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Author

Stavros L. Brekoulakis

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Part I Fundamental Observations and Applicable Law, Chapter 2 - On Arbitrability: Persisting Misconceptions and New Areas of Concern

Stavros L. Brekoulakis

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1 Introduction

2-1 More than twenty years after the seminal decision of the U.S. Supreme Court in *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, (1) it can safely be argued that the argument for the arbitrability of the vast majority of commercial disputes has largely been won. (2) Nevertheless, the subject of arbitrability continues to attract the interest of scholarly writing as the discussion on the matter is far from settled yet. (3)

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2-2 While the issue of what disputes are arbitrable has now become less of a problem, some basic misconceptions about the subject of arbitrability still persist. In particular, two areas on arbitrability require further analysis.

2-3 First, the rationale behind inarbitrability and the role of public policy in particular. Despite the remarkable expansion of the scope of arbitrability in the last two decades, the prevailing view is still that public policy considerations underpin inarbitrability. (4) The paper argues that in the limited types of disputes that are still considered inarbitrable, inarbitrability relates to the natural limitations of arbitration as a dispute resolution mechanism of consensual character rather than to public policy. The latter, as argued here, is effectively irrelevant to the discussion of arbitrability.

2-4 Secondly, the sanctions of inarbitrability, and especially whether it has any impact on the validity of an arbitration agreement. Here the prevailing view is that inarbitrability of the subject matter of an arbitration agreement renders the arbitration agreement invalid. (5) This paper argues that inarbitrability is an issue concerning the jurisdiction of an arbitral tribunal rather than the validity of an arbitration agreement. This discussion has important practical relevance. In fact, as will be shown, it pertains to the much debatable matter of which forum, national courts or arbitral tribunals, should have priority in determining whether a dispute is arbitrable or not.

2 The Rationale behind Inarbitrability

2.1 The limited relevance of public policy

2-5 The argument for arbitrability is now won principally because a series of court decisions in various jurisdictions demonstrated that arbitrators should not be excluded from applying national rules of public policy nature. (6) In their decisions, national courts at the highest level clearly accepted that arbitrators might not only examine, but also apply national provisions of public policy. (7)

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2-6 Notwithstanding the above decisions, the view that inarbitrability is founded upon public policy persistently prevails in international arbitration. (8) More importantly, with the exception of some arbitration laws that define arbitrability by reference to “economic interest” (9) or “property”, (10) many arbitration laws still delineate inarbitrability on the basis of criteria related to public policy. (11)

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2-7 Moreover, in the U.S., the suggested Arbitration Fairness Act of 2007 and Fair Arbitration Act of 2007 (12) constitute the latest legislative effort to severely restrict the scope of arbitrability on public policy considerations. The above drafts would amend the U.S. Federal Arbitration Act to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment, consumer or franchise dispute, or any dispute arising under any statute “intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power”.

2-8 It is still too early to safely say whether the Arbitration Fairness Act and the Fair Arbitration Act will eventually pass through, and whether they will trigger similar legislation in other jurisdictions. Nevertheless, it seems that the argument for arbitrability has not been won after all. Inarbitrability forces driven by public policy concerns are bound to revise the subject in the near future. Public policy remains defiantly pertinent to the discussion on arbitrability.

2-9 Thus, it is entirely timely to look into the reasons that keep the discussion of inarbitrability entangled with public policy. Why is it that arbitration is still perceived as not to be well

equipped to address specific types of public policy disputes? There are three different possible types of objections against the arbitrability of public policy disputes.

2-10 First, there are concerns that have due process implications. Specific characteristics of arbitration proceedings have often been mentioned as reasons related to inarbitrability of public policy disputes. Less intensive fact-finding process and less rigorous evidential proceedings, for example. In *Alexander v. Gardner-Denver*, the U.S. Supreme court noted that:

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Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. (13)

2-11 Or the limited or lack of reasoning of the awards. Justice Douglas, dissenting in *Scherk v. Alberto-Culver*, (14) pointed out that:

An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law. (15)

2-12 Or, the fact that there is usually no appeal process in arbitration combined with the limited review of arbitral awards by national courts. Justice Stevens, dissenting in *Mitsubishi v. Soler* stated characteristically:

Arbitration awards are only reviewable for manifest disregard of the law [...] and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable. Despotic decision-making of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets. (16)

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2-13 Finally, the fact that arbitration proceedings are usually private and confidential. The U.S. Supreme Court in *Merrill Lynch* in rebutting an argument forwarded by Merrill Lynch that the public adjudication of disputes may jeopardise the confidence of the investors and the market in general, noted in regard to the private character of arbitration:

There is no explanation of why a judicial proceeding, even though public, would prevent lessening of investor confidence. It is difficult to understand why *muffling a grievance in the cloakroom of arbitration* would undermine confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored *in the light of impartial public court adjudication*. (17) (emphasis added)

2-14 It is true that arbitration proceedings have procedural characteristics different from national litigation. However, this does not make arbitration a *compromised dispute resolution mechanism* in terms of due process, which is unfit to deal with public policy disputes. Otherwise, if that was the case, all disputes – public policy and non public policy ones – should be excluded from arbitration altogether. Even pure commercial disputes require uncompromised procedural safeguards. Thousands of "private disputes" arise every year, which *prima facie* have no public policy implications. However, they are collectively worth billions of dollars and, in fact, they have a far-reaching impact on economy and society that goes beyond the parties to a private contract. This is why the protection of the fundamental principle of due process is accorded to any type of dispute, be that a private or a public policy one. The European Convention of Human Rights Art. 6 is not limited to public policy disputes. (18) Similarly, parties to non public policy disputes are not permitted to waive fundamental due process guarantees. (19)

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2-15 The conclusion here is that arbitration, despite its unique procedural character, meets all due process standards necessary to safeguard rigorous and uncompromised proceedings.

2-16 A second, and arguably more pervasive, set of reservations relates to arbitrators as *decision makers* rather than to the procedural characteristics of arbitration proceedings. The *ability* of the arbitrators to correctly apply public policy rules seems to be under question. (20)

2-17 In another oft-cited extract, the U.S. Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.* (21) noted that as

issues of war and peace are too important to be vested in the generals, ... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community-particularly those from a foreign community that has had no experience with or exposure to our law and values. (22)

2-18 Whereas, In *University Life Insurance Co. v. Unimarc Ltd.*, Judge Posner wrote:

[Federal anti-trust issues] are considered to be at once too difficult to be decided competently by arbitrators- who are not judges, and often not even lawyers- and too important

to be decided otherwise than by competent tribunals. (23)

2-19 More pertinently, it is believed that arbitrators are unfit to address issues arising out of the economic power disparity between corporations and specific social groups, such as consumers or employees. In this respect, consumers and employees are often portrayed in simplistic, if not demagogic terms, as economically weak, inexperienced or even commercially naïve parties, who are coerced by powerful and sophisticated corporations to sign adhesion arbitration agreements, and relinquish their right to resort to a national judge.

