

Breaking in the ‘Unruly Horse’: The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards

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Abstract

International arbitration has increasingly emerged as a preferred method of dispute resolution in recent years as it offers parties to a contract the autonomy to choose the law that will govern any dispute arising from that contract. The law selected to govern a dispute arising from the contract may not, however, be the only law that the arbitrator is bound to consider when adjudicating the dispute. Questions remain as to whether an arbitrator is bound to apply the mandatory law of a party to the arbitration agreement where that party’s law is not the governing law. If they are, what then is the effect of a failure by the arbitrator to apply such mandatory law on an arbitral award? This second question is the one that this article seeks to explore. In particular, it asks whether a failure to apply a State’s mandatory law constitutes a public policy basis for refusing to enforce an award. Using the decision in *Transfield v Pacific Hydro Ltd* [2006] VSC 175 as a framework for exploring this question, this article considers the concept of ‘public policy’ and those circumstances in which various national legal systems have upheld a failure to apply a State’s mandatory law as a basis for refusing to enforce an arbitral award. It then seeks to distil some common themes from such decisions to consider how the public policy exception may be applied in Australia by our national courts.

I Introduction

In the past three decades, arbitration has increasingly become a preferred method of dispute resolution for parties to international agreements. Many reasons are cited for this trend, such as flexibility, informality, confidentiality or efficacy.¹ The primary motivation for parties, however, is that arbitration represents the peak in party autonomy. This autonomy almost invariably includes the freedom to select the law that will govern the substance of the dispute.² Often, however, a tension arises between the capacity of parties to choose their substantive law and the mandatory national law that binds one or more of the parties to the transaction.³ The tension stems from the fact that not every arbitral award will be enforceable. Notwithstanding that the purpose of near internationally adopted arbitration instruments, such as the *Convention on the Recognition and Enforcement of*

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¹ See Alan Redfern and Martin Hunter, *The Law and Practice of International Commercial Arbitration* (Oxford University Press, 5th ed, 2009) 1–83.

² Peter Megens and Max Bonnell, ‘The Bakun Dispute: Mandatory National Laws in International Arbitration’ (2007) 81 *Australian Law Journal* 259, 259.

³ *Ibid.*

Foreign Arbitral Awards 1958,⁴ is to ensure the enforceability of arbitral awards,⁵ such conventions usually provide a number of grounds for national courts to refuse enforcement.⁶ One common basis for refusing enforcement is that the award is contrary to ‘public policy’.⁷ Although well recognised as an exception to enforcement, public policy remains, at least to some extent, a nebulous concept.⁸ In particular, it is still uncertain whether a failure by an arbitrator to apply a State’s mandatory law constitutes a public policy basis for non-enforcement. The purpose of this article is to explore this question and examine the status of mandatory law in the context of enforcing arbitral awards. In order to provide framework within which to examine mandatory law and public policy, this article next examines the decision of the Victorian Supreme Court in *Transfield v Pacific Hydro Ltd*.⁹ Having analysed the relevance of mandatory law to the conclusion of the Court in *Transfield*, this article then defines the concepts of public policy and mandatory law. Part IV assesses the relationship between mandatory law and public policy and then considers whether, in light of the international jurisprudence on the scope of the public policy exception, a failure to apply mandatory law constitutes a basis for non-enforcement. Finally, in Part VI, some comment will be made on the likely approach of Australian courts to public policy.

II *Transfield v Pacific Hydro Ltd* [2006] VSC 175

A The facts

The dispute in *Transfield* arose out of the construction of the Bakun Hydro Electricity Power Station in the Philippines. Luzon Hydro Corporation (‘Luzon’) was a Philippines incorporated company responsible for the construction and operation of the power station. Half of Luzon’s shares were owned by Pacific Hydro Ltd, an Australian company. The construction of the plant was carried out by a wholly owned subsidiary of an Australian company, Transfield Holdings Pty Ltd, which acted as guarantor for the subsidiary.

The contract between the Australian subsidiary, Transfield Philippines Inc (‘TPI’), and Luzon was executed in 1997. Included in the contract was a choice of law provision that selected Philippines law as the proper law of the contract. The clause further provided that all disputes were to be settled by arbitration under the *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, with the seat to be situated in Singapore. The hearings were, however, conducted in Melbourne.

Several disputes arose from the construction of the power station. In 2000, as a result of Luzon threatening to cash A\$18 million in project securities, TPI initiated arbitration. Included in TPI’s Request of Arbitration, were claims for breaches of the *Trade Practices Act*

⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (‘*New York Convention*’); Andrew Guzman, ‘Arbitrator Liability: Reconciling Arbitration and Mandatory Rules’ (2000) 49 *Duke Law Journal* 1278, 1287.

⁵ Okezie Chukwumerije, ‘Enforcement of Foreign Awards in Australia: The Implications of Resort Condominiums’ (1994) *Australian Dispute Resolution Journal* 237.

⁶ *United Nations 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) art V.

⁷ *Ibid* art V(2)(b).

⁸ Audley Sheppard, ‘Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) *Arbitration International* 217, 218.

⁹ [2006] VSC 175 (4 December 2006) (‘*Transfield*’).

1974 (Cth) ('*TPA*')¹⁰ 'for negligent misrepresentation and for equivalent breaches of Philippines law.'¹¹ The Tribunal, however, declined to entertain TPI's claims under the *TPA*. They concluded that the claims were governed by Philippines law either as the direct law of the contract or, by applying choice of law rules, as the law most closely connected with the claim.¹²

TPI subsequently commenced proceedings in the Victorian Supreme Court seeking damages under the *TPA*.¹³ Luzon applied to have a stay issued under article 7(2) of the *International Arbitration Act 1974* (Cth) ('*IAA*').

B The decision

The decision of Hollingworth J was delivered on 4 December 2006. Having found against TPI for defects in service out of the jurisdiction, her Honour went on to consider whether to stay the proceedings. It was accepted by the parties that the *TPA* claim could be arbitrated.¹⁴ As to whether the *TPA* claim should have been considered, her Honour concluded that:

it would not be appropriate for an Australian court to adjudicate claims for misrepresentation under Australian statutes once the arbitral tribunal had determined them ... To do so would ... usurp the jurisdiction of the tribunal and deny the intention of the parties.¹⁵

C The significance of *Transfield*

The reasoning in *Transfield* may have significant consequences for the future of the public policy exception in Australia. Although the exception was not raised before, or considered by, the Court, implicit in Hollingworth J's reasoning was a preparedness to respect the sanctity of the arbitral process. Notwithstanding that the Tribunal failed to apply arguably mandatory Australian law, the Court was reluctant to review the content of the award. Accordingly, while Luzon was not seeking to enforce the award in Australia, it is a logical extension of her Honour's reasoning that she would have enforced the award. In light of these concerns, it is relevant to ask, was *Transfield* correctly decided? This raises further questions of whether the application of Philippines law ousted the *TPA*;¹⁶ whether this ousting was permissible;¹⁷ and if this contracting out was impermissible, does the failure to apply the *TPA* constitute a public policy basis for non-enforcement? It is these questions which this article seeks to answer.

¹⁰ Since the initial draft of this article, the *Competition and Consumer Law Act 2010* (Cth) was adopted, thereby outdating any reference to the *TPA*. To the extent possible, the author has attempted to replace the references to the *TPA* with references to the *Competition and Consumer Law Act 2010* (Cth). However, where such reference formed part of the claim before the Court, or part of the Court's reasoning, the reference to the *TPA* has been retained. The Acts can, in principle, be referred to interchangeably.

¹¹ *Transfield* [2006] VSC 175 (4 December 2006) [66].

¹² Megens and Bonnell, above n 2, 260.

¹³ *Transfield* [2006] VSC 175 (4 December 2006) [7].

¹⁴ See Max Bonnell, 'Arbitrability of Competition Disputes in Australian Law' (2005) 79 *Australian Law Journal* 585 (arbitrability of claims under *Trade Practices Act 1974* (Cth)).

¹⁵ *Transfield* [2006] VSC 175 (4 December 2006) [73].

¹⁶ Megens and Bonnell, above n 2, 261.

¹⁷ *Ibid.*

III Definitions

The extent to which an arbitrator must have regard to the mandatory rules of law governing the parties relationship, the mandatory law of the forum, supranational mandatory rules, and the mandatory rules at the potential place of enforcement are some of the most difficult issues in international arbitration.¹⁸ Some of the difficulties associated with these questions arise from the competing theoretical approaches to arbitration. Among those theories most commonly referred to in arbitration literature are the contractualist,¹⁹ jurisdictional²⁰ and hybrid theories.²¹ To resolve these complexities, three broad approaches could be taken by arbitrators when determining whether to apply mandatory law: apply all mandatory rules, apply no mandatory rules or apply mandatory rules at the arbitrator's discretion or under an objective formula.²²

The question of whether an arbitrator must apply mandatory rules of law, and which mandatory rules they should apply, will impact upon whether any failure to apply mandatory law renders an award unenforceable on public policy grounds. It is accepted that a mandatory rule will apply where it forms part of the *lex contractus*, is not expressly excluded and one party has invoked it before the arbitrators.²³ Absent these conditions, however, the task of the identifying the proper approach to applying mandatory law is beyond the scope of this article. This article proceeds on the assumption that an obligation to apply mandatory law exists and the arbitrator has failed to comply with this obligation. It is then asked whether a court could refuse to enforce the award on public policy grounds.

