The Foundations of Arbitrability in International Commercial Arbitration

Ilias Bantekas

I. Introduction

Arbitrability is concerned with whether a particular type of dispute is amenable to settlement by arbitration, or if instead jurisdiction lies exclusively with the domestic courts or state organs. These determinations are usually made by reference to domestic statute law. The parties to a dispute, when considering whether its subject matter is arbitrable, must ensure the said dispute is arbitrable not only in accordance with the law of the *lex arbitri*, but that it also conforms to the laws and public policy of the governing law of the contract and of those states where enforcement of the award will be sought. It should be said that some confusion exists with regard to the precise terminology associated with the concept of arbitrability. In Europe the term refers, as explained above, to the permission granted by state laws for a dispute to be settled by arbitration, rather than compulsory judicial settlement. In the United States, it has taken on an additional overtone. There, the term has been consistently employed to determine whether an arbitral tribunal has sufficient jurisdiction to hear a dispute as a matter of construction of the arbitral clause, as well as whether the arbitrators may validly...
hear a dispute that has already been decided in a different forum.3 To a European arbitration lawyer, the functions raised by these cases necessarily refer to an examination of the tribunal’s jurisdiction as a result of the contract – and not public law – while the second may turn on the tribunal’s Kompetenz-kompetenz authority. In any event, such questions do not pertain in the slightest to the notion of arbitrability that is analysed in this article.

Matters of arbitrability are generally encountered either at the early stages of arbitral proceedings, at the moment when the arbitration clause is triggered, or in the final stages, at which time the winning party seeks enforcement. When encountered in the early stages, it may be raised by anyone of the parties, not the arbitrator. Given that arbitrability may only concern the laws of a country other than those of the lex arbitri, there is no reason why the arbitrator need be concerned and raise the issue himself. Where the lex arbitri renders a particular dispute non-arbitrable, it should not be presumed, in the absence of an express provision in the relevant laws of the lex arbitri, that the arbitrator is obliged to consider this matter proprio motu. Depending on the particularities and subject matter of each dispute, the parties may well decide to choose as the seat of their arbitration a jurisdiction where the subject matter of their dispute is arbitrable. It may very well transpire that although the dispute is not arbitrable in that jurisdiction either if it was of a wholly domestic nature, that the lex arbitri of this jurisdiction generally permits arbitration of foreign disputes therein irrespective of their theme. Obviously, the parties will subsequently face the prospect of having their award set aside as unenforceable, unless they reach agreement that they will mutually honour the award without recourse to judicial enforcement procedures. This is not as unlikely as it sounds, particularly if one considers that disputes that are wholly un-arbitrable most commonly involve illicit transactions that the parties do not want to bring to the public domain anyway. A notable example of non-arbitrable awards that the parties are not intent on subjecting to an enforcement procedure concerns disputes between banks and Saudi private investors. Therein, the imposition of interest on the loan triggers the non-arbitrability of the dispute, given the prohibition of interest in Saudi Arabia, rendering moreover the relevant contract void.

This article sets out to discover the possible existence of an underlying theory or policy whereby particular types of disputes may be referred to arbitration rather than compulsory adjudication by regular courts or executive decision. The 1958 New York Convention4 does not offer any guidance, as its purpose was to create some coherency at the enforcement stage, but does offer some examples in the sphere of public policy, which as will become evident in the course of this article are linked to some degree with the question of arbitrability. Similarly, despite the extensive regulation of even the most minute of affairs in the context of the

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European Union, arbitrability has not been addressed. With the exception of some vague guidance by the European Court of Justice (ECJ) in one case, it seems that the European Union is content with leaving the matter to the particular legislation of member states. This article asks whether as a result of unilateral state practice some coherency has emerged, regional or global in nature, which would help discern a degree of consistent state practice. Are there particular disputes that are never subject to arbitration throughout the world? A strong contender would certainly be the arbitration of crimes between private parties, but here question whether or not this is actually an absolute rule globally on the basis of its underlying rationale. Equally, the classic examples of disputes that are generally cited as being precluded from arbitration are those related to anti-trust (or anti-competitive practices), patents, copyrights, trademarks and tax, among others. This article examines the degree to which these disputes are subject to arbitration through the evolution and globalisation of world trade. The analysis, given the search for a common trend and general rule, takes into consideration the intentions of states in expanding and relaxing their arbitrability laws. The relevant laws and jurisprudence of Australia has also been considered to a substantial degree. It is evident that financially stronger states cannot rely on the same rationales as their developing state counterparts, since different interests arise between the two. It should become clear by the end of this article that a significant divergence exists between developing and developed states and their thinking behind the concept of arbitrability and its application.

II. The Rationale for Excluding Certain Disputes

Notwithstanding the plethora of national arbitration laws and other domestic statutes by which certain types of disputes are excluded from referral to arbitration, one is at pains to discern a general rule. Certainly, with the exception of Articles II.1 and V.2(a) of the 1958 New York Convention, which itself limits arbitrability only to those disputes that are ‘capable of settlement by arbitration’, no other binding international instrument has provided a theoretical grounding, or even a list of excluded activities. Arbitrability itself is no doubt closely connected to the concept of public policy, which by definition is circumscribed and delineated exclusively by the internal processes of states. Nonetheless, arbitrability and public policy is not the same thing, but simply complement one another. For one thing, it is possible for a particular type of dispute to fail the arbitrability test in a given jurisdiction (eg relating to intellectual property) and yet not be encompassed within a range of activities offending the public policy of that country. Moreover, the issue of arbitrability arises twofold: a) either as an interlocutory matter, in which case it must be dealt with by the arbitral tribunal or the courts of the lex arbitri before the dispute can go to its merits, or b) at the enforcement stage, at which time even if the award was deemed arbitrable in the lex arbitri, there is no guarantee that the country of enforcement will itself consider it as both arbitrable or compliant with its public policy. Such matters cannot practically arise where disputes otherwise outside the ambit of arbitration have been referred by the parties to

5 Ibid.
arbitration, and where moreover one of the parties is a state and the other a foreign private investor. This is because the limited institutional fora that entertain such disputes, particularly the ICSID Convention, are not subject to the restraints posed by arbitrability and public policy, given that the state party referring said disputes has necessarily excluded them by the very fact of agreeing to submit the dispute. Put simply, the removal of arbitrability constraints on the basis of a bilateral treaty necessarily overrides the arbitrability limitations ordinarily reserved in the statutes of the contracting states. The same is true where the two state parties under the same circumstances choose to refer their dispute to ad hoc arbitration, provided that in their submission agreement (compromis) or their arbitration clause they agree that all issues pertaining to their contractual arrangements are indeed arbitrable. Equally, where a state has referred a dispute with a foreign investor to commercial arbitration and the award has been rendered (eg the International Chamber of Commerce or the Stockholm Chamber of Commerce), the enforcement court of the state that is a party to said arbitration must enforce the award on the same grounds. Refusal to do so will entail the international responsibility of that state for the performance of an unlawful act by a state organ; in this case, the domestic court of enforcement. The invocation of non-arbitrability on the basis of domestic law is no defence for the state entity concerned and will certainly not affect the legal position of third states. Therefore, this discussion necessarily excludes awards rendered by ICSID and the North American Free-Trade Agreement (NAFTA) on the grounds that the tribunals thereto are not examining arbitrability in the traditional sense, but whether the disputes in question are arbitrable under the parties’ contract, or covered by a relevant bilateral investment treaty.

Some authors suggest that the lack of arbitrability pertaining to particular types of disputes is premised on the fact that because arbitration is a private proceeding with public consequences, some states prefer to have such disputes entailing public consequences heard in the public domain. Therefore, it is argued, this task can

6 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSIID Convention or Washington Convention) (18 March 1965), 575 UNTS 160.
7 Obviously, a state that is not party to ICSID, or which has no contractual ties to the disputants may validly subject an ICSID award to arbitrability and public policy scrutiny if the prevailing party wishes to enforce it there: art 53(1) ICSID Convention. See L Reed, J Paulsson and N Blackaby, Guide to ICSID Arbitration (2004) 97-8. In all other respects, the 1958 New York Convention, above n 4, would continue to govern the relations between the state of enforcement and the prevailing party.
9 Art 3 of the ILC Articles on State Responsibility, ibid.
10 However, with respect to other states, the very fact of submission may demonstrate a tacit consent by the disputing state to overcome the issue of arbitrability (even if contrary to national law). Hence the civil courts of such third states may enforce such awards therein on the basis of a perceived tacit consent.
12 A Redern and M Hunter, Law and Practice of International Commercial Arbitration
only be achieved where cases of this type are referred to civil courts that are not subject to the privacy and confidentiality constraints of arbitration. Others maintain that some states prefer to exclude certain disputes from the ambit of arbitral tribunals because of the ‘assumption that an arbitral tribunal would not be able or willing to apply the law as accurately as a judicial court would’. Perhaps the most convincing argument is one that excludes arbitrability for those disputes involving questions regarding the exclusive functions of the state. This would undoubtedly encompass matters such as foreign policy and inter-state relations, fiscal policy, military policy, promulgation of laws, but it is not quite clear if it would also encompass the administration of criminal justice, labour disputes, anti-trust and patent disputes. The former, such as foreign policy, falling within a state’s sovereign realm, can under no circumstances be delegated to private entities and as such cannot become the subject matter of arbitral proceedings. In any event, it is hard to envisage a situation where a dispute over foreign or military policy may arise in a contractual context between two private parties, or between a private entity and a state. It is, however, possible for a contractual undertaking to involve elements of foreign or military policy, particularly through agency agreements for the procurement of arms to third states, or the representation of the state in its external relations by a private firm, legal, public relations, auditing, or otherwise. In these cases, the undertakings in said agreements that relate to public functions reserved to the state and that were delegated to the agents, will not be amenable to arbitral proceedings.