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2-20 The argument implies that arbitrators, as private judges, are by nature in alliance with the interests of private corporations. Thus, arbitrators are necessarily unfit to take into account, or even acknowledge, the interests of economically weak parties.

2-21 It is worth looking into the preamble of the text of the bill of 2007 Arbitration Fairness Act (24) as it was written by its sponsor and submitted to the House for consideration:

Sec.2- Findings: The Congress finds the following: [...]

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

2-22 There are, thus, apparent concerns that arbitrators, as private adjudicators, are not necessarily suitable to reveal the real meaning of public policy statutory provisions, which can properly be applied by national judges only. The private viewpoint that arbitrators are expected to adopt towards a dispute, automatically renders them inappropriate to apply national rules set out to protect society or a group of people larger than the parties that have instructed the arbitrators.

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2-23 This argument is based on the assumption that the policy behind consumer or labour legislation, for example, set out to protect specific social groups (i.e. consumers or employees) and may only be implemented by a forum that is *biased towards those social groups*. In other words, the materialisation of the objective of public policy legislation requires a forum that is predisposed, namely a forum that takes a public rather than a private perspective to the dispute.

2-24 Indeed, in *Barrentine v. Arkansas-Best Freight System*, (25) it was noted with regard to the application of national labour legislation that:

Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [US Fair Labor Standards Act], thus depriving an employee of protected statutory rights. (26)

2-25 However, it is questionable whether the above assumption is correct. First, it would be difficult to readily accept that all national judges, as opposed to all arbitrators, are positively predisposed to specific social groups, such as consumers, for example.

2-26 Second, and more importantly, public policy rules are not drafted in *neutral* moral and social terms. Rather, the public policy objective underpinning the relevant rules is *clearly reflected in the wording* of the relevant provisions, in the form of specific conditions. For example, a provision drafted to protect the interests of employees will typically provide that for an employer to terminate an employment contract, proper notice and compensation has to be given to the employee. The amount of the compensation and the minimum period of the notice required are also provided in detail in the relevant provision. (27)

P 28

2-27 Thus, the objective of such a provision, which is set out to protect the interests of employees and which reflects valid public policy considerations, is achieved as soon as the conditions of 'compensation' and 'specific notice' are met. The materialisation of the public policy objection does not depend on the external condition that the decision maker would be favourably predisposed towards employees. Otherwise the relevant provision would have been dangerously ill drafted.

2-28 In general, the proper application of public policy rules does not depend on the whims of the person applying the provision. For the public policy purpose to be attained, the decision maker is not required to be biased; they are required to *correctly* apply the relevant rules. In principle, rules can be correctly applied by both a person hired by a state (i.e. a judge) and a person hired by parties (i.e. an arbitrator). Therefore, it can be argued, that allegiance to a

national state is not a condition precedent for the correct application of a public policy provision.

2-29 This is not to argue that the question of who applies a legal rule is irrelevant. A decision maker does not mechanically apply the rules simply going through a checklist. The application of a legal provision requires the judge or the arbitrator to perform a complicated analysis, which to some extent is subjective. For example, the analysis of whether an agreement would restrict competition or not by reference to EC Art. 81(1) seems to provide the decision maker with plenty of discretion. However, this analysis as well as the final determination on the issue would have to be performed by reference to facts, evidence, and possibly, previous relevant case law, rather than by reference to abstract principles or to the personal beliefs of the decision maker. (28)

2-30 Eventually, any discretion allowed by legal provisions to a decision maker cannot overturn their original drafting purpose, which is reflected in the wording of the rules. It can thus be argued that the fact that arbitrators, as opposed to national judges, may take a private rather than public perspective to the dispute, does not make them, as a matter of principle, unfit to apply public policy rules.

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2-31 The third area of concern pertains to whether arbitrators will *ever actually apply* the public policy or mandatory provisions of a national law, rather than to whether arbitrators *are fit* to apply them in accordance with their drafting purpose.

2-32 This objection is possibly the most valid one. The arbitration dealing with the resolution of a dispute relating to the public policy of a particular country may well take place in a different country. Thus, the question here is whether the arbitrators would have the duty to take the public policy rules of the former country into account. Here, it is feared that choice-of-forum clauses operating in tandem with choice-of-law clauses can be used as a vehicle for the parties to escape the public policy of a specific state. This is an objection based on a typical *Mitsubishi v. Soler* case scenario. (29)

2-33 An obvious possible response here would be that, in principle, arbitrators are not bound to apply the rules of any other country than the one whose rules the parties have expressly agreed on. (30) One could also refer to the well-known "second look", advanced by the *Mitsubishi v. Soler* in this context: national courts of the country whose public policy provisions are at stake will have the chance to examine whether the award has actually disregarded their public policy at the stage of the enforcement. (31)

2-34 Arguably, this is not the most satisfactory answer, and in this respect, the *Mitsubishi* dictum has been validly criticised on two grounds: first, it is not at all certain that the award will be brought for enforcement before the courts of the state whose public policy was relevant in the dispute; second, the review of an award by national courts at the enforcement stage might not be thorough enough to reveal any public policy infringement. (32)

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2-35 However, the *Mitsubishi* scenario is a matter related more to the application of mandatory or public policy rules by the arbitrators than to the inarbitrability of public policy provisions altogether. In other words, it is a matter on how arbitrators can efficiently resolve a dispute relating to the public policy of a particular country, rather than a matter relating to an inherent flaw of the arbitration mechanism, which would render arbitration unfit to deal with public policy disputes in general.

2-36 Indeed, it is within the duties of the arbitrator to balance all the relevant factual circumstances of a dispute and decide whether to apply, or at least take into account, the public policy or mandatory rules of a country other than the one whose rules the parties have agreed on. The ultimate goal of the arbitrators is to resolve the dispute as efficiently as they can, (33) which of course would require that the award is enforceable after all. (34)

2-37 Ultimately, it is upon the arbitrator deciding the particular case whether to take the enforcement factor into account or not. However, there is nothing to indicate that arbitrators are inherently incapable of exercising this kind of balance. After all, the arbitrators in the *Mitsubishi* case did take the U.S. anti competition rules into account, despite the fact that the parties in their contract had expressly agreed on the application of Swiss law.

