Introduction
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This treatise aspires to provide a comprehensive description and analysis of the contemporary constitutional structure, law, practice and policy of international commercial arbitration. It also endeavors to identify prescriptive solutions for the conceptual and practical challenges that confront the international arbitral process. In so doing, the treatise focuses on the law and practice of international commercial arbitration in the world's leading arbitral centers and on the constitutional principles and legal frameworks established by the world's leading international arbitration conventions, legislation and institutional rules.

International arbitration warrants attention, if nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs. For centuries, arbitration has been a preferred means for resolving transnational commercial disputes, as well as other important categories of international disputes.[1] The preference which businesses have demonstrated for arbitration, as a means for resolving their international disputes, has become even more pronounced in the past several decades, as international trade and investment have burgeoned. As international commerce has expanded and become more complex, so too has its primary dispute resolution mechanism – international arbitration.[2] The practical importance of international commercial arbitration is one reason that the subject warrants study by companies, lawyers, arbitrators, judges and legislators.

At a more fundamental level, international commercial arbitration merits study because it illustrates the complexities and uncertainties of contemporary international society – legal, commercial and cultural – while providing a highly sophisticated and effective means of dealing with those complexities. Beyond its immediate practical importance, international arbitration is worthy of attention because it operates within a framework of international legal rules and institutions which – with remarkable and enduring success – provide a fair, neutral, expert and efficient means of resolving difficult and contentious transnational problems. That framework enables private and public actors from diverse jurisdictions to cooperatively resolve deep-seated and complex international disputes in a neutral, durable and satisfactory manner. At their best, the analyses and mechanisms which have been developed in the context of international commercial arbitration offer models, insights and promise for other aspects of international affairs.

The legal rules and institutions relevant to international commercial arbitration have evolved over time, in multiple and diverse countries and settings. As a rule, where totalitarian regimes or tyrants have held sway, arbitration – like other expressions of private autonomy and association –

1 The history of international arbitration is summarized below. *See* §1.01.

2 The popularity of international commercial arbitration as a means of dispute resolution is discussed below. *See* §1.03.

has been repressed or prohibited; where societies are free, both politically and economically, arbitration has flourished.

Despite periodic episodes of political hostility, the past half-century has witnessed the progressive development and expansion of the legal framework for international commercial arbitration, almost always through the collaborative efforts of public and private actors. While the latter have supplied the driving and dominant force for the successful development and use of international commercial arbitration, governments and courts from leading trading nations have contributed materially, by ensuring the recognition and enforceability of private arbitration agreements and arbitral awards, and by affirming principles of party autonomy and judicial non-interference in the arbitral process.

In recent decades, the resulting legal framework for international commercial arbitration has achieved progressively greater practical success and acceptance in all regions of the world and most political quarters. The striking success of international arbitration is reflected in part in the increasing numbers of international (and domestic) arbitrations conducted each year, under both institutional auspices and otherwise,[3] the growing use of arbitration clauses in almost all forms of international contracts,[4] the preferences of business users for arbitration as a mode of dispute resolution,[5] the widespread adoption of pro-arbitration international arbitration conventions and national arbitration statutes,[6] the refinement of institutional arbitration rules to correct deficiencies in the arbitral process,[7] and the use of arbitral procedures to resolve new categories of disputes which were not previously subject to arbitration (*e.g.*, investor-state, competition, securities, intellectual property, corruption, human rights and taxation disputes).[8]

The success of international arbitration is also reflected by a comparison between the treatment of complex commercial disputes in international arbitration and in national courts – where disputes over service of process, jurisdiction, forum selection and *lis pendens*, taking of evidence, choice of law, state or sovereign immunity, recognition of judgments and neutrality of litigation procedures and decision-makers are endemic, and result in significant uncertainty and inefficiency.[9] Equally, the litigation procedures used in national courts are often ill-suited for both the resolution of international commercial disputes and the tailoring of procedures to particular parties and disputes, while decision-makers often lack the experience and expertise demanded by complex international business

3 *See* §1.03.

4 *See* §1.03.

5 *See* §1.04.

6 *See* §1.04.

7 *See* §1.04.

8 *See* §1.05.

9 The persistence and complexity of such disputes are beyond the scope of this work. They are discussed in G. Born & P. Rutledge, *International Civil Litigation in United States Courts* (5th ed. 2010); L. Collins *et al.* (eds.), *Dicey Morris and Collins on The Conflict of Laws* (15th ed. 2011); R. Geimer, *Internationales Zivilprozessrecht* (5th ed. 2005).

controversies. In all of these respects, international arbitration typically offers a simpler, more effective and more competent means of dispute resolution, tailored to the needs of business users and modern commercial communities.

Drawing on these advantages, this treatise aspires to describe the law, practice and policy of international commercial arbitration in a manner that enables it to be of use, and guidance, in other areas of international affairs, including international litigation. The treatise begins with an Overview, in Chapter 1, which introduces the subject of international commercial arbitration. This introduction includes an historical summary, as well as an overview of the legal framework governing international arbitration agreements and the principal elements of such agreements. Chapter 1 also introduces the primary sources relevant to a study of international commercial arbitration. The remainder of the treatise is divided into three Parts.

Part I of the treatise deals with international commercial arbitration agreements. It describes the legal framework applicable to such agreements, the presumptive separability or autonomy of international arbitration agreements, the law governing international arbitration agreements, the substantive and formal rules of validity relating to such agreements, the nonarbitrability doctrine, the competence-competence doctrine, the legal effects of international arbitration agreements, the interpretation of international arbitration agreements and the legal rules for identifying the parties to international arbitration agreements.

Part II of the treatise deals with international arbitration proceedings and procedures. It addresses the legal framework applicable to such proceedings, the selection and challenge of international arbitrators, the rights and duties of arbitrators, the selection of the arbitral seat, the conduct of arbitral procedures, disclosure or discovery, provisional measures, consolidation and joinder, the selection of substantive law, confidentiality and legal representation.

Part III of the treatise deals with international arbitral awards. It addresses the legal framework for international arbitral awards, the form and contents of such awards, the correction and interpretation of arbitral awards, actions to annul or vacate awards, the recognition and enforcement of international arbitral awards and the application of principles of *res judicata*, preclusion and *stare decisis* in international arbitration.

The focus of the treatise, in all three Parts, is on international standards and practices, rather than a single national legal system. Particular attention is devoted to the leading international arbitration conventions – the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[10] the European

10 *See* §1.04[A][1].

Convention on International Commercial Arbitration[11] and the Inter-American Convention on International Commercial Arbitration.[12]

This treatise rests on the premise that these instruments, and particularly the New York Convention, establish a constitutional framework for the conduct of international commercial arbitrations around the world. That framework is given effect through national arbitration legislation, with Contracting States enjoying substantial autonomy to give effect to the basic principles of the Convention. At the same time, the Convention also imposes important international limits on the ability of Contracting States to deny effect to international arbitration agreements and arbitral awards. These limitations have not always been appreciated by courts in Contracting States, and are not always fully addressed in commentary, but they form a critical constitutional foundation for the contemporary international arbitral process. Identifying and refining these limits is a central aspiration of this treatise.

The treatise also devotes substantial attention to leading national arbitration legislation – including the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration[13] and the arbitration statutes in leading arbitral centers (including the United States, England, France, Switzerland, Germany, Austria, Sweden, Singapore, Hong Kong, Japan and elsewhere). The treatise's focus is expressly international, focusing on how both developed and other jurisdictions around the world give effect to the New York Convention and to international arbitration agreements and arbitral awards. Every effort is made to avoid adopting purely national solutions, without consideration of international and comparative perspectives.

