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The development of concept of arbitrability – an international comparison

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I hereby declare that I have read and understood the regulations governing the submission of LLM dispute Resolution dissertations / research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation / research paper conforms to those regulations.

Signed

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A. Table of Content

B. Introduction

The topic of this dissertation is "The development of concept of arbitrability – an international comparison". The main research question is the different approach towards arbitrability taken in Germany, the United States of America and South Africa, with a short overview of Europe and Africa. I will outline the current position on arbitrability in those states and how it has developed and changed over the past decades. In my conclusion I will elaborate whether or not the development is heading into the right direction; here I will put a focus on those subject matters where I regard further development as necessary. I will outline differences in the countries, without proposing universal provisions to be adopted by all states. As every nation has its specific needs, this would not work out. I will further not suggest any transplantation of a working rule of one country to another, as this entails a great risk of rejection and loss of its original meaning, which is a crucial part of the rule.[1] Though, it does not mean, that legislators cannot borrow from other laws. This, as Watson presents, worked very well in history.[2] I will give general suggestions for improvements for the handling of arbitrability of certain subject matters, with room for adjustment to the nation's needs. In doing so I will work with existing provisions.

I have chosen three countries from three different continents to determine different approaches among the globe. By looking at the scope of arbitrability, one can determine how arbitration-friendly a country is. Coming from Germany, a country with a favourable position towards arbitration, it is of interest to understand comparative positions held by different countries with different legal backgrounds.

In this dissertation I will argue for a continuous development towards a liberal stand on arbitrability across the globe.

Before discussing whether certain subject matters are arbitrable or not and whether they should be, it is worth recalling why arbitration is viewed as an alternative to litigation. It offers many advantages over litigation. One of those is the great flexibility: The parties can choose their own judges, with whom they feel comfortable, they can pick the governing law and arbitration rules, can set the schedule for meetings and hearing and do not have to stick to

[1] Kahn-Freund, Modern Law Review, 1974, Vol. 37 (1), 1, 6 f., 27; Legrand, Maastricht Journal European & Comparative Law, 1997, Vol. 4, 111, 116 f..
[2] Watson, Electronic Journal of Comparative Law, 2000, Vol. 4 (4), III.

available court hours. Due to the limitation on appeals and speediness arbitration can be cheaper than litigation. The finality of the award has the advantage of an expeditious resolution of the dispute. Another advantage is the confidentiality of the proceedings and the award.[3] Arbitration is also less adversarial, which can contribute to more peaceful hearings and thus likely to an award acceptable to both parties.

This is not to say that there are no disadvantages. Where the tribunal does make a substantive mistake it is difficult to challenge the award.

C. Definition

Arbitrability can be described as the possibility of an arbitration proceeding to be pursued. It is divided into subjective and objective arbitrability. Subjective arbitrability covers the capacity of the party to enter into an arbitration agreement while objective arbitrability means the capability of the subject matter to be submitted to arbitration.

1. Subjective arbitrability

As this dissertation focuses on objective arbitrability, I will merely give a brief overview on the subjective arbitrability, and will not elaborate on differences among the legislations.

To be able to enter into an arbitration agreement a party must possess the legal capacity to do so. This is called the subjective arbitrability. This aspect forms part of the legal validity of the agreement.[4] There are no differences between the capacity to conclude an arbitration agreement and any other contract. Hence, in most national legislations the arbitration act does not address this issue, but the relevant provisions can be found in the general civil law of the law governing the contract.[5]

Generally, it can be said that natural persons and corporations have the necessary capacity under certain conditions.[6] Legal persons need to reach legal age, corporations have to contract through their institutions, which is competent for such actions under the applicable law.[7] For States and State agencies the law varies a lot. There are countries, which generally prohibit or restrict its State and State agencies to enter arbitration agreements, e.g. the United States or

[3] Regarding the latter the extent of the confidentiality depends on the chosen arbitration rules.
[4] Born, International Commercial Arbitration, p. 721.
[5] Born, International Commercial Arbitration, p. 724; Redfurn, International Arbitration, para. 2.31 ff..
[6] Born, International Commercial Arbitration, p. 724; Redfurn, International Arbitration, para. 2.34 ff..
[7] Redfurn, International Arbitration, para. 2.35 f..

the Republic of Iran, while others removed those provisions, e.g. England, Algeria, Colombia, Greece.[8]

Without elaborating on the requirements of legal capacity, the incapacity of one party constitutes one of the seven reasons in the New York Convention (NYC) and the Model Law (ML) upon which courts may refuse the recognition and enforcement of an arbitral award.[9] In most national acts this provides a ground for non-recognition as well.[10]

2. Objective arbitrability / non-arbitrability doctrine

In some countries the following issue is referred to as "objective arbitrability", in others it is called the "non-arbitrability doctrine". For the sake of clearer understanding the author of this dissertation will only use "objective arbitrability".

The prerequisite of objective arbitrability can be found in arbitration conventions and acts - the New York Convention mentions the "capability of settlement in arbitration" in Art. II and Art. V (2) (a), Art. 2 of the South African Arbitration Act lists matters not subject to arbitration, § 1030 of the German Arbitration Act deals with arbitrability.

Generally, this term describes whether a subject matter is arbitrable, i.e. if it can be resolved in arbitration.[11] It must not be mistaken for the validity of the arbitration agreement itself. These are two separate aspects.[12] There can be a valid agreement, but an inarbitrable issue in dispute. Hence, the parties cannot solve this particular dispute in arbitration, but still can submit other issues to arbitration due to their arbitration agreement.

The issue of arbitrability is one of national character.[13] This can be seen in Art. V (2)(a) NYC. Pursuant to this article a court can refuse recognition and enforcement if "(t)he subject matter of the difference is not capable of settlement by arbitration under the law of that country"[14].

Some countries differentiate between domestic and international arbitrability and have a wider understanding of arbitrability in regards to international arbitrability.[15] For example in

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[8] Born, International Commercial Arbitration, p. 727.
[9] Art. V (1)(a) NYC; Art. 34 (2)(a)(i) ML.
[10] Born, International Commercial Arbitration, p. 724.
[11] Kurkela, Due Process in Arbitration, p. 16.
[12] Wagner in: Weigand (1st edition), Part 4, para. 49.
[13] Brekoulakis in: Mistelis, Arbitrability, para. 2-85.
[14] Art. V (2) (a) NYC, emphasis added.
[15] Berg, The New York Convention, p. 152 f..

the U.S. Supreme Court stated in a case concerning antitrust laws in 1985 that this approach is necessary due to

> "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of international commercial system for predictability in the resolution of disputes."[16].

Hence, some states subordinate certain national interests for the sake of international harmony.

Another aspect that needs to be considered in regard to arbitrability is public policy. Initially legislators used public policy as a factor to determine arbitrability. Matters, which involved public policy or were of a public nature, were not arbitrable. The general view was that it could not be ensured that mandatory law and public policy was properly enforced in arbitration. This view results from the private nature and confidentiality of arbitration and because arbitrators were seen as businessmen, who are more likely to favour an economical outcome rather than institutionalised and formal law enforcement. Another concern was the lack of a possible appeal within arbitration. The relevance of public policy for the determination of arbitrability has declined in Europe and America and the majority of the cases involving public policy are now deemed arbitrable.[17] On the contrary, it still has a great significance in Africa.[18]

D. Legal comparison of arbitrability

In this chapter I am going to compare arbitrability and its development in various countries. As said earlier, I will do so without transferring rules from one country to the other. The handling within countries and international treaties is very distinct. The most important international regulations (Model Law, New York Convention) more or less leave the decision to the national governments. Within Europe and the United States there is an extensive discussion of the arbitrability of each individual subject matter. In South Africa the scholarly discussion on this topic is not as precise, and the same is true in the case law. The non-arbitrability doctrine is based on legislation and common law, without much development.

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[16] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 629 (1985).
[17] Born, International Commercial Arbitration, p. 950; Kirry, Arbitration International, Vol. 12 (4), p. 375; Youssef in: Mistelis, Arbitrability, paras. 3.7 ff..
[18] Mante, Arbitration International, 2016, Vol. 0, p. 15.

1. International Treaties

a) Model Law

The UNCITRAL Model Law (ML) does not address the matter of arbitrability explicitly and hence does not give a definition of the scope of arbitrability.[19] Art. 1 ML deals with the scope of its application. Pursuant to Art. 1 (1) ML the Model Law applies to international commercial arbitration. According to the footnote 2 the term "commercial" should be interpreted in an extensive way – explicitly it includes contractual and non-contractual disputes. The footnote also enumerates some examples; however the list is not exhaustive. The UNCITRAL Secretariat states in its explanatory note that there is no definition for the term "commercial".[20] Further, in order to be arbitrable under the Model Law a dispute must be international.

Art. 1 (5) ML states that the Model Law does not affect any national law dealing with the restriction of arbitrability. This approach points out two aspects. Firstly, it shows that the matters which are inarbitrable are few and secondly, that a uniform approach on the arbitrability doctrine does not (yet) exist.[21] It becomes clear that arbitrability is a matter of national law.[22] This dissertation will show the different approaches taken by various states. Hence, it can be assumed that a definition of arbitrability in the Model Law probably would not have been widely accepted.

b) New York Convention

Like the Model Law the New York Convention (NYC) does not address the actual scope of arbitrability. In Art. II (1) and V (2)(a) it is stated that the matter in dispute must be "capable of settlement by arbitration". This subsection is usually applied in case of legal obstacles.[23]

The NYC does not specify which law should apply towards the determination of arbitrability. Hence, different views exist on this issue.[24] In accordance with one view it should be the lex fori, i.e. the law of the court where the matter is brought.[25] Others find that the law applicable to the agreement itself is the suitable law. In practice most tribunals apply the law of the seat

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[19] Digest of Case Law, Art. 1 para. 12.
[20] Explanatory Note by Secretariat, para. 12.
[21] Born, International Commercial Arbitration, p. 958.
[22] Mistelis, Concise International Arbitration, p. 588.
[23] Born, International Commercial Arbitration, p. 947.
[24] Arfazadeh, Arbitration International, (2001), Vol. 17 (1), 73.
[25] Arfazadeh, Arbitration International, (2001), Vol. 17 (1), 80.

of the arbitration and most courts apply their domestic law (*lex fori*).[26] As the issue of applicable law is not the content of this dissertation, this discussion will not be elaborated.

However, it is accepted that the NYC does not determine arbitrability, but leaves it to national law.

2. Germany

a) Introduction

Since 1998 § 1030 Code of Civil Procedure (ZPO) deals with the objective arbitrability and substitutes the old version of § 1025 ZPO. This section is a mandatory provision and therefore not modifiable by the parties.[27]

In accordance with § 1030 I 1 ZPO claims under property law – i.e. claims involving economic interests - are subject to arbitration. Pursuant to the old § 1025 I ZPO the only criterion to determine arbitrable subject matters was whether the subject matter was to the free disposal of the parties, i.e. that parties were legally allowed to conclude a settlement. Therefore, arbitration is not possible in case the State retains exclusive jurisdiction regarding the dispute resolution of a particular matter.[28]

This criterion is maintained for non-pecuniary claims in § 1030 I 2 ZPO. Parties can effectively agree on arbitration provided that parties are entitled to conclude a settlement respecting the subject matter in dispute.[29] Because the Model Law does not address this issue this subsection is no deviation.[30]

According to § 1030 II ZPO arbitration agreements regarding lease agreements are invalid.[31]

Further, the legislator introduced § 1030 III ZPO, which is based on Art. 1 (5) ML. According to this subsection statutory regulations on arbitrability outside the ZPO are not affected by the

[26] Mistelis, Concise International Arbitration, p. 6.
[27] Trittman in: Böckstiegel, § 1030 para. 7 f..
[28] Berger, International Economic Arbitration, p. 191.
[29] Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 109.
[30] BT-Drs. 13/5274, p. 35.
[31] See C. 2. g) lease agreements.

arbitration provisions of the ZPO, but any exclusion or required prerequisite under other statues[32] remains in force.

The former § 1025 II ZPO was omitted without replacement. Pursuant to that provision an arbitration agreement was invalid in case one party did not sign the agreement voluntarily. This issue is not part of the arbitrability discussion and therefore will not be discussed further.

b) Arbitrability pursuant to § 1030 I ZPO

As mentioned above property claims are arbitrable pursuant to § 1030 I 1 ZPO, with a broad interpretation of the term "property claim".[33] Therefore, claims other than for a payment also fall within the scope of arbitrability. Examples for different types of lawsuits are the declaratory claims (Feststellungsklage), actions for the change of a legal relationship (Gestaltungsklage), prohibitory actions (Unterlassungsklage) and actions for revocation (Widerrufsklage).[34]

The general arbitrability of property claims was taken from Art. 177 (1) Swiss Federal Act on Private International Law.[35] In accordance with the old § 1025 I ZPO the only criterion to determine arbitrable subject matters was the claim's capability to be legally concluded by a settlement. The same wording can already be found in § 851 ZPO of 1877 (date where the ZPO came into effect).[36] Hence, changes in arbitrability before 1998 are only according to case law and other statutes.

The stated requirement was interpreted very narrowly until the early 1990's. The settlement had to match mandatory substantive provisions.[37] This criterion maintained for non-pecuniary claims in § 1030 I 2 ZPO. In those cases parties can effectively agree on arbitration provided that they are entitled to conclude a settlement respecting the subject matter in dispute.[38] The legislator's decision to keep this criterion for those issues has been widely criticised.[39] The source of this criticism is a judgement of the German Federal Supreme Court from 1996, still regarding the old § 1025 ZPO, that only those disputes where a court decision is required by

[32] E.g. C. 2. f) labour law.
[33] Born, International Commercial Arbitration, p. 960; Hanefeld in: Weigand, Practioner's Handbook, para. 7.32.
[34] Hanefeld in: Weigand, Practioner's Handbook, para. 7.32.
[35] BT-Drs. 13/5274, p. 34.
[36] http://deutscher-reichsanzeiger.de/Gesetze/blog/1877/02/19/cpo-buch-10/ (last visited 20.02.2017).
[37] Wagner in: Weigand (1st edition), Part 4, para. 53.
[38] Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 109.
[39] Trittmann in: Böckstiegel, § 1030, para. 12.

the public interest (monopoly of adjudication) should not be arbitrable.[40] Considering, that the criterion of the former § 1025 ZPO was the requirement of free disposal, it is confusing, that the legislator kept this criterion for non-pecuniary claims. However, this step is explained in the explanatory note. The legislator states that the criterion of a necessarily required court decision is too vague for a legal restriction. In its opinion mandatory court decisions are more frequently needed in non-pecuniary matters than in property claims. In case a subject matter is not capable of settlement, this means the state requires a decision by state courts.[41] The monopoly of adjudication must not be mistaken for exclusive jurisdiction of a court. Exclusive jurisdiction means merely the distribution of jurisdiction among state courts. In case a court has exclusive jurisdiction it does not exclude those matters from arbitration. However, in case the legislator has established specialised courts, e.g. the patent court, parties are bound to .litigation before those. Those courts only deal with administrative acts by public authorities, which need to be decided by judgement, which has an effect towards everybody.[42]

The change of the determining criterion expanded the scope of objective arbitrability significantly.[43] Provisions containing prohibitions of settlement, waiver or disposal of rights do not exclude disputes regarding the underlying rights from arbitration anymore.[44] Examples of such rights are 1614 BGB (no waiver of future maintenance), 89a HGB (right to immediate termination of a contract of a sales representative with good cause) and § 231 HBG (no exclusion of the silent partner from share of profit).

Further, subsequent claims resulting from contracts, such as claims for damages, unjust enrichment and rescissions of an invalid main contract are now arbitrable[45], as they are of economic interest. Also it does not matter whether the dispute is of civil or public nature. However, in regard to issues of public nature the legislator states that it must be able to conclude a contract under public law.[46] Hence, parties must have the authority of disposition regarding this subject matter. Matters of public nature are further arbitrable in case there is a legal directive, such exist e.g. in § 30 II Property Act. In accordance with § 30 II Property Act

[40] BGH 29.03.1996, BGHZ 132, 278, para.12; Stein/Jonas-Schlosser, § 1030 para. 6.
[41] BT-Drs. 13/5274, p. 34.
[42] BT-Drs. 13/5274, p. 35.
[43] Baron, Arbitration International, 2003, Vol. 19 (1), 27, 36.
[44] BT-Drs. 13/5274, p. 34; Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 79.
[45] Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 78.
[46] BT-Drs. 13/5274, p. 35.

parties can agree that decisions shall be made by an arbitral tribunal (in accordance with § 38a Property Act) instead of the public authority.[47]

Lastly it has to be mentioned that only disputes before the ordinary jurisdiction are arbitrable as the ZPO only applies to them. Hence, disputes before the fiscal court or the social welfare court are not arbitrable.[48] The labour court is also a specialised jurisdiction; however, the Labour Court Act provides for separate provisions regarding arbitration, which will be discussed below.