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2-38 Equally, there is nothing to suggest that national judges that are "bound" to apply the mandatory rules of their country, or even the mandatory rules of a different country by reference to the Rome Convention (35) , will eventually apply these rules rightly.

2-39 To conclude on the issue of arbitrability and public policy, it can be argued that the prohibition of arbitrability on public policy grounds is to a large extent unsubstantiated. In fact the relevance of public policy to the discussion of arbitrability is essentially very limited, and therefore, the scope of inarbitrability should not be determined by reference to public policy.

2.2 Inarbitrability and inherent characteristics of arbitration: redefining the theory of inarbitrability

2-40 The previous section argued that public policy has limited relevance to inarbitrability. This section examines whether there are other considerations that relate to the scope of inarbitrability. The main question here, in effect, remains unanswered: why do state laws still restrict arbitrability? To what extent are these restrictions acceptable?

2-41 One could argue that prohibition of arbitrability is based on persisting prejudice against arbitration. Prejudice might still have a role to play in inarbitrability. However, its role is much more limited than two decades ago, (36) and, in any case, prejudice alone could not sufficiently explain the theory of inarbitrability.

2-42 Inarbitrability should be examined in light of the inherent limitations of arbitration as a dispute resolution mechanism of contractual origins. Based on consent, arbitration has
P 32
intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement. This conceptual limitation of arbitration has repercussions on the scope of arbitrability.

2-43 For example, an insolvency dispute would most likely involve several claims (some unsecured, some secured or preferred, some even contested) and several parties (for example, the insolvent, the trustee, several creditors). (37) Invariably, the several claims would normally arise out of completely different contracts, which would have been concluded at different stages, and which would provide for different dispute resolution agreements. In such a scenario, it would be virtually impossible to bring all the several claims and the several parties involved in insolvency disputes under the jurisdiction of a single arbitral tribunal. If the several claims were allowed to be submitted to different bilateral proceedings (some before arbitral tribunals and some others before national courts), the outcomes of the several bilateral proceedings would most likely be incompatible, if not conflicting. A decision to satisfy one creditor would necessarily affect the legal position of another creditor. Given the fact that third-party proceedings are generally not accepted in arbitration, (38) third-party creditors would not be able to take part in bilateral proceedings between the trustee or the administrator and one of the several creditors. Therefore, it would be very difficult to determine the order in which the several creditors would be paid, and the allocation of the available funds to the several creditors, especially if some of the claims are contested. Thus, the purpose of the insolvency legislation (namely, the allocation of the limited funds to the several creditors in accordance with the security that each of the creditors had originally obtained) might be defeated, because of the contractual limitations of arbitration.

2-44 Therefore, national laws often provide that insolvency disputes will collectively be submitted to the exclusive jurisdiction of specially designated national courts. (39) To the extent that insolvency disputes are considered inarbitrable, (40) the rationale of the inarbitrability of insolvency disputes is exactly that the resolution of this type of disputes can
P 33
more efficiently be achieved by collective litigation proceedings where all the relevant parties may be brought before the same court. (41)

2-45 This is why, insolvency disputes involving the debtor, but not affecting the collective insolvency proceedings, are in general considered arbitrable. (42) Here, the scope of inarbitrability of insolvency disputes is defined by reference to the consensual limitations of arbitration, which constitute, thus, the underpinning rationale of inarbitrability.

2-46 A similar theory underpins the inarbitrability of some intra-company disputes. Here, the main concern militating against the arbitrability of disputes regarding shareholders resolutions is that the decision of an arbitral tribunal, constrained by the boundaries of the arbitration agreement upon which it is based, would be binding only upon those shareholders that were parties to the arbitration agreement. (43) By contrast, those shareholders not bound by an arbitration agreement would be left unaffected by the arbitral award. Thus, the dispute would in effect remain partially resolved, if submitted to an arbitral tribunal. Therefore, it is questionable whether arbitration is fit to deal with this type of intra-corporate disputes, which would be better addressed by national courts. (44)

2-47 Arbitration has a natural limitation to accommodate disputes that involve several parties. It would defeat the principle goal of arbitration, namely the effective resolution of commercial disputes, to have only some of the several claims submitted to arbitration and others to a different court.

2-48 'Inarbitrability' can thus be read 'inability of arbitration to provide for an effective resolution of a specific dispute'. In fact, this is a limitation that is not exclusively related to arbitration and arbitration agreements. It equally applies to jurisdiction (choice of courts) agreements. Similar issues, for example, would arise in relation to a jurisdiction agreement
P 34
between a creditor and a debtor, who becomes insolvent. Or, in relation to a jurisdiction agreement binding some of the shareholders in an intra-company dispute. In such cases, the jurisdiction agreement would most likely be inoperative too, in favour of collective court proceedings.

2-49 Two reasonable questions may arise from the above thoughts: first, if inarbitrability mainly relates to the contractual constraints of arbitration, why are not other types of multiparty disputes considered inarbitrable too? In other words, why are mandatory collective proceedings provided only for insolvency disputes, for example, and not for other multiparty interrelated contracts, such as construction or maritime contracts? (45)

2-50 One possible explanation here would be that collective proceedings in insolvency disputes (to remain in the same example) directly relate to the fundamentals of our commercial system: they relate to the securitisation of contractual claims. More specifically, collective insolvency proceedings are required to ensure that secured claims will be given priority over unsecured claims. If secured claims were not preferentially satisfied, the securitisation and financial system would be undermined.

2-51 The negative repercussions of non-collective proceedings in this case would extend way further than in the case of other types of multiparty disputes, such as construction or maritime disputes. The mandatory centralisation of insolvency disputes seems more reasonable. This does not mean that "public policy" considerations would enter again "through the back door". The primary reason for inarbitrability remains the fact that arbitration has inherent difficulties to reach out beyond its contractual boundaries. As is accepted, if all the relevant parties agreed to submit to arbitration, insolvency or intra-companies disputes would be perfectly arbitrable. (46)

2-52 This brings us to the second question, namely, why not have all disputes centralised before an arbitral tribunal then? As just mentioned, there is nothing to suggest that an arbitral tribunal would not be capable to hear and determine collective insolvency or intra-company disputes. However, this would also go against the consensual nature of arbitration: only those parties that have consented to arbitration may be submitted to the jurisdiction of an arbitral tribunal. Thus, creditors or shareholders not bound by an arbitration agreement could not be brought before a tribunal against their own volition. By contrast, the jurisdiction of national courts does not depend on the agreement of the parties; national courts have default jurisdiction over them.

