Arbitrability

Arbitrability, in the sense in which it is used both in this book and generally,[45] **3–12**
elves determining which types of dispute may be resolved by arbitration and
ch belong exclusively to the domain of the courts. Both the New York
vention and the Model Law are limited to disputes that are "capable of
lement by arbitration".[46]

n principle, *any* dispute should be just as capable of being resolved by a
ate arbitral tribunal as by the judge of a national court. Article 2059 of the
nch Civil Code, for example, provides that "all persons may enter into

urts around the world have adopted even wider interpretations of similar clauses, although the nderlying principles are similar. See *ABI Group Contractors Pty v Transfield Pty Ltd Mealey's ternational Arbitration Report* (1999), Vol.14, No.1 pp.G-1–G-10; summary in (1999) XXIV earbook Commercial Arbitration 591; *Multistar Leasing Ltd v Twinstar Leasing Ltd*, US District ourt, Eastern District of Louisiana, August 28, 1998, Civil Action Case No.98-1330; summary (2000) XXV Yearbook Commercial Arbitration 871; *American Bureau of Shipping v Tencara pA*, Italian Corte di Cassazione, Plenary Session, June 26, 2001, No.8744; summary in (2002) XXVII Yearbook Commercial Arbitration 509. See also the decision of the German court in *andgericht Hamburg* (1979) IV Yearbook Commercial Arbitration 261 and the commentary by an den Berg, "Scope of the Arbitration Agreement" (1996) XXI Yearbook Commercial Arbitration 415.

nglish cases give further guidance. In *Ashville Investments Ltd v Elmer Contractors* [1988] loyd's Rep. 73, an arbitration clause which referred to "any matter or thing of whatsoever nature rising thereunder or in connection therewith" was sufficiently wide to cover claims based on lleged mistake and misrepresentation. Similarly in *Ethiopian Oilseeds and Pulses Export Corp v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep. 86, the words "arising out of" were held to cover disputes concerning rectification. But in *Fillite (Runcorn) Ltd v Aqua-lift (a firm)* (1989) 45 B.L.R. 27, disputes arising under a contract was not wide enough to include disputes as to misrepresentation, or negligent misstatements since it referred exclusively to obligations created by or incorporated into that contract. See also *Hi-Fert v Kiukiang Maritime Carriers* [1999] 2 Lloyd's Rep. 782.

n the US and elsewhere, there is sometimes discussion by judges and others as to whether a particular dispute is "arbitrable", in the sense that it falls within the scope of the arbitration greement. The concern in such cases is with the court's jurisdiction over a particular dispute rather than a more general enquiry as to whether the dispute is of the type that comes within the domain of arbitration. See Zekos, "Courts' Intervention in Commercial and Maritime Arbitration under US Law" (1997) 14 Journal of International Arbitration 99. For a general discussion of "arbitrability" in the sense of "legally capable of settlement by arbitration", see Sanders, "The Domain of Arbitration" in the "Arbitration" section of *Encyclopaedia of International and Comparative Law* (Martinus Nijhoff), Vol.XVI, Ch.12, pp.113 *et seq.*; see also Hanotiau, "The Law Applicable to the Issue of Arbitrability" ICCA Congress, Series No.14, Paris, 1998.

New York Convention, Arts II.1 and V.2(a); Model Law, Arts 34(2)(b)(i) and 36(1)(b)(i).

arbitration agreements relating to the rights that they may freely dispose of". Although Art.2060 further provides that parties may not agree to arbitrate disputes in a series of particular fields (*e.g.* family law), and "more generally in all matters that have a public interest" ("*plus généralement dans toutes les matières qui intéressent l'ordre public*"), this limitation has been construed in a very restrictive way by French courts. Similarly, s.1030(1) and (2) of the German Code of Civil Procedure provide that any claim involving an economic interest (*Vermögensrechtlicher Anspruch*) can be subject to arbitration, as can claims not involving an economic interest of which the parties may freely dispose.

However, it is precisely because arbitration is a private proceeding with public consequences[47] that some types of dispute are reserved for national courts, whose proceedings are generally in the public domain. It is in this sense that they are not "capable of settlement by arbitration".

3–13 National laws establish the domain of arbitration, as opposed to that of the local courts. Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. In some Arab states, for example, contracts between a foreign corporation and its local agent are given special protection by law and, to reinforce this protection, any disputes arising out of such contracts may only be resolved by the local courts. The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes. In the international sphere, the interests of promoting international trade as well as international comity have proved important factors in persuading the courts to treat certain types of dispute as arbitrable.[48]

If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different states that are or may be concerned. These are likely to include the law governing the party involved, where the agreement is with a state or state entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the place of enforcement of the award.

Whether or not a particular type of dispute is "arbitrable" under a given law is in essence a matter of public policy for that law to determine. Public policy varies from one country to the next, and indeed changes from time to time.[49] The most that can be done here is to indicate the categories of dispute that may fall outside the domain of arbitration.

[47] For instance, in the recognition and enforcement of the award.

[48] See the *Mitsubishi* case, discussed below. However, the opposite is often argued in the context of less developed countries. In that situation, it is suggested that the state should impose very strict limits on arbitrability, especially in respect of disputes involving state entities. The reason for such a policy is that this is the only way for these states to retain control over foreign trade and investment, where more economically powerful traders may have an unfair advantage. See Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989) 6 Journal of International Arbitration 7 at 16.

[49] The concept of so-called "international public policy" which may impose limits on the arbitrability of certain agreements—for instance, an agreement to pay bribes (below, para.3–20)—is considered later, in Ch.10, in the context of challenging recognition and enforcement of arbitral awards.

Reference has already been made in passing to contracts of agency, for which special provision may be made in some states as a matter of public policy. More generally, criminal matters and those which affect the status of an individual or corporate entity (such as bankruptcy or insolvency) are usually considered as not arbitrable. In addition, disputes over the grant or validity of patents and trade marks may not be arbitrable under the applicable law. These various categories of dispute are now considered. **3–14**