UNIVERSITY OF TECHNOLOGY, SYDNEY

DOCTOR OF JURIDICAL SCIENCE DEGREE COURSE

DOCTORAL DISSERTATION

International Commercial Arbitration and Public Policy

(With principal reference to the laws of Australia, France, Switzerland, the United Kingdom and the United States)

Student:	**John Tarlinton** [redacted]
Principal Supervisor:	**Professor Katrin Cutbush-Sabine**
Co-Supervisor:	**Professor Sam Blay**

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CERTIFICATE OF AUTHORSHIP / ORIGINALITY

I certify that this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

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Professor Cutbush-Sabine in particular inspired the investigation of a number of issues by pointing out various interrelationships of the many actors and institutions in international trade. This greatly assisted in providing practical contexts for the principal matters that were investigated.

CONTENTS

ABSTRACT

The paper examines the evolution of the recognition and enforcement of "foreign" arbitral awards prior to the introduction of the various international arbitration conventions by referring to court decisions of the relevant countries, primarily the United States and the United Kingdom. The scope and importance of the New York Convention will be canvassed, with specific reference to cases.

The Dissertation traces the evolution of judicial and legislative attitudes towards arbitration (in particular, the issue of arbitrability), from the original position of antipathy towards arbitral processes, to the active promotion of arbitration and a "hands-off" approach to its processes by legislators as well as courts.

The introduction of the arbitral process to developing countries will be discussed in the context of some recent controversial arbitrations in Indonesia and Pakistan.

Public policy as the criterion for the enforcement of awards by national courts will be discussed and relevant authorities referred to. The reasoning adopted by courts in this area will be examined and discussed.

The paradigm shift in the enforcement of awards and the leeway granted within the parameters of the arbitral decision making process will be highlighted by two case studies. Both demonstrate clearly the current negation of public policy considerations. The first is a decision of the English Court of Appeal [1] which was mirrored by a subsequent arbitration award [2] in which the discarding of public policy considerations was particularly remarkable as constitutional issues were involved, which normally would have given rise to the expectation of deliberations as to the notions of public policy.

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1 *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and ors* [1999] 3 WLR 811.

2 *Sandline International Inc v Independent State of Papua New Guinea*, International law Reports (2000), Volume 117, 552.

NOTE CONCERNING "UNITED KINGDOM" AND "ENGLISH" LAW

The title of the Dissertation *inter alia* refers to the " . . . laws of . . . the United Kingdom." Within the text, there are references to both the "United Kingdom" and "England." The constitutional and legislative position in the United Kingdom is perhaps more complex than in other jurisdictions and a brief outline is necessary.

United Kingdom Parliament

Parliament is called the "Parliament of the United Kingdom of Great Britain and Northern Ireland." (Great Britain is comprised of England, Scotland and Wales). The United Kingdom Parliament comprises the monarch, the House of Lords and the House of Commons. [3]

Until relatively recently, Parliament was regarded as the supreme law-making body within the United Kingdom; however, European Community law is now paramount within the United Kingdom's constitutional framework. [4]

The legislation of the United Kingdom Parliament is presumed to apply to the whole of the United Kingdom, although there can be an express or implied exclusion of a part of the United Kingdom from the operation of a particular Act. [5]

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3 Halsbury's *Laws of England*, Fourth Edition Reissue, Volume 34, 1997, at paragraph 501.

4 Halsbury's *Laws of England*, op cit, Volume 8(2), paragraph 1.

5 Halsbury's *Laws of England*, op cit, Volume 44(1), paragraph 1318. For example, the *Arbitration Act* 1996 (UK) applies in England and Wales, and Northern Ireland, although provisions relating to consumer arbitrations apply in Scotland. The general commercial arbitration law applying in Scotland is the *Arbitration Act* 1975 (UK). The latter Act was repealed in England and Wales and Northern Ireland, by the *Arbitration Act* 1996 (UK).

