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THE SCOPE OF ARBITRABILITY

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ABSTRACT

When a court is seised with a matter for judicial determination, the judge generally turns to the various rules of positive law to determine the source and scope of his power over the issue submitted to him for adjudication. This is because his adjudicative jurisdiction finds its basis in a systematized legal order[1]. This jurisdiction is usually general in nature, encompassing both criminal and civil matters. By contrast, in private dispute resolution, the private judge's jurisdiction to decide a matter submitted to him for determination may not be so broad. This might result partly from limitations imposed on him by the parties, and partly from restrictions imposed by the law, or from both. For instance, in the area of international arbitration today, it is common to find such restrictions on the arbitrator's power, whether by party agreement or by law. Through extensive data and case analyses, I will examine the scope of the principle of arbitrability in international commercial arbitration. The focus will be on the extent of its applicability on commercial claims, which, though forming part of a private dispute settlement agreement by arbitration, remain excluded from the jurisdiction of arbitration tribunals. Main areas discussed include, anti trust and competition claim, securities claims, intellectual property and bankruptcy disputes. A discussion of the recent decisions on the cases in this area will also reveal that the scope and applicability of the doctrine has undergone serious decline today. The reason is that the vast majority of contemporary interpretations of the doctrine show increasing judicial preference for the arbitrability of previously non-arbitrable claims. Such a finding implies that as global commerce expands and more actors continue to prefer arbitration, the distinction between arbitrable commercial claims and non-arbitrable commercial claims by courts may be losing its practical importance.

[1]That is to say derived from norms of positive law enshrined in forms such as legislative enactments, administrative orders, regulations, and decrees.

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INTRODUCTION

Arbitration is a form of alternative dispute resolution mechanism by which parties to a contract select an extra judicial mechanism to settle disputes that arise between them. In principle, this definition implies that *any* dispute should be capable of settlement by arbitration once the parties, in some form, usually contract, have manifested a mutual intention to have the disputes so settled, to the exclusion of any form of judicial intervention. Yet, as the abstract to this work already suggests, this is not the case in practice. In fact, notwithstanding the intention and wishes of parties, courts still exercise an extensive degree of supervisory control over the arbitral process. The exercise of this control, which can be before or after the arbitral process, may take both substantive and procedural dimensions. One method by which courts usually exercise this control is by making an inquest, when one of the parties to an agreement or award challenges its validity, into whether the particular dispute or issue fell within the scope of submission to arbitration. Some authors assert that the answer to this question depends on the arbitration agreement itself[2]. Therefore, it may frequently be necessary to interpret the agreement in order to ascertain the intention of the parties in respect of whether they authorized the arbitral tribunal to resolve certain issues. Here, courts will be controlling the scope of the jurisdiction of the tribunal as granted to them by the parties. The principle of party autonomy is, therefore, supreme as a definitional guide when resolving this question.

Another approach is to determine whether the substance of the dispute it self was initially capable of submission to arbitration by the parties. Here, courts refer not to the *types* or *form* of disputes presumably falling within the scope of submission to arbitration, but rather to the *substance* of each of such disputes in order to establish whether they fall within the limits permissible by law for the jurisdictional competence of arbitral tribunals. How this second question is resolved is clearly a

[2] David St John Sutton/John Kendall/ Judith Gill, Russell *on Arbitration*, (21st Ed 1997)

matter of law and not regulated by the principle of party autonomy. The objective apparently is to control the legality of the tribunal's subject matter jurisdiction. Hence, claims that are susceptible to this control are either arbitrable or non-arbitrable. Courts control "arbitrability" when they engage in these forms of inquiry. The term "non arbitrability" also describes the same form of control. Another term synonymous with these two, which I will use interchangeably with them throughout this work, is "subject matter arbitrability".

The growing importance of arbitration among businesspersons, as an alternative to litigation, has attracted enormous concern from policy makers and legal scholars especially with regard to issues concerning arbitrability. International Instruments[3] and Arbitration Acts in many legal systems have recognized arbitrability as a core principle in arbitration practice. In fact, there can be no arguing that there is a plethora of write-ups and commentaries on the issue already. Yet, definitional and interpretational concerns have surfaced and remained, attracting growing attention and academic debate from scholars across the globe. According to Redferne and Hunter for instance, arbitrability involves determining on one hand which kinds of disputes, in view of the arbitration agreement, may be resolved by arbitration and, on the other hand, which disputes must remain exclusively to the domain of the courts[4]. On his part, Park submits that arbitrability deals essentially with three conceptually distinct but overlapping questions, which, collectively, are determinative of an arbitrator's powers[5]. The first relates to whether or not there exists an arbitration agreement expressly granting him adjudicative jurisdiction over a dispute. Assuming an agreement exists, the next question relates to the scope of jurisdiction expressly conveyed upon the arbitrator by the agreement. The last question addresses public policy concerns that may override the parties' wishes and thereby empower a forum court to wrestle jurisdiction over some category of claims from the scope of the

[3] Articles I (1), II (3), V (2) (a) of the New York Convention on The Enforcement of Foreign Arbitral Awards are illustrative in this instance. A perusal of the UNCITRAL Model Law will also find it wanting in a definition of arbitrability

[4] Alan Redferne and Martin Hunter, *Law and Practice of International Arbitration.* (4th ed., Sweet and Maxwell, 2004).

agreement[6]. Varady et al. have categorized the first two formulations as representing the broader approach, while the last encapsulates the narrower conception[7]. Whatever the variations in the interpretations and formulations of these scholars, a common theme seems recurrent. This is the fact that arbitrability deals generally with questions of jurisdiction. Park has simply framed the question in terms of *"Who decides what."*[8]

While acknowledging the relevance of the etymological concerns by the various authors to any research on arbitrability, this study, however, seeks to address more practical problems directly connected with this doctrine. An instance of this is the need for businesspersons to know the legal classification and substance of disputes, which they include within their agreement, for future arbitration. The same applies to arbitrators who need to be able to determine with precision which disputes are amenable to their jurisdiction. More precisely, it examines the scope of subject matter arbitrability in International Commercial Arbitration by focusing on the extent of its applicability to specific cases. Part of the study therefore is to examine the limitations of the principle in its practical application today as well. Emphases will lie on studying those disputes, which, though of a commercial nature, remain non-arbitrable. These include, for instance, anti trust, intellectual property, bankruptcy, and security claims; as opposed to other categories, generally excluded from submission to arbitration by many national arbitration statutes. These are claims, the solutions of which usually have more than *inter partes* effect and, as a matter of public policy are reserved for the exclusive jurisdiction of courts. They are also often non-commercial in nature. Though varying from

[5] William D. Park, *Arbitration of International Business Disputes* (Oxford University Press Inc 2006).
[6] Park, *ibid.*
[7] Tibor Varady et al., *International Commercial Arbitration: A Transnational Perspective* (Thomson and West 2006).
[8] Park, *supra* note 4 at 71)

one legal system to another, such claims will typically include those falling within the domain of family law, criminal and in some cases labor law[9].

The rationale for narrowing the study down to commercial arbitration finds its justification firstly in the increasing popularity of arbitration as a favorable alternative to litigation among businesspersons. Secondly, while academicians indulge in cogitations and reflections over the meaning and scope of judicial definitions and interpretations of statutory formulations of the subject, businesspersons in the meantime, will continue to submit disputes to arbitration, with little means of predicting before hand whether the agreement and award will satisfy the arbitrability requirement for recognition and enforcement. Consequently, as the notion of arbitrability remains vaguely defined and its scope varying in time and space[10], it becomes important for businesspersons resorting to arbitration to be able to predict the consequences of their actions, should arbitrability questions eventually emerge, and judicial intervention required. Finally, there is also the need, especially for purposes of business efficiency, to provide more clarification on the vague distinction often made between arbitrable commercial claims and non-arbitrable commercial claims. As a result, focusing on the scope of arbitrability in International Commercial Arbitration in the present context seems quite appropriate and pragmatic.

Considered from this perspective therefore, it can be submitted that this study is designed not only as a contribution to the wealth of existing knowledge on the subject, but also, to provide practical legal guidelines for businessmen inclined to resorting to arbitration for dispute settlement.

[9]Sutton et al. 1997, cited in Paul O. Idornigie, *The Principle of Arbitrability in Nigeria Revisited* Journal of International Arbitration Vol 21, (2004). Also available online at: http://www.accessmylibrary.com/coms2/summary_0286-12779621_ITM; See also Redferne and Hunter, *supra* note 4 at 149)

[10] No International Convention or National Statute on the subject, as shall be seen in chapter 2 lists in an exhaustive manner what dispute is arbitrable from what is not. Most is left to the national courts whose decisions, as the cases studied indicate, vary from one system to another at different periods in time.