The administration of criminal justice on the other hand, although generally within the authority of the executive branch, is not under the absolute authority and function of the state. Thus, in western criminal justice systems, a particular facet of the principle of respect for individual autonomy suggests that with respect to some
offences, it is the prerogative of the victim to pursue the infliction of criminal penalties for the wrongdoer. This is certainly true with regard to assault and battery, and the matter is hotly debated with regard to sexual offences and domestic violence.\textsuperscript{15} The rationale for this approach is that criminal prosecution by the state, without the victim’s approval, would potentially stigmatise the victim or render him or her more vulnerable. In other systems, particularly those falling within the broader family of Islamic law, it is acceptable for the culprit and the victims, or their respective families, to agree to a final resolution of the ‘dispute’ through the payment of so-called blood money (\textit{diyeh}). These arrangements are acceptable even in cases of serious offences, such as murder.\textsuperscript{16} Thus, although the criminal legislation of some Muslim nations permits under their public policy rules the privatisation of particular aspects of criminal law through the payment of blood money, it does not, on the other hand, deem as arbitrable the perpetration of other offences, thus removing them from the public domain.\textsuperscript{17}

\textbf{(a) The arbitrability of labour disputes}

This subsection reflects on the permissibility of recourse to arbitration with respect to labour disputes and in light of domestic arbitrability statutes and jurisprudence. This approach is justified on the basis that labour disputes are internal in character. Modern welfare states approach labour relations in a twofold manner. On the one hand they recognise the existence of a contractual relationship between employer and employee, yet on the other hand the state definitively regulates other elements of labour relationship through its public law. This encompasses, for example, the provision and supervision of health and safety, unfair or unlawful dismissal and others. Thus, there exist both private and public perspectives in the relationship of employment. Were this article to argue that only the former are lawfully subject to arbitral proceedings because the latter constitute part of the exclusive authority of the state, then a ‘persuasive’ employer would be left with the power to insert an arbitration clause in all contracts with employees. While it stands to reason to prevent matters such as health and safety as being arbitrable between the employee and the employer, the power imbalance between the two also suggests that allowing the private law aspects of their relationship to remain arbitrable in no way repairs the imbalance, which the public law argument seeks to address, whereby all matters falling within the exclusive public function of the state may not be

\begin{itemize}
\item See L Ellison, ‘Prosecuting Domestic Violence without Victim Participation’ (2002) 65 \textit{Modern Law Review} 834. The prosecution in the United States and the United Kingdom does not require the authorisation of the rape or domestically abused victim in order to pursue the offender, but the lack of cooperation may either destroy the prosecution’s case, or as a result the prosecutor may be convinced to abandon the case.
\item See USC-MSA Compendium of Muslim Texts [Hadiths narrated by Buhkari] on the applicability and function of blood money in \textit{Shari‘a} <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/083.sbt.html>.
\item Art 1 of the 1985 Saudi Implementing Rules, above n 13, prohibits arbitral proceedings relating to \textit{hodoud}. \textit{Hodoud} are crimes for which the Qur’an provides corporal punishment, such as theft, adultery and accusation of adultery. The position is supported in \textit{Hanbali} jurisprudence. See Ibn Qudamah Almaqdisi, \textit{Almoghni [The Comprehensive One]} (vol 11, 1992) 484.
\end{itemize}
subjected to arbitration. In some states, arbitrability of labour disputes may be
deemed by the parties as more beneficial to the employee than to the employer,
because of particular cultural and jurisprudential circumstances. In such cases, both
courts and legislators adapt their legal tools accordingly and provide for wide-
ranging arbitrability. In *Alliance Bernstein Investment Research and Management v Schaffran*,18 the United States Court of Appeals for the Second Circuit was asked
to decide, among others, whether the dismissal of an employee for blowing the
whistle against his employer, as a result of a federal duty imposed on the employee
under the Sarbanes-Oxley Act (SOX),19 was arbitrable and whether it was the
courts or the arbitral tribunal itself that possessed jurisdiction to decide this matter.
The parties were professionally engaged in securities and were subject to the
National Association of Security Dealers (NASD) Code.20 Rule 10211(a) of the
NASD Code bound parties to settle disputes arising out of the employment or
termination of employment agreement by reference to NASD-based arbitration.
The employer argued that this was a case concerned with employment
discrimination and as a result did not fall within Rule 10211(a) and should have
been submitted to a civil court. The issue at hand does not concern arbitrability,
*stricto sensu*, but it is interesting that the Court of Appeals reiterated Rule 10324 of
the NASD Code, which empowers the arbitral tribunal itself to decide its own
jurisdiction (essentially an exercise of Kompetenz-kompetenz powers) and
proceeded to satisfy the defendant’s claim to submit the dispute to arbitration.21

This case strongly demonstrates that in some jurisdictions the national legislator
will consider that the existing standard of regulation in employment relations is
sufficient from the executive’s point of view so as to permit the parties to submit
their disputes to arbitration. Where this was not so, the employees themselves
would have refused, through their unions, to be bound contractually to do so and
the government would have rendered such matters outside the scope of arbitral
tribunals. It should be noted that the relevant parts of the SOX Act are concerned
with the criminal ramifications of employee failure to notify the authorities, with
the subsequent dismissal of said employee being contrary to (public) law. Given
the public character of such law, it is all the more astonishing that disputes arising
therefrom are arbitrable. Nonetheless, the United States federal government is
happy for such matters to be handled by arbitration, presumably on the basis that
such disputes eventually boil down to a compensation claim, the determination for
which can just as well be handled by both the courts and arbitral tribunals, given
that the compensatory stage of these proceedings are of an essentially private
nature. The author is not convinced, however, that issues of this nature entertained

18 *Alliance Bernstein Investment Research and Management v Schaffran* 445 F 3d 121
(2nd Cir 2006).
19 See s 806, Sarbanes-Oxley Act, 18 USC § 1514A.
20 The Code was incorporated into the parties’ contractual agreements.
21 See also *Howsam v Dean Witter Reynolds Inc* 537 US 79 (2002), where the US
Supreme Court held that the interpretation of a NASD rule imposing a six-year time
limit for arbitration was a matter presumptively for the arbitral tribunal, not the civil
courts.
under the SOX Act are at any stage purely of a private dimension, given the Act’s absolute public character.22

In Australia, the issue of the arbitrable scope of domestic employment disputes has not specifically been excluded in statute, nor rejected by the courts.23 Section 652ff of the Workplace Relations Act 1996 (Cth), while allowing the arbitration of all disputes pertaining to relations arising from the employment contract, renders these, nonetheless, arbitrable only before the Industrial Relations Commission, depriving the parties, therefore, from the choice of other arbitrators or arbitral fora. This is not a serious encroachment to the arbitrable nature of said disputes, because given their limited ambit, access to ordinary arbitration would be far more costly and time-consuming.

III. Arbitrability is Based in each Case on Individualistic and not Communal Interests

In the previous section this article demonstrated the lack of a convincing general rule under which particular types of disputes are not properly subject to arbitration, at least in terms of state practice. This is only natural, given that the public interests of each state are not only different, but also subject to change through the passage of time. In the most developed legal systems, where the range of themes excluded from arbitration are unclear, local courts – or indeed the arbitrators, if unchallenged – may broaden the ambit of arbitrability where they find no real or potential harm to public interest as a result. Equally, states may very well decide that the pursuit of foreign investment during particular historical periods necessitates extending arbitrability to matters that in previous times would have been inconceivable.

(a) The arbitrability of tax disputes

One poignant example is demonstrated by a case involving foreign investment arbitration, between Ecuador and a US corporate investor.24 The dispute arose because of the action of the authorities of Ecuador in passing a series of resolutions that resulted in the Occidental Exploration & Production Company (OEP), a United States corporation, not being able to recover the value-added tax (VAT) paid on local purchases and on the import of goods made in connection with export activities. The case was initially decided by an arbitral tribunal, but subsequently Ecuador challenged the award in London and the case came before the Queen’s Bench division of the High Court. Ecuador’s challenge to the award under section 67 of the United Kingdom Arbitration Act25 was essentially that the arbitrators made an award on the claims of OEP that involved ‘matters of taxation’ and

23 See, however, Metrocall Inc v Electronic Tracking Systems P/L, (2000) 52 NSWLR 1, below n 36.
24 Ecuador v Occidental Exploration & Production Co (OEP), [2006] EWHC 345 (Comm).
25 In particular, art 67(1) of the Arbitration Act 1996 (UK), relating to a challenge as to the substantial jurisdiction of an arbitral tribunal.
under the terms of Article X of the 1993 USA-Ecuador Bilateral Investment Treaty (BIT)\textsuperscript{26} such matters fell outside the ambit of the BIT and so could not be the subject of a claim in arbitration under the dispute resolution procedure set out in Article VI of the BIT. Article X of the BIT is entitled ‘Tax Policies’, and reads as follows:

The Treaty exhorts both countries to provide fair and equitable treatment to investors with respect to tax policies. However, tax matters are generally excluded from the coverage of the prototype BIT, based on the assumption that tax matters are properly covered in bilateral tax treaties.

The Treaty, and particularly the dispute settlement provisions, do apply to tax matters in three areas, to the extent they are not subject to the dispute settlement provisions of a tax treaty, or, if so subject, have been raised under a tax treaty’s dispute settlement procedures and are not resolved in a reasonable period of time.