A What is mandatory law?

For Mayer, a mandatory rule is an imperative provision of law that must be applied to an international relationship irrespective of the law that governs the relationship.²⁴ Mandatory rules of law tend to share most of the characteristics of 'public law'; they are typically expressed in statutory form, they are regulatory, rather than elective, they frequently vary from nation to nation and they are often enforced directly by an agency of government.²⁵ Mandatory rules may also be procedural. However, the obligation to apply the mandatory procedural laws at place of enforcement is uncontentious.

There are numerous examples of substantive mandatory provisions both domestically and internationally. Among those mandatory rules most frequently encountered are competition laws, currency controls, environmental protection laws, measures of

¹⁸ Sheppard, above n 8, 231; Marc Blessing, 'Mandatory Rules of Law Versus party Autonomy' (1997) 14(4) *Journal of International Arbitration* 23; see also Nathalie Voser, 'Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319.

¹⁹ Geoffrey Hartwell, 'Arbitration and the Sovereign Power' (2000) 17 *Journal of International Arbitration* 11, 11.

²⁰ Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 33–4.

²¹ Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books, 1994) 11.

²² Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 1, 20.

²³ Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arbitration International* 274, 280.

²⁴ Ibid 275; Sheppard, above n 8, 231; Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) *Arbitration International* 249, 261.

²⁵ Philip J McConaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1998-1999) 93 *Northwestern University Law Review* 453, 474; Andreas Lowenfeld, *International Litigation and Arbitration* (West Group, 1993) 1; see also Voser, above n 18, 321.

embargo,²⁶ and laws protecting those presumed to be in an inferior bargaining position (eg consumer protection law).²⁷ In Australia, it has been recognised that there are several sources of mandatory law. Such sources include section 18 of the *Australian Consumer Law*²⁸ ('ACL'),²⁹ sections 7(2)(b) and 8 of the *Carriage of Goods by Sea Act 1991* (Cth) and section 7 of the *Insurance Contracts Act 1984* (Cth).³⁰

B What is public policy?

I The public policy exception in arbitration instruments: International and Australian perspectives

Almost every multilateral legal instrument regulating the recognition and enforcement of arbitral awards contains a form of public policy exception.³¹

(a) The New York Convention

The *New York Convention* is widely regarded as the cornerstone of international commercial arbitration.³² The central objective of the Convention is to recognise arbitral awards as binding and to secure their enforcement outside the country in which the award was made.³³ One way in which the Convention encourages enforcement is by strictly limiting the grounds on which the courts of Member States may refuse to enforce an award.³⁴ One such ground is public policy. Under article V(2)(b):

Recognition and enforcement of an arbitral award may also be refused if ... The recognition or enforcement of the award would be contrary to the public policy of that country.

As is apparent from article V(2)(b), the notion of public policy included in the *New York Convention* is directed at the policy of the country of enforcement. The Convention does not, however, define public policy.

²⁶ Mayer, above n 23, 275; Roman Jordans, 'Application of consumer protection provisions as foreign mandatory laws in international arbitration' (2004) 15 *Australasian Dispute Resolution Journal* 194, 196.

²⁷ Daniel Hochstrasser, 'Choice of Law and Foreign Mandatory Rules in International Arbitration' (1994) *Journal of International Arbitration* 57; William Dodge, 'Breaking the Public Law Taboo' (2002) *Harvard International Law Journal* 161, 163.

²⁸ Formerly TPA s 52. The *Australian Consumer Law* is contained in a schedule in the *Competition and Consumer Law Act 2010* (Cth).

²⁹ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (20 December 2006) [195] (Allsop J); Reid Mortensen, *Private International Law in Australia* (LexisNexis Butterworths, 2006) [15.12]; Kate Lewins, 'Maritime Law and the TPA as a "mandatory statute" in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78, 79.

³⁰ See also *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

³¹ Vesselina Shaleva, 'The "Public Policy" Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) *Arbitration International* 67, 69.

³² Albert Jan van den Berg, 'When is an Arbitral Award Non-domestic in Nature under the New York Convention of 1958?' (1965) 6(1) *Pace Law Review* 25.

³³ *United Nations 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); Chukwumerije, above n 5, 238.

³⁴ Troy Harris, 'The Public Policy Exception to Enforcement of International Arbitration Awards Under the New York Convention' (2007) 24(1) *Journal of International Arbitration* 9, 10.

(b) UNCITRAL Model Law

The thrust of the *New York Convention's* public policy exception was subsequently embodied in the *UNCITRAL Model Law*.³⁵ Adopted in 1985,³⁶ the *Model Law* included public policy as a ground for refusing recognition and enforcement of a foreign award.³⁷ Both articles 34(1)(b)(ii) and 36(1)(b)(ii) contain a public policy exception. Article 36(1)(b)(ii) provides:

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (a) at the request of the party against whom it is invoked [...];
 - [...] or
 - (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

An almost identical exception is contained in article 34(1)(b)(ii).

As with the *New York Convention*, the *Model Law* does not define public policy.³⁸ Thus, while the concept of public policy is obviously directed at the country of enforcement, interpretations of public policy have been left to the judiciary.

(c) The Australian response

The *New York Convention* was given domestic effect in Australia with the adoption of the *LAA*. The *UNCITRAL Model Law* was subsequently incorporated as Part III of the *LAA* in 1989.³⁹

The regime concerning the enforcement of foreign arbitral awards in Australia is prescribed in Part II of the *LAA*. Section 8(7) adopts the *New York Convention's* public policy exception. Section 8(7A), however, further defines public policy, whereby a foreign award will be contrary to Australian public policy if:

- (a) the making of the award was induced or affected by fraud or corruption; or⁴⁰
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.⁴¹

³⁵ Sheppard, above n 8, 223.

³⁶ *Model Law on International Commercial Arbitration*, UN Doc A/40/17 (1985); 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.

³⁷ *Ibid* art 36.

³⁸ Sheppard, above n 8, 223.

³⁹ Duncan Miller, 'Public Policy in International Commercial Arbitrations in Australia' (1993) 9(2) *Arbitration International* 167, 169.

⁴⁰ *International Arbitration Act 1974* (Cth), s 8(7A)(a).

⁴¹ *Ibid* s 8(7A)(b).

Part III gives the *Model Law* force of law in Australia.⁴² Section 19 then clarifies the meaning of public policy as contained in the *Model Law*. Pursuant to section 19:

Without limiting the generality of Articles ... 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law ... an ... award is in conflict with, or is contrary to, the public policy of Australia if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

2 The meaning of public policy: In search of a definition

Much of the difficulty in ascertaining whether a failure to apply mandatory law enlivens the public policy exception stems from the problems associated with defining public policy.⁴³ Over the past 200 years, public policy has been described as an 'unruly horse';⁴⁴ a nebulous, concept that changes from State to State.⁴⁵ The definitions of public policy have not, however, changed markedly over the years.⁴⁶

There are three classes of public policy that may form part of the exception in the *New York Convention*: (a) 'domestic public policy', ie those principles of morality and justice which a State sets into its domestic laws;⁴⁷ (b) 'international public policy', ie those principles of a State's domestic public policy that a State insists should apply in an international relationship;⁴⁸ and (c) 'transnational public policy', ie those principles of universal justice and morality accepted by civilised nations.⁴⁹

(a) Domestic public policy

Domestic public policy is a principle of law which holds that 'no subject can lawfully do that which [is] injurious to the public or against the public good'.⁵⁰ In the context of enforcement of an arbitral award, it must be shown that the enforcement of the award would be injurious to the public good.⁵¹ Considerations of public policy must, however, be approached with caution.⁵² Courts will not exercise their power to refuse enforcement lightly. For enforcement to be refused, it must be shown that the award violates 'the State's most basic notions of morality and justice'.⁵³

⁴² Ibid s 6.

⁴³ Sheppard, above n 8, 218.

⁴⁴ *Richardson v Mellish* (1824) 2 Bing 229, 252 (Burrough J); *Enerby Town Football Club v Football Association Ltd* [1971] Ch 591, 606 (Lord Denning MR).

⁴⁵ Andrew I Okekeifere, 'Public policy and arbitrability under the UNCITRAL Model Law' (1999) 2(2) *International Arbitration Law Review* 70, 70.

⁴⁶ Sheppard, above n 8, 218.

⁴⁷ Okekeifere, above n 45, 71.

⁴⁸ Anil Changaroth, 'International Arbitration – A Consensus on Public Policy Defences' (2008) 4 *Asian International Arbitration Journal* 143, 156.

⁴⁹ Sheppard, above n 8, 231.