With the extensive use of data and case analyses, I will also demonstrate that despite the conventional recognition of the non arbitrability of certain commercial claims, limitations to arbitrability in International Commercial Arbitration is actually on the decline as courts are more than ever, increasingly willing to circumvent the doctrine in favor of arbitrability for previously non arbitrable claims. As a contribution to the scope and body of academic research on the subject, I will conclude the study by examining and evaluating some the reasons advanced by some authors to explain this shift in judicial policy.

Subdivided into two broad chapters and a concluding chapter, chapter one of this paper sets the general contextual basis relevant for a full understanding of the work by reviewing and examining both the concept of arbitrability and its historical development. I shall also review some of the underlying considerations generally advanced to support limitations to arbitrability. In order to properly elucidate on the "*Who* decides *what"* question. Next, I will focus on how arbitrability issues are determined. The emphases will be on who determines arbitrability and what law governs its determination. Chapter 2 examines the applicability of the doctrine. It begins with a brief review of statutory delimitations of the doctrine both in the international and domestic law context; and follows with an examination of how courts have interpreted and applied these delimitations to specific categories of commercial claims. In the second part of the chapter, I evaluate the applicability of the doctrine in the light of modern decisions. Specifically, I focus on those previously non-arbitrable commercial cases in which courts are increasingly excluding the applicability of the doctrine and giving deference to the jurisdiction of arbitral tribunals. Finally, and as a contribution to the existing scope of research and material on the topic, this work also raises, in its concluding chapter, questions concerning this sudden shift in attitudes by the courts in respect of their interpretations of the notion of arbitrability. I will also examine some of the explanations advanced by others to justify this attitudinal shift in the courts.

CHAPTER I

ARBITRABILITY: "WHO DECIDES WHAT" AND THE DOCTRINE OF NON-ARBITRABILITY.

According to Menkel et al., the question of *"who decides what"* is regarded by many as a complex and fascinating topic[11]. This is because contrary to the general perception, the question is actually a three pronged and not two-pronged one. Firstly, it involves not only who between the arbitrator and the court should resolve what dispute, but also who decides whether arbitration should proceed. Assuming the *Who* question is resolved and an appropriate jurisdiction is established for the tribunal to hear the case, it must next answer the question of *What* issues it has authority to resolve; to wit, what matters are arbitrable by the jurisdiction and which issues must it recuse itself from entertaining. The answers to this question necessarily call for analyses of how arbitrability is determined, the evolution and the underlying considerations behind the *Who* and *What* questions; as well as some pieces of national legislations and case law that have attempted to draw the line between what is arbitrable and what is not in the context of international commercial arbitration. The first two issues form the subject of this chapter while the second chapter addresses the last issue.

1.1. HISTORICAL EVOLUTION AND REASONS FOR NON- ARBITRABILITY

If principles and definitions are anything to go by, then arbitration tribunals should have authority to resolve any disputes submitted to them by parties in a dispute. This is because arbitration, historically, is a private, non-jurisdictional, independent mechanism for dispute settlement. Strictly construed, private and independent refer to a mechanism created by agreement of the parties with own rules and jurisdiction all based on the terms of the contract. Non-jurisdictional implies the absence of intervention by mandatory state judicial institutions. It follows from this that a dispute

should be just as capable of settlement by an arbitral tribunal as by a court[12]. This should be the case especially once a valid arbitration agreement exists providing for settlement, by arbitration, of all resulting disputes[13]. The practice however, has always been inconsistent with this principle. In fact, despite the recognition of arbitral tribunals as partners in the commercial dispute resolution process, national courts in almost all countries still jealously regard the resolution of certain categories of disputes as being their exclusive privilege. Such is the situation with disputes whose settlement has significant public consequences despite their private nature and origins. Consequently, disputes falling within this class are non-arbitrable and incapable of settlement by arbitration. Following this doctrine, the trend around the world is to exclude from arbitration certain non-commercial disputes of public law implications such as family and administrative disputes[14]. The same view prevails among arbitration law scholars with regard to criminal law cases[15]. Courts have gone even further, invoking statutory exceptions to make a distinction between arbitrable commercial and non-arbitrable commercial disputes.[16] In analyzing the bases for this discrimination, scholars and judges invariably employ the terms *arbitrability* and or *non-arbitrability*. Many reasons account for this judicial hostility to the arbitration of some category of claims. These include, *inter alia*, lack of confidence in the arbitration mechanism, limited appellate review of arbitral decisions, and most importantly public policy. I shall examine in detail a few of some of these justifications.

[11]Menkel-Meadow et al. *Dispute Resolution: Beyond the Adversarial Model*. (Aspen Publishers 2003)

[12]Dengoua Hou, Arbitrability in China: Towards Modernization and Internationalization *No 4 U. S-China Law Review (2006).*

[13]Article 2059 of the French Civil Code provides, for instance, that "All persons may enter into arbitration agreements relating to the rights that they may freely dispose of" the same approach is taken by the German Code of Civil Procedure which provides for any claim involving an economic interest to be capable of settlement by arbitration: SS1030(1)(2)

[14]Chinese Arbitration legislation for instance expressly excludes from the scope of arbitration disputes relating to adoption, marriage ,guardianship, succession as well as administrative disputes: Articles 3(1)(a)(b) of the Arbitration Law

[15]See in general Varady et al., *supra* note 7; Idornigie, *supra* note 9; Redferne and Hunter, *supra* note 4.

[16]Consequently, while disputes arising out of contracts for the sale and supply of ordinary goods, for instance, will generally be arbitrable, those relating to intellectual property, bankruptcy, anti trust, etc have been generally considered non arbitrable despite their commercial character. See further, chapter II.

1.1.1. Party Autonomy and the Absence of Appellate Review.

The dynamic nature of the concept of arbitrability has made it difficult for a uniform and universal distinction between arbitrable and non-arbitrable claims. This is because different countries, as will be seen later, deal with the question differently. Yet, it would seem the rationale for such judicial chauvinism is universal. One common proposition is that arbitrators generally do not apply the law nor furnish reasoned opinions for their decisions[17]. In fact, failing any contractual agreement to the contrary, there is no legal obligation on them to do so[18]. The implication therefore is that arbitrators have the right to misapply the law and even make non-reviewable mistakes as long as they remain within the permissible limits of their arbitral jurisdiction. In fact, a U.S. court has expressly held that under both domestic law and the New York Convention, arbitrators are free to decide the law as well as the facts and their decision cannot be subject to appellate review. Courts as such, cannot seat to resolve claims of factual or legal error on their part. Pro arbitration advocates defend this approach on the grounds that these are some of the risks that parties willingly assume when they waive their rights to litigation. Advocates of the non-arbitrability doctrine exploit some of its dangers to challenge unfettered arbitral jurisdiction of arbitrators. For instance, it has been argued that the absence of reasoned opinions in most arbitral decisions make it difficult for the award to be challenged[19]. The practical implication of this is to make appellate review on the merits where possible, hopelessly difficult. This position is understandable giving that courts do not always review substantive issues in setting aside or enforcement proceedings[20]. Even subsequent actions in court therefore cannot be considered an effective check against oversight by arbitrators in their duties. Varady et al., also provide

[17]Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law through Arbitration.* 83, Minnesota Law Review (1999).
[18]*Ibid.*
[19] Park, *supra* note 5
[20]Setting aside and enforcement- often times referred to in arbitration language as vacatur and exequatur proceedings constitute the two main mechanisms which courts use to control and supervise the arbitral process.

support for these analyses when they argue *inter alia* that, the contractual character of arbitration makes the arbitrators beholden to the parties from whose agreement they derive their authority[21].

1.1.2. Lack of Confidence in the Arbitral Process

A second, less compelling reason today though, focuses on the level of legal education of most arbitrators. Varady et al. for instance, articulate one of the justifications for the non-arbitrability doctrine on the grounds that there is no requirement that they be trained lawyers[22]. The courts in some jurisdictions have also used this argument to enforce the non-arbitrability doctrine- the main prong being that the legal and factual issues are too complicated for arbitrators[23]. In *American Safety Equipment Corp. v. J. P. Maguire & Co,* 391 F. 2d (2nd Cir 1968), one of the arguments for instance was that certain issues are prone to complication necessitating sophisticated legal and economic analyses which private dispute resolution mechanisms are ill-suited to deal with. Park captures this judicial mistrust of the arbitral process in a picturesque analogy wherein he compares the distrust for arbitrators to that had of foxes guarding a chicken coop, predicated on the fear that in the process they have a pro-business bias and might under enforce laws designed to protect the public good[24]. The weaknesses of the "pro-business bias" and the "lack of education argument" is however obvious from the fact that in recent times, most arbitrators are known to be experts, not even in a particular business sector, but rather as highly trained lawyers, legal scholars and even retired judges.

