Document information

Author

Stefan Michael Kröll
Julian D. M. Lew (IAI profile)
Loukas A. Mistelis (IAI profile)

Publication

Comparative International Commercial Arbitration

Bibliographic reference

'Chapter 9 Arbitrability', in Julian D. M. Lew , Loukas A. Mistelis , et al., Comparative International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 2003) pp. 187 - 221

Chapter 9 Arbitrability

9-1 Arbitrability is one of the issues where the contractual and jurisdictional natures of international commercial arbitration meet head on. (1) It involves the simple question of what types of issues can and cannot be submitted to arbitration. Party autonomy espouses the right of parties to submit any dispute to arbitration. It is the parties' right to opt out of the normal national court jurisdiction.

9-2 National laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration. For example, states or state entities may not be allowed to enter
P 187 into arbitration agreements at all or may require a special authorisation to do so. This is "subjective arbitrability." More important than the restrictions relating to the parties are limitations based on the subject matter in issue. This is "objective arbitrability." (2) Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts.

9-3 These disputes are not capable of settlement by arbitration. This restriction on party autonomy is justified to the extent that arbitrability is a manifestation of national or international public policy. Consequently, arbitration agreements covering those matters will, in general, not be considered valid, will not establish the jurisdiction of the arbitrators and the subsequent award may not be enforced.

9-4 In the US the term "arbitrability" is often used in a wider sense covering the whole issue of the tribunal's jurisdiction. (3) In line with the prevailing international understanding, this chapter only deals with the restrictions imposed on the parties' freedom to submit certain types of disputes to arbitration. Specifically this chapter discusses (1) the law applicable to questions of arbitrability, (2) the limitations imposed in different countries, and (3) whether arbitration tribunals have the right and duty to deal with the issue of arbitrability on their own initiative.

1 Law Applicable to Questions of Arbitrability

9-5 Determination of the law governing arbitrability is of considerable importance. Despite the generally prevailing tendency to increase the scope of arbitrable disputes national laws frequently differ from each other. A number of disputes which are not arbitrable under the law of one country are arbitrable in another country where the interests involved are considered to be less important.

P 188 9-6 The approach to bribery is an example of existing differences. In many countries, whilst bribery is a vitiating factor in all contracts, it can be considered by arbitrators. In other countries not only is bribery illegal but also to preclude it from being legitimised, by a commercial or consultancy arrangement, if allegations of bribery are raised they cannot be considered by arbitrators. Consequently, in some countries, consultancy contracts relating to public procurement are not arbitrable because of the prevalence of excessive commissions considered to be bribes. (4)

9-7 The law governing the arbitrability of a dispute may depend on where and at what stage of the proceedings the question arises. Tribunals may apply different criteria than courts in determining this law and the criteria applied by courts at the post-award stage may differ from those at the pre-award stage.

1.1 International Conventions

9-8 Under the various conventions the obligations of national courts to enforce arbitration agreements and awards only exist where the dispute is arbitrable. Therefore these conventions generally regulate which law governs arbitrability. If a dispute is arbitrable according to *this* law courts may not rely on non-arbitrability of the dispute under a different law to refuse enforcement of the arbitration agreement or award.

9-9 The New York Convention provides for the law of arbitrability only from the perspective of enforcement. It requires the enforcing court to look to its own law to determine whether the dispute is arbitrable. Article V(2)(a) provides

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*... (5) [Emphasis added.]

P 189 9-10 In contrast to this clear rule at the enforcement stage the New York Convention does not contain a rule as to what law governs the question of arbitrability at the pre-award stage. For example, when a party challenges the jurisdiction of a court invoking the existence of an

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

arbitration clause. Article II(1) only states that arbitration agreements have to be recognised so that courts have to deny jurisdiction under Article II(3) unless the dispute is not capable of settlement by arbitration. According to which law the dispute has to be capable of settlement by arbitration, however, is not expressly provided for and has given rise to a number of divergent views in national court practices.

9-11 It is not uncommon that courts support the application of different criteria depending on whether the question arises at the referral stage or at the enforcement stage. This is well illustrated by a 1986 Belgian case involving an exclusive distributorship between a Swiss and a Belgian party. (6) The contract was submitted to Swiss law and contained an arbitration clause. The Belgian party started court proceedings in Belgium relying on a provision of Belgian law that disputes arising out of distributorship contracts were not arbitrable. The Swiss party asked for the dispute to be referred to arbitration. The application was granted by the Court of Appeal in Brussels which held that

the arbitrability of a dispute must be ascertained according to different criteria, depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award.

In the first case, the arbitrability is ascertained according to the law which applies to the validity of the arbitration agreement and ..... its object. It is therefore the law of autonomy which provides the solution to the issue of arbitrability.

An arbitrator or court faced with this issue must first determine which law applies to the arbitration agreement and then ascertain whether, according to this law, the specific dispute is capable of settlement by arbitration. [...]

Within the framework of the New York Convention, the expression 'concerning a subject matter capable of settlement by arbitration' Article II(1) does not affect the applicability of the law designated by the uniform solution of conflict of laws for deciding on the arbitrability of the dispute at the level of the arbitration agreement.

According to the New York Convention, the arbitrability of the dispute under the law of the forum must be taken into consideration only at the stage of recognition and enforcement of the award and not when examining the validity of the arbitration agreement. This rule can be explained by the consideration that the arbitral award will, in the majority of cases, be executed without the intervention of an enforcement court .... (7) [References omitted.]

P 190

9-12 An interesting approach was also adopted by the US District Court for the Eastern District of New York in *Meadows Indemnity v Baccala & Shoop Insurance Services.* (8) The claimant initiated court proceedings in the US, despite an arbitration agreement, alleging that the dispute in question was not arbitrable under the law of Guernsey, where it was incorporated and where an award would have to be enforced. The court had to decide whether to enforce the arbitration agreement under Article II New York Convention or whether the claim was not arbitrable. It treated Article II as a substantive rule, providing for an autonomous international concept of arbitrability. The court held that

reference to the domestic laws of only one country, even the country where enforcement of the arbitral award will be sought, does not resolve whether a claim is 'capable of settlement by arbitration' under Article II(1) of the Convention.

The determination of whether a type of claim is 'not capable of settlement by arbitration' under Article II(1) must be made on an international scale, with reference to the laws of the countries party to the Convention. The purpose of the Convention, to encourage the enforcement of commercial arbitration agreements, and the federal policy in favour of arbitral dispute resolution require that the subject matter exception of Article II(1) is extremely narrow. (9) [references omitted]

9-13 However, in the majority of cases courts have determined the question of arbitrability at the pre-award stage according to their own national law. (10) While this is frequently done without any conflict of laws analysis (11) courts which have reviewed the issue properly have in general applied Article V(2)(a) New York Convention. This approach and the underlying rationale of applying the national law are well illustrated by two Italian cases.

P 191

9-14 In *Fincantieri v Iraq* (12) the Court of Appeal in Genoa was faced with the question whether disputes as to the effects of the United Nations embargo against Iraq were arbitrable. Dealing with the question of the applicable law the court held that

The answer must be sought in Italian law, according to the jurisprudential principle that, when an objection for foreign arbitration is raised in court proceedings concerning a contractual dispute, the arbitrability of the dispute must be ascertained according to Italian law as this question directly affects jurisdiction, and the court seized of the action can only deny jurisdiction on the basis of its own legal system.

This also corresponds to the principles expressed in Arts. II and V of the [New York Convention]. Hence, the answer to the question [of arbitrability] can only be that the dispute was not arbitrable due to [Italian embargo legislation]. (13)

9-15 In a case concerning the arbitrability of EC competition law the Bologna Court of First Instance based its reasoning not on the jurisdictional nature of arbitration but on other

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

arguments. The court held that

Art. II(3) of the said Convention provides that jurisdiction must be denied if the arbitration clause is null and void, inoperative or incapable of being performed, and that this review can only take place in light of the national law.

This principle becomes even clearer if Art. II(3) is read in conjunction with Art. V(2)(a) of the same Convention, which subordinates the efficacy of the arbitral award to the requirement that its subject matter be capable of settlement by arbitration, according to the law of the State where recognition and enforcement are sought.

This provision not only applies to the field which it directly regulates (the efficacy of an arbitral award already rendered); it also applies when the court obtains its own jurisdiction in
P 192 the presence of an arbitration clause or agreement for international arbitration. It would be totally useless to recognize the jurisdiction of the arbitrator if the award, when rendered, could in no way be enforced in the legal system of the court which has jurisdiction. (14)

9-16 The practice of national courts determining arbitrability according to their own law is also supported by Article VI(2) European Convention. This provides in its pertinent part

The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.