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2-53 From this perspective, the reasoning behind national laws restricting arbitrability in some areas could be re-examined. For example, inarbitrability of disputes over the validity of intellectual property rights, such as patents or trademarks, which require registration with a public authority.

2-54 Except for Switzerland, where the relevant governmental agency accepts an arbitral award as a basis for altering the ownership status of a patent or a trademark, national laws usually provide that disputes regarding ownership rights on patents and trademarks may only be submitted to the exclusive jurisdiction of specific national courts. (47) A typical example of legislation restricting arbitrability on this subject is the EC Regulation 44/2001 Art. 22(4).

2-55 Is the prohibition of arbitrability of this type of dispute reasonable? One could argue in the affirmative: effectively, it depends on whether the relevant public authorities are ready to accept an arbitral award as a valid cause for them to alter their public records. This principle is feasible, as is provided in Switzerland. There is nothing inherently wrong with an arbitral award, that would render it unfit to be taken as a basis for the annulment of a patent, for example. In this context, a national judgement may produce exactly the same effects as an arbitral award. (48) A national judgment on the validity of a patent acquires an *erga omnes* effect because it can be registered or deposited with the relevant public authority, which eventually alters the ownership status of a trademark or a patent in accordance with the dictum of the judgment. (49) An arbitral award could equally obtain such an *erga omnes* effect, if the relevant public authorities were willing to accept an arbitral award as a basis for them to alter the ownership status of an IP right. Arbitral awards and national judgments can operate equally in this respect.

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2-56 Nevertheless, inarbitrability of this type of patent and trademark disputes is arguably justified by reference to the *inter partes* effect of the *arbitral proceedings*, rather than the *inter partes* effect of *arbitral awards*. The bilateral arbitration proceedings between two parties disputing over the ownership of a patent or a trademark, would naturally exclude any third party, who might actually be the true owner of the right at stake.

2-57 Court litigation over these disputes, where third parties, possibly real owners, have extensive opportunities to take part into the proceedings can reduce the risk of collusion, and ensure that the public record would reflect the actual ownership status of patents and trademarks. The consensual limitations of arbitration most likely lies behind inarbitrability here too: the resolution of disputes involving ownership rights registered on public records may be more efficiently resolved by national courts rather than arbitral tribunals.

3 Effects of inarbitrability on the validity of arbitration agreement

2-58 The prevailing view here is that inarbitrability of the subject matter of an arbitration agreement renders the arbitration agreement null and void. (50) However, it is questionable whether inarbitrability relates to the validity of an arbitration agreement. Indeed, the following indicate that inarbitrability relates to tribunal's jurisdiction and should be distinguished from arbitration agreement's invalidity:

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2-59 First, many arbitration provision draw a distinction between inarbitrability and invalidity. In the New York Convention, for example, invalidity of an arbitration agreement is provided in Art. V(1)(a), whereas inarbitrability is provided as a distinct ground for non-enforcement in Art. V(2)(a). Similarly, in many arbitration laws arbitrability is not included in the provisions dealing with the validity requirements of arbitration agreements. This is, for example, the case for the UNCITRAL Model Law Art. 7, the English Arbitration Act 1996 s. 6, the German ZPO s. 1029 or the Swiss PILA Art. 178. Arbitrability is usually dealt with at a separate provision. (51)

2-60 Second, and more importantly: as is generally accepted, arbitration agreements are *sui generis* contracts with both contractual and jurisdictional features. (52) Arbitration agreements differ from ordinary contracts, as they produce unique jurisdictional effects, namely they establish the jurisdiction of a particular arbitral tribunal, excluding the default jurisdiction of

national courts. (53)

2-61 However, as regards their validity requirements, arbitration agreements are on the same footing as any other substantive contract (contractual nature). Indeed, for an arbitration agreement to be validly concluded, the only conditions to be met are: consent (meeting of minds), capacity of the parties and the formal requirements provided in the New York Convention (NYC) and the other arbitration laws. (54) No additional requirements of validity may be provided for an arbitration agreement, or else the principle of the contractual nature of arbitration agreements would be violated. If further conditions of validity were required for them in particular, arbitration agreements would be put in a disadvantageous position compared to other substantive contracts, and, therefore, the principle of the contractual nature of arbitration agreements would be violated.

2-62 True, the arbitration agreement's validity and a tribunal's jurisdiction are closely interrelated; however, the latter has a wider scope. Whether a tribunal has jurisdiction over a particular claim would usually depend on more factors than arbitration agreement's validity. For example, an arbitration agreement may be valid, but the tribunal might still not have
P 38
jurisdiction to look into the dispute, because, for example, the claim falls outside the scope of the arbitration agreement; or because the main claim is covered by *res judicata* of a previous award or a national judgement, which would preclude the tribunal to determine the merits of the claim. Equally, arbitrability belongs to this group of additional factors related to jurisdiction that go beyond the validity of an arbitration agreement.

2-63 Arbitrability is, thus, a specific condition pertaining to the jurisdictional aspect of arbitration agreements, and therefore, it goes beyond the discussion on validity. Arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement).

2-64 When a particular claim is considered to be inarbitrable, the tribunal is prevented from assuming jurisdiction over the particular claim only. The inarbitrability of this claim would not render the arbitration agreement *ab initio* null and void. The same tribunal might well have jurisdiction to determine another claim falling under the same arbitration agreement. Indeed, as is accepted, different claims may arise out of the same dispute, some of which might be inarbitrable, whereas some others might perfectly be arbitrable. (55)

2-65 In fact, it would be difficult to determine with certainty at the time of the conclusion of an arbitration agreement whether an arbitration agreement deals with a subject matter that is inarbitrable. In the majority of the cases, it is not the subject matter of an arbitration agreement that is *in abstracto* inarbitrable; rather, it is the specific dispute that arises after the arbitration agreement is concluded that is *ad hoc* determined inarbitrable by a tribunal or a national court.

2-66 For example, an arbitration agreement in a contract for the licensing of a patent providing that “any dispute arising out of this contract will be referred to arbitration”, would not provide for a non-arbitrable subject matter *per se*, and thus it could never be held as null or void from the outset. If, however, a specific dispute arose out of this contract, which touched upon issues of ownership and validity of the patent, the tribunal would probably decline jurisdiction over the specific dispute. However, the particular arbitration agreement would
P 39
remain valid and active and, if another dispute, relating to the licensing contract this time arose between the same parties, the tribunal would have no difficulties to confirm its jurisdiction over the licensing dispute.

