



Trends in Arbitrability

by Dr Beata Kozubovska

Abstract

In recent years a trend toward expansion of arbitrability has been noticed. Each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not. Arbitration friendly countries inevitably attract more arbitration users and this results in forum shopping. Public policy doctrine is not entirely relevant to the concept of arbitrability. Precisely for this reason a different approach has been suggested. The restrictions of arbitrability are more relevant and precisely described by the reference to the origin of arbitration; arbitration by being of the contractual nature cannot affect people that are outside the scope of the arbitration agreement. Restriction of arbitrability refers to the contractual nature of arbitration process which lacks the tools needed to reach the relevant parties beyond the arbitration agreement and not to public policy issues.

1. Introduction

In recent years a trend toward expansion of arbitrability has been noticed. Arbitration is considered to be an attractive competitor to the court due to its features such as preservation of privacy, costs saving, expeditious decision making, choice and competence of arbitrators, and avoidance of adversarial proceeding as there are limits of adjudication.

In this article the term “arbitrability” will be used as a condition for the parties to refer particular categories of disputes to arbitration tribunal (objective arbitrability). Contrary to the understanding of “arbitrability” in the U.S. where it refers to the whole issue of the tribunal’s jurisdiction¹.

It is important to mention that “... Each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not”². Arbitration friendly countries inevitably attract more arbitration users and this results in forum shopping. The Author is committed to the idea that competition between national law makers in setting attractive forum for arbitration is desirable and will lead to creation of decent arenas for arbitration³.

2. What is the rationale behind inarbitrability of certain types of disputes?

To begin with, we could invoke beautiful legal prose that encapsulates the rationale behind the inarbitrability concept: “... the central theme in non-arbitrability cases is a concern that society will

¹ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 5

² A Redfern and M Hunter, *Law and practice of International Commercial Arbitration*, London: Sweet & Maxwell, 1991, p 137

³ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 17

be injured by arbitration of public law claims. Courts express a fear that public law issues are too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators are like foxes guarding the chicken coop, with a pro-business bias that will lead to under-enforcement of laws designed to protect the public. Lack of appeal on the merits of arbitral awards in the United States makes arbitration seem to some as a “black hole” to which rights are sent and never heard from again⁴. Along the same lines, the notion of non-arbitrability of the vast majority of disputes is grounded upon the old concept which holds that the referral of some categories of disputes to arbitration that is not controlled by the state itself, goes against sovereign dignity⁵. Such position was adopted in countries which historically expressed distrust toward arbitration. They feared that a method of dispute resolution could favour parties from industrialized countries⁶. Fortunately, the aforementioned views have been revised since then and no longer hold in the modern and arbitration friendly legal systems.

It is important to realise that arbitration should not be regarded as second level justice and, therefore, the right word to use in arbitrability context is not “incapable” of being settled by arbitration but merely “not permitted” to arbitrate by state for public policy reasons and mandatory rules⁷. The author is inclined towards the idea that almost every dispute, which is capable of settlement by adjudication, may be arbitrated.

Parties may refer any claim to arbitration except where statutory provisions preclude the arbitration of particular types of disputes. Even though there might be certain types of disputes which legislators intended to preserve for the courts exclusively, in accordance with the preemption doctrine, national non-arbitrability rules may be overcome in the interstate commerce context⁸.

3. The relationship between arbitrability and public policy. Are the aforementioned terms synonyms?

It is not easy to establish the precise relation between the doctrine of non-arbitrability and public policy. Some scholars tend to distinguish these categories. However, there are those who use these terms as synonyms and state that arbitrability merely reflexes the public policy⁹. The author would argue that the aforementioned categories are not synonyms. Even if a dispute involves issues of public policy this is not to be considered as automatically non-arbitrable. For instance, competition law claims involve matters of public policy, nevertheless they usually are arbitrable¹⁰. Even in the New

⁴ WW Park, “National law and Commercial Justice, Safeguarding procedural Integrity in International Arbitration”, 63 Tulane Law Review 648, 1989, p 700 in M Lourens, “The issue of “Arbitrability” in the Context of International Commercial Arbitration”, 11 South African Mercantile Law Journal 363, 1999, p 365

