# TABLE OF CONTENTS

 Foreword v  
 Table Contents vii  
 Table of Abbreviations xvii  

## PART I: FUNDAMENTAL OBSERVATIONS AND APPLICABLE LAW

### Chapter 1  
**Arbitrability – International and Comparative Perspectives. Is Arbitrability a National or an International Law Issue?** 1  
*Loukas A. Mistelis*

1. Introduction 1  
2. The Notion and Rationale of Arbitrability 3  
   2.1. The Notion(s) of Arbitrability 5  
   2.2. The Rationale of Arbitrability 8  
3. Law Applicable to the Issue of Arbitrability 9  

### Chapter 2  
**On Arbitrability: Persisting Misconceptions And New Areas Of Concern** 19  
*Stavros L. Brekoulakis*

1. Introduction 19  
2. The Rationale behind Inarbitrability 21  
   2.1. The Limited Relevance of Public Policy 21

*L Mistelis & S Brekoulakis (eds), Arbitrability: International & Comparative Perspectives, vii-xv*  
© 2009 Kluwer Law International. Printed in the Netherlands
2.2. Inarbitrability and Inherent Characteristics of Arbitration: Redefining the Theory of Inarbitrability

3. Effects of Inarbitrability on the Validity of Arbitration Agreement

4. Practical Relevance of the Discussion on the Rationale behind Arbitrability

5. Conclusions

Chapter 3

The Death of Inarbitrability

Karim Youssef

1. Introduction

2. A notion in Flux

3. From Restriction to Expansion

4. Uncertainties

4.1. Patents & Trademarks

4.2. Antitrust, Bribery & Corruption

5. The Conceptual Leap towards Universal Arbitrability

5.1. “Claims Arbitrable Unless…”

5.2. Presumption of Arbitrability

(a) U.S. Law

(b) French law: Autonomous Arbitration Agreements

(c) Swiss & German Laws: Economic Criteria of Arbitrability

(d) Universal Arbitrability in Emerging and Third World Jurisdictions?

(e) Canadian Law and the Arbitrability “Big-Bang”

(f) Arbitration in International Administrative Contracts in the Arab World

5.3. Modern-Day-Calvo-Provisions

6. The Changing Face of International Arbitration

7. Future Perspectives

7.1. Subsidiarity

7.2. Merit-Review?

7.3. Emergence of a Notion of “International Arbitrability”

8. Conclusions

Chapter 4

The United States’ Perspective on “Arbitrability”

Laurence Shore

1. Introduction

2. Clarifying the Term
Table of Contents

Chapter 3
Jurisdiction 72
3.1. Recent U.S. Supreme Court Jurisprudence Regarding Arbitrability 73
   (a) First Options and the Presumption that Courts Decide “Questions of Arbitrability” 73
   (b) Howsam, Pacificare, and Green Tree: Defining the Gatekeeper Function 74
3.2. The Circuit Courts 80
4. Conclusion 82

Chapter 5
General Remarks on Arbitrability Under the New York Convention 85
Domenico Di Pietro
1. Introduction 85
2. The New York Convention and its Device for Success 86
3. Arbitrability in the Provisions of the New York Convention 87
   3.1. Article I(3) 88
   3.2. Article II 90
   3.3. Article V1(a) 95
   3.4. Article V(2) 96
4. Conclusion 97

Chapter 6
Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori 99
Stavros L. Brekoulakis
1. Introduction 99
2. Looking Again into the Scope and the Relevance of the Lex Fori 101
   2.1. When Arbitrability Arises Before National Courts at a Pre-Award Stage 103
   2.2. When the Award is Challenged before the National Courts of the Seat 108
   2.3. Arbitrability Control by National Courts at the Place of Enforcement 109
   2.4. When the Dispute is Before an Arbitral Tribunal 111
3. A Brief Look into Relevant Case Law 114
4. Conclusion 118

ix
Chapter 7

On Arbitrability: the Arbitrator as a Problem Solver

Haris Pamboukis

1. Introduction

1.1. The Concept and Function of Arbitrability: Limitation to the Power to Arbitrate

1.2. Differences between Arbitrators and State Judges

1.3. Is Arbitrability a Jurisdictional or a Conflict of Laws Problem?

2. The Notion of Arbitrability (What is Arbitrability)

2.1. Distinction between Arbitrability and Validity of an Arbitration Agreement

2.2. Distinction from other Important Notions

(a) Distinction from International Public Policy

(b) Distinction from the Lois de Police

2.3. Arbitrability Seen as a Jurisdictional Problem – Distinction Between Internal and International Jurisdictional Exclusive Rules

3. Arbitrability and Applicable law (How Arbitrability Has to be Decided)

3.1. Is Arbitrability a Conflict of Laws Problem?

3.2. The Relativity of the Answer According to the Stage and Nature of the Procedure in which the Problem is Raised

3.3. Arbitrability and Arbitrator Seen as a Problem Solver

3.4. Arbitrability and the State Judge Seen as a Social Engineer

(a) Recognition and Enforcement- Annulment

i. State law

ii. Uniform law

(b) Pre-arbitral state control

4. Concluding Remarks

PART II: SUBSTANTIVE RULES ON ARBITRABILITY

Chapter 8

Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States

Thomas E. Carbonneau

1. Introduction

2. The General Rules on Arbitrability in U.S. Law

3. The Specific Example of Labour Arbitration

4. Conclusions
# Table of Contents

## Chapter 9
**Insolvency and Arbitrability**

*Christoph Liebscher*

1. Introduction 165
2. Jurisdictions 168
   2.1. Austria 168
   2.2. England 170
   2.3. France 172
   2.4. Germany 174
   2.5. Switzerland 176
3. Conclusions 178