9-17 Like Article V New York Convention, Article VI(2) European Convention clearly distinguishes between the law applicable to the issue of arbitrability and the law governing the validity of the arbitration agreement. While the latter is primarily submitted to the parties choice and in the absence of a choice to the law of the place of arbitration, each national court determines the arbitrability of a dispute according to its own law. (15) This distinction and the perception that arbitrability is an issue of the general validity of the arbitration agreement has lead to the view that the dispute must be arbitrable according to both the law governing the arbitration agreement and the law of the deciding court. (16)

9-18 However, such an interpretation of the relevant provision is unnecessarily restrictive and not in line with the general tendency to favour arbitration. Though arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction. Therefore the better view is that the law applicable to the question of
P 193 arbitrability in court proceedings should be governed exclusively by the provisions of the law of the national court which determines the case. (17) That is also the way in which Article V(2)(a) New York Convention should be interpreted when the issue is the enforcement of an arbitration agreement at the pre-award stage. (18) Each country determines for itself which disputes it considers to be arbitrable.

1.2 National Arbitration Laws

9-19 The different national arbitration rules do not regulate which law governs the question of arbitrability. Rather they determine directly which disputes are arbitrable. While in common law countries this approach can traditionally be found in case law, various civil law countries have attempted to legislate the law applicable to arbitrability.

9-20 In civil law countries two different approaches can be distinguished. The first relies primarily on substantive criteria which are completely self sufficient. For example Swiss PIL Article 177 provides

1. Any dispute involving property can be the subject-matter of an arbitration.
2. If a party to the arbitration agreement is a state or an enterprise held, or an organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement. (19)

9-21 This approach is based on a broad notion of arbitrability defined by the national legislator. Complex conflict of laws questions may only arise for few claims involving no economic interest in the sense of the broad notion given to this concept. (20)

P 194 9-22 The second approach generally relies on the parties' power to dispose of the rights involved in the dispute or to reach a compromise. This requires a conflict of laws analysis. An example of this approach is Article 1676(1) Belgian Judicial Code which provides

Any dispute which has arisen or may arise out of a specific legal relationship and in respect of which it is permissible to compromise may be the subject of an arbitration agreement. (21)

9-23 Other examples of this approach, with certain elements of the first approach, can be found in French and Italian arbitration laws. These require that the parties have the right to dispose of the dispute, but also expressly exclude arbitrability of certain disputes. Article 806 Italian Code of Civil Procedure provides

The parties may have arbitrators settle the disputes arising between them, excepting those provided for in Arts. 409 [individual labour disputes] and 442 [social security and obligatory medical aid], those regarding issues of personal status and marital separation and those others that cannot be the subject of a compromise. (22)

9-24 Similarly the French Civil Code provides

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

Article 2059

Any person may submit to arbitration the rights of which he has full disposition.

Article 2060

Matters regarding the civil status or capacity of a person, relating to divorce or legal separation, or disputes concerning public collectives and public establishment and generally concerning all matters involving public policy may not be submitted to arbitration.

However, certain industrial and commercial public entities may be authorised by decree to enter into arbitration agreements. (23)

9-25 There are two ways to determine whether parties can settle the specific legal relationship. One is by reference to the substantive law of the seat of arbitration. (24) In practice this question is generally submitted by the conflict of laws of the seat of the arbitration to the law applicable to the relevant legal relationship. (25) The result of the necessary conflict of laws analysis may be that the question of arbitrability is to be determined by a different law.

P 195

9-26 A completely different approach is foreseen in the 1989 draft Japanese arbitration law. It favours a more rigid double arbitrability test provision which provides

An arbitration agreement is valid only when it relates to matters which are arbitrable under both the applicable law governing the arbitration agreement and the law of Japan.

1.3 Arbitration Practice

9-27 Additional problems arise when a tribunal has to determine the arbitrability of a dispute. Article V New York Convention and Article VI European Convention are primarily directed to courts and not to tribunals. It is unclear to what extent these conventions and national laws bind an international arbitration tribunal.

9-28 Consequently the practice of arbitration tribunals concerning the issue of arbitrability varies considerably. Eight different approaches in arbitration practice and scholarly writing relating to the law applicable have been suggested

1. The national law of the parties, or of one of them.
2. The law applicable to the contract as such (lex causae).
3. The law at the seat of the arbitral tribunal (lex loci arbitri).
4. The law of the country whose ordinary courts would be competent to handle the dispute in the absence of an arbitration clause.
5. The law of the country in which it is most likely that enforcement of the award will have to be sought.
6. The law governing the arbitration clause (or arbitration agreement).
7. A combination of laws which may be contemplated under 1.-6. above.
8. Common and fundamental principles of law, applying thus a denationalised approach. (26)

P 196

9-29 In the majority of cases, however, tribunals determine the arbitrability of a dispute on the basis of the provisions of the place of arbitration. (27) However, in some cases arbitrators have avoided a definitive decision where the disputes were arbitrable according to all possibly applicable laws. (28)

9-30 There is an alternative view which maintains that as they are not organs of a particular legal order arbitration tribunals should determine arbitrability on the basis of a genuinely international public policy. (29) Whilst this view is intellectually convincing it may lead to unwanted practical consequences in cases where the law of the place of arbitration contains a narrower concept of arbitrability than the “genuinely international public policy”. In those cases necessary measures of support from the courts of the place of arbitration may not be available and the award may be open to challenge.

9-31 To ensure enforceability arbitration tribunals should generally determine arbitrability with specific reference to the law of the place of arbitration. If a dispute is not arbitrable according to the relevant rules contained in that law, the award will be open to setting aside procedures in that country, and may also exclude its enforcement in another country. This is the case for provisions relating to *ordre public*, (30) and for all rules declaring certain disputes not to be arbitrable.

P 197

9-32 The lack of arbitrability is codified in Article 34(2) Model Law and in most other laws as a separate reason for annulment besides public policy (31) although arguably arbitrability is an illustration of public policy. Irrespective of their public policy character any conflict with the provisions on arbitrability may lead to the threat of annulment proceedings. In this context the tribunal has to ensure that the rule providing for non-arbitrability is actually applicable to the case at issue. A number of the relevant rules are only applicable to domestic arbitration;

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

accordingly the fewer connections the dispute has with a country the greater is the likelihood that the considerations underlying the rules are not applicable to the case. (32)

9-33 Some authors argue that a tribunal should additionally consider arbitrability according to the law of the probable enforcement state. (33) This is on the basis that enforcement of an award can be resisted if the dispute is not arbitrable according to the law of the state of enforcement. (34) Nevertheless tribunals have been reluctant to deny jurisdiction on the basis that the dispute is not arbitrable under the law of the possible place of enforcement or even another interested country. (35) The probable place of enforcement is often uncertain and not the only place of enforcement. Most awards are complied with voluntarily. Where enforcement may not be possible in the country originally envisaged assets may be available in a different country.

9-34 Irrespective of the approach a tribunal adopts there is always the threat of court proceedings unless the dispute is arbitrable according to the laws of all courts which would have jurisdiction but for the arbitration agreement. If not a recalcitrant party can always bring proceedings in the court where the dispute is considered not to be arbitrable and therefore is not obliged under Article II New York Convention to deny jurisdiction.

2 Substantive Rules on Objective Arbitrability

9-35 Every national law determines which types of disputes are the exclusive domain of national courts and which can be referred to arbitration. This differs from state to state reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration. It involves a balancing of the mainly domestic importance of reserving certain matters for exclusive decision of courts with the more general public interest of promoting trade and commerce through an effective means of dispute settlement. (36) Therefore the decision may be different in cases arising in a purely national context from that in relation to international transaction.

9-36 In *Mitsubishi v Soler* the US Supreme Court held that in an international context the ambit of arbitration may be wider than in a national context. (37) Though the case only dealt with US law, the decision describes what is now the prevailing view. (38) The case also evidences a second general trend: the increase in the types of disputes which can be referred to international arbitration. (39) While originally arbitration was often limited to claims arising directly out of a contract, gradually more and more claims based on statutes, for example regulating important parts of the national economy in the public interest, have become arbitrable. In *Mitsubishi v Soler* the court declared antitrust disputes to be arbitrable which in *American Safety Equipment Corp v J P Maguire & Co* (40) were still held not to be arbitrable in a domestic context.

P 199

9-37 Although in general limits on arbitrability of disputes arise from public policy only few laws make express reference to the notion of "public policy". (41) Not only is the notion often too vague to give clear guidance but in the contemporary arbitration friendly environment not every rule of public policy justifies reserving the disputes involved for determination by state courts. (42) Therefore, despite the underlying public policy consideration, different criteria are adopted in determining arbitrability.