⁵⁰ *Egerton v Brownlow* (1853) 4 HLC 1.

⁵¹ *Deutsche Schachtbau- und Tiefbohrergesellschaft mbh v Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep 246, 254.

⁵² Ibid.

⁵³ *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier RAKTA and Bank of America*, 508 F 2d 969 (2nd Cir, 1974).

(b) International public policy

Although similar, a distinction is often drawn between domestic and international public policy.⁵⁴ International public policy is narrower in scope; not every rule that belongs to a State's internal public policy is necessarily part of the international order. Rather, international public policy is confined to truly fundamental conceptions of the legal order in the country concerned.⁵⁵

International public policy has been increasingly referred to by the legislature and judiciary of various nations.⁵⁶ In France, a court may refuse to enforce an award where it offends France's '*ordre public international*'.⁵⁷ Portugal has legislation to a similar effect.⁵⁸ In speaking of the French example, however, it should be remembered that it is the French concept of international public policy that is being referred to; that is, a set of values a breach of which cannot be tolerated by the French legal order, even in international cases.⁵⁹ Thus, the content of application of this class of public policy remains subjective, as with domestic public policy.

(c) Transnational public policy

The concept of transnational public policy is more restrictive in scope, but universal in application.⁶⁰ It seeks to identify a common international standard of public policy, comprised of general principles of morality accepted by civilised nations.⁶¹ Unlike the other classes of public policy, reference to this form is limited. While it is yet to be applied in a judicial decision, both Swiss⁶² and Milan courts have spoken favourably of adopting a universal conception of public policy.⁶³

3 The scope of public policy: Substantive vs procedural public policy

Another controversial issue is whether article V(2)(b) encompasses both substantive and procedural law. This distinction is relevant as it may determine the form that the mandatory law exception might take.⁶⁴

Substantive public policy concerns the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award.⁶⁵ Included in this category are fundamental principles of law, public order, national/foreign interests and, significantly, mandatory law. Procedural public policy concerns the process by which the dispute was adjudicated.⁶⁶ Included in this category are issues of impartiality, lack of reasons, and manifest disregard for the law or facts.⁶⁷

⁵⁴ Ibid; Sheppard, above n 8, 219; Changaroth, above n 48, 158.

⁵⁵ Sheppard, above n 8, 220.

⁵⁶ Ibid 219.

⁵⁷ *New Code of Civil Procedure* (1981) (France) arts 1498, 1502 of Title V.

⁵⁸ *Code of Civil Procedure* (1986) (France) art 1096(f).

⁵⁹ Sheppard, above n 8, 220.

⁶⁰ Mark Buchanan, 'Public policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511.

⁶¹ Shaleva, above n 31, 69.

⁶² *W v F and V* (1995) Bull ASA 217.

⁶³ Sheppard above n 8, 221.

⁶⁴ Shaleva, above n 31, 76.

⁶⁵ Sheppard above n 8, 230.

⁶⁶ Shaleva, above n 31, 76.

⁶⁷ Stephen Schwebel and Susan Lahne, 'Public Policy and Arbitral Procedure' in Pieter Sanders (ed) *Comparative Arbitration and Public Policy in Arbitration* (Kluwer Law International, 1986) 216.

The scope of article V(2)(b) was addressed by UNCITRAL with the adoption of the *Model Law*. The Commission's Report stated:

It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside.⁶⁸

In referring to corruption, bribery and fraud, the UNCITRAL Commission was referring to circumstances in which the making of an award was induced or affected by fraud or corruption. It follows from the Commission's reasoning that the public policy exception not only encompasses procedural public policy, being laws which regulate the process by which a dispute is regulated, but may also extend to substantive public policy.

4 Mandatory law, public policy and arbitrability

Arbitrability is another aspect of public policy. Although strictly beyond the scope of this article, the issue of arbitrability raises the question of whether an arbitrator has the authority to apply mandatory rules of law.⁶⁹ In order for a dispute to be lawfully arbitrated under article V(2)(a) of the *New York Convention*, the dispute must concern a 'subject matter capable of settlement by arbitration'.⁷⁰ A matter will be non-arbitrable where there is a legitimate public interest in the subject matter which renders inappropriate the making of an enforceable private resolution by the parties outside the national court system.⁷¹ For some, article V(2)(a) is superfluous, as arbitrability forms part of public policy and is covered by Art (V)(2)(b).⁷² Others, by contrast, argue that rules regulating arbitrability do not always rise to the level of public policy. While they may be mandatory in character, they do not necessarily reflect national policies of a fundamental character.⁷³

The non-arbitrability of mandatory law claims was traditionally a fundamental premise of international arbitration.⁷⁴ Increasingly, however, courts have approved of their mandatory law being subject to arbitration, even where they protect a fundamental public interest.⁷⁵ This trend has been repeated in Australia.⁷⁶ Courts have held that *TPA* claims

⁶⁸ Sheppard, above n 8, 224. See also Shaleva, above n 31, 76.

⁶⁹ Okekeifere, above n 45, 70. See also the discussion of this issue and the connection between arbitrability and transnational public policy in Luke Nottage and Richard Garnett, 'The Top 20 Things to Change in or around Australia's International Arbitration Act' in Nottage and Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 162.

⁷⁰ Sam Luttrell, 'Public Policy Conflicts in the Arbitrability of the *Trade Practice Act 1974* (Cth)' (2007) 4 *Macquarie Journal of Business Law* 139, 144.

⁷¹ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, 200 (Allsop J).

⁷² Sheppard, above n 8, 231.

⁷³ Shaleva, above n 31, 78.

⁷⁴ McConaughay, above n 25, 475.

⁷⁵ See for example *Scherk v Alberto-Culver Co*, 417 US 506 (1974); *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* 373 US 614 (1985).

⁷⁶ Leanne Rich, 'The Arbitrability of *TPA* claims: To Stay or not to Stay?' (2010) 18 *Trade Practices Law Journal* 7, 7–9; Romauld Andrew, 'The ILL-Favour Child of Litigation: International Commercial Arbitration and the Australian Trade Practices Act 1974' (2004) 21(3) *Journal of International Arbitration* 239, 240; Luttrell, above n 70, 147.

are capable of arbitration.⁷⁷ This is not to say that all mandatory laws are arbitrable. Mandatory laws may still represent a public interest too precious to resolve outside of the court system, as was the case in Singapore recently.⁷⁸

IV Will a failure to apply a State's mandatory law constitute a public policy basis for refusing to enforce an arbitral award?

It is apparent from the above discussion, that there are several different meanings of the term 'public policy'. Which meaning is preferred and whether that meaning is limited to procedural or substantive public policy will affect the question of whether a failure to apply a State's mandatory law constitutes a public policy basis for non-enforcement.

In order for a failure to apply mandatory law to form part of the public policy exception, there must be some connection between the concepts of public policy and mandatory law. The terms mandatory law and public policy should not, however, be used interchangeably.⁷⁹

For Voser, this is necessary is for two reasons. First, rules of public policy — which imply a higher moral standard — can be, but are not necessarily, enacted explicitly in statutory provisions. Mandatory laws, by contrast, are always explicit rules which the parties seek to apply in the dispute in question.⁸⁰ The second, and more prevalent reason, is that mandatory rules may contain issues that could be classified as issues of public policy.⁸¹ As Mayer states:⁸²

[M]andatory rules of law are a matter of public policy (ordre public), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.

Public policy may, therefore, require that the applicable law be displaced by a mandatory law of the forum or relevant foreign or supra-national legal system. In this sense public policy and mandatory law may reflect similar concerns.

The question arises as to whether the connection between the two terms will elevate a failure to apply mandatory law to the status of a public policy exception to enforcement. While mandatory laws may contain issues of public policy, they also have a broader content.⁸³ It is by virtue of this broader content that the courts of many countries have concluded that not all of their prohibitive or proscriptive laws (ie mandatory laws) are

⁷⁷ *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 16; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45. Such claims would now of course be claims under the *CCL Act*.

⁷⁸ *Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v Larsen Oil and Gas Pte Ltd* [2010] SGHC 186.

⁷⁹ Voser, above n 18, 322.

⁸⁰ *Ibid.*

⁸¹ Shaleva, above n 31, 73.

⁸² Mayer, above n 23, 275.

⁸³ Voser, above n 18, 322.

relevant in considering whether or not to enforce a foreign award.⁸⁴ In essence: every single public policy rule is mandatory, but not every mandatory rule forms part of public policy.⁸⁵

The relevant point at which a mandatory rule of law will form of a State's public policy is affected by two key factors: the *New York Convention's* pro-enforcement bias and the internationally preferred definition of public policy.

A The pro-enforcement bias within the New York Convention

It is well recognised that the public policy exception must be construed consistently with the two overriding purposes of the *New York Convention*: to encourage recognition and enforcement of commercial arbitration agreements and to unify standards by which arbitral agreements are enforced in signatory countries.⁸⁶ This first purpose is known as the 'pro-enforcement bias'.