2-67 The same would apply to insolvency disputes. The fact that a debtor becomes insolvent would not retrospectively render an arbitration agreement, signed by the debtor, null and void. (56) This is why specific insolvency disputes (for example, disputes that do not affect the collective insolvency proceedings) may be submitted to arbitration even after the debtor becomes insolvent. (57) The subject matter of the arbitration agreement as such cannot be held arbitrable or inarbitrable at the time of its conclusion. It is the specific dispute or claim that will be arbitrable (if it does not affect the collective insolvency proceedings) or not (if it does affect the insolvency proceedings).

2-68 In this respect, some provisions on arbitrability are more accurately drafted than others. For example, the Swiss PILA (58) and the German ZPO (59) refer to “dispute” and “claim” respectively, whereas the New York Convention (60) refers to “subject matter”.

2-69 The conclusion that can be drawn from the above analysis is that inarbitrability should not be considered as a condition of arbitration agreement's validity. Arbitrability pertains to the unique jurisdictional character of arbitration agreements, and it is thus a condition precedent of the jurisdiction of an arbitral tribunal.

4 Practical relevance of the discussion on the rationale behind arbitrability

2-70 The above is not mere academic discussion. The issue of whether arbitrability relates to the validity of an arbitration agreement or to the tribunal's jurisdiction has important
P 40
practical repercussions. It may, in particular, influence the discussion of which forum should be given priority, or even exclusivity, in determining arbitrability: national courts or arbitral tribunals?

2-71 While different approaches have been taken on this issue, (61) the prevailing view seems to be that courts and tribunals have concurrent power to review arbitrability at a pre-award stage. (62)

2-72 It is worth noting that the suggested U.S. Arbitration Fairness Act of 2007 intents to take the issue completely out of the domain of arbitration, providing that U.S. Courts will have the exclusive jurisdiction to determine the issue of arbitrability under federal law. The provision seems to apply to all issues relating to arbitrability, not just to the arbitrability of employment, consumer, or franchise disputes. (63)

2-73 However, if, as argued above, arbitrability is a matter related to jurisdiction rather than a matter related to the validity of arbitration agreements, it seems less reasonable for the courts to review arbitrability at a pre-award stage.

2-74 Indeed, at the stage of referral of the dispute to the tribunal, national courts should limit their review to what pertains to the contractual requirements of an arbitration agreement: capacity of the parties, consent to arbitrate, and formal requirements. Once a national court is satisfied that an arbitration agreement, as a substantive contract, is validly concluded, the "baton will be handed" to the tribunal. (64) It should then be for the tribunal to exclusively
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review any issue relating to the jurisdictional effects of that arbitration agreement: for example, arbitrability or the scope of the arbitration agreement. (65)

2-75 As long as the parties have validly concluded an arbitration agreement, a tribunal is established as the forum that assumes the exclusive jurisdiction to address all questions relating to the parties' relationship, including, of course, the question of arbitrability of their dispute. National courts may have concurrent jurisdiction to review the foundations of the jurisdiction of the tribunal, namely the validity of the arbitration agreement. (66) However, anything more than the validity of the arbitration agreement should be reviewed exclusively by the tribunal at the pre-award stage.

2-76 In this sense, arbitrability would be effectively disconnected from NYC Art. II(3), (67) which will have to read along the lines of:

once the court of a Contracting state is seized of an action in a matter in respect of which the parties have made an agreement *which is valid, in terms of substantive and formal validity*, the court shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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2-77 True, it is not easy to bring this view into conformity with the wording in NYC Art. II(3) and in particular with the phrase "within the meaning of this article" which is a reference to NYC Art. II(1), which seems to include arbitrability within the essential meaning of an arbitration agreement. (68) Equally, it is not easy to overlook the last line of NYC Art. II(3), which is widely drafted and which refers not only to arbitration agreements that are "null and void", but also to arbitration agreements that are "inoperative or incapable of being performed", a phrase that would on the face of it include arbitrability.

2-78 However, it is certainly easier to uphold this argument in the context of more favourable national provisions that first, do not include arbitrability within the essential meaning of validity (69) and second, avoid the wording "inoperative, or incapable of being performed". This is the case, for example, with the French NCPC Art. 1458, (70) or with the English Arbitration Act 1996 ss. 72. (71)

2-79 By reference to such national provisions, which are directly applicable at the referral stage, a national court would have to be satisfied that only the minimum requirements for the valid conclusion of an arbitration agreement are met. Thus, once all the formal and substantive requirements of the validity of an arbitration agreement are confirmed, the court shall have the duty to refer the parties to the tribunal, which will have the exclusive power to determine issues related to its own jurisdiction.

2-80 This argument based on the distinction between contractual and jurisdictional features of arbitration agreements can provide clear-cut guidance on the troublesome issue of conflict of jurisdiction between national courts and arbitral tribunal: national courts, at the stage of referral, may review only whatever is related to the formation of arbitration agreements as substantive contracts (the contractual aspect of an arbitration agreement). Issues related to the jurisdictional aspect of an arbitration agreement should be under the exclusive jurisdiction of arbitral tribunals.

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2-81 This view is further supported by the argument, explained above, that public policy is not relevant to arbitrability. Thus, if public policy of a state is not at stake when the arbitrability of a dispute is in question, it seems less reasonable for the national courts of that state to have the right to review arbitrability at the stage of referral. (72) Finally, this view is in line with the recorded trend of the last two decades, favouring the expansion of the scope of arbitrability. (73)

5 Conclusions

2-82 Despite the significant progress of the arbitration theory in the last three decades, the

discussion on inarbitrability remains today more pertinent than ever. New anti-arbitration forces from different ideological perspectives seem to have re-emerged seeking to revisit, and eventually, restrain the scope of arbitrability.

2-83 It is thus critical to put the discussion on arbitrability in the right context, which does not include considerations of public policy. As was argued in this paper, arbitration theory should oppose recurring arguments that arbitration cannot address public policy disputes on the basis that it is a compromised – in due process terms – dispute resolution system or that arbitrators owe allegiance to the private interests of the parties rather than to the public interests of the state.

2-84 At the same time, it is equally important to define the boundaries of arbitrability on a realistic basis. Arbitration as consensual dispute resolution system has inherent limitations. Based on consent, arbitration has intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement. This type of conceptual boundaries of arbitration may have repercussions on the scope of arbitrability. Thus, for example, some types of patent or insolvency or intra-company disputes may be addressed by national courts more efficiently than by an arbitral tribunal. Eventually, arbitrability should be determined on the basis of efficiency: whether an arbitral tribunal can get disposed of the pending dispute in an effective manner.

