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Arbitrability and Public Policy: An African Perspective

Joseph Mante *

Introduction

Globalisation and the expansion of international trade have led to a considerable expansion of the scope of commercial matters which are capable of settlement by arbitration. This development notwithstanding, the concept of arbitrability remains an important one. The international impact and dynamics of arbitrability has made it an important subject for discussion in international commercial arbitration.[1] The concept has the potential to affect the validity of an arbitration agreement, strip an arbitrator of jurisdiction to determine a matter in spite of party agreement or derail enforcement of an award.[2] It is therefore not surprising that after years of scholarly work on the subject, there are still concerns with the concept of arbitrability.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law, 1985 (as amended in 2006) (the UNCITRAL Model Law) leave the determination of the issue of what subject matters are arbitrable to individual States. Historically, States have made such determinations on the basis of considerations such as public policy, which in turn, is dictated by several other factors including economic, political, social and cultural demands.[3] There is evidence that in Europe and America, the effect of public policy as a determinant of what is arbitrable is waning.[4] The implication is that public policy is no longer a bar to arbitration but remains one of the legal considerations at the award stage or during enforcement of the award. It also signals a further widening of the scope of matters which are arbitrable.

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[1] See Loukas A Mistelis and Stavros L Brekoulakis (ed) Arbitrability: International & Comparative Perspectives (Kluwer Law International 1999).

[2] See Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 (the New York Convention), Article V (2) (a); UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (the UNCITRAL Model Law) Article 34 (2) (b) (i).

[3] See Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.114.

[4] McLaughlin, Joseph T. 'Arbitrability: Current Trends in the United States' (1995-1996) 59 Alb. L. Rev. 905, 915ff; Kirry, Antoine, 'Arbitrability: Current Trends in Europe' (1996) 12(4) Arbitration International 373-390.

Relying on relevant literature and arbitration laws, this study draws a comparison between arbitrability and its relationship with public policy in Europe and America on one hand, and the trend in Africa in an attempt to critically investigate the extent to which States in Africa are willing to extend the scope of subject-matters capable of resolution by arbitration. This study is important for a number of reasons. First of all, it is imperative that foreign entities involved in transnational commercial transactions in Africa become aware that the scope of subjects which are arbitrable in Europe are not necessarily the same as those in the African jurisdictions where they may be transacting business. In selecting arbitration as a preferred dispute resolution method, parties need to be aware of the extent to which disputes which arise out of their respective transactions will be arbitrable. Secondly, it is important that parties seeking to enforce their awards in a jurisdiction in Africa are aware of possible challenges under the New York Convention as a result of the relatively distinct scope of what may be arbitrable in the African context. Finally, there is a gap in the literature on the African perspective of arbitrability generally and the role of public policy in the determination of what is non-arbitrable.

The paper is divided into five sections. The first section provides a brief overview of the concept of arbitrability. The second section surveys the current trend and relationship between arbitrability and public policy in the European and American contexts. This is followed by an examination of the trend in Africa. Under this third section, approaches to the regulation of international arbitration, in general, and arbitrability specifically are explored. Then there is an examination of the scope of non-arbitrable matters on the continent. The fourth section discusses some of the key issues emerging from the material on arbitrability from Africa, how they compare with the trends in Europe and the persisting role of public policy. The final section pulls together conclusions from the discussions.

Arbitrability

A dispute is arbitrable if it is 'capable of settlement by arbitration'.[5] This definition implies that there are disputes which are incapable of resolution by arbitration. Disputes may be non-arbitrable for different reasons. States wielding power to determine how disputes arising from transactions in their jurisdictions are resolved may exclude certain matters from the private process of arbitration for reasons including public interest, public policy and the need for judicial protection.[6] In such instances, a dispute may be

[5] See the New York Convention (n3), Articles II (1) and V (2) (a); the UNCITRAL Model Law (n2) Articles 34(2)(b) and 36(1)(b)(i)

[6] Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012)82

arbitrable or non-arbitrable simply on the basis of the subject-matter involved.[7] Traditionally, this is the sense in which the concept of arbitrability has been used.[8]

Viewed broadly, this is not the only reason why a specific dispute involving specific individuals and entities may not be capable of resolution by arbitration. As a consensual process, arbitration can be utilised as a dispute resolution process only if parties expressly or by implication[9] consent to use the process.[10] Where there is no evidence of an agreement, disputes may be incapable of settlement by arbitration – it has been argued that such disputes will be non-arbitrable.[11] Similarly, disputes outside the scope of the agreement to arbitrate are non-arbitrable, in principle, not as a result of a statutory injunction but because the parties' consent/agreement to arbitrate does not extend to such disputes.[12] Further, Böckstiegel has argued that the concept of arbitrability should be view broadly beyond an objective criterion which focuses on subject-matter; there is a place for a subjective criterion which focuses on the capacity of parties to an arbitration agreement.[13] In his view, lack of requisite legal capacity, though not traditionally considered a matter for arbitrability, will eventually make certain disputes incapable of settlement by arbitration even in the context of international arbitration.[14]

The import of the foregoing is that the concept of arbitrability has different dimensions and may arise in different circumstances in the context of arbitration. The question whether a dispute is capable of settlement by arbitration can thus, be answered by looking at four different aspects of the arbitration process namely the subject matter of the arbitration, the existence

[7] Carbonneau, T.E. 'Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States' in Loukas A Mistelis and Stavros L Brekoulakis (ed) *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 1999)para 8-1.

[8] See Arbitration (Scotland) Act 2010 (asp1) s 30 (where arbitrability is defined with a clear focus on subject-matter); Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.111; Mante, J and Ndekugri, I. 'Arbitrability in the context of Ghana's new Arbitration Law' [2012] 2 Int ALR 31,32.

[9] Situations where consent is implied. See e.g. *Stellar Shipping Co LLC* v *Hudson Shipping Lines* [2010] EWHC 2985;[2012] 1 C.L.C. 476 where a guarantor of an agreement containing an arbitration clause was held to be bound by the clause even though it was not party to the original agreement and so had not expressly consented to the arbitration clause therein. See also Park, William W. *Non-signatories and International Contracts: An Arbitrator's Dilemma* (OUP 2009)

[10] An exception here will be statutory arbitrations.

[11] See American case of *MCI Telecommunications Corp. v. Exalon Indus. Inc*. 138 F.3d 426 at 429 (1st Cir. 1998) cited in Rau, Alan Scott 'The Arbitrability Question Itself' (1999)10 Am. Rev. Int'l Arb. 287, 355 (where the judge argued that absence of arbitration agreement raises a fundamental question of arbitrability). See also Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.111; Rau, Alan Scott. 'Arbitral jurisdiction and the dimensions of "consent".' (2008) 24(2) Arbitration International 199-264.