The pro-enforcement bias of the *New York Convention* has been consistently affirmed in decisions of the United States (US) judiciary. First addressed in *M/S Brenman v Zapata Off-shore Co*,⁸⁷ the pro-enforcement bias was later approved of in *Scherk v Alberto-Culver Co*⁸⁸ and again in *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA and Bank of America*.⁸⁹ In *Parsons*, the Court equated the pro-enforcement bias with a narrow construction of the public policy defence, stating: 'The general pro-enforcement bias informing the Convention points towards a narrow reading of the public policy defense ...'.⁹⁰

That the public policy should be read narrowly has been confirmed in the jurisprudence of other nations. In England, Walker J was prepared to enforce an arbitration clause as a matter of policy of the upholding of international awards, irrespective of the fact that a different result might have arisen under English law.⁹¹ Statements to a similar effect have also been made in Korea,⁹² the Netherlands,⁹³ Italy⁹⁴ and India.⁹⁵

This initial prejudice in favour of enforcing arbitral awards limits the scope of the public policy exception. While this will not, of itself, prevent mandatory law forming part of the public policy exception, the narrow construction of public policy implies that not all failures to apply a nation's mandatory law will fall within the public policy exception.

⁸⁴ Sheppard, above n 8, 231.

⁸⁵ *Ibid.*

⁸⁶ *Waterside Ocean Navigation Co v International Navigation Ltd*, 737 F 2d 150, 152 (1984); Changaroth, above n 48, 144.

⁸⁷ 407 US 1 (1972).

⁸⁸ 417 US 506 (1974).

⁸⁹ 508 F 2d 969 (2nd Cir, 1974) ('*Parsons*').

⁹⁰ *Ibid* 973–4; Harris, above n 34, 13.

⁹¹ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222, 244–5.

⁹² *Adviso NV v Korea Overseas Construction Corporation* (1996) XXI Yearbook Commercial Arbitration 612.

⁹³ *Societe Europeene d'Etudes et d'Enterprises v Federal Republic of Yugoslavia* (1976) I Yearbook Commercial Arbitration 195.

⁹⁴ *Allsop Automatic Inc v Technock SNC* (1997) ICAA Yearbook 142 Corte di Appello, December 1992.

⁹⁵ *Renusgar Power Ltd v General Electric Co*, AIR 1994 SC 860.

B Public policy in international jurisprudence: Domestic, international or transnational?

The preparedness of States and courts to adopt a narrow construction of the public policy exception is reflected in the preferred definition of public policy. In furtherance of this narrow construction, the majority of the judiciary⁹⁶ and jurists⁹⁷ have defined ‘public policy’ within the *New York Convention* as meaning ‘international public policy’. In *Parsons*, the Court explicitly distinguished between domestic and international public policy, indicating that the utility of the *New York Convention* would be undermined if its public policy defences were used to defend only national political interests.⁹⁸ Moreover, as the Court noted in *Mitsubishi Motors Corporations v Soler Chrysler-Plymouth Inc*, ‘it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration’.⁹⁹ In light of this trend, in 2003 the International Law Association (ILA) endorsed the application of a test of international public policy.¹⁰⁰

The adoption of the test of international public policy does not exclude mandatory law from the public policy exception. Indeed, as the ILA recognised, international public policy includes both procedural and substantive public policy.¹⁰¹ It is further recognised that international public policy includes *lois de police* (ie mandatory law).¹⁰²

To fall within a State’s *lois de police*, however, it is insufficient that the rule is merely of a mandatory character. As recognised in China¹⁰³ and Switzerland,¹⁰⁴ the mere fact that a foreign award violates a domestic mandatory law, will not necessarily violate a State’s international public policy. Likewise, in India, in order to attract the bar of public policy, the award rendered must involve something more than the violation of Indian law.¹⁰⁵ Rather, as the European Court of Justice (ECJ) confirmed, ‘[t]he infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought’.¹⁰⁶

The approach of the ECJ was adopted by the ILA. As the ILA Committee notes, enforcement should only be refused when an award giving effect to a solution prohibited under a mandatory rule: (i) is intended to encompass the situation under consideration; and (ii) would manifestly disrupt the essential political, social or economic interests protected by the mandatory rule.¹⁰⁷

⁹⁶ *Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier RAKTA and Bank of America*, 508 F 2d 969 (2nd Cir 1974); *Waterside Ocean Navigation Co v International Navigation Ltd*, 737 F 2d 150 (2nd Cir, 1984); *Allsop Automatic Inc v Technock SNC* (1997) ICAA Yearbook 142 Corte di Appello, December 1992.

⁹⁷ Voser, above n 18, 334; Luttrell, above n 70, 149; Barraclough and Waincymer, above n 22, 11; International Law Institute, *Resolution on the Autonomy of Parties in International Contracts between Private Persons or Entities* (1989), art 2.

⁹⁸ *Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier RAKTA and Bank of America*, 508 F 2d 969, 973–4 (2nd Cir 1974).

⁹⁹ 373 US 614, 639 (1985) (*Mitsubishi*).

¹⁰⁰ Mayer and Sheppard, above n 24, 251.

¹⁰¹ As the ILA noted in its earlier Interim Report, a failure to apply mandatory law falls into the category of substantive public policy. See also Mayer and Sheppard, above n 24, 253.

¹⁰² Mayer and Sheppard, above n 24, 255.

¹⁰³ Lanfang Fei, ‘Public Policy as a Bar to Enforcement: A Review of the Chinese Approach’ (2010) 26(2) *Arbitration International* 301, 306; *ED&F Man (HK) v China Sugar and Wine Company (Group)* [2003] Min Si Ta Zi [Civil Court Ruling] No 3.

¹⁰⁴ *Inter Maritime Management SA v Russin & Vecchi* (1997) XXII Yearbook of Commercial Arbitration 789.

¹⁰⁵ *Renusgar Power Ltd v General Electric Co* AIR 1994 SC 860.

¹⁰⁶ *Krombach v Bamberski* (C-7/98) [2000] ECR I-1935.

¹⁰⁷ Mayer and Sheppard, above n 24, 261.

Accordingly, it is possible that a failure by an arbitrator to apply a State's mandatory law may give rise to a public policy basis for refusing to enforce an award. The mere mandatory character of a law will, however, be insufficient to activate this possibility. Rather, a law must be described as essential to the legal order of the State. In light of this burdensome threshold requirement, it is unlikely that a failure to apply a State's mandatory law will regularly give rise to a ground to refuse to enforce an award.

It must be noted that the definition adopted by the ILA is not uniform. In Malaysia¹⁰⁸ and Hong Kong,¹⁰⁹ the respective countries' courts have defined public policy to mean a State's own domestic public policy. Accordingly, it is more likely in these jurisdictions that a violation of their mandatory law will violate the public policy exception and constitute a ground for refusing to enforce an arbitral award. In Singapore, section 31(4)(b) of the *International Arbitration Act* also refers to domestic public policies.¹¹⁰ It has been noted, however, that the reference to Singapore's public policies will be balanced against Singapore's obligations as a member of the international community, particularly when considering a *New York Convention* award.¹¹¹ Thus, even in these cases, there is still some weight given to international public policy considerations.¹¹²

C Possible exceptions

Although adopting the international public policy standard, the precise point at which a State's mandatory laws form part of the essential legal order of a State remains unclear. There are, however, two key instances in which courts have indicated a preparedness to refuse enforcement with respect to mandatory law on public policy grounds: anti-trust law and competition law.

I The 'second-look doctrine'

The 'second-look doctrine' was famously enunciated by the US Supreme Court in the *Mitsubishi*¹¹³ decision, which concerned the arbitration of US competition and anti-trust law under the *Sherman Act*.¹¹⁴ The Court began by confirming the arbitrability of US anti-trust law, eliminating any doubt that remained about the demise of the inarbitrability doctrine following *Scherk v Alberto-Culver Co.*¹¹⁵

The Court continued, however, noting that arbitration was not tantamount to waiver of a nation's mandatory law rights.¹¹⁶ Rather, as the Court stated:

In the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as against public policy¹¹⁷

¹⁰⁸ *Banque Nasionale de Paris v Wuan See May* [2003] 3 MLJ 587.

¹⁰⁹ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665.

¹¹⁰ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).

¹¹¹ Changaroth, above n 48, 159–60.

¹¹² *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 675 (Bokhary PJ); 691 (Mason NPJ).

¹¹³ *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 373 US 614 (1985).

¹¹⁴ McConaughay, above n 25, 474.

¹¹⁵ 417 US 506 (1974).

¹¹⁶ Alexander Greenawalt, 'Does International Arbitration Need a Mandatory Law Method?' (2008) 18 *American Review of International Arbitration* 103, 106.