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2-85 Finally, in this discussion it is always relevant to note that arbitrability is an issue exclusively related to jurisdiction. As this paper argued, all arbitrability provisions are in essence jurisdictional rather than substantive rules. They are conflict of jurisdiction rules, whose objective is to delineate the area of exclusive jurisdiction of its national courts. From this jurisdictional viewpoint, the role of the national state and the *lex fori*, in particular in the discussion on arbitration is diminished. As was shown above, the *lex fori* would only be relevant if the actual dispute pending before the tribunal had any territorial or other jurisdictional connection with the national state of the *lex fori*.

2-86 Inarbitrability is not dead; at least, not yet. As the matter pertains to the fundamentals of arbitration and its relation with the state courts, the scope of inarbitrability will always remain a relevant subject matter. However, arbitration doctrine must win the argument that inarbitrability should be defined by reference to the specific characteristics of arbitration, rather than old prejudices.

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References

*) LLB (Athens), LLM (KCL), PhD (QMUL), Advocate; Lecturer in International Dispute Resolution, Centre of Commercial Law Studies, Queen Mary, University London. I would like to thank Dr Stefan Kröll, in particular, for the very useful discussion we had on an earlier draft of this paper. Many of his comments have been incorporated here. My thanks are also extended to Maarten Draye, Associate Hanotiau & van den Berg, who critically read this paper.

1) 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985).

2) *Cf* K. Youssef, in Chapter 3 *infra*, who goes as far as proclaiming "The Death of Inarbitrability". *Cf* however, T. Carbonneau, in Chapter 8, *infra*, in "Conclusions", who draws the attention to a possible backlash against arbitration coming from the U.S. and a change in power configurations in the U.S. Congress. This backlash would restrict the scope of arbitrability, especially in the areas of employment contracts and consumer transactions.

3) See for example articles H. Arfazadeh, "Arbitrability Under the New York Convention: the Lex Fori Revisited", 17 *Arb. Int'l* (2001) 73; M. Blessing "Arbitrability of Intellectual Property Disputes", 12 *Arb. Int'l* (1996) 191; K.-H. Böckstiegel, "Public Policy and Arbitrability" in P. Sanders (ed), *ICCA Congress Series No.3* (Deventer: Kluwer Law & Taxation 1987) at 177; G. Born, *International Commercial Arbitration: Commentary and Materials*, (2nd ed, Kluwer 2001) Chapter 3 (D), at 343 et seq; T. Carbonneau, The *Law and Practice of Arbitration* (2nd ed, Juris 2007) para 23-26; T. Carbonneau & Janson "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", 2 *Tul. Int'l & Comp. L.* (1994) 193; Fouchard, Gaillard & Goldman, *On International Commercial Arbitration*, E. Gaillard & J. Savage (eds) (1999), para 532 et seq; B. Hanotiau, "What law governs the issue of arbitrability?", 12(4) *Arb. Int'l* (1996) 391; B. Hanotiau, "The Law Applicable to Arbitrability", in A. van den Berg (ed), *ICCA Congress Series No.9*, (Kluwer 1999) at 146; B. Hanotiau, "L'arbitrabilité", in *Recueil des Cours - Collected Courses of The Hague Academy of International Law*, (2002) Tome 296, at 165–166 (The Hague Boston London, Martinus Nijhoff Publishers, 2003); A. Kirry, "Arbitrability: Current Trends in Europe", 12 *Arb. Int'l* (1996) 373; J. McLaughlin, "Arbitrability: Currents Trends in the United States", 59 *Alb. L. Rev.* (1996) 905; P. Level, "L'arbitrabilité" 2 *Rev. Arb.* (1992) 213; J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, (Kluwer 2003), Chapter 9; J. Paulsson, "Arbitrability, Still Through a Glass Darkly", in *Arbitration in the Next Decade (ICC Bulletin, Special Supplement 1999)* at 95; Redfern & Hunter (with N. Blackaby & C. Partasides), *Law and Practice of International Commercial Arbitration*, (4th ed, Sweet & Maxwell 2004), para 3-13 et seq; A. Rogers, "Arbitrability", 10 *Arb. Int'l* (1994) at 263; E. Schwartz, "The Domain of Arbitration and Issues of Arbitrability: The View from the ICC", 9(17) *ICSID Rev-FILJ* (1994) at 27.

4) See section A(a) below, and *supra* notes 9 and 10 in particular.

5) See section B below, and *supra* note 33 in particular.

6) In the U.S., *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, *supra* note 1 (with regard to anti-competition claims); in France, CA Paris, 29 March 1991, *Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT)*, (1991) Rev. Arb. 478, (with regard to fraud allegations) – with note L. Idot; also CA Paris, 19 May 1993 *Labinal v. Mors*, (1993) Rev. Arb. 645, (with regard to anti-competition claims) – with note Jarrosson; in England, CA, *Fiona Trust & Holding Corporation and Others v. Privalov and Others*, [2007] 2 Lloyd's Rep. 267 (with regard to fraud allegations) confirmed by the House of Lords, *Premium Nafta Products Limited (20th Defendant) and others v. Fili Shipping Company Limited (14th Claimant) and others*, [2007] UKHL 40; in Switzerland, Federal Tribunal, 23 June 1992, *Fincantieri-Cantieri Navali Italiiani and Oto Melara v. M and arbitration tribunal*, (1995) XX YBCA 766 (with regard to claims arising out of illegal activities); in the context of the European Union, ECJ, 1 June 1999, C-126/97, *Eco Swiss China Time v. Benetton International*, [1999] ECR I 3055 (with regard to anti-competition claims).

