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Part I Fundamental Observations and Applicable Law, Chapter 3 - The Death of Inarbitrability

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(*)

1 Introduction

3-1 The significant expansion of the domain of arbitration, in the last few decades, has greatly undermined the relevance of the notion of arbitrability, in international matters. Back in 1999, Redfern & Hunter wrote:

the significance of "arbitrability" should not be exaggerated. It is important to be aware that it may be an issue, but in broad terms most commercial disputes are arbitrable under the laws of most countries. (1)

In recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life.

3-2 Gradually, the issue of arbitrability faded in disputes on jurisdiction. The defence that a particular subject matter is not arbitrable has almost disappeared in the practice of developed *fora*, and arises less frequently in emerging ones. Arbitrability seems to be the least of a modern practitioner's problems; while other issues, including third-party involvement, consolidation of proceedings and conflict between commercial and investment jurisdiction occupy the top of the list of the most frequent objections to arbitral jurisdiction and the more problematic issues in reform agendas.

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2 A Notion in Flux

3-3 Arbitrability is a key concept of arbitration law. "What is arbitrable and what is not" is a ubiquitous question, which faces policy makers, contract drafters, judges and arbitrators. (2)

3-4 Arbitrability is also the *primordial* question, which precedes all other matters in the regulation of arbitration. National laws establish *a priori* the domain of arbitration (3) *vis-à-vis* State justice. The scope of arbitrable claims is thus a central *policy* decision, which involves beyond the purely *legal*, essential reflections of a *pragmatic* nature, and the legislative or judicial arbitration of competing policy considerations. (4) This *political essentiala* of arbitrability adds to the fascination of its study, but also to the complexity of decision-making and the incessant dynamism of the concept. (5) This also makes arbitrability *national* by nature, (6) and thus a subject with respect to which the international unification or harmonisation of arbitration rules is at its lowest. (7)

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3-5 *Primordial*, arbitrability thus precedes *jurisdiction*, conceptually and usually also in time. (8) Arbitrability involves a *general* enquiry as to what types of disputes are "capable of settlement by arbitration." Jurisdiction comes at a *post-design* stage, as a more specific issue: the authority to rule on the particular dispute. It is decided by reference to the existence, validity and scope, under the applicable law, of the specific source of the tribunal's jurisdiction (the particular arbitration agreement, or other source of authority, such as legislative arbitration provisions).

3-6 An *objective* notion, arbitrability is also the fundamental expression of freedom to arbitrate. It defines the scope of the parties' power of reference or the boundaries of the right to go to arbitration in the first place. With respect to all non-arbitrable matters, courts retain exclusive jurisdiction and parties lack jurisdictional autonomy about *where* they can settle their dispute. The modern history of arbitration has been one of expansion of the parties' freedom to arbitrate.

3 From Restriction to Expansion

3-7 National laws traditionally defined arbitrability in terms of *public policy*. (9) Legal systems would only accept the arbitration of rights of a private nature or those that "can be compromised." (10) Rights which the parties could not dispose of were outside the domain of arbitration and within *exclusive* judicial jurisdiction. The nature of arbitrability: as restriction to party autonomy, its source: as national policy decision and its essential role: as *technique of* demarcation of the spheres of two jurisdictional orders, State and private justice, all supported this initial – and apparently inescapable attachment of arbitrability to *public policy*. In fact, public policy was more than an element of the definition of arbitrability. Arbitrability was the *jurisdictional* reflection of public policy.

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3-8 With arbitrable claims defined on the private-public divide, rights of a purely private nature did not pose particular problems with respect to their arbitrability. The main uncertainty existed regarding cases where the private right of action is entangled with elements of public interest or involves public law. Traditionally, legal systems excluded the arbitrability of these rights; and the arguments advanced to exclude their arbitrability revolved around the idea of *national public interest*.

3-9 Because the private right is entangled with the public interest, its enforcement has public effects external to the parties. Society at large has an interest in the proper enforcement of these rights; and arbitrators would fail to do that. The fear that private arbitrators would under-enforce public laws has very widely served as the reason to consider certain matters non-arbitrable. The image of arbitrators as "commercial men" biased to business and hostile to public regulation of commercial activity, or presumably unable to deal with complex public law issues (11) has nourished this classic fear. Furthermore, if arbitrators did not correctly apply public laws, there is no remedy, since awards are final.

3-10 On a technical level, the *problematique de base* of the arbitrability of rights involving public interest relates to the nature of the arbitrator's mandate as a limited delegation of power. Constrained by the *privity* inherent in the source of his jurisdiction, an arbitrator has authority to dictate legal effects *inter partes* and not *vis-à-vis* third parties. To the extent it would dictate effects with respect to third parties, the arbitrability of mixed/public rights would simply conflict with the contractual nature of arbitration.

3-11 While this approach to arbitrability is associated with the earlier days of the development of arbitration in the 20th century, the idea that certain areas of law are so sensitive that it is felt they should be applied exclusively by State courts has continued to haunt the definition of arbitrability. In the U.S., as late as mid-1970s, public policy continued to be an important factor in restricting arbitrability. The pro-arbitration policy advanced by the Federal
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Arbitration Act was often outweighed by conflicting federal policies giving courts exclusive jurisdiction over certain matters. (12)

3-12 With the development of arbitral practice in the last 25 years, the public policy exception has gradually eroded. Progressively, courts in the U.S. and Europe started to reduce the role of public policy in the definition of arbitrability, (13) and as a defence to enforcement under Art. V(2)(a) of the New York Convention (NYC). With that, the scope of arbitrable claims expanded in international matters; and legal systems have

> [become] more supportive of the parties' right to elect private dispute resolution [in lieu of courts], even where the public interest might appear to be compromised by the nature of the dispute. (14)

3-13 *Autonomy* arguments played a central role in justifying the arbitrability of disputes tainted with public interest. The simple faith in freedom of contract, (15) the principle of good faith which prohibits a party from seeking refuge in domestic limitations, to deny an arbitration clause, to which he has freely consented, (16) and the protection of the parties' legitimate expectations in having their agreements honoured, would gradually outweigh a systematic invocation of public policy.