⁵ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 6

⁶ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 6

⁷ Redfern, Hunter, Blackaby, and Partasides, *Redfern & Hunter on International Arbitration*, 2004, p 19

⁸ *Southland Corp. v. Keating*, (1984) 104 S. Ct 852

⁹ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p 198

¹⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, (1985) 473 U.S. 614, 626-27 (U.S. S.Ct)

York Convention¹¹ non-arbitrability and public policy are established separately in the Article V (2) (a) and Article V (2) (b), respectively. This confirms that these two categories are indeed distinct. The non-arbitrability doctrine provides that in certain cases it cannot be turned to arbitration- arbitration is precluded from rendering binding award (regardless of its results); whereas the public policy doctrine provides that certain results reached by arbitration tribunal contradict public policy and cannot be enforced¹².

Often restrictions on arbitrability tend to refer to public policy generally. However, laws rarely explicitly point to only few existing concrete “public policy” provisions. In those rare cases when they do, it often lacks of clear guidance and decent justification to explain why certain disputes should be submitted to the exceptional jurisdiction of the courts¹³.

The eagerness and possessiveness of domestic laws to hold the exclusive courts' jurisdiction over certain types of disputes should be replaced by more general public interest of promoting trade and commerce through an effective method of dispute resolution¹⁴. In the 1990s, the French Court in the context of international arbitration in *Ganz*¹⁵ and *Labinal*¹⁶ stated that “...the arbitrators have jurisdiction to rule on the arbitrability of the dispute which is submitted to them, having regard to the notion of international public policy, and if they conclude that the dispute is arbitrable they may apply rules that are relevant to the dispute, regardless of whether these are public policy rules”¹⁷. French case law once again confirmed that public policy is not relevant to the determination of arbitrability of disputes by arbitrators. A similar view has been expressed in a number of other European jurisdictions. For instance, the Swiss court ruled that a dispute concerning the validity or termination of a contract may be arbitrable despite the fact that one of the party brings up an argument that relies on public policy considerations¹⁸. I believe that such approach is the right one to take, as otherwise arbitrators would have to decide on the substance of the dispute first (inefficient time use and waste of financial resources) in order to be able to notice the breach of public policy (to reach the conclusion whether the issue is arbitrable)¹⁹. All in all, the examples above prove the trend toward diminishing the role of public policy on concept of arbitrability. Along the same lines, some scholars have suggested that the relevance of public policy to arbitrability is rather limited. They argue that in the inarbitrable categories of disputes, non-arbitrability relates to the restriction of arbitration as a method of dispute

¹¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by United Nations on 10 June 1958 and entered into force on 7 June 1959

¹² Gary B Born, *International Commercial Arbitration*, Kluwer Law International, 2009, p 772

¹³ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 9

¹⁴ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 10

¹⁵ *Ganz*, 1991 Court of Appeal of Paris in Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 376

¹⁶ *Labinal*, 1993 Court of Appeal of Paris in Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 376

¹⁷ Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 376

¹⁸ *Ampalgas*, 1975 Chambre des Recours du Canton de Vaud; (1981) *Journal des tribunaux* III, 71

¹⁹ Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 375

resolution of consensual nature, and not to public policy²⁰. The strength of the argument is backed by the fresh breeze that has been noticed in the recent years in the international arena: decreasing role of public policy concerns as a barrier to arbitrability has been noticed (for instance, by allowing the arbitration in cases that require the application of public policy rules)²¹. In the same vein, in the United States the latest legislative initiatives (Arbitration Fairness Act of 2007 and Fair Arbitration Act of 2007)²² aimed to limit the scope of arbitrability on public policy considerations²³. Without having the possibility of looking into a crystal ball, it cannot be said whether these projects will succeed or if similar legislation would be enacted in other countries. To sum up, public policy impact on non-arbitrability concept should be revised.

