhi, India, 2-6 April 2002. The ILA Resolution is the culmination of a six year study of public policy by the International Law Association Committee on International Commercial Arbitration. It is appended to this thesis – see Appendix 1.

The two reports on the ILA Resolution are the *ILA Interim Report* (Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 217), and *ILA Final Report* (Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 249).

<sup>21</sup> While resolutions of the ILA are non-binding legal instruments under international law, however in practice, the ILA's work is 'highly regarded and generally reflects the opinions of leading international arbitration scholars': R Fathallah, 'International Law Association Resolution on the Application of Public Policy as a Ground for Challenging Arbitral Awards' (2003) 16(2) *White & Case International Dispute Resolution* 3, 3. Consequently, resolutions of the ILA are a source of international law pursuant to Art 38(1)(d) of the *Statute of the International Court of Justice 1945*.

<sup>22</sup> See the relevant definitions in section 5(a) of this Introduction (Terminology – 'Categories of public policy'). Chapter 3 further explores these categories of public policy.

Yet public policy issues in international commercial arbitration remain controversial, some of which are designated as topics for UNCITRAL's future work.<sup>23</sup>

Being a Contracting State of the New York Convention, as well as 'a centre for international arbitration in the Asia/Pacific area',<sup>24</sup> Australia will continue to participate in the debate on the appropriate scope and application of the public policy exception. Australian courts can learn from the approaches and experiences of other courts. They also have much to offer. They need to anticipate future challenges in this area of law and, where necessary, formulate their own approach to the public policy exception in the *International Commercial Arbitration Act 1974 (Cth) (IAA)*,<sup>25</sup> which implements the New York Convention and adopts the Model Law.<sup>26</sup>

Through a critical analysis of the narrow approach to the public policy exception and the ILA Resolution, this thesis makes recommendations to the Australian judiciary on the main issues in the application of the public policy exception in determining the enforceability of foreign arbitral awards in Australia.

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<sup>23</sup> After holding a special commemoration of the New York Convention's 40<sup>th</sup> anniversary in June 1998, the UNCITRAL Working Group on Arbitration has adopted several topics for its future work. These include the residual discretionary power to grant enforcement notwithstanding the existence of an exception to enforcement, as well as the enforcement of awards which have been annulled or set aside: see *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999); *Report of the Working Group on Arbitration on the Work of its 32<sup>nd</sup> Session*, UN GA, 33<sup>rd</sup> session, UN Doc A/CN.9/468 (10 April 2000).

In addition, the drafting of provisions on recognition and enforcement of interim measures of protection (Draft Art 17 bis of the Model Law) reveals continuing debate on the meaning and scope of the public policy exception in this context: see eg, *Report of the Working Group on Arbitration on the Work of its 39<sup>th</sup> Session*, UN GA, 37<sup>th</sup> session, UN Doc A/CN.9/545 (8 December 2003); *Report of the Working Group on Arbitration on the Work of its 40<sup>th</sup> Session*, UN GA, 37<sup>th</sup> session, UN Doc A/CN.9/547 (16 April 2004).

<sup>24</sup> Michael Pryles, 'Australia', ICCA Handbook, <<http://www.kluwerarbitration.com>> at 27 July 2004.

<sup>25</sup> See *International Arbitration Act 1974 (Cth)* s 8(7)(b), as outlined in section 6 of this Introduction (Terminology – 'The public policy exception').

<sup>26</sup> Chapter 1 section 1.2 outlines the Australian law on the enforcement of arbitral awards.

## THESIS STATEMENT

There is a ‘public policy paradox’ in the New York Convention – namely, both the pro-enforcement policy and the public policy exception to enforcement are paradoxically based on public policy.<sup>27</sup> This has created the perception that the public policy exception and the pro-enforcement policy are competing public policies serving competing interests. The courts of many countries have resolved this apparent conflict by deferring to the pro-enforcement policy, usually without exploring whether there is indeed a conflict between these public policies, and without appreciating that the public policy exception is an exception to the pro-enforcement policy.