9-38 Some national laws refer to very broad notions such as "disputes involving economic interest" (43) or "dispute involving property." (44) Other national laws rely on the narrower concept of "capability of the parties to reach an agreement." (45)

9-39 The Model Law does not contain any definition of which disputes are arbitrable. Quite to the contrary Article 1(5) Model Law provides that it is not intended to affect other laws of the state which preclude certain disputes being submitted to arbitration. In implementing the Model Law national legislators are completely free to determine which disputes are arbitrable and which are not. This may be done expressly where arbitrability of certain disputes are excluded by statute. The exclusion may also result from conferring exclusive jurisdiction on specialised tribunals (46) or national courts. (47)

9-40 The express exclusion of certain disputes from arbitration is well illustrated in German law. For example, former section 28 Securities Exchange Act (BörsG) provided that arbitration agreements in contracts for transactions on a German securities exchange were only valid when the customer was a registered businessperson (Vollkaufmann) or a company or businessperson established outside of Germany. Disputes with other private parties could not be referred to arbitration. (48)

P 200

9-41 The differences between the various approaches are, however, diminishing with the gradual enlargement of the scope of arbitration in most countries. The areas where traditionally problems of arbitrability have arisen are anti-trust and competition, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investments in natural resources.

2.1 Antitrust and Competition Laws

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

9-42 Antitrust and competition legislation involve important issues of national or regional economic policy, given the influence they may have on the market structure. The US, Europe and a number of other developed countries have regulations forbidding agreements and practices which restrict competition, lead to a dominant position or can be considered to be an abuse of a such position. Violations of those prohibitions usually result in the illegality of an agreement or practice and may give rise to actions for damages.

9-43 Article 81 EC Treaty, for example, provides that agreements which restrict competition and have an effect on the Community market are forbidden and are void unless entitled to exemption under Article 81(3). Unless by the terms of the agreement a block exemption applies, these exemptions can only be granted by the European Commission after notification and review. However, it is generally recognised that most other issues in relation to competition law are considered to be arbitrable. This has been decided in a number of cases where a party trying to resist contractual claims invoked the illegality of the agreement for alleged infringements of competition law. (49) This has found indirect approval by the ECJ in the *Eco Swiss v Benetton* case, though the case only dealt with the enforcement of an award. (50) It is accepted that under EC law private enforcement of competition remedies is permissible. (51)

P 201

9-44 This European approach has been largely influenced by the prevailing opinion in the US case law for antitrust disputes involving claims based on the Sherman Act. The Supreme Court decision in *Mitsubishi v Soler* considered the control at post-award stage to be sufficient to safeguard the national interests underlying the antitrust legislation. (52)

9-45 In this case, the Puerto Rican distributor had entered into a distributor agreement with Chrysler International (CISA), according to which it was to sell automobiles produced by Mitsubishi Motors, a Japanese car manufacturer, a joint venture between CISA and Mitsubishi Heavy Industries. The distributorship agreement required Soler to buy a certain amount of cars from Mitsubishi per year, and provided that any disputes should be resolved by arbitration in Japan under the rules of the Japan Commercial Arbitration Association. After a period of successful selling Soler was unable to maintain the required sales volumes. It requested permission from CISA to sell cars outside the designated area but this was refused. Soler brought an action in the District Court of Puerto Rico for breach of the US Sherman Act and other competition laws. CISA sought a stay of the court proceedings and an order to compel Soler to arbitrate in Japan.

9-46 The Supreme Court determined that the issues were arbitable and compelled the parties to go to arbitration in Japan, under the JCAA Rules, in accordance with the Agreement. Only at the enforcement stage would the Court review the anti-trust issue. The Court stated

The importance of the private damages remedy, ... does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by Sect. 4 of the Clayton Act, ... and pursued by Soler ... seeks primarily to enable an injured competitor to gain compensation for that injury. 'Sect. 4 ... is in essence a remedial provision. It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws....' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed.... It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.'

P 202

There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, 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. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. (53) [References omitted]

9-47 Though the result is convincing the argument is flawed by the fact that it presupposes enforcement will take place in the US. If the losing party has assets in another country the award may be enforced there without US courts having a chance to intervene to safeguard the public interest protected by the Sherman Act. (54) Though any award violating US competition law may not be enforceable in the US it may be enforceable in other countries.

2.2 Securities Transactions

9-48 In the area of securities transactions national laws seek to protect the market but also often grant special protection to customers. Certain transactions may not be enforceable or customers are given special statutory rights to recover damages incurred. For example, the US Securities Act 1933 and the Securities Exchange Act 1934 grant special statutory rights to customers. All agreements which have the effect of limiting those rights granted are declared

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

void. These rules were considered to prevent the arbitrability of all or certain disputes in relation to securities transactions.

9-49 In particular in the US the arbitrability of securities transactions has undergone considerable change over the years. The history of judicial hostility towards securities arbitration can be traced to the *Wilko v Swan* decision of 1953. (55) There the US Supreme Court held that claims under the Securities Act 1933 were not capable of being resolved by arbitration and had to be referred to the courts, as arbitration offered the parties less protection of their statutory rights than the courts.

P 203

9-50 Since then the legal position has shifted completely. First in 1974 in *Scherk v Alberto-Culver Co* (56) the Supreme Court recognised the arbitrability of federal securities claims with an international element. The case involved a cross-border transaction between a German citizen and a US company containing an arbitration clause. As the Court emphasised, the international nature of the agreement was the essential difference between *Wilko* and *Scherk*. While purely domestic claims could not be arbitrated, an international element could make the dispute arbitrable. Indeed, the Supreme Court acknowledged that

> a parochial refusal by the courts of one country to enforce an international arbitration agreement [...] would damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreement. (57)

9-51 In 1987, in *Shearson v McMahon*, (58) the Supreme Court extended that position to claims under the Securities Exchange Act in purely domestic transactions. Finally two years later, in 1989, in *Rodriquez de Quijas v Shearson/American Express Inc*, (59) the *Wilko* rationale was overruled, and all federal securities claims were declared arbitrable regardless of the nature of the transaction. In that case, the plaintiffs had opened a brokerage account with American Express and their agreement incorporated a standard pre-dispute arbitration clause. The Supreme Court no longer regarded arbitration as falling short in protecting investors' rights, due to the Securities Exchange Commission supervision, and stated that

> [...] arbitration agreements [...] should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise. (60)

P 204

9-52 The Court recognised that *Wilko* was pervaded by

> the old judicial hostility to arbitration [...] and it would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side. (61)

9-53 Since the *Rodriquez* decision there has been an “explosion” of securities arbitration. (62) Brokerage firms in the US now regularly require investors to sign in their consumer accounts agreements to the effect that any dispute is to be settled by arbitration, generally under the stock exchange or self-regulatory body of which the broker is member, such as the National Association of Securities Dealers and the New York Stock Exchange.

9-54 The positive impact of arbitration in the securities area is nowadays evidenced by the fact that most self-regulatory organizations such as the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), the American Stock Exchange (Amex) and the Commodity Exchange administer arbitration services. This trend is not a prerogative of the United States only, as a number of European stock exchanges have established their own arbitration bodies and structures, which adopt specially tailored arbitral procedures and clearly defined rules for settling securities disputes. (63) There is a rapid growth as it can be seen by the recent NASD Dispute Resolution Inc (NASD-DR) (64) and NASDAQ Europe (65) Arbitration Rules.

P 205

2.3 Insolvency Law

9-55 The arbitrability of disputes with an insolvent party has been an issue in a number of cases in various countries. (66) In this respect one has to distinguish between the “pure” bankruptcy issues, such as appointment of an administrator, opening of proceedings and other issues. It is beyond doubt that the “pure” bankruptcy issues are generally not arbitrable. (67) Their purpose is not so much the settlement of disputes between the parties but they are more proceedings for the collective execution or reorganization of the debtor.

9-56 Most cases, however, are not concerned with such “pure” bankruptcy issues but with standard monetary claims against or by an insolvent party. In these cases the question arises whether disputes which are clearly arbitrable as such lose their arbitrability due to the insolvency of one party. The reason for this is that separate arbitration proceedings might conflict with the policies of the national insolvency laws. In order to centralise all claims and to enable the assets of a debtor to be dispersed in an equitable, orderly and systematic manner the national laws often provide for suspension of individual actions, dispossession of the debtor and an exclusive jurisdiction of a particular court. (68)

9-57 The conflict is well described by the Bankruptcy Court of Massachussetts which held in *SONATRACH v Distrigas* that

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

there will be occasions where a dispute involving both the Bankruptcy Code, ..., and the Arbitration Act, ..., presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution. (69)

P 206

9-58 The court came to the conclusion that the strong policy of the Federal Arbitration Act favouring arbitration in international cases overrode the policies underlying the bankruptcy law. The main argument was that the type of dispute involved, *i.e.* the determination of damages arising out of the termination of a contract, did not implicate any major bankruptcy issue.