3-14 Extension of the scope of arbitrability took place in two directions: beyond contract (17) and to mixed and public rights. Areas of law traditionally falling within the "*domaine réservé*" of the State have fallen one after the other in the scope of arbitrable claims, notwithstanding their potential inarbitrability in domestic settings. The evolution is particularly evident in the
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U.S. and Europe. (18) Expansive approaches to arbitrability are most evolved in common law jurisdictions, but the liberal trend is also clearly noticeable in many civil law States. It has accelerated, in recent years, to reach emerging jurisdictions, and in some cases, to ultimately extend to *domestic* arbitration, as is the case in the U.S.

3-15 The marginalisation of public policy, the growing trust in international arbitration and assimilation of arbitrators to judges (19) have allowed the domain of arbitration to extend to areas of economic activity involving significant public interest. These include antitrust, intellectual property, (20) consumer and securities disputes. (21) However, the arbitrability of mixed or public rights is not given. They may not be under the applicable law. Areas of special difficulties exist.

4 Uncertainties

4.1 Patents & Trademarks

3-16 Arbitrability of intellectual property disputes is problematic with respect to rights which confer a *monopoly* and require the intervention of the State to grant it, such as trademarks and patents. To allow the arbitration of questions of grant or validity of patents or trademarks challenges the contractual nature of arbitration, since a private arbitrator is not authorised to dictate legal effects *erga omnes*. (22) An award ruling on the ownership or validity of a monopoly right also usurps the power of the State in granting the monopoly.

3-17 For these reasons, legal systems excluded questions of grant or validity of monopoly rights from the domain of arbitration. National laws either prohibited the arbitration of these rights altogether, or accepted it in principle, but excluded arbitrability when the dispute affected the rights of third parties. In French law, the principle of arbitrability of disputes concerning
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patents and trademarks is explicitly recognised, (23) but considerable controversy exists as to whether the *validity* of registered rights can be submitted to arbitration. In comparative law, the arbitrability of validity and title is very likely to be denied. (24)

3-18 On the contrary, copyrights, (25) and *contractual* disputes related to patents and trademarks (such as licensing) are arbitrable in most European jurisdictions (26) and the U.S. However, the validity or ownership of a patent or trademark often arises, as a preliminary question or as defence, in the context of disputes on infringement or transfer of licenses. In this case, "there is no legal obstacle that bars an arbitration tribunal to rule on the validity of a patent, as a preliminary matter." (27) But the conclusions of the award will operate solely *inter partes*, since only a national court with proper jurisdiction can invalidate a monopoly. (28) If the award rules the patent invalid for purposes of the contractual dispute, it would still remain in force until cancelled according to law.

3-19 Following this new approach of giving *inter partes* effect to decisions that are by nature *erga omnes*, parties can agree that the validity of a patent or a trademark could be made an issue in arbitration even if the arbitral award could not invalidate the trademark or patent itself. In the U.S., explicit legislation permits the arbitration of disputes "relating to patent validity or infringement," (29) while at the same time, restricting the effect of the arbitral award. The award "shall be binding between the parties to the arbitration, but shall have no force or effect on any other person." (30)

3-20 German law reserved the question of the formal validity of patents to the exclusive jurisdiction of the Federal Patent Court (*Patentgericht*). After the reforms of 1998, questions of
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revocation and annulment of patents are in principle arbitrable. (31) Swiss law displays the most liberal position. Rights that are subject to registration (patents, trademarks, designs) are arbitrable. All aspects of patent rights can be arbitrated, even their validity and their removal from the registry. (32) Belgian law competes in liberalism. The patent law expressly permits the arbitrability of the ownership and validity of patents. (33) The arbitration of monopoly rights is increasingly accepted, even in reluctant jurisdictions. (34)

4.2 Antitrust, Bribery & Corruption

3-21 The arbitrability of antitrust claims or of allegations of bribery or corruption is uncertain in a number of jurisdictions. In these cases, the arbitrability question is framed as follows: Whether the arbitral tribunal can rule on allegations that the contract under which the arbitration is brought is *illegal* because it constitutes a violation of antitrust laws, has been procured by bribery or corruption, or has as its object the payment of bribes. While the shadows of restraint of trade or fraudulent activities would intuitively incline in favour of an outright exclusion of these matters from the scope of arbitration, the issue here is not really one of arbitrability.

3-22 First, arbitrability in these cases is confused with *separability*. The doctrine of separability, universally accepted, should allow a tribunal to rule on a contract whose legality is challenged. An arbitral tribunal should thus be able to rule on whether the contract is or is not in violation
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of antitrust laws. With the U.S. Supreme Court opening the way, (35) today international antitrust disputes are widely arbitrable, in jurisdictions as diverse as New Zealand, (36) France, (37) Italy and Switzerland. (38)

3-23 Similarly, an allegation of bribery or corruption in the procurement or performance of the contract should not in itself deprive the arbitral tribunal of jurisdiction. (39) While the operation of separability was dubious in cases where the main contract was not only invalid but *never existed*, recent case law allows tribunals to rule on illegality for bribery or fraud. (40) Once jurisdiction is asserted, the question is then one of *enforceability*. If bribery or corruption is proven, the tribunal will declare the contract unenforceable.

5 The Conceptual Leap towards Universal Arbitrability

5.1 "Claims Arbitrable Unless..."

3-24 While some authors have warned that an absolute freedom to arbitrate may undermine State sovereignty, (41) the evolution of legal systems to expand the definition of arbitrable claims did not slow down. On the contrary, the trend in favour of arbitrability has recently taken a new dimension, with the inception of what can be termed "universal arbitrability." (42) Put simply, this means that arbitrability today is rarely an issue. All international disputes of an economic nature are *prima facie* arbitrable in most jurisdictions, and it would be hard to find a dispute arising out of the operation of global commerce that is not.
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Commentators have deemed the expansive trend of such a magnitude that it witnesses of the "ultimate doctrinal ascendancy of arbitration." (43)

3-25 The public policy test imposed the *individual* examination of the conformity of each subject matter to public policy and complex reflections on conflicting policy goals. Different areas of law were opened, one-by-one, to arbitrability. The disentanglement of arbitrability and public policy has opened the way for the formulation of *general* and more liberal criteria for the definition of arbitrability; and ultimately for a conceptual leap in the classical regulation of the question. The international policy in favour of arbitration has also

contributed to the *simplification* of decisions on arbitrability. In doubt, arbitrability prevails over inarbitrability.