The three areas where the Treaty could apply to tax matters are expropriation (Article III), transfers (Article IV) and the observance and enforcement of terms of an investment agreement or authorization (Article VI (1) (a) or (b)). These three areas are important for investors, and two of the three – expropriatory taxation and tax provisions contained in an investment agreement or authorization – are not typically addressed in tax treaties.

It is clear from paragraphs 2 and 3 of the US-Ecuador BIT that not all disputes relating to tax are outside the ambit of arbitration. On the contrary, the government of Ecuador entering into this BIT consciously declared as arbitrable three distinct types of tax disputes. The High Court succinctly noted that although each state party had agreed, under the terms of the BIT, with the other to ‘strive’ with respect to its ‘tax policies’, Article X.2 expressly stated that ‘nevertheless the provisions of the Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following …’\textsuperscript{27} The court, therefore, had no problem in ascertaining a limited arbitrability in relation to a closed number of tax disputes:

To my mind that wording makes it clear that, apart from matters of taxation that come within the three identified exceptions, all matters of taxation are outside the ambit of the BIT. The Submittal Letter of the Secretary of State to President Clinton explains that this general exclusion is based on the assumption that tax matters are properly covered in bilateral tax treaties between States. That explanation seems plausible. Therefore, in my view, unless a particular “matter of taxation” comes within the ambit of Article X.2 (a), (b) or (c), then the dispute resolution provisions of the BIT in Article VI cannot apply to any dispute that arises between a State and an investor in relation to that “matter of taxation”.\textsuperscript{28}

Given the US-Ecuador BIT is premised on a United States Model BIT,\textsuperscript{29} it is logical to assume that many other states have agreed to similar tax arbitrability provisions in other treaties. In fact, a procedure known as Mutual Agreement

\textsuperscript{27} OEPC judgment, above n 24 [93].
\textsuperscript{28} Ibid [93]-[94].
Procedure (MAP) has been incorporated in a number of instruments, including Article 25 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention and Articles 6-14 of the European Community Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises.

The European Union Arbitration Convention procedure is not far removed from the normal strands of arbitration. The taxpayer is not contractually bound with any of the states that tax individuals, this being a unilateral act on the basis of public law. While, however, the taxpayer is excluded from the European Union’s Convention’s ‘arbitral’ process, the competent authorities of the states concerned contractually agree to submit double taxation claims to arbitration on the basis of Article 7(1) of the European Union Convention itself, which in this sense serves the same purpose as an arbitration clause in a private-law contract. The parties to this arbitration clause are the concerned states and no further submission agreement is required (compromis) before the advisory commission assumes responsibility. The fact that the parties to the arbitration clause are states in no way invalidates the application of an arbitral process, given that states are quite capable of settling their disputes before arbitral fora. It is also perfectly normal for the parties in the present instance to submit to arbitration disputes that arose out of a claim invoked by private entities. This is so because the imposition of tax is always a matter falling within the exclusive sovereign authority of the executive and in any event the competent authorities are representing the legal interests of the taxpayer. Moreover, the advisory commission constitutes a species of institutional, rather than ad hoc, arbitration. The MAP in the OECD Convention is initiated by tax authorities, unlike the European Community Arbitration Convention, but in both cases although the proceedings are described as arbitral they in fact resemble a species of diplomatic protection, albeit with the active participation of the interested private party. Equally, tax disputes should be considered as arbitrable, even in the absence of a specific provision in state-investor agreements, where the unforeseen tax is a disguised expropriation, or in any other event where a grandfathering clause has been inserted in the contract.

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32 See I Bantekas, ‘The Mutual Agreement Procedure and Arbitration of Double Taxation Disputes’ (2008) 1 Colombian Yearbook of International Law (forthcoming). The only case which has so far been entertained under this arbitration procedure, as far as this author is aware, is the Electrolux Case. Only fragments of the case and the proceedings are known, as these have been excerpted in EU JTPF, Draft Summary Record of the Third Meeting of the EU JTPF, Doc JTPF/007/2003/EN (4 June 2003); see also C Burnett, ‘International Tax Arbitration’ (2007) 36 Australian Tax Review 173; M Desax and M Veit, ‘Arbitration of Tax Treaty Disputes: The OECD Proposal’ (2007) 23 Arbitration International 405.
34 B Weston, ‘Constructive Takings under International Law: A Modest Foray into the
(b) The protection by national authorities of ‘sensitive’ commercial activities from arbitral proceedings

The arbitrability of matters that touch upon otherwise sensitive areas of exclusive governmental competence is premised primarily, if not exclusively, on the negotiating power of the host state. Thus, in the OEPC Case, Ecuador had little negotiating power vis-à-vis the United States and in its pursuit of attracting badly needed foreign investment was forced under the circumstances to succumb to the United States Model BIT, which renders particular tax matters arbitrable between the host state and the foreign investor protected by the BIT. Moreover, states with smaller, yet healthy, economies choose to exclude certain commercial sectors or activities from the scope of international and domestic arbitration, although disputes arising out of these activities and sectors are based on contractual or quasi-contractual undertakings, such as agency agreements. In the case of international arbitration the restriction to arbitration is justified usually by the desire to control the relevant markets, currency exchanges, to prevent dominant and abusive behaviour by the foreign party and to protect the local employment market, among others. No doubt, the assistance to particular economic actors or sectors of the economy viewed as vital, in conjunction with a geographically limited state problem of creeping expropriation.’ (1975) 16 Virginia Journal of International Law 103; see also, Middle East Cement Shipping and Handling Co SA v Egypt, (2002) 7 ICSID Reports 173.

Grand-fathering clauses generally provide for the ‘freezing’ of the authority of the state vis-à-vis the investor in the parties’ future relations. As a result, no law that the state, or its affiliated entities, promulgates after the signing of the contract has any effect on the investor.

See Audi-NSU Auto-Union A G v S A Adelin Petit & Cie (1979) V Yearbook Commercial Arbitration 257, in which the Belgian Cour de Cassation held that the resolution of distribution agreements fell within the exclusive jurisdiction of civil courts as a matter of statute law. Cited in Redfern and Hunter, above n 12, 541. Restrictions on agency-related arbitration are prevalent also in Muslim states. But see Colvi v Interdica, above n 1, where the Cour de Cassation reversed this situation in 2004. On the contrary, art 5 of the Lebanese Law No 34 of 5 August 1967 on the Regulation of Commercial Representation states that disputes arising out of commercial agency agreements are not arbitrable. This result was confirmed by the 9th Chamber of the Beirut Court of Appeals. Judgment of 7 October 2004, <http://idiproject.com/docs/news/Court%20of%20appeal.def.pdf> (in Arabic). In a subsequent judgment by the 5th Chamber of the Lebanese Supreme Court, a distinction was made between the reference of commercial agency disputes to arbitration by means of an arbitration clause and a submission agreement (compromis). It is only when said disputes are submitted to arbitration through a compromis that they are arbitrable. Judgment No 4/2005 (11 January 2005), <http://www.idiproject.com/docs/news/Supreme%20Court.def.pdf> (in Arabic). The Law, therefore, was promulgated with a view to protecting him, whereas it is assumed that because the compromis is drafted following the appearance of a dispute, the parties are at a relative parity. The same is true with respect to contracts under ss 43 and 19 of Australia’s Insurance Contracts Act 1984 (Cth) and the Insurance Act 1902 respectively, which permit recourse to arbitration only through a compromis. Equally, claims for relief under s 106 of the Industrial Relations Act 1996 (Cth) were held to be out of bounds for arbitration, in Metrocall Inc v Electronic Tracking Systems P/L (2000) 52 NSWLR 1.
encompassing a relatively small local population may act as an incentive to restrict arbitrability in a single area of commerce and not in others.\textsuperscript{37} The Australian paradigm suggests that it, too, is protective of certain commercial activities and has, therefore, by statute refused to allow recourse to arbitration in respect of these. The most prominent example is section 11 of the Carriage of Goods by Sea Act 1991 (Cth), according to which an arbitration clause incorporated in a bill of lading, or similar instrument, and pertaining to the international carriage of goods to and from Australia, is void, unless the said clause designates Australia as the seat of the arbitral proceedings.\textsuperscript{38} In the case of domestic arbitration, the most significant reason for imposing arbitrability restrictions seems to be the protection of particular commercial or trade activities.

Yet, it is also quite possible for a neighbouring state with more or less the same socio-economic circumstances to render particular activity arbitrable, deeming that to do so will generate more jobs and investment in the long run, even if this necessitates the imposition of a commercial disadvantage for local merchants.\textsuperscript{39} Developed economies, such as that of the United Kingdom, no longer pose such restrictions. The ability of such states to generate investment and funds constantly means that there is no need to protect the local merchants from commercial disadvantages. In English law, an undisclosed principal may enforce an arbitration clause entered into by his agent on his behalf and can do so in his own name. The agent may also commence proceedings in his own name, although this may raise particular issues as to the type of loss he can recover.\textsuperscript{40} Equally, large economies that generally attract significant foreign investment without much effort do not as a rule accept bilateral investment treaties that undermine their authority in areas under their exclusive competence. This is particularly true in the case of Russia and its 1995 Production Sharing Act.\textsuperscript{41} Under section 22 of the Act, arbitrability is extended to disputes regarding the performance, termination, or the validity of the production sharing agreement (PSA), where these relate to the contractual arrangements of the parties. It is not clear, however, that the PSA is exclusively and always of a private character, or whether it implicitly incorporates elements of

\textsuperscript{37} The UAE Federal Supreme Court has held that a foreign arbitration clause in a registered commercial agency agreement is unenforceable (and therefore inarbitrable) because the Commercial Agencies Law No 18 of 1981 (as amended by Federal Law No 14 of 1988 and by Federal Law 13 of 17 June 2006) states that only UAE courts have jurisdiction over commercial agency disputes. See I Bantekas, ‘Arbitrability in Banking and Finance’ in L E Mistelis and S Brekoulakis (eds), \textit{Arbitrability in International Arbitration} (2008) forthcoming.