Delictual claims are usually not included in a pre-dispute arbitration agreement as they invariably only arise after the conclusion of the matter when the parties are in dispute. However, if the agreement is wide enough and the tortious conduct is substantially linked to the breach of contract, the delictual claim can fall within the scope of the arbitration agreement.[49]

c) Intellectual Property

Before the reformation in 1998 patent disputes, which affected the validity of the patent, were not arbitrable. Those patent matters are not to the free disposition of the owner, but need a judgment with *erga omnes* effect. Another argument was that the Federal Patent Court had exclusive jurisdiction on these disputes.[50] Since 1998 disputes on patent are generally subject to arbitration as patents are of economic interest, and therefore arbitrable under § 1030 I 1 ZPO - including all pecuniary claims arising out of the patent law dispute.[51]

In 1996 the Federal High Court decided that the exclusive jurisdiction of the Federal Patent Court is no longer a restriction on the arbitrability of patent matters other than patent validity.[52] The granting of the patent is undertaken by a public body by an administrative act and is effective toward everyone. Hence, validity disputes are of a public nature. In its explanatory note for the new arbitration law the government stated, that in case the legislator implemented special courts for a certain matter – as it did with the Federal Patent Court – matters within its scope of jurisdiction are inarbitrable. These matters required a court

[47] Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 80.
[48] Kühn in: Arbitration World, p. 97.
[49] OLG München, 07.07.2014, AzSchH 18/13, para. 40 f..
[50] Wagner in: Weigand (1st edition), Part 4, para. 57.
[51] Hanefeld in: Weigand, Practioner's Handbook, para. 7.35.
[52] 03.03.1996, BGHZ 278, Simms, Arbitration International, 1999, Vol. 15, (2), 193, 196; Smith, Harvard Journal of Law & Technology, 2006, Vol. 19, 229, 334 f..

judgement with *ergo omnes* effect.[53] Further, because validity disputes are of public nature court jurisdiction is required.[54] Besides validity issues annulment actions and actions for compulsive licences are inarbitrable.[55]

There are scholars who argue for an opposite approach. Schlosser, for examples, states that even the Federal High Court in an action for annulment is bound to a declared waiver.[56] Further, the patent owner can dispatch the patent by mere declaration to the Federal Patent Office (§ 20 I No. 1 Patent Act) or non-payment of the license (§ 20 I No. 2 Patent Act). Hence, the patent is dispositive.[57] In 1989 Schlosser proposed that tribunals should be able to decide validity issues with *inter partes* effect.[58] Thus the tribunal would not revoke the patent, but render it invalid regarding the legal relationship of the disputants. This approach has now been widely accepted among scholars.[59] It has been argued, that there are no legal obstacles for a tribunal to oblige a patent owner to request the cancellation of the patent.[60]

In conclusion a tribunal cannot grant or revoke patents with *erga omnes* effect; awards only have *inter partes* effects.[61] Therefore, the tribunal can declare a patent invalid with regards to the relationship of the parties.

Hence, arbitrability of patents is being enlarged, with an on-going discussion towards a non-restricted arbitrability.

d) Antitrust

Contemporaneously with the 1998 reform of the ZPO § 91 of the Act against Restraints on Competition (GWB) was rescinded and not replaced. Consequently antitrust claims became arbitrable without restrictions.[62] Before that § 91 I 1 GWB declared pre-dispute arbitration agreements void, unless they included a right for every party to choose between arbitration and litigation on a case-by-case basis; in case of agreements concerning export antitrust

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[53] BT-Drs. 13/5274, p. 35.
[54] Jansson, Juridisk Publikation 1/2011, p. 62.
[55] Trittmann in: Böckstiegel, § 1030, para. 15.
[56] BGH X ZR 23/71; Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, para. 317.
[57] Haubner, InTeR 4 /14, p. 242.
[58] Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, para. 232.
[59] Granhtham, Berkeley Journal of International Law, 1996, Vol. 14, p. 208; Smith, Harvard Journal of Law & Technology, 2006, Vol. 19 (2), p. 336; Jansson, Juridisk Publikation 1/2011, p. 62; Haubner, InTeR 4 /14, p. 243.
[60] Haubner, InTeR 4 /14, p. 243.
[61] Hanefeld in: Weigand, Practioner's Handbook (2nd edition), para. 7.35.
[62] Baron, Arbitration International, 2003, Vol. 19 (1), 27, 37 f..

matters lacking such a clause the parties had to seek the approval of the cartel office pursuant to § 91 I 2 GWB.

The federal government proposed the repeal of § 91 GWB in its legal draft for the revision of the arbitration law and was approved by the legal committee in its recommended resolution.[63] The rationale given was that legal reality has changed and the restrictions therefore now lack significance. Further, it was reasoned that tribunals have to apply antitrust law to the same extent as court judges do. Lastly, arbitral awards underlie a court scrutiny in which the court reviews whether antitrust laws were given effect. Due to these aspects a deregulation is in order.[64] Contrary the Federal Council argued that § 91 GWB has to be maintained has it is still necessary for the protection of the weaker party and is the only way to prevent a compulsion to arbitration. Additionally, it said that the court review is merely retrospective and is subject to limiting conditions. Moreover it can only cause an annulment, but not a court judgment, which the Federal Council requests.[65] These arguments did not convince the Federal Government, which repeated its previous arguments and stated that the situations that fall under the scope of the current § 1 GWB now are not comparable to those when § 91 GWB was drafted. Further, the phenomenon of the weaker party is a general issue and not a antitrust specific one. It also points out that the European Commission based their measures on provisions on bans on cartels in case it found an arbitration clause to be problematic. The national cartel authorities could do the same irrespective of the existence of § 91 GWB.[66]

This decision shows increased confidence in arbitral tribunals, that they, too, are able to properly decide legal matters involving the public interest.

However, only civil antitrust matters are arbitrable. The administrative antitrust law, the antitrust penalty law and the administrative offences law are administrative functions and therefore not subject to arbitration.[67]

e) Corporate law

The criterion of the old § 1025 respectively new § 1030 ZPO also governs disputes in corporate law. However, there has been a great discussion about the arbitrability of

[63] BT-Drs. 13/5274, p. 19; BT-Drs. 13/9124, p. 44.
[64] BT-Drs. 13/5274, p. 70.
[65] BT-Drs. 13/5274, p. 74.
[66] BT-Drs. 13/5274, p. 76.
[67] Adolphsen, Europäisches Zivilverfahrensrecht, § 3, para. 43.

shareholder resolutions (Beschlussmängelstreitigkeiten). In 1996 the Federal High Court of Justice rejected the arbitrability and affirmed it in 2009 under certain conditions.

The dispute arose out of the binding effect of judgements of §§ 248 I 1, 249 I 1 Stock Corporation Act (AktG) for and against all partners even though they had not been party to the proceedings.[68] However, pursuant to § 1055 ZPO, the arbitral award only has a binding effect amongst the parties. On this account and because the effect of §§ 248, 249 AktG is a special provision under corporate law by the legislator[69], it cannot be transferred to arbitration.[70] The High Court enumerated several further objections such as unequal treatment of the parties regarding the (very crucial aspect of) appointment of arbitrators and the danger of several arbitral proceedings.[71] But it negates its right to develop the law as this is a highly complex and sensitive matter and therefore has to be decided by the legislator.[72] In its judgement it denies the applicability of §§ 248 I 1, 249 I 1 AktG to arbitral proceedings and hence the arbitrability of such claims.[73]

In its decision from 2009 the High Court expressly overruled its 1996 decision and followed the prevailing opinion in literature.[74] It now is of the opinion that the matter is arbitrable and consequently it is an analogous application of §§ 248 I 1, 249 I 1 AktG – including its power of development of the law.[75]

The legislator did not regulate this issue, but explicitly left it to be resolved by jurisprudence with consideration of the particular circumstances of the specific case.[76] In its 1996 judgement the High Court stated that the mentioned concerns towards the arbitrability can be resolved[77] and therefore are not absolute. Meanwhile scholars have had further debate on this topic and the majority favours an affirmation of arbitrability if certain prerequisites are satisfied.[78] As legal protection cannot be waived but only specified in certain aspects and an arbitration agreement is at risk to deprive non-disputants of their necessary legal protection, the

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[68] Schäfer, Verträge zur Durchführung des Schiedsverfahrens, p. 79.
[69] According to § 325 I ZPO judgements „shall take effect for and against the parties tot he dispute“ and therefore do not have a generell inter omnes effect.
[70] BGHZ 132, 278, para. 14.
[71] BGHZ 132, 278, para. 15.
[72] BGHZ 132, 278, para. 16.
[73] Baron, Arbitration International, 2003, Vol. 19 (1), 27, 39.
[74] BGH, 6.4.2009, II ZR 255/08, para. 14.
[75] BGH, 6.4.2009, II ZR 255/08, para. 17.
[76] BT-Drs. 13/5274, p. 35.
[77] BGHZ 132, 278, para. 6.
[78] Baron, Arbitration International, 2003, Vol. 19 (1), 27, 40; Geimer in: Zöller, § 1030 para. 9.

arbitration clause has to fulfil specific minimum requirements.[79] These conditions have been set out by the High Court in 2009.

Most importantly due process needs to be respected. The arbitration clause either has to be incorporated in the company's articles of incorporation with consent of all partners or in a separate agreement in which conclusion all partners were involved. Further, every partner has to be informed about the initiation and process of the arbitral proceedings and must at least have the possibility to join as an intervening party. All partners have to participate in the appointment of the arbitrators, unless those get appointed by a neutral institution. In case of multiple partners in one party the principle of majority rule is applied. Finally, it needs to be ensured that all disputes are resolved by the same tribunal, so that there are not several parallel proceedings with possibly different outcomes.[80]

Hence, shareholder resolutions are arbitrable, but a specially drafted arbitration clause, meeting the set requirements, must be drafted.[81]

Further, it is provided that disputes in regard to the nominal capital of a limited liability company, disputes about the partnership of general partnership (oHG), limited partnership (KG), and private company (GbR) are arbitrable.[82]

f) Labour Law

In German legislation there are several Acts that govern labour law, including the Labour Court Act (ArbGG). The labour courts have exclusive jurisdiction regarding those disputes listed in § 2 ArbGG. In general such an exclusive jurisdiction does not exclude the issues to be solved in arbitration, this, however, is different in case the government-implemented special courts for certain disputes.[83] This is the case for labour law. According to § 1 ArbGG labour courts have jurisdiction in labour cases, cases within the exclusive jurisdiction is specified in § 2 ArbGG (e.g. disputes arising out of / regarding the existence of a collective agreement, disputes between employer and employee regarding the employment relationship, disputes between aid workers and the devilment service according to the Development Aid Workers Act). Hence, those subject matters cannot be arbitrated. However, § 4 ArbGG states a reverse exception. Pursuant to this provision employment disputes are arbitrable within the

[79] BGH, 6.4.2009, II ZR 255/08, para. 22.
[80] BGH, 6.4.2009, II ZR 255/08, para. 24.
[81] Trittmann in: Böckstiegel, § 1030, para. 19.
[82] Trittmann in: Böckstiegel, § 1030, para. 18.
[83] BT-Drs., 13/5274, p. 35.

limits of § 101 ff. ArbGG, without application of the provision of the ZPO (§ 101 III ArbGG). The arbitration proceedings are governed by §§ 102 – 110 ArbGG.

§ 101 I ArbGG covers disputes between parties to a collective labour agreement in regard to the existence of such an agreement or rights provided by the agreement. Parties have to explicitly agree on arbitration, either in general or for the individual case. According to subsection II parties can exclude jurisdiction of labour courts in the collective labour agreement in case this agreement mainly regards stage artists, filmmakers or artists. The arbitration agreement will only be binding on parties to the collective labour agreement or in case other parties are bound by the collective labour agreement and agreed in writing on the binding effect of the arbitration agreement.

Managing directors are not employees under German employment law, as they do not fall within the scope of § 5 I ArbGG, which defines the term employer. Therefore disputes between them and their company are subject to ordinary court jurisdiction and hence can be submitted to arbitration and often are.[84] This was already the case before the reform in 1997, as these disputes were capable of settlement.[85] Problems arise in cases where the managing position lapses and the contract becomes a normal employment contract in accordance with § 2 I No. 3 ArbGG.[86] However, this conversion does not eliminate the former arbitration agreement, unless parties repeal it. But in regard to disputes arising after the transformation the arbitration agreement cannot be invoked, which is why many disputes are within the court's jurisdiction.[87] To determine the arbitrability of the issue at hand one has to examine the time of origin of the claim and the original claimant[88] – meaning the claimant as managing director. Further it is possible that the claim has a causal link to the previous organ status and hence has to be adjudicated before the ordinary courts, which makes those claims arbitrable.[89]

The competence of the tribunal can also be constituted by procedural aspects. In case the tribunal has been appointed before the conversion of the contract, procedural economical aspects suggest continuity of these proceedings. This, however, has been scarcely discussed.

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[84] Trittmann in: Böckstiegel, § 1030, para. 22.
[85] Hentzen in: celebration publication Sandrock, p. 181.
[86] In accordance with the jurisprudence of the Federal Labour Court this conversion does not happen automatically. Either parties conclude an employment contract or the previous employment contract, which got suspended for the time of the managing position, revives. BAGE 24, 383, 392.
[87] Hentzen in: celebration publication Sandrock, p. 185.
[88] Hentzen in: celebration publication Sandrock, p. 185.
[89] Hentzen in: celebration publication Sandrock, p. 185.

Hentzen suggests an analogy to § 17 I Court Act (GVG). § 17 I GVG states that changes in regard to circumstances substantiating the court's competence do not affect its competence. A direct application of this section is not possible because arbitral proceedings do not generate *lis pendens* – pursuant to § 1032 III ZPO, arbitral proceedings are possible parallel to court proceedings e.g. regarding the validity of the arbitration agreement. But § 17 GVG deals with procedural economy and has a wide scope[90], an analogous application is justified as arbitral and court proceedings are considered to be equivalent.[91] Another aspect to be considered is that, at the time of the initiation of the arbitral proceedings, the labour court lacks competence, as the dispute (arisen before the conversion of the contract) does not fall within the scope of the ArbGG. Any seized ordinary court had to dismiss the case upon a party's objection based on the arbitration agreement.[92]

I agree with this argument regarding procedural economy. First of all, this solution is coherent with the substantial allocation of jurisdiction. Secondly, procedural economy is a general principle in procedural law, it is not restricted to civil court procedures. Even though there are specific provisions within the ZPO applying this principle in regard to civil court proceedings, the principle also can and has to be applied to those proceedings where the law is silent in this regard. This is particularly true regarding arbitration in the light of its current development. Law and jurisdiction are more arbitration-friendly and support arbitration. Hence, there is now no reason why an established general principle should not be applied to arbitration proceedings.

g) Lease Agreements

§ 1030 II ZPO explicitly mentions the inarbitrability of residential lease agreements within German territory. This is a unique provision, and cannot be found in any other legislation.[93] The legislator gave exclusive jurisdiction to courts in rental matters[94], but because exclusive jurisdiction does generally not exclude arbitration. Hence a special provision is needed to maintain the monopoly of adjudication. The legislator wanted to bar circumvention of this exclusive jurisdiction, which was established for protection of the lessee. Lessees are very

[90] Hentzen in: celebration publication Sandrock, pp. 190.
[91] Kissel, Gerichtsverfassungsgesetz, § 17, para. 4, 7.
[92] Hentzen in: celebration publication Sandrock, pp. 189 f..
[93] Trittmann in: Böckstiegel, § 1030, para. 4.
[94] § 29 a ZPO.

protected in Germany by legislator[95] and jurisdiction[96], to ensure that nobody loses their accommodation too quickly and too easily; there must be a crucial reason to interfere with the lessee's rights. By prohibiting arbitration in residential accommodation the legislator ensures this high level of protection.

However, only disputes on the existence or non-existence of the agreement, either as the issue itself or as a prerequisite for the claim, fall within the scope of subsection II.[97]

The restriction of arbitration exists only in regard to residential accommodation within German territory, not to commercial agreements. In case of mixed use the predominant one is decisive.[98] Further, § 1030 II 2 BGB limits the restriction and excludes agreements in accordance with § 549 II No. 1-3 BGB from the inarbitrability, those matters also do not fall within the exclusive jurisdiction of the courts according to § 29 a II ZPO. Among those are short-term lease agreements, furnished accommodation if the property is part of the property, which is used by the landlord himself and lease agreements with legal person of public law. Even though the commission was of the opinion that § 1030 II 2 ZPO (former § 1025a s. 2 ZPO) was dispensable, the legislator kept this sentence due to otherwise unnecessary restriction of arbitrability and subsequent relief of the ordinary courts.[99]

In case German law is not *lex arbitri*, but a lease agreement regarding a property within Germany is in dispute, § 1030 II ZPO will still apply and no jurisdiction is given to the tribunal.[100]

h) Insolvency

§ 160 II No. 3 Insolvency Code (InsO) contains specific restrictions towards arbitration in insolvency. Therefore, generally these issues are arbitrable.[101] According to the prevailing

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[95] The BGB contains a chapter on lease agreements (95 sections), with detailed provisions on the residential lease agreements and lessee's protection, e.g. § 555 no contractual pentalty allowed, §§ 556 – 556g, §§ 557 – 561 on rent, rent increase, §§ 568, 573 special provisions for termination (narrower reasons, stricter form required).
[96] BGH VIII ZR 281/03, lessee entitled to sufficient electrical supply; BGH VIII ZR 30/08, unilaterial waiver of termination by lessee generally invalid, AG Neukölln 11 C 414/15, confirmation of Berlin law on restriction of rent increases; LG Düsseldorf 23 S 18/15, no termination without notice due to smoking in flat; KG Berlin (2) 161 Ss 160/15 (44/15), lessor cannot enter premises without the lessee's permission and cannot forbid visitation.
[97] Trittmann in: Böckstiegel, § 1030, para. 30.
[98] Trittmann in: Böckstiegel, § 1030, para. 29.
[99] BT-Drs. 13/5274, p. 35.
[100] Trittmann in: Böckstiegel, § 1030, para. 29.
[101] Trittmann in: Böckstiegel, § 1030, para. 27.

view in German literature all issues relating to insolvency are arbitrable, except for "core" bankruptcy issues[102]. This point of view is also undisputed in international literature. However, there is no international consent on which issues fall under "core" issues.[103]

Firstly it has to be stated that the insolvency of one party in principle does not interfere with an ongoing arbitration or prevent either party from initiating one. Pursuant to § 240 ZPO court proceedings regarding insolvent assets have to be stayed in case of the bankruptcy of one party. This provision, however, does not apply to arbitral proceedings. The exception of non-interference is in case the insolvent party does no more have the necessary means to participate in the arbitral proceedings. Then the arbitration agreement becomes inoperable.[104] As discussed above exclusive jurisdiction of a specific court does not exclude arbitration.[105] Therefore § 2 I InsO does not render insolvency inarbitrable.