9-59 The importance of the type of dispute for its arbitrability becomes even more apparent in a recent decision of the Court of Appeal for the Second Circuit. (70) In taking up the distinction in the Bankruptcy Code between "core matters" and "non-core matters", the Court in denying the arbitrability of the claim in dispute held in relation to the balancing of interest and potential conflict between the FAA and the Bankruptcy Code

> Such a conflict is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration. ... Core proceedings implicate more pressing bankruptcy concerns, but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration. Certainly not all core bankruptcy proceedings are premised on provisions of the Code that inherently conflict with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code.' .... However, there are circumstances in which a bankruptcy court may stay arbitration, and in this case the bankruptcy court was correct that it had discretion to do so.
>
> In exercising its discretion over whether, in core proceedings, arbitration provisions ought to be denied effect, the bankruptcy court must still carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause. ... The Arbitration Act as interpreted by the Supreme Court dictates that an arbitration clause should be enforced unless [doing so] would seriously jeopardize the objectives of the Code.
>
> In the instant case, the declaratory judgment proceedings are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, as we have previously pointed out, the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor.... The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers. (71) [References omitted.]

P 207

9-60 In the light of the test promulgated by the Court of Appeal for the Second Circuit the distinction between "core matters" and "non core matters" becomes relevant. Disputes relating to the latter are probably with very few exceptions arbitrable while the opposite is true for "core matters".

9-61 Comparable distinctions underlie the question of arbitrability in other countries, with the effect that the majority of contractual disputes against the insolvent debtor are probably considered to be arbitrable. In France, for example, the exclusive jurisdiction of the Commercial Court in Article 174 of the Bankruptcy Law (72) only covers "pure" bankruptcy issues. (73) The same applies to Italy. (74)

9-62 By contrast under Dutch law only non-monetary claims against the estate are arbitrable while claims for payment have to be settled by the special *renvoi procedure* if they are contested in bankruptcy. (75)

9-63 Under German law the insolvency of one party does not in general affect the arbitrability of a dispute. Claims against the estate have to be filed in bankruptcy and if contested are then arbitrable. Only enforcement actions are barred by the insolvency of the debtor, which do not include actions to have an award declared enforceable. (76) A more serious threat to arbitration than the issue of arbitrability, however, in connection with the insolvency of one party derives from the wide interpretation by German courts of the notion of "inoperability" of the arbitration clause. German courts have consistently held that an arbitration agreement becomes inoperable if one of the parties lacks the necessary funds for arbitration proceedings, (77) which might be the case when a company is insolvent.

P 208

2.4 Intellectual Property Rights

9-64 Intellectual property rights derive from legal protection granted by a sovereign power, which affords the beneficiary certain exclusive rights to use and to exploit the intellectual property in question. Their existence often requires the registration with a governmental or quasi governmental agency which alone can grant, amend or revoke these rights and determine their scope. It is this involvement and the effect decisions concerning the existence of an intellectual property right have on third parties which have lead to the non-arbitrability of these disputes in some countries. For example, in the European Union disputes directly affecting the existence or validity of a registered intellectual property right are still not considered to be arbitrable. (78) By contrast in Switzerland where the law contains a

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

comparable definition of arbitrability the opposite is true: arbitration awards are recognised by the Swiss Patent and Trade Mark Office as a basis for revoking the registration of a patent. (79)

9-65 Fewer problems concerning arbitrability arise if the dispute is not about the validity of an intellectual property right but involves contracts concluded in the exercise of a such a right. Disputes as to validity, effect and royalties due under licensing agreements, contracts for the transfer of property rights, or research and development agreements intended to lead to intellectual property rights are generally considered to be arbitrable. They usually do not have a direct effect on third parties. (80)

P 209

9-66 Two legal systems which accept the arbitrability of almost all intellectual property disputes are Switzerland (81) and the US. (82) Most other countries do not exclude intellectual property rights as a whole from the jurisdiction of arbitration tribunals but usually draw a distinction between those rights which have to be registered, *i.e.* patents and trade marks, and those which exist independently of any such formality, such as copyright. With regard to the former category, most jurisdictions will only permit an award which takes effect between the parties. However, most related issues such as ownership, infringement, transfer or violation of the patent can be freely arbitrated in all major jurisdictions. In respect of intellectual property rights which are not subject to registration, such as copyright, arbitrability appears to be internationally accepted. The general acceptance of the arbitrability of intellectual property disputes is reflected in the arbitration system under the World Intellectual Property Organisation Rules.

9-67 A hybrid system has been established for the non judicial settlement of domain name disputes. Domain names which are akin to trademarks are subject to registration under the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN). (83) The procedure deals with the issue of abusive domain name registrations. While it is arguable whether the UDRP system is an arbitration system, the point remains that disputes about domain names may be referred to arbitration.

2.5 Illegality and Fraud

9-68 Allegations of illegality and fraud have always raised serious problems as to the arbitrability of a dispute. (84) In conjunction with the acceptance of the doctrine of separability it has become increasingly accepted that allegations of illegality of the main contract do not necessarily lead to the non-arbitrability of the dispute. This is only where the provisions which lead to illegality are of such kind that they require the dispute to be decided by state courts.

P 210

9-69 One type of provisions which has led to divergent views in this context are United Nations embargoes. In connection with the Iraq embargo legislation Italian and Swiss courts came to opposing conclusions as to the arbitrability of the dispute.

9-70 In the Italian case (85) Fincantieri and other Italian providers of army technology had entered into contracts with agencies of the Republic of Iraq for the supply of corvettes for the Iraqi Navy. After the invasion in Kuwait an embargo was declared by the United Nations Security Council followed by similar legislation by the European Union and Italy which made any dealings with Iraq illegal. At that time, most of the corvettes had not yet been built or delivered.

9-71 The Italian parties commenced proceedings against Iraq in the Court of First Instance of Genoa, alleging frustration of contract and seeking termination and damages. The Iraqi parties objected to the court's jurisdiction and maintained that the dispute should have been referred to arbitration as provided for in the contracts. The Italian parties replied that only arbitrable matters may be referred to arbitration and that the dispute concerned matters which would have been arbitrable before the embargo legislation was issued but were no longer so. They maintained that arbitrability must be ascertained under Italian law and relied on Article 806 Code of Civil Procedure. This provided that only disputes concerning rights of which the parties may freely dispose may be referred to arbitration. They alleged that, due to the embargo legislation, the parties could not freely dispose of the contractual rights at issue.

9-72 The Court of Appeal ruled that Italian courts had jurisdiction over the case as the dispute was not arbitrable under the applicable Italian and European embargo legislation. In connection with the EC Regulation 3541/1992 it held that

... Art. 21 of this Regulation forbids [parties] to meet or take any measure to meet Iraqi requests to perform in any way under contracts or transactions falling under Resolution no. 686/1990 .... Art. 1.2 explains that 'request' means a request made in or out of court, before or after the date of entry into force of the Rule; that 'transaction' ... generically means negotiation, and that this provision, in the light of its ratio, must be interpreted in the sense that it forbids not only meeting a request but also any (voluntary) act aiming at meeting it. This *jus superveniens* is worth mentioning: even where the answer given above to the question of jurisdiction were uncertain under the legislation in force at the time of commencing this action, [this EC Rule] would make the arbitral clause null and void and grant the Italian courts jurisdiction to hear the case.

P 211

This solution finds no obstacle in the fact that the main claim aimed at terminating the

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

contracts, not obtaining performance under them. Also in this case, referral of the dispute to the arbitrators could have affected ... rights which international and national embargo legislation had made *indisponibili*.... Further, as a set-off had been claimed, in case termination were granted, between the Iraqi parties' credits for advance payments made and their allegedly higher debts, the arbitration could have led to meeting [Iraqi requests] in violation of the said supranational legislation. Also, an hypothetical arbitral award against the claimants, denying termination of the contract, would have recognized the continuing validity of the contracts, thereby affecting, in a contrary but similar manner, *diritti indisponibili*. (86)

9-73 The Swiss Supreme Court came to the opposite conclusion in a dispute involving the Italian party and its agent for the sales to Iraq. (87) The agent had initiated arbitration proceedings for outstanding payments under the agency contract. In a preliminary award the arbitration tribunal held that despite the embargo legislation it had jurisdiction. An action for the annulment of the award went to the Swiss Supreme Court which rejected the claim that the dispute involved was not arbitrable. The court held that generally the only condition for the arbitrability of disputes according to Swiss law was that it was a dispute in relation to property. Public policy considerations included in the embargo could only lead to non-arbitrability if they required the submission of disputes to the state courts and not only the non-enforcement of the substantive contract. The court held that

the arbitrability of the dispute does not depend on the material existence of the claim. Thus, it 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; it could be denied only as far as the claims are concerned which should have been heard exclusively by a State court, according to provisions of law which were to be taken into consideration for reasons of public policy.

P 212 [11] This is not at all the case here. The commercial measures taken against the Republic of Iraq raise indeed the issue of the validity of the contracts concluded before these measures were taken, or the issue of the subsequent impossibility to perform under said contracts. It does not seem, however, and [Fincantieri and Oto Melara] in any case do not prove, that all this must lead us to find that the claims arising out of these contracts are not arbitrable, and even more that the claims arising out of related contracts, like the agency contract on which M. bases his claims, are not arbitrable.