In spite of this apparent public policy paradox, the prevention and sanction of injustice in arbitration are the overriding objectives of both the public policy exception and the pro-enforcement policy. The public policy exception refuses to enforce unjust awards while the pro-enforcement policy does not extend to the enforcement of unjust awards. ‘Injustice’ includes, on the one hand, unfairness to one party or undue enrichment of one party at the expense of the other party (ie private injustice); and on the other hand, undue impairment of the legitimate interests of third parties or the public at large (ie public injustice).

Accordingly, the Australian judiciary may need to depart from the narrow approach to the public policy exception in certain circumstances, lest arbitral finality and party autonomy be upheld at the expense of justice or public confidence in the system of arbitration.

Furthermore, the infamous ‘unruly horse’ metaphor warns that an unruly application of the inherently unruly public policy exception may lead to unruly and even unjust consequences.

This thesis recommends the Australian judiciary to consider (or re-consider) the following:

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<sup>27</sup> See Andrew Rogers, ‘The Enforcement of Awards Nullified in the Country of Origin’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 549: “the principle of enforcement is itself the child of public policy, an exception exists where, to enforce... would itself be contrary to public policy.”

See also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 542: “this pro-enforcement bias is itself considered a matter of public policy.”

- (a) the current perception of the New York Convention's public policy paradox, particularly the need to reorient it, which may involve re-balancing competing interests in international commercial arbitration;
- (b) the current characterisation and categorisation of public policy as domestic, international, multinational and transnational, particularly the need to re-express the concept of 'international public policy', as well as to re-define the scope of the public policy exception;
- (c) the interaction between public policy and mandatory rules, including the need to delimit the sources of public policy;
- (d) the interaction between the public policy exception and other exceptions to the enforcement of arbitral awards, including the possible concurrent application of these exceptions;
- (e) the criteria for exercising the judicial discretion to refuse or allow enforcement under the public policy exception;
- (f) the circumstances for considering the public policy exception on the court's own motion;
- (g) the appropriateness of adopting the same approach to the public policy exception in both enforcement and annulment proceedings; and
- (h) the criteria for determining the enforceability of annulled awards under the public policy exception.

Despite the judicial propensity in other countries to enforce foreign arbitral awards, Australian courts should deny enforcement where necessary or appropriate. For instance, where enforcement would cause or condone injustice so as to undermine the integrity of arbitration. The unruly horse of public policy can, and must, 'come down on the side of justice'.<sup>28</sup>

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<sup>28</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 607 (Lord Denning MR).

## TERMINOLOGY

For the purposes of consistency and convenience, the following defined terms will be used throughout this thesis.

### 1 International commercial arbitration & foreign arbitral awards

This thesis uses the following terms interchangeably, unless otherwise indicated:

- ‘arbitration’, ‘international arbitration’ and ‘international commercial arbitration’;
- ‘award(s)’, ‘arbitral award(s)’ and ‘foreign arbitral award(s)’.

‘Arbitral awards’ include awards made by arbitrators appointed by the parties, as well as by arbitral tribunals chosen by the parties.<sup>29</sup>

‘International’ means that the relevant arbitration involves a foreign element.<sup>30</sup> ‘Foreign element’ arises where the parties’ residence and place of business, the subject-matter of their arbitration agreement or dispute involve different countries.<sup>31</sup> 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.

In the context of arbitral awards, the word ‘foreign’ has a narrower meaning even though it is often used synonymously with the word ‘international’ in other contexts. There are at least three definitions or categories of ‘foreign awards’.

- The first and widest definition encompasses any award with or involving foreign element. Here the terms ‘foreign awards’, ‘international awards’ and ‘non-domestic awards’ are used interchangeably, and in contradistinction to ‘(purely) domestic awards’. All of these awards may be made and sought to be enforced in the same country – the distinction lies in the presence and absence of foreign elements.<sup>32</sup>

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<sup>29</sup> See New York Convention Art 1(2) and IAA s 3.

<sup>30</sup> The ILA defines ‘international arbitral awards’ as awards ‘which are not strictly domestic and which include a material foreign element’: ILA Final Report 250.

<sup>31</sup> See Model Law Art 1(3).