7) In *Ganz v. SNCFT*, *ibid*, the court held that:

> in international arbitration, an arbitrator [...] is entitled to apply the principles and rules of public policy and to grant redress in the event that those principles and rules have been disregarded

In, *Fincantieri-Cantieri Navali Italiiani and Oto Melara v. M and arbitration tribunal*, *ibid*, the court stressed that:

> The fact that the said claim affects public policy would not suffice, in itself, to rule out the arbitrability of the dispute [...] Arbitrability cannot be denied for the only reason that mandatory provisions of law or a given material public policy make the claim null and void or its execution impossible

8) See for example, Redfern & Hunter, *supra* note 3, para 3-13, who argue: "Whether or not a particular type of dispute is "arbitrable" under a given law is in essence a matter of public policy for that law to determine." In the same vein, K.-H. Böckstiegel, *supra* note 3 at 177 et seq.; Y. Fortier, "Arbitrability of Disputes" in *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum in honour of Robert Briner*, G. Aksen, K.-H. Böckstiegel, M. Mustill, P.M. Patocchi & A.-M. Whitesell (eds) (ICC 2005) at 276; Lew, Mistelis & Kröll, *supra note* 3, para 9-2; Fouchard, Gaillald & Goldman, *supra* note 3 at 332-333; Carbonneau & Janson, *supra* note 3 at 195 et seq; *cf*, however, Kirry, *supra* note 3 at 374, who argues that the role of public policy in arbitrability is diminishing; the same D. Cohen, *Arbitrage et Société*, tome 229 (LGDJ 1993), para 238 et seq.

9) German ZPO Art. 1030

10) Swiss Private International Law Act (PILA) Art. 177

11) See for example, arbitration laws that define inarbitrability on the basis that the dispute is "permissible to compromise" (Belgian Judicial Code Art. 1676(1)), or that the legal consequences which "the parties cannot freely dispose" (The Netherlands Arbitration Act Art. 1020(3)) or that the rights in question "cannot be disposed by the parties" (Italian Code of Civil Procedure Art. 806 and Greek Code of Civil Procedure Art. 867). See also, French Civil Code 2060

> One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned. However, categories of public institutions of an industrial or commercial character may be authorized by decree to enter into arbitration agreements.

In Singapore arbitrability is also defined by reference to public policy, see Singapore's International Arbitration Act Art. 11 providing that

> Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.

In China, administrative disputes, disputes over personal rights, labour disputes and disputes concerning agricultural projects are excluded from arbitration (Chinese Arbitration Law 1995 Art. 2, 3 and 77). *Cf* also the A/CN.9WG.II/WP.150 Annotated Provisional Agenda (9 July 2008) of the UNCITRAL working group on the revision of UNICTRAL Arbitration Rules (available at: http://daccessdds.un.org/doc/UNDOC/LTD/V08/554/48/PDF/V0855448.pdf?OpenElement) para 10:

> The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.

12) Arbitration Fairness Act of 2007, H.R. 3010, S. 1782 (110th Congress, 1st Session) (July 12, 2007); Fair Arbitration Act of 2007, S. 1135 (110th Congress, 1st Session) (April 17, 2007). Arbitration Fairness Act of 2007 declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. It declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. It also exempts arbitration provisions in collective bargaining agreements from this Act. The latest news on that front is that on the 15th July 2008 the House Subcommittee on Commercial and Administrative Law voted to report favourably the Arbitration Fairness Act of 2007 (H.R. 3010) to the full Judiciary Committee. See the full text at http://www.govtrack.us/congress/billtext.xpd?bill=h110-3010 (last visited 3 September 2008).

13) 415 U.S. 36, 94 S Ct 1011, 39 L.Ed.2d 147 (1974). The same view was taken by the U.S. Supreme Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203, 76 S Ct 273, 276, 100 L.Ed. 199 (1956) and in *Wilko v. Swan*, 346 U.S., at 435-437, 74 S Ct, at 186-188.

14) 417 U.S. 506 (U.S. Supreme Court 1974).

15) *Ibid*, at 533.

16) *Supra* note 1 at 657-658. *Cf* also the preamble of the text of the bill Arbitration Fairness Act of 2007, *supra* note 13, as it was written by its sponsor and submitted to the House for consideration:

> S. 2(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.
>
> (6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

17) *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 136, 94 S Ct 383, 394, 38 L.Ed.2d 348 (1973), at 136.

18) See Lew, Mistelis & Kröll, *supra* note 3, paras 5-54 et seq. for a detailed review of the matter of application of basic human rights and due process, in particular, to arbitration.

19) In the *Dutco* case (French Cour de cassation, 7 January 1992, *Siemens AG/BKMI Industrieanlagen v. Dutco Construction Company*, (1993) XVII YBCA, p.140), for example, the dispute that arose out of a consortium agreement in the context of a construction contract had no public policy connotations. However, the Cour de cassation held that the parties cannot waive fundamental procedural safeguards, such as the principle of the equality of the parties in arbitral proceedings.

20) Here note that public policy rules will be understood in a wide sense, including mandatory rules.

21) 391 F. 2d 821 (2d Cir. 1968).

22) *Ibid*, at 826-827.

23) 699 F. 2d 846 (CA 1983) at 850-851.

24) See *supra* note 12.

25) *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S Ct 1427, 67 L.Ed.2d 641 (1981), at 744-45.

26) Similarly, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S Ct 1011, L.Ed.2d 147 (1974), at 39:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation.

27) See for example, in England, the Employment Rights Act 1996 s. 86 et seq.

28) Unless the parties in arbitration have expressly authorised the arbitrator to decide *ex aequo et bono*, in which case too the decision may not violate public policy, see Lew, Mistelis & Kröll, *supra* note 3, para 18-91.

29) Where the dispute arose in connection with the U.S. Sherman Act, but the seat of the arbitration was agreed to be in Japan, while the law applicable to the merits of the dispute was agreed to be the law of Switzerland.

30) As the U.S. Supreme Court in *Mitsubishi v. Soler*, *supra* note 1 at 637 noted

> the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.

31) *Ibid*, at 638-639.
32) See for example, WW Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration" (1986) 12 *Brook. J. Int'l L.* 642:

> The 'second look' doctrine is a problematic safety valve for ensuring that public law issues receive proper consideration. If it calls for review on the merits, it disrupts the arbitral process. But if it calls only for a mechanical examination of the face of the award, it may not provide an effective check on an arbitrator who mentions the Sherman Act before he proceeds to ignore it.

A possible response to this criticism could be in the *Mitsubishi v. Soler* itself:

> While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

Ibid., at 639.