The treatise's international and comparative focus rests on the premise that the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has global application and importance. From this perspective, the analysis and conclusions of a court in one jurisdiction (*e.g.*, France, the United States, Switzerland, India or Hong Kong) regarding international arbitration agreements, proceedings, or awards have direct and material relevance to similar issues in other jurisdictions.

That conclusion is true both descriptively and prescriptively. In practice, on issues ranging from the definition of arbitration, to the separability presumption, the competence-competence doctrine, the interpretation of arbitration agreements, choice-of-law analysis, nonarbitrability, the role of courts in supporting the arbitral process, the principle of judicial non-interference in the arbitral process, the immunities of arbitrators and the recognition and enforcement of arbitral awards, decisions in individual national courts have drawn upon and developed a common body of international arbitration law. Guided by the constitutional principles of the New York Convention, legislatures and courts in Contracting States around

11 *See* §1.04[A][2].

12 *See* §1.04[A][3].

13 *See* §1.04[B][1][a].

the world have in practice looked to and relied upon one another's decisions and have formulated and progressively refined legal frameworks of national law to ensure the effective enforcement of international arbitration agreements and awards.

More fundamentally, national courts not only have but should consider one another's decisions in resolving issues concerning international arbitration. By considering the treatment of international arbitration in other jurisdictions, and the policies which inspire that treatment, national legislatures and courts can draw inspiration for resolving comparable problems. Indeed, it is only by taking into account how the various aspects of the international arbitral process are analyzed and regulated in different jurisdictions that it is it possible for courts in any particular state to play their optimal role in that process. This involves considerations of uniformity – where the harmonization of national laws in different jurisdictions can produce fairer and more efficient results – as well as the ongoing reform of the legal frameworks for international arbitration – where national courts and legislatures progressively develop superior solutions to the problems that arise in the arbitral process.

The treatise also focuses on leading institutional arbitration rules, particularly those adopted by the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association's International Centre for Dispute Resolution, as well as the UNCITRAL Rules.[14] Together with the contractual terms of parties' individual arbitration agreements, these rules reflect the efforts of private parties and states to devise the most efficient, neutral, objective and enforceable means for resolving international disputes. These various contractual mechanisms provide the essence of the international commercial arbitral process, which is then given effect by international arbitration conventions and national arbitration legislation.

Taken together, international arbitration conventions (particularly the New York Convention), national arbitration legislation and institutional rules provide a complex legal framework for the international arbitral process. That framework requires Contracting States to effectuate the broad constitutional mandate of the New York Convention – to recognize and enforce arbitration agreements and arbitral awards – while affording individual states considerable latitude in implementing these obligations. In turn, most Contracting States have used that latitude to adopt vigorously pro-arbitration legislative frameworks, which grant arbitral institutions, arbitrators and parties broad autonomy to devise mechanisms for the arbitral process and which give effect to international arbitration agreements and arbitral awards. The resulting legal framework provides a highly effective means for resolving difficult international commercial disputes in a fair, efficient and durable manner.

The treatise's analysis is intended to be clear, direct and accessible. International arbitration law is complex, sometimes unnecessarily so. That is unfortunate. Like most things, the arbitral process works better, and its problems are more readily confronted and overcome, when it is clearly

14 *See* §1.04[C].

described and when issues are transparently presented. Every effort has been made in the drafting of this treatise to avoid obscurity, and instead to address matters clearly and simply so they can be understood and debated.

Like international commercial arbitration itself, this treatise is a work in progress. The first edition of *International Commercial Arbitration*, published in 2009, was the successor to two earlier works by the same author; this second edition of the treatise builds upon and extensively revises these earlier works. In doing so, this edition of the treatise draws on the extensive body of judicial authority, legislative and institutional developments and commentary that have been become available since 2009.

This edition inevitably contains errors, omissions and confusions, which will require correction, clarification and further development in future editions, to keep pace with the ongoing developments in the field. Corrections, comments and questions are encouraged by email to gary.born@kluwerlaw.com.

of competence to resolve jurisdictional challenges to international arbitration agreements between arbitral tribunals and national courts, focusing on the divergent approaches to this issue in different national legal systems.

Chapter 8 discusses the legal effects of international arbitration agreements and the mechanisms for enforcing those agreements. It considers both the positive duties (*e.g.*, the obligation to participate in good faith and cooperatively in arbitral proceedings) and negative duties (*e.g.*, the obligation to refrain from litigating arbitrable disputes) imposed by arbitration agreements. The Chapter also sets out the various means by which these obligations are given effect, including stays of litigation, orders compelling arbitration, damages actions, antisuit injunctions and non-recognition of judgments procured in breach of a valid arbitration agreement.

Chapter 9 addresses the interpretation of international arbitration agreements. It considers the rules applicable to interpreting the scope of arbitration agreements which have been developed in different national legal systems. The Chapter also addresses the exclusivity of international arbitration agreements, as well as issues concerning the mandatory or optional nature of arbitration agreements.

Chapter 10 discusses issues relating to the identities of the parties to international arbitration agreements. In particular, it examines the various legal theories that have been used to give binding effect to arbitration agreements *vis-à-vis* non-signatories, including agency, alter ego status, the group of companies theory, estoppel, guarantor relations, third party beneficiary rights and miscellaneous other grounds. The Chapter also examines the choice of law governing the foregoing issues and the allocation of competence to decide such disputes between national courts and arbitral tribunals.

CHAPTER 2:
LEGAL FRAMEWORK FOR INTERNATIONAL ARBITRATION AGREEMENTS[1]

The validity, effects and interpretation of international arbitration agreements depend in substantial part on a legal framework of international arbitration conventions and national arbitration legislation. These instruments eliminate historic obstacles to the enforceability of arbitration agreements and provide a decisively "pro-arbitration" enforcement regime for such agreements. This Chapter examines that legal framework, focusing particularly on the jurisdictional requirements which must be satisfied in order for this regime to apply.

First, the Chapter introduces the presumptive validity of international commercial arbitration agreements under contemporary international arbitration conventions (particularly the New York Convention) and national legislation. Second, the Chapter addresses the definition of an "arbitration agreement," again under both international and national instruments. Third, the Chapter examines a series of additional jurisdictional requirements applicable to arbitration agreements under leading international arbitration conventions and national legislation, including requirements that such agreements concern a "commercial," "international" and "defined legal" relationship, and that they apply to the resolution of "disputes." Finally, the Chapter addresses the role of the arbitral seat's location in determining the legal framework applicable to an international arbitration agreement.

§2.01 INTRODUCTION

It is sometimes said that "arbitration is a creature that owes its existence to the will of the parties alone."[2] That is correct, but only partially correct. Although the parties' consent is essential for an agreement to arbitrate, the ultimate efficacy of an international arbitration agreement depends in large part upon its validity and enforceability in national courts, applying rules of national and international law.[3] Only if national courts are prepared to recognize and enforce an agreement to arbitrate, under applicable national and international law, can the parties' will be effective.

After a dispute arises, parties sometimes reconsider their prior commitments to a neutral, speedy and competent dispute resolution process[4] – often in favor of more parochial, less efficient, or less experienced decision-makers. That reappraisal frequently results in claims that the parties' arbitration agreement never existed, is invalid on various formal or substantive grounds, has been repudiated, waived, or

1 For commentary, *see* §1.04.
2 *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, ¶51 (Canadian S.Ct.).
3 *See* §1.02[B][3].
4 *See* §1.02[B].

otherwise terminated, or does not apply to the parties' dispute. The speedy and effective resolution of such jurisdictional objections is of fundamental importance to the international arbitral process.