[12] Rau, Alan Scott 'The Arbitrability Question Itself' (1999)10 Am. Rev. Int'l Arb. 287.

[13] Böckstiegel, Karl-Heinz "Public Policy as a Limit to Arbitration and its Enforcement." (2008) 2 Disp. Resol. Int'l 123,126-128

[14] Ibid.

or otherwise of an arbitration agreement, the scope of the agreement and the capacity of the parties. This study focuses mainly on arbitrability in the traditional sense, that is, as it relates to the subject-matter of arbitration - this is the sense in which the term is used in the New York Convention and the UNCITRAL Model Law.[15] Even so, in the African context, it appears that the laws which define arbitrability and non-arbitrability often embrace both the objective and subjective dimensions of the concept. Consequently, some reference in this work to the subjective dimension of arbitrability in the African context is inevitable.

Arbitrability in the context of Arbitration

Arbitrability, as a concept, raises a number of questions on the process of arbitration. Which law governs the question of arbitrability? In what circumstances can the question of arbitrability be raised? Who determines the question of arbitrability? What are the possible consequences of non-arbitrability on the arbitration process and its outcome? These questions are briefly examined in succession. In both domestic and international arbitration, states have the prerogative to determine what subject matters are capable of settlement by arbitration within their respective jurisdictions. This position is supported by provisions from two key instruments on international commercial arbitration namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC) and the UNCITRAL Model law on international Commercial Arbitration, 1985 (as amended in 2006) (the Model Law).[16] As the determination of what is arbitrable remains a matter for individual states, different approaches, often influenced by public policy considerations,[17] have been adopted by states.[18] This also means a subject matter arbitrable in one jurisdiction may not be arbitrable in another. The effect is that there is likely to be confusion as to the arbitrability of a matter in the context of international arbitration.[19] Consequently, parties to arbitration are free to contest the arbitrability or otherwise of a pending claim.

In the context of international arbitration, the governing law for arbitrability will depend on a number of factors including the time it is raised. If raised in the course of the arbitration proceedings as a jurisdictional challenge or in defence to a claim, there are several possible sources of law which may

[15] In the African context, it appears that the laws which define arbitrability and non-arbitrability often embrace both the objective and subjective dimensions of the concept. Consequently, some reference to the two dimensions of arbitrability in the African context is inevitable.

[16] See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V (2) (a) and the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006), Articles1(5) and 34 (2) (b) (i).

[17] McLaughlin (n4)915-916

[18] Schwartz, E. A. 'The Domain of Arbitration and Issues of Arbitrability: The View from the ICC' (1994)9(1) *ICSID Review* 17ff

[19] Vincent, Jennifer, 'Oh, What a Tangled Web We Weave: The Implications of Conflicting Domestic Policy on Arbitrability and Award Enforcement' (2015) *38 Hastings Int'l & Comp. L. Rev. 141*

apply. These include the law governing the arbitration agreement or the law of the seat of the arbitration.[20] When the issue of arbitrability is raised at the stage of recognition and enforcement, Article V (2) (a) of the New York Convention[21] implies that the law of the forum of enforcement shall apply.[22] However, the question is not as simple as it appears. A tribunal dealing with the question of arbitrability even in the course of the arbitration cannot overlook and thus, may take into account the law of the place of enforcement for practical reasons.[23]

A question of arbitrability may be determined either by an arbitral tribunal or a designated national court.[24] It is widely accepted both domestically and internationally that the tribunal has power to determine its own jurisdiction under the competence-competence principle.[25] Alternatively, there are, at least, three instances where a national court may be called upon to determine the question of arbitrability: firstly, where there is a repeat application by a party who disagrees with a first instance ruling by an arbitral tribunal on the question of arbitrability;[26] secondly, where the relevant national legislation provides alternative means of dealing with jurisdictional issues directly through the court as is the case under section 32 of the English Arbitration Act, 1996; and finally, when the question of arbitrability is raised as a defence to the enforcement of an award under the New York Convention.

Arbitrability and Public Policy: Trends in Europe and America

The concept of public policy is notoriously difficult to define due to its vague confines and characteristic lack of uncertainty.[27] Nevertheless, it has played a

[20] In *French Consultant v. Egyptian Local Authority* (ICC Case No.6162) (1992)XVII Yearbook Comm. Arb 153 it was held that the law of the seat of the arbitration (the law of Switzerland) applied to the question of arbitrability even though Egyptian law was the applicable law by agreement.

[21] See also the UNCITRAL Model Law, Article 36.

[22] See *Company M v. M.S.A.,* No.6 Cour d'appel, Brussels, 4 October, 1985 reported in XIV Yearbook Comm. Arb. (1989) 619

[23] See Carbonneau T, Shattering the barrier of Inarbitrability (2011) 22 American Review of International Arbitration Law 573 at 596 (where the author argues that the tribunal in a given situation may be confronted with a choice amongst different variations of competing laws).

[24] Matters of recognition and enforcement are within the jurisdiction of national courts –see the New York Convention, Article V.

[25] See the UNCITRAL Model Law, Article 16; English Arbitration Act 1996, s. 30; Ghana's Alternative Dispute Resolution Act 2010 (Act 798), s.24; Scottish Arbitration Rules, Rule 19.

[26] UNCITRAL Model Law, Article 16(3).

[27] In *Egerton v. Brownlow* (1853) 4 HLC 1, Parke B observed in relation to public policy as follows: "Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not…"

major role in both domestic and international legal discourse on arbitration.[28] An "unruly horse"[29] it may be but its influence lives on. An interim report by the Committee on International Arbitration of the International Law Association (ILA) dated 2000 on the role of public policy in the enforcement of foreign arbitral awards examined a number of possible definitions and explanations of the concept.[30] It also explored current strands and ramifications of the concept for international arbitration.[31] At its core, public policy is about "basic norms of morality and justice"[32] of a state the violation of which "would be clearly injurious to the public good or, possibly …would be wholly offensive to the ordinary reasonable and fully informed member[s] of the public on whose behalf the powers of the State are exercised".[33] In the context of international arbitration, there are different notions of the concept.[34]

Studies in America[35] and Europe[36] on current trends on arbitrability reveal that there is a shift in attitudes on, firstly, the scope of disputes that are arbitrable and secondly, the extent to which public policy remains a bar. Across Europe and America, certain disputes are regarded as generally non-arbitrable.