However, today public policy concern is still relevant when defining the inarbitrability. Why are public policy matters to be considered to be inarbitrable? Opponents of arbitrability of public policy issues often invoke certain arbitration procedural features, for instance, less intense fact-finding process, the absence of particular rules of evidence compared to the evidential proceedings in court, and the laconic or lack of reasoning in the award. Such position was reflected in a number of courts' decision, for instance, the U.S. Supreme court stated "... the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable"²⁴; In another decision the U.S. Supreme Court ruled " An arbitral award can be made without explanation of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law"²⁵; One more procedural difference is limited judicial review of arbitral awards (and absence of appeal process) as pointed out in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*²⁶: " Arbitration awards are only reviewable for manifest disregard of the law ... and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable. ... Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets"; Another objection refers to the privacy and confidentiality of arbitration process in *Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner, v. David Ware*²⁷: "There is no explanation of why a judicial proceeding, even though public, would prevent lessening of investor confidence. It is difficult to understand why muffling a grievance in the cloakroom of arbitration would

²⁰ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 20

²¹ Kirry "Arbitrability: Current Trends in Europe", *Arbitration International*, Vol 12, Nr 4, 1996, p 375

²² "...Drafts would amend the U.S. Federal Arbitration Act to invalidate any pre-dispute arbitration agreement requiring arbitration of an employment, consumer or franchise dispute, or any dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power" in L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 22

²³ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 22

²⁴ *Alexander v. Gardner-Denver Company* 415 US 60 (1974)

²⁵ *Scherk v. Alberto-Culver Co.* (1974). 417 US 506, S Ct

²⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 1985, 473 US 614, S Ct

²⁷ *Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner, v David Ware*, 1973, 414 US 117

undermine confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored in the light of impartial public court adjudication”.

The author is committed to the idea that procedural differences between arbitration and litigation do not convert the aforementioned private means of dispute resolution into compromised dispute resolution mechanism. Otherwise, if one had to follow the latter argument all disputes should be excluded from arbitration, even purely monetary claims; particularly having considered their collective impact on economy and society that goes far beyond the parties to the private contract. That is to say that private means of dispute resolution operate in “conformity” with fundamental process’ principles and are the subject to guarantees set in Convention for the protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) Art. 6²⁸. To sum up, the features of arbitration make it a perfectly tailored alternative method of dispute resolution, having all the necessary rigid safeguards and fair proceedings. Alleged “procedural disadvantages” will be discussed in more depth, later on in the paper when dealing with the arbitrability of specific dispute types.

Second line of arguments question the ability of arbitrators to rule on matters that include public policy issues. In the *American Safety Equipment Corp. v. J.P. Maguire & Co.*²⁹ the U.S. court expressed that: “... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community-particularly those from a foreign community that has had no experience with or exposure to our law and values”. Bigger distrust towards arbitrators was presented in *University Life Insurance Co. v. Unimarc Ltd.*³⁰ decision: “... antitrust issues are considered to be at once too difficult to be decided competently by arbitrators- who are not judges, and often not even lawyers- and too important to be decided otherwise than by competent tribunals”. Moreover arbitrators are often pictured as unable to resolve the dispute between the parties of unequal bargaining powers; consumers, employees often presented as weak parties contrary to the powerful entrepreneurs who by “forcing” to sign arbitration agreement deprive them of the access to courts. The reasoning behind such approach is that arbitrators being private judges are more sympathetic to private companies and will not address properly the interests of weaker parties. Weaker parties are said to have no real options other than to accept arbitration since due to the fact that a growing amount of commercial parties are adopting arbitration clauses, other party has no choice but to accept them while signing job contract or entering into the purchase of goods or services contracts. It is said that arbitrators being privately funded might favour the repeat-players in order to assure that they will opt in for arbitration in the future. “How much profit it and individual arbitrators make depends on how often they work. Thus, an almost symbiotic relationship exists between the arbitrator and repeat-player”³¹. Some have come up with the idea that arbitrators take into account the interests of parties to the dispute only, and not that of a wider society. That is to say that consumer or employment laws are here to protect socially weaker groups of people and may be implemented only by court that adopts public view toward the dispute and not arbitration that adopts private perspective.