[A] PRESUMPTIVE VALIDITY OF INTERNATIONAL ARBITRATION AGREEMENTS

As discussed above, both developed states and the international business community have taken a series of related steps over the past century to ensure the enforceability of international arbitration agreements and the efficacy of the international arbitral process.[5] In particular, they have developed increasingly "pro-arbitration" national and international legal regimes that recognize the presumptive validity and enforceability of international arbitration agreements and that provide effective enforcement mechanisms for such agreements. These legal regimes have contributed significantly over past decades to enhancing the efficacy of the international arbitral process.[6]

[1] Presumptive Validity of International Arbitration Agreements Under International Arbitration Conventions

Essential to the enforcement of international arbitration agreements are contemporary international arbitration conventions. Particularly significant in this regard are the New York Convention, the European Convention and the Inter-American Convention.

[a] New York Convention

As discussed above, one of the basic purposes of the New York Convention, as ultimately drafted, was to facilitate the enforcement of international arbitration agreements.[7] This was one of the Convention's fundamental objectives – notwithstanding the fact that the Convention was originally conceived and drafted to deal only with the recognition and enforcement of foreign arbitral awards; that focus continues to be reflected in the Convention's title, which is limited to the recognition of arbitral awards.[8] In fact, as discussed elsewhere, it was only in the final phases of negotiations that the Convention was extended to provide for the recognition of arbitration agreements, as well as awards.[9]

5 *See* §1.04.

6 *See* §1.04[A]; §1.04[B][1]; §5.01; §8.01. *See also* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶20 (2d ed. 2010); G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1161-62 (5th ed. 2011); J. Carter & J. Fellas, *International Commercial Arbitration in New York* 1-34 (2010); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1-4 (1999).

7 *See* §1.04[A][1].

8 As noted above, the Convention's title is the "United Nations Convention on the Recognition and Enforcement of *Foreign Arbitral Awards*," with no reference to arbitration agreements. *See* §1.04[A][1], p. 99

9 *See* §1.04[A][1], p. 101

The Convention's objectives with regard to arbitration agreements are evidenced in the instrument's negotiating history. That history documents the drafters' desire to make arbitration agreements more readily enforceable, including more readily enforceable than under the 1923 Geneva Protocol, in accordance with uniform international standards.[10]

National court decisions uniformly cite these objectives of the Convention.[11] As one national court concluded:

> "[The goal of the Convention was] to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[12]

Consistent with these objectives, Article II(1) of the Convention establishes a basic rule of formal and substantive validity for international arbitration agreements:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."[13]

10 A. van den Berg, *The New York Arbitration Convention of 1958* 6-10, 135 (1981); *Summary Record of the Twenty-Third Meeting of the United Nations Conference on International Commercial Arbitration*, U.N. Doc. E/CONF.26/SR.23 (1958) (discussing Article II); *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF.26/L.59, Agenda Item 4, ¶2 (1958) (working group draft of Article II); Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Law. 269, 277-79 (1979).

11 *See, e.g., Polimaster Ltd v. RAE Sys., Inc.*, 623 F.3d 832, 841 (9th Cir. 2010) ("[T]he New York Convention was enacted to promote the enforceability of international arbitration agreements."); *Int'l Ins. Co. v. Caja Nacional De Ahorro y Seguro*, 293 F.3d 392, 399 (7th Cir. 2002) ("The purpose of the New York Convention, and similarly the Panama Convention, is to 'encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'"); *Judgment of 20 January 1987, Société Bomar Oil NV v. Entreprise Tunisienne d'Activités Pétrolières*, 1987 Rev. arb. 482, 485-86 (Paris Cour d'appel) ("Considering the silence of the [New York] Convention, its interpretation requires to determine the objective of its drafters ... to facilitate dispute resolution by way of international commercial arbitration."); *Judgment of 7 February 1984, Tradax Exp. SA v. Amoco Iran Oil Co.*, XI Y.B. Comm. Arb. 532, 535 (Swiss Federal Tribunal) (1986) ("purpose of the Convention is to facilitate the resolution of disputes through arbitration"); *Judgment of 30 September 2010*, 2011 NJW-RR 569, 570 (German Bundesgerichtshof) ("[Convention] was intended to facilitate the enforcement of arbitration agreements"); *Automatic Sys. Inc. v. Bracknell Corp.*, (1994) 18 O.R.3d 257, 13 (Ontario Ct. App.) ("The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules chosen by the parties, is respected."); *Judgment of 28 January 2011, Altain Khuder LLC v. IMC Mining Inc.*, [2011] VSC 1, ¶53 (Victoria S.Ct.); *Altain Khuder LLC v. IMC Aviation Solutions Pty Ltd*, [2011] VSCA 248, ¶45 n.16 (Victoria Ct. App.) ("The New York Convention is widely recognised in international arbitration circles as having a 'pro-enforcement' policy.") (Warren, C.J.).

12 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 521 (U.S. S.Ct. 1974).

13 New York Convention, Art. II(1). The formal requirements that the Convention imposes with regard to arbitration agreements are elaborated in Art. II(2) of the Convention. *See* §5.02[A][2].

That rule is elaborated, and provided an enforcement mechanism, in Article II(3) of the Convention, which requires the courts of Contracting States to refer parties to international arbitration agreements to arbitration unless they find "that the said [arbitration] agreement is null and void, inoperative or incapable of being performed."[14] Unless one of those enumerated grounds for non-recognition is present, Articles II(1) and II(3) mandatorily require recognition of the arbitration agreement and reference of the parties to arbitration.[15]

As discussed in greater detail elsewhere, Article II's rules of formal and substantive validity and specific enforcement mechanism play a central role in the contemporary international arbitral process.[16] They mandate a "pro-arbitration" legal regime in all Contracting States which ensures the validity and enforceability of the material terms of those international arbitration agreements which are subject to the Convention – notwithstanding national arbitration legislation that sometimes perpetuates or revives intermittent historical mistrust of the arbitral process.[17] As an early commentator on the Convention observed, this "extraordinary provision" establishes a mandatory international obligation, with multiple facets, on Contracting States.[18]

As also discussed in greater detail below, Article II of the Convention provides the basis for several fundamentally important rules of international law. First, Article II allocates the burden of proof of the invalidity of an international arbitration agreement to the party resisting enforcement of the agreement.[19] Second, Article II requires that courts of Contracting States apply generally-applicable rules of contract law to the formation and validity of international arbitration agreements, without singling out such agreements for discriminatory requirements or burdens.[20] Third, Article II(1) permits Contracting States to treat particular categories of disputes as "nonarbitrable" (or "not capable of settlement by arbitration"), but requires that they do so exceptionally, and only where necessary to achieve specific and articulated policies.[21] Taken together, these uniform international rules have provided a highly effective and robust "pro-enforcement" legal framework for international arbitration agreements.

14 New York Convention, Art. II(3).

15 *See* §5.01[B][2]; §8.03.

16 *See* §1.04[A][1]; §5.01[B][2]; §5.02[A][2]; §5.06[B][1]. *See also Judgment of 15 January 1992*, XVIII Y.B. Comm. Arb. 427, 430 (Italian Corte di Cassazione) (1993) (Article II "means that arbitration prevails [over] court proceedings, so that the enforcement court, if it ascertains that there is a clause validly referring disputes to foreign arbitration, may not take into consideration court proceedings initiated before the foreign award became final. ... The [enforcement court and the court seized of an action on the merits] maintain their separate competence: the latter examines the arbitration agreement or arbitral clause, in order to ascertain whether it has jurisdiction [over] the dispute; the former – the [court] seized of an enforcement action – sees the existence of a valid arbitral clause only as one of the conditions for enforcement under Article V(1)(a).").

17 *See* §1.04[B][2].

18 Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1062 (1961) ("Article II(1) requires each State to 'recognize' agreements in writing, to 'submit to arbitration past or future differences arising between the parties in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.' This extraordinary provision has many facets.").