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[28] See Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series, 1986 New York, Kluwer Law International 1987) vol 3, 177-366 (the entire work of the Working Group 2 was devoted to public policy in Arbitration); Loukas A Mistelis and Stavros L Brekoulakis (ed) Arbitrability: International & Comparative Perspectives (Kluwer Law International 1999). See also ILA, 'Interim Report on Public Policy as a bar to the Enforcement of International Arbitral Awards' (International Law Association Conference, London,2000); <http://www.newyorkconvention.org/publications/full-text-publications/general/ila-interim-report-public-policy-2000 > accessed 1 August 2015.

[29] *Richardson v Mellish* (1824) 2 Bing. 229 at 252 per Burrough J.

[30] See e.g. *The German Bundesgerichtshof* 12 July 1990 - III ZR 174/89, NJW 1990 at 3210: "A violation of essential principles of German law (*ordre public*) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way. A mere violation of the substantive or procedural law applied by the arbitral tribunal is not sufficient to constitute such violation"; Cheshire and North, *Private International Law* (13th edn., Butterworths 1999), 123 : "… some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception"; and Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978), 532: "…the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community… those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception".

[31] See ILA Report on Public Policy (n28).

[32] *Parsons & Whittemore Overseas Co., Inc. -v- Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974) per Judge Smith

[33] *Deutsche Schachtbau-und Tiefbohrgesellscaft mbh -v- Ras Al Khaimah National Oil Company*[1987] 2 Lloyd's Rep. 246 at 254 per Donaldson MR

[34] Public policy in the context of municipal law, public policy under private international law (also called international public policy) and trans-national public policy. For more details on these strands of the concept, see Lalive, P. 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series, 1986 New York, Kluwer Law International 1987) vol 3, 258-318

[35] McLaughlin (n4); Vincent, Jennifer, 'Oh, What a Tangled Web We Weave: The Implications of Conflicting Domestic Policy on Arbitrability and Award Enforcement' (2015) *38 Hastings Int'l & Comp. L. Rev. 141*-168.

[36] See Kirry, Antoine 'Arbitrability: Current Trends in Europe' (1996) 12(4) Arbitration International 373-390; Baron, P.M. and Liniger, S. 'A Second Look at Arbitrability: Approaches to arbitration in the United States, Switzerland and Germany' (2003) 19(1) Arbitration International 27ff

These include criminal matters and status-related cases involving individuals or corporate entities.[37] Disputes relating to fraud allegations,[38] bribery[39] and competition[40] (obviously issues of public interest) have in recent times encountered questions on arbitrability.[41] These types of disputes and others relating to patents, family law, employment and insolvency previously regarded as non-arbitrable are increasingly becoming arbitrable. In the United States, there is a strong presumption in favour of arbitrability[42] rebuttable only by a clear congressional intent against submitting particular disputes to arbitration;[43] and the presumption is even stronger with disputes arising out of international commerce.[44] The English courts have also endorsed presumption of arbitrability. In *Fiona Trust & Holding Corporation and Others v. Privalov and Others,*[45] the English Supreme Court (per Lord Hoffmann) observed as follows:

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[46]

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[37] E.g. the French Civil Code, Article 2060.

[38] See the decision in Fiona *Trust & Holding Corp v Privalov Also known as: Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; [2007] Bus. L.R. 1719,1725ff

[39] See *Honeywell International Middle East Limited v Meydan Group LLC* [2014] 2 Lloyds Rep.133 (where it was held that an allegation that an agreement was procured by bribery, even when proved, will not lead to the setting aside of an order for the enforcement of a foreign award, though contrary to English public policy because contract procured by bribes were not unenforceable under English law. See also Parish, M. (2010) 'The proper law of an arbitration agreement' (2010) 76(4) Arbitration 661-679.

[40] In *Eco-Swiss China Time Limited v. Benetton International NV* (Case C-126/97) 1999 ECR1ff, an award which was in violation of European Union competition law (Article 81 EC) was annulled on the basis that the law constituted a fundamental provision essential to the working of the Community, especially, the functioning of the internal market.

[41] Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on international arbitration* (5th edn, OUP 2009) para 2.117-2.143.

[42] *Moses Cone Memorial Hospital v Mercury Construction Corporation* 460 US 1, 24-25 (1983); McLaughlin (n4) 906-907

[43] Vincent (n35)143

[44] See *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*. 473 U.S. 614 S Ct (1985)(the US Supreme Court held that a dispute is arbitrable even though the transaction concerned raised issues concerning violation of an American Statute on antitrust ; McLaughlin (n4) 906-907

[45] [2007] UKHL 40; [2007] Bus. L.R. 1719

[46] ibid. 1725, para 13

There are some instances where courts have held in some European jurisdictions that particular types of dispute are not arbitrable[47] but generally, the scope of arbitrable matters has widened considerably, partly as a result of the gradual chipping away of the influence of public policy on what may be submitted to arbitration.[48]

Historically, public policy has been a key consideration in the determination of arbitrability.[49] In America and Europe, the last three decades have witnessed a remarkable reversal of this trend through judicial pronouncements on arbitrability of public policy issues.[50] The traditional position precluding arbitrators from dealing with public policy disputes has now given way to a view that the application of public policy rules should not be the sole preserve of judges, arbitrators can do the same. Nevertheless, even with countries in Europe where it is thought that the role of public policy in the determination of arbitrability is waning, it can be argued that public policy considerations still underpin either overtly or covertly some provisions on non-arbitrability.[51]

Trends in Africa

Developments on arbitrability and non-arbitrability in Africa can be gleaned mainly from national legislations and legal writings as there are limited case law on the subject. In this study, the arbitration laws of thirty-six countries in Africa were explored for information on the varied legislative approaches towards regulating the issue of arbitrability, subject matters which are arbitrable or non-arbitrable, and the extent to which public policy still remains an important consideration.

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[47] In relation to disputes involving rights which the parties are not free to dispose- see *Fincantieri-Cantieri Navali Italiani v. Ministry of Defense* 21 Y.B. Comm. Arb'n 594 (1994). See also *Eco-Swiss China Time Limited (n41); Manfredi, Cannito, Tricorico & Murgolo v. Lloyd Adriatico Assicurazioni SpA, Fondiaria Sai SpA & Assitalia SpA* C-295-98/04 [2006] E.C.R. 1, 31 (where it was held that compliance and application of Article 81 and 82 of EC law on competition was a matter of public policy; *UAB Kauno vandenys v WTE Wassertechnik GmbH* (3K-7-304/2011) (where the Supreme Court of Lithuania held that disputes arising out of public procurement contracts are not arbitrable - for more on this case, see Daujotas, Rimantas and Audzevičius, Ramūnas, 'Arbitrability of Disputes Arising from Public Procurement Contracts – Lithuanian Example' (2012) http://dx.doi.org/10.2139/ssrn.2086349>Accessed 12 August 2015

[48] See Stavros L Brekoulakis, 'On Arbitrability: Persisting Misconceptions and new areas of Concern' in Loukas A Mistelis and Stavros L Brekoulakis (ed) *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 1999) 19-44.