Also, if an arbitration agreement has been concluded prior to the insolvency the insolvency administrator is generally bound by it, unless it is inoperable due to insufficient means.[106]

Further, arbitration and bankruptcy proceeding pursue different aims. Arbitration seeks to settle a dispute while bankruptcy proceedings are 'collective execution' proceedings and therefore allocate assets among creditors. Hence, the areas of the two proceedings do not necessarily overlap.[107]

"Core" bankruptcy issues are such disputes which deal with the actual insolvency of the debtor, e.g. "the commencement of the proceedings, the collection and distribution of the assets, verification of the claims"[108]. Claims regarding transactions between the debtor and a third party prior the insolvency arising after the avoidance of the transaction do not fall within the scope of such core issues and are therefore arbitrable.[109]

i) Consumer

There are no objective restrictions concerning arbitration of disputes involving consumers. However the formal requirements of the agreement are stricter.[110] Those can be found in §

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[102] Youssef in: Mistelis, Arbitrability, 9-41.
[103] Youssef in: Mistelis, Arbitrability, paras. 9-7, 9-9.
[104] BGH 14.09.2000 – Az. III ZR 33/00, para. 15 ff..
[105] See F. 3. b).
[106] Trittmann in: Böckstiegel, § 1030, para. 27.
[107] Živkovic, Effects of Bankruptcy in Arbitration, p. 20.
[108] Živkovic, Effects of Bankruptcy in Arbitration, p. 20.
[109] Trittmann in: Böckstiegel, § 1030, para. 27.
[110] Adolphsen, Europäisches Zivilverfahrensrecht, § 3, para. 47.

1031 V ZPO. The arbitration agreement has to be a separate document, signed personally by the parties and must not contain any other agreements then regarding arbitration. It shall protect consumer against arbitration clauses hidden in general terms,[111] hence the arbitration does not wish to prohibit arbitration agreements with consumers, but wants to ensure that those are aware of it and have the chance to refuse or further negotiate on this matter.

j) Arbitrability

According to § 1040 I 1 ZPO the tribunal has the so-called competence – competence[112], which means that the tribunal has the power to decide on its own jurisdiction and the existence and validity of any arbitration agreement.[113] This power also includes the power to decide on whether or not a subject matter is arbitrable. Such a provision was not contained in the ZPO before the 1998 reform. The first time the Federal Supreme Court had a case in this regard was in 1955. It decided that the tribunal has the competence to decide on its own jurisdiction.[114] The Federal Supreme Court further stated that parties were able to grant the tribunal the competence – competence due to § 1025 I ZPO, as this is subject matter parties can dispose of.[115] The question of jurisdiction also covers the aspect whether the tribunal may decide on the disputed subject matter, hence the arbitrability of it.[116]

k) § 1030 III ZPO

In the following section I outline examples of the restriction of arbitrability outside the Code of Civil Procedure.

Pursuant to § 37h of the Securities Trading Act (WpHG) arbitration agreements regarding future disputes in investment services, ancillary securities services and financial futures transactions are only binding if both parties are either merchants or legal persons of public law. In case of an arbitration agreement after the dispute has arisen, there are no restrictions as to subjective arbitrability.[117] This restriction was previously found in § 28 Stock Exchange Act (BörsG), which got repealed.

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[111] Trittmann in: Böckstiegel, § 1031, para. 22.
[112] Huber in: Böckstiegel, § 1040, para. 2.
[113] § 1040 I 1 ZPO: The arbitral tribunal may decide on ist own competence, and in this context also regarding the existence or the validity of the arbitration agreement.
[114] BGH DB 1955, 688; affirmed in BGHZ 68, 356, 364 f..
[115] BGHZ 68, 356, 367.
[116] Philips, Boston University Int. Law Journal, 1996, Vol. 14, 119, 137.
[117] Trittmann in: Böckstiegel, § 1030, para. 20.

For the validity of an arbitration agreement concerning insolvency matters § 160 II No. 3 Insolvency Code (InsO) requires the approval of the committee of creditors regarding disputes with a substantial amount in dispute. The inverse conclusion is the general arbitrability of insolvency disputes – as discussed above[118].

In 1931 the imperial court of justice (Reichsgericht) decided that disputes within the voluntary jurisdiction / non-contentious proceedings (Freiwillige Gerichtsbarkeit) are not arbitrable.[119] The Federal Supreme Court decided in 1952 that the decisive factor is not whether the dispute is within the voluntary or the litigiously jurisdiction. The allocation to either jurisdiction is due to expediency rather than any other reason. Therefore, adversarial proceedings can also be found within the voluntary litigation, which then are arbitrable.[120] However, in many cases disputes within the voluntary jurisdiction do not contain a pecuniary claim and hence need to be to the free disposition of the parties, which generally is not the case.

Matters of the non-contentious jurisdiction are regulated in the Act on Court Procedure in family matters and matters of non-contentious proceedings (FamFG), among these are divorce (previously § 606 ZPO), access to children, custody, adoption, registered partnership for life (previously § 661 ZPO), family status and company register.

In case of legal guardianship of a minor the legal guardian needs, pursuant to § 1822 no. 12 BGB, the consent of the family court to enter into an arbitration agreement.

3. European approach

Besides of the initial focus on Germany, I would like to give a quick overview how arbitrability is approached in other European countries. In doing so I will do so in outline and briefly and will not address all the subject matters, which have been discussed above.

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[118] See F. 3. h).
[119] VII 237/30, RGZ 133, 128 cited in: Wieczorek/Schütze, Zivilprossordnung und Nebengesetze, Vol. 5, § 1025 para. 11; Trittmann in: Böckstiegel, § 1030, para. 24.
[120] Judgement of 17.06.1952, BGHZ 6, 248, 253 f.; Schütze in: Wieczorek/Schütze, Zivilprossordnung und Nebengesetze Vol. 5, § 1025 para. 11, 39; Trittmann in: Böckstiegel, § 1030, para. 25.

The **Swiss** arbitrability provision, which was the model for the German one, is even more liberal than the German copy – at least in regard to claims involving economic interest. The Swiss Federal Tribunal stated, that "any rights which, for at least of the parties, can be assessed in monetary terms"[121] are subject to arbitration. In the same judgment the Tribunal ruled that the involvement of public policy is not enough for a dispute to be inarbitrable.[122]

Like the FAA the **English** Arbitration Act of 1996 does not address arbitrability and therefore places no restrictions on arbitrability. Generally speaking the same is true for case law. Only a few cases deal with this issue. While courts in the 17th century extensively reviewed arbitral awards and often gave them no binding effect, arbitration was already a common method for dispute resolution. Arbitration as a dispute resolution method was integrated into legislation by the Arbitration Act 1950. The effect was that court litigation was stayed and parties were compelled to use arbitration, except for strong policy reasons.[123]

The vast majority of case law affirms arbitrability of the matter at hand and holds basically all civil damages claims are arbitrable. Recently the English High Court declared "competition and anti-trust claims" arbitrable[124] and minority shareholder claims governed by the Companies Act were deemed arbitrable in 2011 by the Court of Appeal[125]. Further, many non-contractual claims are subject to arbitration. These include claims in tort, intellectual property claims and some statutory claims.[126] In cases involving claims of fraud courts reject referral to arbitration.[127] Arbitration of securities claims was never excluded, as there was and is no exclusive jurisdiction of courts. Further, the securities law and the Arbitration Acts do not conflict; therefore, those claims have been the subject matter of arbitration.[128]

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[121] Swiss Federal Tribunal, 23.6.1992, Ficantieri-Cantieri Navali Italiani SpA et OTO Melara Spa v. M and arbitration tribunal, para. 7. Inoffical translation http://newyorkconvention1958.org/index.php?lvl=notice_display&id=910 (last visited 20.02.2017).
[122] Swiss Federal Tribunal, 23.6.1992, Ficantieri-Cantieri Navali, para 10.
[123] Kerr, Arbitration International, 1996, Vol. 12 (2), 171, 175.
[124] *ET Plus SA v. Jean Paul Welter* (2005) EWHC 2115 (Comm.), para. 51 (English High Ct.).
[125] *Fulham Football Club (1987) Ltd. v. Richards* (2011) EWCA Civ 855, para. 78. (English Ct. App.).
[126] Miles, ICLG to: International Arbitration 2014, p. 247.
[127] Kerr, Arbitration International, 1996, Vol. 12 (2), 171, 175.
[128] Kerr, Arbitration International, 1996, Vol. 12 (2), 171, 175 f..

In **Dutch** legislation parties can agree on arbitration only if they can freely dispose of these rights.[129] The change of wording from "subject matter" to "legal consequences" in the current provision had no effect on the scope of arbitrability.[130] According to the International Bar Association disputes involving public policy and those with *erga omnes* effect cannot be arbitrated. The IBA lists in their Arbitration Guide family law, intellectual property law and bankruptcy law.[131] In case of exclusive jurisdiction of domestic courts these matters are inarbitrable.[132]

a) Bankruptcy

In Switzerland disputes relating bankruptcy fall within the scope of arbitrability, however matters that involve "core" bankruptcy issues are still excluded.[133]

Under Dutch and French law an arbitration agreement concluded prior the insolvency still binds the trustee.[134] Therefore, generally bankruptcy issues are also arbitrable. In French litigation creditor's claims are stayed in case of insolvency proceedings.[135] These provisions are part of French public policy[136] and as such applicable towards arbitration, this has been confirmed by legal commentators and the judiciary.[137]

b) Intellectual Property / Patent

In Switzerland all rights that are subject to registration, such as patents, trademarks and design rights are arbitrable. This includes their validity and revocation. This, in fact, is not a recent development, but has been established jurisprudence since 1945.[138]

Similar legislation can be found in Belgian Patent Law, which was amended in 1984. Art. 11 allows arbitration in patent disputes and pursuant to Art. 51 Belgian Patent Act patents can be revoked by arbitral awards with *erga omnes* effect.

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[129] Art. 1020 (3) Arbitration Act: „The arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose.".
[130] Berger, International Economic Arbitration, p. 191.
[131] Leijten, International Bar Association, Arbitration Guide Netherlands, p. 5.
[132] Berger, International Economic Arbitration, p. 191.
[133] Kovacs, Transnational Approach to the Arbitrability of Insolvency, p. 71 f., with further reference.
[134] Lazic, Arbitration and Insolvency Proceedings, para. 3.1.
[135] Art. 47, 48 Loi du 25 janvier 1885; Lazic, Arbitration and Insolvency Proceedings, para. 4.1.1.
[136] Lazic, Arbitration and Insolvency Proceedings, para. 4.1.1.
[137] Lazic, Arbitration and Insolvency Proceedings, para. 4.2; Bordeaux, 9 juill. 1987; Trib. gr. inst. Fontainebleau, 8 avr. 1987.
[138] Blessing, Arbitration International, 1996, Vol. 12 (2), p. 200 f.; Simms, Arbitration International, 1999, Vol. 15 (2), p. 197.

Because of the exclusive jurisdiction of domestic Dutch courts trademarks and patents are not arbitrable in the Netherlands. However, damages due to patent infringements and royalty disputes under patent-licensing agreements can be submitted to arbitration.[139]

Finland, France, Hungary, Italy, Ireland, Spain and Sweden also have a favourable policy towards arbitration of IP disputes, but have some limitations and restrictions. According to the ICC Working Group on IP Disputes Brazil, India, Israel, Republic of Korea and South Africa do not allow arbitration in this case.[140]

c) Antitrust, Bribery, Corruption

For a long time many countries excluded antitrust, bribery and corruption from arbitration, as the involved highly sensitive matters of public interest. The actual problem is whether a tribunal has the power to decide on the legality of a contract which involving those subjects. However, considering the doctrine of separability the mere involvement should not affect the tribunal's jurisdiction, as the contract does not affect the arbitration clause.[141] Therefore, jurisprudence and legislation have to address the issue of arbitrability not jurisdiction.

Since the *Mitsubishi* decision of the U.S. Supreme Court, arbitrability of antitrust matters is generally accepted.[142] For bribery the English Court of Appeals recently affirmed the tribunal's jurisdiction regarding the contract's validity in case the contract was obtained through bribery, unless the arbitration clause itself is affected by the bribery.[143]

4. United States of America

Arbitrability in the USA has come a long way. Since 1925 the Federal Arbitration Act (FAA) has governed arbitration. Even though the Act does not address arbitrability explicitly, it emphasises the validity of arbitration agreements in s 2.[144] Before the enactment arbitration agreements were hardly enforced. The Supreme Court stated in *Dean Witter v. Byrd* that Congress' intent with the FAA was to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate[145]. Courts established and developed the non-arbitrability doctrine

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[139] Berger, International Economic Arbitration, p. 191.
[140] http://www.wipo.int/amc/en/events/conferences/1994/blessing.html (last visited 20.02.2017).
[141] Youssef in: Mistelis, Arbitrability, para. 3-22 f..
[142] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S., 614, 639 f. (S.Ct. 1985); Youssef in: Mistelis, Arbitrability, para. 3-22.
[143] *Fiona Trust & Holding Corp. & ors v. Yuri Privalov & ors* (2007) APP.L.R. 01/24, para. 21 ff., 44.
[144] S 2: „Any written provision (...) evidencing a transaction involving commerce to settle by arbitration a controversy (...) shall be valid (...)".
[145] *Dean Witter Reynolds, Inc. v. Byr*, 470 U.S. 213, 119 (1985).

through case law and interpretation of other statutes as the FAA does not address arbitrability.[146]

A few decades ago objective arbitrability was very restricted; now, however, both the Supreme Court and legislation has opened arbitration to many types of disputes.[147] The courts found that disputes that include public interest or constitutional rights are "too important"[148] to be arbitrated. These included claims in federal antitrust, Racketeer-Influenced and corrupt Organizations Act, bankruptcy, Carriage of Goods by Sea Act and race discrimination claims.[149] In *McDonald v. City of W. Branch* the Supreme Court stated that "arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard."[150]. § 1983 of 42 U.S. Code secures that no person is deprived of any right, privilege or immunity, which is granted by the constitution. The hostility of the courts towards arbitration was also nourished by the fact that arbitrators are required to adhere to the intent of the parties. The Supreme Court stated that arbitrators are not obliged to enforce the statute, as judges are, and hence awards can thereby deprive a party of statutory rights.[151]

One milestone was the Supreme Court's *Moses v. Mercury* decision in 1983, in which the Court emphasised the strong pro-arbitration presumption of the FAA regarding all kind of claims.[152] In its 1985 *Mitsubishi v. Soler* decision the Supreme Court stated that it would not rule matters in international commercial arbitration inarbitrable, unless Congress expressly declared a claim inarbitrable. It substantiated this decision with the accession to the NYC and its aims, which would otherwise be undermined.[153]

Nowadays Congress has passed a few statutes in which it excludes certain matters from arbitration. These are, however, mainly in the domestic context and very narrow.[154] The majority of claims are deemed to be arbitrable under U.S. law.[155] Already in 1996 the United States was seen to have one of the most advanced jurisdictions towards arbitrability.[156]

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[146] Born, International Commercial Arbitration, p. 963.
[147] Born, International Commercial Arbitration, pp. 964 f..
[148] Born, International Commercial Arbitration, pp. 965.
[149] Born, International Commercial Arbitration, pp. 965 f..
[150] *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (S.Ct. 1984).
[151] *Barrentine v. Arkansas-Best Freight Sys*, 450 U.S. 728, 729, (S.Ct. 1981); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S., 614, 649 (S.Ct. 1985).
[152] *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 US 1, 24 f. (1983).
[153] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S., 614, 640 (S.Ct. 1985).
[154] Born, International Commercial Arbitration, p. 967.
[155] Born, International Commercial Arbitration, p. 968.
[156] Grantham, Berkeley Journal of International Law, 1996, Vol. 14, 173, 214.