3-26 On the level of legal technique, universal arbitrability is implemented by national laws in one of two ways: Either all matters are considered, *a priori*, arbitrable, unless particular disputes are reserved to exclusive court jurisdiction. Alternatively, arbitrable claims are defined very broadly to encompass all disputes involving an economic or a financial interest. Accordingly, legal rights would be arbitrable by default, unless they fall outside a general criteria set by the law, or are specifically excluded from the scope of arbitrability. Both approaches are popular. While the first is found in U.S., Canadian, and to some extent French law, the second approach characterises Swiss and German Laws.

3-27 Arbitrators, more than courts, are likely to reason on arbitrability in simple and *global* terms. In doubt, arbitrators usually tend to assert jurisdiction, on the basis that in so doing, they are giving effect to the parties' intention to arbitrate. (44) Arguably, the duty of arbitrators to render an enforceable award would not limit the arbitrator's freedom to arbitrate what the parties have submitted to them, since this duty only exists to the extent that the parties have not waived it. (45) Nevertheless, in popular viewpoints, international arbitrators, by virtue of their growing *public* mission, are bound to raise arbitrability issues *ex officio*. (46)

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5.2 Presumption of Arbitrability

a U.S. Law

3-28 Over the last three decades, the U.S. Supreme Court has pioneered the international expansion of arbitrability to areas of economic activity heavily impregnated with public interest. (47) More, U.S. courts have provided a much-needed conceptual frame for universal arbitrability.

3-29 First, U.S. courts, with their explicit sensibility to international commerce, have supplied a fundamental policy *rationale* for the expansion of arbitrability in international matters. The court decisions which allowed the arbitrability of international securities and antitrust claims were invariably driven by basic reflections on the needs of international commerce; and in addition to the special reasons which founded arbitrability in the particular case, they typically contained arguments of a general nature which supported the parties' freedom to arbitrate *per se*. The “sensitivity to the need of the international commercial system for predictability in the resolution of disputes,” (48) or to avoid damage to “the fabric of international commerce and trade” (49) “require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.” (50) These explicit references to the jurisdictional needs of international commerce found echoes in other common law jurisdictions. In justifying the arbitrability of international antitrust claims, the New Zealand High Court has ruled that the importance of international trade and “adherence to international comity” (51) overrides national public interest.

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3-30 Second, the U.S. is a model of a legal system, which solves arbitrability issues by reference to general principles governing arbitration in general. They include the treatment of arbitration agreements as ordinary contracts (52) (and thus its parties benefit from the same measure of freedom of contract generally available for parties to other contracts); the federal policy in favour of arbitration; and its main expression: the general idea that doubt should be interpreted in favour of arbitral jurisdiction. (53) In *Moses*, the Supreme Court has articulated a general principle of interpretation of doubt in favour of arbitrability that is well-established today. “Any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.” (54) The result is the domain of arbitrable claims is exceptionally large and “US courts will enforce almost all agreements to arbitrate disputes, regardless of the genesis of the claims.” (55)

3-31 This general presumption of arbitrability has inspired solutions to arbitrability problems in other common law jurisdictions as well. While U.K., Australian and Canadian laws are silent on the arbitrability of securities claims, commentators tend to interpret silence in favour of arbitration. (56) The reasoning is: if nothing in the legal system expressly prohibits a specific right from being submitted to arbitration, then this right should be arbitrable, *a priori*.

b French Law: Autonomous Arbitration Agreements

3-32 The French notion of *arbitrabilité*, originally based on criteria of public policy, (57) constituted a major impediment to the development of arbitration. Art. 2060-1 was particularly ill-adapted to international arbitration. (58) To overcome this hurdle (which continued to exist after the reforms of 1981) and formulate a more liberal criteria that is suitable to international settings, has required serious judicial groundwork.

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3-33 The definition of arbitrability by reference to public policy has, at times, been interpreted restrictively. Courts would exclude arbitration every time the dispute involves the application of legislation, which relates to public policy. (59) This restrictive view has been heavily criticised, and ultimately abandoned in case law, for being particularly damaging to the expansion of arbitration. (60) Beginning in the 1950s, French courts have simply ignored the legislative text; and explicitly ruled out the restrictive association of public policy and

arbitrability. “The arbitrability of a dispute is not excluded by the mere fact that rules pertaining to public policy are applicable to the disputed rapport.” (61) The *jurisprudence* that followed has largely emptied Art. 2060 of its substance, and left it *lettre morte*. (62)

3-34 French courts did not only dissociate arbitrability from public policy, but have also gradually associated it with a more international and less restrictive notion. Indeed, French courts were the first to explicitly define arbitrability in international matters by reference to *international public policy*. (63) Non-arbitrable matters are those that are “of the closest interest to international public policy.” (64) In subsequent case law, French courts developed the famous principle of *autonomy* of international arbitration agreements of all national law, which dictates that the validity of international arbitration agreements should be assessed solely

within the limits of the mandatory norms of French law and international public policy, by reference to the common intention of the parties, without the need to refer to a national law. (65)

While the reference to the *lex fori* blurs the so-called autonomy of all national law, the evolution of *jurisprudence* left to inarbitrability only a *residual* place: personal status and criminal matters.