33) *Cf* EAA s. 1 (a).
34) *Cf* ICC Art. 35.
35) 1980 Rome Convention On The Law Applicable To Contractual Obligations. *Cf* also the latest 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).
36) A series of progressive court decisions in different countries, see *supra* note 7, played a significant role in this respect, raising awareness about arbitration and fighting old myths and prejudice against it.
37) See, in detail, C. Liebscher, Chapter 9 *infra*.
38) See for example, Lew, Mistelis & Kröll, *supra* note 3, para 16-74; Born, *supra* note 3, Chapter 10; Redfern & Hunter, *supra* note 3, para 3-73.
39) See for example, Austrian Bankruptcy Code s. 43(5) and s. 111(1) or the French Code of Commerce, R 662-3.
40) See Liebscher, Chapter 9 *infra*, referring to list of "non-core" insolvency disputes that are considered arbitrable.
41) See Cohen, *supra* note 9, para 243.
42) See V Ancel "Arbitation et procédure collectives", *Rev. Arb* (1983) at 255; and Cohen, *idem*.
43) See in detail P. Perales, Chapter 14 *infra*; see also Trittman/Hanefeld in K.-H. Böckstiegel, S. Kröll, P. Nacimiento (eds), *Arbitration in Germany - The Model Law in Practice* (Wolters Kluwer 2007), s. 1030, para 17-19.
44) See EC Regulation 44/2001 Art. 22(2).
45) Although it should be noted that there have been cases that have held arbitration agreements "inoperative" on the basis that they did not cover all the parties concerned in the dispute, see for example British Columbia Supreme Court, *Prince George (City) v. McElhanney Engineering Services Ltd and Al Sims and Sons*, (1997) 6 ADRLJ 315 (BCSC 30 December 1994).
46) See also Trittman/Hanefeld in Böckstiegel, Kröll & Nacimiento, *supra* note 43, s. 1030, para 27. The same in Liebscher, Chapter 9 *infra*.
47) See A. Mantakou, Chapter 13, *infra*.
48) See S. Brekoulakis, "The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited", 1 (16) *Am. Rev. Int'l Arb.* (2005) 180, notes 9-10.
49) See the in detail about the effect of national court decisions in patent litigation in the European context, ECJ case C- 4/03 *GAT v. Luk* [2006] FSR 45.
50) See for example, B. Hanotiau, "What law governs the issue of arbitrability?", *supra* note 3 at 391: "Arbitrability is indeed a condition of validity of the arbitration agreement and consequently, of the arbitrators' jurisdiction."; Böckstiegel, "Public Policy and Arbitrability", *supra* note 3 at 180:

> The final effect for the arbitration agreement and for the arbitration procedure is identical: the arbitration agreement is invalid and the arbitrators lack jurisdiction if either one of the two is missing.

Switzerland, Federal Tribunal, 23 June 1992, *Fincantieri- Cantieri Navali Italiiani and Oto Melara v. M and arbitration tribunal*, *supra* note 7: "Arbitrability is a requirement for the validity of the arbitration agreements". Also, Redfern & Hunder, *supra* note 3, examine the subject of arbitrability under the section "The Validity of an Arbitration Agreement" in Chapter 3, para 3-13 et seq; *Cf* Lew, Mistelis & Kröll, *supra* note 3, para. 9-18: "though arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction."

51) See for example, the Swiss PILA Art. 177, or the German ZPO s. 1030.
52) Lew, Mistelis & Kröll, *supra* note 3, para 6-2.

53) See S. Brekoulakis, "The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?", 24(4) *J. Int'l Arb.* (2007) 361.
54) Lew, Mistelis & Kröll, *supra* note 3, para 7-3.
55) See in general A. Buzbee, "When arbitrable claims are mixed with nonarbitrable ones: What's a court to do?", 39 *S. Tex. L. Rev.* (1997-98) 663 et seq.
56) See Trittman/Hanefeld in Böckstiegel, Kröll & Nacimiento, *supra* note 43, s. 1030, para 27.
57) *Idem*; The same Liebscher, Chapter 9 *infra*.
58) Art. 177 "Any *dispute* involving property…"
59) S. 1030 (1): "Any claim involving an economic interest". The provision has in fact been influenced by the Swiss PILA; see, Trittman/Hanefeld in Böckstiegel, Kröll & Nacimiento, *supra* note 43, s. 1030, para 3.
60) Art. II(1): "…concerning a subject matter capable of settlement by arbitration".
61) See in general on the discussion L. Shore, Chapter 4 *infra*. See also Y. Fortier, *supra* note 8 at 274 et seq., who argues that the *First Option* dictum on arbitrability, taken in the U.S. wide sense (i.e. covering the scope of the arbitration agreement), should apply equally to the issue of objective arbitrability. Thus, according to Fortier, the issue of which forum should determine arbitrability is eventually a matter that would depend on the parties' agreement.
62) See Lew, Mistelis & Kröll, *supra* note 3, para 14-49 et seq, who however refer to the matter in more general terms, including all issues related to the jurisdiction of an arbitral tribunal, and not just arbitrability.
63) See note *supra* 12 above. As is mentioned in the suggested s. 2(c):

    An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

64) To refer to the Lord Mustill's well-know comparison of the relationship between courts and arbitrators to a relay race:

    Ideally, the handling of arbitrable disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

    Mustill, "Comments and Conclusions" in *Conservatory and Provisional Measures in International Arbitration* (ICC ed, 1993) at 119.

65) *Cf* Cour de cassation, 18 May 1971, *Impex v. P.A.Z. Produzione Lavorazione*, (1972) Rev. Arb. at 3:

    arbitral tribunals have exclusive jurisdiction to rule on disputes falling within the terms of the brief conferred upon them, subject to review by the courts hearing the application for an enforcement order [or to set the award aside…] if … a party claims that public policy has been contravened.

66) *Cf* Fouchard, Gaillard & Goldman, *supra* note 3 at 569:

    Disputes concerning matters that remain non-arbitrable (such as divorce) can be brought directly before the courts, even where they are the subject of an existing arbitration agreement. In that case, the court will establish its jurisdiction by carrying out a *prima facie* review of the arbitration agreement and determining that it is patently void.

67) See Born, *supra* note 3 at 243 and note 102-103.
68) "Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or nor, *concerning a subject matter capable of settlement by arbitration*" (emphasis added).
69) See *supra* para 2-59.
70) NCPC Art. 1458(2) only refers to invalidity "àmoins que la convention d'arbitrage ne soit manifestement nulle".
71) EAA s. 72 only refers to validity of arbitration agreement, rather than arbitrability.
72) *Cf* Fouchard, Gaillard & Goldman, *supra* note 3 at 569:

    Under the previous approach, where the criterion was a breach of public policy in the disputed contract, determining the arbitrability of the dispute entailed examining often complex aspects of the merits of the case. By contrast, using a criterion based on the subject-matter of the dispute enables the courts to determine the arbitrability or non-arbitrability of a dispute with ease. French law has thus returned to the simple technique of "non-arbitrable blocks".

73) See Lew, Mistelis & Kröll, *supra* note 3, para 9-36; Fouchard, Gaillard & Goldman, *supra* note 3, para 568.

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