1.1.3 Public Policy

A third reason for the distinction between arbitrable and non-arbitrable disputes revolves around the notion of public policy mentioned earlier. This in fact has been the most frequent justification found

[21] Varady et al., *supra* note 7, at 219
[22] *Ibid*
[23] William D. Park, *Private Adjudicators, and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brooklyn Journal of International Law (1986).
[24] Park, *supra* note 5.

also in all international legal instruments[25] that address the issue. Ironically, none of them attempts any clarifications nor provide indicators to the inherent vagueness that surrounds the acknowledged relativity of the notion. However, since this is an entirely separate topic falling out side the scope of this work, what is important to note here is that the public policy doctrine, regardless of how it is defined, is generally explained away in the context of alternative dispute resolution by the fact that, while parties may be at liberty to waive away some of their rights to private dispute resolution mechanisms even before the dispute arises, certain rights are non waivable giving their implication on society as a whole. The risks on the society of having an arbitrator decide certain cases wrongly may be too great to allow an arbitrator adjudicative jurisdiction over it. In other words, only those disputes which affect only the parties and to which society has no interest are, or should be arbitrable[26]. Consequently, disputes between private parties that might affect public rights or those of persons other than the litigants remain a matter of public concern justifying judicial appropriation by the courts. Park makes a further compelling submission in support of this position[27]. He argues that public rights belong not to litigants but to society[28]. Consequently, if the result of an arbitration process that was fundamentally a consensual matter between two parties threatens to affect the rights of society, which never signed the arbitration agreement, then adjudication of such claims becomes a matter of public concern[29]. This argument has generated the conclusion that public policy doctrine is a catchall prohibition on the arbitrability of certain disputes based on the need to protect the integrity of the arbitral process in matters such as arbitrator bias or lack of due process[30]. Notwithstanding the above, the rationality of these arguments, over time, has become questionable as the non-arbitrability doctrine itself faces complete erosion. I shall treat this elsewhere in this work, as it does not fall within the scope of this subsection.

[25] See articles V.2 and 36(1) of the New York Convention and UNCITRAL Model Law respectively.
[26] John Collier and Vaughan Lowe, The Settlement of Disputes in International Law: Institutions and Procedures (Oxford University Press Inc. 1999).
[27] Park, *supra* note 22
[28] *Ibid*
[29] *Ibid*

1.2 DETERMINING ARBITRABILITY

As the popularity of arbitration as an alternative means to international commercial dispute resolution continues to grow, so too has been the attention given to the issue of arbitrability. Arbitrability issues pose problems that threaten the continuous development of international commercial arbitration as a favorable alternative to litigation. The complex and dynamic nature of the subject has continued to draw significant interest from judges, scholars, and lawyers in recent times. The dominant question has often been whether arbitrable matters are definable in a generic manner (with an illustrative list of such matters). To date there seems to be still no unified international approach on how to deal with the issue.[31] The direct consequences of this impasse is that most international instruments that address the subject- as will be seen later- have generally allowed the substance of the question to be resolved by states according to their national law.

According to Varady et al, there are four main stages in the arbitration process during which issues or arbitrability may arise and need to be determined[32]. The first may be before a municipal court adjudicating on whether or not to enforce an arbitration agreement; the second may be when the arbitrators themselves are deciding their competence and the scope thereof. The third might be before a court in the country where the arbitration has taken place in an action to set aside and, lastly; before a court in a country where enforcement of the award is sought. Before proceeding further into this, it is perhaps important at an early stage to clarify the distinction between arbitrability and the scope of the arbitration agreement. The latter differs from the first in that it only addresses what questions fall within the scope of the arbitration clause[33], the determination of which was long decided by the courts in *Monro v. Bognor UC* (1915) 3 K.B.167; and *Cunningham - Reid and Ano. V. Buchanan-Jardine,*

[30] Park, *supra* note 5

[31] In 1999, the United Nations Commission on International Trade Law during its 32nd session of 17 May-4th June short listed the issue for future work but later abandoned it on grounds that the subject was constantly developing and that states found such interference undesirable. At the 39th submit in June-July2007, the subject again came up but was more or less defeated by public policy considerations.

[32] *Supra* note 7 at 219

(1988) 2 All E R.438, to be a matter of interpretation of the particular agreement[34]. In other words, it only relates to the specific issues, which the parties have submitted to arbitration. The importance of making this distinction lies in the fear of generating confusion that may arise from the general view that the subject matter of the dispute determines arbitrability. This subsection deals only with the first (arbitrability), and addresses two questions that are central to the understanding of this topic. Firstly, who determines arbitrability and by what law is arbitrability determined?

1.2.1 Who Determines Arbitrability?

Although the issue of arbitrability may arise in four stages, the present subsection addresses arbitrability only at the second juncture, to wit, when there is an application to determine the competence of the tribunal. Viewed from this perspective, arbitrability revolves essentially on the jurisdiction of the tribunal over the dispute[35]. Framed otherwise, who between court and arbitrator has the power to decide whether arbitration should proceed? This question is of serious practical and legal significance. It has sparked a lot of debate and further exploratory questions among arbitration scholars. For instance, is it, as Menkel Meadow et al., question, because one decision maker over the other has more expertise to make certain kinds of decisions[36] , or again, is it because one decision maker is more apt to give a better solution than the other?[37] It will be risky business to try to answer these questions giving the subjective approaches given to arbitrability questions both by courts[38] and by scholars.

[33]Sutton et al., cited in Idornigie, *supra*, note 9
[34]See also Investments Inc. v. Jugoimport-SDPR. Holding Co. and Others(1999) 3 All E.R. 864
[35]Mathias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*: Columbia Journal of Transnational Law, Vol 42 (2004). Available online at: http://www.columbia.edu/cu/jtl/Vol_42_3_files/Vol_42_3_lehmann.html
[36] *Supra*, note 11
[37] *Ibid* at 502
[38] Comparative analyses of some US cases that have dealt with the issue of arbitrability such as *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc, Shearson/American Express, Inc. v. McMahon, Scherk v. Alberto-Culver Co.*, etc show great variations in the legal bases for decisions that have produced basically the same results.

Giving the sacrosanct reverence with which courts held the principle of non-arbitrability in the past, it would not be a wholly inaccurate presumption that they appropriated the right to determine arbitrability in international commercial arbitration matters. Be these as it may, it is trite learning today that both arbitrators[39] and courts can decide arbitrability questions both in the narrow and broad senses[40]. This authority encompasses the well-known *kompetenze- kompetenze* principle. Kompetenze-kompetenze gives arbitrators the power or jurisdiction to determine their own jurisdiction at first instance on the application of one of the parties[41]. The doctrine is recognized in case law[42], certain national pieces of legislation[43] and international[44] arbitration instruments. The Komptenze-Kompetenze principle, broadly construed, gives arbitrators an inherent power to determine jurisdiction[45]. In theory, this is an extensive power that should ordinarily cover even issues relating to subject matter jurisdiction such as arbitrability. Construed as such, it should, when addressed in connection with questions relating to who has the power to determine arbitrability, provide an effective limitation to the general rule in *AT&T Technologies, Inc. v. Communications Workers of America et al,* 475 US 649 (1986), that the *"questions of arbitrability…is undeniably an issue for judicial determination"*. This however is not the case in practice. In fact, despite the broad interpretation of the Kompetenze-Kompetenze doctrine, its application in this area is still very much circumscribed. Failing express agreement by the parties, the current trend is still to reserve the power to determine arbitrability questions, as a general principle to the courts. The arbitrator's power to determine

[39] There is no parity however on the scope of this authority between the courts and arbitrators as the arbitrators decision on arbitrability is still reviewable. In practice therefore , the courts still retain the ultimate authority on issues of arbitrability

[40] Varady et al., *supra* note 7

[41] Phillipe Fourchard/Emmanuel Gaillard/Berthold Goldman, *International Commercial Arbitration* Kluwer Law International 1999).