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3-35 This general judicial liberalism in addressing arbitrability is particularly evident in international consumer disputes. (66) Essentially, international consumers are entirely assimilated to professional parties for the purpose of evaluating arbitrability. The Paris *Cour d'Appel* has ruled that *domestic* law prohibitions on arbitration agreements between merchants and non-merchants should *not* apply in the international context. (67) Similarly, international employment disputes are now arbitrable in France. (68)

c Swiss & German Laws: Economic Criteria of Arbitrability

3-36 Swiss law provides: “[a]ny dispute involving financial interests can be the subject matter of arbitration.” (69) This is an extremely broad notion of arbitrability, perhaps unparalleled in the modern history of arbitration. All rights relating to “*property*”, real or personal, tangible or intangible, are thus arbitrable. Only non-economic rights would fall beyond the reach of the parties' freedom to arbitrate. Arbitrability is truly “universal”; and international parties are given the autonomy to arbitrate virtually all disputes arising under the global economy.

3-37 Swiss law also totally rejects inarbitrability by reason of the public nature of the applicable rules. The Swiss Federal Tribunal has refused to consider the U.N. embargo on commercial activities with Iraq, which is effective in Switzerland, a bar to the arbitrability of a dispute arising under a contract for the sale of military equipment to Iraq. (70) The court thus did not exclude the possibility that a private tribunal could be brought to apply public international law.

3-38 German Law is based on the UNCITRAL Model Law, but is heavily influenced by Swiss law. In identifying arbitrable claims, it combined the two approaches, leading arguably to an even larger notion of arbitrability. Parties may arbitrate “any claim involving an economic interest (*vermögensrechtlicher Anspruch*). (71) Arbitrable subject matter also includes “claims involving no economic interest”, if they can be the object of settlement by the parties. The classic criterion is given a *residual* place in the sphere of non-economic rights, to transport these rights into the circle of arbitrability.

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3-39 National laws which define the domain of arbitration with such *largesse* usually also explicitly reserve the case of claims excluded by specific legislation. This is the case of German law.

d Universal Arbitrability in Emerging and Third World Jurisdictions?

3-40 The trend towards liberating arbitration from local barriers transcends different degrees of arbitral development. A plethora of factors, including regulatory competition, legal borrowing and the needs to protect foreign investment and commerce have contributed to a gradual, yet deep, shift in third world voices on what is arbitrable and what is not. While local impediments to the arbitrability of certain types of disputes continue to exist in the third world, they are more reminiscences of past unpleasant arbitration experiences, than true reflections of present and potentially future attitudes. Many emerging jurisdictions have either borrowed or adopted very liberal approaches to arbitrability, or have considerably altered the way they protect what they deem “national interest” in a manner which does not conflict with their international commitment to arbitration.

e Canadian Law and the Arbitrability “Big-Bang”

3-41 In the matter of few years, Canada's traditional Anglo-Saxon distrust of arbitration (72) turned into a pronounced favourable policy. (73) Following Canada's adoption of the UNCITRAL Model Law (in 1986), the Canadian Supreme Court led an impressive enlargement of the scope of what parties can submit to arbitration.

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3-42 The Court started by giving a restrictive interpretation to the concept of ‘public interest’, as a limitation to arbitrable claims. (74) It also prevented lower courts from reverting to narrow

definitions of public policy. (75) In a famous 2003 decision, the court ruled that "parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding." (76) While the decision deals with the arbitrability of copyright disputes, the generality of the court's pronouncement suggests the inception of *une arbitrabilité de principe*, or a general presumption that claims which parties have chosen to arbitrate are arbitrable. (77)

3-43 Canadian law not only allows the parties to arbitrate virtually everything, but recent legislation also makes arbitration, not the courts, the *default* jurisdiction with respect to some disputes. The Quebec Professional Artists Act, Section 37 reads as follows

In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.

In other words, unless parties to a professional artist's contract provide otherwise, the dispute is submitted to arbitration, not to judicial courts. Beyond a presumption of arbitrability, this is a presumption of consent to arbitration.

f Arbitration in International Administrative Contracts in the Arab World

3-44 In post-colonial Arab eyes (following deceiving arbitration experiences in government contracts relating to the exploration of natural resources) recourse of public entities to arbitration was not perceived to be in the public interest. As a result, Arab laws have widely prohibited arbitration in administrative or State contracts with foreign parties. However, and contrary to common misconception, this prohibition was not technically implemented by
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excluding the arbitrability of these contracts, but by limiting (78) or totally depriving (79) State entities and public bodies from the legal *capacity* to enter into international arbitration agreements. (80) The same excluded subject matters, however, remained arbitrable in domestic settings or between private parties.

3-45 As entrenched as they were, these impediments to arbitrating administrative contracts in the Arab world are essentially history today. The State and public bodies can submit to arbitration, under Tunisian, (81) Algerian Law, and an express provision of Omani law. (82) In Egypt, to end uncertainty, the 1994 arbitration law was amended in 1997, to explicitly give public entities the capacity to arbitrate. (83) A 2002 legislative amendment in Lebanon (84) has reversed the well-established judicial exclusion of arbitration in administrative contracts. (85) A Saudi Regulation of 25 April 1983 (Article 3) removed the total restriction on the use of arbitration by government agencies. Arbitration may be stipulated with the approval of the president of the council of ministers. (86)

3-46 In all cases, the international effectiveness of domestic law limitations to the validity of
P 63
State's consent to arbitrate, if any remain, has significantly decreased. A norm of *international public policy*, (87) found in a growing body of awards (88) and court decisions, (89) prohibits a State from pleading its own law as an excuse to avoid the obligation to arbitrate it has undertaken. Swiss law explicitly provides that a State cannot invoke its internal law restrictions to arbitration, including not only issues of State capacity to arbitrate, but also defences to arbitrability. (90)

3-47 Today, Arab law approaches to arbitrability are rather positive. Arbitration is widely accepted in the area of the highest sensitivity: State contracts. International employment disputes are arbitrable under Saudi law. (91) Algerian and Tunisian laws formally recognize the concept of *ordre publique international*. (92)

5.3 Modern-day-Calvo-provisions (93)

3-48 Modern-day local barriers to arbitration in the Arab world, if any, are *different*. Legal systems rarely exclude arbitrability, even in areas involving predominant national interest. Instead, arbitration is permitted, but regulated in a way that is protective of the public interest in question. The Egyptian law on the transfer of technology (Embodied in the *Code de Commerce*) is a good example. Article 87 (94) permits recourse to arbitration, but restricts freedom to arbitrate. The law mandates Egypt as the place of arbitration and Egyptian law as
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governing procedural and substantive law. The Supreme Constitutional Court (SCC) of Egypt has recently rejected, and rightly so, a constitutional challenge to the legislative provision. (95) While vaguely resembling old Calvo clauses, modern ones do not prohibit the principle of arbitration, but merely regulate its parameters.