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.¹¹⁸

The second look, therefore, consists of the right of enforcing courts to judicially review arbitral awards that considered applying mandatory law.¹¹⁹ Moreover, as the Court notes, a failure by an arbitrator to permit a party access to statutorily available remedies will constitute a public policy basis for refusing to enforce the award. Claims under US anti-trust law may, therefore, fall within the public policy exception. By reaffirming the right of courts to review the content of arbitral awards addressing US statutory remedies, the Court seemingly elevated mandatory anti-trust law to the status of ‘essential’ legal order.¹²⁰

The Court in *Mitsubishi* did envisage a limitation to scope of the second-look doctrine.¹²¹ Judicial review was limited to ‘ascertain[ing] that the tribunal took cognizance of the antitrust claims and actually decided them.’¹²² This limitation has implications for the potential review and refusal of enforcement on public policy grounds. The mere fact that a party may not have been awarded relief by a tribunal under an arbitral award will not entitle a Court to refuse enforcement. Moreover, providing the arbitrator applied and decided a mandatory law issue, the fact that they have reached the wrong decision will not justify review and non-enforcement.

While regularly referred to in academic writing, the potential scope the ‘second-look’ doctrine is yet to be clarified as the Court has not taken a second look.¹²³ Although enunciated with respect to anti-trust law, the Court did not limit its application to only one form of mandatory law. The fact that the doctrine is yet to be re-invoked in two decades, however, suggests that it will not be greatly expanded beyond US anti-trust claims.

2 European Union competition law

That the potential scope of the second-look doctrine is likely to be limited to anti-trust claims is seemingly confirmed in European competition law jurisprudence. Many jurisdictions within Europe have taken a liberal approach to the enforcement of awards.¹²⁴ European courts have, however, been less inclined to enforce an award that violates the *EC Treaty*,¹²⁵ and particularly article 81, which restricts anti-competitive practices between Member States.

Article 81 of the *EC Treaty* has been elevated to the status of international public policy by the ECJ.¹²⁶ In *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV*,¹²⁷ the

¹¹⁷ *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 373 US 614, 639 (1985).

¹¹⁸ *Ibid* 638.

¹¹⁹ McConnaughay, above n 25, 457.

¹²⁰ Mayer and Sheppard, above n 24, 255.

¹²¹ Greenawalt, above n 116, 106.

¹²² *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 373 US 614, 639 (1985).

¹²³ McConnaughay, above n 25, 457.

¹²⁴ In Switzerland for example, it has been suggested that an award should still be enforced, notwithstanding that it violates Swiss mandatory law: *Inter Maritime Management SA v Russin & Vecchi* (1997) XXII Yearbook of Commercial Arbitration 789.

¹²⁵ *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) (*EC Treaty*); Mayer and Sheppard, above n 24, 261.

¹²⁶ Sheppard, above n 8, 232.

¹²⁷ [1999] 2 All ER (Comm) 44.

ECJ concluded that the provisions of article 81 were fundamental provisions essential for the functioning of the European Community's internal market. Accordingly, they were to be regarded as public policy within the meaning of the *New York Convention*. The application to the ECJ to set aside the award, however, was made out of time. As a result, the Court concluded that the award should not be set aside, instead holding that the provisions of article 81 were not so fundamental as to overcome otherwise valid procedural requirements.¹²⁸

This somewhat confusing outcome was clarified by the Paris Court of Appeal in 2004.¹²⁹ In *SA Thales Air Defense v GIE Euromissile et al*, the Court held that, while European competition law was a matter of public policy, any violation of the law in an international arbitration needed to be flagrant to justify setting aside the award.¹³⁰ Providing such flagrancy is present, European competition law forms part of the public policy exception.

This position was codified in 2009, with the adoption of the *European Community Regulation on the Law Applicable to Contractual Obligations*¹³¹ at the end of 2009. Article 9 of that Regulation provides:

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

By virtue of article 9, enforcing courts are now permitted to ensure overriding mandatory provisions of the *lex fori* apply. This includes such laws as are crucial for ensuring the safeguard of a country's public interests, such as article 81 of the *EC Treaty*. Accordingly, a failure by an arbitrator to apply such law (at least between Member States) will give rise to a public policy basis for refusing enforcement.

¹²⁸ Sheppard, above n 8, 233.

¹²⁹ Changaro, above n 48, 154.

¹³⁰ See Assimakis Komminos, 'Paris Court of Appeal Refuses to Set Aside Arbitral Award for Public Policy Violation' (2004) 17(4) *International Dispute Resolution Newsletter*, White & Case International.

¹³¹ *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6.

3 *In search of a common theme: Can this jurisprudence be transposed into Australia?*

The mandatory rules most often cited as possessing the requisite public policy character generally have a specific economic purpose.¹³² For both the US Supreme Court and the ECJ, the failure to apply mandatory competition law gave rise to a public policy basis for refusing to enforce an award. Likewise, in the decisions of *Gallay v Fabricated Metals Inc*¹³³ and *Ingmar GB Ltd v Eaton Leonard Technologies Inc*,¹³⁴ which concerned competition law and commercial agents respectively, the economic purpose of these mandatory laws was sufficient to elevate the law to a fundamental legal principle. That is not to say that only mandatory laws with an economic purpose will fall within the public policy exception. As noted by the Court in *Mitsubishi*, however, it is necessary to identify some overriding public policy in favour of the particular legal concept the mandatory law seeks to protect before such law will form part of a State's essential legal order.¹³⁵

In Australia the equivalent competition law provisions are contained within the *Competition and Consumer Law Act 2010* (Cth) (*CCL Act*) and, more accurately, the *ACL*.¹³⁶ By virtue of its economic focus, the *CCL Act* may be regarded as essential to the legal order of Australia. Accordingly, if an arbitrator fails to apply the *CCL Act*, a court will be entitled to refuse enforcement on public policy grounds.

The *CCL Act* provisions that have mandatory extraterritorial effect are, however, consumer-focused.¹³⁷ Mandatory laws protecting parties in an inferior bargaining position (eg consumer protection laws) are regularly invoked as examples of public policy laws.¹³⁸ They have not, however, been regularly upheld as a public policy basis for refusing enforcement. Indeed, for the ECJ in *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV*,¹³⁹ article 81 was elevated to the status of international public policy as it was essential for the functioning of the internal market.¹⁴⁰ It is questionable whether aspects of the *ACL*, and particularly section 18, can be said to be essential for the functioning of Australia's internal market. As Greenberg notes, however, States choose to enact competition and anti-trust laws to encourage competition for the protection of consumers.¹⁴¹ It follows that the laws under consideration in *Mitsubishi* and *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV* were, at least to some extent, consumer-focused. On this basis, it is arguable that some aspects of the *ACL* may be sufficiently essential to Australia's internal market to form part of Australia's international public policy. Indeed, in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*, Gilmour J said:

The [TPA] is "a public policy statute". Its operation cannot be ousted by private agreement. "Parliament passed the [TPA] to stamp out unfair or improper conduct in

¹³² Mayer and Sheppard, above n 24, 261.

¹³³ (2000) 4 Rev Arb 805.

¹³⁴ (C-381/98) [2000] ECR I-9305.

¹³⁵ *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 373 US 614, 643 (1985).

¹³⁶ Lewins, above n 29, 79.

¹³⁷ See s 52 (Misleading and Deceptive Conduct); *Ibid* 101.

¹³⁸ Hochstrasser, above n 27, 57; Dodge, above n 27, 163.

¹³⁹ [1999] 2 All ER (Comm) 44.

¹⁴⁰ Sheppard, above n 8, 233.

¹⁴¹ Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: an Asia-Pacific Perspective* (Cambridge University Press, 2011) 122.

trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the [TPA]" ... Any attempt to contract out of the remedies conferred by the Act may be void¹⁴²

D An exception to the exception: Transfield personified

There may be an exception to the second-look doctrine with respect to the contractual exclusion of US mandatory law. In the above discussion of US anti-trust and EC competition law, it was assumed that parties are not able to contract out of mandatory law.¹⁴³ Mandatory law was assumed to have an extraterritorial application and a failure to apply it by virtue of choice of law rules would justify refusing to enforce the award.

There is a line of US authority, however, that proceeds on the assumption that private parties to international transactions are entitled to have only one nation's mandatory law apply to their multinational contract.¹⁴⁴ As a result, parties to international transactions may elect out of applicable mandatory law so long as the law they substitute for mandatory national law vindicates rights of a similar nature and does not 'subvert' the policy of the displaced law.¹⁴⁵ This substitution may occur even if the remedies available under the substituted law are less favourable than under the mandatory law.¹⁴⁶ Accordingly, if the substitute is appropriate, an arbitrator cannot have been said to have failed to apply mandatory law — rather, they have simply given effect to a permissible alternative. As a result, the public policy basis for refusing enforcement disappears.

The doctrine enunciated in these cases might resolve the lingering questions in *Transfield*. In their request for arbitration, TPI sought relief for misleading and deceptive conduct under the *TPA* (now the *ACL*) and Philippines law. Assuming that misleading and deceptive conduct under Philippines was sufficiently similar to the *ACL* as to not subvert its purpose, the Court was legally correct in refusing to review the arbitrators decision. Rather, by virtue of the choice of law clause, the parties could be said to have elected out of the applicable mandatory law.