\textsuperscript{38} See \textit{Comandate Marine Corp v Pan Australia Shipping Pty Ltd} [2006] FCAFC 192 [196], explaining the explicit exceptions to arbitration introduced by s 2C of the International Arbitration Act 1974 (Cth).

\textsuperscript{39} A 1998 amendment to the Bahraini Commercial Agency Law abolished the statutory requirement of exclusivity for local commercial agents, unlike its other UAE counterparts.

\textsuperscript{40} \textit{Leif Hoegh & Co A/S v Petrolsea Inc}, [1992] 1 Lloyd’s Rep 45.

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public law, which are not subject to arbitration. Given that PSAs are to be construed in conjunction with the relevant provisions of the Production Sharing Act, which in turn refers to other Russian legislation that de-privatises certain areas of law pertinent to PSAs, particularly licensing, taxation and export regulation, any disputes arising in these spheres can only be settled by negotiation or by reference to the civil courts of Russia. In fact, a developed economy such as that of Russia, wherein many suitors are willing to invest cannot afford to exclude arbitrability from most, if not all, fields of potential investment. However, if it were to do so, such practice would run contrary to the contemporary trend of industrially strong states, whereby all private matters are amenable to arbitration. This will be expanded in more detail in the next section. Equally, strong economies have little problem in excluding certain activities from the ambit of permissible investments as a matter of public policy. The corollary of this practice is that where a principal investment is subsequently used in order to enter into a secondary investment in a prohibited field, any dispute arising from it will be excluded from arbitral proceedings altogether.

The conclusion so far is that the lack of a general rule on the types of activities that are excluded from the purview of arbitrability may be supplemented by the claim that states, at the very least, determine arbitrability on the basis of their power in the international arena to enforce their individual interests. Economically weak states must necessarily extend arbitrability, whether through a bilateral investment treaty or otherwise, to encompass activities they would under different circumstances wish to retain under their exclusive control, whereas economically stronger states are under no such constraints. In practice this is the case, but weak states begin to appreciate the consequences of broad arbitrability only when foreign investors commence arbitral proceedings. The knee-jerk reaction of weak states at this stage is to try to frustrate proceedings through the assertion of non-investor friendly – and at times silly – public policy constructions. An additional consequence is that they also tend to restrict

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42 Moss, above n 14, 13.
43 Equally, foreign investment arbitration is possible where a relevant bilateral investment treaty stipulates as much.
45 It has been suggested that, realistically, developing states should decrease the range of arbitrable matters because of the financial power of foreign investors and the inequality of the parties as a result. See M Sornarajah, ‘The UNCITRAL Model Law: A Third World Viewpoint’ (1989) 6 Journal of International Arbitration 7, 15-16.
46 Pakistan is a good example. In Hub Power Company (HUBCO) v Pakistan, WAPDA (PLC 2000 SC 841), the Pakistani Supreme Court held that the investigation of illegality by Pakistani officials in respect of a commercial transaction could only be determined by its national courts and not by the arbitrators of the dispute. Equally, in Societe Generale Surveillance S A (SGS) v Pakistan, (2003) 42 ILM 1290, the Pakistani Supreme Court argued, inter alia, that SGS could not rely on the Pakistan-Switzerland bilateral investment treaty because the bilateral investment treaty had not been enacted into Pakistani law. See also, for the same reasons as the SGS Case, Impregilo S.p.A v Pakistan, ICSID Case No ARB/03/3, Decision on Jurisdiction of 22
arbitrability in domestic arbitrations, whether as a matter of favouritism to particular commercial actors, or because their markets are susceptible to volatility and are thus thought to require increased protective measures.

IV. Are Developed States themselves under Pressure to Expand Arbitrability?

There are two propositions to this argument. The first is that financially strong states never extend arbitration over matters falling within their exclusive authority and if in fact they seem to be so doing they only permit arbitrability of disputes that encompass foreign elements. Second, strong states may extend arbitrability over disputes otherwise regulated under public law, but they will do so only with regard to the private dimension of the said public law. These two propositions are now more closely examined.

(a) Private enforcement of anti-trust disputes

In Scherk v Alberto-Culver, 47 a United States corporation purchased three European businesses, but later claimed that the seller had fraudulently misrepresented the status of particular trademarks, which were supposedly registered in Europe, in violation of Article 10(b) of the 1934 US Securities Exchange Act. 48 The plaintiff sought damages in the United States and the crucial matter was whether the arbitration clause entered into between the parties was operative, given that the dispute concerned trademarks, a matter for which the foreign authority that issued them was presumed to have held exclusive authority. While arbitrability over the same issue in the United States would have been precluded where the trademarks had been issued by and registered in the United States, the Supreme Court took a different stance on account of the fact that the dispute arose in a foreign jurisdiction. It held that the parties’ agreement to arbitrate any dispute arising out of the purchase agreement was enforceable under the US Federal Arbitration Act. 49 The Court distinguished Wilko from Scherk on the ground that the former was governed in toto by United States law, whereas the governing law of the Scherk contract was foreign and, moreover, if the arbitration clause was not ultimately enforced, a plethora of international conflict-of-laws would arise. It explained this as follows:

Alberto-Culver’s contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany, whose companies are organised under the laws of

April 2005. These national judicial determinations are blatantly ridiculous. Art 27 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, clearly points out that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

48 15 USC § 78j(b).
49 Scherk judgment, above n 47, 510-13, relying on its previous judgment in Wilko v Swan 346 US 427 (1953), in which it held that an agreement to arbitrate could not preclude a buyer of a security from seeking judicial remedies under the 1933 Securities Act.
Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England and Germany and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organised under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations and the subject matter of the contract were all situated in this country and no credible claim could have been entertained that any international conflict-of-laws would arise. In this case [that is, *Scherk*], by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement and still exists concerning the law applicable to the resolution of disputes arising out of that contract.50

As a result, the matter was open for arbitration because the Court viewed the fraudulent misrepresentation of the trademarks in the same light as a breach of a warranty claim. If both parties were American and the dispute concerned a United States trademark, the result would have probably been different. Importantly, the Court was asserting that no executive or public policy implications arose in the forum by the granting of arbitrability to a dispute that is not arbitrable in those other states that have a direct interest therein. In effect, in the present instance, no reciprocity of arbitrability is recognised by the United States vis-à-vis third states. To what degree this practice is acceptable in international relations is debatable, but whatever the outcome it certainly does not expand the boundaries of arbitrability for the United States.

It did not, therefore, involve a big step for the Supreme Court to conclude that other matters with foreign elements, such as anti-trust, could be subject to arbitration, despite the fact that United States district courts had previously rejected arbitrability with regard to anti-trust disputes because of the large numbers of people affected and the widespread infliction of financial damage, which only federal authorities had the means to cope with.51 This step came about in 1985 in the celebrated *Mitsubishi Case*.52 There, the parties involved were incorporated in various jurisdictions, including the United States. A sales agreement had been entered into between Soler Chrysler (a Puerto Rican company), Mitsubishi (a Japanese company) and Chrysler International (a Swiss company), providing for arbitration of any disputes in Japan under the rules of the Japan Commercial Arbitration Association, the governing law being Swiss law. Mitsubishi filed a request for arbitration against Soler claiming damages for breach of the sales agreement and Soler counterclaimed under the Sherman Act53 alleging anti-trust

50 *Scherk* judgment, above n 47, 515-16.
52 *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614.
53 15 USC § 1 et seq.
practices. The question for consideration by the Supreme Court was whether or not the counterclaims for antitrust breaches were arbitrable. The fact that the plaintiff argued that the matter be settled in accordance with the parties’ contractual undertakings through arbitration did not entail an expectation that the arbitral tribunal examine the anti-trust violation with the purpose of punishment and the imposition of fines. These functions remain within the exclusive prerogative of the state. Neither did the plaintiff entertain the demand that the arbitral award settle the matter for the future with respect to all interested parties. The claim only concerned losses incurred as a result of one of the parties’ anti-competitive behaviour. The Supreme Court, therefore, by a majority of five to three it should be emphasised, decided that international contracts of this nature were arbitrable under the Federal Arbitration Act. It concluded that:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.54

The result is truly astounding. A determination that domestic anti-trust arbitration is permissible under the same set of facts would have perhaps made more sense, although still clearly not fully in conformity with United States federal law at the time. Although it will be surprising if the United States Supreme Court denies recourse to arbitration for purely domestic anti-trust disputes, there is equally no supportive jurisprudence to suggest otherwise. While it is true that the alleged violation in the Mitsubishi Case took place in the United States, it is also a fact that the other parties to the transaction were domiciled in other jurisdictions, as was also the forum of the arbitral tribunal. To rule, however, that it is out of respect to international comity that foreign anti-trust disputes are amenable to arbitration in the United States, or abroad, when not subject to arbitration in the countries where the violation took place55 clearly makes a mockery of the principle itself.56 The Court would have done well to apply a reciprocity test to such a sensitive issue. It did, nonetheless, point out quite correctly that irrespective of whether such a

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54 Mitsubishi judgment, above n 52, 628.