6 The Changing Face of International Arbitration

3-49 A narrow scope of arbitrability was perhaps most fundamentally the natural emanation of a now old and outmoded perception of international arbitration as "*ouster*" of the natural jurisdiction of courts, if not a lesser competitor whose domain should be reduced to a minimum. (96) Similarly, the evolution towards universal arbitrability is the natural reflection of the universal development of arbitral justice, and its rising *cosmopolitan* spirit. Before, legal systems specified what subject matter *is* arbitrable. Today, with arbitration being the rule rather than the exception in international settings, legal system need to determine what disputes are *not* arbitrable. (97)

3-50 Universal arbitrability can be justified primarily by reference to the *institutional* progress of international arbitration: the simple yet fundamental observation that, over the last few decades, arbitration has become a *better* justice. For many contemporary thinkers, arbitration

is the normal forum, if not the *juge naturel* (98) of global commerce. Today, international arbitration is a *sophisticated* justice that has "matured" to provide sufficient protection for weaker parties (99) or the public interest. International arbitrators are expected, if not required, to conform to a judge-like standard of conduct. The classic fear that arbitrators would under-enforce public laws is no longer tenable. International arbitrators routinely apply mandatory norms, foreign *lois de police* and may occasionally be brought to apply constitutional or international norms. They are not insensitive to considerations of equity or efficacy, and may even apply moral norms. (100) Arbitrators are also equipped to deal with complex contracts or highly technical subject matter. The usual inclusion of commercial arbitration clauses in international State contracts relating to "investment," increasingly brings matters of national interest before private arbitrators. The expanding definition of "investment" under bilateral investment treaties to include contractual rights also contributes to this blurring of the line between the private and the public.

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7 Future Perspectives

7.1 Subsidiarity

3-51 In the not too distant future, national laws would find vain the provision of definitions of what claims are arbitrable. The domain of international arbitration *vis-à-vis* that of national courts would simply be associated with the legal nature of the dispute and whether it relates to international commerce or involves its interests. That is to say that the allocation of jurisdictional competence between the two jurisdictional orders would be governed by a principle of *subsidiarity*. This principle would dictate, for the purpose of defining arbitrable claims, that national courts may assert exclusive jurisdiction in an international matter, only if arbitration is explicitly excluded by law. If the need for legislative reference to arbitrability would remain, it would take the form of *exclusionary* rules which keep non-patrimonial rights, mainly family and criminal law in the "*domaine réservé*" of State justice.

7.2 Merit-Review?

3-52 The emergence of universal arbitrability, as all-important evolutions, has come with uncertainties and unanswered questions. One of them is the idea expressed in the *Mitsubishi dicta* and developed in U.S. law under the name "second-look doctrine." In simple terms, arbitrability of public rights comes with a necessary price: the necessity of a parallel extension of "merits review" by courts to control the exercise of arbitral justice in its extended domain, and ensure the proper application of public laws or mandatory norms. A similar solution would cause arbitration to lose in finality and effectiveness what it has gained in universal application; and should not be considered.

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7.3 Emergence of a Notion of "International Arbitrability"

3-53 Today, a well-established principle of the law of international arbitration dictates that international parties may agree to arbitrate matters which would be non-arbitrable under national laws. Whether conceptualized as a norm of national law, an "autonomous substantive rule of public policy," (101) or a general principle of arbitration law, that this rule exists is beyond doubt. International practice has sanctified a notion of "international arbitrability" which is defined solely by reference to international public policy, or *l'ordre public véritablement international*.

8 Conclusion

3-54 In Bruno Oppetit's last reflections on the universal development of arbitration, "[a] concept usually loses in comprehension what it gains in extension. The concept of arbitration does not escape this rule of formal logic." (102) The significant broadening of arbitrability in international matters, and ultimately the transformation in the methods of its definition by the effect of the international policy in favour of arbitration, have announced a new phase in the life of the concept of arbitrability: the beginning of its end. (103) Arbitrability is a concept whose success has banalized and, to a large extent, emptied of significance. The "commerciality" reservation and the defence of inarbitrability as ground for non-enforcement under the New York Convention (104) have lost much of their role. With the gradual death of arbitrability, they would also fall in desuetude. The liberation of arbitrability from all references to local law, to favour the security of international contracts, has stripped arbitrability of its *essentiala* as a notion of national content, embodying political choices of a sovereign.

3-55 Scholarship on the subject is invited to explore the consequences of universal arbitrability and the extension of the concept. The new developments in the domain of arbitrability favour global and internationalist approaches to its study, rather than the examination of specific types of claims through the lens of local norms.