In 2007 Congress introduced drafts of the Arbitration Fairness Act and the Fair Arbitration Act. The Fair Arbitration Act was reintroduced in 2011 and covers procedural aspects. One of the biggest changes the Bill sought to institute was that pursuant to the new section 17 (a) (1), (2) an arbitration clause needs be titled as "ARBITRATION CLAUSE" in all bold, capital letters in at least ½ inch in height and has to state whether arbitration is mandatory or optional. The Arbitration Fairness Act has been reintroduced in Congress in 2009, 2001, 2013 and again in 2015 and adds a chapter 4 to the FAA, titled "Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes". Pursuant to § 402 (a) pre-dispute arbitration agreements regarding those subject matters would be invalid and unenforceable. A definition of all terms used is given in § 401. None of the Acts has passed the introduction stage. As the draft has not been enacted by 03.01.2017 and the 114th Congress has ended, the amendment has to be newly introduced to the 115th Congress.[157]

These drafts show that some elements in Congress are not entirely on board with the Supreme Court's liberal jurisprudence towards subject matters regarding state monopolies and disputes involving public policy. However, as seen, so far it has not been able to pass the drafts through Congress and Senate.

a) Intellectual Property

In regard to patents Congress enacted 35 USC in 1983. According to its § 294 (a) parties to a contract "involving a patent or any right under a patent" can agree on arbitration for disputes "relating to patent validity or infringement". However, as expressly stated in § 294 (c) awards are only binding between the parties and "have no effect on any other person". This section also obligates the patentee to notify the Commissioner of Patents and Trademarks of any award. An award is only enforceable in case of compliance. Claims outside the scope of § 294 will probably also deemed as arbitrable.[158]

For other intellectual properties no statute exists. However, it can be observed in jurisprudence, that those matters are largely arbitrable.

The 2nd Circuit held in 1982 in *Kamakazi v. Robbins* that public policy does not exclude claims for infringement of a valid copyright from arbitration.[159] However, this case does not address the arbitrability of the validity of a copyright. The validity of a copyright arising in

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[157] https://www.govtrack.us/congress/bills/114/hr2087 (20.10.2016).
[158] Grantham, Berkeley Journal of International Law, 1996, Vol. 14, 215.
[159] *Kamakazi Music Corp. v. Robbins Music Corp.,* 684 (F.2d) 228, 231, (2nd Cir. 1982).

copyright license suits was an issue at hand in the *Saturday Evening Post v. Rumbleseat Press* case in 1987, in which the court ruled in favour of arbitration.[160] The defendant argued that this matter was not arbitrable because of the exclusive jurisdiction of federal courts pursuant to 28 USC § 1338 (a) in disputes regarding the validity of a copyright. The court rejected this argument for cases of validity arising in copyright license suits. Further, the court referred to *Mitsubishi* and argued that even in an antitrust claim public policy does not exclude arbitration. Therefore, in case of a less significant monopoly, such as copyright, arbitration shall be permitted.[161]

Considering this development it can be assumed that in future courts will allow arbitration in most disputes involving state monopolies of adjudication and public policy. This is underpinned by the *Mitsubishi* decision. Courts widely apply its doctrine to other disputes and take it as a leading case regarding the general attitude towards arbitration and the tribunal's ability.

b) Antitrust

The arbitrability of antitrust law was a disputed topic in the United States. Since 1968 antitrust and arbitrability has been an issue at hand.[162] Courts used to deny enforcement of arbitral awards containing antitrust issues on the grounds of public interest in the application of antitrust laws, complexity of antitrust matters and that antitrust laws give exclusive jurisdiction to the federal courts.[163]

The Second Circuit reasoned in *American Safety* that antitrust was not arbitrable[164] and until 1985 this ruling was undisputed. In its judgement the court gave four reasons. The first and foremost one is the public interest in antitrust cases – "(a) claim under the antitrust laws is not merely a private matter".[165] In the opinion of the court the plaintiff rather asserts his rights to an attorney-general than to arbitration. Secondly, the court assumed that in antitrust cases arbitration clauses were frequently a compelled part of the contract and that Congress did not plan for adhesion contracts to set the forum. As a third rationale the court argued that antitrust

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[160] *Saturday Evening Post Co. v. Rumbleseat Press, Inc*., 816 F.2d, 1191, 1198-1199 (7th Cir. 1987).
[161] *Saturday Evening Post Co. v. Rumbleseat Press, Inc*., 816 F.2d, 1191, 1198-1199 (7th Cir. 1987); Grantham, Berkeley Journal of International Law, 1996, Vol. 14, 216.
[162] Goodman, Columbia Journal of Transnational Law, Vol. 23, 655, 665; Lemly, Northwestern University Law Review, p. 6.
[163] Brewer, Antitrust Law Journal, 1997, Vol. 66 (1), 91, 91.
[164] *American Safety Equipment Coorp. V. J. P. Maguire & Co.,* 391 F. 2d 821 (1968); Zumbusch, Texas International Law Journal, 1987, Vol. 22, 291, 293.
[165] *American Safety Equipment Coorp. V. J. P. Maguire & Co*., 391 F. 2d 821, para. 19 (1968).

claims are complicated, with extensive and diverse evidence, which rather should be litigated. Lastly, in the view of the court an objective outcome might be less likely as arbitrators are businessmen.[166] The second circuit ruled that public interests regarding antitrust prevail those regarding arbitration.[167]

In the *Mitsubishi v. Soler* decision, however, the U.S. Supreme Court ruled that international disputes involving antitrust issues are subject to arbitration. As a rationale the court gave reasons of international concern, such as "international comity" and "predictability in the resolution of disputes"[168]. The court points out that one now has to distinguish between domestic and international disputes by stating that in the domestic context contrasting findings are possible.[169] It also stated that there is not presumption that arbitration of statutory claims is excluded and explicitly overruled *American Safety* by reasoning that the enforcement of arbitration agreements is prevalent to the enforcement of antitrust laws.[170] It also addressed the three of the given reasons by the court.[171] It rejects the assumption that arbitration agreements are contracts of adhesion as an undemonstrated assumption. Further, in such a case the compelled party has remedies to challenge the validity of the agreement so that it does not function as a ground for inarbitrability.[172] Secondly, the mere reason of complexity is not enough to exclude arbitration; especially against the background that arbitration was allowed arbitration after the dispute has arisen.[173] Lastly, it refuses the assumption that arbitral tribunals will not abide to the restrictions by antitrust laws because to a business background of the arbitrator.[174]

After this decision the rulings of lower courts dissented. However, the general judgment is that domestic antitrust cases can also become arbitrable. This development in jurisprudence of district courts was affirmed by the Second Circuit in 1991, the Ninth Circuit in 1993, the Tenth Circuit in 1995 and by the First Circuit in 2001.[175] The Eleventh Circuit has made a

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[166] *American Safety Equipment Coorp. V. J.P. Maguire & Co.*, 391 F. 2d 821, para. 19-21 (1968); Gordon Blanke, EU and US Antitrust Arbitration, para. 42-006 f..
[167] Zumbusch, Texas International Law Journal, 1987, Vol. 22, 291, 294.
[168] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 629 (1985).
[169] *Mitsubishi v. Soler* 473 US 614, 629 (1985).
[170] Zumbusch, Texas International Law Journal, 1987, Vol. 22, 291, 296.
[171] Brewer, Antitrust Law Journal, 1997, Vol. 66 (1), 91, 97 ff..
[172] *Mitsubishi v. Soler* 473 US 614, 632 (1985).
[173] *Mitsubishi v. Soler* 473 US 614, 633 (1985); Brewer, Antitrust Law Journal, 1997, Vol. 66 (1), 91, 99.
[174] *Mitsubishi v. Soler* 473 US 614, 634 (1985).
[175] *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 286 (S.D.N.Y. 1994), aff'd, 946 F. 2d 883 (2d Cir. 1991); *Nghiem v. NEC Electronics, Inc.*, 25 F. 3d 1437 (9th Cir. 1994); *Acquaire v. Can. Dry Bottling*, 906 F. Supp. 819, 837 (E.D.N.Y. 1995); *Coors Brewing Co. v. Molson Breweries*, 51 F. 3d 1511 (10th Cir. 1995); *Motors of Sailsbury, Inc. v. DaimlerChryler Motors Corp.*, 271 F. 3d 6, 11 (1st Cir. 2001).

contradictory ruling in 1995 in the *Kotam v. JBL* case. In its ruling the court decided that the *Mitsubishi* decision is only applicable to international cases and that *American Safety* and *Cobb*[176] were still precedent for domestic antitrust contexts.[177] However, this case has been reheard *en banc* and the Eleventh Circuit then reasoned that domestic antitrust cases are also subject to arbitration.[178] Case law of Circuit courts and dicta in Supreme Court decisions expressly render domestic antitrust issues arbitrable.[179]

In conclusion, even without a Supreme Court decision on a domestic case it can be said that antitrust is now arbitrable – in both the domestic and international contexts.

However, in *Mitsubishi* the Supreme Court established the so called "second look doctrine". This means that during the enforcement stage U.S. Courts review the arbitration tribunal's decision and the appropriate application of mandatory law.[180] By implementing this mechanism the Supreme Court enabled mandatory law to be arbitrated, but did not surrender complete court jurisdiction. Therefore, it can be concluded, that even though U.S. jurisdiction is pro-arbitration, it retains some hesitation regarding disputes involving public policy.[181]

c) Labour Law

Arbitration of employment disputes has increased significantly. A turn-around decision was the *Gilmer v. Interstate*[182] case in 1991.

Arbitration until the 1990's was mostly conducted in disputes of workplaces with trade unions and about the enforcement of collective bargaining agreements. The union took the role of a bilateral partner and helped in the proceedings.[183] Employers interpreted the *Alexander v. Gardner-Denver* decision in a negative way.[184] In this case the Supreme Court allowed court litigation after concluded arbitration proceedings, arguing that the Title VII of Civil Rights Act of 1964 supplements law, rather than ousting it. The rights under Title VII are independent of the arbitration, which only dealt with contractual rights. It further ruled that the doctrine of remedies does not apply because the present case was regarding statutory

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[176] *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974).
[177] *Kotam Electronics v. JBL Consumer Prod., Inc*., 59 F. 3d 1155, 1158 (11th Cir. 1995).
[178] *Kotam v. JBL*, 93 F.3d 724 (11th Cir. 1996).
[179] Brewer, Antitrust Law Journal, 1997, Vol. 66 (1), 91, 91.
[180] *Mitsubishi v. Soler,* 473 US 614, 638 (1985); Kovacs, Transnational Approach to the Arbitrability of Insolvency, p. 82.
[181] Zumbusch, Texas International Law Journal, 1987, Vol. 22, 291, 329.
[182] *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 24, 26 (1991).
[183] http://www.epi.org/publication/the-arbitration-epidemic/ (20.02.2017).
[184] McLaughlin, Arbitration International, 1996, Vol. 12 (2), 113, 119.

rights, contrary to the contractual rights context of the arbitration.[185] Decisions by lower courts came to similar judgements.[186]

Hence, employers had to fear that employees were able to initiate court litigation under federal statutes after losing in arbitration. This changed with the *Gilmer v. Interstate* decision in 1991 where it compelled an employee to arbitrate his age discrimination complaint under the Age Discrimination in Employment Act of 1967 (ADEA). In its reasoning the Supreme Court referred to its *Mitsubishi* decision where it decided that statutory claims are arbitrable. The court found that the provisions of the ADEA do not prevent arbitration and rejected the claimant's argument that the ADEA required that important social policies be considered. The claimant listed other statutes that do so, but the court pointed out that claims under those statutes were still arbitrable.[187] Just before this decision the 2nd Circuit decided that disputes under the Employee Retirement Income Security Act are arbitrable, holding that the purposes of ERISA are not inconsistent with arbitration.[188]

The Supreme Court did not decide on the interpretation which employment contracts are excluded by s 1 FAA, but cited only cases which took a narrow interpretation, that only employment contracts in the transportation sector that cross borders are excluded. This same interpretation was taken in the later case *Circuit City Stores v. Adams*.[189]

The legislator, as well, passed legislation favouring employment disputes. S 513 Americans with Disabilities Act encourages arbitration "(w)here it is appropriate and to the extent authorized by law". The same text can be found in s 118 Civil Rights Act 1964.

d) Consumer Protection

In 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act amended several statutes by adding consumer protection norms regarding arbitration.

According to § 15o Securities Exchange Act the Securities and Exchange Commission can instate a rule to prohibit or to impose condition or limitations on the use of arbitration regarding future disputes when customers are involved and it finds that these are in the public interest or for the protection of investors. The commission has not yet made use of this power.

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[185] *Alexander v. Gardner-Denver Co* 415 U.S. 36, 37 (1974).
[186] *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S: 728 (1981); *McDonald v. City of West Branch, Mich*., 466 U.S. 284 (1984); McLaughlin, Arbitration International, 1996, Vol. 12 (2), 113, 120.
[187] *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 24, 26 (1991).
[188] *Bird v. Shearson Lehman/Amercian Express, Inc*. 926 F.2d 116, para. 28 (2nd Circ.1991).
[189] *Circuit City Stores v. Adams* 532 U.S. 105 (2001).

This power is also given to the SEC by s 205 (f) Investment Advisers Act of 1940 for disputes arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organisation.

A similar provision is introduced into the Consumer Financial Protection Act 2010, which provides the Consumer Financial Protection Bureau (CFPB) with the same power in s 1028 (b); subsection (c) states that the Bureau cannot prohibit consumers from entering into a voluntary arbitration agreement. S 1057 (d) (2) reiterates that pre-dispute arbitration agreements are not valid and according to subsection (1) cannot waive rights and remedies provided by s 1057. However, collective bargaining agreements shall be enforceable, unless the Bureau decides otherwise, s 1057 (d) (3).

The Bureau conducted a study, which showed that only a few consumers refer disputes to arbitration. Hence, it proposed to prohibit mandatory arbitration clauses in the contracts, so that consumers are able to pursue class action lawsuits.[190]

The Dodd-Frank Act granted the Bureau the same power in s 129C Truth in Lending Act regarding mortgage loans pursuant. The Bureau made use of this power and the prohibition of mandatory arbitration in mortgage loans subject to the Truth in Lending Act took effect on 01.06.2013.[191]

S 26 of 7 U.S. Code Commodity Exchanges prohibits any pre-dispute arbitration agreements and prohibits a waiver of rights and remedies provided by s 26 to be waived by an arbitration agreement.

Whistle-blowers of public registered companies (15 U.S.C. 78l) and nationally recognised statistical rating organisations (15 U.S.C 78o (d)) are protected in the same way by s 1514A (e) of 18 U.S. Code.

e) Tort claims / Punitive damages

Tort claims need to be divided into those occurring between strangers and those within contractual relationships. The former can be arbitrated if parties agree on arbitration after the delictual incident. Regarding the latter, parties can also conclude pre-dispute arbitration agreements. The wording of this agreement has to be wide enough to include such claims and

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[190] http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/ (last visited 20.02.2017).

[191] Comptroller's Handbook, Truth in Lending Act, p. 3.

the claim must be germane to the subject matter[192], i.e. a direct or indirect connection to the contract.

Some states excluded tort claims from arbitration by state law.[193] McLaughlin assumed in 1996 that those laws would be pre-empted by the *Allied-Bruce Terminix* judgment by the Supreme Court, in which the court stated that the FAA pre-empts conflicting state law.[194] In 2012 the Supreme Court vacated *per curiam* in *Marmet Healt v. Brown* the Court of Appeals judgment, in which the lower court decided that West Virgina's public policy prevents arbitration of tort claims.[195]

Hence, since then tort claims occurring in contractual relationships are arbitrable even in case of conflicting state law.

Since the 1995 decision of the Supreme Court the discussion regarding arbitrability of punitive damages is basically decided. In *Mastrobuono* the court decided that arbitrators may award punitive damages.[196]

The case law on this subject matter starts in 1976, where the Court of Appeal of New York denied to enforce an award regarding punitive damages in *Garrity v. Lyle* after the trial court and the court of appeals confirmed the award.[197] The court reasoned that punitive sanctions are reserved to the state, and therewith punitive damages. The freedom to contract does not include the freedom to punish.[198] However, punitive damages are not reserved to the state, and parties may agree to punishment in a contract.[199] This case was then seen as New York state law preventing arbitrators to award punitive damages by the 2nd Circuit in *Fahnestock v. Waltman* in 1991.[200] It can be summarised that the court holds that in case the agreement

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[192] *Old Dutch Farms Inc. v. Mild Drivers and Dairy Employees Local Union No,* 359 F.2d 598, para. 4 (2nd Cir. 1966).
[193] According to McLaughlin these states are Alabama, Arkansas, Georgia, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, South Carolina and West Virginia. McLaughlin, Arbitration International, 1996, Vol. 12 (2), 113, 131.
[194] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995). This doctrine was restated by the Supreme Court e.g. in *Volt Information Science v. Stanford University*, 489 U.S. 4698(1989) *and AT&T Technologies, Inc. v Communications Workers of America et. al.,* 475 U.S. 643 (1986).
[195] *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. (2012) Nos. 11-391.
[196] *Mastrobuono v. Shearson Lehman Hutton, Inc*. 512 U.S. 52, 52 (1995); Boyarsky, Pepperdine Disp. Res. LJ, 2006, Vol. 6 (2), 229, 230.
[197] *Garrity v. Lyle Stuart, Inc.,* 353 N.E.2d 793 (1976).
[198] *Garrity v. Lyle Stuart, Inc.,* 353 N.E.2d 793, 797 (1976).
[199] Ware, Fordham Law Review, 1994, Vol. 63 (2), 529, 549.
[200] *Fahnestock & Co v. Waltman*, 935 F.2d 512, 515 (2nd Cir.), cert. denied, 112 S. Ct. 380 (1991).

allows for punitive damages, but the law prohibits them the FAA pre-empts the state law. If, however, the agreement is silent the prohibitive law sustains.[201]

In the same year the 9th Circuit affirmed an award contain punitive damages. It reasoned that those are included in the broad power of arbitrators to settle disputes and are included in the AAA's Commercial Arbitration Rules, which were incorporated by the parties. Further, it stated that Garrity was pre-empted by the FAA.[202]