This line of reasoning is, however, peculiar to the US. It is also somewhat questionable as it proceeds on several fallacious assumptions: in particular, that private arbitrators are equipped to address complex issues of public policy. As McConnaughay further notes, the conclusions reached by the courts in the relevant decisions¹⁴⁷ also fail to address the extraterritorial operation of US securities law, instead proceeding on the assumption that such law had an extraterritorial reach.¹⁴⁸ Accordingly, it is questionable whether this will truly form an exception to the second look doctrine.

¹⁴² [2007] FCA 881 (7 June 2007) [41] citing *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 561. See also *IOOF Australia Trustees (NSW) Ltd v Tantipecth* (1998) 156 ALR 470, 478–80; *Hi-Fert Pty Ltd v Kukiang Maritime Carrier Inc* (1998) 90 FCR 1, 24.

¹⁴³ See Barraclough and Waincymer, above n 22, 20.

¹⁴⁴ McConnaughay, above n 25, 486.

¹⁴⁵ *Riley v Kingsley Underwriting Agencies, Ltd*, 969 F 2d 1953 (10th Cir, 1992); *Roby v Corporation of Lloyd's*, 996 F 2d 1353 (2nd Cir, 1993); *Bonny v The Society of Lloyd's*, 3 F 3d 156 (7th Cir, 1993); *Allen v Lloyd's of London*, 94 F 3d 923 (4th Cir, 1996); *Haynsworth v Lloyd's of London*, 121 F 3d 956 (5th Cir, 1997); *Richards v Lloyd's of London*, 135 F 3d 1289 (9th Cir, 1998); *Lipson v Underwriters at Lloyd's*, 147 F 3d 1285 (11th Cir, 1998); McConnaughay, above n 25, 485–6.

¹⁴⁶ *Bonny v The Society of Lloyd's*, 3 F 3d 156 (7th Cir, 1993).

¹⁴⁷ McConnaughay, above n 25.

¹⁴⁸ *Ibid* 455, 487–8.

E Should the public policy exception continue to be construed narrowly?

When first conceived, it was feared that the public policy exception would become a ‘catch-all’ means for parties seeking to vacate an international arbitral award.¹⁴⁹ Quite the opposite has occurred. The quintessential advantage of a narrow construction of the public policy defence is its consistency with the object and purpose of the *New York Convention*.¹⁵⁰ The Convention sought to rectify mistakes with earlier conventions that placed the burden of proof on the party enforcing the award.¹⁵¹ By reversing this onus, the Convention ensured certainty and predictability of enforcement of awards, thereby facilitating the expansion of arbitration as an efficient method of (international) dispute resolution.¹⁵²

Moreover, the narrow construction of the public policy exception has not resulted in courts consistently enforcing an award to the prejudice of a party’s legitimate interests. There are numerous subcategories within the public policy exception, both substantive and procedural, under which enforcement may be refused.¹⁵³ The fact that the mandatory rules of law will not always form part of the public policy exception is perhaps reflective of their variable character.

However, by severely narrowing the scope of the public policy exception, the defence has been arguably neutralised.¹⁵⁴ The same issue arises with respect to mandatory law claims. The standard at which mandatory law will form part of a State’s international public policy is so high that it is difficult to anticipate which law will meet this standard. While the Supreme Court and the ECJ have indicated that it will include competition law, the Supreme Court, for example, is yet to exercise its foreshadowed second look.¹⁵⁵ Likewise, the ECJ has imposed an additional requirement that the breach of EC competition law must be flagrant to justify refusing to enforce an award.¹⁵⁶

The debate concerning to what extent arbitrators are obliged to apply mandatory law, and which mandatory laws they must apply,¹⁵⁷ must also be considered when addressing the scope of the public policy exception. The above questions have been said to be some of the most difficult in international arbitration.¹⁵⁸ Such problems are particularly acute in the case of a contract with multiple places of enforcement, as there are likely to be conflicts between multiple mandatory laws.¹⁵⁹

Barraclough and Waincymer argue that there are four situations in which the application of mandatory laws is not (or should not) be contentious. These are: (i) laws that create a force majeure for one of the parties; (ii) laws implementing transnational public

¹⁴⁹ Eloise Bouzari, ‘The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence’ (1995) 30 *Texas International Law Journal* 206, 209.

¹⁵⁰ *Waterside Ocean Navigation Co v International Navigation Ltd*, 737 F 2d 150, 152 (2nd Cir, 1984); Changaroth, above n 48, 144.

¹⁵¹ Bouzari, above n 149, 209.

¹⁵² *Ibid.*

¹⁵³ See generally Sheppard, above n 8; Shaleva, above n 31, 77; Changaroth, above n 48, 143.

¹⁵⁴ Bouzari, above n 149, 209.

¹⁵⁵ McConnaughay, above n 25, 455.

¹⁵⁶ *SA Thales Air Defense v GIE Euromisile et al*, referred to in Anil Changaroth, ‘International Arbitration – A Consensus on Public Policy Defences’ (2008) 4 *Asian International Arbitration Journal* 143.

¹⁵⁷ Greenberg, Kee and Weeramantry, above n 141, 123.

¹⁵⁸ Sheppard, above n 8, 231; Blessing, above n 18; Voser, above n 18; Barraclough and Waincymer, above n 22, 243.

¹⁵⁹ Jeff Waincymer, ‘International Commercial Arbitration and the Application of Mandatory Rules of Law’ (2009) 5 *Asian International Arbitration Journal* 1, 43.

policy; (iii) mandatory rules of the *lex contractus*, and (iv) mandatory procedural laws at the place of arbitration applicable to international arbitrations.¹⁶⁰

Where an arbitrator fails to apply an uncontentious mandatory rule of the above kind, a reviewing court is more likely to refuse to enforce the award on public policy grounds. Outside of these situations, commentators continue to argue for different approaches and reach different conclusions concerning the appropriate role of mandatory rules in international arbitration. Some studies, for example, have focused on the commonly applied preconditions to the application of mandatory rules and assert that only these forms of mandatory laws should be applied.¹⁶¹ Others appeal to common conceptions of transnational public policy, arguing that such an approach will promote certainty and provide justifiable limits to the circumstances in which an arbitrator can ignore parties' consent.¹⁶² Conversely, for Greenberg, substantive mandatory laws should only be applied where there is some real connection between those laws and the underlying transaction that would trigger the application of the mandatory rules.¹⁶³ Where one party requests the application of a mandatory rule outside the scope of the parties' choice of law agreement, it is more likely that such a rule will have some connection with the dispute in question. Even if does not, the fact that a party has requested the application of a mandatory rule may be a sufficient basis to require an arbitrator to consider the mandatory law.¹⁶⁴

More controversial is whether an arbitrator, *ex officio*, can have regard to mandatory rules that have come to their attention. Such a question is likely to be most controversial where the mandatory rules the arbitrator purports to apply are those of the *lex arbitri*.¹⁶⁵ Indeed, for Voser, the seat of arbitration, while having a close connection for any mandatory procedural laws, lacks such a connection with the merits of the dispute as to justify applying substantive mandatory laws, unless some other connection also exists with the dispute.¹⁶⁶

Consensus is yet to emerge as to whether a structured approach or broad discretion should be exercised by arbitrators when faced with mandatory law questions.¹⁶⁷ Whether or not an arbitrator is obliged to apply mandatory law will, however, likely have an inverse effect on the scope of the public policy exception. In circumstances where there is no obligation to apply mandatory law, it would be contrary to the legislative purpose of the *New York Convention* to refuse to enforce an award on public policy grounds. To give some content to the public policy exception, however, there are strong grounds for expanding

¹⁶⁰ Barraclough and Waicymyer, above n 22, 218.

¹⁶¹ Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed) *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International, 1987) 228.

¹⁶² Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999).

¹⁶³ Greenberg, Kee and Weeramantry, above n 141, 120, 126. This appears to have occurred in *International Chamber of Commerce (ICC) Case No 4132* (1983) where an arbitrator considered EU competition law, but did not ultimately apply such law as the agreement did not affect trade between EU states: see *ICC Case No 4132* (1983) in Jarvin, Derains and Arnaldez, *Collection of ICC Arbitral Awards 1974-1985* (1990), 164-7. See also *ICC Case No 6320* (1992), *ICC Case No 6379* (1990) and *ICC Case No 7047* (1994) considered in Greenberg, Kee and Weeramantry, above n 141, 122.

¹⁶⁴ See Greenberg, Kee and Weeramantry, above n 141, 123.

¹⁶⁵ *Ibid* 125.

¹⁶⁶ Voser, above n 18, 338.

¹⁶⁷ Waicymyer, above n 159, 3; Blessing, above n 18; Peter Berger, 'Acts of State and Arbitration: Exchange Control Regulations' in Karl-Heinz Böckstiegel (ed) *Acts of State and Arbitration* (C Heymanns, 1997) 99.

the exception consistently with expanding notions of arbitrability and the expanded statutory protections capable of enforcement by private parties.¹⁶⁸ As States increasingly permit their national laws to be arbitrated, some protection must be retained to ensure that such laws are properly and necessarily applied. This view is consistent with the prevailing view of the nature of arbitration, as being a hybrid between consent and State control.¹⁶⁹ Thus, in circumstances where some obligation may be inferred on the arbitrator to apply mandatory law, the standard of scrutiny under the public policy exception is likely to be more severe than in circumstances where no obligation to apply mandatory law existed.