<sup>32</sup> This is akin to the approach in Model Law Art I(3).

The New York Convention also applies to ‘awards not considered as domestic awards in the State where their recognition and enforcement are sought’ – this is known as the ‘functional criterion’ in Art I(1). For

- The second and narrower definition is confined to awards made and sought to be enforced in different countries.<sup>33</sup>
- The third and even narrower definition is found in Australia's IAA s 3(1), which means awards made and sought to be enforced in different 'Convention countries' (ie countries that are Contracting States of the New York Convention).<sup>34</sup> Accordingly, this category of foreign awards is also known as 'Convention awards'.<sup>35</sup> In Australia, a foreign award is an award made in a Convention country other than Australia.

This thesis primarily uses the second definition of foreign awards, and utilises the third definition when its discussions are specific to the Australian context or perspective.

On the other hand, the word 'commercial' has a wide meaning – it covers 'matters arising from all relationships of a commercial nature, whether contractual or not'.<sup>36</sup> This would exclude political, territorial or diplomatic disputes between sovereign nations, or between nations and individuals'.<sup>37</sup>

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instance, the New York Convention can apply to an award made by a permanent international arbitral institution situated within the territory of the enforcement State if that enforcement State does not regard it as a domestic award: see John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 723 para 12.85.

<sup>33</sup> This is known as the 'territorial criterion' in New York Convention Art I(1), which refers to 'awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'.

<sup>34</sup> See IAA s 3(1) definitions of 'foreign award' and 'Convention country'. This is effectively a reciprocity reservation or declaration under New York Convention Art I(3) – ie Australia 'will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'.

<sup>35</sup> However, note the wider definition of 'Convention awards' – ie awards which fall within the scope of the New York Convention by virtue of either the territorial criterion or the functional criterion in New York Convention Art I(1).

<sup>36</sup> The footnote to Model Law Art 1(1) provides examples such as trade transactions for the supply or exchange of goods or services, agency, leasing, licensing, construction of works, financing, banking, insurance, joint venture and other forms of business co-operation.

According to the Explanatory Note on the Model Law (UN Doc A/40/171) para 11, this list emphasises 'the width of the suggested interpretation' and indicates that 'the determinative test is not based on what the national law may be regarded as commercial'.

On the other hand, New York Convention Art I(3) allows its Contracting States to apply the Convention 'only to differences arising out of the legal relationships which are considered as commercial under the national law of the State making such declaration'. This is known as the commercial reservation or declaration.

<sup>37</sup> John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 693 para 12.8.

## 2 State, nation, country, place & law area

This thesis uses the words ‘State’, ‘nation’, ‘country’ and ‘place’ interchangeably to mean a sovereign nation, and will be confined to Convention countries, unless otherwise indicated.

It should be noted that ‘law area’ is a defined area with a distinct and single system of law. In countries with a unitary system of law such as England, there is only one law area within each of those countries, and accordingly the terms ‘law area’ and ‘country’ can be used synonymously.

By contrast, in countries with a federal system of law such as Australia and the United States, there are multiple law areas within each of those countries.<sup>38</sup> Here the terms ‘law area’ and ‘country’ are not synonymous.

## 3 Recognition, enforcement, annulment

### (a) *Judicial proceedings & decisions*

‘Recognition’ is a judicial decision which recognises the legal validity of an arbitral decision. It generally acts as a ‘shield’ against attempts to raise issues that have already been decided in arbitration.<sup>39</sup>

‘Enforcement’ is a judicial decision which gives practical effect to an arbitral decision by imposing legal sanctions against non-compliance with the recognised award – it is ‘a step further than recognition’ and can act as a ‘sword’ to compel compliance with the award.<sup>40</sup> In this context, recognition and enforcement ‘do run together’ – a court which enforces an award necessarily recognises that award.<sup>41</sup>

This thesis adopts the approach in IAA s 3(2) – namely, enforcement in relation to an award includes the recognition of that award. Accordingly, references to ‘enforcement’ and ‘non-enforcement’ will include recognition and non-recognition respectively.