Legal systems

England and Wales have the one legal system. [6] As from the Sixteenth Century, "English law" has prevailed in Wales. [7] Scotland has a distinct legal system and its own courts, with, in civil matters, rights of appeal to the Appellate Committee of the House of Lords. [8]

Northern Island also has its own courts, with rights of appeal to the House of Lords in both civil and criminal matters. [9]

Devolution

The United Kingdom Parliament has legislated for the devolution of power to regional assemblies - to the Scottish Parliament, the Northern Island Assembly and the National Assembly for Wales. [10]

The Scottish Parliament has the power to pass primary legislation, subject to certain subject matters being reserved by the United Kingdom Parliament. The Northern Ireland Assembly also has power to enact primary legislation, but the Northern Ireland Assembly is also presently suspended. The National Assembly for Wales has no power to enact primary legislation - that power remains with the United Kingdom Parliament. [11]

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6 Halsbury's *Laws of England*, op cit, Volume 8(2), paragraph 41.

7 Halsbury's *Laws of England*, op cit, Volume 8(2), paragraph 42, n.2.

8 The general commercial arbitration law applying in Scotland is the *Arbitration Act* 1975 (UK). The latter Act was repealed in England and Wales and Northern Ireland, by the *Arbitration Act* 1996 (UK).

9 Halsbury's *Laws of England*, , op cit, at paragraphs 52, 60 and 67.

10 Via the *Scotland Act* 1998 (UK), the *Northern Ireland Act* 1998 (UK) and the *Government of Wales Act* 1998 (UK).

11 For a detailed discussion of these issues, see Burrows, *Devolution*, Sweet & Maxwell,, 2000.

Consequently, at present, the Scottish Parliament alone has power to pass legislation which has equal force to that of the United Kingdom Parliament. [12]

Dissertation

In relation to the expressions used in the Dissertation; generally, references to legislation will be referred to as United Kingdom legislation, as Parliament is the United Kingdom Parliament.

It should also be noted that it is the United Kingdom which is the contracting State to the New York Convention.

References to decisions of the House of Lords and the Court of Appeal will be described as "United Kingdom" and "English" decisions respectively. As noted above, whilst each of Scotland and Northern Ireland has its own courts, there are rights (in the case of Scotland, in civil matters only). of appeal to the House of Lords. The House of Lords, consequently, hears appeals from the whole of the United Kingdom.

The English Court of Appeal is the Court of Appeal for the unitary system of England and Wales. Given that "English law" was historically also the law of Wales, it is more appropriate to refer to decisions handed down by it as "English" decisions. Decisions of other Courts (such as Queen's Bench and Chancery) will also be referred to as "English" decisions.

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[12] In this context, it might be noted that the Scottish Council for International Arbitration has prepared a draft *Arbitration (Scotland) Bill*, which has yet to be introduced to the Scottish Parliament. One of the provisions of the draft Bill, if enacted, would repeal the *Arbitration Act* 1975 (UK) – see *scia.co.uk*.

ABBREVIATIONS

Convention/New York Convention	The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).
ECOSOC	United Nations Economic and Social Council.
GATT	General Agreement on Trade and Tariffs.
ICC	International Chamber of Commerce.
ICC RULES	Arbitration Rules of the International Chamber of Commerce.
IMF	International Monetary Fund.
OECD	Organisation for Economic Cooperation and Development.
PICJ	Permanent International Court of Justice.
UN	United Nations.
UNCITRAL	United Nations Commission on International Trade Law.
UNCITRAL Model Law	UNCITRAL Model Law in International Commercial Arbitration.

UNCTAD	United Nations Commission for Trade and Development.
UNIDROIT	International Institute for the Unification of Private Law.
USC	United States Code.
WTO	World Trade Organisation.

PREFACE AND OUTLINE

"*Today, international commercial arbitration has a new prominence.*" [13]

Principal issue

The principal issue addressed in the Dissertation concerns the selective application of public policy and the potential harm to the emerging global society as a result of the increasing negation of public policy in international commercial arbitration.

The negative effect follows from the reading down of public policy particularly in the process of enforcement of awards. Leading courts, such as those of the United States seem to have turned away dramatically from public policy considerations in the decision making process, which previously had been viewed as part of a well established doctrine within the law.

The reasons behind this change must - after careful consideration - be seen as a consequence of the shift in attitude towards public policy generally, following in the wake of the broad interpretation of privatisation policies at national and international level which has resulted in a general reading down of public policy evaluations within a specific societal framework, elevating private interests by raising their strict enforcement to paramount importance. Courts and arbitral tribunals are following this ground-breaking shift both at State level and internationally.