Before the Supreme Court decided the *Mastrobouno* case the 7th Circuit decided that the FAA did not pre-empt the *Garrity* rule relying on that the FAA and federal policy is merely "to ensure enforceability" of the agreement and, citing the *Volt* judgment, does not contain an "express preemptive provision"[203], and stating that the court cannot change the agreement to enlarge arbitrability. As parties agreed on New York law, they are bound by it. However, *Volt* also said, that in cases where state law is in conflict with federal law it can be pre-emted by the FAA.[204] The Supreme Court eventually decided that the arbitration agreement was ambiguous, which is construed against the drafter (read as parties agreed upon awarding punitive damages)[205]. The court also states that in the case of there being no agreement the FAA pre-empts the *Garrity* rule.[206] Hence, with this decision is has been decided that punitive damages may be awarded, unless parties expressly exclude this in their arbitration agreement.

f) Family

Arbitration of family matters is the most recent development in the United States. The National Conference of Commissioners on Uniform State Law (ULC) published their approval of the Uniform Family Law Arbitration Act on 28th November 2016. Now states can adopt this Act as state law to allow family arbitration and establish uniform state law within the U.S.. Up to date only a few states already have separate statue for family law.[207] Under the Uniform Act disputes, which can be decided by a judge, are arbitrable, except those mentioned in s 3. These exceptions are the granting of a divorce, adoption or guardianship,

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[201] Ware, Fordham Law Review, 1994, Vol. 63 (2), 529, 550.
[202] *Cunard Line, Ltd. v. Todd Shipyards, Inc*., 943 F.2d 1056, 1063 (1991).
[203] *Volt Information Science v. Stanford University*, 489 U.S. 468, 469 (1989).
[204] *Volt Information Science v. Stanford University*, 489 U.S. 468, 477 f. (1989).
[205] M*astrobuono v. Shearson Lehman Hutton*, *Inc*., 512 U.S. 52, 62 (1995).
[206] *Mastrobuono v. Shearson Lehman Hutton*, *Inc*., 512 U.S. 52, 59 (1995).
[207] Among those are North Carolina, Colorado, Connecticut, Indiana, Michigan, New Hampshire and New Mexico. Burleson, Campbell Law Review, 2008, Vol. 30, p. 297, 297.

the termination of parental rights and the determination of status. States have the option to exclude child-related disputes altogether or only specific areas of such, e.g. child support. This statute only includes provision specifically to family law arbitration, otherwise it refers to the Uniform Arbitration Act / 2000 Revised Uniform Arbitration Act (UAA being adopted by 49 states).[208]

Further, the American Academy of Matrimonial Lawyers (AAML) published the Rules for Arbitration of Financial Issues in 1990 and in 2005 the Model Family Law Arbitration Act, which was based on the North Carolina Family Law Arbitration Act, but has not been adopted by any state. The Act provides procedural rules to conduct arbitration, and it does not oust any substantive law.[209] Nonetheless, the AAML offers training to become a certified family law arbitrator.[210] North Carolina was the first state to enact a separate Arbitration Act for family matters in 1999.

Historically spouses could not contract, as they were seen as a unit. Hence, they could not agree to arbitrate. However, courts dissociated from this concept and consequently allowed arbitration agreements in marriages regarding property division, spousal support and post-divorce alimony.[211] Progressively courts allowed arbitration in the majority of family disputes. Generally the granting of a divorce and disputes involving children are still excluded.[212]

It seems that states are reconsidering the latter issue. The former trend was that child- related disputes were inarbitrable.[213] Now only a minority of states exclude child matters altogether.[214] The following cases were the first ones, which evidenced a different approach.[215] In 1982 the Supreme Court of North Carolina mentioned in an *obiter dictum* that there is no prohibition of arbitration of child custody and child support, however awards will be subject to review and modification by the courts.[216] This was confirmed in 1984 by the

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[208] ULC, Commentary Uniform Family Law Arbitration Act, p. 2; Burleson, Campbell Law Review, 2008, Vol. 30, p. 297, 297.
[209] http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-10 (last visited 20.02.2017).
[210] ULC, Commentary Uniform Family Law Arbitration Act, p. 1.
[211] McLaughlin, Arbitration International, 1996, Vol. 12 (2), 119, 129, further reference to case law in footnote 95.
[212] De Jong, PER, 2014, Vol. 17 (6), 2356, 2379; Kennett, International Journal of Law, 2016, Vol. 30 (1), 1, 7.
[213] McLaughlin, Arbitration International, 1996, Vol. 12 (2), 119, 129.
[214] ULC, Commentary Uniform Family Law Arbitration Act, p. 8.
[215] McLaughlin, Arbitration International, 1996, Vol. 12 (2), 119, 129.
[216] *Jenne Eder Crutchley v. William F. Crutchley, Jr.*, 293 S.E. 2d 793 (N.C. 1982).

Court of Appeals.[217] In 1992 the Supreme Court of Ohio decided that matters of temporary spousal and / or child support may be arbitrated as agreed upon in a pre-nuptial agreement.[218] In *Kelm v. Kelm II* in 2001 the same court then, however, held that child custody and visitation rights are not subject to arbitration.[219] However, the Supreme Court of California held in 1994 that an arbitration agreement regarding custody is enforceable if the agreement was concluded in a judicially supervised proceeding.[220] Also the Court of Appeals of Michigan found in 1995 that arbitration is "an acceptable and appropriate method" for child custody, especially as there is no prohibition of such by case law, court rule or statute in Michigan. It does not hinder parties from later proceeding to change the decision for the future.[221] In 2009 the Supreme Court of New Jersey allowed binding arbitration of child custody in *Fawzy v. Fawzy*. It reasoned that by deciding on arbitration the parent exercised their parental autonomy and that an arbitration forum can be less adversarial than a court litigation.[222]

Presently, arbitration of child-related matters is allowed in most states, but courts reserve the right of review. The extent of such court review can take two different approaches. It can either be that any challenge of the award leads to a *de novo*[223] rehearing, or the challenging party needs to provide *prima facie* evidence that the award is not in the best interest of the child.[224] The review is based on the courts' role as *parens patriae*, in which they protect the welfare of the child.[225] However, this doctrine is questioned to some extend, because courts used to supersede the parental autonomy[226], which is granted through the constitution.[227] Eventually, this right includes the right to "decide wrongly"[228], which the court has to respect. It only should be used as an *ultima ratio*. This approach was taken in *Fawzy*.[229]

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[217] *Robert Lewis Rustad v. Cecilia Salley Rustad*, 314 S.E.2d 275 (N.C. Ct. App. 1984).
[218] *Kelm v. Kelm*, 68 Ohio St. 3d 26 (Ohio 1993).
[219] *Kelm v. Kelm*, 92 Ohio St. 3d 223, 229 (Ohio 2001).
[220] *Re Marriage of Assemi* (7 Cal. 4th 896, (1994).
[221] *Dick v. Dick*, 534 N.W.2d 185, p. 588 (Mich. Ct. App. 1995).
[222] *Fawzy v. Fawzy* 973 A.2d 347, 357, 360 (N.J. 2009).
[223] The court has the right to rehear the case without reference to the previous arbitration proceedings.
[224] Kennett, International Journal of Law, 2016, Vol. 30 (1), 1, 17.
[225] Spitko, Washing and Lee Law Review, 2000, Vol. 57 (4), 1139,1162.
[226] De Jong, PER, 2014, Vol. 17 (6), 2356, 2384.
[227] Kennett, International Journal of Law, 2016, Vol. 30 (1), 1, 7.
[228] Spencer, Duke Law Journal, 1976, 911, 913.
[229] Kennett, International Journal of Law, 2016, Vol. 30 (1), 1, 18.

g) Bankruptcy

In U.S. legislation there is a conflict between FAA and Bankruptcy Reform Act of 1978. 28 USCA section 1471 (a) gave original and exclusive jurisdiction over bankruptcy cases to the district courts, the same power was given to bankruptcy courts in section 1471 (c). The intention was that all disputes are handled in one proceeding. Most of the bankruptcy courts interpreted this section to mean that they have a discretion in deciding on the enforcement of arbitration agreements concluded before the insolvency.[230] This led to a different jurisprudence between lower courts and was affirmed by the 3rd Circuit in 1983 in *Zimmerman v. Continental Airlines*[231]. Even though the Supreme Court declared such broad jurisdiction as unconstitutional in 1982[232] the 3rd Circuit decision was the one prevailing in lower courts jurisprudence to deny arbitration.[233] In 1984 Congress reacted to the inconsistent jurisprudence. Even though section 1471 was repealed, letters (a) and (b) were identically implemented in section 1334, merely 1471 (c) eliminated. This was the section giving bankruptcy courts exclusive jurisdiction. Since 1984 bankruptcy judges only have full power regarding "core proceedings" under section 157 (b) (2), which provides a non-exclusive list. In regard to other issues bankruptcy judges may hear the matter pursuant to section 157 (cXl). In 1989 the 3rd Circuit overruled its *Zimmerman* decision and decided that bankruptcy courts do not have discretion whether to enforce an arbitration agreement in regard to non-core matters.[234]

Once an insolvency proceeding is initiated any "judicial, administrative, or other action or proceeding" against the debtor will be stayed pursuant to 11 USC Section 362 (a)(1). This section does not expressly mention arbitration proceeding, but it can be concluded from legislative history that it also comprises arbitration, presumably also international arbitration. The American Arbitration Association declared its willingness to hold arbitration proceedings.[235]

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[230] Lazic, Arbitration and Insolvency Proceedings, para. 3.2.
[231] *Fred Zimmerman v. Continental Airlines, Inc.* 712 F.2d 55, para. 1, (3rd Cir. 1983).
[232] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 US 50 f. (1982).
[233] Lazic, Arbitration and Insolvency Proceedings, para. 3.2.
[234] *Hays and Company v. Merril Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149, para. 60, (3rd Cir. 1989).
[235] Lazic, Arbitration and Insolvency Proceedings, para. 4.2; *Coar v. Brown*, 29 B.R. 806 (Bankr. N.D. Ill. 1983).

h) Securities Transactions

The point of view of arbitrability of securities transactions has made a complete reversal over the past decades. Under the US Securities Act 1933 and the Securities Exchange Act 1934 arbitration agreements were considered void, as those limit the consumer's rights.[236]

In *Wilko v. Swan* in 1953 the Supreme Court declared claims under the Securities Act 1933 as inarbitrable.[237] It ruled that the Securities Act prevailed over the FAA because the former was drafted to protect costumers as the weaker party.[238] According to the Supreme Court tribunals are not able to protect the investors' substantive rights under the Securities Acts[239]. Twenty years later in *Scherk v. Alberto Culver* it then ruled that claims with international element were arbitrable.[240] The Supreme Court rejects Respondent's reliance on the *Wilko* decision by pointing out the international aspect of the contract at hand – which was not given in *Wilko*. The judges explained that refusal of the enforcement of the agreement would lead to forum shopping among parties.[241]

This decision illustrates the differentiation between domestic and international contexts, which the Supreme Court also highlights in *Mitsubishi*. From those decisions it can be seen that the Supreme Court recognises the importance of international commerce and different standards in international (public) policy. For the sake of international conformity it is willing to surrender certain exclusive court jurisdiction, to which it yet adheres in domestic cases.

In 1987 in *Shearson v. McMahon* the Supreme Court enforced an arbitration agreement in a domestic case. The Court reasoned that *Wilko* has to be interpreted in the way that a pre-dispute waiver is only void under § 29 (a) Exchange Act if arbitration is an inadequate forum for the protection of substantive issues.[242] It then elaborated that arbitration is now seen as equally able to solve such disputes. The court referred to the explanation given in its *Mitsubishi* decision and stated that *Scherk* shows the suitability of arbitration for claims under the Exchange Act – even though it was an international scenario, the tribunal's competence to resolve issues under § 10 (b) Securities Act is the same in domestic cases.[243]

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[236] Lew, Comparative Arbitration, p. 203.
[237] *Wilko v. Swan*, 346 U.S. 427, 438 (1953).
[238] *Wilko v. Swan*, 346 U.S. 427, 434 f. (1953).
[239] Kerr, Arbitration International, Vol. 12 (2), 171, 172.
[240] *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 515 (1974).
[241] *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 517 (1974).
[242] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 229 (1987).
[243] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

Finally, in 1989 the Supreme Court overruled *Wilko* and declared that it is "inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements"[244] and that *Wilko* and *McMahon* cannot coexist. The court further stated that a referral to arbitration does not undermine substantive rights under the Securities Act.[245]

Hence, claims under securities law are arbitrable since 1989.

i) Class actions

In *Green Tree v. Bazzle* the Supreme Court decided that class actions can be arbitrated if the arbitration clause is drafted accordingly. However, it also said that this question is a matter which is to be decided by the arbitrator in the particular cases, as the dispute is neither regarding the validity of the agreement nor the its applicability – only those are matters to be decided by courts.[246] The preceding judgment was by the Supreme Court of South Carolina, in which this court decided that class actions are arbitrable if the arbitration agreement is silent on this matter. It based its decision on decisions by Californian courts, which took this approach.[247]

Previous courts judgments contain a variety of different approaches. The Seventh Circuit denied class arbitration in *Champ v. Siegel Trading*based on s 4 FAA. If the court allows for class arbitration it compels parties to a different type of arbitration than agreed to.[248] The court in *Atlas Plastering v. Superior Court* decided that class arbitration is not possible because it would deprive the parties of their right to appoint an arbitrator according to the arbitration agreement, nor have they conceded to consolidated proceedings.[249]

Contrary in *Keating v. Superior Court* the Supreme Court of California decided that class arbitration is an appropriate procedure. This decision finally was the decisive case on which the Supreme Court of South Carolina based its decision and was eventually affirmed by the Supreme Court in *Green Tree v. Bazzle* decision.

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[244] *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 484 (1989).
[245] *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 486 (1989).
[246] *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 f. (2003).
[247] *Bazzle v. Green Tree Financial Corp*., 351 S.C. 244, 266 (2002).
[248] *Champ v. Siegel Trading Co., Inc.,* 55 F.3d 269 para. 18 (7th Cir. 1995).
[249] *Atlas Plastering, Inc. v. Superior Court,* 72 Cal. App. 3d 63 (1977).

j) Arbitrability

The discussion on the arbitrability of arbitrability started with the Supreme Court's decision in *Prima Paint*. Here the court decided on the severability doctrine, meaning that the validity of the arbitration agreement is separable from the validity of the main contract.[250] Further, it was decided that a federal court only has the jurisdiction to decide "issues to the making and performance of the agreement to arbitrate"[251], i.e. that the question whether the merits are arbitrable is to be decided by courts.

In *First Option v. Kaplan* the Supreme Court decided that the question of arbitrability can only be decided by the arbitral tribunal if the parties expressly agreed on this, there must be a "clear and unmistakable" evidence of this agreement. The court pointed out that even though there is a presumption in favour of arbitration, this could not be transferred on the question who has to decide the question of arbitrability.[252] Hence, there is a pro-court presumption in this regard.

Even though *First Option* was not the first case, in which the Supreme Court decided on this issue, it is the most prominent one.[253] Already in 1960 in *Steelworkers v. Warrior & Gulf* decided in this manner, even though not expressly stated.[254] Then in 1986 in *AT&T Technologies v. Communications Workers* it clearly stated that the question of arbitrability has to be decided by courts, unless the parties agree otherwise. The court explained that this is to avoid court involvement in the merits claiming to decide the issue of arbitrability.[255]

5. South Africa

While the European and American scholarly discussion regarding arbitrability is diversified and particularised on the different subjects, this topic is rather neglected in South African literature. The same counts for South African case law. In light of the legislative discussion in the South African Law Commission (SALC) about reforming the South African Arbitration Act 42 of 1965 since 1997 this scarcity of academic discussion is astonishing. Even though

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[250] *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 402 (1967); Germain, J. Disp. Res., 2005 (2), 523, 527.
[251] *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 (1967).
[252] *First Options of Chicago, Inc. v. Kaplan et al*, 514 U.S. 938, 944 (1995).
[253] Cited as relevant case in Berger, Baylor L. Rev., 2004, Vol. 56, 753, 788; Germain, J. Disp. Res., 2005 (2), 523, 526.
[254] *United Steelworkers of America v. Warrior & Gulf Nacigation Co.,* 363 U.S. 574, 592 (1960).
[255] *AT&T Technologies, Inc. v. Communications Workers of America et al,* 475 U.S. 643, 647 (1986).

the SALC discussed different approaches on how to address arbitrability within the new statute and gave plenty of opportunities to hand in statements on its reports and discussion papers scholars only rarely took part in this discourse.

South Africa's attitude towards arbitration became more favourable. The Constitution of 1994 provides in the bill of rights "the right to have any dispute that can be resolved by the application of law decided (…) before (…) another independent and impartial tribunal or forum."[256] The Supreme Court of Appeal and the Constitutional Court have expressed arbitration-friendly positions in their judgements, stressing party autonomy and support a restrictive exertion of the power to nullify arbitration agreements and awards. However, even though jurisdiction holds a favourable position towards arbitration, it still refuses enforcement on public policy grounds if necessary. [257]

The current Arbitration Act 42 of 1965 deals with arbitrability in its s 2. This provision enumerates several subject matters that are not arbitrable, those are matrimonial causes or any matter incidental to any such case (s 2 (a)), and any matter relating to status (s 2 (b)). Those were the subjects which were restricted by public policy at the time of drafting.[258] Hence, any other matter appears to be arbitrable. This, however, is not the case. There are further restrictions in other statues, common law and through further public policy.