[42] Texaco v. Libya 53 Int'l L. Rep.389B 409 (1979); Rio Algom Ltd v. Sammi Steel Co.,Ontario Cout of Justice(1991); Net Sys Technology Group AB v. Open Text Corp., Ontario Superior Court of Justice(1999)

[43] Article 1458 of the New French Code of Civil Procedure requires courts to decline jurisdiction whenever a dispute submitted to an arbitral tribunal by virtue of prior agreement, is brought before it, regardless of whether or not the tribunal has already been seised with the matter, unless the agreement is manifestly void.

[44] Articles 16 and 15 of the UNCITRAL Model Law on Arbitration and the American Association Arbitration Rules respectively, both give arbitrators the power to rule on their jurisdiction including any objections with respect to the existence, scope or validity of the arbitration agreement.

[45] Lawrence W. Newman and Richard D. Hill, *The Leading Arbitrator Guide to International Arbitration*, (Juris Publishing Inc 2004)

arbitrability therefore comes rather as an exception than part of the rule. This position is well established in case law**.** In *First Options of Chicago, Inc. v. Kaplan, et UX and MK Investments, Inc.*, 514 U.S. 938. (1995), for instance, the United States Supreme Court had the opportunity to rule on the question when considering the standard or review courts should apply to certain issues including an arbitrator's decision on arbitrability under the Federal Arbitrations Act (FAA), 9 U.S.C. 1 et seq. (1988 Ed and Supp. V). The Court held that the question relating to who between the courts and arbitrator has the primary power to determine arbitrability turns on whether or not the parties had agreed to arbitrate arbitrability. The court concluded that where arbitrability is not specifically submitted to arbitration, the courts retain the final jurisdiction to review independently the question in the same manner, as it would decide any other issues not submitted to arbitration. The United States Court of Appeal for the Federal Circuit followed this same line of reasoning, in interpreting section three of the FAA in the much recent decision in *Qualcomm Incorporated, et al. v. Nokia Corporation, et al,* Fed. Cir. 2006, 06-1317 when it concluded that;

> *' if the parties did not clearly and unmistakably intend to delegate arbitrability decisions to an arbitrator, the general rule that the "question of arbitrability …is…for judicial determination" applies and the Court itself should then undertake full inquiry in order to be "satisfied" that the issue involved is referable to arbitration'*[46]

Two major conclusions emerge from these decisions. The first is that the question of who determines arbitrability is not to be presumed and must be stipulated as a matter of fact[47]. Second, despite the kompetenze-kompetenze doctrine, the power to determine arbitrability questions between courts and arbitrators remain an unevenly split one-with the results that more often than not, it will be the courts, who acting, pursuant to the general rule on determination of arbitrability laid down in *AT&T Technologies* will have to rule on the issue. The reason is that, often times, parties hardly address the issue of arbitrability in their contract. Further, they hardly give any thought to the importance of

[46] Ibid at 13
[47] See also *First Options*

having arbitrators determine the scope of their own powers. The principle being that a party can only be compelled to arbitrate issues he has specifically submitted, or demonstrated a *"clear and unmistakable intent"* to delegate to the power of the arbitrator; it follows that it is less likely that courts would interpret silence on the issue in favor of letting the arbitrators decide. This reasoning in fact formed the crux of the courts' analyses both in *First Options* and *in Qualcomm.*

1.2.2 What Law governs the determination of arbitrability?

Unlike the question of who determines arbitrability, the question of what law governs the determination of arbitrability is much greyer. There is no one single approach so far. The result is that the question is left for determination by a multiplicity of legal systems and arbitrators, in function with the particular specificities of each case. In fact, with arbitrators also endowed with the power to determine arbitrability issues, and an unfettered discretion to choose which, among general principles of law, custom, and positive law they should apply in each case, the observation of one commentator that it is not uncommon to find arbitrators, in determining arbitrability questions, referring or citing laws that have no connection with the dispute in question, should not come as a surprise to any careful observer. Such confusion and problems are wholly understandable when considered against the background of the lack of a unified single approach among legal systems to what is arbitrable and what is not[48]. Be this as it may, there are some conventional guidelines established to determine which law should govern arbitrability issues. This section addresses that question.

Arbitrability questions while recurrent in international arbitration instruments, is yet to find one that shall comprehensive define what laws should govern whether or not a dispute is arbitrable. Most international instruments in fact give only guidelines rather than state in definite terms which law should govern the determination of arbitrability. The most authoritative guidelines for this purpose

[48] *Supra* note 30

are those embodied in the New York Convention of 1958 and the UNCITRAL Model law of 1985 by which. The Convention provides in its articles II.1 and V.2, for instance, that states are not obligated to enforce arbitration agreements or awards resulting from it if the state considers the subject matter of the dispute to be incapable of settlement by arbitration. The Model Law carries a similar provision in its article 36(1) (b) (i) a court shall deny recognition or enforcement of an award if the subject matter of the dispute was incapable of settlement by arbitration under its laws, (*lex fori*). I shall analyze in detail the provisions of these instruments in the next chapter. What is important to note here however, is that both the Convention and the Model Law both the fall short of addressing the substance of the principle. While transferring the issue for determination to the national laws of member states, they simply limit its field of application – whether of the agreement or of the ward- to questions of enforcement. Giving that that such questions will probably be raised before the courts of the place of arbitration, *(arbitral scitus),* or those of the place of enforcement, the practical implications of these provisions is that the laws of the state of arbitration or state of enforcement are the primary determinants of arbitrability regardless of the contemplation of the parties. This *lex fori* (law of the forum court) approach seems to be a practical solution to the problem on the face of it. In fact, the weight of opinion among commentators, according to Born, is in support of the Convention's approach, especially in respect of the application of the laws of the enforcing forum.[49] This approach was followed in the American cases of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 105 S.Ct.3346 (1983) and *Scherk v. Alberto-Culver Co.* 417 US 506(1974) where the United States Supreme Court referred to American law in determining whether or not anti trust and securities claims should be arbitrable. The popularity of the lex fori approach is also evidenced in the fact that all the major international instruments that addressed the principle of arbitrability expressly authorize the forum state to use its own laws to resolve arbitrability controversies[50].

[49]Gary B. Born, *International Commercial Arbitration.* The Hague. Transnational Publishers Inc. and Kluwer Law International 2001).

[50] See Chapter II

In purely domestic arbitration cases, the Convention's *lex fori* approach seems to pose no problem, especially, if parties also select the forum as the *lex arbitri*. Following this technique in international cases however, may, and often result in complications. Such would be the case where the parties chose, for instance, the laws of a third country as the *lex arbitri*, (law of the arbitration) which is different not only from the *lex fori*[51], but also from the *lex contractus,* (law governing the main contract). Such a situation, clearly, has the potential to spark conflict of law questions, which, if not properly resolved could lead to questionable results. This situation arose in the Belgian case of MSA *(Belgium) v. Company M (Switzerland)*[52].

On the facts, the parties had entered into an exclusive distributorship agreement with an arbitration clause that provided for Swiss law as the *lex arbitri*. A dispute arose and the Belgian brought suit against the Swiss party before the Brussels Court of First Instance. The Swiss party sought to compel arbitration on the bases of the arbitration agreement. The court ruled that the arbitration clause was invalid under article II.1 of the New York Convention because it concerned a dispute incapable of settlement by arbitration under Belgian law. Reversing the decision and compelling arbitration, the Brussels Court of Appeal stated that when determining arbitrability questions considered only from the point of view of the validity of the contract, it is the law of the autonomy which had to be applied in resolving the arbitrability dispute. The practical implication of this decision is that in interpreting article II.1 of the Convention, courts must draw the distinction between the *lex contractus,* and the *lex arbitri* in order to establish which law governs arbitrability. This approach may be justified on the grounds that, often times, parties may choose a law, different from that governing the contract, to regulate the arbitration agreement.

[51] For practical purposes, it has been submitted by some authors that that the lex fori when construed in the light of articles II.1 and V.2 (a) of the New York Convention is presumed to refer to both the laws of the place of enforcement and the place of arbitration; see in this connection Jan Van den Berg *"The New York Convention of 1958"* (1981), also cited in Varady et al, (2006)

The conclusion from these analyses is a pointer to the dilemma, which courts and tribunals may have to deal with when called upon to resolve issues relating to laws governing arbitrability. With a myriad of suggested possible applicable laws[53], all likely to yield different solutions, the case for a uniform international approach to this question in international commercial arbitration is more than compelling. This seems to be the position already adopted by some commentators. Lehman for instance, is of the opinion that, in international cases, the adoption of transnational principles already widely in use, and accepted by many jurisdictions in determining arbitrability will be a pacesetter towards uniformity[54]. He argues that a comparative analysis of national arbitrability laws will reveal these transnational principles, and which when applied tends to increase efficiency and predictability of international arbitration[55].