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<sup>38</sup> These multiple law areas are commonly (but confusingly) referred to as ‘States’ (eg the State of Queensland), even though they are merely the subdivisions of a sovereign State.

<sup>39</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 690 para 26-10; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 22.

<sup>40</sup> *Ibid.*

<sup>41</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 515.

On the other hand, ‘annulment’ is a judicial decision which sets aside or invalidates an arbitral award.<sup>42</sup> It declares and renders that award null, void and therefore unenforceable. A court which refuses to annul an award may grant enforcement of that award.<sup>43</sup>

**(b) Enforcement vs Supervisory State, court & jurisdiction**

The ‘enforcement State’ (or place of enforcement) is the country in which an award is sought to be enforced. This is usually the place where the parties’ assets are located. The ‘enforcement court’ (ie the court of the enforcement State) has ‘enforcement jurisdiction’ – it determines whether or not to enforce an award.

The ‘supervisory State’ (or place of rendition or origin) is the country in which, or under the law of which, an award is made. This is usually the ‘seat’ of arbitration, which determines the legal place of arbitration and whose laws apply to the arbitral procedure.<sup>44</sup> The ‘supervisory court’ (ie the court of the supervisory State) has supervisory, revisional or ‘curial jurisdiction’,<sup>45</sup> such as determining whether or not to annul an award.

Each of the Australian law areas (ie the States, Territories and the federal law area) can be ‘enforcement State’ or ‘supervisory State’.

**4 National law, private international law, public international law**

‘Private international law’ (also known as ‘conflict of laws’) governs transactions or relationships between private parties, as well as between private parties and State entities. However, despite the word ‘international’, private international law is part of a law area’s ‘national law’, which is often used interchangeably with ‘domestic law’,

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<sup>42</sup> ‘Annulment’ is also known as ‘vacatur’, declaration of nullity, vacating and revoking an arbitral award.

<sup>43</sup> See, eg, *Mond v Berger* [2004] VSC 45, para 114: “if an award is not set aside, it may be enforced.”

Chapters 5 and 7 further explore the distinction and interaction between enforcement and annulment.

<sup>44</sup> Michael Moser and Teresa Cheng, *Hong Kong Arbitration: A User's Guide* (2004) 109.

The New South Wales Court of Appeal has emphasised that the ‘seat’ of arbitration has a technical meaning – it is the ‘legal place’ and not the ‘physical place’ of the arbitration: see *Raguz v Sullivan* [2000] NSWCA 240, paras 97, 102 and 103.

<sup>45</sup> *Hiscox v Outwaite* [1992] 1 AC 562, 598 (Lord Oliver of Aylmerton).

‘local law’ and ‘municipal law’.<sup>46</sup>

By contrast, ‘public international law’ (also known as ‘international law’ and ‘the law of the nations’) governs transactions or relationships between sovereign States and international organisations. It is a separate system of law which does not pertain to any law area.

Nonetheless, private international law and public international law are becoming less distinguishable and more interactive with each other.<sup>47</sup>

## 5 Public policy

Owing to the ‘evolutive and relative’<sup>48</sup> nature of public policy, an exhaustive definition of public policy is neither possible nor desirable. The ‘public policy’ of a particular place can be defined as comprising the principles and rules ‘pertaining to justice or morality’ or serving ‘the essential political, social or economic interests’ of that place.<sup>49</sup>

Chapters 2 and 3 explore the characteristics and categories of public policy. However, a brief introduction to the two methods of classifying public policy is appropriate meanwhile.

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<sup>46</sup> A law area’s ‘national law’ comprises ‘domestic private law’ and ‘private international law’. A major function of private international law is to resolve ‘conflict of laws’ issues arising from relationships which have material foreign elements. For instance, it identifies which law area’s domestic private law should apply.

<sup>47</sup> See further discussions in Chapter 3 section 3.4.2 – ‘Fusion of international & transnational public policies caused by fusion of private & public international law’.

<sup>48</sup> Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999) 273.

<sup>49</sup> See ILA Resolution Rec 1(d).

In *Wilkinson v Osborne* (1915) 2 CLR 89, 97, Isaacs J defined public policy as ‘some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce’. This definition has been adopted by *Butterworths Business & Law Dictionary* (2<sup>nd</sup> ed, 2002).