9-74 In the US it has long been recognised that a tribunal has jurisdiction to hear a dispute concerning a contract which has allegedly been induced by fraud. In *Prima Paint Corporation v Flood & Conklin Mfg Co* the Supreme Court was faced with the question of whether a claim of fraud in inducement of an entire contract was arbitrable under an ordinary arbitration clause providing for reference of "any controversy or claim arising out or relating to agreement or breach thereof". The court held that under the Federal Arbitration Act the claim should be referred to arbitration, in the absence of any evidence that contracting parties intended to withhold that issue from arbitration. (88)

2.6 Bribery and Corruption

9-75 Bribery and corruption have been at the heart of several famous arbitrations arising out of contracts for consultancy and related services in the acquisition of contracts of public procurement. The usual situation has been that a party who wants to resist claims for payment of fees or commission alleges that the agreement was actually one for the payment of bribes and is therefore void, negating the arbitration agreement as well.

9-76 In 1963, in ICC case 1110, Judge Lagergren concluded that a dispute relating to bribery was not arbitrable. After determining that he had to enquire into his jurisdiction *ex officio*, despite a different view by the parties, Judge Lagergren held that neither French law, as the law of the place of arbitration, nor Argentine law, as the law governing the contract, would allow the
P 213 dispute to be arbitrated. He continued (89)

... Finally, it cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international arbitration tribunals that lack a 'law of the forum' in the ordinary sense of the term.

After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes. (90)

9-77 According to Judge Lagergren' s view credible allegations of bribery not only affect the main contract but also make the dispute non-arbitrable. Therefore the arbitration tribunal lacks jurisdiction to hear the dispute and investigate the truth of those allegations of bribery.

9-78 A decision by the Supreme Court of Pakistan followed the view of Judge Lagergren. In *HUBCO v WAPDA* (91) the dispute arose out of a contract for the purchase of power from a plant

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

constructed and run by the claimant. The Pakistani defendant alleged that several amendments to the original agreement leading to higher prices were obtained by fraud and bribing government officials. The Pakistani Court held that mere allegation of corruption and fraud were insufficient to make disputes not arbitrable. By contrast where *prima facie* evidence of such practices exist, public policy matters are raised which require findings about the alleged criminality, the dispute cannot therefore be referred to arbitration. The Supreme Court held

P 214

The allegations of corruption in support of which the above mentioned circumstances do provide *prima facie* basis for further probe into matter judicially and, if proved, would render these documents [*i.e.* the amendments of the original contract] as void; therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to Arbitration (92)

9-79 The underlying rationale is that due to the criminal element involved those issues should be left to the state courts. These have greater means of investigation and can better serve the public interest in prosecuting those acts.

9-80 However, the now prevailing view in international arbitration practice, in particular in Europe, supports the arbitrability of disputes involving allegations of corruption and bribery. Relying on the doctrine of separability arbitration tribunals and courts have come to the conclusion that the arbitration agreement as such is generally not tainted by alleged corruption which only affects the main contract. (93) Despite the international public policy implications it is felt that the tribunal should be allowed to decide whether or not there was bribery or corruption involved. National courts retain control over contracts involving bribery and corruption at the enforcement stage since awards which uphold such contracts would be contrary to public policy.

9-81 This is clearly stated in the award and the various court decisions in the *Westacre v Jugoimport* case which arose out of a consultancy agreement between Westacre Investments, Inc and Jugoimport - SDPR Holding Co Ltd. and Beogradsk Banka (the old Directorate). Westacre had agreed to assist Jugoimports in relation to orders to be placed by the Kuwait Ministry of Defence (KMD) for M-84 tanks. In return Westacre was to receive a substantial percentage of the value of the contracts. The contract was submitted to Swiss Law and provided for ICC arbitration in Geneva. After the old Directorate had secured an order from the KMD it gave Westacre written notification that it was terminating their contract because it was in violation of a circular of the KMD which prohibited the use of agents or intermediaries.

P 215

Westacre started arbitration proceedings for the unpaid monies. The arbitrators awarded Westacre approximately US$ 50 million plus interest.

9-82 The arbitration tribunal held that the consultancy agreement was not invalid: there was no infringement of *bona mores.* Furthermore, it had not been established that the KMD Circular was part of the mandatory law of Kuwait, as distinct from a term of the M-84 contract or that it belonged to international public policy. They also held that the respondent had failed to establish that the consultancy agreement was null on grounds that the parties were to procure a contract with the Kuwait Government by illicit means. Accordingly, the consultancy agreement did not violate international public policy. Lobbying by private enterprises to obtain public contracts was not, as such, an illegal activity and contracts to carry out such activities were not illegal. (94)

9-83 The arbitration tribunal made a strong case for the separability of the arbitration agreements and the function of illegality as a defence that renders an agreement void, as well as the adversarial nature of the proceedings which limit significantly, if not extinguish, the inquisitorial role of the tribunal. More importantly, the tribunal expressed a confident opinion that it was entitled to discuss an allegation of bribery.

9-84 The defendants sought to have the award annulled before the Swiss Supreme Court claiming that Westacre was a shell for a member of the Kuwaiti Government. The Swiss court sought information from the arbitrators as to whether this information had been provided during the arbitration. The arbitrators reported that the claim had not been made before them and that in the arbitration proceedings the Directorate had sought to play down the role of the government official it now claimed was behind Westacre. Despite the new evidence, the Swiss court refused to go behind the facts as found by the arbitration tribunal and dismissed this claim in 1995. (95) The claimants had also applied to have the award enforced in Kuwait and in May 1994, without challenge from the respondents, the Kuwaiti court enforced the award. (96)

9-85 Later in 1995, Westacre applied to enforce the award in England. Through affidavit, the respondents presented more evidence of their claim that Westacre was merely a shell for the

P 216

Kuwaiti government official, including that Westacre was run by the son-in-law of the government official in question. The main issue before the English courts was whether the facts should be re-opened to consider the new evidence on the grounds that it may show that the contract violated English public policy. The Court of Appeal refused to reopen the facts holding "that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption." (97)

9-86 At the heart of these divergent approaches lies the different weight accorded to the various public policy issues involved in those disputes. There is a clear conflict between the public policies of sustaining the parties' agreement to arbitrate all their disputes, and not enforcing illegal contracts. Allowing arbitration tribunals to deal with disputes involving

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

allegations of bribery does not generally lead to the enforcement of illegal contracts. Arbitration tribunals have refused to enforce such contracts where bribery or corruption was proved. (98) Where tribunals have gone wrong and have issued awards, which have upheld illegal practices, courts have refused to enforce those awards. (99)

9-87 Nevertheless there might be cases which could lead to the enforcement of illegal contracts. Under the existing system courts do not go behind the facts established by the arbitrator unless the basic rules of ascertaining the facts have been violated. They decide on the basis of the facts established by the arbitrator whether the award violates public policy. In these circumstances errors of fact may lead in certain cases to the enforcement of illegal contracts. In England this threat is considered to be so minor that predominant weight is given to the public policy of sustaining the parties' agreement to arbitrate their disputes. (100) In Pakistan it is the other way round. (101)

P 217

9-88 It appears that international arbitrators are capable of turning national courts, through the enforcement process, into pawns in the execution of contracts based on egregious illegality. However, it would also be inappropriate to submit a foreign investor in a HUBCO-WAPDA situation to the national courts. In such investment contracts it is unlikely that the foreign investor could obtain a fair chance to present its case that no corruption was involved, in particular, if the people in power have changed. Therefore the solution in those cases cannot be to declare the dispute non-arbitrable but to make sure that no errors of fact arise which could lead to the enforcement of agreements tainted by corruption.

9-89 Objectively the Westacre position may be disturbing. Its effect is to allow an arbitration award effected by illegality to be upheld by a national court simply because illegality was not proven during the arbitration process. There should be no reason why, if new evidence becomes available, a court should not review the award at the time of enforcement. If precluded from doing so, national courts would be the instrument through which contracts that are clearly illegal and contrary to public policy would be legitimised.