[52] Court of Appeal of Brussels , 1985
[53] See Born, *supra* note 48 at 244

CHAPTER II

APPLICABILITY OF THE DOCTRINE OF ARBITRABILITY

In the preceding chapter, I examined the development of, and justifications for arbitrability in the area of international commercial arbitration. Other issues crucial to situating the reader within the context of the entire subject dealt with questions relating to the determination of arbitrability with a focus on what laws governed arbitrability and who, between judge and arbitral tribunal is empowered to decide arbitrability. The present chapter shall examine the applicability of the doctrine of arbitrability to specific categories of claims. Firstly, I will briefly analyze the statutory delimitations of the scope of the doctrine as enshrined in some leading international instruments and the Arbitration Acts of some selected countries arbitrability. Case law examples will show how courts have interpreted and enforced statutory restrictions to arbitrability in specific contexts.

2.1 STATUTORY AND JUDICIAL

Formulations of limitations to arbitrability in international commercial arbitration have taken two essential forms: statutory and judicial. The former has been more predominant at the international level with conventions setting general guidelines and standards left for state parties to interpret and apply according to their national law and specificities. Within national systems however, the approach varies depending on the character of the legal system in place. Consequently, while countries of the civil law tradition have relied fundamentally on legislation to draw the line between what is arbitrable and what is not, states following the common law model have faithfully turned to case law for delimitation on arbitrability[56]. This subsection deals first with how different international conventions have formulated

[54] *Supra* note 34
[55] *Ibid*
[56] Varady et al., *supra* note 9 at 218

limitations to arbitrability and, secondly, with national limitations as formulated by statutory definitions as well as their judicial interpretations.

2.1.1 Arbitrability in International Law

Albeit their touching on the issue of arbitrability, one is yet to find any international instrument that deals comprehensively with the issue. Most only provide vague delimitations referring to the subject without providing any comprehensive guidelines to what claims are arbitrable or not. The most important for present purposes include the New York Convention on Enforcement of Foreign Arbitral Awards of 1958, the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration of 1985, the Inter American Convention on International Commercial Arbitration of 1975 and the European Convention on International Commercial Arbitration of 1961.

2.1.1.1. The New York Convention on the Enforcement of Foreign Arbitral Awards, (1958)

Described and praised by Wetter as "*the single most important pillar on which the edifice of international arbitration rests*[57]*"* and by Mustil, as the Convention that *"perhaps could lay claim to the most effective instance of international legislation in the entire history of commercial law*[58]*"*, the New York Convention treats arbitrability issues in articles II (1) (3) and V (2).

Article II provides in substance that each Contracting State shall:

(1) Recognize and agreement in writing to…submit to arbitration differences… concerning a subject matter capable of settlement by arbitration.

[57]Gillis J.Wetter, The Present Status of the International Court of Arbitration of the ICC: An Appraisal. 1. American Review of International Arbitration 91 (1990:93)
[58]Mustil, *Arbitration: History and Background, 6*. Journal of International Arbitration 42 (1989). See also Stephen M. Schwebel, *A Celebration of the United Nation's New York Convention* 12 Arbitration International (1992).

(3) Refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.

Article V (2) on its part provides that recognition and enforcement of an award *may* be refused by courts of the Contracting states if:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Article II.3 relates to arbitrability based on the validity of the agreement and falls outside the scope of this section. Consequently, I will limit the focus of my analyses in this respect principally to articles II.1 and V.2

While article II.1 provides for jurisdictional challenges on grounds of arbitrability at the level of scrutiny for the validity of the agreement, article V.2 provides for such challenges only at the post arbitration stage, to wit, recognition and enforcement phase. It is also important to note that articles V.1/2 serve two distinct interests. The first is to protect the interest of the award debtor and the second to protect the vital interests of the forum state[59]. The practical effect of this variation in policy considerations is that while courts can invoke paragraph two *ex officio*, a challenge under paragraph one depends on prior application by one of the parties.[60]

Another point worth mentioning is that by making it an obligation on each of the Contracting States, to recognize *only* agreements submitting disputes *"capable of settlement by arbitration"* to arbitration, Article II.1 of the Convention implicitly recognizes the fact that *not all disputes* are capable of settlement via the arbitral mechanism. The same presumption results from reading article V.2 (a). The article effectively makes it a matter of discretion for Courts of the Contracting States to decide whether to deny recognition and enforcement of an award, if the subject matter of the dispute

[59] Lawrence W. Craig et al,. *International Chamber of Commerce Arbitration* (3rd ed., Oceania Publication Inc. 1998).
[60] *Ibid.*

from which it resulted would not have other wise been *"capable of settlement by arbitration"* under the laws of the forum court[61]. The provisions of both articles prevail regardless of whether the disputes in question initially fell within the scope of submission to arbitration. Like the public policy requirement of article V.2 (b) therefore, the implication of Articles II.1 and V.2 (a) appears in effect to be the establishment, in the principle of arbitrability, of an objective criterion against which the ultimate validity and applicability of all other standards of the Convention must be evaluated. This position is especially true for the case of Article II.1 when read together with article II.3. A careful reading of the provisions of this subparagraph reveals that it imposes on Contracting States an obligation to refer the parties to arbitration only in so far as the agreement in question is "*within the meaning of this article"*[62].

Viewed from this perspective, it will not be an over statement to conclude that arbitrability emerges as one of the most fundamental principles of the New York Convention. In endorsing this principle thus, the Convention provides Contracting States with one of the most extensive and arbitrary control mechanism over the arbitral process seconded perhaps only by the public policy doctrine. Support for this observation resides not only in the fact that Contracting States to the Convention are given unfettered discretion to determine the scope of its applicability[63]; but also in the fact that the principle is used to check the validity and enforceability of both the agreement and the resulting award. Further, the fact that Courts of Contracting States have the power to control arbitrability, *suo motu*, strongly compels the conclusion that the Convention recognizes arbitrability as a major principle in international arbitration.

[61] It is submitted that the use of the sentence *"may ...be refused"* in article V.2 suggests that judges may use their discretion in recognition and enforcement proceedings. This by contrast with the word *"shall"* in article II.1, suggesting the imposition of an obligation on the courts

[62] "The Courts of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement *within the meaning of this article*, shall… refer the parties to arbitration…" Article II.3

[63] This clear consecration of the principle of arbitrability not withstanding, the Convention falls short of distinguishing, or even provide guidelines for what kinds of disputes will meet the "*capable of settlement by arbitration*" standards from those which will not. Instead, it gives states a blanket authority in Article V.2 to apply their national laws in determining which disputes will be arbitrable or non-arbitrable.

2.1.1.2. The United Nations' Commission on International Trade Law (UNCITRAL), Model on International Commercial Arbitration, (1985).

Drafted against the recognized need to supplement some of the inadequacies, and bridge the disparities between national arbitration laws, it is important to note that the Model Law is not *stricto senso* and international convention with international legislative force. Rather, it is just a model, which states are at liberty to adopt or use as a guide when drafting national legislation to govern international arbitration. The Model Law also recognizes the possibility for countries to impose limitations to the subject matter jurisdiction of arbitral tribunals. This arbitrability principle if provided for in its articles 34(2) (b) (i) and 36 (1) (b) (i).

In substance, article 34(2) (b) (i) provides for the setting aside of an ward if the court finds that the subject matter of the dispute is incapable of settlement by arbitration under the forum law. The same is true of article 36(1) (b) (i) which empowers the court with the discretion to recognize or refuse enforcement of an award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the forum. It is worth noting that, the Model Law provides for limitation to arbitration in the form of a statement of principle in that, like the New York Convention, it neither defines arbitrability nor provide for a list of non-arbitrable subject matters. Detailed regulation of the scope of the principle is therefore, for the different legal systems, in accordance with the precepts of their policy requirements.