55 In many countries anti-trust disputes may be subject to private enforcement, not necessarily arbitral resolution. See the UK 1998 Competition Act and the Enterprise Act 2002 (UK), as well as Network Multimedia Television Ltd (T/A Silicon.com) v Jobserve Ltd [2001] All ER 57, one of the first cases that involved the granting of an injunction with respect to a private anti-trust enforcement action. See also P Pinsolle, ‘Private Enforcement of European Community Competition Rules by Arbitrators’ (2004) 7 International Arbitration Law Review 14.

56 In fact, the United States is a champion in entertaining private anti-trust suits through the employment of extraterritorial jurisdictional tools in defiance of comity. In F Hoffmann-La Roche Ltd and Others v Empagran SA (2004) 542 US 155, the UK, Ireland and the Netherlands submitted an amicus brief expressing their disapproval of such jurisdiction in anti-trust suits in which the claimants are seeking damages in a forum other than that where the alleged violation was committed. They argued that the assertion of such broad jurisdiction contravenes basic principles of international law. See M Furse, Competition Law of the EC and UK (2004) 72-3.
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The confirmation of the death of the Wilko judgment came about as a result of Rodriguez De Quijas v Shearson/American Express Inc, in which Justice Kennedy criticised Wilko as plainly incorrect and the Court moved to allow arbitration of all claims under section 12(2) of the 1933 Securities Act, as well as any violations under the 1934 Securities Exchange Act. This judgment paved the way, unlike its Mitsubishi counterpart, for the arbitrability of all securities disputes, irrespective of whether they may be designated domestic or international. This is clearly the right solution if the argument of the Supreme Court is based on claims of reciprocity. The United States obviously desires that its nationals are able to arbitrate the private contours of anti-trust disputes with other contracting parties throughout the world. The only way to do this is to take the bold step and open up its doors first and then to foster its bilateral and multilateral relations in such a way as to render arbitrability a reciprocal necessity with its commercial partners. Thus, while the judgments extending recourse to arbitration in the field of securities referred to domestic arbitration, the transnational character of said transactions in the United States necessarily rendered the judgments relevant to international arbitration. It is of no surprise, therefore, following the Shearson judgment that European Union member state courts and national legislators enabled the arbitrability, albeit reluctantly, of the contractual elements of anti-trust disputes.

A test of reciprocity by the Mitsubishi court would have made it abundantly clear that anti-trust disputes were not at the time validly subject to arbitration in every country in the world; if indeed it was the United States Supreme Court’s desire to promote international comity. In Eco Swiss China Time Ltd v Benetton International NV, the defendant challenged two arbitral awards before the Supreme Court of the Netherlands on the grounds that they were contrary to Dutch public policy that was consistent with the anti-competition provisions of the European Community Treaty (formerly art 85), which sets forth rules on

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57 Mitsubishi judgment, above n 52, 628.
58 Ibid 637. This qualification has yet to be raised in any of the Australian cases. See also D Donovan and A Greenawalt, ‘Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators’ in L A Mistelis and J D M Lew (eds), Pervasive Problems in International Arbitration (2006) 11ff.
60 15 USC §§ 77a-77bbb.
61 15 USC §§ 78a-78lll.
64 Treaty Establishing the European Economic Community (Treaty of Rome) (25 March
competition applicable to undertakings. Under the relevant Dutch law, an arbitration award is contrary to public policy if its terms of enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. The Supreme Court referred the matter to the ECJ, asking whether European Community competition law constitutes such a fundamental mandatory law. The ECJ ruled that:

A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 [EC Treaty], where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.65

The ECJ’s ruling is ambiguous and it is not clear whether similar disputes are always arbitrable, or whether the arbitrator is required to always apply European Union law, or simply take cognisance of it for the purposes of the proceedings’ substantive law.66 Some commentators have interpreted it as implying that where the contract giving rise to arbitration is governed by the law of a European Union member state, then the tribunal has a duty to apply fundamental principles of European Union law, otherwise the award may be rendered unenforceable. An additional interpretation suggests that where the contract giving rise to the arbitration is governed by the law of a non-European Union member state, the tribunal and the parties will do well to consider such fundamental principles of European Union law, particularly if they envisage enforcement in the territory of a European Union state.67 As a matter of state law, it is very clear that all European Union member states permit the arbitrability of the contractual elements of anti-trust disputes, whether by general language, or specifically.68 This ‘opening of doors’ from the United States has enabled other developed states, other than from the European Union, to abandon restrictive practices with respect to anti-trust disputes.69

The second proposition cited in the beginning of this section has been partially proven. That is, developed states, even where they expand the ambit of their arbitrability rules, do so only with regard to the private dimension of said claims and disputes and not with respect to the public law elements. The risk of control lost by the state is minimal and in any event governments are aware of the significance of confidentiality relating to many business disputes, which the parties want to remove from the public domain and from their competitors. Section V better assists the reader in conceptualising this argument by reference to disputes arising in the field of intellectual property.

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65 Above n 63, *Eco Swiss China* judgment.
66 Redfern and Hunter, above n 12, 168.
67 Bruland and Quintin, above n 63.
68 Milan Court of Appeals, Freyssinet Terra Armata S.r.l. v Tensacciai S.p.A (1897/06).
69 *Quintette Coal Ltd v Nippon Steel Co* [1991] 1 WWR219 (Court of Appeal of British Columbia), 227-8; *Attorney-General v Mobil Oil New Zealand Ltd* [1987] ICSID Rep 117, 139.
(b) The Australian position

The Australian experience has been somewhat confusing. In their determination as to whether a particular dispute is susceptible to arbitration, Australian courts have declined to focus on the possible existence of a public policy exception to specific commercial or other activities, or whether these are best settled by reference to the courts. The Australian courts have instead tended to concentrate on whether the arbitration clause sufficiently incorporated all the matters under dispute. Thus, contract interpretation has been crucial to the determination of arbitrability and it is no wonder that Australian jurisprudence has not been entirely consistent. In *Clough Engineering Ltd v Oil and Natural Gas Corp Ltd*, the Federal Court held that the Trade Practices Act 1974 (Cth), being a ‘public policy statute’, cannot be circumvented by private agreement, even where the parties to an international contract have designated foreign law as the proper law of the contract.\(^{70}\) This position, although of very recent vintage, is in contrast to the *Comandate Marine Case*,\(^{71}\) which held that claims arising under section 52 of the Trade Practices Act 1974 (Cth) are clearly arbitrable. The same conclusion was drawn in *Francis Travel Marketing P/L v Virgin Atlantic Airways Ltd*, where the Supreme Court of New South Wales conclusively confirmed ‘there is no reason in principle why the parties to a commercial contract cannot agree to submit to arbitration disputes which have arisen between them in relation to their rights and obligations under the TPA’.\(^{72}\) The same result was reiterated in *Transfield Philippines Inc v Pacific Hydro Ltd*, which held that recourse to arbitration was essentially a matter to be decided by reference to party autonomy and its true and unambiguous reflection in the contract, in the presence of which a presumption of arbitrability must be read.\(^{73}\) Although Australian courts have not been called upon to determine whether disputes relating to anti-trust, securities and similar disputes may be contractually referred to arbitration, the majority of the judgments suggest indirectly that this is indeed possible, because the arbitrator’s authority is limited only to those matters arising under contract, and does not extend to powers granted to courts by the country’s Constitution. In *Tridon* it was succinctly observed that:

> The question for determination is whether it is competent for parties to an arbitration agreement to agree with one another, in this fashion, to empower the arbitrator to exercise the powers of a Court under the Corporations Act. The purpose of such an agreement could not and would not be to have the arbitrator’s award operate as an order of a Court. The arbitrator’s determination would be an exercise of consensual

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\(^{70}\) [2007] FCA 881.

\(^{71}\) See above n 38 [194ff].


\(^{73}\) [2006] VSC 175 [60ff]. This statement on a presumption of arbitrability should be contrasted with its explicit refusal by Austin J in the Supreme Court of New South Wales in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 [136]. In fact, the Court in *Tridon* pointed out that arbitrability would not extend to certain fundamental aspects of corporate law such as shareholder oppression relief (as opposed to other ‘default rules’ of shareholder contracts).
power equivalent in scope to the power of a Court under the Corporations Act, having binding effect as between the parties by force of their agreement.\textsuperscript{74}

In this case, the court confirmed that contractual disputes arising out of Shareholders’ Agreements, as well as a company’s Articles of Association as between its members, are certainly arbitrable matters. Equally, the High Court of Australia in \textit{Tanning Research Labs v O’Brien}, in determining the arbitrability of a dispute involving a debt to the creditor of a company in liquidation, held that all private rights and liabilities are arbitrable.\textsuperscript{75} And while in \textit{Francis Travel Marketing} the New South Wales Supreme Court concurred \textit{obiter} with the United States Supreme Court’s subjection of anti-trust disputes to arbitral fora,\textsuperscript{76} Justice Allsop’s contention in \textit{Comandate Marine} that disputes concerning intellectual property, anti-trust, securities and insolvency are not arbitrable – although later appealed, but this contention was not challenged by the Court on appeal – is strikingly at odds with his judicial counterparts. The opinion of this author is that a comprehensive reading of the above judgments suggest that where the clear intention of the parties is to settle their difference by reference to arbitration, the courts would generally be willing to stay judicial proceedings, as long as the claims arising out of the dispute were contractual in nature and did not involve the arbitrator passing judgment on matters falling within the purview of the state’s public law functions.