2.7. Investment Contracts relating to Infrastructure and Natural Resources

9-90 It has been argued that certain types of investment contracts are not arbitrable (102) since they involved issues of sovereignty over natural resources or other issues of *ius cogens*. (103) Arbitrators should not pronounce on the validity of sovereign actions by a state. This view was rejected by a high profile arbitration tribunal in 1982. The state party challenged the jurisdiction of the arbitration tribunal on the basis that it could not decide on the validity of the decision of the government to renounce the exploitation of natural resources. The arbitrators rejected that view and held that

P 218

one must distinguish the governmental decision itself which, ... escapes as such the considerations of the Arbitral Tribunal and is thus not “arbitrable”, from the financial consequences of this decision in relation to the disputed Contract. While the Arbitral Tribunal was invited by the claimants' Request for Arbitration to declare that the claimants have a right to certain payments claimed, and which were claimed to be due under the disputed Contract, which ABC, following the decision of the Utopian Government, decided not to pursue, the said Tribunal is not invited to “deny the consequences” of the political decision not to have recourse to the exploitation of natural resources. On the contrary, to the extent that the claim put forward by the claimants is based on non-performance resulting from the Government's decision [...] it may be said that the Request for Arbitration invites the Tribunal to “draw the consequences”, in a contractual and purely financial context, of the said decision, and not to deny them. (104)

9-91 The distinction drawn by the tribunal seems to be sensible. On the one hand the tribunal does not have to determine the validity of the states exercise of sovereign power. On the other hand it gives the private party the required protection which it might not get in the courts of the host state. To declare these types of disputes relating to the financial effects of measures of nationalization non-arbitrable would allow the state to walk away from the arbitration clause in cases where the private investors are most vulnerable to state interference. If a state agrees to arbitrate these disputes it should be bound by its commitments.

9-92 As a result some countries have adopted a different approach. For example, Turkey which traditionally held concession contracts not to be arbitrable changed its law to allow for arbitration in these types of contracts. (105) There are, however, still a number of countries where this is not the case. (106)

3 Duty to Deal with the Lack of Arbitrability *ex Officio*

9-93 In the majority of cases the non-arbitrability of a dispute is raised by one party seeking to preclude arbitration. It may prefer to have the dispute decided by the courts. There are, however, cases where none of the parties invokes the lack of arbitrability. They may either not have realised it or may have an interest in having their dispute settled in private. For example, parties to contracts involving bribery or certain illegal conduct may accept the need for their dispute to be resolved but may not want the relevant authorities to be informed about their

P 219

contract which will invariably be the case if the dispute is dealt with in the courts. In such cases the question arises whether the arbitration tribunal has the right itself to raise the issue of arbitrability even though the parties do not challenge the jurisdiction of the tribunal.

9-94 This was done by Judge Lagergren in ICC case 1110. (107) After studying the pleadings filed

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

by the parties and oral and written witness statements, the sole arbitrator raised the question of his jurisdiction *ex officio*, to entertain the subject matter of the case, and stated

In this respect both parties affirmed the binding effect of their contractual undertakings and my competence to consider and decide their case in accordance with the terms of reference. However, in the presence of a contract in dispute of the nature set out hereafter, condemned by public policy decency and morality, I cannot in the interest of due administration of justice avoid examining the question of jurisdiction on my own motion. (108)

9-95 It is worth noting that under the New York Convention recognition and enforcement of an award may be refused *ex officio* if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country. (109)

9-96 One could argue that arbitration tribunals are not part of any national judicial system and therefore do not owe any allegiance to a particular state. As long as the parties want to have their dispute decided by arbitration the tribunal should do so irrespective of the fact that its award may later be set aside for lack of arbitrability. The duty towards the parties to render an enforceable award only exists as long as the parties have not renounced it.

9-97 However, the preferred view is that an arbitration tribunal should on its own initiative deny jurisdiction if the dispute is not arbitrable on the basis of the facts submitted by the parties. This is not contrary to the principle of *"ne ultra petita", i.e.*, not raising an issuing
P 220
outside the arbitrators' authority (110) but is the result of an application of the law to the facts. (111) Though the parties are in general free to decide which provisions the tribunal should apply this freedom does not extend to avoiding the mandatory rules governing the issue of arbitrability. By declaring certain disputes not arbitrable the legislator has removed these from the disposal of the parties. Accordingly, the arbitration tribunal, despite being a creation of the parties, not only owes a duty to the parties but also the public. The success of arbitration as a recognised dispute settlement mechanism is also due to the fact that arbitration is not abused to circumvent the policy of states in areas which are considered to be so crucial that they are reserved for adjudication by courts.

9-98 The non-arbitrability of a dispute might also exclude any further court support during and after the arbitration. A party that agreed to arbitrate a non-arbitrable dispute might later change its mind when an award has been rendered in favour of the other party and refuse voluntary enforcement. It is at least doubtful whether in an action to set aside courts would
P 221
consider that party from being estopped from raising the lack of arbitrability defence given the importance of the matter.

References

1) See also the definition by Carbonneau and Janson, "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", 2 *Tul J Int'l & Comp L* 193 (1994) 194 according to which arbitrability "determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins."
2) For distinction between subjective and objective arbitrability see Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 533; Kirry, "Arbitrability: Current Trends in Europe", 12 *Arb Int* 373 (1996) 381 *et seq.*
3) See, *e.g., First Options of Chicago v Manuel Kaplan et and MK Investment, Inc*, 115 S Ct 1920, 1943 (1995); *Smith Enron Cogeneration Limited Partnership, Inc et al v Smith Cogeneration International, Inc*, XXV YBCA 1088 (2000) para 28 (2d Cir); see also Carbonneau and Janson, "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", 2 *Tul J Int'l & Comp L* 193 (1994) 194.
4) Another example are disputes arising out of the termination of exclusive distributorships. They are not arbitrable under some laws such as Belgian Law: see Tribunal de Commerce Brussels, 20 September 1999, *Matermaco SA v PPM Cranes Inc et al*, XXV YBCA 673 (2000) 675, while their arbitrability poses no question under most other laws such as *e.g.* US law (*JJ Ryan & Sons, Inc v Rhône Poulenc Textile, SA et al*, XV YBCA 549 (1990) (4th Cir); for further examples see Bortolotti, "International Commercial Agency Agreements and ICC Arbitration", 12(1) *ICC Bulletin* 48 (2001) 50 *et seq.*
5) An identical provision is contained in Inter-American Convention Article 5(2)(a).
6) Cour d'appel Brussels, 4 October 1985, *Company M v M SA*, XIV YBCA 618 (1989).
7) *Ibid*, 619.
8) *Meadows Indemnity Co Ltd v Baccala & Shoop Insurance Services Inc*, 760 F Supp 1036-1045, XVII YBCA 686 (1992) (EDNY 1991). For further examples see Born, *International Commercial Arbitration*, 244.
9) XVII *YBCA* 686 (1992) 690. To give the notion "capable of being referred to arbitration" in Article II an autonomous meaning based not on one law goes a step further than admitting that under the national law a broader concept of "arbitrability" exists for international claims. The latter is still a concept of a national law not dependent on foreign laws.