Already recognized and endorsed by the New York Convention to which approximately 135 countries are presently contracting parties[64] other regional conventions have not so much as simply consecrated and allowed contracting parties to impose limitations to the subject matter jurisdiction of

[64] Varady et al. *International Commercial Arbitration : Documents Supplement* (West 2006)

the arbitral tribunals in the same more or less the same terms as the Convention. The provisions of these regional conventions are excerpted below. The almost word *verbatim* manner in which they reproduce those of the New York Convention demonstrate just much impact the Convention's arbitrability provisions have had in shaping policy on the subject around the globe

2.1.1.3. The Inter-American Convention on International Commercial Arbitration, (1975)

Also commonly referred to as the Panama Convention, it provides in its article 3(2) (a) that

"That the recognition and enforcement of an arbitral decision may also be refused if the competent authority of the state in which the recognition and enforcement is requested finds that the subject matter of the dispute cannot be settled by arbitration under the law of that state "

2.1.1.4. The European (Geneva) Convention on International Commercial Arbitration, (1961)

Article VI (2) (c) provides that;

"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"

2.1.1.4. The (OHADA) Uniform Acts on Arbitration [65]

Article 2 of chapter I dealing with the scope of application of the statute provides that;

"Every person, moral or physical, can resort to arbitration in respect of rights which he/she can freely dispose of"[66]

2.1.2. Arbitrability in Municipal Law and Judicial Application

In the forgoing subsection, I reviewed and made some analyses of how some major international instruments and conventions have formulated limitations to the general presumption of arbitrability

[65] Organisation Pour l'Harmonisation du Droit des Affaires en Afrique.

of disputes in international commercial arbitration. We have also seen that, despite recognizing a need for some form of restrictions on the subject matter jurisdiction of arbitral tribunals, most of these instruments go no further than stating these restrictions in general terms, taking the form of statements of principle. The general pattern in each of these instruments, as seen already[67] has been to allow contracting states to determine, in accordance with national law, which disputes will be arbitrable or not. I will now examine how some legal systems have regulated the arbitrator's subject matter jurisdiction.

As a starting point, it is important perhaps to note that despite being vested by international legal instruments with the authority to carve out, according to their national priorities, the exact parameters of the applicability of the arbitrability doctrine, very few national arbitration statutes effectively enumerate or outline arbitrable disputes from non-arbitrable disputes. Such is the case with the article 2059 of the French civil code prohibiting the submission to arbitration by parties, of any rights in respect of which they cannot they freely dispose. Similarly, section 1 of the 1999 Swedish Arbitration Act prohibits arbitrability of all disputes arising out a legal relationship in respect of which parties cannot reach a settlement; while article 33(1) of the same legislation allows for the setting aside and invalidation of awards resulting from a dispute which was initially incapable of settlement by arbitration under Swedish law. The same drafting technique is reminiscent in the provisions of the Japanese and Portuguese arbitration statutes[68]. It seems therefore that whether a particular class of disputes will be arbitrable remains matter for ascertainment by reference to substantive law as interpreted by the courts.

[66]This is my translation from the original French text which reads thus ; *"Toute personne physique ou morale peut récourir a l'arbitrage sur les droits dont elle a la libre disposition"* available at: www.jurisint.org/ohada/actes_fr.html
[67] Op. cit; pp. 22-24
[68]See articles 786 of the Japanese Civil Procedure Code of 1890 and the Portuguese Act on Voluntary Arbitration of 1986 respectively, in Varady et al,. *supra* note 7 at 220-221

Courts in many legal systems have subsequently used this discretionary power of interpretation of substantive national law- for reasons already discussed[69] - to exclude from the subject matter jurisdiction of arbitral tribunals even commercial claims that would otherwise been arbitrable under a broader interpretation of the arbitrability doctrine. The more common of such claims that are traditionally subjected to this strict interpretation of the doctrine in many legal systems have been related to anti trust, security, and to some extent intellectual property and bankruptcy claims. In the United States, most of these are classified under the so called "Federal Statutory Claims " category and governed by separate pieces of federal legislation viz; the Sherman Act (1890), the Securities exchange Act (1934), the Securities Exchange Act (1933) and the Racketeer Influenced and Corruption Organisation Act. The subsections below examine the applicability of the doctrine by courts to securities, anti trust, insolvency, and bankruptcy claims.

2.1.2.1. Securities Claims

Securities claims provide perhaps one of the first known cases in which a judicial tribunal made a ruling on the question of arbitrability. This was in the American case of *Wilko v. Swan,* 346 US 427(1953), decided as far back as 1953 under the Securities Act of 1933. A *locus classicus* on the subject in the United States, the reasoning in the case formed the bases for many subsequent decisions that addressed arbitrability questions. Petitioner (customer), had brought an action in a United States District Court against Respondent (a securities brokerage firm), to recover damages, under the civil liabilities provisions of S. 12(2) of the Securities Act (1933), for alleged misrepresentation in the sale of securities. Respondent moved to stay trial under S.3 of the United States Arbitration Act until arbitration in accordance with the terms of the agreement was conducted. Invoking section 14 of the Securities Act, the District Court sent all but the securities claims to arbitration. The Court of Appeal reversed and the Supreme Court granted certiorari to answer the

[69] Op.cit: pp.9-13

question whether an agreement to arbitrate a future controversy is a condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of the Act declared to be void by section 14. Finding for the Petitioner, the Supreme Court held that the agreement was a stipulation and that the right to select a judicial forum under section 22(a) of the Act was a provision that cannot be waived under S. 14 of the Act. In the court's opinion, S. 22 was a protective provision of the Act requiring the exercise of judicial direction and that in order to assure their effectiveness, Congress must have intended section 14 to apply to waiver of trial and review.

2.1.2.1. Anti - Trust and Competition Claims.

Anti trust, or in the European Community, competition claims, are those usually resulting from restrictive agreements between the parties. Typical examples of such agreements include arrangements to monopolize an industry and prevent potential competitors from accessing it through restrictive trade practices such as market sharing and exclusive distribution agreements. Such agreements usually have the long-term effects of creating monopolists who can control an entire market and make economic hostages of consumers. Considering the massive adverse economic implications of such restrictive trade practices on market growth, policy makers especially in market economies generally regard any agreements promoting them with inherent suspicion. To pre-empt any such eventuality, many countries have passed legislation prohibiting, against the pain of judicial prosecution any, agreement between or among persons that tend to promote such practices.[70]

Giving their generalized effect, many U.S. courts in their enforcement of these prohibitive laws have also adopted the narrow interpretation approach, espoused in *Wilko*, by holding that all claims arising from contracts of anti trust character fall within the exclusive jurisdiction of the courts. The case of *American Safety Equipment v. J.P. Maguire*[71], for instance, stands out as a leading example in this

[70] See for instance Article 1 of the US Sherman Act and Article 85 of the EC Treaty
[71] *Op cit*, p. 9

area for the proposition that anti trust claims are more than just private matters between the parties to be capable of settlement by arbitral process. In the court's view, the fact that anti-trust violations can affect millions of people with staggering damage casts doubts on any presumption that Congress could have intended that claims connected with it be amenable to an extra judicial forum. Besides arguing that agreements resulting in anti trust violations are most often contracts of adhesion, the court contended that anti trust issues are inherently too sophisticated and complicated in terms of the legal and economic analyses involved, making them inappropriate for arbitration. According to the court, the public policy implications connected with anti trust issues makes it ill advised that disputes arising from it should be left for determination by a private panel which too often would be made up of members of a business community likely to be hostile to the constraints of anti trust regulation. Many U.S. courts later relied on these same reasons to cement further the doctrine of non-arbitrability in respect of anti trust disputes[72]

Outside the United States and in a more international context, courts have also ruled that claims resulting from restrictive and anti competitive agreements are unarbitrable. In *Eco Swiss China Time Ltd v. Benetton International NV,* Case C1 126/97 1998 ECR 14493, the question before the European Court of Justice was whether an award based on a licensing agreement that violated European Union should be annulled. In its ruling, the Court held that:

> *" A national court to which application is made for the annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81EC(ex Art.85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy"*

While acknowledging that annulment or refusal to enforce an arbitral award should be possible only in extreme cases, the anti competition provisions of the treaty were so fundamental to the growth of the internal market that any agreement contrary to it must be automatically void. The court expressly

[72]See also *Cobb v. Lewis,* 488 F.2d 41 (5th Cir.1974), Kotam Electronics, Inc. v. JBL Consumer Products Inc: No 94-4984(11th Cir. 1995)

recognized the provisions of article 81 of the EC treaty as a matter of public policy within the meaning of the New York Convention from which private parties and arbitrators cannot derogate.