[49] For example, the Arbitration Act 2005 (Malaysia), s4 (1) ('any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy'); the International Arbitration Act1996 (Singapore), Article 11; the French Civil Code 2060. See also McLaughlin (n4)915-916; Böckstiegel, K-H. (n13); Baron, P.M. and Liniger, S. (37) 27. cf Stavros L Brekoulakis (n48) who argues that public policy has no role in the determination of arbitrability.

[50] Examples from the United States: *Moses Cone Memorial Hospital v. Mercury Construction Corporation* 460 US 1, 24-25 (1983); *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc.* 473 U.S. 614 S Ct (1985); *Scherk v. Alberto-Culver Co.* 417 US 515 – 521. From the UK: Fiona Trust (n46); *Honeywell International Middle East Limited* (n40). See also Brekoulakis, S. 'On Arbitrability: Persisting Misconceptions and New Areas of Concern in Mistelis, L. A. and Brekoulakis, S. L. (eds.) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)19,20.

[51] See the French Civil Code, 1804, Article 2060; the Code of Civil Procedure of the Netherlands, 1986, Article 1020(3); the Italian Civil Procedure Code, 1990 (as amended in 2006), article 806, etc.

Approaches to Arbitrability

Growing influence of international arbitration as a means of resolving international commercial and investment disputes has made it imperative for African legislatures to take note. Current legislations across the continent reflect common acceptance of arbitration as a means of resolving both domestic and international disputes. Asante has observed that the acceptance of international arbitration has been mainly driven by a desire to attract investment and trade. He argues that,

> …most developing countries involved in negotiating international business transactions recognise the virtual inevitability of international commercial arbitration. Indeed, the acceptance of international arbitration has become an invariable ingredient of the liberalization package which developing countries provide as a *sine qua non* of their strategies to attract foreign investment, technology, international finance and foreign trade.[52]

The arbitration laws on the continent also reveal deep theoretical divisions in the approaches to regulation of international arbitration. There is a view that all arbitrations are, in a sense, national in character and governed principally by the procedural rules of the seat of the arbitration.[53] In that sense, there appears to be no justification for making one set of rules for domestic arbitration and another for international arbitration. Principles deemed beneficial to international arbitration must be equally beneficial to domestic arbitrations. A typical example of arbitration laws which reflect this view is the Alternative Dispute Resolution Act 2010 of Ghana.[54] Another view argues that international arbitration is distinct from domestic arbitration and thus requires separate rules.[55] There is a recognition that the validity and effectiveness of international arbitration does not depend solely on domestic laws of a single jurisdiction.[56] Having separate provisions on international arbitration based on well-known and widely accepted principles such as those under the

[52] Asante, S.K.B. 'Some Key Issues in Negotiating International Joint Ventures' (1998) 1(1) Banking and Financial Law Journal of Ghana 52-71.

[53] See the 'mono-localisation' theory of arbitration canvassed by F.A. Mann, '"Lex Facit Arbitrum," in International Arbitration' (1986) 2 Arb. Int' 241 and captured succinctly in Emmanuel Gaillard, 'Three Philosophies of International Arbitration' in Arthur Rovine (ed) Contemporary issues in international arbitration and mediation(The Fordham Papers, Martinus Nijhoff Publishers 2010)305,308.

[54] The Alternative Dispute Resolution Act 2010 (Ghana) applies to both domestic and international arbitration but refrains from any indication of a distinction between principles applicable to both types of arbitration. See also Liberia Commercial Code Title Ch 7 (2010)

[55] The view here is closer to that of proponents of the trans-national theory of arbitration – see Emmanuel Gaillard, 'Three Philosophies of International Arbitration' in Arthur Rovine (ed) *Contemporary issues in international arbitration and mediation*(The Fordham Papers, Martinus Nijhoff Publishers 2010)305,308.

[56] Emmanuel Gaillard, 'Three Philosophies of International Arbitration' in Arthur Rovine (ed) Contemporary issues in international arbitration and mediation(The Fordham Papers, Martinus Nijhoff Publishers 2010)305,308

UNCITRAL Model Law gives assurance of validity and effectiveness of an award and also inspires confidence in foreign parties.[57] Majority of modern arbitration laws in Africa tend to take the middle ground for reasons including the need for investment and trade[58] and recognition of the peculiarities of international arbitration. Consequently, they tend to have separate provisions on domestic and international arbitration (all in a single law) with varying differences in the extent of regulation.

The differences in approach to regulation of arbitration are also mirrored in how the question of arbitrability is addressed. Asouzu[59] identified three different approaches to arbitrability in the African context. The first approach entails omitting any reference to the word "commercial" as a means of limiting subject matters that are arbitrable.[60] Instead, customised criteria are provided which cover a wider scope.[61] The second approach involves providing a specific and comprehensive definition of arbitrable subject matters based on the indicative scope of the word "commercial" given under the UNCITRAL Model Law.[62] For example, the Arbitration and Conciliation Act, 1988 (CAP 19) of Nigeria aim to "provide a unified legal framework for fair and efficient settlement of *commercial disputes* by arbitration and conciliation…"[63] Section 57 of the Act then defines what kinds of transactions are 'commercial' in nature.[64] The third approach to arbitrability canvassed by Asouzu entails providing general definitions of subject matters that are arbitrable without any limitations.

The distinctiveness of the various approaches to arbitrability runs deeper than sticking to the scope provided under the UNCITRAL Model law or having a customised scope; it has theoretical connotations. Generally, arbitration laws with stronger emphasis on international arbitration take a liberal view of arbitrability and have limited or hardly any express provisions on non-

[57] The International Arbitration Act 2008 Act No. 37 of 2008 (Mauritius) is a typical example of arbitration law reflecting this view.

[58] See Asante (n53)

[59] Asouzu, A.A. *International commercial arbitration and African states: practice, participation, and institutional development* (Cambridge University Press 2001)140-176.

[60] cf UNCITRAL Model Law (n2) Article 1(1) where it is stated that the law applies to international commercial arbitration. An indication of the scope of the word 'commercial' is provided in the footnote to the article.