(a) *Categories of public policy*

Firstly, public policy can be categorised by reference to the substance-procedure distinction. ‘Substantive public policy’ concerns the contents of an arbitral award whereas ‘procedural public policy’ concerns the procedure pursuant to which an arbitral award is rendered.<sup>50</sup>

Secondly, public policy may pertain to one nation (ie ‘national public policy’<sup>51</sup>), a group of nations (ie ‘multinational public policy’<sup>52</sup>) or the international community as a whole (ie ‘transnational public policy’<sup>53</sup>).

National public policy is further divided into:

- ‘domestic public policy’ – ie public policy which applies territorially in the sense that it applies only to transactions or relationships which do not involve any foreign element;<sup>54</sup> and
- ‘international public policy’ – ie public policy which applies extra-territorially in the sense that it applies to transactions or relationships which involve foreign elements.<sup>55</sup>

Here it can already be seen that the category of ‘international public policy’ is likely to confuse as it is ‘national’ (in the sense of being part of national public policy), rather than ‘international’ in the ordinary sense of that word.<sup>56</sup>

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<sup>50</sup> See ILA Resolution Rec 1(c) and the examples in Rec 1(d). See further discussions in Chapter 2 section 2.3 – ‘Substantive & procedural public policies’.

<sup>51</sup> ‘National public policy’ is also known as ‘public policy based on national law’: Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 181-182.

<sup>52</sup> ‘Multinational public policy’ is also known as ‘regional public policy’, ‘community public policy’ and the civil law terminology, ‘*ordre public communautaire*’.

<sup>53</sup> ‘Transnational public policy’ is also expressed as ‘truly international public policy’, ‘genuinely international public policy’, ‘really international public policy’, ‘supranational public policy’ and the civil law terminology, ‘*ordre public reellement international*’.

<sup>54</sup> ‘Domestic public policy’ is also known as ‘internal public policy’ and the civil law terminology, ‘*ordre public interne*’.

<sup>55</sup> ‘International public policy’ is also known as ‘external public policy’ and the civil law terminology, ‘*ordre public international*’.

<sup>56</sup> See further discussions in Chapter 3, sections 3.3 (‘International vs Domestic public policies’) and 3.6.1 (‘Avoiding misnomers’).

Both methods of categorising public policy can operate concurrently. For instance, international public policy can be either substantive or procedural.<sup>57</sup>

**(b) Public policy & mandatory rules**

‘Mandatory rules’ are the imperative provisions of law which must be applied to a transaction or relationship involving foreign element, irrespective of the law that governs that transaction or relationship.<sup>58</sup> They can either be ‘purely of a policing nature’<sup>59</sup> (which are not public policy), or of a ‘public policy nature’<sup>60</sup> (which are also public policy).

Thus mandatory rules can be, but need not be, public policy. Similarly, public policy can be, but need not be, mandatory rules. Chapter 4 explores the distinction and interaction between public policy and mandatory rules.

**(c) Public policy & *lex mercatoria***

The literal translation of the ‘*lex mercatoria*’ is the ‘law of merchants’. Despite the ongoing debate on its content and even its existence, the *lex mercatoria* can be defined as comprising the rules and principles which govern international trade and commerce, and which are either independent of any national legal system or are common to several legal systems.<sup>61</sup> It is accepted as ‘law’ even though it does not derive from the traditional sources of law.<sup>62</sup>

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<sup>57</sup> See ILA Resolution Rec 1(c) and ILA Final Report 253.

<sup>58</sup> Daniel Hochstrasser, ‘Choice of Law and “Foreign” Mandatory Rules in International Arbitration’ (1994) 11 *Journal of International Arbitration* 57, 67.

<sup>59</sup> Marc Blessing, ‘Choice of Substantive Law in International Arbitration’ (1997) 14 *Journal of International Arbitration* 39, 61.

<sup>60</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 88.