²⁸ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009

²⁹ *American Safety Equipment Corp v J P Maguire & Co* 391 F 2d 821 (2d Cir 1968)

³⁰ *University Life Insurance Co v Unimarc Ltd* 699 F 2d 846 (CA7 1983)

³¹ A Brafford, “Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?” 21 *Journal of Corporate Law* 332, 1995-1996, p 1257

The author is rather sceptic about the latter view as we cannot take for granted that judges contrary to arbitrators are sensitive about the needs of consumers or employees. Furthermore the public policy rules protecting the interest of the parties are often expressed in clear terms and do not leave much space for misinterpretation. For instance, statutory rights of the consumers as to the period of time for returning unwanted goods is clearly stated and not expressed as abstract norm. It is to say that it is not crucial who has to apply correctly public policy rules arbitrators or judges. Moreover, even in the situation where the scope of discretion is wide decision makers have to rule by referring to factual situation, possessed evidence, and case law rather than their personal views. Therefore the author does not see the correlation between the "private" decision maker (arbitrator) and inability to applying public policy norms in accordance with their legislative aim. In addition, arbitrators should apply public policy rules. It goes without saying that different scenarios are possible. However, it is more a question of the incentive of arbitrators to ignore public policy rules rather than the issue of whether arbitration is unsuitable to address public policy issues. At the end of the day, the aim of arbitrators is to render the enforceable award. Therefore they will not ignore the potential impact that ignorance of particular state policy might have on the rendered decision. Any reasonable arbitrator would take into the account the public policy norms of the country where award might need to be enforceable.

To recapitulate, there is no substantial correlation between arbitrability and public policy. That is to say that public policy doctrine is not entirely relevant to the concept of arbitrability. Precisely for this reason a different approach has been suggested. The restrictions of arbitrability are more relevant and precisely described by the reference to the origin of arbitration; arbitration by being of the contractual nature cannot affect people that are outside the scope of the arbitration agreement (contrary to the jurisdiction of the courts)³². For instance, the limitation on arbitrability of insolvency disputes refers to the fact that the resolution of this category of claims can be more efficiently achieved by collective litigation proceedings where all the parties may be taken before the same court (e.g. eliminate the risk of contradicting awards)³³. Along the same lines, the arbitration process between two parties, related to the ownership rights of the patent (requirement of authorization by public authority), excludes third party who in fact might be the legitimate owner of the latter right; this is contrary to the court proceedings where third parties have possibilities to take part in the proceedings and make sure that the public record would reflect the actual ownership status of patents³⁴. Restriction of arbitrability refers to the contractual nature of arbitration process which lacks the tools needed to reach the relevant parties beyond the arbitration agreement and not to public policy issues.

To conclude, "The marginalisation of public policy, the growing trust in international arbitration and assimilation of arbitrators to judges have allowed the domain of arbitration to extend to areas of economic activity involving significant public interest"³⁵.

³² L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 32.

³³ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 33

³⁴ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 37

³⁵ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 52

4. Adjudication and Arbitration Should Go in Tandem

“... there are fashions in the world of arbitration, and that the issue of arbitrability is becoming increasingly fashionable”³⁶. Having analyzed current tendencies of arbitrability the author would draw the inference that in disputes related to international commerce there are few spheres that are inarbitrable. Following the latter trend “one can conclude that the subject of arbitrability of disputes arising from international business transactions should – and hopefully will- become out of fashion in the not too distant future”³⁷. The reason why during the past three decades a trend toward expansion of arbitrability has been noticed is the success of this alternative means of dispute resolution and huge increase in use of it in international commercial disputes. To add, it serves public as well as private purposes. The use of arbitration also contributes to the saving of the budget expenses. Here the author would like to argue that promoting arbitration does not mean that the quality of justice would suffer. Along the same lines, arbitration helps to decrease workload of courts and prevents the growth of courts costs respectively. Consequently, it helps to maintain the quality of the latter public service. In the same vein, I do not think that “It is the essential dividing line between public and private justice”³⁸. Latter quotation is a mere expression of inherent skepticism and distrust towards arbitration. Moreover, as “justice should not merely be done but also should be seen to be done” people would not submit their cases to arbitration without seeing the benefits of it.