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[13] UN Secretary-General Annan, "Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration", *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, UN Publication E.99 V.2

International commercial arbitration

Commercial arbitration is an important part of the complex structure of international trade. As a dispute resolution mechanism, arbitration fulfils a "widespread need", both on a domestic and international level. It has become the preferred method of dispute settlement in international commercial transactions. [14]

As the volume of international trade and commerce has increased manyfold in recent years [15], arbitration has consequently grown significantly in importance. The "huge growth" in the "volume and complexity" of arbitration has prompted initiatives at all levels - "national, regional and international", in order to facilitate the arbitral process. [16] International institutions have been established and international conventions have been developed to assist the processes of arbitration. [17] Countries such as those selected for representative analysis in the Dissertation have amended their arbitration laws to make arbitration more accessible and less subject to control by courts. [18]

Interestingly, arbitration was not always held in such high regard. Initially, courts in jurisdictions such as England and the United States were reluctant to condone private arbitration. [19] If powers of adjudication were conceded at all, Courts astutely reigned in those powers by limiting the scope of the subject matter which parties could submit to arbitration.

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14 Lew, *Applicable Law in International Commercial Arbitration,* Oceana, 1978, 1.

15 Giddens, *Runaway World,* Routledge, 2000, at 28.

16 ibid.

17 An example of such an institution is the ICC Court for International Arbitration; probably the best known and most widely accepted convention is the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 10 June 1958 (the "New York Convention"); the New York Convention was followed by the *UNCITRAL Model Law in International Commercial Arbitration.*

18 Eg, the United Kingdom *Arbitration Act* 1979; Chapter 12 of Switzerland's Private International law [*Loi fédérale sur le droit international privé* (1989)]; in France, the Decree of 12 May 1981 (*Décret n. 81-500 du 12 Mai 1981*), which introduced new provisions into the French *Code Civile.*

19 For a discussion of earlier judicial attitudes to arbitration, see Mason P, *Changing Attitudes in the Common Law's Response to International Commercial Arbitration,* International Conference on International Commercial Arbitration, Sydney, 19 March 1999.

Judicial and legislative attitudes have changed, resulting in commercial arbitration now being favoured and promoted. Not only has new "arbitration-friendly" legislation been enacted in many jurisdictions (including those selected for analysis in the Dissertation), but some courts have gone so far as to pull back from their supervisory role by reading down the public policy defence available under the New York Convention [20] and by issuing judicial guidelines actually imposing restrictions on their supervisory role in appeals from arbitral proceedings and awards. [21]

With regard to specific aspects of arbitration, due consideration is to be given to the following issues:-

(i) Arbitrability

Courts (and legislatures) have at times imposed exclusions on certain subject matters from arbitration. For example, in the United States, antitrust matters and remedies relating to the purchase of securities were initially regarded as non-arbitrable. The United States Supreme Court, however, altered its position over time and removed the previous bar on the arbitration of such matters. [22]

(ii) The application of public policy by arbitrators in the making of awards

As the scope of subject matter which may be submitted to arbitration widens and at the same time the formal supervising control of courts is reduced, the question must be posed, if the legal systems – which overall are needed to guarantee a structured balancing between rights and obligations on the basis of legal principle – are being unhinged by the new evolutionary process which favours the seemingly open-ended protection of private rights at the cost of any relevant analysis of the wider

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20 Article V.2(b) of the New York Convention provides that recognition and enforcement of an award may be refused if such recognition or enforcement would be contrary to the public policy of the forum State.

21 See, eg, the United Kingdom decision, *Pioneer Shipping Limited v BTP Tioxide Ltd* [1982] AC 724, where the House of Lords laid down the "Nema guidelines", concerning appeals from arbitral awards under the United Kingdom *Arbitration Act* 1979.

22 See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985) on anti-trust matters; and *Scherk v Alberto-Culver* 417 US 506 (1974), *Dean Witter Reynolds Inc v Byrd* 470 US 213 (1985) and *Rodriguez De Quijas v Shearson/American Express* 490 US 477 (1989) on securities law.

consequences for societal development as a whole - if this is not undermining the very purpose of the inclusion of public policy considerations in the adjudicative process.

(iii) Enforcement of awards

The enforcement of awards is largely governed by the relevant Conventions.

The reading down of the public policy defence in relation to the enforcement of awards has become so pronounced in jurisdictions such as the United States, that the statutory defence has been virtually negated. [23] Such an approach is at odds with the very concept of public policy. To fetter or restrict public policy means that legal systems are potentially falling victim to untrammelled private interests.