19 *See* §5.04[B][1].

20 *See* §4.04[A][1].

21 *See* §2.01[B][2]; §2.03[B][1][b][ii].

Finally, and importantly, Article VII makes it clear that nothing in the Convention limits a party's rights to enforce an arbitration agreement under national laws, where these are more favorable than the terms of the Convention itself.[22] This "savings provision" is of fundamental importance to the purpose and structure of the Convention, confirming its objective of facilitating, not restricting, the recognition and enforcement of international arbitration agreements.

[b] European Convention and Inter-American Convention

Other significant international arbitration conventions are similar to the New York Convention in providing substantive and formal standards affirming the presumptive validity of international arbitration agreements. The European Convention impliedly recognizes the presumptive validity of international arbitration agreements,[23] while setting forth a specified, limited number of bases for invalidity.[24] More explicitly, and paralleling Article II of the New York Convention, Article 1 of the Inter-American Convention provides that "[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction *is valid*."[25] Again, these provisions affirm the presumptive validity of those international arbitration agreements which are subject to the respective Conventions and override historic (and occasional contemporary) mistrust of the arbitral process. In so doing, these treaty provisions play central roles in the contemporary international arbitral process.

[2] Presumptive Validity of International Arbitration Agreements Under National Arbitration Legislation

National arbitration legislation in virtually all Contracting States has followed, and implemented, the New York Convention and other international conventions in formulating "pro-arbitration" rules of presumptive substantive and formal validity for international arbitration agreements. As discussed in greater detail below, Article 8(1) of the UNCITRAL Model Law is representative; it provides that a court, when it is seized of a matter "which is the subject of an arbitration agreement shall, if a party so requests ... refer the parties to arbitration," subject only to exceptions if the court

22 New York Convention, Art. VII(1); §4.06[A][2].

23 It does so through provisions for the organization of the arbitral proceedings, the rights of public entities and jurisdictional objections. European Convention, Arts. II(1), IV, V. There is, however, no express provision paralleling Article II of the New York Convention.

24 European Convention, Art. V(1) ("either non-existent or null and void or had lapsed").

25 Inter-American Convention, Art. 1 (emphasis added). Unlike the New York Convention, this provision does not expressly identify grounds for challenging the presumptive validity of arbitration agreements, although such grounds are clearly implied in the Convention. Thus, Article 5 of the Inter-American Convention specifies numerous grounds on which an arbitral award may be denied recognition. One of these grounds is "[t]hat the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the state in which the decision was made." *Id.* at Art. 5(1)(a); §26.05[A]. *See also* Grigera Naón, *Arbitration in Latin America: Overcoming Traditional Hostility*, 5 Arb. Int'l 137, 145 (1989).

A parties' failure to commence an arbitration within a contractual time period for doing so will often result in barring it from pursuing that claim, in either arbitral or other proceedings. Courts have refused to interpret clauses providing that arbitral proceeding had to be commenced within a specified time limit as granting the claimant the option of commencing a court action in the event that it does not resort to arbitration within that time period.[1608] As with other types of time limitations (*e.g.*, statutes of limitations), contractual time limitations are generally for the arbitrators to decide as elements of the parties' substantive dispute.

[E] EFFECT OF NONCOMPLIANCE WITH PROCEDURAL REQUIREMENTS ON VALIDITY OF ARBITRATION AGREEMENT

Finally, in virtually all cases, procedural missteps in commencing an arbitration will not affect the validity of the parties' underlying arbitration agreement, but instead only the ability of the claimant to pursue a particular submission or reference to arbitration. In general, nothing prevents the claimant who has failed to comply with procedural requirements of an arbitration agreement in one instance from subsequently complying with the applicable procedural requirements and then properly commencing a new or different arbitration.[1609]

§5.09 EXISTENCE OF "DISPUTE" WITHIN MEANING OF DISPUTE RESOLUTION AGREEMENT

A related issue, arising under some national arbitration laws and institutional rules, is whether there is a "dispute" between the parties that can provide the basis for an arbitration. As discussed elsewhere, a number of authorities have held that particular arbitration clauses apply only in the case of a "dispute," and that no arbitration is possible unless this requirement is satisfied.[1610] Moreover, as discussed above, courts (or statutory provisions) in some jurisdictions provide that, if there is no genuine dispute, then there is no basis for commencing an arbitration and/or that national arbitration legislation is inapplicable.[1611] In neither case, however, does the issue ordinarily concern the validity of the parties' agreement to arbitrate, but rather its scope or application in particular circumstances.

1608 *China Merchant Heavy Indus. Co. Ltd v. JGC Corp.*, [2001] HKCA 248 (H.K. Ct. App.); *Tommy C.P. Sze. & Co. v. Li & Fung (Trading) Ltd*, [2002] HKCFI 682 (H.K. Ct. First Inst.).

1609 *See, e.g., Waste Mgt, Inc. v. Mexico, Award in ICSID Case No. ARB(AF)/00/3 (NAFTA) of 30 April 2004*, 43 Int'l Legal Mat. 967, ¶¶70 *et seq.*, 118 *et seq.* (2004); *Cable & Wireless plc v. IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041 (QB) (English High Ct.); *Westco Airconditioning Ltd v. Sui Chong Constr. & Eng'g Co. Ltd*, [1998] HKCFI 946 (H.K. Ct. First Inst.) (failure to proceed to mediation as required under multi-tier dispute resolution clause does not render arbitration clause inoperative or incapable of being performed); *Fulgensius Mungereza v. Africa Cent.*, [2004] UGSC 9 (Mengo S.Ct.) (same).

1610 *See* §2.03[D]; §9.02[E][2].

1611 *See* §2.03[D].

CHAPTER 6:

NONARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS[1]