Notwithstanding the need to protect a State's legitimate interests in its national laws being applied, there remains great merit in continuing to generally restrict the scope of the public policy exception. Adopting a broad definition, for example 'social and public interest' as used in China,¹⁷⁰ has the capacity to lead to absurd results. Indeed, in China, an arbitral award in favour of a heavy metal band banned from playing in China was refused enforcement on the basis that the award violated China's social and public interests.¹⁷¹

V Mandatory law in Australia: Will Australia take the same approach?

A The public policy objectives of the IAA

The *IAA* is somewhat unique in that it partly clarifies the meaning of public policy in Australia.¹⁷² Section 8(7A) of the *IAA* provides that an award will be contrary to public policy if it was induced or affected by fraud or corruption or the rules of natural justice were breached in the making of the award.¹⁷³

The definition, however, does not exclude the generality of the public policy exception.¹⁷⁴ For Nottage and Garnett, the omission of the word 'only' in section 8 of the *IAA* clarifies that the grounds for refusing enforcement are non-exhaustive.¹⁷⁵ Such a provision simply avoids any inference that the term 'public policy' does not contain those elements.¹⁷⁶ The Act, therefore, adds little to the limits of the public policy exception within Australia.

The residual discretion vested in courts by section 8 of the *IAA* has been criticised as being completely contrary to the legislative history, text and worldwide understanding of article V of the *New York Convention*.¹⁷⁷ The vesting of an unguided discretion also permits a court to more broadly construe the public policy exception.¹⁷⁸ Several recent decisions

¹⁶⁸ Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International 2001), 82; Waincymer, above n 159, 8.

¹⁶⁹ Waincymer, above n 159, 10.

¹⁷⁰ Fei, above n 103, 303.

¹⁷¹ *American Product Co and Tom Flight v Chinese Women's Travel Agency*, Ta [1997] No 35 SPC.

¹⁷² See above III B 1 c 'The Australian Response'.

¹⁷³ *International Arbitration Act 1974* (Cth) ss 8(7A), 19.

¹⁷⁴ *Ibid.*

¹⁷⁵ Nottage and Garnett, above n 69, 162.

¹⁷⁶ Miller, above n 39, 171.

¹⁷⁷ Nottage and Garnett, above n 69, 162.

¹⁷⁸ *Ibid.*; see also Albert Jan van den Berg, 'Why Are Some Awards Not Enforceable?' in Albert van den Berg (ed), *New Horizons for International Commercial Arbitration and Beyond* (Kluwer Law International, 2005) 291.

have reflected on the discretionary nature of the public policy exception in the *IAA*.¹⁷⁹ Accordingly, Australian courts may, by virtue of the nature of the exception in the *IAA*, be more prepared to refuse to enforce an award on public policy grounds.

B Public policy in Australian jurisprudence

That Australian courts are more likely to refuse to enforce an award on public policy grounds is confirmed in Australian public policy jurisprudence.

Although not addressing mandatory law, the leading Australian case on public policy is *Resort Condominiums v Bowell*.¹⁸⁰ In *Resort Condominiums*, the Court held that the award violated public policy as the orders were so vague as to make enforcement impossible, they were not orders a Queensland court would make, and the enforcement of the orders would constitute double vexation.¹⁸¹

The approach to public policy in *Resort Condominiums* is quite remarkable. By expanding the public policy exception into otherwise unrecognised categories, the Court eschewed the internationally supported narrow approach to public policy.¹⁸² Moreover, the requirement that the arbitral order mimic those of a Queensland court would lead to many awards not being enforced, thereby defeating the object of the *New York Convention*.¹⁸³

The decision of *Resort Condominiums* does not appear to have been followed in subsequent cases. However, in *Corvetina Technology Ltd v Clough Engineering Ltd*,¹⁸⁴ the Court made it clear that the defence was a serious one and was not to be easily dismissed.¹⁸⁵ As the Court noted:

The very point of provisions such as 8(7)(b) is to preserve the enforcing Court's right to apply its own standards of public policy in respect of the award ... There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy.¹⁸⁶

While not going as far as *Resort Condominiums*, the Court insisted that Australian public policy standards must be rigorously applied in applications to enforce foreign awards.¹⁸⁷ Although the Court showed some deference to the harm that a too indulgent and unbalanced approach to public policy could do to the *New York Convention*, it construed the public policy standard more liberally than in other jurisdictions. The Court appeared to

¹⁷⁹ *Resort Condominiums v Bowell* (1993) 118 ALR 655. Lee J's reasoning was applied in *International Movie Group Inc v Palace Entertainment Corp Pty Ltd* (1995) 128 FLR 458 to refuse to enforce an award on the grounds it was too uncertain.

¹⁸⁰ (1993) 118 ALR 655 ('*Resort Condominiums*').

¹⁸¹ *Ibid* 680.

¹⁸² Richard Garnett and Michael Pryles, 'Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand' (2008) 25(6) *Journal of International Arbitration* 899, 910.

¹⁸³ *Ibid*.

¹⁸⁴ [2004] NSWSC 700 (29 July 2004).

¹⁸⁵ Garnett and Pryles, above n 182, 911.

¹⁸⁶ *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700 (29 July 2004) [18].

¹⁸⁷ Garnett and Pryles, above n 182, 911.

adopt a domestic public policy test; a test rejected in *Parsons*. It is questionable, therefore, whether the international public policy standard will be adopted in Australia.¹⁸⁸

If Australia adopts a more liberal public policy standard, it follows that a failure to apply Australia's mandatory law will more readily justify a refusal to enforce a foreign award. As with the approach to public policy, it seems that Australian courts will ensure that Australian mandatory law is applied by arbitrators. In *Walter Rau Neusser Öl und Fett AG v Cross Pacific Trading Ltd*,¹⁸⁹ Allsop J required parties to an arbitration agreement to consent to consider all future issues arising under the *TPA*. As his Honour noted: 'The arbitration agreement is a contract about submission. Its enforcement should not undermine the operation of a statute such as the TP Act'.¹⁹⁰

A similar statement was made by Gilmour J in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*, reinforcing the essential public policy character of the *TPA/ACL* (see above).¹⁹¹

This form of intervention by the judiciary appears to be more aggressive than in other jurisdictions. While US courts have reserved the capacity to review arbitral decisions, such review is limited to determining whether the arbitrator considered US anti-trust law.¹⁹² The threat of refusing to enforce an award, however, has the effect of imposing a requirement on an arbitrator to apply US anti-trust law. The Australian approach to mandatory law may not, therefore, differ extensively from other jurisdictions. The desire to ensure the application of mandatory laws in Australia, however, seems to be greater than in the US and EC. It is, therefore, more likely that an Australian court would refuse to enforce an award on public policy grounds by virtue of an arbitrator's failure to apply mandatory law.

C Other trends in Australian international arbitration jurisprudence

Recent trends in Australian international arbitration jurisprudence, particularly concerning the construction of arbitration agreements, further support the idea that the public policy exception will be applied more forcefully in Australia than in other jurisdictions. As a result, Australian courts are more likely to refuse to enforce an award on public policy grounds where an arbitrator could have, but failed to, apply mandatory Australian law.

The proper approach to interpreting arbitration agreements was considered by Austin J in *ACD Tridon v Tridon Australia*.¹⁹³ For Austin J, the *LAA* and the *New York Convention* which gives it force, reflect a legislative and multi-jurisdictional policy supporting arbitration as a form of international commercial dispute resolution.¹⁹⁴ The importance of the policy supporting arbitration has been frequently emphasised by US courts.¹⁹⁵ Indeed, in the seminal *Mitsubishi* decision, Blackmun J delivering the majority opinion said this

¹⁸⁸ See Richard Garnett and Michael Pryles, 'Enforcement of Foreign Awards in Australia and New Zealand' in Nottage and Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 77.

¹⁸⁹ [2005] FCA 1102.

¹⁹⁰ *Ibid* [111] (Allsop J).

¹⁹¹ [2007] FCA 881 (7 June 2007) [41] citing *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 561. See also *IOOF Australia Trustees (NSW) Ltd v Tantipecth* (1998) 156 ALR 470, 478–80; *Hi-Fert Pty Ltd v Kukiang Maritime Carrier Inc* (1998) 90 FCR 1, 24.

¹⁹² *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 373 US 614, 639 (1985).

¹⁹³ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002).

¹⁹⁴ *Ibid* [113].