In the recent case *Brookstein v. Brookstein* the Supreme Court of Appeal specified the time-frame in which a case falls within the scope of s 2 Arbitration Act. It decided that there must be a "live matrimonial cause either pending, or in the process of being instituted"[259]. In this case the divorcing spouses reached a settlement agreement, which was made an order of court. According to the court the consequence of such is the dissolution of the marriage and the termination of all matrimonial matters and the matrimonial cause itself, hence there is no live cause anymore.[260] The claimant sought the setting aside of an arbitration award on the ground that the matter was not arbitrable. The arbitration was dealing with a delictual claim due to the non-disclosure of the accurate value of the accrual within the previous litigation process.

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[256] Art. 34 South African Constitution of 1994.
[257] See C. 5. g) public policy.
[258] Taitz, Arbitration Procedures in South Africa, para. 4.
[259] *Brooksein v. Brookstein*, (20808/14) (2016) ZASCA 40, para. 9.
[260] *Brooksein v. Brookstein*, (20808/14) (2016) ZASCA 40, para. 11 f..

Even though this case deals with a matrimonial matter (s 2 (a)), it could be included in matters relating to status (s 2 (b)). The judgment is not specifically connected to the matrimonial issue at hand, but deals with the different stages of litigation, meaning when a case is closed and no longer falls within the scope of s 2 of the Arbitration Act. This is irrespective of the subject matter at hand.

a) Matrimonial cases

S 2 (a) Arbitration Act needs to be read in conjunction with common law to get a clearer picture of which cases are restricted from arbitration.[261] In the *Pitt v. Pitt* decision the propriety rights of the spouses in a divorce proceeding were at issue. The court decided that a referral to arbitration would be contrary to the Arbitration Act.[262] Further in *Ressell v. Ressell* it was ruled that the well-being of the children – in this case the place of access and assertion of custody rights - cannot be arbitrated, but has to be decided in court. According to the judge this is the intention of the statute, and the previous common law.[263] It was also the court's opinion that the wording "any matter incidental to any such matter"[264] is broad enough to exclude such disputes from arbitration[265].

In 1948 in *Estate Setzen v. Mendelsohn*[266] a deceased grandfather bequeathed 20 per cent of his business assets to his grandchildren, who were minors. The value of the company's assets was disputed. At that time the Arbitration Act 29 of 1898 of the Cape of Good Hope was still in force, of which s 7 (c) precluded a submission of "(m)atters in which minors (…) may be interested" to arbitration without the special leave of the court.[267] Eventually the judge's decision was based on this provision, as the respondent was not able to bring a sufficient reason forward for granting such leave.[268] However, the Arbitration Act 42 of 1965, which repealed Act 29[269], does not contain a comparable provision. There does not appear to be any case since 1965 dealing with this matter, or containing an *obiter dictum* in this regard. Hence, this judgment should be treated with caution. It cannot be taken for granted that a court would decide such a case in the same manner under the current law, as this case does not concern

[261] Ramsden, The Law of Arbitration, p. 24.
[262] *Pitt v. Pitt* 1991 (3) SA 863 (D), 864.
[263] *Ressell v. Ressell*, 1976 (1) SA 289 (W), 292 A-B.
[264] S 2 (a) Arbitration Act 42 of 1965.
[265] *Ressell v. Ressell*, 1976 (1) SA 289 (W), 291 G-H.
[266] *Estate Setzen v. Mendelsohn*, 1948 (3) SA 292 (C).
[267] S 7 (c) Arbitration Act 29 of 1989.
[268] *Estate Setzen v. Mendelsohn*, 1948 (3) SA 292 (C), 295.
[269] S 42 (1) Arbitration Act 42 of 1965.

matrimonial matters or status, it cannot restricted by s 2 (a) or (b) Arbitration Act of 1965. This is particularly so, taking into consideration that the legislator made the decision to rescind the decisive relevant provision, which the judges ultimately have to abide by in their judgements. Nevertheless some authors[270] still cite this case for the exclusion of such matters by common law. This, in my opinion, cannot be done without explicitly stating the change of circumstances. According to Butler and Finsen case law regarding s 7 (c) Arbitration Act 29 of 1898 does no longer apply.[271]

Du Plessis, on the other hand, takes this change in legislation as an argument that the exclusion of access rights – such as in *Ressell v. Ressell* – is too wide.[272] He argues that as subsection (c) has been repealed and hence the restriction regarding matters involving minors is no longer applicable. However, the s 7 (b) of Arbitration Act of 1898 merely states "Matrimonial causes"; the present s 2 (a) is broader in this instance by adding the phrase "any matter incidental to any such case", on which the court relied[273].

b) Matters related to status

According to s 2 (b) Arbitration Act matters relating to status are excluded from arbitration. However, the term "status" is not defined in the statute.[274] Therefore case law and legal literature have to determine the scope of this term. However, some authors merely mention the exclusion of such matters without further explanation.[275] Others enumerate for example legal standing and capacity[276], legitimacy and mental capacity[277]. According to the Law Commission until 1998 there was no case before the courts in which they had the chance to define "status" in relation to arbitration[278]. I also cannot find any case since 1998. The only cited case in this regard is *Re Curators of Church of England v. Colley* dating back to the year 1888. In this case an archdeacon wished to submit his claim for salary to arbitration, which the court denied. The court stated that matters of status "were supposed to be too serious to be

[270] Davis, Law & Practice of Arbitration, p. 11; Ramsden, The Law of Arbitration, p. 24.
[271] Butler, Arbitration in South Africa, p. 52, footnote 116.
[272] Du Plessis, LL D 1977, p. 322, cited in: Butler, Arbitration in South Africa, p. 53, footnote 117.
[273] *Ressell v. Ressell*, 1976 (1) SA 289 (W), 291 G-H.
[274] In contrast to e.g. s 16 (c) Small Claims Courts Act 61 of 1984, which specifies the lack of jurisdiction regarding status „in respect of his mental capacity".
[275] Davis, Law & Practice of Arbitration, p. 11; Ramsden, The Law of Arbitration, p. 24.
[276] http://uk.practicallaw.com/4-502-0878?service=arbitration#a670845 (last visited 20.02.2017).
[277] Kelbrick, Civil Procedure in South Africa, para. 328.
[278] SALC Report 1998, para. 2.42.

disposed of in that way"[279]. Butler and Finsen suggest that this case law should not be followed anymore.[280]

Butler and Finsen also recommend that s 2 (b) Arbitration Act should be interpreted restrictively. Their argument is that arbitration nowadays finds great support in legislation and jurisdiction and thereby the limitation can be minimised.[281] However, they also argue that those disputes, which would change the status of a person, have to be decided by the Supreme Court. This was already stated by the Minister of Justice in 1965.[282] Further, the restrictive interpretation shall not apply to disputes on matters of status, which parties cannot dispose of.[283]

In *Grobbelaar v. De Villiers* the court decided that the question whether an act of an employee of a company (in this case a voluntary association) is ultra vires the company's articles is a matter of status.[284] However, whether a termination of a membership was valid or not is not and hence arbitrable.[285]

Outside arbitration literature and case law status is understood to be a person's 'standing' in the law"[286], it is the entirety of a person's "rights, duties and capacities"[287]. The most substantial capacities are legal capacity, capacity to act and the capacity to litigate.[288] Status is effected by a great variety of factors, e.g. age, mental illness, intoxication, nationality, domicile, gender.[289] Hence, disputes concerning those determining factors will not be seen as arbitrable, once put before a judge.

c) Criminal Matters

Under common law arbitration of criminal matters is not permissible.[290] This is also laid out in Section 35 (3) (c) of the 1996 Constitution[291]. According to this section every accused person has the right to a public trial before an ordinary court, hence a restriction of arbitration

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[279] *Re Curators of Church of England v. Colley*, (1888) 9 N.L.R. 45, at p. 47, cited in: Voet 4.8.10 footnote (d).
[280] Butler, Arbitration in South Africa, p. 54, footnote 130.
[281] Butler, Arbitration in South Africa, p. 53.
[282] Cited in: Butler, Arbitration in South Africa, p. 53, footnote 126.
[283] Butler, Arbitration in South Africa, p. 54.
[284] *Grobbelaar en 'Ander v. De Villiers NO en 'n Ander*, 1984 (2) SA 649 (C), 656 B-C, 657 C.
[285] Butler, Arbitration in South Africa, p. 54.
[286] Cronjé, The South African Law of Persons, p. 37.
[287] Boberg, The Law of Persons and the Family, p. 35; see also: Davel, Law of Persons, p. 6.
[288] Davel, Law of Persons, p. 7; Cronjé, The South African Law of Persons, p. 37.
[289] Davel, Law of Persons, p. 136; Cronjé, The South African Law of Persons, p. 37.
[290] Butler, Arbitration in South Africa, p. 55; Voet 4.8.10 (ii).
[291] Constitution of the Republic of South Africa, 1996.

in criminal matters. No such provision was contained in either the 1961[292] or the 1983 constitution[293]. In contrast to Act No. 29 of 1898[294] the current Arbitration Act does not explicitly prohibit arbitration of criminal matters.

There are, however, no restrictions on civil claims for e.g. damages due to criminal charges. Those do not deal with the criminal matter itself and do not fall under the restriction excluding arbitration.[295]

d) Restriction by statute

a) Patent law

Arguably the most prominent statutory restriction can be found in the Patent Act 57 of 1978. In its s 8 it confers jurisdiction on a commissioner of patents; read with s 17 (1) the commissioner has the same power and jurisdiction as a single judge has in a civil action before a provincial court. According to s 18 (1) no tribunal shall have jurisdiction in the first instance, unless it is regarding criminal proceedings, relating to matters under the Patent Act. By this South Africa completely bars arbitration of patent matters, and is the only country that prohibits arbitration in this regard through legislation.[296]

b) Insurance Act

S 63 (1) Insurance Act 27 of 1943 gave exclusive jurisdiction to the courts, and thereby excluded arbitration.[297] This Act was repealed by the Short-term Insurance Act No. 53 of 1998 and the Long-term Insurance Act No. 52 of 1998.[298] Both Acts do not contain provisions regarding arbitration, hence do not prohibit those to be arbitrated. However, in 2011 the registrar made use of his right under Art. 55 Short-term Insurance Act and introduced the Policyholder Protection Rules. According to rule 5.1 (d) any provision of a policy that requires mandatory arbitration is void. However, pursuant to rule 5.2 parties can voluntarily agree on arbitration after a dispute has arisen. This only accounts for personal insurance

[292] Act No. 32 of 1961.
[293] Act No. 110 of 1983.
[294] S 7: Criminal cases, so far as the prosecution or punishment thereof is concerned, shall not be submitted to arbitration.
[295] Voet 4.8.10 (ii).
[296] Cook, International Intellectual Property Arbitration, p. 68; Jansson, Arbitrability regarding Patent Law, p. 59.
[297] S 63 (1): „in any court of competent jurisdiction in the Union"; Asouzu, Internation Commercial Arbitration, p. 153.
[298] Schedule 4 (s 73) Long-term Insurance Act; S 1 Short-term Insurance Act.

policies, where the policyholder is a natural person.[299] This restriction reminds of the exclusion in s 63 (1) Act 27 of 1943. The reason for the previous restriction was the protection of the insured. Insurance companies can use the privacy of arbitration to minimise claims and they could abuse the possibility of technical defences.[300] Hence, the rationale for this provision is consumer protection, which now is reflected in the Policyholder Protection Rules, as these rules only limit the restriction to policies including private persons. This consumer protection was only reinstated 13 years after the repeal of the original provision. S 58 (1) of the draft Domestic Arbitration Act 2001 contains the provision that a consumer can cancel the arbitration agreement within the first ten days.[301] This, however, offers no current protection, as the draft bill has not been enacted yet. Further, a consumer is unlikely to realise the effect of an arbitration agreement within the first ten days after signing the contract if no dispute arises.

Hence, for 13 years there has not been any restriction on insurance matters, and now only pre-arbitration agreements in personal insurance policies.

c) Protection of Investment Act 2015

In disputes between the government and foreign investors the government is, according to s 13, only allowed to consent to arbitration after the exhaustion of all domestic remedies. This Act has been enacted after the termination of various BIT's with European Countries[302] to enable trade after the termination.

e) Common law exceptions

There are several restrictions by common law, which include those by case law and accepted authorities. The basis of the common law is the Roman-Dutch law and the English Arbitration Act 1889. When instituting the Arbitration Act in 1965 the legislator did not repeal the existing common law. Even though the English Arbitration Act served as a basis and South

[299] Rule 1 Policyholder Protection Rules: „"policy" means any short-term policy where the policyholder is a natural person acting otherwise than solely for the purposes of the person's own busines; but excluding a reinsurance policy".
[300] Van Nierkerk, SA Merc LJ, 1989, Vol. 1, 347, 364.
[301] SALC Report on Domestic Arbitration, p. 160.
[302] http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (last visited 20.02.2017).

African courts used English case law as reference, the English common law on arbitration has not been adopted.[303]

According to Voet[304], besides other matters already mentioned, claims for restitution, cases of freedom, popular actions and actions of infamy are inarbitrable. Further spiritual causes were not allowed to be arbitrated in accordance with former canon law.[305] Regarding the inarbitrability of claims for restitution Jacobs in 1977 claims that this restriction no longer applies.[306] This statement seems to be accurate as more recent literature does not mention this restriction at all.[307]

Case law and literature provide for the opportunity that the validity of a contract can be arbitrated, if the arbitration clause is wide enough to include this question. However, it is consensus that an award that obliges one party to undertake illegal actions is not enforceable.[308]

f) Family matters

Section 2 of the Arbitration Act prohibits arbitration of matrimonial cases and matters incidental to it, meaning family matters. There is a discussion whether or not this prohibition should be repealed.[309] The Law Society of South Africa (LSSA) stated in its annual general meeting in April 2016 that there have been attempts within the last two years to allow arbitration in family matters. Further, the society claims that this approach has support by some senior members of the Rules Board and that there has been communication with the Deputy Minister of Justice and Constitutional Development. Arbitration Rules for family arbitration have been drafted already. The final draft needs to be handed in to the ministry, on which the ministry will discuss a revision of the subsection.[310]

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[303] Cotran, Arbitration in Africa, pp. 193 ff.; Lourens, SA Merc LJ, 1999, Vol. 11, 363, 367 f..
[304] Johannes Voet, 1647 – 1713, professor of law in the University of Leiden, his Commentary has impact on the current South African law and is judicially considered. Voet xi.
[305] Voet 4.8.10.
[306] Jacobs, The Law of Arbitration in South Africa, para. 14; see also: Lourens, SA Merc LJ, 1999, Vol. 11, 363, 368.
[307] See e.g.: Butler, Arbitration in South Africa, pp. 52-56; Davis, Law & Practice of Arbitration, p. 11; Ramsden, The Law of Arbitration, p. 24 (even though citing Voet for other examples).
[308] Butler, Arbitration in South Africa, p. 55; Joubert, The Law of South Africa, Vol. I, para. 557; *North East Finance v. Standard Bank*, (492/2012) (2013) ZASCA 76, para. 13; *Veldspun (Pty) v. Amalgamated Clothing and Textile Workers Union of South Africa*, 1992 (3) SA 880 (E) 898D.
[309] Cohen already asked in 1993 whether this restriction is still justified. Cohen, De Rebus, August 1993, 642, 642.
[310] LSSA, paper for annual general meeting 02.04.2016, pp. 2 f..

Hitherto only informal arbitration has been used in family matters, and here also only in commercial and financial issues. Informal arbitration, however, has the potential disadvantage that after an award has been rendered any party can claim that arbitration in family matters is prohibited in domestic arbitration. Such an outcome can be prevented by an agreement of both parties that they will be bound by the award. In the *Honig* judgment the court specifically allowed arbitration on commercial aspects of the divorce.[311]

According to the LSSA at this time domestic arbitration of family matters should be restricted to commercial aspects, because courts are the upper guardians of all minors[312] and take a fairly conservative approach. However, the LSSA argues for arbitration of matters of status and matters involving children, once arbitration of the commercial aspect has been accepted and proven in practice.[313]

The rationale behind this discussion is diversified. Firstly, litigation is an adversarial system. However, family matters are very delicate matters, and sometimes the legal aspects are subordinate to maintaining the relationships or a mutually consented outcome as the judgment will have a great influence on the future relationship. The adversarial system can aggravate disputes. Further, because of this it can be disadvantageous if inexperienced judges get allocated to such a case.[314] As South Africa is still without a Family Court not many judges will be specialised in family law. Therefore, in arbitration the parties could choose an experienced family lawyer.

Additionally, the High Court tends not to interfere greatly with parental rights and practice.[315] This, however, might be necessary once a matrimonial dispute arises. Thirdly, different judges may handle the same case at different stages. This would not happen in arbitration.[316]

The LSSA pleads for an arbitration forum for family law in South Africa, and introduced the FLAFSA - Family Law Arbitration Forum South Africa. They drafted rules, have their own facilities and infrastructure and provide training for family lawyers to be able to practice

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[311] *Honig* Judgement (Cape) cited in: LSSA, paper for annual general meeting 02.04.2016, p. 9.
[312] *Calitz v. Calitz*, 1939 AD 56.
[313] LSSA, paper for annual general meeting 02.04.2016, p. 13.
[314] De Jong, PER, 2014, Vol. 17 (6), 2356, 2361.
[315] De Jong, PER, 2014, Vol. 17 (6), 2356, 2392.
[316] De Jong, PER, 2014, Vol. 17 (6), 2356, 2362; LSSA, paper for annual general meeting 02.04.2016, pp. 2, 12; Singer, Family Law, 2012, 1353, 1359.

arbitration.[317] This would be a – at least initially - supervised arbitration to ensure due process and compliance with present values.