1 For commentary, *see* H. Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation* 79-109 (2d ed. 2006); Arfazadeh, *Arbitrability Under the New York Convention: The Lex Fori Revisited*, 17 Arb. Int'l 73 (2001); Baker & Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 Bus. L. 395 (1993); Bedell, Harrison & Grant, *Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements*, 13 J. Cont. L. 1 (1987); Beechey, *Arbitrability of Anti-Trust/Competition Law Issues – Common Law*, 12 Arb. Int'l 179 (1996); Blessing, *Arbitrability of Intellectual Property Disputes*, 12 Arb. Int'l 191 (1996); Böckstiegel, *Public Policy and Arbitrability*, in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* 177 (ICCA Congress Series No. 3 1987); Borris, *Arbitrability of Corporate Law Disputes in Germany*, 2012 Int'l Arb. L. Rev. 161; Brekoulakis, *Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri*, in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* 117 (2011); Buzbee, *When Arbitrable Claims Are Mixed With Nonarbitrable Ones: What's A Court to Do?*, 39 S. Tex. L. Rev. 663 (1998); Carbonneau, *Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*, in L. Mistelis & S. Brekoulakis (eds.), *Arbitrability: International & Comparative Perspectives* 143 (2009); Carbonneau, *Shattering the Barrier of Inarbitrability*, 22 Am. Rev. Int'l Arb. 573 (2011); Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 Vand. J. Transnat'l L. 265 (1986); Carbonneau & Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 Tul. J. Int'l & Comp. L. 193 (1994); Dharmananda, *Arbitrability: International and Comparative Perspectives*, 5 Asian Int'l Arb. J. 223 (2009); Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 Colum. J. Transnat'l L. 923 (2003); Hanotiau, *L'arbitrabilité*, 296 Recueil des Cours 29 (2002); Hanotiau, *The Law Applicable to Arbitrability*, in A. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 146 (ICCA Congress Series No. 9 1999); Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 Arb. Int'l 391 (1996); Hanotiau & Capresse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention*, 25 J. Int'l Arb. 721 (2008); Kerr, *Arbitrability of Securities Claims in Common Law Nations*, 12 Arb. Int'l 171 (1996); Kirry, *Arbitrability: Current Trends in Europe*, 12 Arb. Int'l 373 (1996); Klein, *Arbitrability of Company Law Disputes*, 2007 Austrian Arb. Y.B. 29; Kleinheisterkamp, *The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3 World Arb. & Med. Rev. 91 (2009); Landi & Rogers, *Arbitration of Antitrust Claims in the United States and Europe*, 13-14 Concorrenza e Mercato 455 (2005-2006); Lowenfeld, *The Mitsubishi Case: Another View*, 2 Arb. Int'l 178 (1986); McLaughlin, *Arbitrability: Current Trends in the United States*, 12 Arb. Int'l 113 (1996); Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 Arb. Int'l 95 (2006); Mourre, *Arbitrability of Antitrust Law From the European and US Perspectives*, in G. Blanke & P. Landolt (eds.), *EU and US Antitrust Arbitration: A Handbook for Practitioners* 3 (2011); Park, *Arbitrability and Tax*, in L. Mistelis & S. Brekoulakis (eds.), *Arbitrability: International & Comparative Perspectives* 179 (2009); Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brooklyn J. Int'l L. 629 (1986); Quinke, *Objective Arbitrability: Article V(2)(a)*, in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* 380 *et seq.* (2012); Rau, *The Arbitrator & "Mandatory Rules of Law"*, 18 Am. Rev. Int'l Arb. 51 (2007); Smit, *Mandatory Law in Arbitration*, 18 Am. Rev. Int'l Arb. 155 (2008); Smit, *Mitsubishi: It Is Not What It Seems to Be*, 4(3) J. Int'l Arb. 7 (1987); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481 (1981); van Otterloo, *Arbitrability of Corporate Disputes: A Cross-Jurisdictional Analysis* (unpublished paper 2013); Wai, *Transnational Private Law and Private Ordering in A Contested Global Society*, 46 Harv. Int'l L.J. 471 (2005); Youssef, *The Death of Inarbitrability*, in L. Mistelis & S. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* 47 *(2009)*.

This Chapter addresses "nonarbitrability" as a basis for challenging the enforceability of an international arbitration agreement. The "nonarbitrability" doctrine applies to categories of subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters. This Chapter first considers the treatment of the nonarbitrability doctrine in international arbitration conventions, including distinctions between the nonarbitrability doctrine and rules of contractual validity, illegality and public policy exceptions. Second, the Chapter considers the treatment of the nonarbitrability doctrine under national law, including the historical evolution of the doctrine in leading jurisdictions. The Chapter then considers the application of the nonarbitrability doctrine in a variety of specific contexts, including antitrust, securities regulation, corruption, intellectual property, bankruptcy or insolvency, consumer, employment, corporate disputes and other settings. Finally, the Chapter considers various choice-of-law, procedural and related issues arising from application of the nonarbitrability doctrine.

§6.01 INTRODUCTION

Arbitration legislation or judicial decisions in many states provide that particular categories of disputes are not capable of settlement by arbitration, or "nonarbitrable." In some jurisdictions, this defense is referred to as "objective arbitrability," or "arbitrability *ratione materiae*,"[2] while, in other jurisdictions, it is termed the "nonarbitrability" doctrine.[3] Both international arbitration conventions (including the New York Convention) and national law provide that agreements to arbitrate such "nonarbitrable" matters need not be given effect, even if they are otherwise valid,[4] and that arbitral awards concerning such matters also need not be recognized.[5]

The nonarbitrability doctrine has deep roots and a reasonably well-defined character both historically and in different contemporary national legal systems. In one commentator's words:

> "All jurisdictions put limits on what can be submitted to arbitration. Customary law in Homeric Greece as in modern Papua Guinea would allow a dispute arising from a killing to be settled by arbitration; but not sacrilege in Greece, nor adultery in parts of Papua New Guinea … or in Rome."[6]

[2] B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶365 (2d ed. 2010); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶5-59 *et seq.* (1999); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶¶9-35 *et seq.* (2003).

[3] U.S. courts have also occasionally used the term "arbitrable" more broadly to include any question whether or not a particular dispute should be arbitrated. For example, some U.S. courts have treated questions about the scope of the arbitration clause or compliance with predispute conditions to commencing arbitration as issues of "arbitrability." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (U.S. S.Ct. 1995); §7.03[E][2], pp. 1132-34. This terminology is imprecise, even in the U.S. context, and should be avoided in international settings.

[4] *See* §6.02; §6.03.

[5] *See Id.*

[6] D. Roebuck & B. de Fumichon, *Roman Arbitration* 104-05 (2004). *See also* D. Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154-58* (2012) (various crimes, including murder, subject to arbitration).

The New York Convention and other international arbitration conventions recognize, and permit Contracting States to apply, nonarbitrability exceptions of this nature. Although the better view is that the Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine (as discussed elsewhere),[7] the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters.[8]

As these examples suggest, the types of disputes which are nonarbitrable nonetheless almost always arise from a common set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve "public" rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect. This rationale was summarized, in evocative terms, by one U.S. appellate court:

> "A claim under the antitrust laws is not merely a private matter. … Anti-trust violations can affect hundreds of thousands – perhaps millions – of people and inflict staggering economic damage. … We do not believe Congress intended such claims to be resolved elsewhere than in the courts."[9]

The court explained that the relevant statute, the Sherman Act, "is designed to promote the national interest in a competitive economy" and equated a private litigant asserting antitrust claims under the provisions of the Act with an agent of the government, reasoning "thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."[10] Other explanations of the rationale for the doctrine are similar.[11]

As discussed elsewhere, the nonarbitrability doctrine contemplates a peculiar, and limited, type of unenforceability of valid arbitration agreements. When an arbitration agreement is invalid for lack of consent, noncompliance with form requirements, duress, or mistake, then the agreement is invalid: the agreement is not binding or enforceable upon the parties in any circumstances. In contrast, as discussed in greater detail below, the nonarbitrability doctrine provides that an otherwise valid arbitration agreement may not be given effect as applied to a particular "dispute" or "subject matter."[12] The focus of analysis is on the particular dispute or claim, not on the terms of the parties' arbitration agreement.

[7] *See* §4.05[A][2]; §6.02[H].

[8] *See* §§6.04 *et seq.*

[9] *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968).

[10] *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968).

[11] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646-50 (U.S. S.Ct. 1985) (Stevens, J., dissenting); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (U.S. S.Ct. 1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (U.S. S.Ct. 1974); §6.03[C][4]; §6.04.

[12] *See* §6.02[D]. This is consistent with the text of the New York Convention and most national arbitration legislation. New York Convention, Arts. II(1) & V(2)(a) ("*subject matter of the difference* is not capable of settlement by arbitration") (emphasis added); European Convention, Art. VI(2)

§6.02 NONARBITRABILITY IN INTERNATIONAL ARBITRATION CONVENTIONS

The nonarbitrability doctrine has long been acknowledged in international arbitration conventions. Article 1 of the Geneva Protocol provided for the recognition of international arbitration agreements concerning "commercial matters or ... any other matter *capable of settlement by arbitration.*"[13] This formulation served as a basis for subsequent international arbitration treaties.[14] Similarly, the Geneva Convention provided for recognition of arbitral awards where "the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon."[15]

[A] NEW YORK CONVENTION: ARTICLES II(1) AND V(2)(A)

Drawing on the Geneva Protocol, Article II(1) of the New York Convention provides that an international arbitration agreement shall be recognized if it "*concern[s] a subject matter capable of settlement by arbitration.*"[16] Similarly, Article V(2)(a) of the Convention provides that an award need not be recognized or enforced if "*[t]he subject matter of the difference is not capable of settlement by arbitration under the law*" of the country where recognition is sought.[17] Together, these provisions permit the assertion of "nonarbitrability" defenses to the recognition and enforcement of otherwise valid and binding international arbitration agreements and awards under the Convention.