\textbf{V. A Dispute is Arbitrable only between Parties to a Contract or where it is Covered by a Bilateral Investment Treaty}

\textbf{(a) Intellectual property disputes}

It is a fundamental principle of arbitration that only the parties to an agreement providing for arbitration can be part of such a process and subsequently be legally affected by the award rendered.\textsuperscript{78} Moreover, such an agreement must be in writing.\textsuperscript{79} Nonetheless, it is also true that as a result of particular conduct or activity, persons who are not contractual parties to that conduct or activity may nonetheless be materially affected. This is so irrespective of whether said activity is legal or illegal. For example, anti-competitive conduct harms the interests not only of the particular businesses that sustain direct losses as a result, but the activity has an additional impact on the masses of consumers and retailers who are coerced into paying a higher price for goods purchased, among others. The same is true of trust vehicles, where the beneficiaries are not parties to the agreement,\textsuperscript{80} although with

\textsuperscript{74} Ibid [180].
\textsuperscript{75} (1990) 169 CLR 332, 342, per Brennan and Dawson JJ.
\textsuperscript{76} Above n 72.
\textsuperscript{77} [2006] FCAFC 192, 200.
\textsuperscript{78} Art III(1), 1958 New York Convention; art 7(1), UNCITRAL Model Law.
\textsuperscript{79} Art II(2), 1958 New York Convention.
\textsuperscript{80} It is not rare for contracts in which the parties are not named to be enforced by them, including arbitral clauses. See the definition of ‘parties’ in s 82(2) of the UK Arbitration Act 1996, which includes ‘any person claiming through or under him’. Those who succeed to agreements by operation of law – for example a trustee in
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respect to common law trusts it is perceived that the trustee is not appointed by the settlor on the basis of a contract, but a *sui generis* appointment.\(^{81}\) Equally, when there is a violation of copyright or patent law, recourse to arbitration, if at all possible, can only arise following the violation – that is, there can never exist an arbitration clause – because the violator will in all probability not be contractually tied to the patent or copyright holder – although as will become evident in this section some countries have catered to this possibility. Moreover, the national authorities will naturally consider that the granting of intellectual and industrial property (IP) rights should be exclusively controlled by the state, as these constitute national assets and contribute significantly to the national economy. As a result, states would naturally wish to defer IP disputes to the jurisdiction of regular courts. At the other end of the spectrum, businesses possessing IP rights, given that in many cases these involve confidential and sensitive information, will understandably desire to prevent airing the content of such rights in the public domain. Arbitration, therefore, is a natural forum for the settlement of intellectual property disputes.

It is only natural that developed states will go through all the stages of regulation in order to find the right balance between national control of IP rights and de-centralisation of dispute settlement, with a view to promoting the entrepreneurial qualities of the relevant industries. Up until 1983, patent disputes in the United States were removed from arbitration on account of the ‘public interest in challenging invalid patents’.\(^{82}\) With the adoption of section 294 of the country’s Patent Act, which pertains to domestic arbitration and not to international, arbitrability over patent disputes was properly installed.\(^{83}\) The provision reads as follows:

> A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.\(^{84}\)

Section 294 refers not to IP disputes generally, but specifically to patent disputes that involve a prior contractual undertaking. Where no contractual undertaking exists, recourse to arbitration is still possible if the disputing entities

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81 In the common law it is permissible for the settlor to provide expressly the power to another individual to appoint a trustee. It is not clear whether such a person may then proceed to appoint himself because he would be deciding that ‘he is the best possible person’ for the job. See *Re Skear’s Settlement* (1889) 42 Ch 522, per Kay J.

82 *Beckman Instruments Inc v Technical Development Corp* 433 F 2d 55, 63 (7th Cir 1970).

83 35 USC § 294.

84 Under s 135(d) of the Patent Act, disputes relating to patent interference may be resolved by the parties through submission to arbitration.
subsequently draw up a submission contract (compromis). Obviously, there are some limitations as to the realisation of the latter possibility. Where the disputing entities are incorporated in the United States, it is in the interest of the infringing party to agree to settle the dispute through arbitration because the other patent holder will enforce the rights via United States civil courts, effecting at some point the infringing party. On the other hand, if the infringing party is incorporated in a foreign jurisdiction that does not take the protection of international IP rights seriously, there is no incentive for that entity to submit the infringement dispute to an arbitral tribunal. In such cases, and depending on the size of the alleged infringement, practice suggests that the process of diplomatic protection will constitute the first port of call. The governments of the two states will either negotiate compensation and an end to the infringement, or agree to the submission of the dispute before an appropriate forum. If negotiations of this type fail, the government of the patent holder, as a means of last resort, may impose trade sanctions against the infringing entity. This in itself may act as an incentive to settle through arbitration. In any event, the disputing entities cannot submit to arbitration the determination of whether a patent is valid and accordingly arbitrators do not possess the authority to invalidate patents.85 This is logical and not surprisingly, the same trend is followed in other developed countries with regard to patent disputes.86 Equally, transnational disputes arising out of patents, or other intellectual property license agreements, may become arbitrable even where the host state’s laws provide otherwise, if the foreign investor’s state has entered into a bilateral investment treaty with the host state that does not specifically exclude IP rights as ‘investments’.87 No statutory provision equivalent to section 294 of the Patent Act covers arbitrability of copyright and trademark claims. Nonetheless, United States courts have accepted arbitrability over such claims on the same grounds as those espoused with regard to anti-trust and patent arbitrability.88

It may seem blatantly obvious in a contemporary legal context, but it should still be emphasised that the fundamental premise for the granting of arbitrability status to IP disputes stems from the contractual relationship of the disputants. The notional incorporation of anti-trust and IP disputes within the realm of non-arbitrability and public policy protection persisted even where the disputants did

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85 Ballard Medical Products v Wright, 823 F 2d 527, 531 (Fed Cir 1987).
86 See arts 2059 and 2060 of the French Civil Code, under which any patent dispute, other than a claim for invalidation of a patent, may fall within the authority of an arbitral tribunal.
88 Regarding copyright, see Kamakazi Music Corp v Robbins Music Corp 684 F 2d 228 (2nd Cir 1982). The Court of Appeals held that the submission of copyright infringement claims to arbitration did not violate United States public policy. This early case, however, did not determine whether the validity of a copyright may be decided by an arbitral tribunal. This was answered in the affirmative by the Court of Appeals for the Seventh Circuit in Saturday Post Co v Rumbleseat Press Inc 816 F 2d 1191 (1987).
not challenge any of the public elements of IP and anti-trust. This early stance is evident, for example, in *Wyatt Erp Enterprises v Sackman*, where trademark infringement was claimed by the plaintiff, but only after the expiration of a trademark licence agreement between the parties. The New York District Court rejected the applicability of the arbitration clause in the license agreement on the ground that the parties could only have agreed for it to apply to disputes arising out of the contract and not as a result of an extra-contractual action in tort. This case, as hostile as it may be against arbitration, cannot certainly be construed in a manner that precludes arbitration altogether. On the contrary, it merely precludes arbitration with respect to infringements in tort and then only under the assumption that it could not have been the intention of the parties to submit torts to arbitration. Therefore, were a judge to construe the intention of the parties otherwise, the result would still be capable of complete reversal. Such a result in favour of arbitration in respect of trademarks is also contingent on the breadth of the arbitration clause, as otherwise the civil courts may find the language of the clause restrictive and in doubt choose to limit access to arbitration. A broad-embracing arbitration clause should encompass ‘all controversies arising under or in connection with or relating to any alleged breach of this agreement’.

Following the previous discussion, an attempt to define the boundaries of ‘contractual’, as opposed to ‘public’ elements in IP disputes is warranted. The public element encompasses all those functions that belong exclusively to the executive; particularly the award and registration of the patent or trademark, its qualification as a patent or an improvement to an existing patent, as well as its de-registration. The contractual element involves the use of all rights vested in the patent or trademark by the owner, whether by the owner or through third parties. Where the owner enters into a licensing or other agreement with a third party, which involves both contractual and public elements, the latter will not be susceptible to arbitration. This determination may be made by a court either at the enforcement stage, or indeed earlier. It has to be noted that while the granting and registration of a trademark refers to a public function, there is no compelling argument against the arbitral settlement of a dispute between two or more persons staking a legal claim as to a particular trademark. It is obviously advisable for the entity with the stronger claim to refer to the state authorities for registering its trademark claim, but it should be equally permissible for the disputing parties to settle the matter privately and apply for registration subsequent to, and on the basis of, the arbitral award.