[61] Examples of this approach can be found in Law No. 27/1994 of Egypt and the Tunisian Arbitration Code (Law No. 93-42 of 26 April 1993)

[62] See footnote to the UNCITRAL Model law, Article 1(1)

[63] Emphasis added. See the long title of the Act

[64] S.57 of the Act define the word 'commercial' as "all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road"

arbitrability.[65] This is because international arbitration is often limited to subject matters that are commercial in character which are largely arbitrable across the African continent even at the domestic level. The International Arbitration Act 2008 (Act No.37) (Mauritius) is an example of standalone legislations on international arbitration with a liberal position on arbitrability.[66] The Act provides virtually no limits on arbitrable disputes. It states that where jurisdiction is conferred on a court concerning a matter, it does not necessarily imply that such a matter is incapable of settlement by arbitration. In effect, matters over which the courts have jurisdiction can equally be the subject matter of arbitration, unless expressly exempted.

Though the OHADA[67] Uniform Act, 1999 has a domestic application, it is essentially international in character. It has a strong international focus and applies common rules to all arbitration which has its seat in any of the sixteen signatory countries.[68] It has as its goal harmonisation of arbitration laws in member states and therefore abhors any act which can potentially stifle this effort. Under the Uniform Act, states and public entities are permitted to arbitrate their disputes and are barred from invoking "their own law to contest the arbitrability of the claim, their authority to sign arbitration agreements or the validity of the arbitration agreement".[69] With the strong international focus, it is not a surprise that the OHADA Uniform Act has little or no tolerance for national laws on arbitrability.

Similarly, arbitration laws which are less emphatic on separate rules for international arbitration have more elaborated provisions on non-arbitrability.[70] Arbitration laws with distinct provisions on domestic and international arbitration tend to provide for arbitrability, non-arbitrability or both.[71] It is instructive that for most of these laws, arbitrability and non-arbitrability are covered under provisions applicable mainly to domestic arbitration.[72] In some

[65] The 1997 Draft International Arbitration Law of South Africa is an exception here. Under the proposed section 6, matters relating to status and arbitration agreements contrary to public policy were to be non-arbitrable.

[66] The long title of the Act states that it is '[a]n Act to promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration, to lay down the rules applicable to such arbitrations and to provide for related matters'. S 3(1)(c) (i) states that its provisions apply solely to international arbitration with a minor exception

[67] The organisation for the Harmonisation of Business laws in Africa.

[68] List of signatories: Togo, Cote d'Ivoire, Mali, Cameroun, Niger, Guinea Bissau, Equatorial Guinea, Senegal, Burkina Faso, Democratic Republic of Congo, Gabon, Guinea, Chad, Central African Republic, Benin and Comoros.

[69] See the OHADA Uniform Act 1999, Art 2.

[70] See e.g. the Alternative Dispute Resolution Act 2010 (Ghana); Liberia Commercial Code Title Ch 7 (2010), Article 7.

[71] Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters(Egypt), Articles 1,2,11; Law No.05/08 Relating to Arbitration and Mediation Agreements (Morocco), Articles 308-310; Law No 11/99 of 8 July,1999 (Mozambique), Articles 5 – 6.

[72] ibid.

other instances, the non-arbitrability provisions are part of the common clauses applicable to both domestic and international arbitration.[73]

Non-Arbitrable disputes

Across the continent, there are many disputes which are non-arbitrable. These can be categorised into, at least, four groups namely status and capacity-related disputes, disputes relating to protected persons and institutions such as the family, subject matters which relate to the state or public interest and those categorised in this work as "generic exemptions". Disputes relating to status (and capacity) are generally exempted from the scope of arbitration.[74] Examples include disputes relating to whether a person is a minor, married, unmarried, divorced, *non compos mentis or* a citizen of a country. Under the Tunisian Arbitration Code,[75] disputes relating to nationality and personal status are not arbitrable. Similarly, Article 309 of Law No.05/08 of Morocco provides that, "disputes relating to status of a person, their capacity or personal rights that cannot be a subject matter of commerce" are non-arbitrable. In this case, both status-related and capacity-related disputes are not arbitrable. The implication is that, disputes relating to whether a person has a requisite legal personality are non-arbitrable.[76] This is one sense in which the term "capacity" is used in relation to arbitrability in the African context. In a second sense, it is used as a defining criterion in determining whether a party has the right (entitlement) to settle a specific dispute by arbitration. Some arbitration laws in Africa define arbitrability in terms of rights that individuals or entities have the 'capacity' (that is, an entitlement) to settle or dispose.[77] For instance, Article 3326 (1) of the Ethiopian Civil Code provides that "the capacity to dispose of a right without consideration shall be required for the submission to arbitration of a dispute concerning such right".[78] Under Article 308 of the Arbitration law of Morocco "persons of the *requisite capacity* can conclude arbitration agreements pertaining to *rights that are*

[73] Tunisian Arbitration Code (Law No. 93-42 of 26 April 1993), Article 7; Arbitration Act No.19 of 2000 (Zambia),s.6; Arbitration Act (Chapter 7:15; Act 6 of 1996) (Zimbabwe),s4

[74] See e.g. the Arbitration Act, Chapter 6.01, 1959 of Botswana, s.7; Law No.05/08 of Morocco Relating to Arbitration and Mediation Agreements, Article 309; South African Arbitration Act 42 of 1965,s.2; Tunisian Arbitration Code (Law No. 93-42 of 26 April 1993), Article 7; Arbitration Act of Zambia [No.19 of 2000], s.6(2)(g); and Law No 11/99 of Mozambique, Article 6(2)

[75] Law No. 93-42 of 26 April 1993

[76] A question arises here as to what happens when an issue of capacity is raised in the course of arbitration. The rationale for precluding an arbitral tribunal from determining a question of capacity in the context of a commercial matter is unclear in the absence of a judicial interpretation.

[77] This is a phrase commonly observed in statutes based on the civil law tradition

[78] See also the Law No. 27/1994 of Egypt (, supra, Article 11; the International Arbitration Code of Djibouti, 1984, Article 2(2); and the OHADA Uniform Act on Arbitration, 1999, Article 2.

under their free disposal …"[79] Not only must individuals have the capacity to conclude arbitration agreements, they must also be entitled at law to free disposal of the right which is the subject matter of the arbitration. In this instance, the legislator sets both objective and subjective criteria for arbitrability.