Prior to the *Eco Swiss case*, a Bologna Court earlier in 1987 handed down a similar decision in respect of a similar question.[73] An Italian company had unilaterally terminated a distribution agreement it had with a French company and sought declaratory judgment from the court that it was not bound by a non-competition clause in the agreement as alleged by the French party because the clause was a violation of European Union Completion law. The French party challenged the jurisdiction of the court and sought to compel arbitration. Citing article 806 of the Italian Civil Code according to which, only the courts can decide matters in respect of which the parties' freedom of private disposition is limited by provisions of public law and public interest, the court declared that the non competition clause of the agreement was a nullity and consequently non arbitrable. The court based its decision on the fact that the clause breached the provisions of article 85 of the EC Treaty which provides for the nullity of all agreements which can hinder trade among member states. The *Eco Swiss* and Bologna Tribunal decisions clearly demonstrate the ferocity with which courts will wrestle jurisdiction from arbitral panels in anti trust and competition cases even in an international context.

2.1.2.3 Intellectual Property

While claims with anti trust and anti competition traits have often taken the centre stage especially in the international context in attracting judicial non-arbitrability sanctions, other claims, which form a residual category, though with little noticeable consistency, have also routinely been declared by some courts to be non arbitrable. Such is the case with claims founded on rights in intellectual property. The notion of intellectual property describes the interest or rights of persons in their artistic

[73] XVII Year Book, Commercial Arbitration. 534(1992)

or scientific creations. These include rights in scientific inventions (patents), rights in distinctive signs or names (trademarks), rights in literary and artistic work (copyrights), etc. The policy reasons underlying the regulation and protection of rights in intellectual property are the need to regulate the market and encourage creative work.

In an international context, intellectual property disputes usually arise from international license, franchise or research and development agreements, For instance, parties may dispute the validity of a licensed intellectual property right such as a trademark or patent, or a licensor may claim that a licensee has used a licensed intellectual property right outside a granted field of use. A dispute might also concern the ownership of intellectual property rights in light of a research and development agreement.

With the exception of copyright claims which are generally referable to arbitration, it is submitted that other forms of intellectual property claims such as those connected with the grant or validity of patents and trade marks are non arbitrable giving the *erga omnes* effects of decisions from invalidity disputes[74]. In contrast to their American, English, Canadian, Australian, and Swiss counter parts who have taken a comparatively more liberal approach[75] towards validity disputes in respect of patents and trademarks, France and Germany have taken a tougher approach on the subject and made all such disputes the exclusive jurisdiction of national courts. Under article 2060 of the code civil, an arbitrator may not declare as invalid, a French patent or trademark. In Germany, the position is that arbitral awards cannot create or rescind rights in patents. The practical effect of this rule, however viewed, is to wrestle the question from arbitral jurisdictions[76]. In the Netherlands, even though a

[74]Redferne and Hunter, *supra* note 4; See also Per Sundin and Erik Wernberg *"The Scope of Arbitrability Under Swedish Law"* available at: http://www.globalarbitrationreview.com/ear/sweden.cfm

[75]The Anglo Saxon systems allow for the arbitrability of validity disputes to the extent that the resulting decision will have only inter partes effects. Australia and Switzerland have the most liberal approach- allowing for arbitrability of even validity questions.: see in general: http://www.wipo.int/amc/en/events/conferences/1994/briner.html

[76] IAPIP Yearbook 1991/VI,

claim for damages for patent infringement is amenable to the jurisdiction of arbitration tribunals, all validity claims for the same remain within the exclusive jurisdiction of the District Court of The Hague[77]. In Belgium, the Belgian Supreme Court has ruled that claims arising out of franchise agreements are not arbitrable.[78]

2.1.2.4 Bankruptcy (Insolvency) Claims.

Bankruptcy is a legally declared inability of individuals or organizations to pay their creditors[79] . Bankruptcy law seeks to achieve the dual objective of giving an honest debtor the opportunity for a "fresh start" while at the same time enabling him to discharge his debts in a manner that maximizes payment to his creditors to pay off his creditors. Consequently, proceedings in bankruptcy seek to provide a systematic framework for debt collection and settlement by centralizing competing claims of different creditors in a single proceeding of a summary nature.

Some have argued that the question whether insolvency claims are arbitrable is of no practical relevance today[80]. The reason is that insolvency cases raise certain core technical issues that are appropriate only for a bankruptcy court. These include, for instance, questions regarding orders opening and closing of the insolvency proceedings, conduct, and methods of surveillance, nominating the trustee, verification, inventorization, collection, and distribution of the estate and reorganization of the business[81]. In the United States, some court decisions have even suggested that the fact that the trustee in bankruptcy is a different entity from the debtor is a strong justification to invalidate any prior arbitration agreement[82]. Consequently, the position in some countries is that once a debtor files a petition in bankruptcy before the competent bankruptcy tribunal, it automatically excludes the

[77]Pieter Sanders, ed. *International Handbook on Commercial Arbitration*, (Kluwer Law International 1984)
[78] See the 1980 decision of the Belgian Cour de Cassation in NSU Auto Union AG v.SA Adelin Petit & Cie
[79] http://en.wikipedia.org/wiki/Bankruptcy
[80]Fernando Mantilla-Serrano. *International Arbitration and Insolvency Proceedings,* 11 Arbitration International, (1995)
[81]Vezna Lazic, *Arbitration and Insolvency Proceedings: Claims of Ordinary Bank Creditors* European Journal of Commercial Law Vol.3 (1999), Available online at : http://www.ejcl.org/33/art33-2.html#h1

prosecution and execution of any claims against him or his estate.[83] Some national statutes even provide that filing a petition in bankruptcy attracts an automatic stay of *all* administrative, judicial, or *other* proceedings in respect of related claims[84]. The use of terms as broad as *all* or *other* strongly suggests the intention of lawmakers to include within the exclusion *other* forms of proceedings such as arbitral proceedings.

Be this as it may, it is still not clear to what extent insolvency claims are arbitrable or not. This is because of the distinction made between arbitral proceedings instituted before the filing of a bankruptcy and those initiated after the filing of an application. While it is clear that no arbitral proceedings are possible in respect of, the later, different positions prevail with regard to the former. U.S. courts, for instance, effectively wrestle jurisdiction from the arbitrators by automatically staying the arbitral proceedings. French courts on the other hand tend to assume jurisdiction only if insolvency law affects the resolution of the dispute. This attitude is clearly inconsistent with the broad wordings of article 174 of the 1985, which gives bankruptcy courts exclusive jurisdiction over insolvency claims. Another grey distinction often made is between "pure" and "soft" bankruptcy disputes; with the former being generally non-arbitrable[85].

2.2 ARBITRABILITY TODAY: A DOCTRINE IN DECLINE?

In the previous section, I examined the breadth of the principle of arbitrability in terms of its applicability by courts to certain categories of commercial claims. The conclusion from that chapter naturally is that judicial chauvinism remains a critical factor in respect of claims resulting from securities agreements, intellectual, anti trust and-with some variations in some countries- insolvency disputes. Such a position considered in the light of court practice today will appear to be slightly or

[82] *Braniff Airways, Inc. v. United Air Lines, Inc. (In re Braniff Airways, Inc.*), 33 B.R. 33 (Bankr. N.D.Tex. 1983).
[83] See for instance, articles 47 and 48 of o the French *Loi du 25 Janvier 1985*, article 26 of the Dutch *Faillisementswet (Fw)* and Section 362 of the US Bankruptcy Code.
[84] See, for instance, S. 362(a)(1) of the US Bankruptcy Code, see also article 368 of the French Code de Procedue Civil

wholly inaccurate. This is because in as much as courts have been, and are still unwilling to share jurisdiction with arbitrators in respect of claims falling within certain fields, there is nevertheless ample evidence that public tribunals are increasingly ready, within certain defined, limits to extend arbitrability to even some of the previously excluded classes. The increasing is provoking talks of a *"decline"* or *"narrowing"* of the non-arbitrability doctrine by some authors[86].

One of the earliest break –throughs in this trend was again in an American court in 1974[87] where, in holding that claims arising under the Securities Exchange Act (1934) were arbitrable; the Supreme Court drew a distinction between purely domestic and international transactions. In reasoning 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 agreements", the Supreme Court effectively distinguished and overruled *Wilko*[88]. In 1985, the arbitrability doctrine received another blow when the same Supreme Court, relying on the same reasoning in *Wilko* overruled *American Safety Equipment* by holding that claims arising under the Sherman Act were arbitrable in international cases[89]. The court posited that the need for predictability in international commerce dictated that it enforced the parties' agreement at least in cases of an international character, subject to its residual jurisdiction to review the legality of any resulting award at the enforcement stage[90].