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90 Ibid 627.
91 It was only natural that in time arbitrability would be extended to copyright disputes, even in the absence of a statutory provision. See *Saucy Susan Products Inc v Allied Old English Inc* 200 F Supp 724 (SDNY, 1961); *Necchi Sewing Sales Corp v Necchi S.p.A* 369 F 2d 579 (2nd Cir 1966).
92 See in this regard, *Givenchy Sàt v William Stuart Industries (Far East) Ltd* 85 Civ 9911 (SDNY, 1986).
93 Cited with approval as a broad arbitration clause in *BVD Licensing Corp v Maro Hosiery Corp* 688 F Supp 961, 962 (SDNY 1988).
Although United States federal courts generally favour arbitration in patent cases over judicial determination,\(^{94}\) the jurisdiction of arbitral tribunals is not absolute, even where the dispute concerns claims arising out of the parties’ contract. This is particularly true where a specialised body has been granted by statute concurrent jurisdiction over particular patent issues. This situation arose in \textit{Farrel Corp v US International Trade Commission} (ITC),\(^{95}\) in which the ITC’s assumption of jurisdiction in a case concerning misappropriation of trade secrets, misrepresentations as to source and trademark infringement, was challenged by Farrel. The ITC’s statutory exceptional jurisdiction over particular patent infringements\(^{96}\) necessarily foreclosed the arbitrability of such claims.\(^{97}\)

\subsection*{(b) Arbitrability of consumer disputes}

Quite apart from IP rights, should disputes arising between private corporations and consumers be submitted to arbitration? On the one hand, it may be argued that party autonomy should be respected, but on the other hand, it is also true that the two contracting parties are not necessarily equal in negotiating strength. In the United States, and in accordance with the Federal Arbitration Act 1925 (US) (FAA), pre-dispute arbitration clauses are permissible with respect to consumer contracts, as upheld by the United States Supreme Court.\(^{98}\) This general rule is subject to two exceptions; first, given the right of \textit{locus standi} before the courts has a constitutional basis, it may not be waived without express and unambiguous agreement, thus necessitating the consumer is fully aware of the implications of the waiver.\(^{99}\) Second, civil courts will not feel bound to uphold a pre-dispute arbitration clause that is deemed to be unconscionable. Unconscionability will be determined both procedurally and substantively on the basis of the negotiations, disclosure of the arbitration terms, their fairness, inconvenient arbitration venue, as well as other relevant factors.\(^{100}\) Where the arbitration clause is not unconscionable and the consumer is found to be fully aware of its existence and implications, United States courts are willing to extend arbitrability to statutory consumer protection claims brought in a bankruptcy case.\(^{101}\) In the European Union, on the

\begin{itemize}
  \item Rhone-Poulenc Specialities Chimiques \textit{v} SCM Corp 769 F 2d 1569 (Fed Cir 1985) ; \textit{In re Medical Engineering Corp} 976 F 2d 746 (Fed Cir 1992).
  \item \textit{Farrel Corp v US International Trade Commission} 949 F 2d 1147 (Fed Cir 1991).
  \item 19 USC § 1337(a) and (b).
  \item \textit{Farrel} judgment, above n 95, 1150-154.
  \item \textit{Allied-Bruce Terminix Companies v Dobson} 513 US 265 (1995).
  \item In \textit{Discover Bank v Superior Court} (judgment of 27 June 2005) 36 Cal 4th 148, a putative class action against a credit card issuer was made for improper charges relating to late fees. The credit card issuer argued that the class action was impermissible on account of the arbitration clause, which barred customers from proceeding with their claims on a class action basis. On 27 June 2005, the California Supreme Court held that it is unconscionable under California law for a corporation, by way of a contract of adhesion, to bar customers with small individual claims from bringing or participating in a class action. On remand, however, the California Court of Appeals upheld the Delaware choice of law clause in the credit card contract and found that Delaware law would allow the contractual ban on class actions.
  \item See \textit{Arnold v United Companies Lending Corporation} 511 SE 2d 854.
  \item \textit{Mintze v American General Financial Services, Inc} 434 F 3d 222 (3rd Cir 2006).
\end{itemize}
other hand, under the terms of the Unfair Terms in Consumer Contracts Directive, pre-dispute arbitration clauses inserted in consumer contracts will be deemed contrary to good faith where they have not been individually negotiated and subsequently any disputes arising therefrom cannot be arbitrated. This development is obviously based on the assumption that consumers will in the majority of cases be severely disadvantaged if arbitration is pursued instead of litigation, although empirical studies demonstrate otherwise. Article 3(3) of the Directive refers to an Annex, which lists some terms that are deemed to be unfair.

VI. Public Policy as Justification for Precluding Arbitrability

The article already discussed the relationship between arbitrability and public policy by explaining a particular dispute may not be arbitrable in a given jurisdiction, yet at the same time not be encompassed within the public policy rules of that country, such as IP disputes. Public policy is most often utilised as a justification to deny recognition and enforcement of an award at the enforcement stage. The courts of the enforcement state may decide that because the arbitral tribunal officiated over a dispute not arbitrable under the laws or public policy of that state, the award produced cannot be enforced. In this sense alone arbitrability is inextricably linked to public policy. The parties to an arbitration clause or compromis, therefore, must ensure in advance their dispute is indeed arbitrable in the desired enforcement state, as well as the lex arbitri, where the arbitration laws of the latter so require. In the particular case of the lex arbitri, where the dispute concerns a claim predicated on a criminal offence, such as corruption, the arbitrator need not necessarily refuse to entertain the said dispute simply because it is a criminal offence in the country where the contract was performed; it must also be found to violate the public policy of the lex arbitri. On the contrary, the principle of separability suggests, as a matter of customary international law and general principles of arbitration law, the arbitration clause survives an otherwise void or voidable contract. As a result, the arbitrator has the authority to examine

104 Term (q) in the Annex, which is particularly relevant to this article, renders unfair those terms the effect of which is to: ‘Exclude[e] or hinder the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.’
the dispute if it falls within the purview of the surviving clause. Obviously, this will not help the parties to enforce the award once it is rendered. The crucial question for the purposes of this article is whether there exists a common core of international public policy rules that preclude a tribunal from passing judgment over the substantive elements of particular activity, or subsequent contractual or tort manifestations. All international crimes falling under the *jus cogens* umbrella would qualify, as would international crimes prescribed under customary international law. Does this mean, however, that the arbitration clause of a contract between two slave merchants survives under the theory of separability where one of the parties claims compensation as a result of poor contractual performance by the other party?108 If one answers that those disputes are not subject to arbitration, one is asserting the existence of an international or ‘trans-national public policy rule’ precluding arbitrability on the basis of *opinio juris* alone, not *usus* (state practice), because no national court has had the chance of entertaining such cases in the past.

Below the *jus cogens* and customary law threshold one finds offences that are criminalised in most, if not all, countries, but which do not necessarily constitute public policy impediments to arbitrability. The most common offence encountered by international tribunals is corruption and its various manifestations. Some tribunals have taken the view that corruption-related disputes are not properly arbitrable.110 The same view was shared by some courts during the enforcement

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107 *Premium Nafta Products Limited (20th Defendant) and others v Fili Shipping Company Limited and others* [2007] UKHL 40.

108 In *O’Callaghan v Coral Racing Ltd*, *The Times* (26 November 1998), the parties sought to enforce an arbitral award that arose out of a gambling dispute, which itself was illegal. Lord Justice Hirst rejected the parties’ contention that the arbitration clause was severable. He noted that ‘the gaming transaction was declared null and void … [by statute]. It was manifest that the arbitrator, if such he was, would be obliged to hold that the gaming transaction was void. … Consequently, the clause must be treated as an integral part of the terms on which alone Coral was willing to do business … and consequently could not be separated from the rules and could not survive independently.’ Equally, in *Vee Networks v Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep 192, Colman J observed that the effect of the doctrine of separability enshrined in s 7 of the UK Arbitration Act is: ‘[T]o confirm that arbitrators have jurisdiction conclusively to determine issues on the voidness or voidability of the matrix contract to the effect that they do not lose jurisdiction by reason only that the matrix contract may be void or voidable. However, s 7 leaves intact the requirement that the arbitration agreement should be valid and binding. If it is not valid and binding for reasons other than the bare fact that the matrix contract is not valid and binding, then s. 7 does not enable arbitrators to exercise conclusive jurisdiction in respect of any issue relating to the matrix contract.’

109 The Swiss Federal Tribunal in *Les Emirats Arabes Unis v Westland Helicopters* (1994) *Bulletin of the Swiss Arbitration Association* 404, did not initially take a position on this point, but in a decision a year later in *W v E and V* (1995) *Bulletin of the Swiss Arbitration Association* 217, it acknowledged the existence of a ‘universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilized countries’.

stage. In the *Lemenda Case*,

concerning a contractual dispute where an intermediary was obliged to use personal influence in order to obtain a contract in Qatar, Phillips J refused to enforce the contract on the grounds that it was contrary to English public policy, which itself was founded on general principles of morality. Moreover, he found the contract also violated a similar public policy in the country of performance. The theoretical possibility exists, therefore, that where the contractual terms do not offend the public policy of the proper law of the contract and the place of performance, the award is susceptible to enforcement in the United Kingdom. This is exactly what transpired in the *Westacre Case*.

It concerned a contract governed by Swiss law by which the defendants appointed the plaintiffs as consultants for the procurement of contracts for the sale of military equipment to Kuwait. During the arbitral proceedings the Kuwaitis contested that the contract envisaged an element of fraud and bribery and was therefore contrary to public policy. Although the defendants raised the concept of public policy, because this was done before the arbitral tribunal it entailed also a claim of non-arbitrability. The arbitrators held the dispute to be arbitrable on the basis of separability and so did the Swiss Federal Tribunal. The plaintiff obtained leave, *ex parte*, to enforce the award in England. The Court found that performance of the contract would not have offended the public policy of Kuwait, nor would it have been contrary to its laws. Moreover, the same was true as regards the public policy of Kuwait. The preceding analysis concerns, however, only the laws and jurisprudence of a single jurisdiction, namely the United Kingdom. Each country is free to set up its own public policy and arbitrability rules, so long as these are consistent and do not change in a discriminatory fashion on a case-by-case basis. The fact that particular behaviour is prescribed as criminal under treaty or customary international law does not mean that the said behaviour is

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359, where the Paris Court of Appeal took the view that corruption was contrary to the ethics of international commerce. Equally, in the landmark ICC Arbitration case 1110 (1963), Judge Largegren famously held a dispute over bribing not to be arbitrable as contrary to public morality, although Wetter argues that a further reason as to why the separability doctrine was not applied is because the contract lacked an arbitration clause. See G Wetter, ‘Issues of Corruption before International Tribunals: The Authentic Text and True Meaning of Judge Gunnar Largegren’s 1963 Award in ICC Case No 1110’ (1994) 10 Arbitration International 277.