<sup>61</sup> Karyn Weinberg, ‘Equity in International Arbitration: How Fair is ‘Fair’? A Study of *Lex Mercatoria* and Amiable Composition’ (1994) 12 *Boston University International Law Journal* 227; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 453-454 para 18-46.

<sup>62</sup> It has been argued that the *lex mercatoria* ‘does not purport to be a self-contained or autonomous legal system independent of national laws, but rather a source of law like international customary law that draws on a variety of sources such as practice, judicial precedents, treaties and national laws’: see Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ [2002] 3 *Melbourne Journal of International Law* 400, 411.

Several scholars refer to the *lex mercatoria* as ‘international commercial law’, and more confusingly, as transnational commercial law, principles or rules, and even ‘public policy of the international community of merchants’.<sup>63</sup> This has led to the view that transnational public policy is ‘a hybrid between international public policy and the *lex mercatoria*’ – a view which reinforces the ambiguity and perplexity of ‘international public policy’.<sup>64</sup>

## 6 The ‘public policy exception’

The ‘public policy exception’ refers to the public policy exception to the enforcement of arbitral awards in any or all of the following legislative provisions.

- New York Convention Art V(2)(b): “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... [t]he recognition or enforcement would be contrary to the public policy of that country.”
- Model Law Art 36(1)(b)(ii): “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only... if the court finds that...the recognition or enforcement of the award would be contrary to the public policy of this State.”
- IAA s 8(7)(b): “In any proceedings in which the enforcement of a foreign award... is sought, the court may refuse to enforce the award if it finds that... to enforce the award would be contrary to public policy.”

For ease of reference, excerpts from the IAA, New York Convention and Model Law are appended to this thesis.<sup>65</sup>

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<sup>63</sup> See, eg, Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 807-808 para 1447; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 68 para 4-57; Michael Pryles, ‘Application of the Lex Mercatoria in International Commercial Arbitration’ (2004) 78 *Australian Law Journal* 396, 397; Peter Flanagan, ‘Demythologising the Law Merchant: The Impropriety of the Lex Mercatoria as a Choice of Law’ (2004) 15 *International Company & Commercial Law Review* 297; Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 *International Law Forum Du Droit International* 248, 251.

<sup>64</sup> Kenneth Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’ (1997) 64 *Defense Counsel Journal* 271.

See further discussions in Chapter 3 sections 3.4.3(a) (‘Application through the *lex mercatoria*’) and 3.6.6(a) (‘An alternative perception of transnational public policy’).

<sup>65</sup> See Appendix 2 – IAA; Appendix 3 – New York Convention; Appendix 4 – Model Law.

For the purposes of convenience and conciseness, this thesis uses the expression ‘public policy exception’ as shorthand for synonymous terms such as the ‘public policy exception to enforcement (of arbitral awards)’, the ‘public policy defence to enforcement (of arbitral awards)’, and the ‘public policy ground for non-enforcement (of arbitral awards)’.

Having set out the context, objectives and the relevant terminology of this thesis, the following section provides a brief overview of each chapter.

### **THESIS STRUCTURE, SCOPE & SIGNIFICANCE**

This thesis is confined to public policy as an exception to the enforcement of arbitral awards, which is known as ‘the public policy exception’. It examines the main controversies and complexities in the application of the public policy exception through the lens of the Australian judiciary, and its recommendations are intended for the Australian judiciary. Accordingly, any coverage of non-Australian law and arbitral decisions is for illustrative and comparative purposes only. In addition, any discussions on the application of public policy in other contexts (notably the annulment of arbitral awards, the enforcement of foreign judgments and the exclusion of foreign law) are for the same purposes only.

As the author has not had the benefit of practical experience in this area of the law, this thesis has been written from her perspective as an academic lawyer.

**Chapter 1** outlines Australia’s regulatory framework for the enforcement of arbitral awards, specifically the Australian implementation of the New York Convention and the Model Law, the interaction between Australia’s federal and state arbitration legislation, as well as the interaction between Australian laws concerning the enforcement of foreign awards and foreign judgments. It also outlines certain distinctive features of the Australian legal system which may impact on the Australian judiciary’s approach to the public policy exception.