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

10) See, *e.g.*, Belgium, Tribunal de Commerce, Brussels, 20 September 1999, *Matermaco SA v PPM Cranes Inc et al*, XXV YBCA 673 (2000) 675; Switzerland, Tribunal Fédéral, 28 April 1992, XVIII *YBCA* 143 (1993) 146.
11) In relation to US practice see Born, *International Commercial Arbitration*, 244.
12) Corte di Appello Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, 4 Riv Arb 505 (1994), XXI YBCA 594 (1996).
13) *Ibid*, XXI *YBCA* 594 (1996) 13; for further examples see Corte di cassazione, 27 April 1979, no 2429, *Compagnia Generale Construzioni CIGECO SpA v Piersanti*, VI YBCA 229 (1981) 230; *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3360 Fn 21 (1985) (US Supreme Court, 2 July 1985).
14) 18 July 1987, XVII *YBCA* 534 (1992); the decision was later reversed since it considered disputes relating to EC competition law not to be arbitrable, see Corte di Appello Bologna, 21 December 1991, XVIII *YBCA* 422 (1993).
15) Arfazadeh, "Arbitrability under the New York Convention: The *Lex Fori* Revisited", 17 *Arb Int* 73 (2001) 80.
16) For that view see Bertheau, *Das New Yorker Abkommen vom 10 Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Wintherthur 1965) 38 *et seq*; von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Schweitzer 1973) 135 *et seq*; Sandrock/Kornmeier, *Handbuch der Internationalen Vertragsgestaltung*, Vol 2 (Verlag Recht und Wirtschaft 1980) para 210; see also Article 44 of the draft Japanese Arbitration law according to which the arbitration agreement is only valid if it fulfils the requirements of both, the law of Japan and the law applicable to the arbitration agreement.
17) Reithmann Martiny, *Internationales Vertragsrecht* (5th ed, Schmidt 1996), para 2380; see also Arfazadeh, "Arbitrability under the New York Convention: The *Lex Fori* Revisited", 17 *Arb Int* 73 (2001)76 *et seq.*
18) Due to the fact that in the enforcement-situation for which the provision is drafted the law referred to is that of the place of enforcement it is sometimes seen as a referral to the law of the place of enforcement; see Hanotiau, "The Law Applicable to Arbitrability", van den Berg (ed), *ICCA Congress series no* 9, 146, 163.
19) See also Germany, ZPO section 1030(1). This is a change from the previous German law which was based on the first approach.
20) See the decision of the Swiss Tribunal Fédéral, 23 June 1992, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v M and arbitration tribunal*, XX YBCA 766 (1995) para 4; (French Original ATF/BGE 118 (1992) II 353, 356) according to which the notion covered "any claims that have pecuniary value for the parties, whether assets or liabilities, in other words rights which present, for at least one of the parties, an interest that can be assessed in monetary terms".
21) See also Netherlands, CCP Article 1020(3).
22) According to Article 1966 Civil Code the parties can compromise when they have the capacity to dispose of the rights. For an application of these provisions and the relevance of mandatory provisions in this context see Chamber of National and International Arbitration of Milan, Final award, 23 September 1997, XXIII *YBCA* 93 (1998).
23) See also Japan, Code of Civil Procedure 1890, Article 786.
24) For such an approach see ICC case no 4604, X *YBCA* 973 (1985) 975, French original in Jarvin Derains Arnaldez, *ICC Awards 1986-1990*, 545 *et seq*; see also Corte di Appello, Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, XXI YBCA 594 (1996). The case relates to embargo legislation and arbitrability and the Italian court applied *lex fori* to determine the arbitrability question.
25) For those problems in connection with intellectual property rights see Blessing, "Arbitrability of Intellectual Property Disputes", 12 *Arb Int* 191 (1996).
26) See Blessing, "Arbitrability of Intellectual Property Disputes", 12 *Arb Int* 191 (1996), 192 and Lew; "Intellectual Property Disputes and Arbitration, Final Report of the Commission on International Arbitration", 9 *ICC Bulletin* 37 (1998) 41 *et seq.*
27) See, *e.g.*, ICC case no 6162, *Consultant v Egyptian Local Authority*, XVII YBCA 153 (1992); ICC case no 4604, X *YBCA* 973 (1985) 975, French original in Jarvin Derains Arnaldez, *ICC Awards 1986-1990*, 545; Partial Award ICC case no 8420, XXV *YBCA* 328 (2000), 330 *et seq.* In favour of such an approach see also ICC case no 6149 XX *YBCA* 41(1995) 144.
28) ICC case no 6719, Arnaldez Derains Hascher, *ICC Awards 1991-1995*, 567, 568 *et seq*; ICC case no 6149 Arnaldez Derains Hascher, *ICC Awards 1991-1995*, 315, 318; for the tendency of ICC tribunals to ascertain the arbitrability of a dispute according to all laws concerned, see Schwartz, "The Domain of Arbitration and Issues of Arbitrability: The view from the ICC", *ICSID Rev-FILJ* 17 (1994) 27.
29) Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 559.
30) For a comparable view see Arfazadeh, "Arbitrability under the New York Convention: The *Lex Fori* Revisited", 17 *Arb Int* 73 (2001) 79; Hanotiau, "The Law Applicable to Arbitrability", *ICCA Congress series no 9*, 146, 158, wants to limit the applicability of the law of the place of arbitration to those cases involving public policy.
31) For example Germany, ZPO section 1059(2) no 2a; Hungary, Arbitration Law section 54; India, Arbitration Ordinance 1996 section 34.
32) See Craig Park Paulsson, *ICC Arbitration*, para 5-07 with reference to a number of court decisions where rules restraining arbitrability in the domestic context were considered to be not applicable to international cases.

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

33) Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 559; see also ICC Rules Article 35; for a detailed discussion of whether an arbitration tribunal having its seat in Geneva should take into account the provisions of the *lex causae*, see Partial Award ICC case no 8420, XXV *YBCA* 328 (2000) 330 *et seq*.
34) See New York Convention, Article V(2)(a); Model Law, Article 36(1)(b)(i).
35) See, *e.g.*, ICC case no 2476, 104 *Clunet* 936 (1977) 937; ICC case no 4604, X *YBCA* 973 (1985) 975, French original in Jarvin Derains Arnaldez, *ICC Awards 1986-1990*, 545 *et seq*.
36) For a description of the relevant issues in the balancing process in the context of arbitrability of disputes involving allegations of bribery see the decision of the English Commercial Court, 19 December 1997, *Westacre Investments Inc v Jugoimport-SPDR Ltd* [1998] 2 Lloyd's Rep 111, 129.
37) *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 *et seq* (1985).
38) See the study undertaken by UNCITRAL in preparation for the Model Law, Secretariat Study on the New York Convention, A/CN9/168 (20 April 1979), para 45; Kaplan, "A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend towards Supporting an International Arbitration Culture", van den Berg (ed), *ICCA Congress series no 8*, 191; for the French law see Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 560.
39) For this trend in the European context see Kirry, "Arbitrability: Current Trends in Europe", 12 *Arb Int* 373 (1996) 374-379; for a critical comment see Carbonneau and Janson, "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", 2 *Tul J Int'l & Comp L* 193 (1994).
40) *American Safety Equipment Corp v JP Maguire & Co*, 391 F 2d 821, 826 *et seq* (2d Cir 1968).
41) See, *e.g.*, France, NCPC Article 2060.
42) See Kirry, "Arbitrability: Current Trends in Europe", 12 *Arb Int* 373 (1996) 374-379.
43) Germany, ZPO section 1030(1).
44) Switzerland, PIL Article 177.
45) Belgium, Judicial Code Article 1676(1).
46) For an overview of the importance of the "exclusive jurisdiction" criterion and other criteria see Lazic, *Insolvency Proceedings*, 146-158.
47) See, *e.g.*, EC Regulation 44/2001 Article 22.
48) Replaced by 37h WpHG. Further examples are Germany, ZPO section 1030(2) (rent of housing), BGB section 1822(12) (Representation of a child); see also France, NCPC Article 2060; Belgium, Judicial Code section 1678(2) (exclusion of labour disputes). Jordan, Law no 35 of 1983 section 2 (disputes relating to bills of lading).
49) Italy, Corte di Appello Bologna, 21 December 1991 no 1786, *SpA Coveme v CFI – Compagnie Francaise des Isolants SA*, XVIII YBCA 422 (1993) 425 *et seq*; Switzerland, Tribunal Fédéral, 28 April 1992, *V SpA v G SA*, XVIII YBCA 143 (1993) 148; Hanotiau, "The Law Applicable to Arbitrability", van den Berg (ed), *ICCA Congress series no 9*, 146, 161.
50) ECJ, 1 June 1999, Case 126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 3055.
51) See Idot, "Arbitrage et Droit Communautaire" *RDAI/IBLJ* 561 (1996); Hanotiau, "Arbitration and European Competition Law", in *Arbitration and European Law* (Bruylant 1997), 31-64; Abdelgawad, *Arbitrage et Droit de la Concurrence*; Komninos, "Arbitration and the Modernisation of European Competition Law Enforcement", 24(2) *World Competition* 211 (2001).
52) *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).
53) See also the US Supreme Court decision in relation to the protection granted under the Carriage of Goods by Sea Act, *Vimar Seguros y Reaseguros, SA v M/V SKY REEFER, her Engines, etc, et al*, 115 S Ct 2322 1995, 132 L Ed 2d 462 where a comparable reasoning was adopted.
54) See contrasting views of Werner, "A Swiss Comment on Mitsubishi", 3(4) *J Int'l Arb* 81 (1986), and Jarvin, "Mitsubishi ICC comment", 4(1) *J Int'l Arb* 87 (1987).
55) *Wilko v Swan*, 346 US 427 (1953).
56) 417 US 506 (1974).
57) *Ibid.*
58) *Shearson/American Express Inc et al v McMahon et al*, 482 US 220 (1987).
59) 490 US 477 (1989).
60) *Ibid*, 482-483.
61) *Ibid*, 484.
62) Park, "Arbitration in Banking and Finance", 17 *Annual Review of Banking Law* 213 (1998) 232; Kröll, "Schiedsverfahren bei Finanzgeschäften – Mehr Chancen als Risiken", *ZBB* 376 (1999) 376 *et seq*.
63) *E.g.* Austria and Hungary. For further details see the Eleventh Report of the Securities Industry Conference on Arbitration (July 2001) available at <www.nyse.com/pdfs/SICA2001.pdf>.
64) See NASD Code of Arbitration Procedure. The NASD DR operates the largest dispute resolution forum in the US, handling roughly 80% of all the arbitration cases in this sector.

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

65) The NASDAQ Stock Market announced in March 2001 that it had agreed to acquire a majority shareholding in EASDAQ market, the pan-European market formed by a consortium of US and European Banks which, thus, will be restructured in a truly pan-European and globally linked exchange called NASDAQ Europe. The NASDAQ Europe, substantially a subsidiary of the NASDAQ Stock Market, is completely independent from any national market place. The market operates on a pan-European basis, with a unified infrastructure including a single Rule Book, a single membership, a dedicated trading platform and settlement. See NASDAQ Europe Rule Book, May 2001, 11 *et seq*, approved by the Belgian Minister of Finance on 11 May 2001 and entered into effect on 8 June 2001, following its publication in the Belgian State Gazette.