Therefore in the recent years many national regulatory provisions have become more arbitration friendly. The court’s interpretation of national laws has favoured the arbitrability of certain types of disputes that historically were inarbitrable as well. The tendency is noticed worldwide. Such concept is consistent with the objective of the New York Convention³⁹ and is compatible with modern legal systems. Moreover, it is an expression of party autonomy especially in international commercial disputes. International arbitration has the potential to provide benefits of cost, speed and enforceability that are not readily replicated in national courts.

Arbitration due to flexibility of its process has a lot to offer in a wide majority of disputes. For instance, “... there are now more than 2,000 bilateral and multilateral investment treaties in force, pursuant to which most states have undertaken to arbitrate a vast range of disputes with foreign investors, often affecting public interests and third party rights in profound ways. At the same time, national laws and institutional arbitration rules have provided for the arbitration of class action claims, small claims by consumers and employees, human rights claims—and other “new” categories of disputes”⁴⁰. The author inclines to the idea that demand for arbitration in the international arena has significantly increased due to, among other factors, the paramount concern of the parties to have a neutral forum (here the comparison may be drawn to the arbitrators on the football pitch where the referee always comes from the third country so that any bias would be eliminated; to prevent any possibility for the court to favour local parties at the expense of foreign parties- that is not to say that judges’ objectivity is doubted but once again neutral arbitration helps to support the concept that

³⁶ Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 373

³⁷ Kirry “Arbitrability: Current Trends in Europe”, *Arbitration International*, Vol 12, Nr 4, 1996, p 390

³⁸ L A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p 5

³⁹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations on 10 June 1958 and entered into force on 7 June 1959

⁴⁰ Gary B Born, *International Commercial Arbitration*, Kluwer Law International, 2009 p 839

“justice not only has to be done but also should be seen to be done”), workability, confidentiality and fairness of this dispute resolution method.

By no means the author is suggesting that arbitration is suitable for all categories of disputes. All in all, arbitration is not a panacea and may be not appropriate tool to resolve certain types of claims where for example the nature of the disputes cannot permit to opt in for the consensual process between relevant parties; for instance, “... requests that an arbitral tribunal declare a company bankrupt, impose a criminal sentence, approve a merger, or issue similar administrative acts. These decisions necessarily dictate the rights and obligations of third parties and involve the exercise of prosecutorial or administrative discretion which must reside in democratically-accountable decision-makers”⁴¹. Along the same lines, “... arbitration does not generate law. Thus, when a company seeks a ruling on a controlling point of law, it must bring the matter before a court to obtain the desired precedent”⁴².

All in all, “... the relationship between the arbitral and judicial systems is symbiotic- the courts provide implementation and enforcement mechanisms for arbitration, and arbitration presents great opportunities for relieving court congestion and delay”⁴³

5. Conclusion

By way of conclusion, this paper provides with a survey of a recent advancement in the field of arbitrability. When the non-arbitrability doctrine is applied, it must be within the limits imposed by Article 2(3) and Article 5(2)(a) of the New York Convention. That is to say that non-arbitrability should be applied narrowly and states should not abuse the use of escape clauses. States should create hospitable and safe environment for voluntary arbitration. There is no substantial correlation between arbitrability and public policy. Public policy doctrine is not entirely relevant to the concept of arbitrability. Precisely for this reason a different approach has been suggested. The restrictions of arbitrability are more relevant and precisely described by the reference to the origin of arbitration; arbitration by being of the contractual nature cannot affect people that are outside the scope of the arbitration agreement. Restriction of arbitrability refers to the contractual nature of arbitration process which lacks the tools needed to reach the relevant parties beyond the arbitration agreement and not to impinge upon public policy issues.

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⁴¹ Gary B Born, *International Commercial Arbitration*, Kluwer Law International, 2009 p 840

⁴² J.A. Martin, “Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution”, 49 *Stanford Law Review* 917, 1996-1997 p 995

⁴³ J.R. Allissont, (1985-1986) “Arbitration agreements and antitrust claims: the need for enhanced accommodation of conflicting public policies”, 64 *The New York University Law Review* 246, 1985-1986 p 276