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2) Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (3rd ed, 2000) 60.
3) See P. Sanders, "The Domain of Arbitration", in *Encyclopedia of International & Comparative Law*, Vol. XVI, chapter 12, at 113.
4) Arbitrable claims and the subsequent reception of expansive notions of arbitrability "depend on the judgment of the respective community at a particular time." Douglas Jones, "Arbitration and Party Autonomy: How free is the Choice to Arbitrate?", in *The Commercial Way to Justice*, G.M. Beresford Hartwell (ed), (Kluwer 1997) at 121-149. In international arbitration, national perceptions of the role of private justice, the sphere of private autonomy versus social norms, and the ordering of global and local values are decisive factors.
5) "L'arbitrabilité est une question abstraite, mal cernée, fuyante, et qui suscite un certain nombre de malentendus, voire de contresens." Ch. Jarosson, "L'arbitrabilité: Présentation Méthodologique", JCP, Droit Int. *Cited in* J-B. Racine, *L'Arbitrage Commercial International et L'ordre Public* (LGDJ 1999) 27.
6) "Each State may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not." Redfern & Hunter, *supra* note 1 at 148. The New York Convention and the UNCITRAL Model Law treat arbitrability as a matter which belongs to the *lex fori*, respectively *the law of the country where enforcement is sought* (Art. V(2)(a)) or *the law of the place of arbitration* (Art. 34(2)).
7) "Uncertainty about and differences among definitions of which disputes are arbitrable may cause considerable difficulties in practice." U.N. General Assembly Document A/CN.9/460 (April 6, 1999) 32–34.
8) Unfortunately, legal systems do not always distinguish the two notions. In the U.S. and elsewhere, arbitrability is often used to refer to jurisdiction. Courts would describe the dispute as being not "arbitrable" when they mean that it falls outside the scope of the arbitration agreement. Redfern & Hunter, *supra* note 1 at 20.
9) Germany, ZPO, s 1030; France, Art. 2060-1 of the *Code Civil* (and its predecessors Art. 83 and 1004 Ancien Code de Procedure Civile) both now unwritten by judicial practice; Japan, Code of Civil Procedure, Art. 786; Dutch Arbitration Act of 1986, Art. 1020(3)); Art. 1 Spanish Arbitration Act; In Italy, rights that may not be freely alienated (*diriti indisponibili*) are not arbitrable, Italian Code of Civil Procedure Art. 806. *Cf* Art. 11 of the 1994 Egyptian Arbitration Law.
10) Rights that "can be compromised lawfully by way of accord and satisfaction" para 503, Halsbury's Laws of England 32 (4th ed).
11) Only national courts can give effect to the true intention of the legislator. Justice Andrew Rogers, "Arbitrability", 1 *Asian Pac. L. Rev.* (1992) 1.
12) "[W]here compelling the arbitration of disputes conflicts with other important federal policies, the courts have frequently refused to order arbitration" *Bache Halsey Stuart, Inc. v. French*, 425 F.Supp.1231, 1233 (D.C. Cir. 1977) These important federal policies included the maintenance of confidence in the securities market; the preservation of competition in the economy; the protection of weaker parties such as consumers or investors in securities claims.
13) Antoine Kirry, "Arbitrability: Current Trends in Europe", 12(4) *Arb. Int'l* (1996) 373-389.
14) Douglas Jones, *supra* note 4 at 121-149.
15) See Roscoe Pound, "Liberty of Contract", 18 *Yale LJ* 454 (1909).
16) Federal Court of Canada, *Pilotes du Saint-Laurent Central Inc v. Laurentian Pilotage Authority*, August, 8, 2002, 246 FTR 161 (FCTD).
17) An arbitration agreement can be "in respect of a defined legal relationship, whether contractual or not." Article II (1), New York convention and Article 7(1), UNCITRAL ML. Tort claims and rights directly created by the law are, in principle, arbitrable in virtually all legal systems today. See for *ex.* Section 7(1) of the 1996 Indian Arbitration Act.
18) Antoine Kirry, *supra* note 13 at 373-389.
19) Serge Lazareff, "L'arbitre est-il un juge?" in *Mélanges en hommage à François Terré* (1999) 173.
20) The arbitrability of intellectual property disputes is well recognized in a large number of jurisdictions, notably the us, France, Italy, Switzerland, Germany, Japan, Canada. See Douglas Jones, *supra* note 4 at 121-149; William Grantham, The Arbitrability of International Intellectual Property Disputes, 14 *Berkeley J. Int'l L.* (1996) 173 for a more comprehensive list.
21) Securities claims are arbitrable in the U.S. since the mid-1970s. *Sherk v. Alberto-Culver* [30] 417 U.S. S Ct 506 (1974).
22) Christopher John Aeschlimann, "The Arbitrability of Patent Controversies", 44 *J. Pat. Off. Soc'y* (1962) 655, 662-663.
23) Consecutively, Articles L. 716.4 and L. 615.17 of the Code de Propriété Intellectuelle (C.P.I).

