

**DEFEATING AND
DEFENDING AWARDS**

*Arbitrability, Public Policy, and
Global Court Practice*

Victoria Bui

JURIS

Questions about This Publication

For assistance with shipments, billing or other customer service matters, please contact the Customer Services Department at:

customerservice@jurispub.com

For questions of an editorial nature, contact the Editorial Department at:

editorial@jurispub.com

To obtain a copy of this book, or to find other titles related to this topic, please visit:

www.arbitrationlaw.com

© 2026

by JurisNet, LLC

Huntington, New York 11743

ISBN 978-1-944825-76-8

All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

Printed in the United States of America

Contents

<i>Acknowledgements</i>	<i>xi</i>
<i>Abbreviations List</i>	<i>xv</i>

1 The Thesis Narrative	1
1.1 The Research Background and Aim.....	1
1.2 The Research Steps.....	2
1.3 The Empirical Enquiries and Findings.....	7
1.4 The New York Convention 1958: Background and Legislative History.....	10
1.5 UNCITRAL Model Law: General Legislative History.....	15
1.6 Research Questions and Enquiries	20
1.6.1 The Connections between the Research Questions	23
1.6.2 The Choice of Bribery and Corruption, Insolvency, and Patent Laws.....	24
1.7 Perspectives and Addressees.....	25
1.8 The Research Framework	27
1.9 Delimitations	28
1.10 Summary of the Methods Used.....	31
1.11 Thesis Outline – The Structure	32
1.12 The Contributions	35
2 Methods and Methodologies	37
2.1 Introduction	37
2.2 Methodologies – The Four Pillars of Research Methods.....	39
2.2.1 Part Descriptive.....	43
2.2.2 Traditional Legal Dogmatic – Problems Orientated	45
2.2.3 Part Comparative	48
2.2.4 Empirical – Quantitative and Qualitative	51
2.3 Relationship between the Methods Used in Each of the Chapters.....	60
2.4 Materials, Sources, and Analytical Tools.....	61
2.5 Search Engines.....	63

3	The Realm of Public Policy	67
3.1	Introduction	67
3.2	General Perception and Understanding.....	75
3.3	The Variations of Public Policy over Time and Demographics	81
3.4	Types of Public Policies.....	88
3.4.1	Domestic or National and International Public Policies.....	88
3.4.2	Transnational or Truly International Public Policy	96
3.4.3	The Two Categories of Public Policy: Substantive and Procedural	102
3.5	A Comparison of the Different Classifications of Public Policies	106
3.6	Concluding Remarks.....	109
4	The Swamp of Arbitrability	113
4.1	Introduction	113
4.2	The Arbitrability or Inarbitrability Complexities	117
4.3	The Three Main Factors Affecting Arbitrability	119
4.3.1	Private Rights versus Courts' Protection of Public Interests	119
4.3.2	Jurisdictional Basis Argument	122
4.3.3	Condition of Validity of Arbitration Agreement Inclination.....	125
4.4	The Two Categories of Arbitrability.....	129
4.4.1	Objective Arbitrability or Arbitrability <i>Ratione Materiae</i>	130
4.4.2	Subjective Arbitrability or Arbitrability <i>Ratione Personae</i>	135
4.5	The Four Stages of Arbitrability	136
4.6	Concluding Remarks.....	137
5	US Arbitrability: A Gateway Issue, a Matter of Jurisdiction	141
5.1	Introduction	141
5.2	Why Examine the Gateway Question?.....	143
5.3	The American Arbitrability <i>Locus</i>	146
5.4	Who Decides Who Will Decide the Issue of Arbitrability?	152
5.4.1	<i>Clear and Unmistakable</i> Evidence.....	152