The SALC has not presented a final or updated draft bill for a new domestic Arbitration Act. Therefore it cannot be said whether this discussion will be reflected in the new Act. However, the draft bill of 2001 allows arbitration of "property disputes not affecting the rights or interests of any minor child of the marriage".[318] Hence, the present goal of LSSA to arbitrate commercial aspects of matrimonial cases would be included in the law.

The latest draft bill shows that the SALC is dealing with this issue and pays attention to the scholarly discussion.

g) Public policy

As seen above the importance the influence of public policy on the arbitrability question in Europe and the United States has decreased over time. It is only a consideration of last resort in very few cases. The trend to decrease the role of public policy can also be observed in South Africa, however not as much and as rapidly. In 1988 in *Sasfin v Beukes* the Supreme Court stated

> "No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power."[319]

In 1993 the Supreme Court of Appeal referred to this case in *Amalgamated Clothing and Textile Workers Union of South Africa v. Veldspun*[320] and transferred the restrictive application of power also to arbitral awards. In several recent cases the Supreme Court of Appeal and the Constitutional Court acknowledged that South Africa upholds a favourable approach towards arbitration – national and foreign –and claims that this has been common practice since the early 19th century.[321] In the *Telcordia* decision the Supreme Court of Appeal

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[317] LSSA, paper for annual general meeting 02.04.2016, p. 7.
[318] S 5 (1) draft bill, SALC, Report on domestic arbitration, p. 132.
[319] *Sasfin (Proprietary) Ltd v Hendrik Johannes Stefanus Beukes*, (1989) 1 All SA 347 (A) at para. 12.
[320] *Amalgamated Clothing and Textile Workers Union of South Africa v. Veldspun, (PTY) Ltd.*, 1994 (1) SA 162 (AD).
[321] *Telcordia Technologies Inc v. Telkomm SA Ltd*, 2007 (3) SA 266 (SCA) para. 4; *Lufuno Mphapahuli & Associates (Pty) Ltd. V. Andrews and another*, 2009 (4) SA 529 (CC) 598H, 599D, E; *Zhongji Development Construction Engineering Co. Ltd v. Kamoto Copper Co. Sarl*, 2015 (1) SA 345 (SCA) 364D.

stressed respect for party autonomy and the need to minimise the courts' interference.[322] Mante claims that this development is due to the growing influence of international arbitration, which pressured African states to change their handling of arbitration.[323] This statement complies with Asante's statement that this development occurred because developing states try to get foreign investment and trade into their countries[324], and a well-organised arbitration forum is a good bait for this.

That public policy still plays a role in present jurisdiction can be seen in the landmark case *Cool Ideas v. Hubbard*, decided by the Constitutional Court in 2014. The court refused to enforce an arbitral award because it was "in violation of a statutory prohibition backed by a criminal sanction" and hence enforcement "would be contrary public policy".[325] The award was in favour of the respondent, ordering the claimant to make full payment for the construction of her house. However, the respondent was not a registered home builder pursuant to s 10 (1)(b) Housing Consumers Protection Measure Act No. 95 of 1998, and hence had no right to receive compensation. The receipt of consideration would constitute a criminal offence according to s 21 (1)(b) Housing Act. In its judgement the Constitutional Court cited *Lufuno*[326] in emphasising that courts have to be cautious not to subvert goals of arbitration and to respect the parties' choice, where it previously expressed its arbitration favouring position. It weighed the severity of the statutory prohibition against the objectives of arbitration. Even though it outweighed arbitration in this case, the court stated that awards at odds with a statutory prohibition are capable of enforcement, if they are not contrary public policy.[327]

There seems to be no case since then that relied on *Cool Ideas v. Hubbard* with regards to enforcement of an arbitral award. Hence, only time will tell if courts will from now on pursue a stricter approach towards enforcement of arbitral awards with regards to public policy.

Mante splits public policy into four categories: mandatory laws, fundamental principles of law, public order or good morals and national interest. In African countries having a

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[322] *Telcordia Technologies Inc v. Telkomm* SA Ltd 2007 (3) SA 266 (SCA) para. 4.
[323] Mante, Arbitration International, 2016, Vol. 0, 1, 8.
[324] Asante in: Muller: The Flame Rekindled, p. 134.
[325] *Cool Ideas 1186 CC v. Hubbard and Another*, 2014 (4) SA 474 (CC) 494H.
[326] *Lufuno Mphapahuli & Associates (Pty) Ltd. V. Andrews and another*, 2009 (4) SA 529 (CC) 598H, 599D, E.
[327] *Cool Ideas 1186 CC v. Hubbard and Another*, 2014 (4) SA 474 (CC) 493A, C.

constitution that contains these principles, those form the basics of the law and are above other laws. A violation of those principles is seen as a threat to the "security and welfare of the state"[328]. This also includes South Africa.[329]

A consequence of this approach is that an arbitration agreement, and any other contract, is null and void as soon as it contains a provision that contradicts "public policy in the light of the values of the constitution"[330]. Other provisions may be regarded as valid if the severability doctrine applies.[331] Further, arbitration of public rights is not possible because it would be contrary to public policy.[332] Not every affected party is part of the arbitration proceedings, hence the award cannot be binding on those people or interests.

It is said that agreements that exclude the courts' jurisdiction entirely are illegal and hence contrary public policy.[333] One could say that this leads to the nullity of every arbitration agreement. However, courts are still able to intervene during the proceedings and in any case necessary for the enforcement of the arbitration award. Therefore, it is not possible to entirely exclude the courts' jurisdiction by an arbitration agreement.

h) Arbitrability

The Arbitration Act does not allocate the so-called competence-competence to the arbitral tribunal. The competence-competence gives arbitrators the power to decide on their own jurisdiction. If a party challenges the arbitrability of the subject matter or the jurisdiction of the tribunal, the arbitrators themselves can decide on this challenge.[334] However, as this is not included in the South African Arbitration Act arbitrability is not arbitrable and has to be decided by the court.

However, parties can agree to vest the tribunal with this competence. The Rules of the Arbitration Foundation of South Africa[335] and of the Association of Arbitrators[336] include this

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[328] Mante, Arbitration International, 2016, Vol. 0, 1, 16.
[329] Art. 2 of the Constitution states that the constitution is the supreme law of the Republic and inconsistent law is invalid.
[330] *Lufuno Mphapahuli & Associates (Pty) Ltd. V. Andrews and another*, 2009 (4) SA 529 (CC) 593E-G. According to Mante this statement was on behalf oft he majority of the South African Constitutional Court, Mante, Arbitration International, 2016, Vol. 0, 1, 15.
[331] *Lufuno Mphapahuli & Associates (Pty) Ltd. V. Andrews and another*, 2009 (4) SA 529 (CC) 593G.
[332] Du Plessis, De Jure, 1981, Vol. 14, 25, 26.
[333] Davis, Law and Practice of Arbitration, p. 10; Van Niekerk, SA Merc LJ, 1989, Vol. 1, 347, 350.
[334] Born, International Commercial Arbitration, p. 1047 f..
[335] Rule 11.2.2: „to rule on his own jurisdiction".
[336] Article 23: „The arbitral tribunal shall have the power to rule on ist own jurisdiction".

competence in their rules. By agreeing on these – or any other arbitration rules, which include the competence-competence – parties agree on the arbitrability of arbitrability.

i) Future perspective

a) South African Law Commission

The discussion on updating the Arbitration Act 42 of 1965 started in August 1994 when the SALC Executive Director of the Association of Arbitrators in South Africa sent a letter to the SALC suggesting the reform and proposing an adoption of the Model Law.[337] The draft Arbitration Act was meant for domestic arbitration only.[338]

The SALC lays out the three options possible: 1. to reject it for international and domestic arbitration, 2. to adopt it for international and domestic arbitration and 3. to adopt it for international arbitration only and have a separate Act for domestic arbitration. In the next two Discussion Papers the SALC rather talks about Alternative Dispute Resolution in general then the reform itself. It then decided on the option to adopt the Model Law only for international arbitration.[339] In the SALC's opinion the current Arbitration Act is "totally inadequate"[340] for international arbitration. But as the Model Law does not deal with the arbitrability question specifically the reasons on why the Model Law shall only be adopted for international arbitration will not be discussed in this paper.

b) Domestic arbitration

In October 1999 the SALC first published a draft bill for a Domestic Arbitration Act. It deals with arbitrability in s 5.[341] Matrimonial cases are still prohibited from arbitration, though property disputes that do not affect the rights or interests of any child of the marriage are now arbitrable. The SALC argues that mediation in matrimonial property disputes has never been doubted and that public policy objections might not always apply to those disputes.[342]

A new approach is taken in subsection 2, which allows arbitration in any matter, which the parties can dispose of, unless the agreement is contrary to South African public policy or inarbitrable under any other South African law. Subsection 3 points out that a conference of

[337] SALC Working Paper 59, para. 1 f..
[338] SALC Working Paper 59, para. 3.
[339] SALC Working Paper 69, para. 2.1.
[340] SALC Report on International Arbitration 1998, para. 1.3.
[341] SALC Discussion Paper 83, p. 69.
[342] SALC Discussion Paper 83, para. 3.20.

exclusive jurisdiction to any court does not automatically excludes this matter from arbitration. This is the same wording as in s 7 of the Draft International Arbitration Act.[343] According to the SALC this should lead to an easier application and is more in line with provisions in other jurisdictions, which would lead to some conformity on this aspect.[344]

According to s 3 (2) it only applies to those agreements, which are not subject to the International Arbitration Act, these being domestic arbitration and international non-commercial arbitration. The Association of Arbitrators handed in a draft bill, in which they suggested that s 2 remains unmodified.[345]

The draft bill of 2001 has the same content, except that the exception in s 5 (1) now only applies when there are minor children.[346] While most responses favoured the exception in s 5 (1), difficulties in the application were pointed out. It will be relatively easy to argue that the interest of a minor is affected.[347] Hence, this exception will mostly apply in marriages without children and those with adult children. The discussion on further restrictions outside the Arbitration Act[348] does not affect the reform. To this date the SALC has not acted any further on the enactment of the Domestic Arbitration Act.

c) International arbitration

South Africa will most likely get a new International Arbitration Act shortly. Cabinet approved the draft bill of this Act on 13th April 2016. However the changes made by the Justice and Constitutional Development department to accommodate local circumstances still needs to be approved by the cabinet.[349] Experts say the chances that the draft bill will be enacted are high.[350] In 1997 the SALC published the first draft bill for an International Arbitration Act. Arbitrability was addressed in its s 6[351], excluding arbitration in matters relating to status and if the agreement is contrary to public policy or the dispute is not arbitrable under any other law. As a matter regarding the latter the SALC enumerates criminal law, s 63 (1) Insurance Act and s 2 Arbitration Act 42.[352] This provision was modified in the

[343] SALC Report on International Arbitration 1998, p. 220.
[344] SALC Discussion Paper 83, para. 3.21.
[345] SALC Discussion Paper 83, p. 97.
[346] SALC Report on Domestic Arbitration, p. 133.
[347] SALC Report on Domestic Arbitration, para. 3.29.
[348] SALC Report on Domestic Arbitration, para. 3.33 f..
[349] http://www.sabinetlaw.co.za/justice-and-constitution/articles/draft-international-arbitration-bill-heading-back-cabinet (last visited 20.02.2017).
[350] Simson, Draft Bill Reflects S. Africa's Mixed Views On Arbitration.
[351] SALC Discussion Paper 69, Annex A, p. 6.
[352] SALC Discussion Paper 69, para. 2.42.

SALC report 1998. The now s 7 omits the paragraph excluding matters relating to status. Arbitration can now be pursued in all matters "which the parties are entitled to dispose of by agreement", the prerequisite that the agreement must not be contrary to public policy (specified to South African public policy) and the dispute not inarbitrable under any other law (specified to South African law) remains.[353]

The omission of the prohibition of arbitration in status-related matters was explained with the difficulty of the definition and meaning of the term "status". Courts have not yet had the opportunity to define this term in case law.[354] Defining this term could lead to more problems than solving existing ones around arbitrability.[355] However, the omission does not make those matters arbitrable, because parties are not entitled to dispose of such matters. Hence, it is included in the restriction of the new provision.[356] S 7 of the current draft is identical to the one from 1998.[357]

6. African Approach

As I did for Europe, I will now give an overview on the African approach towards arbitrability, without going into deep discussions on particular subject matters or countries.

African countries generally have accepted arbitration as an alternative for dispute resolution.[358] Consequently arbitration has become a more commonly used method, especially in regard to international commercial arbitration.[359] For example, the Liberian Supreme Court confirmed in several cases Liberia's favourable attitude towards arbitration. In *Chicri Brothers v. Isuzu Motors* it also stated that besides the agreement itself courts should respect parties' choice of place of arbitration, law and manner of appointing arbitrators. In its judgment the court relied on Civil Procedure Law, Rev. Code 1:64.1, which states that an arbitration agreement "is valid without regard to the justiciable character of the controversy", unless grounds for revocation of the agreement exist.[360] Rwanda passed the Law on Arbitration and Conciliation in Commercial Matters in 2008, in which it accepted arbitral

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[353] SALC Report on International Arbitration 1998, p. 185.
[354] SALC Report on International Arbitration 1998, para. 2.42.
[355] SALC, Response to Discussion Paper 69, Paper 2, para. 2.3.
[356] SALC Report on International Arbitration 1998, para. 2.46.
[357] http://discover.sabinet.co.za/webx/access/policydocuments/policies16/DP050102.pdf (last visited 20.02.2017).
[358] Mante, Arbitration International, (2016), p. 8.
[359] Bosman, Arbitration in Africa, i.a. p. xlvii, 30, 36, 152, 246.
[360] *Chici Brothers, Inc. v. Isuzu Motors Overseas Distribution Corporation, et. al.,* (2000) LRSC 13; 40 LLR 128 (2000); *Emirates Trading Agency Co. v. Global Africa Import & Export Company,* (2004) LRSC 18; 42 LLR 204 (2004).

awards as final and binding (Art. 50). Prior this law awards were, like judgment of the first instance, appealable to the High Court.[361]

There are two main approaches towards arbitrability within African laws.

The first is to enumerate those subject matters, which are inarbitrable. According to s 1 Alternative Dispute Resolution Act, 2010 (Ghana) the Act applies to all matters except those listed – national or public interest, environment, enforcement and interpretation of the constitution and any other matter that by law cannot be settled by and alternative dispute resolution method. By excluding those matters from the scope of the Act, it listed those matters as inarbitrable. Art. 309 of the Moroccan arbitration law excludes matters relating to status, capacity of persons and personal, non-commercial rights from arbitration. The Botswana Arbitration Act excludes criminal cases and matters relating to status, matrimonial causes and matters involving minors or persons under legal disability may only be arbitrated with special leave of the court. Further examples are s 6 (2) Zambian Arbitration Act of 2000, s 4 (2) Zimbabwean Arbitration Act, 1996 and Art. 7 Tunisian Arbitration Code.

The second approach is to subject the arbitrability to the subject matter's capability to be settled by the parties. According to Art. 11 of the Egyptian arbitration law matters, which cannot be subject to compromise, are not arbitrable. In Djibouti parties can arbitrate all disputes when they have the capacity to settle their claim, Art. 2 (2) Code of International Arbitration. Even though Morocco lists inarbitrable subject mattes, it states in Art. 308 that only rights which are to the free disposal of the parties are arbitrable, within the limits of the chapter of this act. The same approach was taken in Algeria in Art. 442 of the Code of Civil Procedure. Also according to Art. 2 OHADA Uniform Act on Arbitration requires the ability of free disposal.

It can also be observed that some African arbitration laws do not contain any reference to "commercial" anymore.[362] This counts for the Acts in Zimbabwe (does not contain an "application" article, but does not mention commercial within Art. 4, which deals with arbitrability), Tunisia (same as in Zimbabwe), OHANDA (Art. 1), Kenya (Art. 2) and Uganda (Art. 1).

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[361] http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Reforms/Case-Studies/2008/DB08-CS-Rwanda.pdf (last visited 20.02.2017).
[362] Asouzu, Arbitration in Africa, p. 148 f..

Mante analysed that African countries with focus on international arbitration tend to have a less restrictions on arbitrability[363] or do not include arbitrability provisions[364] in their Arbitration Acts. Contrary, countries with separate acts for international and domestic arbitration or with stronger focus on domestic arbitration contain more detailed provisions governing arbitrability.[365]

The subject matters, which are generally inarbitrable in Africa, can, according to Mante, be assigned to four groups. These are (1) disputes on status and capacity, (2) disputes involving protected persons and institutions, (3) disputes relating to state or public interest and (4) disputes within generic exemptions, as Mante called them.[366]

Status related issues are exempted in Botswana (s 7 (a) Arbitration Act 1959), Morocco (Art. 309 Law No. 05/08), Tunisia (Art. 7 (3) Arbitration Act), Zambia (s 6 (2)(g) Arbitration Act) and Zimbabwe (s 4 (2)(d) Arbitration Act, but the High Court can give special leave to arbitrate). Status related matters are also excluded by those states requiring the capability of disposition, as parties cannot compromise on status. Tunisia further excludes matters regarding nationality (Art. 7 (2) Arbitration Act).