The drafting history of Article V(2)(a) provides limited guidance in interpreting the provision. The initial drafts of what became Article V(2)(a) referred to the "subject matter of the award," paralleling the Geneva Convention, which used the same formula.[18] That provision was subsequently revised to refer in the final version of Article V(2)(a) to "[t]he subject matter of the difference." These changes do not appear to have a material impact on interpretation of the Convention.[19]

More significant is the Geneva Protocol's treatment of all "commercial matters" as arbitrable, with the possibility of certain additional categories of non-commercial disputes also being regarded as arbitrable. This is different from the view generally

("*dispute* is not capable of settlement by arbitration") (emphasis added); UNCITRAL Model Law, Art. 1(5) ("certain *disputes* may not be submitted to arbitration") (emphasis added).

13 Geneva Protocol, Art. I(1) (emphasis added).

14 A. van den Berg, *The New York Arbitration Convention of 1958* 368 (1981); §1.01[C][1]; §5.01[B][1].

15 Geneva Convention, Art. 1(b).

16 New York Convention, Art. II(1).

17 New York Convention, Art. V(2)(a).

18 *Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955*, U.N. Doc. E/AC.42/4/Rev.1, 2 (Art. IV(a)).

19 Also during the negotiations, the French delegation proposed omitting Article V(2)(a) entirely, on the basis that it might be used to apply purely domestic rules to international awards. ECOSOC, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/Conf.26/SR.11, 7 (1958) (French delegate). That proposal was, however, not accepted by the New York Conference.

taken of the New York Convention, which is that both "commercial" and other types of subject matter may be categorized as "nonarbitrable," depending on national law.[20]

[B] EUROPEAN AND INTER-AMERICAN CONVENTIONS

Other international arbitration conventions contain nonarbitrability provisions that are almost identical to those in the New York Convention. Article VI(2) of the European Convention provides: "The courts may also refuse recognition of the arbitration agreement if under the law of their country *the dispute is not capable of settlement by arbitration.*"[21] Consistent with the exceptional character of the nonarbitrability doctrine, Article VI(2) provides only a limited recognition of the doctrine, in those courts where "under the law of *their country*," the dispute is nonarbitrable.

In contrast, Article 5(2)(a) of the Inter-American Convention does not refer to nonarbitrability in the context of arbitration agreements and provides only for the non-recognition of arbitral awards where "the subject of the dispute *cannot be settled by arbitration* under the law of that State."[22] The Convention does not expressly provide for the non-recognition of arbitration agreements in such circumstances; on the contrary, Article 1 provides broadly that "an agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid,"[23] without reference to any "nonarbitrability" exception.[24]

[C] "SUBJECT MATTER IS NOT CAPABLE OF SETTLEMENT BY ARBITRATION"

It is not entirely clear what the Geneva Protocol, New York Convention and European Convention mean when they refer to a subject matter or dispute "not capable of settlement by arbitration." As a factual and logistical matter, it would be possible to settle almost any dispute by arbitration: different cultures have arbitrated all manner of disputes, including criminal, family, inheritance, intellectual property and other matters. There might be situations where indispensable evidence was physically unavailable, preventing any meaningful decision, or where none of the parties could participate in arbitral proceedings. Even these (very) unusual circumstances would not, however, fall comfortably within the exception in Article V(2)(a) of the New York Convention for subjects "not capable of settlement by arbitration" and would instead

20 *See* §6.02[C].

21 European Convention, Art. VI(2) (emphasis added).

22 Inter-American Convention, Art. 5(2) (emphasis added).

23 Inter-American Convention, Art. 1.

24 The Inter-American Convention has not yet been frequently applied, but the effect of its text is to require recognition of arbitration agreements even if they may concern matters that cannot be resolved by arbitration, while permitting states subsequently to refuse recognition of resulting awards on this ground. This is a sensible result, consistent with the approach taken by courts in developed nations towards many other issues relating to the validity of arbitration agreements. *See* §26.05[C][10]. On the other hand, there is at least a credible argument that a nonarbitrability exception could be implied into Article 1.

> international arbitration. ... [T]he Arbitral Tribunal will continue to prosecute these arbitral proceedings in accordance with its duty to the parties, in a manner consistent with their arbitration agreement."[320]

This reasoning was adopted by another tribunal, which refused to comply with an antiarbitration injunction issued by a court located in the arbitral seat (Indonesia), at the behest of the respondent (the Republic of Indonesia), instead moving the situs of the arbitral hearings to another state and continuing with the arbitration.[321] The tribunal correctly reasoned that the "purported injunction violates the Republic of Indonesia's undertakings [in the parties arbitration agreement]," and that "to prevent an arbitral tribunal from fulfilling its mandate in accordance with procedures formally agreed by the Republic of Indonesia is a denial of justice."[322] Less persuasively, the tribunal also denied that there was any conflict (or, in its words, "struggle") between "the Indonesian courts and the Arbitral Tribunal": "to the contrary ... [t]he Jakarta Court's injunction purported to forbid pursuit of the arbitration [but] the jurisdiction of that court is perforce limited to Indonesian territory."[323] Because the tribunal conducted hearings outside Indonesia there was, in the tribunal's view, no breach of the Indonesian injunction.[324]

The same rationale that supports an arbitral tribunal's refusal to comply with an antiarbitration injunction, whether by a court in the arbitral seat or otherwise, also justifies a tribunal's refusal to stay the arbitral proceedings on *lis pendens* grounds pending litigation of the parties' jurisdictional dispute in a national court.[325] Indeed, as discussed below, even where the parallel litigation involves jurisdictional challenges to the arbitral tribunal's authority, it has an independent right – and obligation – to itself proceed to consider and decide the jurisdictional challenges.[326]

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320 *Partial Award in ICC Case No. 10623*, 21 ASA Bull. 59, 99 (2003).

321 *See Himpurna Cal. Energy Ltd v. Repub. of Indonesia, Interim Ad Hoc Award of 26 September 1999 and Final Award of 16 October 1999*, XXV Y.B. Comm. Arb. 109 (2000). *See also* §14.04[B][2].

322 *Himpurna Cal. Energy Ltd v. Repub. of Indonesia, Interim Ad Hoc Award of 26 September 1999 and Final Award of 16 October 1999*, XXV Y.B. Comm. Arb. 109, ¶73 (2000) (reciting Procedural Order of 7 September 1999).

323 *Himpurna Cal. Energy Ltd v. Repub. of Indonesia, Interim Ad Hoc Award of 26 September 1999 and Final Award of 16 October 1999*, XXV Y.B. Comm. Arb. 109, ¶114 (2000).

324 This conclusion is far from clear. It is common in many jurisdictions for *in personam* injunctions to have extraterritorial effect. G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 567-88 (5th ed. 2011). It is difficult to imagine that the Indonesian court took a different view. The real basis for the tribunal's decision was that its independent assessment that a valid arbitration agreement bound the parties and that the Indonesian court's contrary conclusion was illegitimate.

325 *See* §27.03, pp. 3792-3809 for a discussion of the *lis pendens* doctrine in this context. As discussed above, most national arbitration legislation recognizes the power of arbitrators to continue with an arbitration notwithstanding a pending jurisdictional challenge in national courts. *See* §7.03[A], pp. 1076-78; §7.03[E][2], pp. 1142-47.