24) See William Grantham, *supra* note 20 at 205 and 206.
25) See in the U.S.: *The Saturday Evening Post Co. v. Rumbleseat Press Inc*; 816 F. 2d 1191 (1987), and more generally, See Bruno Oppetit, "L'arbitrabilité des litiges de droit d'auteur et droits voisins", in *Arbitrage et propriété intellectuelle*, (Institut de Recherche en Propriété Intellectuelle Henri-Desbois, ed, 1994) at 124. Greater controversy exists however as to the arbitrability of *moral* rights.
26) Antoine Kirry, *supra* note 13 at 373-389.
27) Interim Award in Case No. 6097 (1989), ICC Bulletin, Oct. 1993, 79.
28) *Ibid.*, at 78.
29) 35 U.S.C. § 294: "Voluntary Arbitration", (a). Effective November 2, 2002.
30) 35 U.S.C. § 294 (c).
31) Kommission zur Neuordnung des Schiedsverfahrensrechts, Report published by the Federal Ministry of Justice (February 1994) at 92.
32) M. Blessing, "Arbitrability of Intellectual Property Disputes" 12(2) *Arb. Int'l* (1996) at 200; and Robert Briner, "The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland" in *Worldwide Forum on the Arbitration of Intellectual Property Disputes* (1994) WIPO Publication No. 728(E) at 72.
33) Loi sur les brevets d'invention (du 28 mars 1984) Art. 73 s. 6, Moniteur belge, Mar. 9, 1985, p. 2774. Referred to in William Grantham, *supra* note 20 at 201.
34) An Israeli court held that there was no bar to arbitrating an infringement claim where invalidity of a patent or registered design was raised as a defence. *Golan Work of Art Ltd. v. Bercho Gold Jewellery Ltd.*, Tel Aviv District Court civil case 1524/93, cited in Vidal Pearlman, "Arbitration of IP in Israel", *Managing IP*, (March 1994) 23.
35) *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*. U.S. S Ct 473 U.S. 614 (1985) Arguments against arbitrability, namely that antitrust regulation is "primarily aimed at the regulation of free trade and raises very clear issues of public interest", were deemed insufficient to stand in the face of a sweeping policy in favour of arbitration.
36) *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd* (NZ High Court) [1989] 2 NZLR 649.
37) CA Paris, *Aplix c. Velcro*, 14 October 1993, [1994] Rev. Arb. 164, Note Ch. Jarrosson.
38) Antoine Kirry, *supra* note 13 at 373-389.
39) Kosheri & Leboulanger, "L'arbitrage face a la Corruption et aux Trafics d'influence", 3 *Rev. Arb.* (1984).
40) In a very recent decision, an English Court of Appeals decided that there is no reason why the arbitrators should not have jurisdiction to decide whether the contract was procured by bribery. The vitiating effect of bribery on the whole contract did not affect the arbitration clause, unless there was some extra element, which meant that the arbitration clause itself has to be tainted with the vice in question. *Fiona Trust & Holding Corporation & others v. Yuri Privalov & ors* [2007] EWCA Civ 20 Lovells International Arbitration E-Bulletin, January 2007.
41) K.H. Schwab, "Wandlung der Schiedsgerichtsbarkeit" in *Festschrift für W. Henkel* (1995) n. 10, at 814.
42) The term is used in a 1996 editorial of a special issue of arbitration international on arbitrability. 12(2) *Arb. Int'l* (1996) at iii-x.
43) Douglas Jones, *supra* note 4 at 121-149.
44) In this sense Craig, Park & Paulsson, *supra* note 2 at 60.
45) Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, (Kluwer 2003) at 187-221, no. 9-96.
46) *Ibid.*
47) The trend often attributed to *Mitsubishi*, has begun a decade earlier, in cases like *Sherk v. Alberto-Culver* [30] 417 U.S. S Ct 506 (1974). (Claims under the securities Act are arbitrable in international settings). Reisman, Craig and Paulsson, *International Commercial Arbitration*, (Foundation Press 1997) at 309.
48) *Mitsubishi*, 73 U.S. 614 (1985).
49) *Sherk v. Alberto-Culver* [30] 417 U.S. S Ct 506 (1974).
50) *First Options v. Kaplan*, 115 U.S. S Ct. 1920 (1995).
51) *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd.* [1989] 2 NZLR 668.
52) "Arbitration agreements are to be treated like other contracts, subject to the policy favoring arbitration." "If there are deviations from such standard contract doctrine, they should be in the direction of arbitrability." I. MacNeil, R. Speidel & T. Stipanowich, Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act, (1994) § 18.7.1.1.
53) "A reviewing court examining whether arbitrators exceeded their powers must resolve all doubts in favor of arbitration." *Apache Bohai Corp. LDC v. Texaco China BV* F.3d, 2007 WL 587233, CA 5 (Tex.), 2007. Feb 27, 2007; *Brook v. Peak Intern.*, Ltd. 294 F.3d 668, CA 5 (Tex.), 2002; *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004).
54) *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, U.S. S Ct 460 U.S. 1 at 24 (1983).
55) J.T. McLaughlin, "Arbitrability: Current Trends in the United States", 12(2) *Arb. Int'l* (1996) 113.
56) J. Kerr, "Arbitrability of Securities Law Claims in Common Law Nations", 12(2) *Arb. Int'l* (1996) 171-178.
57) Article 2060-1 of the *Code Civil* (law reform of July 5th, 1972): "matières qui intéressent l'ordre public."