In order to understand the significance of the role of public policy as a vital constituent part of any legal system on which a democratic system rests, the following notions must be canvassed:-

"Threshold" issue

What role should public policy play in what is essentially a private process? Arbitration requires parties to a dispute appointing a trusted third party (the arbitrator) to resolve their dispute, instead of enlisting a court. The arbitrator's authority is based on a contract - the private agreement between the parties. It might, therefore, be said that the immediate parties to a dispute are the only ones with an interest in the resolution of the specific dispute and the enforcement of any resultant award.

As arbitrators are bound to apply the law (which includes public policy), public policy does have (indeed *must* have) a significant role in the processes of arbitration. Because of this, ascertaining and where necessary, balancing, competing public

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[23] In *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F.2d 969 (Second Circuit, 1974), the Court held that the public policy defence in the New York Convention should, because of the Convention's "pro-enforcement bias", be "construed narrowly." (at 973-74.)

interests is part of the overall function of the arbitrator. The arbitrator must apply the most appropriate public policy principles to the dispute at hand. That may be the public policy of the law applicable to the arbitration, the law of the forum of the arbitration, or of the likely place of enforcement of the award, or even international public policy. [24] "International" public policy has been described as not being concerned with purely national influences, but rather with "fundamental standards" of the international community, covering both trading standards and humanitarian concerns. [25]

In choosing the applicable public policy, arbitrators must firstly have regard to (and, where necessary, apply) the public policy of the jurisdictions "whose national interests are substantially involved" in the matter under arbitration. [26] International public policy can override national interests, however, and it is for the arbitrator to decide in each case whether, given the subject matter and the interests involved, international pubic policy should be applied. [27]

Public policy

Public policy is of vital importance – it is the judicial benchmark for the protection of the public interest. [28] It determines the application of the law and shapes its development.

Judges and arbitrators have a clear duty to have regard to public policy considerations and to apply public policy principles where the public interest would otherwise be offended. [29] As noted above, the public policy which is to apply will depend on the context and subject matter involved and the relationship of those to both national and international public policy.

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24 Lew, op cit, at 83.

25 Lew, ibid.

26 Chukwumerije, *Choice of Law in International Commercial Arbitration*, Quorum Books, 1994, at 183.

27 Chukwumerije, op cit, at 194.

28 For discussions on the history and importance of public policy, see Winfield, "Public Policy in the English Common Law" (1928) 42 *Harvard Law Review*, 76 et seq; Knight, "Public Policy in English law", (1922) 38 *Law Quarterly Review*, 207 et seq; Stone, *The Province and Function of Law*, Maitland Publications, 1950, at 494 et seq.

29 Stone, op cit, 500.

Major points

It was noted above that the approach by Courts in jurisdictions such as the United States and United Kingdom has been to broaden considerably the concept of arbitrability and, at the same time, to narrow considerably the scope for courts to intervene in arbitral processes, including the enforcement of awards.

Consequently, at present, practically any type of dispute may be arbitrated. Further, as courts restrict their supervisory function with the enforcement of awards, this leads potentially to a derogation of the courts' constitutional functions, conceptualised as safeguarding citizens from the abuse of power.

The result of the emerging trend to read down or completely negate public policy in some jurisdictions may ultimately do harm to the process of "privatising" the adjudicative process.

Arbitrators do not have to be lawyers. Consequently, they do not have the duties of lawyers as officers of the court. Their selection is not transparent. Arbitrators also have a significant financial self-interest and might, hence, be tempted to favour economically stronger parties as the more likely providers of future appointments. In addition, as the appointment of an arbitrator is by private treaty, an arbitrator may be less inclined to venture into the arena of public policy considerations.

Globalisation

The present developments in arbitration reflect the processes of "globalisation", the main feature of which is the pressure for the liberalising of trade relationships. Globalisation mandates greater certainty in the enforcement of international transactions and promotes the tendency to sidestep public policy issues, because of the non-specificity of the issues involved when viewing society as "global."

One of the principal advocates for a strict limitation of public policy considerations, particularly in the enforcement of awards, is the United States. The latter is also at the forefront to move towards a more liberalised global trade regime. It is the world's largest economy and has the greatest number of the world's largest corporate entities. [30] Further, the United States has always used institutions such as the GATT and WTO to pursue its own interests, which are further enhanced by a rising number of bilateral "free trade" agreements.