The second category of disputes incapable of settlement by arbitration includes those involving protected persons[80] and the family as an institution. Section 7 of the Arbitration Act of Botswana, 1959 exempt matrimonial causes[81] and matters in which persons with legal incapacity may be interested from the scope of subject matters that are arbitrable. Section 6(2) of the Zambian Arbitration Act, 2000 also exempt from arbitration subject matters incidental to a matrimonial cause,[82] the determination of paternity, maternity or parentage and matters affecting the interest of a minor or a person under legal incapacity.[83]

It is worth noting that not all arbitration laws in Africa exempt matrimonial issues from settlement by arbitration. For example, under the Ethiopian Civil Code,[84] conflicts in cases relating to marriages, divorces and irregular unions are arbitrable. Further, some statutes do not provide a blanket exemption of matters involving the interests of minors or persons with limited or no legal capacity from arbitration. For instance, under the Zambia Arbitration Act, a matter affecting the interest of a person under some legal incapacity will be arbitrable if the person is represented by a competent person.[85] Similarly, the Zimbabwe Arbitration Act permits such matters to be settled by arbitration with leave of the High court.[86] Again, there are generally no blanket exemptions on consumer, bankruptcy and related commercial transactions. Section 38 of the Kenyan Arbitration Act, 1995 is deliberately designed to ensure that where necessary, bankruptcy proceedings could be settled by arbitration.[87] Section 8 of the International Arbitration Act of Mauritius places some additional requirements on parties to consumer arbitrations thereby making the

[79] Emphasis added.

[80] such as minors, persons with legal disabilities generally and consumers

[81] See also the Namibian Arbitration Act 42 of 1965, s.2 and the Zimbabwean Arbitration Act, 1996, s.4. cf The Ethiopian Civil Code, Title XX Chapter 2, Article 722ff which states that conflicts in cases relating to marriages, divorces and irregular unions are arbitrable.

[82] Save where there is a leave of court to refer such matters to arbitration

[83] Unless the minor or the person with legal incapacity is represented by a competent person - See section 6(2) (g)

[84] Title XX Chapter 2, Article 722ff

[85] The Zambia Arbitration Act, 2000, s6 (2) (g).

[86] The Zimbabwe Arbitration Act,1996,s.4(2)(e)

[87] See also the Arbitration Act of Malawi,1967, s.5

arbitrability of such matters contingent on compliance with the requirement.[88] These "partial" exemptions are indications that these exempted matters could be arbitrable when certain public interest concerns are properly addressed. In this sense, these African arbitration statutes are as liberal as the prevailing practice in Europe and America on similar subject matters.

The third category of non-arbitrable matters relate to the State and public interests matters. Examples of these subject matters could be found under various arbitration legislations in Africa. Section 1 of the Alternative Dispute Resolution Act, 2010 (Act 798) of Ghana states that the Act applies to all matters except those that relate to "(a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method."[89] The Liberia Commercial code contains similar provisions. It states that the chapter of the code on arbitration does not apply to matters "involving the determination of liability for the commission of a crime,[90] a tort, environmental pollution or matters relating to the public interest or the Constitution".[91]

Compared to earlier categories of non-arbitrable subject matters in the African context, this category poses a greater challenge because it entails matters which are less specific in scope and have the greatest potential to influence commercial transactions. For instance, in the context of international arbitration, the question of arbitrability may arise in relation to crime when a transaction is alleged to have as its object fraud or bribery and corruption. The position on this issue in Europe is that these "crimes" will not deprive an arbitral tribunal of the power to determine such a dispute; such an allegation, if proved will have to be considered by the tribunal as part of its award.[92] This popular view is based in part, on the belief that arbitrators are capable and have the requisite training and general sense of duty to consider the public interest dimension of a matter before them. This may not be the experience of many countries in Africa. In the absence of judicial decisions on this matter in the African context, it is difficult to gauge to what extent criminal matters (such as fraud, bribery and corruption) will be considered arbitrable.

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[88] See the International Arbitration Act (of Mauritius) No. 37 of 2008, s.8 (1) which provides as follows: Where a contract contains an arbitration agreement and a person enters into that contract as a consumer, the arbitration agreement shall be enforceable against the consumer only if the consumer, by separate written agreement entered into after the dispute has arisen, certifies that, having read and understood the arbitration agreement, he agrees to be bound by it.

[89] For a discussion of the implications of this section, see Mante, J and Ndekugri, I. 'Arbitrability in the context of Ghana's new Arbitration Law' [2012] 2 Int ALR 31

[90] See also the Zimbabwe Arbitration Act, 1996, s.4(2)(c); Botswana Arbitration Act,1959,s.7 clarifies the aspect of criminal matters that remain outwith the scope of arbitration by providing that, "criminal cases, so far as the prosecution or punishment thereof is concerned, shall not be submitted to arbitration."

[91] Ch. 7 (2010),Article 7.2 (3)

[92] Fiona *Trust & Holding Corp v Privalov Also known as: Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; [2007] Bus. L.R. 1719; Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.133 -2.141.

As states and public entities increasingly become involved in international economic transactions, the question remains as to the extent to which matters relating to public or national interest could remain outside the scope of arbitrable matters.[93] Drawing a line in such matters poses a difficulty. Can a dispute arising out of a transaction involving a state and a private entity over the refurbishment of a power barge at a time when a country is experiencing a power crisis constitute a matter relating to public or national interest? Will such a matter be arbitrable?[94] Then there is the issue of the scope of matters relating to constitutional interpretation and enforcement. If a dispute arises in the context of a commercial transaction as to whether there has been a breach of a constitutional provision,[95] can such a dispute be resolved by arbitration, for instance, under the Ghana ADR Act?[96] Assuming that an international arbitral tribunal assumes jurisdiction over such a matter and make an award can the enforcement of the award in Ghana be challenged on the basis of non-arbitrability under Article V of the New York Convention as incorporated into the ADR Act? The absence of precedents makes it difficult for a prediction to be made on how the courts will answer such questions.

Even more nebulous are the matters which come under the category called "generic exemptions". The challenge posed by this category is essentially a question of latitude. There are significant numbers of arbitration laws which employ generic phrases to classify arbitrability. The OHADA Uniform Act, like many other arbitration legislations deriving from the civil law tradition, provides that natural persons and corporate bodies can submit to arbitration disputes on rights of which they have free disposal.[97] The Moroccan law on arbitration provides that persons of the requisite capacity can conclude arbitration agreements "*pertaining to rights under their free disposal*…"[98] The Djibouti law on international arbitration states that matters arising out of "juridical relationships as to which parties have the capacity to settle" are arbitrable.[99]

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[93] See Mante, J and Ndekugri, I. 'Arbitrability in the context of Ghana's new Arbitration Law' [2012] 2 Int ALR 31,36-37

[94] This is a real story involving an African country and currently the subject matter of international arbitration. So the answer to this question is yes.