[85]See generally Lazic, *supra* note 81

[86]Christopher R. Drahozal, *Commercial Arbitration: Cases and Problems.* (LexisNexis 2002).
Gary B. Born, *International Commercial Arbitration.* The Hague. Transnational Publishers Inc. and Kluwer Law International 2001).

[87]Scherk v. Alberto-Culver, 417 U. S. 506 (1974)

[88]See also Shearson/American Express, Inc. v. McMahon. 482 U.S. 220(1987) and Rodriguez Quijas v.Shearson/American Express, Inc, 490 U.S. 477(1989) where the Supreme Court definitively laid Wilko to rest by ruling that claims whether domestic or international under both the Racketeer Influenced and Corruption Organizations Act (RICO) and Securities Exchange Acts are arbitrable

[89]See the Decision in the *Mitsubishi Case*

[90]This is the so called "second look" doctrine by which U.S. Courts , having allowed the arbitration to proceed will have the power to ensure at the award enforcement stage that the legitimate interests of U.S. anti trust laws were addressed. This doctrine may be criticize on the grounds that the award may never be challenged if it results in voluntary enforcement, the chance to have a second look will be effectively lost. For a comprehensive review of the doctrine, see generally Park, *supra* note 5 at .123-130; Jan Paulsson *Means of Recourse Against Arbitral Awards Under U.S. Law* 6,

Elsewhere outside the United States, the scope of the doctrine has also seen critical decline. In 1992 and 1999, for instance, a Swiss court decisively ruled that EU competition law claims were arbitrable[91]. In France, the arbitrability of competition law claims was recognized in the 1993 *Mor/Labinal* Case by the French *Cour d' Apel* and confirmed by the *Cour de Cassation* in a 1999 decision. In the area of intellectual property, Switzerland has led the road in adopting one of the most liberal laws, which allow for the arbitrability of all intellectual property disputes in both international and national context. This conclusion finds its basis in the broad wording of the Swiss Private International Law Act of 1987, which provides in its article 177 that "*all* dispute involving *property* may be the subject matter of arbitration"[92]. Similarly, with respect to the arbitrability of competition law claims, the Swiss Supreme court has taken an opposite opinion from the *Eco Swiss* decision by deciding that arbitrators have the final say and their decision reviewable only as an exception rather than the rule.

The above examples certainly support a finding that despite the parochial approach by many national courts with regard to the subject of arbitrability, especially in respect of claims affecting pubic rights, the principle of arbitrability is increasingly on the decline. They acutely highlight the general tendency of States to reduce, or even abolish, public policy limits to arbitrability in international arbitration. Such a *volte-face* certainly calls for some explanations. The next chapter will review and assess some of the reasons commonly advanced to justify the policy shifts.

Journal of International Arbitration. (1989); Richard D. Lillich, *International Arbitration in the 21st Century: Towards "Judicialisation" and Uniformity?* (Transnational Publication Inc 1994).

[91]Tribunal Fédéral, April 28 1992, A.S.A.Bull, 368 ; Tribunal Fédéral Novembre 13 1999, A.S.A. Bull 529 and 455

[92]See also the decision in *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara S.p.A. v. M. and Tribunal arbitral´(*published in *Semaine Judiciaire* 1993, p. 2) demonstrating the broad spirit with which Swiss courts have interpreted national arbitral provisions in respect of Intellectual Property disputes.

CHAPTER III

REMARKS AND CONCLUSION

In the previous chapters, I examined the scope of the applicability of the principle of arbitrability within the context of international arbitration. Drawing the distinction between commercial and non-commercial claims, with the latter shown to be generally unarbitrable, the study was narrowed down to the arbitrability of specific commercial claims in international arbitration. Among the commercial claims examined were anti trust and competition, intellectual property, securities claims, etc[93]. It shown that with regard to these claims, the traditional position of the courts was to consider their public effects too sensitive for private adjudication and consequently incapable of settlement by arbitration. However, a discussion and analyses of recent case law also suggested that the scope of the applicability of the doctrine with regard to these claims had undergone serious judicial setbacks[94]. Top down reforms in judicial reasoning have heralded the demise of judicial parochialism. Courts continue to challenge and overrule themselves on previous positions on the issue and there is an increasing trend towards extending arbitrability to all commercial claims, as even traditionally unarbitrable claims are declared arbitrable in many courtrooms today[95]. These findings suggest that the distinction between arbitrable commercial claims and non-arbitrable commercial claims is becoming redundant. While this proposition may come as good news to pro arbitration actors in international commerce and a "case closed", it is however important to note that this radical alteration in judicial policy has not been without motivation. Some authors and even courts have provided explanations to justify this new position. As a contribution to the existing wealth of knowledge on the subject, I will examine them and evaluate their persuasiveness.

[93] *Op cit,* 26-32
[94] *Op cit,* 32-34
[95] *Ibid*

The first reason finds expression in the doctrine of comity. As generally understood in the context of international law, comity requires that nations extend to other nations certain courtesies, particularly by recognizing the validity and effect of their executive, legislative, and judicial acts. Courts frequently invoke this principle when they want to give deference the jurisdiction, laws or judicial decisions of another country. In *Mitsubishi,* the court held inter alia that *"concerns of international comity, respect for the capacities of foreign and transnational tribunals…"* demand and require the enforcement of parties' agreements. It is doubtful to what extent this has had an influence on the judicial *volte face* towards arbitrability. In fact, giving the extremely private characteristics of arbitration, the persuasiveness of this argument even when raised by the courts, as in *Mitsubishi,* is questionable. The reason, as can be deduced from its definition, is that comity as applied in international law is strictly speaking a doctrine having effects only between public institutions of states and not between private institutions or private and public institutions. Consequently, it is hard to see how invoking comity sufficiently justify an extension and recognition of jurisdiction to purely private institutions such as arbitral tribunals.

A second possible reason could be that courts have started to recognize the importance and competence of arbitrators as partners. At least one decision has even cited this position[96]. This too remains a questionable justification. There are two reasons for this. The first reason is that the pool from which arbitrators typically come has remained the same despite the incompetence labels. Arbitrators today still share the same characteristics as arbitrators of yesteryears, in the sense that they are lawyers, law professors, or experts in the particular trade of the dispute. The second is based on the fact that empirical evidence, as Park has argued, is yet to establish the presumed incompetence and inexperience label placed on arbitrators by some authors like Varady et al,[97].

[96]See Mitsubishi Case.
[97]See Park, supra note 5; Varady et al,. supra note 7

Finally, Park has argued that the threat of clogged civilian court dockets is not giving judges any choices but to share power with private arbitral tribunals[98]. The merit of this argument is questionable because it contradicts two major arguments previously advanced to explain judicial curtailment of the subject matter jurisdiction of arbitral tribunals. These are the so called "arbitrator bias" and "incompetence arguments"[99]. If these arguments are anything to go by, it will seem unlikely that courts will divest themselves of jurisdiction on such policy-sensitive issues as arbitrability on the thin excuse of the need to decongest clogged dockets.

An economic argument based on the theory that it works for business efficiency and promotion of global commerce to split adjudicative functions between courts and other private institutions of equal competence appears most persuasive. Support for this argument is based on the fact that, a perusal of most of the recent pro-arbitrability decisions cited, as conditions warranting the need do away with the non-arbitrability doctrine, the economic imperative of encouraging trade and investment especially in international cases[100]. Park himself recognizes this position when he argues that continuous refusal to honor arbitration agreements on whatever grounds may not only affect effective neutral dispute settlement but also, the very efficiency of international business relations. Accordingly, businesspersons will only conclude international commercial and investment agreements resulting in efficient allocation of global resources if they are confident that a forum more neutral than that of another party' s forum will resolve resulting disputes[101].

From the above, one can conclude *arguendo,* that the economic argument remains one of the most persuasive of all the explanations given to justify the recent trends in judicial attitude towards arbitrability questions. This conclusion finds further in two major arguments. Firstly, the fabric of

[98]Park, *supra* note 5
[99] Varady et al., *supra* note 7 at 219,; see also Park, *supra* note 4
[100]See generally *Scherk v. Alberto Culver, Mitsubishi,* and *American Express*
[101] Park, supra note 5.

global trade today depends not only on the willingness of courts to share adjudicative functions with private institutions of equal competence. Secondly, commercial arbitration, from its very inception, found its strongest justification in the need for easily accessible, cheap, expedited dispute settlement mechanisms to complement expensive, slow, and excessively technical and unfamiliar litigation procedures in courtrooms.

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