Ensuing is the privatisation of dispute settlement through arbitration, which is being promoted as the favourite option for national and international commercial dispute resolution, because it allows for the exclusion of any specific societal public policy considerations. This is cogently promoted by the United States as an achievement in the ongoing pursuit of global trade liberalisation, potentially securing its continued dominance. [31]

Recommendations

The traditional courts should reconsider their duty to shape public policy considerations. Arbitrators, in usurping the position of judges, must not totally negate public policy considerations, if the pursuit of a "global society" is to achieve more than an unsubstantiated slogan.

An institution which secures the promotion and vetting of an "international" public policy, such as an international court for international commercial arbitration is to be proposed, as public policy is an ongoing process, not a specific fixed notion.

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30 In 2002, the United States GDP (expressed in millions of USD) was 10,383,100. That of its nearest rival, Japan, was 3,993.433 (source - World Bank www.worldbank.org). The United States also had nearly 40% of the world's 500 largest companies (source - *www.fortune.com*).

31 Pengilly, "United States Trade and Antitrust Laws: A Study in International Legal Imperialism From Sherman to Helms Burton", 6 (1998) *Competition and Consumer Law Journal*, 187, at 188.

Jurisdictions whose laws and cases will be referred to

Foremost, the laws and cases of Australia, France, Switzerland, the United Kingdom and the United States and will be referred to. The reasons for choosing these jurisdictions are:-

- France, Switzerland, the United Kingdom and the United States host important arbitration centres. Aksen notes that by the 1970s, various centres had started competing to "attract arbitration." [32] Traditionally, London and Switzerland were the places to which most parties turned to schedule international commercial arbitral hearings. [33] The factors involved in those choices were, respectively, London's position at the centre of maritime, insurance and commodity trade and Switzerland's political neutrality and secrecy laws.

  Aksen states that both centres started to lose some attraction, however, and other jurisdictions (such the United States) have risen in importance. [34] The response from both the United Kingdom and Switzerland was to become more "arbitration friendly" by enacting new arbitration legislation. [35] In each case, the ability of parties to appeal from arbitral proceedings was significantly curtailed. This resulted in the Courts of these jurisdictions largely stepping back from their supervisory role.

- As far as institutional arbitration is concerned, the ICC [36] notes that between 1989 and 1999, the leading centres chosen by parties for arbitrations (by way of percentage of the total number of cases referred to the ICC Court for International Commercial Arbitration) were:-

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32 Aksen, "International Arbitration - Its Time Has Arrived!" *Case Western Reserve Journal of International Law*, Volume 14, Number 2 (Spring 1982), 247, at 250.

33 ibid.

34 ibid.

35 In the United Kingdom, the *Arbitration Act* 1979; in Switzerland, the *Loi federale sur le droit international privé*.

36 The ICC is the primary international institution for commercial arbitration - "No other institution approaches ICC's universality and volume of cases." (Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, Third Edition, Oceana, 2000, at 3).

- Paris - 33%;
- Switzerland - 25%;
- United Kingdom – 8.5%; and
- United States - 5.25%.

The total number of such cases during that period was 11,143. [37]

- The Australian jurisdiction is also analysed as efforts are being made to promote it as a regional centre for international commercial arbitration. In 1990, Australia was described as relying on its political stability and well regarded legal system in order to become a regional centre for international commercial arbitration. [38] The desire to attract commercial arbitration business to Australia has undoubtedly been driven by the growth in arbitrations emanating from the Asia-Pacific region, which has been considerable. Between 1983 and 2000, parties from Asia in ICC arbitrations increased from 3.1% to 15.2% and exceeded 16% if Australia was included. [39]

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37 Craig, Park and Paulsson, op cit, at 4.

38 Street, "Dispute Resolution in the Asia/Pacific – Practice Sites and Centres – Australia", paper presented to the American Arbitration Association Conference "Facilitating International Business: Dispute Resolution in the Asia/Pacific Region", San Francisco, 21-22 September 2002.

39 Pryles, "The Growth of International Arbitration", paper presented to Federal Attorney-General's Department 24th International Trade Law Conference, Canberra, 9 Ocober 2002.