[95] E.g. where an agreement which is the subject matter of a dispute is alleged not to have complied with a constitutional requirement to obtain legislative approval – Article 181(5) of the 1992 Constitution of Ghana requires that international business and economic transactions to which the government is a party should receive parliamentary approval.

[96] In the Ghanaian case of A-G v Balkan Energy (Ghana) Limited & Ors (the Balkan Energy Case) [2012] 2 SCGLR 998 the Supreme Court declared an international transaction unconstitutional as it failed to comply with the requirements of Article 181(5) of the 1992 Constitution of Ghana. In the meantime, disputes arising under this international transaction are the subject-matter of international arbitration. It remains to be seen how the Supreme Court's pronouncement on the effect of the constitutional violation on the transaction will be treated by the arbitral tribunal.

[97] See the OHADA Uniform Act, 1999, Article 2.

[98] Emphasis added. See Law No.05/08 Relating to Arbitration and Mediation Agreements, Article 308.

[99] See the International Arbitration Code, 1984, Article 2(2); see also Law No. 27/1994 of Egypt, Article 11.

The difficulty with these phrases is that subject matters within their scope are not readily ascertainable. This is also the case for instances where generic phrases are used to indicate non-arbitrability. Article 11 of the arbitration law of Egypt, 1994 provides that arbitration is not permitted in matters "which cannot be subject to compromise". Under Morocco's arbitration law, a personal right that cannot be subject-matter of commerce is not arbitrable.[100] Matters "that by special law shall be submitted exclusively to a judicial court…" and "those that relate to inalienable or non-negotiable rights" are non-arbitrable under the law of Mozambique.[101]

Arbitrability and Public policy in Africa

Unlike the situation in Europe and America, public policy still remains a critical determinant of what is arbitrable in the African context. There are instances where public policy is expressly made a criterion for non-arbitrability. For instance, the arbitration laws of Tunisia,[102] Zambia[103] and Zimbabwe[104] stipulate that matters of public policy are not arbitrable.[105] Where no express reference is made to public policy, the rationale for exempting certain categories of disputes from arbitration still points to basic morality and justice. Given the importance of the family as a basic unit of society and the vulnerabilities of minors and persons with legal disabilities, it is understandable that matters relating to these categories are considered deserving of the protection of the law.

Though difficult to define, principles which constitute public policy may fall into, at least, four different categories namely mandatory laws,[106] fundamental principles of law, public order or good morals and national interest.[107] For African countries with Constitutions, provisions from these documents constitute the fundamental principles of law.[108] A violation of such rules is

[100] Law No.05/08 Relating to Arbitration and Mediation Agreements, Article 309

[101] Law No 11/99 of Mozambique, Article 5(2)(a)&(b)

[102] Tunisian Arbitration Code (Law No. 93-42 of 26 April 1993),Article 7(1)

[103] Zambia's Arbitration Act [No.19 of 2000], s.6 (2) (a) provides that an agreement which is contrary to public policy is not arbitrable.

[104] Zimbabwe's Arbitration Act, 1996, s.4(2)(a)

[105] None of these laws defines public policy.

[106] These are laws which must be applied to both domestic and international transactions irrespective of the governing law of the relevant transaction in view of their fundamental nature- see a more expansive definition in Mayer, "Mandatory rules of law in international arbitration", (1986) 2 Arbitration International 274 at 275. See also Böckstiegel, supra, who argues that not all legal rules on arbitrability form part of the public policy of a state

[107] See the Interim Report of the International Law Association (Committee on International Commercial Arbitration) on Public policy, 2000, p. 15 Accessed on 01/08/15, available at http://www.newyorkconvention.org/publications/full-text-publications/general/ila-interim-report-public-policy-2000

[108] See the Constitution of Ghana, 1992, Article 1(2) where it is stated that the " Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void"; the Constitution of the Republic of South Africa,1996 which identifies the supremacy of the constitution and the rule of law as values upon which the country is founded - Article 2 states that law or conduct

considered inimical to the security and welfare of the state. Consequently, these principles take precedence over all other laws. In a ruling on a matter involving an alleged violation of a provision of the Constitution of Ghana in the course of an international transaction, the Supreme Court of Ghana per Date-Bah JSC observed as follows:

> Thus, if even statute law is void, if in conflict with the Constitution, a fortiori, contracts breaching the Constitution should not be enforced … *This constitutional provision, in my view, is a peremptory norm that has to be heeded by this Court. To borrow from the language of public international law, it may be viewed as analogous to ius cogens whose enforcement cannot be impeded by the normal rules.* This Court, to my mind, is thus entitled to refuse to award any damages for the breach of what was an unconstitutional contract, even though the appellant has been adjudged to be in breach of it.[109]

Disputes entailing violation of most constitutional provisions will fall within the category of principles referred to as "fundamental principles of law" and thus will come under the scope of public policy. In the Kenyan case of *Christ for all Nations v Apollo Insurance Co Ltd,*[110] Rangera J. defined public policy in the context of the recognition and enforcement of a foreign award in Kenya as entailing any award which is "inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality".[111] Fundamental issues relating to national interest, public order and good morals are generally considered sacrosanct and will qualify as matters of public policy in the African context.

Discussion

The position of African countries on arbitrability, to a large extent, reflects the divergent legal systems on the continent. The fifty-three unique legal systems on the continent have their roots in at least four distinct legal traditions namely, the common law, civil law, customary law and sharia law. These legal systems employ different legislative approaches in dealing with the question of arbitrability and non-arbitrability.[112] Legal systems based on the civil law tradition tend to delineate the boundaries of disputes that are arbitrable generally by reference to rights which the parties have the capacity to

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inconsistent with it is invalid. The Constitution of Kenya,2010 which identifies general principles of international law as part of Kenyan law states as follows: "(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid". See also the Constitution of the Federal Republic of Nigeria, 1999, Article 1(1) & (3).

[109] Emphasis added. *The Attorney-General v Faroe Atlantic Co. Ltd*. [2005-2006] SCGLR 271 at 298.

[110] [2002]2EA 366

[111] See Nyanchoka, Alfred Oseko, The scope of Arbitrability under Kenyan Law, Arbitration, 2013, 79(3), 273-278.

[112] See Asouzu, A.A. *International commercial arbitration and African states: practice, participation, and institutional development* (Cambridge University Press 2001)140-176.

dispose.[113] In this regard, the approach to arbitrability adopted by these legal systems is similar to that of most countries in continental Europe.[114] In the main, most commercial disputes are arbitrable in Africa as is the case in Europe and America.