5.4.2	Federal Pro-Arbitration Policy in Contradiction?.....	157
5.4.3	The Limitation of Arbitrability Scope Continues	160
5.4.4	The Parties' Intention Must Be Clear	163
5.4.5	US Arbitration Law Recast?	170
5.4.6	The Dichotomy Settled, for Now	174
5.5	Concluding Remarks.....	176
6	Public Policy and Arbitrability under the New York Convention 1958 and the UNCITRAL Model Law	179
6.1	Introduction	179
6.2	Constructions	183
6.2.1	Procedural Public Policy: Articles V(1)(b) and (d).....	186
6.2.2	Substantive Public Policy: Article V(2)(b).....	188
6.2.2.1	Interpretation Rules	188
6.2.2.2	Discretionary Power	190
6.2.2.3	Virtually Universal Acceptance of Enforcing Country's Public Policy.....	192
6.2.2.4	What Public Policy?	194
6.2.2.5	A Transition towards Transnational Public Policy	198
6.2.2.6	Courts' Own Construction of Substantive Public Policy and Other Significant Features	199
6.3	Interpreting Public Policy	203
6.3.1	Minimalist versus Maximalist	203
6.3.2	Protectionism	210
6.4	Arbitrability under the New York Convention 1958	214
6.4.1	Commercial Relationship: Article I(3).....	214
6.4.2	Arbitral Jurisdiction: Article II(1)	219
6.4.3	Null and Void, Inoperative or Incapable of Being Performed: Article II(3).....	224
6.4.4	Objective Arbitrability: Article V(2)(a)	228
6.4.5	Incapacity and Invalidity: Article V(1)(a).....	232
6.4.6	In Front of an Enforcing National Court at the Seat of Arbitration.....	237
6.4.7	In Front of an Enforcing National Court at the Place of Enforcement	238
6.5	The UNCITRAL Model Law.....	240

6.5.1	The Silence of the Model Law on Arbitrability	244
6.5.2	Public Policy under the Model Law	248
6.5.3	Article 34 and Article 36: Sword and Shield.....	251
6.6	Concluding Remarks.....	260
6.6.1	The Public Policy Exception.....	260
6.6.1.1	Interpretation	261
6.6.1.2	National Sovereignty	261
6.6.1.3	Interpretation Approaches: Minimalist versus Maximalist.....	262
6.6.1.4	The Model Law	264
6.6.2	Arbitrability Defence	266
6.6.2.1	The Silence of the Model Law on Arbitrability.....	268
7	The Correlation between Public Policy and Arbitrability	269
7.1	Introduction	269
7.2	The Legislatures and the Judiciaries	274
7.3	The Overlap amid Mandatory Laws and Public Policy.....	275
7.4	Public Policy as a Limitation on Arbitrability.....	277
7.5	Arbitrability as a Matter of Public Policy	279
7.6	New York Convention 1958 and Mandatory Law	281
7.7	Concluding Remarks.....	283
8	Gathering the Data, Analysis, and Understanding the Results.....	287
8.1	Introduction	287
8.2	The Searches and the Search Engines	290
8.2.1	Kluwer Arbitration	291
8.2.2	Westlaw International.....	292
8.2.3	The Search Terms and Key Words	294
8.2.4	The Search Methods and Commands.....	295
8.3	The Search Results.....	297
8.3.1	The Number of Hits in Westlaw International	298
8.3.2	The Number of Hits in Kluwer Arbitration.....	300
8.4	The Final Tally of Relevant Court Decisions.....	302
8.5	Analytical Tools: Microsoft Excel Spreadsheet Software.....	305
8.6	Data Analysis and Results Presentations.....	308

8.6.1	Enforcement Frequency	308
8.6.2	Enforcement Rate over Time and Correlation with Other Variables.....	311
8.6.3	Enforcement Rate per Jurisdiction, Jurisdictions, Groups, and Law Systems.....	313
8.7	Concluding Remarks.....	316
9	Concluding Reflections	319
9.1	The Overview	319
9.2	The Public Policy Concept.....	319
9.3	The Public Policy Exception.....	322
9.3.1	Article V(2)(b) and Its Interpretation Approaches...	322
9.3.2	The Public Policy Exception under the Model Law.....	324
9.4	Arbitrability	325
9.4.1	The US Perception of Arbitrability	326
9.4.2	The Arbitrability Defence under the New York Convention 1958.....	328
9.5	The Correlation between Public Policy and Arbitrability	329
9.6	The Pro-Enforcement Approach Consensus Hypothesis	330
9.7	Some Thoughts on the Possible Ways Forward	333
9.8	Ideas for Further Work.....	334
	Annexes.....	337
	Summary	339
	Annex A: List of the 70 Study Cases.....	343
	Annex B: Raw Data	348
	Bibliography	365
1.	Books, Chapters, Monographs, Articles	365
2.	Court Decisions Referred to in the Text	396
3.	Online Sources	400
4.	Reports and Journals.....	406
5.	International Legal Instruments, etc.	407
6.	Other.....	408
	Table of Cases Referred to in the Text	409
	Index.....	411