¹⁹⁵ *Scherk v Alberto-Culver Co*, 417 US 506 (1974); *Moses H Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (1983); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985).

policy is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements'.¹⁹⁶

The adoption of this position has been relied on by some US courts to support certain approaches to the construction of arbitration courts in three ways:

[first], that [courts] should not put obstacles in the way of the effective enforcement of such clauses; [second, courts] should construe such clauses "liberally" so as not to trespass into the field reserved for international arbitration; and [third, courts] should approach construction with a presumption in favour of arbitration.¹⁹⁷

The first principle of construction appears to have been adopted by Australian courts. Indeed, in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*, Mason J referred to the proposition, accepted in the US, that 'the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, provided that they do not violate any rule of law'.¹⁹⁸

Such support for the second interpretative principle, namely that the legislative policy mandates a 'liberal' approach to the construction of arbitration clauses, is not, however, apparent in recent Australian jurisprudence. It has been accepted by courts in Canada and the US that arbitration is a special form of dispute resolution where there is little room for judicial intervention.¹⁹⁹ It is doubtful, however, whether Australian courts would treat the aforementioned policy as mandating a liberal construction of an arbitration clause. As Austin J said:

Liberal construction is not a rigorous notion. In Australia, courts see their task as ascertaining the intention of the authors of a commercial instrument, as expressed in the instrument, taking into account surrounding circumstances and extrinsic materials to the extent permitted by law

In other words, while Australian courts are not constrained by considerations of public policy to adopt a "liberal" construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction.²⁰⁰

Australian courts are not, therefore, averse to adopting a broader construction of arbitration agreements. Such a preparedness to adopt a broader construction does not extend, however, to requiring a court to adopt a 'liberal' construction. The position was accurately summarised by Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*, where his Honour said:

When the parties to a commercial contract agree ... to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved

¹⁹⁶ *Mitsubishi Motors Corporation v Seler Chrysler-Plymouth Inc*, 373 US 614, 625 (1985).

¹⁹⁷ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002) [113].

¹⁹⁸ (1981) 146 CLR 206, 247. See also *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, 480 (Kirby P); *Commonwealth of Australia v Rian Financial Services and Developments Pty Ltd* (1992) 36 FCR 101, 110 (Higgins J); *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002) [117].

¹⁹⁹ See *Proctor v Schellenberg* 2002 MBQB 135 (22 April 2002) (Clearwater J).

²⁰⁰ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002) [119]–[120]. This passage was cited with approval in *Pabarpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 (13 May 2008).

before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues ...²⁰¹

The judgment of Gleeson CJ has been frequently cited in cases concerning the construction of arbitration agreements²⁰² and clearly influences Australian law.²⁰³ Australian courts have nevertheless stopped short of adopting a presumption in favour of arbitration as in North America²⁰⁴ and the United Kingdom.²⁰⁵ In jurisdictions where there is a presumption in favour of arbitration, courts are more reticent to interfere with the arbitration process, including by refusing to enforce an award on public policy grounds. Austin J, however, said of the presumption that: '[t]he concept of "presumption", typically used for presumptions of fact, seems to me out of place when the issue is to construe an instrument'.²⁰⁶

His Honour did continue to note that there is some authority that could be viewed as supporting a presumption in favour of arbitration. Properly analysed, however, such authority depends on the breadth of the language in the arbitration clause.²⁰⁷ The conclusion reached by Austin J is consistent with recent authority of the Federal Court. While accepting the importance of taking a broad approach to interpretation, Mansfield J held:

the syntactical and semantic analysis of [the dispute resolution provision] should not be ignored because it suggests a preserved alternative but limited dispute resolution process by court proceedings. The availability of such access to the courts would not defeat the commercial purpose of the agreement; indeed it may serve it.²⁰⁸

In Australia, therefore, there is neither a presumption in favour of, nor against, arbitration. A lack of a pro-enforcement statement in Australian arbitration jurisprudence stands in stark contrast to the position in other jurisdictions. For example, while not concerned with the public policy exception, courts in France, Switzerland, the Netherlands, as well as some US and German courts have expanded on the pro-enforcement bias by enforcing awards set aside by courts at the seat of arbitration.²⁰⁹ It is hard to envisage Australian courts adopting a similar position. Australian courts remain reluctant to confer complete autonomy on arbitrators to decide disputes. Such reluctance, albeit in the context of interpreting an arbitral award, is consistent with the courts' approach to the public policy exception in *Corvetina Technology Ltd v Clough Engineering Ltd*. It follows that, presently,

²⁰¹ (1996) 39 NSWLR 160, 165.

²⁰² *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002) [120]; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [167]; *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 (13 May 2008) [39]; *Westrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894 (29 August 2008) [22].

²⁰³ For further discussion on the treatment of the judgment of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; see Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australia Practice' (2009) 5 *Journal of Private International Law* 181, 191.

²⁰⁴ *United Steelworkers (America) v Warrior & Gulf Navigational Co*, 363 US 574, 583 (1960); *Deloitte Noraudit v Deloitte Haskins & Sells*, 9 F 3d 1060, 1065 (2nd Cir, 1993); *Howard Electrical & Mechanical Co v Frank Briscoe Co*, 754 F 2d 847, 850 (1985).

²⁰⁵ *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40.

²⁰⁶ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 (4 October 2002) [123].

²⁰⁷ *Ibid* [134]; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 166 (Gleeson CJ).

²⁰⁸ *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) 246 ALR 589, [37].

²⁰⁹ Nottage and Garnett, above n 69, 163.

an Australian court will more likely refuse to enforce an award on public policy grounds by virtue of a failure by the arbitrator to apply Australian mandatory law.

D Transfield: A conclusion

The decision in *Transfield* is incongruous with the aforementioned Australian authority. Whereas in *Corvetina Technology Ltd v Clough Engineering Ltd*, the Court gave weight to the right of a State to protect its public policy, the Court in *Transfield* was hesitant to engage in any form of review.

Transfield may, however, be consistent with the preferred test of international public policy. International jurisprudence on public policy requires that the exception be narrowly construed, giving appropriate weight to the pro-enforcement bias of the *New York Convention*.²¹⁰ Only a failure by an arbitrator to apply a mandatory law essential to a State's legal order will justify non-enforcement on public policy grounds.²¹¹ Assuming that the arbitrator should have considered the claim under the *CCL Act*, whether this failure gives rise to a public basis for non-enforcement will depend in part on whether the *CCL Act* forms part of Australia's international public policy. Notwithstanding this issue, the reasoning of Hollingworth J reflects comprehensively on the proper role that party autonomy plays in arbitration.²¹² As such, it arguably adopts a narrow approach to any possible public policy argument (although none was raised) so as to be consistent with the international approach.

Party autonomy is not, however, absolute. It must be balanced against the legitimate right of a State to protect its own processes.²¹³ Implicit in her Honour's reasoning is an acceptance that the Tribunal could, by applying choice of law rules, exclude the *TPA* claim in preference to the Philippines law. For the Court in *Mitsubishi*, where the choice of jurisdiction and choice of law clauses operate to exclude a statutorily available remedy, the Court would refuse to enforce the award on public policy grounds. Assuming that the *CCL Act* represents the requisite public policy standard, it appears that this occurred in *Transfield*. Moreover, whereas in *Mitsubishi*, the Court reserved for itself the opportunity at the award enforcement stage to ensure that the legitimate interest in the antitrust laws had been addressed, here her Honour eschews any possible right of review.²¹⁴ In light of these factors, it is arguable that *Transfield* is too deferential to the institution of arbitration, to the detriment of the enforcement of Australia's mandatory law. Accordingly, while the approach is more compatible with the international public policy standard with respect to mandatory law, assuming the *CCL Act* meets this standard, there is basis on which to argue that *Transfield* should be reconsidered if the issue of enforcement was to arise.

VI Conclusion

Mandatory law and public policy remain two of the most complex issues in international commercial arbitration. In light of recent jurisprudence, however, the connection between the two concepts is becoming clearer. A consensus has emerged that public policy within

²¹⁰ *Parsons & Whittemore Overseas Co. Inc v Société Générale de l'Industrie du Papier RAKTA and Bank of America*, 508 F 2d 969, 973–4 (2nd Cir 1974); Harris, above n 34, 13.

²¹¹ Mayer and Sheppard, above n 24, 261.

²¹² *Transfield* [2006] VSC 175 (4 December 2006) [73].

²¹³ Megens and Bonnell, above n 2, 259.

²¹⁴ *Transfield* [2006] VSC 175 (4 December 2006) [73].

the *New York Convention* means 'international public policy'. Unlike domestic public policy, international public policy refers only those essential principles of a State's legal order. Mandatory law may reflect public policy concerns. However, not all mandatory laws will form part of a State's international public policy; only those which form an essential part of a State's legal order. What constitutes an essential legal principle is, as yet, uncertain, although it is likely that mandatory law with an economic purpose will meet the standard. Two questions flow from this conclusion: (1) does the *CCL Act* form part of Australia's international public policy; and (2) does it matter? Unlike the US and Europe, Australian courts have been more conscious of ensuring that Australian mandatory law is applied by arbitrators. This divergent approach will have significant consequences for the relationship between mandatory law and public policy in Australia. Whether our approach will morph to resemble that of the international community, will simply be a matter of time.