58) J-B. Racine, *L'Arbitrage Commercial International et l'ordre Public* (LGDJ 1999) 34.
59) See Cass. Civ. 9 January, 1854, D.P. 1854, 1, 69 the dispute "*touchait a l'ordre public.*"; CA Paris, 9 February, 1954, D. 1954, at 192; CA Orleans, 15 May, 1961, Rev. Arb. (1961) 188 (the case involved an international arbitration). "le litige concerne l'ordre public et que le compromis est nul chaque fois que la solution de l'arbitrage suppose l'interprétation et l'application d'une règle d'ordre public".
60) P. Ancel, JCP, *Procédure Civile*, Fasc. 1024, 1986, n.11, p.5.
61) CA Paris 19 May 1993 (Arrêt *Labinel*) *Rev. Arb.* (1993) 645; See also in earlier decisions: CA Paris, 15 June 1956, Dalloz, 1957, at 587; CA Orleans, 15 February 1956 D. 1966, at 340.
62) J-B. Racine, *supra* note 58 at 29.
63) *Ibid.*, at 36.
64) CA Paris, 29 March, 1991, *Rev. Arb.* (1991) 478.
65) Arrêt *Dalico*, *Cass*, 1ere, 20 Décembre 1993, Rev. Arb. (1994) 116.
66) European law is increasingly favourable to arbitrating consumer disputes. See EU guidelines on the promotion of arbitration in consumer contexts, European Parliament Res. of 25 July 1994, EC Off. J. of 25th, July, 1994, n C 205/519; Rev. Arb. (1995) 355.
67) CA Paris, 7 December 1994; RTD com, 1995, at 401. Not only are consumer disputes arbitrable, but consumers are also subject to the very liberal French substantive norms on the extension of arbitration to non-signatories. Commentators have criticized this "*dangerous*" trend. Calais-Auloy (J.), Stcinmetz (F.), *Droit de la consommation*, (6th ed, Dalloz, 2003).
68) CA Grenoble, 13 September 1993; Rev. Arb. (1994) 337. First French decision to hold that the "arbitration agreement included in an international individual employment agreement is valid."
69) Swiss Private International Law Act (PILA), Article 177(1).
70) *Fincantieri-Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. v. M. et Tribunal Arbitral*, ATF 118 II 353, 355 (June 23, 1992). Italian courts ruled this dispute was *not* arbitrable. (See Corte di Appello Genoa, 7 May 1994, 4 Rev. Arb. (1994) 505, XXI YBCA (1996) 594.
71) Code of Civil Procedure – as amended, Section § 1030.
72) The domain of arbitrable claims was curtailed in a variety of ways and was sometimes *minimal*. For example, arbitration was refused when the sole question was the interpretation of the contract.
73) See Cecil Branson describing this instant shift as a *"coup de foudre"*, "The Enforcement of International Commercial Arbitration Agreements In Canada", 16(1) *Arb. Int'l*.
74) Under the Quebec code of civil procedure, issues of public interest cannot be referred to an arbitrator because the decision may be useful in the development of the law, and arbitral decisions are confidential. See *Pilotes du Saint-Laurent Central Inc v. Laurentian Pilotage Authority*, August, 8, 2002, 246 FTR 161 (FCTD) and 2003 FC 1470.
75) *Éditions Chouette inc. v. Desputeaux*, 2003 SCC 17.
76) *Éditions Chouette inc. v. Desputeaux*, 2003 SCC 17 (a very powerful statement in favour of the arbitrability in copyright disputes).
77) Canada is known today to adopt one of the most liberal stances with regard to arbitrability. Richard Boivin and Nicola Mariani, "International Arbitration in Canada, *Highest Court Rules in Favor of Broad Interpretation of Arbitrability*", 20(5) *J. Int'l Arb.* (2003) 507–514.
78) In Iran, Art. 139 of the Constitution makes the referral to arbitration of public contracts with foreign parties, dependent, in every case, on the approval of the Council of Ministers and the Parliament.
79) After *ARAMCO*, Saudi Arabia prohibited all public bodies to accept arbitration of international disputes. Decree No. 58 "constituted an impenetrable barrier to any arbitration in Saudi Arabia". Abudl Hamid El Ahdab, *Arbitration with the Arab Countries*, (2nd ed, 1999) 13.
80) See generally Dhisadee Chamlongrasdr, "Tension in Domestic and International Law on Capacity to Enter into Arbitration Agreements: A Survey on Legal Restrictions", 16 *European Business Law Review* (2005) at 275-310.
81) Law No. 13 of 7 March 1988 on representation before the courts for an implicit – though clear – recognition of this possibility; then an unequivocal recognition in article 21 of Law No. 89-9 of 1 February 1989 concerning participation in State undertakings.
82) Art. 1 of Law of Arbitration in Civil and Commercial Disputes of 1 July 1997.
83) Law No. 9/1997 (15 May 1997) added a paragraph to Article 1. See also Aboul-Enein, *International Handbook on Commercial Arbitration ICC* (n 67) vol I (Egypt) 3-4.
84) Seven articles of the Lebanese New Code of Civil Procedure were amended by Law No. 440/2002 of 29 July 2002. N. Comair-Obeid, "The Impact and Consequences of Changes in Lebanese Arbitration Law" 14(1) *ICC Bulletin* (2003) 47.
85) Conseil d'Etat libanais, 17 juillet 2001, Rev. Arb., 2001 - No. 4, at 868-870.
86) However, in 1994, Saudi Arabia adhered to the New York Convention, but excluded oil-related disputes from the domain of its application.
87) Dhisadee Chamlongrasdr, *supra* note 80 at 275-310.
88) ICC award No. 3481 of 1986, 1986-1990 Collection al'ICC awards 263.
89) In *Société Gatoil v. National Iranian Oil Company*, the court did not allow the National Iranian Oil Company to rely on the Iranian Constitution to invalidate the arbitration agreement it had entered into. CA Paris, 17 December 1990 (1993) Rev. Arb. 280.
90) PILA, Art. 177.2.

91) The Italian Supreme Court has refused to refer Italian parties to arbitration in an international employment contract, subject to Saudi Law, which, contrary to Italian law does not exclude arbitration of employment disputes. Albert Jan van den Berg, Consolidated Commentary on New York Convention, 1981, 223 Court Referral – Arbitrability.

92) Habib Malouche, "Recent Developments in Arbitration Law in Tunisia", 8(2) *J. Int'l Arb.* (1991) at 23-32.

93) The term is used here, *abstraction faite* of its historical or popular pejorative connotation.

94) "1. The Egyptian Courts shall have the jurisdiction to decide on the disputes arising from the technology transfer contract.... Agreement may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of the Egyptian Law.

2. In all cases, deciding the subject of the dispute shall be according to the provisions of the Egyptian Law, and any agreement to the contrary shall be null and void." 17(5) *J. Int'l Arb.* (2000) at 187.

95) Supreme Constitutional Court of Egypt, Case No. 253 for 2007, 15 April, 2007. Restrictions on freedom of contract (in this case, *post*- the initial free choice of arbitration) fall within the normal exercise of legislative power.

96) Yves Fortier, "The Never-ending Struggle between Arbitrators and Judges in International Commercial Arbitration", in Briner, R. and K.-H. Bockstiegel (eds), *Law of International Business and Dispute Settlement in the 21st Century*, *Liber Amicorum* Karl-Heinz Bockstiegel, (2001) at 178.

97) There must be a heavy presumption in favor of arbitrability. Bernard Hanotiau, "L'Arbitrabilité et la favor arbitrandum: un réexamen", 121 *Clunet* (1994) 899.

98) See Yves Derains, "Chroniques de Sentences Arbitrales", *Clunet* (1978) at 976; Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues", 18(3) *J. Int'l Arb.* (2001) 256.

99) Securities claims are arbitrable in the U.S. since the mid-1970s. *Shearson/American Express v. McMahon*, 482 U.S. 220.

100) P. Mayer, "La règle morale dans l'arbitrage international", in *Etudes offertes à P. Bellet* (Litec, 1991).

101) Craig, Park & Paulsson, *supra* note 2 at 72.

102) Bruno Oppetit, *Théorie de L'Arbitrage*, (PUF 1998) 120.

103) "The subject of arbitrability of disputes arising from international business transactions should – and hopefully will – become out of fashion in the not too distant future." Antoine Kirry, *supra* note 13 at 373-389.

104) Consecutively Article I (3) and Article V-2-(a).