112 Ibid 461, per Phillips J.
113 *Westacre Investments Inc v Jugoiimport-SPDR Holding Co Ltd and Others* [1999] 3 WLR 811.
114 The jurisprudence of the Swiss Federal Tribunal in this regard is very consistent. See the decision of the Swiss Federal Tribunal, 2 September 1993, in *National Power Corp (Philippines) v Westinghouse (USA)* ATF 119 II 380.
115 *Westacre judgment*, above n 113, 822.
116 *Soleimany v Soleiman* [1999] QB 785, concerned a contractual dispute between a father and son regarding the smuggling of carpets from Iran to the United Kingdom. Although Waller LJ noted that some ‘illegal or immoral’ dealings are ‘incapable of being arbitrated in English law where the agreement to arbitrate was illegal or violated public policy, the Court of Appeal found the arbitration agreement valid notwithstanding the contract was contrary to the laws of the country of performance’. Ibid *Soleimany*, 797. The Court of Appeal, eventually, refused to enforce the award.
automatically non-arbitrable. Arbitrability concerns questions of civil law, whereas a convention criminalising particular behaviour concerns obligations that the signatories undertake in the realm of criminal law. Some criminal law conventions, however, encompass also the civil law dimension of certain crimes, such as corruption. This is true with regard to Article 3(4) of the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, which urges parties to consider the imposition of additional civil or administrative sanctions. Where this is the case, states parties are under an obligation to enact appropriate civil legislation and the courts, where the matter is dealt with under common law, must take due heed of their country’s contractual undertakings. However, even the admonitions of a wide treaty provision akin to Article 3(4) of the OECD Convention does not oblige states to render un-arbitrable disputes relating to corruption; or other crimes as the case may be. Where the treaty provision is not specific enough, the most probable course of action is to permit arbitration under the doctrine of separability, but to refuse recognition and enforcement as a matter of public policy.

(a) Arbitrability and public policy in contemporary Islamic jurisprudence

Public policy considerations have also arisen where the subject matter in question does not constitute a transnational offence, but where, nonetheless, it offends the religious practices of a particular cluster of states. At the same time the said practice can constitute a regular and unproblematic activity in other parts of the world. A poignant example is the prohibition of simple or compound interest in countries adhering to Islam. As a result of its prohibition, all contracts involving the imposition of interest are void and disputes arising therefrom are not amenable to judicial or arbitral resolution. In Islamic fiqh jurisprudence, interest (riba) is defined as ‘an increase in one of two homogenous equivalents being exchanged without this increase being accompanied by a return’. Two types of riba are recognized: a) riba al nasiah, relating to a specified increase in return for postponement of, or waiting for, the payment, and; b) riba al fadl, which arises where the increase is irrespective of the postponement and is not offset by something in return. It is the first of these, riba al nasiah, that pervades banking activities and which is therefore prohibited in most systems governed by some form of Shari’a. Given, therefore, that it constitutes a prohibited practice, transactions involving riba al nasiah are not amenable to conciliation, or to arbitration, as a result. The conclusion to be drawn from this is that any banking activities

118 Qur’an, 1:275.
120 Ibid.
121 Art 2 of the 1983 Saudi Arbitration Act clearly states that arbitration is permitted in disputes that may be referred to conciliation. Royal Decree No M/46, issued on 12/07/1403 H (1983), repealing in the process the relevant provisions of the Commercial Court Code of 1931. Reprinted in Umm Alqura Gazette, Issue No 2969 of
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involving the payment of interest, as well as other Islamic banking transactions that are incompatible with the principles of Shari’a, will not only be non-arbitrable, but will, moreover, be declared as void by Saudi courts. The Saudi government, itself, seems to have introduced an exception to the riba-prohibition rule, by inserting a clause in a recent Gas Concession Agreement, whereby interest is to be charged for late payment. Given the agreement provides for arbitration where a dispute arises, all matters relating to the payment of interest for delays are arbitrable. It is not entirely clear whether this is a sole exception, but it is certainly evidence that the riba-prohibition rule is not seen as absolute by the Saudi government and that therefore the pacta sunt servanta rule is not hierarchically inferior to its riba-prohibition counterpart. Exceptionally, Articles 76 and 77 of the United Arab Emirates Federal Commercial Transactions Law No 18 (1993) permits a creditor to charge simple (as opposed to compound) interest, which must not exceed 12 per cent. Some law firms warn their clients that it is not clear whether such an interest is compatible with Islamic law and less so if the courts will deem a dispute of this nature arbitrable. However, given the express statement of the Law and the Interpretative Decision No 14/9 (28 June 1981) of the Constitutional Department of the Federal Supreme Court of Abu Dhabi, according to which economic necessity requires the charging of simple interest by banks), as well as Judgment No 245/20 (7 May 2000) of the Federal Supreme Court of Abu Dhabi (equally endorsing simple interest), disputes as to simple interest must be presumed as arbitrable in the United Arab Emirates.

While the question of arbitrability with respect to an offence relates to an executive decision to whether particular behaviour should be criminalised, the acceptance, or not, of interest is a matter of religious importance in Islam. The emergence of a consensual transnational public policy with respect to the former is harder to achieve because of the particular overriding interests of the states concerned, whereas in relation to the latter consensus is taken for granted because of the express stipulations of the Qur’an. Even so, two states sharing the same religious culture end up expressing the realities of their respective social cultures in law in a different manner.

VII. Conclusion

There is a need to point out certain limitations to a study concerning the existence of a general rule emanating from the laws and judicial practice of states,

122 Significantly, Saudi judicial practice demonstrates that in the enforcement of a foreign arbitral award in which the losing party was ordered to pay interest, the Saudi court of enforcement rejected only that part of the award that ordered the payment of interest. Diwan Almazalim Decision No 19/28 of 1399 H (1979). The decision is cited in the unpublished and draft doctoral thesis of A Baamir, ‘The Arbitration and Enforcement of Banking Disputes in Saudi Arabia’ (Brunel Law School, 2008).

123 Art 18, Gas Concession Agreement between the Kingdom of Saudi Arabia and Lukoil Overseas, reprinted in Umm Alqura Gazette, Issue No 3990 of 15/03/1425 H (4/05/2004).

irrespective of the fact that one is not necessarily looking for a rule of customary international law. This limitation is primarily methodological and concerns a legal researcher’s difficulty in accessing the laws, regulations and judgments of most states, let alone subsequently incorporating them into a study without giving the impression of a descriptive and statistical treatise. This article has therefore taken account of the major legal systems under the following premises: a) that they are most often chosen by the parties as arbitral seats; b) they are, moreover, sought by the parties for the purposes of enforcement, and; c) the laws and judgments emanating therefrom possess a transnational and extraterritorial character (eg the Mitsubishi Case).

This article has not been able to discern a customary rule on arbitrability. Given the absence of a treaty provision to that effect, this result is not surprising. However, a general trend is evident. The larger of the developed states, particularly the United States, the United Kingdom and the European Union have since the early to mid-1980s favoured a policy of extending the scope of arbitrability to disputes that were previously within the exclusive domain of national courts or the authority of the executive. This coincides, in the United Kingdom, with a wave of privatisations initiated by the Thatcher government and a restructuring of the United States economy by the Reagan administration. It would have been wholly anachronistic of both governments to force private entities to employ the normal judicial system to oversee their disputes, particularly when in most cases, disputes were transnational in nature and where, moreover, speed was of the essence, as was confidentiality. Therefore, the presumption has since been in favour of arbitrability, unless a statutory provision to the contrary so demands, or, exceptionally, where the existence of fraud or corruption forces a judge or arbitrator to rule against the separability of the arbitration clause from the contract itself. In every case, however, the parties are not free to arbitrate on the validity of actions that fall exclusively within the authority of the state (such as the granting of patents, or the determination of the public or criminal law consequences arising from the violation of anti-trust laws). Rather, private entities can arbitrate otherwise non-arbitrable disputes, only insofar as these arise out of a contractual undertaking and so long as the claims arise out of the contract. It is doubtful that the relevant provisions of the European Convention of Human Rights were a significant factor towards this direction in the European context: no case on arbitrability has so far arisen.

For those developing states that entertain, and indeed welcome, the prospect of direct foreign investment, their arbitrability laws are not always shaped by their own particular needs, as economies in need of some protection for local producers and manufacturers. The proliferation of bilateral investment treaties and the imposition of model clauses by the most powerful states have necessarily removed the sovereign prerogative of some developed states, by which they could have otherwise excluded some disputes from commercial, rather than foreign investment arbitration. This result has not only come about as a result of the specific wording of particular bilateral investment treaties regarding arbitrability, but is also implicit

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from the fact that the concept of ‘investment’ has itself been expanded in recent years to encompass a range of activities and assets, including intellectual property rights.

The liberal trend towards arbitration, despite its national limitations where applicable, is indeed apparent. Whereas even up until the mid-1990s developed states not only tolerated, but implicitly rewarded, corrupt practices by companies incorporated under their laws, it is doubtful that contractual claims arising out of corrupt undertakings may be arbitrated without problems throughout the world. Finally, the extension of arbitrability is not without its share of problems. The precedent in the Mitsubishi Case stipulates that although domestic anti-trust disputes may not be referred to arbitration, transnational disputes of this nature are amenable to arbitration. The Supreme Court’s caution that there is no guarantee that such awards will be enforceable even in the United States does little to appease those states that have commenced parallel proceedings on the same set of facts.