To set the scene for a critical analysis of the so-called ‘narrow approach’ to the public policy exception, Chapter 1 introduces the author’s three stages in the application of the public policy exception to highlight the various dimensions or aspects of the narrow approach. For instance, at stage one (which determines whether the public policy exception is applicable), the enforcement court narrowly defines the scope, and therefore the applicability, of the public policy exception. At stage two (which determines whether the public policy exception is established), the enforcement court imposes a high standard of proof and thereby lowers the likelihood of establishing the public policy exception. At stage three (which determines whether to refuse or allow enforcement under the public policy exception), the enforcement court may proceed to enforce the award notwithstanding the establishment of the public policy exception.

Chapters 2 to 4 focus on stage one in the application of the public policy exception by examining the characterisation and categorisation of public policy, which are critical to determining the scope and applicability of the public policy exception.

**Chapter 2** begins by discussing how the characteristics of public policy define and narrow the scope of the public policy exception, considering relativity, fundamentality and extra-territoriality. It also discusses the substance-procedure distinction within the public policy exception, and the implications of such distinction. Despite its inclusion of both substantive and procedural public policies, the public policy exception envisages a narrow meaning of ‘public policy’.

**Chapter 3** examines the essence of the narrow approach – namely, the use of ‘international public policy’ to narrow the scope of the public policy exception. In spite of the ILC’s recent endorsement and clarification, international public policy may not be a suitable criterion for determining the enforceability of awards under the public policy exception in Australia. Its imprecise meaning has caused disagreement and even bewilderment among judges, arbitrators and scholars. Its resemblance and interaction with other categories of public policy (ie domestic, multinational and transnational public policies) may render the differentiation between these overlapping categories difficult, if not meaningless. Ironically and unfortunately, the concept of ‘international public policy’ risks turning the public policy exception, or the application of that exception, into an unruly horse.

**Chapter 4** complements the critical analysis of the narrow approach in Chapter 3 by exploring another reason why the public policy exception, or its application, remains unruly – namely, the perplexing distinction and interaction between public policy and mandatory rules. It presents an alternative approach to defining the scope of the public policy exception, which confines the public policy exception to ‘mandatory rules of public policy’. This proposed alternative to ‘international public policy’ uses the common denominators of public policy and mandatory rules, while incorporating the concepts of relativity, fundamentality, extra-territoriality and the substance-procedure distinction. It also identifies the sources of public policy as part of its endeavour to develop a definition of ‘public policy’ in the context of the public policy exception that is more suitable for Australia.

After exploring ‘why not international public policy’ and ‘why mandatory rules of public policy’, **Chapter 5** explores ‘why the narrow approach to the public policy exception’. It explores the rationales underlying the pro-enforcement policy and the public policy exception. The New York Convention’s ‘public policy paradox’ stems from the unexplained relationship or unresolved tension between the pro-enforcement policy and the public policy exception, which are two apparently competing public policies. This leads to the recommended alternative perception of the public policy paradox. The pro-enforcement policy and the public policy exception are not incompatible public policies which serve incompatible interests. Rather, they are interactive and even interdependent public policies which fulfil the ultimate and overriding objectives of preventing and sanctioning injustice, and thereby preserving integrity and faith in the system of arbitration.

Chapter 5 also explores other enforcement-related provisions and features, revealing additional paradoxes or tensions within the New York Convention. In particular, the exceptions to enforcement are exhaustive yet discretionary. This means that the enforcement court cannot refuse enforcement beyond the prescribed exceptions to enforcement, yet the enforcement court can still allow enforcement notwithstanding the applicability of one of the prescribed exceptions to enforcement.

Unlike other exceptions to enforcement, the public policy exception can be raised by both the parties and the enforcement court. By identifying the interaction between, and therefore the potential for the concurrent application of, the public policy exception and other exceptions to enforcement, Chapter 5 paves the way for a critical analysis of the narrow approach in stages two and three of applying the public policy exception.

**Chapter 6** explores where the unruly horse of public policy can carry the judges in the enforcement proceedings, dividing into two categories of case studies. The first category concerns awards based on allegedly illegal contracts – it exemplifies substantive public policy. The second category involves awards rendered in violation of due process – it exemplifies procedural public policy and therefore the overlap between the public policy exception and the due process exception to enforcement.