Beyond these similarities, there are areas of divergence between Africa on one hand and Europe and America on the other. Three of these differences are briefly outlined. Firstly, current issues on arbitrability in Africa differ considerably from those in Europe and America. In Africa, questions of arbitrability may arise in relation to disputes concerning constitutional interpretation and enforcement, public or national interests, crime, environmental issues and public policy. In Europe and America, current issues on arbitrability relate to disputes concerning patents and trademarks, insolvency, antitrust and competition laws, fraud and bribery and corruption. Secondly, the developments on arbitrability in Europe and America have been largely driven by judicial interpretation which has favoured the presumption of arbitrability.[115] The story in Africa is different - there has been very little by way of judicial decisions on arbitrability and related matters due to the number of international arbitrations on the continent and the marginal opportunities available to African courts to develop arbitration jurisprudence.

The erosion of the concept of arbitrability in Europe and America has also been on the basis of arguments exploring the real rationale of the concept of arbitrability. It has been argued that the question of arbitrability has to do with the natural limitations of arbitration as a dispute resolution mechanism of consensual character.[116] Using arbitration to determine third party disputes or matters of public nature will be in conflict with the very nature of the process.[117] This rationale for arbitrability gives rise to the need for states to make decisions on what disputes can justifiably be settled by arbitration. In making such decisions, the question of the legitimacy of the process of arbitration and the role of the arbitrator also arises. Unlike judges who are formally appointed under law by the state to carry out judicial functions, arbitrators are appointed by private individuals or entities and are not bound by law to protect the public or the state against morally offensive and unjust actions or, indeed, consider policy implications of their decisions.

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[113] See the OHADA Uniform Act, 1999, Article 2 and the Moroccan Law No.05/08 Relating to Arbitration and Mediation Agreements, Article 308.

[114] France, The Netherlands, Italy etc.

[115] See Moses Cone Memorial Hospital v. Mercury Construction Corporation 460 US 1, 24-25 (1983); Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985); Scherk v. Alberto-Culver Co. 417 US 515 – 521; Fiona Trust & Holding Corp v Privalov Also known as: Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40.

[116] Brekoulakis, S. 'On Arbitrability: Persisting Misconceptions and New Areas of Concern in Mistelis, L. A. and Brekoulakis, S. L. (eds.) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)19,20

[117] Youssef, K.Y. 'The death of Inarbitrability' in in Mistelis, L. A. and Brekoulakis, S. L. (eds.) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)47

These considerations (that is, the natural limitations of arbitration as a consensual process and the legitimacy and role of the arbitrator) are among the vital factors which may weigh on the mind of African law makers enacting laws on arbitrability. Within the context of strong perception of bias against African states involved in international arbitration[118] and a misperception about the competence and roles of arbitrators, there is a good reason why arbitrators may not be accorded the same legitimacy that judges enjoy in Africa. Armfelt captured the rationale for this argument in the following terms:

> International arbitration converts disputes with significant legal, regulatory and policy dimensions into purely private contractual disagreements. Courts, whose duty it is to administer justice pursuant to law and policy, are replaced with private panels that often see their mission as merely to settle disagreements in accordance with 'general' legal principles and prevailing business practices that favour transnational corporations. This type of private justice inevitably ignores the legitimate regulatory interests of concerned states.[119]

In this context, merely vouching for the neutrality of arbitrators or indeed asserting that the procedures meet the requirements of due process will not be sufficient. Consequently, arbitrability defined on the basis of public policy ultimately becomes a safeguard. The implication of the foregoing argument is that the question of arbitrability has a contextual dimension and this is often ignored in the discussion on the relationship between public policy and the concept of arbitrability.

Conclusion

The concept of arbitrability is an enigma. In one sense, it appears insignificant in view of the fact that commercial matters are generally arbitrable in many countries in the world.[120] In another sense, this conclusion leads to the question as to why such an 'insignificant' concept still commands the attention of scholars.[121] The significance of the concept of arbitrability has been immortalised by Article V (2) (a) of the New York Convention. Similarly, Article 34(2) (a) (i) of the UNCITRAL Model Law has been widely incorporated into many arbitration laws across the globe implying that national courts determining applications for recognition and enforcement of foreign awards still have power to refuse enforcement on the basis that the subject matter of

[118] Armfelt,Andrew, Avoiding the Arbitration Trap, Financial Times (London), 27 October, 1992,p.20 cited in Asouzu (n60) 429

[119] ibid

[120] Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on international arbitration (5th edn, OUP 2009) para 2.144.

[121] See Mistelis, L. A. and Brekoulakis, S. L. (eds.) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)

the arbitration is not capable of settlement by arbitration in the jurisdiction concerned. In effect, even if the concept of arbitrability does not succeed in stopping the hand of a tribunal from determining a matter, it may end up stifling the enforcement of its handiwork, the award.

Given the significance of the concept of arbitrability, it is vital that business entities involved in international transactions do not speciously extrapolate knowledge of what pertains in Europe and America across all jurisdictions and regions of the world. In Africa, a number of trends on arbitrability are discernible. Most commercial disputes are generally arbitrable and this observation generally aligns with practice in Europe and America. Beyond this, there are three significant differences in the areas of scope of subject matter, approaches to arbitrability regulation and the role of public policy. Firstly, subject-matters which are non-arbitrable in Africa are comparatively broader in scope and differ in terms of subject matters of interest. Commercial disputes may be embroiled with public interest, constitutional interpretation, tort or other non-arbitrable issues, especially so when a State or a public body is a party to such a dispute.

Secondly, the approaches to regulating the question of arbitrability differ. Judicial activism which has transformed the arbitrability 'landscape' in Europe and America are generally absent in Africa. Two trends are observable from the legislative approaches adopted by African states. Generally, a distinction is maintained between domestic and international arbitration. Where there is legislative emphasis on international arbitration, issues of non-arbitrability are generally muted. Even so, there is clear indication that many African countries are unwilling to do away with rules on non-arbitrability in the context of domestic arbitration, and in some cases, even in the context of international arbitration. The rationale for this practice is linked to the third significant difference between practice in Africa on one hand and Europe and America on the other, namely the role of public policy in deciding what is non-arbitrable. Public policy is considered a vital safeguard for many African countries against perceived "biased arbitral tribunals" who may have as their main objective the satisfaction of commercial interests. Thus, the determination of the question as to what is or is not arbitrable does not depend solely on the natural boundaries or limitations of arbitration but also a desire to safeguard national legal, institutional and economic interests. Could it be that the dirge of non-arbitrability has been sang too soon?[122]

[122] Youssef, K.Y. 'The death of Inarbitrability' in in Mistelis, L. A. and Brekoulakis, S. L. (eds.) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)47