326 *See* §8.04[C]; §27.03[B].

CHAPTER 9:

INTERPRETATION OF INTERNATIONAL ARBITRATION AGREEMENTS

This Chapter examines the interpretation of international arbitration agreements. The Chapter first addresses the rules of construction which are applied in different legal systems in interpreting the scope of arbitration agreements. Second, the Chapter considers the choice of the law applicable to the interpretation of international arbitration agreements. Third, the Chapter addresses a number of recurrent interpretative issues that arise with respect to international arbitration agreements in practice. Finally, the Chapter considers issues of competence-competence to decide disputes over the scope of international arbitration agreements.

§9.01 INTRODUCTION

International arbitration agreements are creatures of contract.[1] Parties are almost entirely free to draft their arbitration clauses in whatever way they choose. As a consequence, like other contracts, arbitration agreements vary widely in language, length, sophistication and quality.[2] Inevitably, like other types of contracts, arbitration agreements give rise to frequent questions of interpretation, particularly concerning the scope of the matters referred to arbitration. In the words of one commentator, there is an "irritatingly large quantity of court litigation relating to the width of arbitral clauses."[3]

To a substantial extent, developed national legal systems have formulated specialized rules for interpreting international arbitration agreements, specifically designed to facilitate the arbitral process. These interpretative principles generally provide for liberal construction of arbitration agreements, both to allow an expansive dispute resolution mechanism and to prevent drafting errors or ambiguities from frustrating the parties' agreement to arbitrate. Nonetheless, where the parties have excluded a particular matter from the scope of their arbitration agreement, it is elementary that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration."[4]

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1 *See* §1.01[A][2]; §1.02; §1.04[E].

2 *See* §5.04[D][1][a].

3 A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* 123-24 (1989).

4 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (U.S. S.Ct. 1995) (emphasis added). *See Czarina ex rel Halvanon Ins. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004) ("arbitration is a creature of contract and thus the powers of an arbitrator extend only as far as the parties have agreed they will extend"); *Walkinshaw v. Diniz* [2000] 2 All ER (Comm) 237 (QB) (English High Ct.); *Sonatrach Petroleum Corp.(BVI) v. Ferrell Int'l Ltd* [2002] 1 All ER (Comm) 627 (QB) (English High Ct.); *Judgment of 3 October 2000, Nejapa Power Co. LLC v. CEL*, 19 ASA Bull. 796, 798 (Swiss Federal Tribunal) (2001) ("Among other prerequisites, an arbitral tribunal has jurisdiction only in case the dispute is within the scope of the arbitration agreement.").

In addition to disputes over the scope of arbitration clauses, arbitration agreements also give rise to other interpretative issues. These include disputes over the arbitral procedures, applicable institutional rules, arbitral seat and similar issues.[5] As with questions of scope, these disputes essentially require interpreting the parties' arbitration agreement, in order to ascertain their intentions.

As noted above, disputes over the interpretation of arbitration agreements raise particular issues of competence-competence, which are often resolved in favor of arbitral determination of such disputes.[6] As also noted above, the interpretation of arbitration agreements raises choice-of-law questions.[7] Both of these issues are also addressed below.

§9.02 SCOPE OF ARBITRATION AGREEMENT

The most frequent issue that arises in the interpretation of international arbitration agreements concerns the "scope" of the parties' agreement. That is, what category of disputes, disagreements, or claims have the parties agreed to arbitrate? In practice, as discussed below, disputes about the scope of an arbitration clause generally concern questions of whether the language of the parties' agreement extends to all contractual claims under a particular contract (or, instead, only a specified subset of such claims); whether noncontractual claims (*i.e.*, tort, delict, breach of noncontractual or statutory protections) are subject to arbitration; or whether claims under separate, but related, contracts are subject to arbitration.

[A] INTERNATIONAL ARBITRATION CONVENTIONS

International arbitration conventions do not expressly address questions concerning interpretation of the scope of arbitration agreements. The New York Convention acknowledges the necessity of interpreting the scope of an arbitration agreement, and provides in Article V(1)(c) for the non-recognition of awards that exceed the scope of the agreement to arbitrate.[8] The Convention does not, however, expressly prescribe any rules governing the interpretative process.[9]

The Inter-American Convention and the European Convention take the same approach as the New York Convention.[10] The ICSID Convention is similar (in omitting express rules regarding the interpretation of arbitration agreements).[11]

5 *See* §5.05[C] (rules); §5.05[C]; §11.05[B][4](procedures); §14.07(seat).

6 *See* §7.03[E][5][d]; §7.03[I][3]. *See also* §9.06[A].

7 *See* §4.09, pp. 635. *See also* §9.05.

8 New York Convention, Art. V(1)(c) ("difference not contemplated by or not falling within the terms of the submission to arbitration"). *See* §26.05[C][4]. Article V(1)(c) uses the phrase "submission to arbitration" rather than "arbitration agreement," and likely was intended to refer, in the first instance, to either the parties' submissions to the arbitral tribunal or their post-dispute submission agreement. *See* §7.03[A][2][c]. The provision nonetheless also encompasses the parties' underlying arbitration agreement, which limits the scope of issues that may be submitted to arbitration. *See also* §7.03[A][2][c]; §25.04[F][3][a]; §26.05[C][4].

9 Articles II(1) and II(3) of the Convention require giving effect to the parties' agreement regarding the scope of those disputes that they wish (and do not wish) to submit to arbitration. New York Convention, Arts. II(1), (3); §1.04[A][1][c]; §2.01[A][1][a; §5.01[B][2].

10 Inter-American Convention, Art. 5(1)(c); European Convention, Arts. V(1), IX(1)(c).

Despite this, and as discussed below, the basic "pro-arbitration" objectives of the New York Convention and other leading international arbitration conventions have been relied upon by national courts in developing liberal rules of construction of international arbitration agreements.[12] In many jurisdictions, courts hold that the parties' intentions, in concluding an agreement to arbitrate in an international commercial setting, are presumptively to resolve all disputes related to their business relationship in a single, centralized proceeding, rather than in separate and potentially inconsistent proceedings.[13] In the words of one national court decision: "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[14]

The better view is that this rule of interpretation is prescribed, as a matter of international law, by the Convention's pro-arbitration objectives and by Article II's requirement that Contracting States recognize and enforce international arbitration agreements. As discussed in detail below, a liberal rule of interpretation, based on a presumption favoring centralized "one-stop" dispute resolution, is mandated by the parties' intentions: rational businesspersons, acting in good faith, do not desire their disputes to be resolved in multiplicitous proceedings that impose costs, delays and the risks of inconsistent results, but instead desire a single, centralized forum for resolving their disputes.[15] Articles II(1) and II(3) of the Convention require courts of Contracting States to give effect to these presumptive intentions (absent contrary agreement by the parties).

This pro-arbitration rule of interpretation, and the authorities discussed below, are applicable generally to arbitration agreements subject to the Convention. In particular, this rule of interpretation is applicable both in disputes over recognition of arbitration agreements under Article II and in disputes over recognition of arbitral awards under Article V(1)(c).[16] In both contexts, the overwhelming weight of national court decisions is consistent with the existence of this rule of construction.

[B] NATIONAL ARBITRATION LEGISLATION

Like the New York Convention, national arbitration legislation recognizes the need for interpreting the scope of arbitration agreements, but generally without prescribing any specific rules of construction. There are a few exceptions to this approach, where national arbitration legislation contains provisions dealing expressly with the interpretation of arbitration agreements, but these are unusual.[17]

The UNCITRAL Model Law is representative of most national legislation in its approach to the interpretation of international arbitration agreements. Article 8 of the Model Law provides for the dismissal or suspension of litigation of "*a matter which is the subject of an arbitration agreement*," referring to matters falling within the

11 ICSID Convention, Art. 52(1)(b); C. Schreuer *et al.*, *The ICSID Convention: A Commentary* ¶¶52.130 *et seq.* (2d ed. 2009).