66) For a detailed account see Lazic, *Insolvency Proceedings*, 1 *et seq*; Westbrook, "The Coming Encounter: International Arbitration and Bankruptcy", 67 *Minn L Rev* 595 (1983); Newman and Burrows, "Enforcement of Arbitration Provisions in Bankruptcy", *NYLJ* 3 (June 18/1992);

Mantilla-Serrano, "International Arbitration and Insolvency Proceedings", 11 *Arb Int* 51 (1995); Fouchard, "Arbitrage et faillité", *Rev Arb* 471 (1998).

67) Lazic, *Insolvency Proceedings*, 156-157.

68) See for an overview of the various techniques employed by the national laws of England, France, Germany, Netherlands and the US, Lazic, *Insolvency Proceedings*, 15 *et seq*.

69) See *Société Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v Distrigas Corp*, 80 BR 606, 610 (D Mass 1987).

70) *United States Lines, Inc et al (US) v American Steamship Owners Mutual Protection and Indemnity Association, Inc, et al (US), In re United States Lines*, XXV YBCA 1057 (2000) (2d Cir, 1 November 1999).

71) *Ibid*, para 14-16.

72) Decree no 85-1388 of 27 December 1985.

73) Cour de cassation, 19 May 1987, *Rev Arb* 142 (1988); Lazic, *Insolvency Proceedings*, 162 with further references.

74) Tribunale Lodi, 13 February 1991, *Adda Officine Elettromeccaniche e Meccaniche et al v Alsthom Atlantique SA et al*, XXI YBCA 580 (1996) para 6.

75) See the Dutch Bankruptcy Act (Faillissementsrecht) Article 122; see also Lazic, *Insolvency Proceedings*, 164-165; for an overview of the legal situation in Hong Kong: Soo, "Impact of Insolvency on Hong Kong Arbitration", 3 *Int ALR* 103 (2000).

76) See Oberlandesgericht Dresden, 25 September 1998, 11 *Sch* 0001/98, unpublished.

77) See Bundesgerichtshof, 14 September 2000, *BB* 2330 (2000) with further references.

78) See generally EC Regulation 44/2001 Article 22(4) which confers exclusive jurisdiction on certain national courts in relation to the registration and validity of patents and trademarks. For Germany, in particular, see Simms, "Arbitrability of Intellectual Property Disputes in Germany", 15 *Arb Int* 193 (1999) 196; for a different view see Raeschke-Kessler and Berger, *Schiedsverfahren*, para 186 *et seq*.

79) Blessing, "Arbitrability of Intellectual Property Disputes", 12 *Arb Int* 191 (1996) 200.

80) See, *e.g.*, the decisions on French law by the Cour d'appel Paris, 24 March 1994, *Société Deko v G Dingier et Société Meva*, Rev Arb 513 (1994) 518 and ICC case no 6709, 119 *Clunet* 998 (1992) 1000, which held that claims that do not involve the validity of a patent but just the breach of contract are arbitrable under French law irrespective of Article 68 of the law on patents. For a detailed account on the situation in different countries see Lew, "Intellectual Property Disputes and Arbitration, Final Report of the Commission on International Arbitration", 9(1) *ICC Bulletin* 37 (1998) 41 *et seq*; for references to US cases see Born, *International Commercial Arbitration*, 281.

81) AAA case no 13T-117-0636-85, 15 September 1987, *IBM Corp v Fujitsu Ltd*, 4(4) J Int'l Arb 153 (1987), XIII YBCA 24 (1988).

82) An example of an arbitration tribunal ruling on the validity of a patent *inter partes* without affecting its registration is ICC case no 6097, 2 *ICC Bulletin* 75 (1993). See also to that effect in the US, Plant, "Binding Arbitration of US Patents", 10(3) *J Int'l Arb* 79 (1993).

83) See <www.icann.org>. See also Davis, "The New New Thing: Uniform Domain-Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Number", 17(3) *J Int'l Arb* 115 (2000).

84) The discussion focused less on "arbitrability", and more on the existence of a valid arbitration clause, which is a question of separability of an arbitration clause; see, *e.g., Heyman v Darwins Ltd* [1942] AC 356.

85) Corte di Appello Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, XXI YBCA 594 (1996).

86) *Ibid.*

87) Tribunal Fédéral, 23 June 1992, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v M and arbitration tribunal*, XX YBCA 766 (1995) paras 10, 11.

88) 87 S Ct 1801, 18 L Ed 2d 1270.

89) ICC case no 1110, published by Wetter, "Issues of Corruption before the International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunner Lagergren's 1963 Award in ICC Case no 1110", 10 *Arb Int* 277 (1994); but see a case where the arbitrability of allegations of fraud was denied, Supreme Court of Pakistan, 14 June 2000, *The Hub Power Company Ltd (HUBCO) v Pakistan WAPDA and Federation of Pakistan*, 15(7) Mealey's IAR Al (2000).

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

90) ICC case no 1110, *Argentine engineer v British company*, 3 Arb Int 282 (1987) with note Wetter, "Issues of Corruption before the International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunner Lagergren's 1963 Award in ICC Case no 1110", 10 *Arb Int* 277 (1994), XXI *YBCA* 47 (1996).
91) Supreme Court of Pakistan, 14 June 2000, *The Hub Power Company Ltd (HUBCO) v Pakistan WAPDA and Federation of Pakistan*, 15(7) Mealey's IAR Al (2000).
92) *Ibid*, A17. In support of such an approach see also Sornarajah, *The Settlement of Foreign Investment Disputes*, 184.
93) See Switzerland, Tribunal Fédéral, *ATF* 119 II, 380, 385; England, *Westacre Investments Inc v Jugoimport-SPDR Ltd*, [1999] 2 Lloyd's Rep 65; [1999] 1 All ER (Comm) 865 (CA); Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof", 15 *Arb Int* 329 (1999) 330.
94) Westacre award excerpt in [1999] 1 *All ER (Comm)* 865, 869 d-h.
95) The Swiss decision is reported in XXI *YBCA* 172 (1996).
96) XXIII *YBCA* 836 (1998) 837-8.
97) *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1998] 4 All ER 570 (QBD), [1999] 1 All ER (Comm) 865 (CA).
98) See, *e.g.*, ICC case no 3913, 111 *Clunet* 920 (1984); ICC case no 3916 (1982), 111 *Clunet* 930 (1984).
99) See, *e.g.*, *Soleimany v Soleimany* [1998] 3 WLR 811 (CA).
100) See also *Westacre Investments Inc v Jugoimport-SPDR Ltd* [1998] 2 Lloyd's Rep 111, 129 (QBD, 19 December 1997).
101) The same result is sometimes reached by adopting a very restrictive interpretation of the arbitration agreement according to which the parties never intended to submit disputes involving allegations of corruption to the tribunal.
102) Some even argue that these disputes are not covered by the arbitration agreement since state parties only want to submit true commercial disputes but not those involving the exercise of national sovereignty; see Sornarajah, *The Settlement of Foreign Investment Disputes*, 186 *et seq.*
103) See, *e.g.*, the argument raised by the state party in Award of April 1982 in *ad hoc* arbitration, *Company Z and others v State Organization ABC*, VIII YBCA 94 (1983) 111; see also Sornarajah, *The Settlement of Foreign Investment Disputes*, 186 *et seq.*
104) Award of April 1982 in *ad hoc* arbitration, *ABC*, VIII YBCA 94 (1983) 112-113.
105) See Kroeger, Kautz, Acikel, "Turkey Revisited: Developments in Energy Project Arbitration in the context of Bilateral Investment Treaties and ICSID", 14(9) Mealey's IAR (1999).
106) See, *e.g.*, the decisions of the Lebanese Conseil d'Etat, 17 July 2001, *Etat Libanais v Société FTML* and *Etat Libanais v Libancell*, Rev Arb 855 (2001), where on the basis of the old French doctrine of the non-arbitrability of administrative contracts, arbitration clauses contained in BOT contracts were considered to be invalid. The court held, however, that under a bilateral investment treaty ICSID arbitration might have been possible.
107) ICC case no 1110, *Argentine engineer v British company*, 3 Arb Int 282 (1987) with note Wetter, 10 *Arb Int* 277 (1994), XXI *YBCA* 47 (1996).
108) *Ibid.*
109) Article V(2); see also Model Law, Articles 34(2)(b), 36(1)(b).
110) New York Convention, Article V(1)(c).
111) For an example of applying provisions not pleaded by the parties *ex officio* in the context of European competition law see ICC case no 7539, 123 *Clunet* 1030 (1996) 1033.

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company

© 2018 Kluwer Law International BV (All rights reserved).

Kluwer Arbitration Law is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.

If you would like to know more about this service, visit www.kluwerarbitration.com or contact our Sales staff at sales@kluwerlaw.com or call +31 (0)172 64 1562.

KluwerArbitration

© 2018 Kluwer Law International. (All rights reserved). A Wolters Kluwer Company