Minors, persons under legal capacity and matrimonial cases are often excluded from arbitration, e.g. Botswana (s 7 (b)(c)), Zambia (s 6 (d), matters incidental to matrimonial cases can be arbitrated with leave of the court, (g) minors, unless represented by a competent person) and Zimbabwe (s 4 (2)(d), unless leave given by High Court, (e)). Zambia further protects paternity, maternity and parentage of a person (s 6 (2)(f)). Mauritius and Zimbabwe place further requirements on the arbitration agreement in case a consumer is party to the arbitration agreement (s 8 (1) International Arbitration Act 2008; s 4 (2)(f) Zimbabwean Arbitration Act).

The third group of excluded matters regards matters concerning state or public interests, this includes agreements that are contrary to public policy. Those subject matters are excluded by e.g. Zambia (s 6 (2)(a)), Zimbabwe (4 (2)(a)), Ghana (s 1(a)) and Tunisia (Art. 7 (1)).

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[363] These are generally those countries requiring the subject matter to be to the free disposition of the parties.
[364] For example Kenya, Mauritius and Uganda.
[365] Mante, Arbitration International, 2016, Vol. 0, 1, 10 f..
[366] Mante, Arbitration International, 2016, Vol. 0, 1, 11.

The fourth group regards those countries that require the subject matter to be free of the parties' disposal,[367] which have been discussed above.

E. Most significant changes / Future discussions

1. International treaties

As the discussed treaties do not deal with arbitrability in particular, hence there are no changes in this discussion.

2. Germany

The most relevant change in Germany was the reform in 1998, which expanded arbitrability to all property claims. Through this arbitrability got expanded to all disputes with economic interests, with a broad definition of "economic interests". By this all subject matters, which are of economic interest, but not to the free disposal of the parties, became arbitrable. The limit of capability of settlement now only applies to non-pecuniary claims. This limitation is in order as it usually only takes effect where there is a state monopoly of adjudication. In general this limitation is an appropriate one, as arbitration is of contractual nature. However, as seen above, it sometimes limits parties in unnecessary cases, e.g. effect of a patent *inter partes*.

The arbitrability of patents with *inter partes* effect is, in fact, a result of the reform, as it is of economic interest. This judicial development is positive because patents are, to some extent, to the owner's disposition as he can request for deletion or amendment. Hence, it should be arbitrable. The restriction to *inter partes* effect is understandable, as an *ergo omnes* effect is contrary to the contractual nature of arbitration. However, as other European countries have no restrictions on patent's arbitrability, further development remains to be seen.

The reform had a minor effect on antitrust law, as the legislator concurrently repealed § 91 GWB. Consequently all pre-dispute agreements are valid, even without the right to decide on arbitration on a case-by-case basis.

It can be summarised that arbitrability is not a big issue anymore, and most subject matters do not underlie any restrictions.

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[367] Mante, Arbitration International, 2016, Vol. 0, 1, 15.

Germany still has restrictions regarding labour law, as the ArbGG restrains arbitrability in certain matters. Likewise arbitrability of family matters underlies certain restrains, as in case of non-pecuniary claims the FamFG does not allow for arbitrability.

3. USA

As in Germany the biggest change regarding arbitrability came along with a new legislation. In 1925 Congress passed the FAA, before which arbitration agreements were barely enforced. Even after the FAA came into force judges' hostility towards arbitration took a long way to decease. Arbitrators were not trusted with public or national interests, it was feared that they do not abide to mandatory law. It seems like courts had to first observe the development of arbitration, and had to cautiously approach it step by step by increasing arbitrability slowly but surely. This means public policy concerns persisted – longer than in Europe. Only in 1983 did the Supreme Court state the generally arbitration favouring policy of the FAA towards arbitrability and not only in regard to the validity or existence of arbitration agreements. This eventually led to various judgements pre-empting state laws by the FAA. The Supreme Court also established arbitrability of certain subject matters first in international context, and eventually in domestic cases. The reasons for allowing arbitration in international contexts were international predictability of arbitral awards, respect for international tribunals and the avoidance of possible forum shopping. The growing spectrum of arbitrability mirrors the dismantling of sceptics towards the quality of arbitration. Further, it can be observed that the Supreme Court reduced the influence of public policy in the arbitrability discussion, as it basically is no longer a factor in the decision-making progress.

Even though trust into arbitral tribunals to enforce U.S law has been established, the Supreme Court instituted the second look doctrine, which allows American courts to review the merits of an arbitration proceeding when national interests are involved.

An exception to the pro-arbitration policy is regarding the decision-making power regarding arbitrability. There is a pro-court assumption, unless parties expressly agreed that this power lies within the tribunal. This was decided by the Supreme Court only in 1986, before this tribunals had no power whatsoever to decide on the arbitrability of subject matter.

In particular the Supreme Court declared international securities transactions arbitrable in 1974, and domestic cases in 1987. In 1989 it explicitly overruled its 1953 judgement in which it forbid arbitration of securities transactions. Also before the 1953 judgement arbitration

agreements regarding securities transactions were seen as void, because they limited consumer's rights.

Another big step was the arbitrability of international antitrust disputes, declared in 1985. While there is not yet a Supreme Court decision on domestic disputes, lower courts apply the jurisprudence in domestic cases and it can be expected, that once the Supreme Court has the opportunity, it will affirm the arbitrability of domestic antitrust disputes.

After 1990 employment matters were widely arbitrable, because employers did not have to fear possible appeal in court anymore. Since a Supreme Court decision in 2012 tort claims are arbitrable, even when excluded by state law. The Court decided that the FAA pre-empts this law.

Initially family matters could not be arbitrated because spouses were prevented from contracting. Legislation on this matter began in 1999 in North Carolina, with the recent approval by the ULC of the Uniform Family Law Arbitration Act. State Supreme Courts started in 1982 to allow arbitration in family matters. Even the last hesitations towards child-related matters decrease. This restrain lasted very long because the courts guard their role as *parens patriae*. However, there is no reason that such matters should not be arbitrated. Eventually, the parents decide what is good for the child and if they decide that arbitration is the better dispute resolution method it is within their parental autonomy.

Congress recently took an approach into the opposite direction when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. With this act Congress instituted a wide range of consumer protection provisions, which include arbitration. Those norms can be put into two categories. First, granting an existing commission with the power to implement restrictions (only the CFPB initiated proceedings to implement restrictions) and those rendering pre-dispute arbitration agreements invalid and prohibiting the waiver of rights and remedies. As it does not include any provision regarding class arbitration, companies are still able to exclude those via the arbitration agreement, which the Supreme Court regarded as valid in 2011.

4. South Africa

Arbitrability in South Africa did not change greatly. The Arbitration Act of 1965 did not change anything regarding arbitrability, and also case law did not alter the scope of arbitrability. The biggest modification yet was the termination of the BITs, with which

investment state arbitration has been decreased, and disputes with companies from those states now has to be litigated right up to the last instance, before arbitration is possible.

The only changes are the arbitrability of insurance matters and the reduction of the influence of public policy on restriction of arbitrability.

However, changes can be expected in the (near) future.

The International Arbitration Act will be (most likely) will be enforced soon. The draft bill provides arbitrability to all disputes parties can freely dispose of, unless the agreement is contrary to public policy or prohibited by other national law. This is a chance to increase the field of arbitrability. It remains to be seen which existing restrictions (e.g. patents) courts will apply to international commercial arbitration. If all restrictions are applied the scope of arbitrability will basically stay the same, as status is excluded by this restriction and hence matrimonial matters are the only matters, which now could be arbitration. But those disputes are generally not of commercial nature. It does, however, vest the tribunal with the power to decide over its own jurisdiction and therewith to decide on the arbitrability of the subject matter.

The draft for a domestic arbitration act provides for arbitrability of property disputes in matrimonial cases, when no minor is affected, and also requires the subject matter to be to the free disposal of the parties. However, the SALC did not take any further actions in this regard since 2001. Consequently, it remains to be seen if this Act will ever enter into force and which changes it would then bring along.

There is a recent discussion about domestic family arbitration, including meetings with the minister of justice. This might be an indication that the development of the domestic arbitration act will be picked up again and the provision on matrimonial cases will be altered. The LSSA and scholars call for full arbitrability of family disputes in the long run.

5. General impression

Generally the scope of arbitrability has increased very much. In Europe and America it is barely an issue anymore, even public policy concerns are almost eradicated.[368] In comparison it still has a greater influence in Africa.[369] But also here it can be observed that jurisdiction and legislation have an arbitration-favouring attitude, which recently shows in new

[368] Youssef in: Mistelis, Arbitrability, para. 3.24 f..
[369] Mante, Arbitration International, 2016, Vol. 0, 1, 15.

legislations. Some states enforced arbitration acts applicable to international and domestic arbitration, some have separate acts, and some are, like South Africa, on the verge of enforcing a new Arbitration Act. As outline above, jurisprudence in Africa tends to make less use to public policy as a shield against arbitration.

Ultimately, each and every newly enforced arbitration legislation grants a greater and more liberal standing on arbitrability than the respective predecessor, no matter whether we look at Africa, America and Europe.

The trust into arbitrators and arbitration has been found, as arbitrators have to and do enforce mandatory law, there are established well-working arbitration legislations and rules and arbitration was eventually able to show off its advantages over litigation by accepted and well-reasoned arbitral awards.

F. Conclusion – right or wrong approach?

Even though judicial decision-making is primarily a state power, private jurisdiction can (and should) be allowed as the state retains the final power through legislation to ensure jurisdiction. Hence, the general extension of arbitrability is a positive development and to be welcomed.

As with a wide scope of arbitrability parties to disputes in the majority of subject matters have excess to the advantages of arbitration. It enables many different people – legal or natural person, consumer or entity, commercial or non-commercial – to choose the dispute resolution method they deem appropriate to their dispute, with customised proceedings to the individual needs.

A main driving force for the extension of international arbitration is the expansion of globalisation. Due to this international trade increased, which entails an increasing number of disputes. In international disputes a neutral forum, such as arbitration, has the benefit that no party has the home ground advantage, which led to a favourable position towards arbitration. But arbitration also expanded in a domestic context. As described earlier arbitration has many upsides beside the neutral forum, which are the reasons of a generally favourable attitude towards arbitration of contracting parties. However, legislations used to be quite restrictive so that arbitration could only be practiced within these limits. The legislators perceived the growing interest in arbitration and its advantages and steadily repealed restrictions. The extent to which the restrictions were withdrawn varies amongst the countries.

All three examined countries take different approaches to define arbitrability.

In Germany the requirement of capability of settlement by the parties existed since 1877 and was reformed in 1998. Since then every claim including economic interest is arbitrable and non-pecuniary claims still only when they are to the free disposal of the parties.

In the United States § 2 FAA renders all arbitration agreements including maritime and commercial transactions valid. However, at least since 1983, when the Supreme Court declared the pro-arbitration assumption of the FAA, it is used for a favourable attitude to arbitration of all claims.

South Africa chose a third option. In s 2 Arbitration Act it enumerates those subject matters that are excluded from arbitration. This will change in the International Arbitration Act, which renders all subject matters of which parties are entitled to dispose of arbitrable.

Another disparity in approaches can be seen in the role of public policy. It is not expressly mentioned in any statute – except for the draft of the coming South African International Arbitration Act.

As seen under D. 2. public policy did not play a big role in the German discussion and development of arbitrability. This is different in the United States and South Africa. Even though public policy is not mentioned within the statute, it did restrict arbitrability through common law. The courts refused enforcement of awards on public policy grounds when interests of the public were involved, as arbitration was deemed inappropriate for these subject matters. However, also in these states the influence of public policy decreased. The U.S. Supreme Court started to allow arbitration in such matters in 1974 and stated the pro – arbitration presumption of the FAA in 1983, which reduced the importance of public policy immensely. A not so radical reduction also took place in South Africa, but only from 1988 onwards. The Supreme Court urged to only annul arbitration agreements on public policy grounds when there is no doubt, the same was stated for awards in 1993. However, this did not reduce the influence of public policy to such an extent as in the U.S., it was merely set back to a more reluctant role.

Only the United States so far distinguished between international and domestic contexts, while extending the scope of arbitrability. With the new International Arbitration Act this distinction will also be implemented in South Africa. Here, however, it will be on a legislative level, which is more persistent, as legislation cannot be changed as quickly. The reason behind the differentiation is to attract international trade and bring international arbitration

into the country, but remain the restrictions, which are considered necessary, for national arbitration.

Hence, the difference in approaches here is that Germany did not differentiate between national and international arbitration whatsoever and the United States distinguished while opening arbitration to more subject matters. The same approach can now be expected in South Africa.

Disputes in different fields of law are quite disparate. Therefore the suitability of arbitration has to be considered for these different kinds of dispute. The biggest field of disputes discussed above is in the commercial sector, for which arbitration is appropriate for all its listed advantages. This can also be seen in the different laws and rules which are established and passed especially for (international) commercial arbitration. The following subject matters need separate consideration.

1. **Disputes involving public authority**

Some legal transactions require resolution through the act of a public authority (sovereign or administrative activity). In such a case no person can act on his own account or dispose of these rights, but needs the state to get involved; the dispensing of justice cannot take place without state involvement. Broadly said, because arbitration is a matter of contract, disputes on absolute rights need resolution by a state body, as it has to have *erga omnes* effect, which cannot be achieved by arbitration.

There are, however, cases where this limits parties unnecessarily – also in matters of administrative activity. In some disputes parties merely seek a resolution that only affects themselves, without the desire for an *erga omnes* effect. In case they are unable to agree on a mutually accepted outcome, there is no reason why they cannot request a third party to decide on their behalf. For example in case of a patent nobody can claim to own a patent, but once he / she obtained one and another person violates this very patent, the disputants can agree that the violating party has to pay damages or obtains the right of usage for a compensation. However, it might be difficult for the parties to agree on a fair payment or conditions, which is why they would like an expert to decide on this. As no third party would be affected by arbitration, there is no reason why parties should not be allowed to conduct such.

This example shows, that not all disputes involving absolute rights and administrative need the involvement of public body, but can be resolved privately. This also has the advantage that public bodies get disburdened with unnecessary work, and parties have a quicker settlement of their disagreement.

Thus, arbitration in matters involving public authority, where no *erga omnes* decision is required, should be allowed with *inter partes* effect.

2. Family law

The one subject area where jurisdictions are still hesitant to concede arbitrability is family law. South Africa still excludes it by law[370], and courts in South Africa and the United States still heed their role as upper guardian respectively *parens patria* quite seriously. In Germany family arbitration is often restricted by the FamFG because those claims are non-pecuniary and not to the free disposition of the parties. But especially in family matters, where the maintenance of relationships is an important aspect, non-adversarial surroundings are preferable. Parties can choose family lawyers as arbitrators, who are experienced with family disputes and know how to handle such sensitive matters. This advantage applies particularly in South Africa, which still does not have a family court. But even though the United States and Germany do have a family court, it still is an adversarial proceeding. Further, a speedy and final decision is desirable for the sake of the family. Hence, arbitration has several advantages over litigation in this field.

I advise to allow arbitration in family matters. If need be states can enact certain requirements. These could be that all arbitrators need to be family lawyers or have to have a particular training in family arbitration or the legislator can draft particular family arbitration rules, which need to be applied.

3. Employment / Consumers

Even though I see arbitration as a great alternative to litigation in most disputes and think it should be embraced more, there are areas where arbitration needs to be treated more carefully. Arbitration is a legal system where the parties decide on most aspects of the proceedings, without or with limited supervision by a third party. Hence, in case of an imbalance of power

[370] In case the International Arbitration Act gets inforced the exclusion does not exist for international commercial arbitration, however, there will hardly be a family dispute in commercial arbitration.

and knowledge of arbitration a more experienced party could take advantage of the weaker party in the negotiations before the set-up of the tribunal. This scenario particularly concerns disputes involving customers and employees.

Those persons are usually the weaker and less experienced party, and often coerced to sign the arbitration agreement in order to contract at all. The arbitration agreement is mostly set up already and cannot be accustomed to the particular needs of the involved parties. As the tribunal is only in existence after those proceedings, they do not have the power to intervene here. Therefore, the legislator has to provide for protection.

In my opinion a ban of arbitration in these fields is no option. Germany requires a separate document to be signed by the parties, the United States implemented prohibitions (or granted the power to prohibit to a commission) of pre-dispute arbitration agreements.

The German approach ensures that the arbitration agreement is not hidden in the terms and conditions or the bylaws. However, it does not ensure that the customer is aware of the actual effects or is able to modify any prewritten agreement. The American approach most likely prevents arbitration in many cases, as it is rather difficult to conclude a contract after a dispute has arisen. It further does not ensure, that the customer / employer is aware of the consequences and is equally involved in the pre-arbitration proceedings.

In my opinion, additional to the German form requirement, an obligation of the superior party to explain arbitration and its effects before signing the agreement is an achievable and effective option. A one-page explanation in plain language for the customer to read should suffice. Further, the inclusion of a right to choose arbitration on a case-by-case basis[371] protects the customer. He / she then has the chance to get clarification on arbitration once a dispute arises, in case he / she was not aware of the agreement or its meaning, and then can still decide for or against arbitration. Another option is to implement an authority, which has to be informed about the arbitration agreement and the initiation of any arbitration proceedings. This, however, produces more bureaucracy and costs, and hence is not advisable. An intensification of the court review of the arbitration agreement in case of a challenge would also be possible. But post-arbitration protections imply that the parties first have to conduct the arbitration with the risk of the annulment of the award.

[371] As it was included in the repealed § 91 I 1 GWB.

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H. Table of cases