12 *See* §9.02[D][1].

13 *See* §9.02[D][1].

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

15 *See* §9.02[D][1].

16 *See* §25.02[B] (annulment of awards); §26.05[C][4][c][ii] (recognition of awards).

17 *See, e.g.*, Italian Code of Civil Procedure, Art. 808-quater, added by Italian Legislative Decree of 2 February 2006; §9.02[D][1][e].

arguable scope of the parties' arbitration agreement.[18] Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law (concerning recognition and annulment of awards) are similar, contemplating that determinations need to be made as to what matters the parties have and have not agreed to submit to arbitration. Nonetheless, none of these provisions further address issues of construction of the arbitration agreement.[19]

Other national arbitration statutes are similar to the Model Law, recognizing the need for interpretation of arbitration agreements, but not specifying rules of construction or interpretation. That is true under the U.S. FAA, the French Code of Civil Procedure, the Swiss Law on Private International Law, the Japanese Arbitration Law and almost all other modern arbitration legislation.[20]

As with the New York Convention, the "pro-arbitration" policies underlying the UNCITRAL Model Law and most other contemporary arbitration statutes speak in favor of liberal approaches to the interpretation of arbitration agreements. The legislative policies underlying modern arbitration statutes all argue decisively for expansive interpretation of international arbitration agreements, in order both to give effect to the parties' intentions and to maximize the efficiency and efficacy of the arbitral process.[21]

[C] Applicability of General Rules of Contract Interpretation to International Arbitration Agreements

As a consequence of the silence of international conventions and national legislation, the interpretation of international arbitration agreements has in most cases been a matter for national courts and arbitral tribunals. The starting point for interpretation has ordinarily been general principles of national contract law.[22] In addition, as discussed below, the pro-arbitration policies of the New York Convention and other international arbitration conventions, as well as the similar policies of national legislation, have significantly influenced the interpretation of such agreements.[23]

It is almost uniformly held or assumed that generally-applicable rules of contract construction apply to the interpretation of international arbitration agreements. Arbitral tribunals routinely refer to general canons of contract interpretation, often not derived from any single national legal system, in determining the meaning and scope of arbitration agreements.[24] As one well-reasoned award held: "an arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, *i.e.*, seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith."[25]

Similarly, national courts in both common law and civil law jurisdictions almost uniformly begin their analysis of the scope of an international arbitration agreement by applying ordinary rules of contract interpretation.[26] Applying the UNCITRAL Model Law, a well-reasoned Singaporean appellate decision concluded:

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18 UNCITRAL Model Law, Art. 8(1) ("A court before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration …").

19 UNCITRAL Model Law, Art. 34(2)(a)(iii) ("award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration"), Art. 36(1)(a)(iii). *See* §25.04[F]; §26.05[C][4].

20 U.S. FAA, 9 U.S.C. §3 ("If any suit or proceeding be brought … *upon any issue referable to arbitration* … the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall … stay the trial of the action.") (emphasis added); French Code of Civil Procedure, Art. 1448 ("When *a dispute subject to an arbitration agreement* is brought before a court, such court shall decline jurisdiction …") (emphasis added); Swiss Law on Private International Law, Art. 7 ("If the parties have made an arbitration agreement *concerning an arbitrable dispute* …") (emphasis added); Belgian Judicial Code, Art. 1681(1) ("The Court before which is brought *a dispute that is also the object of an arbitration agreement* shall declare itself without jurisdiction …") (emphasis added); Austrian ZPO, §584(1) ("A court before which an action is brought in *a matter which is the subject of an arbitration agreement* shall reject the claim …") (emphasis added); Swedish Arbitration Act, §4(1) ("A court may not, over an objection of a party, rule on *an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators*.") (emphasis added); Hong Kong Arbitration Ordinance, 2013, §20(1); Chinese Arbitration Law, Art. 5; Japanese Arbitration Law, Art. 14 ("A court before which an action is brought in respect of *a civil dispute which is the subject of an arbitration agreement* shall, if the defendant so requests, dismiss the action …") (emphasis added); Korean Arbitration Act, Art. 9; Indian Arbitration and Conciliation Act, Art. 8(1); Russian Arbitration Law, Art. 8 ("A court in which an action is brought in *a matter which is the subject of an arbitration agreement* shall … stay its proceedings and refer the parties to arbitration.") (emphasis added).

21 *See* §9.02[D][1].

22 *See* §9.02[C]. This is similar to the rules governing the substantive validity of the arbitration agreement. *See* §5.04[A][3]; §5.06[A][3].

23 *See* §9.02[D].

24 *See, e.g., Partial Award in ICC Case No. 10623*, 21 ASA Bull. 59, 82, 106 (2003) (relying on "generally accepted principle of contract interpretation … that contracts should be interpreted as a whole, so that their provisions make sense together"); *Partial Award in ICC Case No. 7920*, XXIII Y.B. Comm. Arb. 80, 80 (1998) (applying "general principles of contract interpretation" to "reach[] the same result" as other methods of analysis); *Preliminary Award in ICC Case No. 2321*, I Y.B. Comm. Arb. 133 (1976); *Amco Asia Corp. v. Repub. of Indonesia, Award on Jurisdiction in ICSID Case No. ARB/81/1 of 25 September 1983*, 23 Int'l Legal Mat. 351 (1983); *Award in ICAC Case No. 217/2001 of 6 September 2002*, UNILEX (UNIDROIT Principles), available at www.unilex.info (applying general principles of contract interpretation of Article 431 of Russian Civil Code to arbitration agreement); *McCollough & Co., Inc. v. Ministry of Post, Tel. & Tel., Award in IUSCT Case No. 225-89-3 of 22 April 1986*, XII Y.B. Comm. Arb. 316, 318 (1987) ("When there is an apparent difference of meaning between two equally authentic texts of a contract, drawn up in two languages, one first should try, in accordance with general principles of contract interpretation, to construe the contract in such a way as to reconcile the two texts."); *Interim Award on Jurisdiction in VIAC Case No. SCH-5024 of 5 August 2008*, 2(2) Int'l J. Arab Arb. 341, 344 (2010) ("general principles of interpretation of contracts under civil law").

25 *Interim Award in ICC Case No. 7929*, XXV Y.B. Comm. Arb. 312, 317 (2000).

26 *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (U.S. S.Ct. 1995); *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002); *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) ("Because courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA."); *Haviland v. Goldman, Sachs & Co.*, 736 F.Supp. 507, 509 (S.D.N.Y. 1990) ("Arbitration agreements are contractual obligations which are governed by general principles of contract interpretation."); *Judgment of 25 October 2010*, DFT 4A_279/2010 (Swiss Federal Tribunal); *Judgment of 27 January 2010, DFT 4A_562/2009* (Swiss Federal Tribunal); *Judgment of 22 January 2008*, 26 ASA Bull. 549, 555 (Swiss Federal Tribunal) (2008) ("The interpretation of an arbitration clause follows the general principles applicable to the interpretation of private declarations of will."); *Judgment of 21 November 2003*, DFT 130 III 66 (Swiss Federal Tribunal); *Judgment of 13 January 2009*, 2009 SchiedsVZ 122 (German Bundesgerichtshof) ("general principles of interpretation, logic and common sense"); *Judgment of 8 February 1991*, 1991 NJW-RR 602 (Oberlandesgericht München); *Judgment 30 March 2009*, XXXV Y.B. Comm. Arb. 325, 327 (2010) (Austrian Oberster Gerichtshof).