Chapter 6 also explores the circumstances in which the Australian judiciary should consider the public policy exception on their own motion. This complements the discussions on the criteria for exercising the judicial discretion to allow enforcement notwithstanding the establishment of the public policy exception, including partial enforcement by severing the unenforceable part of an award.

The lengthy discussions in Chapter 6 illustrate the continuing lack of judicial consistency and clarity in the application of the public policy exception. They also reinforce that such lack of consistency and clarity have been caused by the current definition of public policy and the current perception of the public policy paradox – namely, the use of international public policy to narrow the scope of the public policy exception in deference to the pro-enforcement policy. Furthermore, they demonstrate that merits review is inevitable (if not necessary) under the public policy exception. The overall conclusion is that the unruly horse of public policy has led some judges away from sound law, but fortunately without causing substantial injustice. Accordingly, recommendations are made throughout Chapter 6 on when and how the Australian judiciary should modify or otherwise depart from the narrow approach in order to avoid an unruly or unjust application of the public policy exception. These recommendations are premised on the recommended alternative perception of the New York Convention's public policy paradox.

Although this thesis is confined to the application of the public policy exception in enforcement proceedings, **Chapter 7** is nevertheless devoted to two annulment-related public policy issues which may prompt the unruly horse to bolt astray and cause havoc. It builds upon the discussions in Chapter 5 on the interaction between enforcement and annulment of awards. Public policy is also ground for annulment under the Model Law, while annulment is a ground for non-enforcement under the New York Convention.

Chapter 7 uncovers yet another conundrum posed by the New York Convention. The New York Convention's pursuit of greater enforceability of awards in preference to uniformity of enforcement means that the New York Convention does not provide for consistent or harmonious implementation of its pro-enforcement policy.

The first annulment-related question in Chapter 7 is whether the Australian judiciary should unify, or at least harmonise, their approach to the public policy in both enforcement and annulment proceedings. The second question asks the Australian judiciary to choose between the competing approaches, or adopt their own approach, to determining the enforceability of awards which have been annulled in another country. Chapter 7 ultimately recommends that any solution to these questions must ensure adequate and effective safeguards, for neither enforcement nor annulment of an award should cause or condone arbitral or judicial injustice. This is because neither the public policy exception nor the pro-enforcement policy condones such injustice.

Recommendations for the Australian judiciary are made throughout this thesis, especially in Chapters 4, 6 and 7. For ease of reference, Chapter 8 reproduces the main recommendations.

As reinforced by Chapter 8, these recommendations both modify and supplement those in the ILA Resolution. This is because, firstly, the recommendations are premised on a different perception of the public policy paradox, leading to a different approach to defining public policy and delimiting the scope of the public policy exception. The partial reconciliation between the public policy exception and the pro-enforcement policy by reference to their shared and overriding objective of justice, together with the proposed criterion of 'mandatory rules of public policy', seek to facilitate consistency and clarity in the judicial application of the public policy exception.

Secondly, the recommendations in this thesis encompass several issues not addressed in the ILA Resolution. They consider additional conundrums posed by the New York Convention which influence the judicial approach to the public policy exception. These issues include the interaction between the public policy exception and other exceptions to enforcement, the criteria for discretionary enforcement notwithstanding the applicability of the public policy exception, the circumstances for *ex officio* consideration of the public policy exception, and the interaction between enforcement and annulment of arbitral awards.

Thirdly, these recommendations are tailor-made for the Australian judiciary after considering certain distinctive features of the Australian arbitration law and the Australian legal system. They are Australian in perspective yet international in character.

Using the author's three stages of applying the public policy exception as the framework for its critical analysis of the current narrow approach to the public policy exception, this thesis attempts to tame the unruly horse by assisting the Australian judiciary with avoiding an unruly or unjust application of the public policy exception. It is hoped that these features of originality and uniqueness will contribute to further development and refinement in the law concerning public policy in the judicial enforcement of arbitral awards.

The law is stated as at 31 August 2005.