## Chapter 10
**Arbitrability and Tax**

*William W. Park*

1. Introduction 179
2. Three Faces of Tax Arbitration 181
   2.1. Business Relationships 181
   2.2. Income Tax Treaties 181
   2.3. Investment Disputes 182
3. The Nature of Tax Measures 183
   3.1. Fire, Passion and Taxes 183
   3.2. Tax as Taking 184
   3.3. The Silesian Claims 187
4. Investment Treaty Arbitration 188
   4.1. The Matryoshka: Rules within Rules 188
   4.2. The Competent Authority Filter 193
5. A Tale of Two Cases: *Occidental* and *Encana* 194
   5.1. *Occidental* 195
      (a) The Award 195
      (b) The English court action 197
   5.2. *Encana* 199
      (a) The Majority Award 199
      (b) The Dissent: Expropriating Investment Returns 200
6. Abusive Taxes 200
   6.1. Treating Like Taxpayers in Like Manner 200
   6.2. Analogies from Non-Fiscal Contexts 203
7. Conclusion 204
Chapter 11
Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal 207
Alexis Mourre
1. Introduction 207
2. Issues of Jurisdiction and Arbitrability 210
   2.1. Severability Set Aside? 210
   2.2. The Power of Arbitral Tribunals to Take Criminal Law Rules into Consideration 215
3. Arbitrating Issues of Criminal Law 218
   3.1. Issues of Evidence 218
   3.2. Direct Application by Arbitral Tribunals of Sanctions of a Mixed Nature 220
4. Arbitrators as Private Judges… 227
   4.1. The Duty of International Arbitrators to Take Rules of Criminal Law into Consideration 227
   4.2. The Consequences of the Private Nature of the Arbitrator’s Mission when Confronted with a Criminal Offence 229
   4.3. Simulated Arbitrations and Manipulation of Arbitrators 233
   4.4. Criminal Law Used to Disrupt Arbitration 234
5. … And Guardians of Good Morals in International Trade 235
   5.1. Arbitrators as Guardians of International Legality 235
   5.2. Self Regulation and Arbitration: the Path to the Future 238

Chapter 12
Competition Laws: Limits to Arbitrators’ Authority 241
Julian DMLew QC
1. Introduction 241
2. Fundamental Duties of an Arbitral Tribunal 243
3. Mandatory Law and International Public Policy 244
4. Competition Law
   4.1. EU Competition Law 246
   4.2. U.S. Competition Law 248
   4.3. Remedies in EU and U.S. competition law 249
5. Arbitrability
   5.1. United States: Mitsubishi 250
   5.2. EU: Regulation 1/2003 and Eco Swiss 253
6. Differing Scenarios for Arbitral Tribunals in EU 257
7. Parallel Proceedings: Arbitration Tribunal and Commission 258
Chapter 13
Arbitrability and Intellectual Property Disputes 263
Anna P. Mantakou
1. Introduction 263
2. The Notion of Intellectual Property and Types of Disputes Involved 264
3. Why Arbitrability of IP Issues is of "Special Concern"? 265
4. The Area of Possible Restrictions 265
   4.1. Are IP Rights Freely Disposable? 266
   4.2. IP Titles Requiring State Involvement 267
5. The Restriction-Free Area 270
6. Conclusion 271

Chapter 14
Arbitrability of (Intra-) Corporate Disputes 273
Maria del Pilar Perales Viscasillas
1. Introduction 273
2. The Dispute: a Component of Arbitrability 275
3. Matters that are Subject to Arbitration 279
   3.1. Arbitrability Defined through a General Standard 279
   3.2. Arbitrability in the Context of Corporate Disputes 281
   3.3. Limits to Arbitrability 285
      (a) Public Policy/Mandatory Rules 285
      (b) Exclusive Jurisdiction of National Courts 287
      (c) The Impact on Third Parties 289
4. Future Perspectives 291

Chapter 15
Arbitrability in Finance and Banking 293
Ilias Bantekas
1. Introduction 293
2. The Application of General Rules and Principles 294
3. Arbitrability of Disputes Arising from Securities Transactions 297
4. The Arbitrability of Selected Financial Agreements 300
5. Arbitrability of Corporate Disputes 302
6. Arbitrability of Matters Arising out of Banking Activities 305
   6.1. Arbitrability of Simple Interest in the Islamic World 306
   6.2. Consumer Banking Arbitration 310
6.3. Other Procedural Bars to Arbitrability of Banking Disputes: Immunity? 312

7. Conclusion 314

Chapter 16
The “Arbitrability” of Disputes Arising From Commercial Representation 317

Stefan Kröll

1. Introduction 317
2. Arbitrability of Distribution Disputes: Still through a Glass Darkly?! 319
3. The Rules on Commercial Agency as an Example for Addressing the Inequality of Bargaining Power 320
   3.1. Protection Afforded to Commercial Agents 320
   3.2. Legal Status of the Substantive Rights Granted 321
   3.3. Procedural Protection 323
4. The Different Approaches to the “Arbitrability” of Disputes Arising from Commercial Representation 324
   4.1. The Underlying Problem 324
   4.2. Overview of the Approaches Adopted 326
   4.3. The Exclusion of Objective Arbitrability of Disputes 326
      (a) Salient Features of the Arbitrability Defence and its Position in the NYC-System 326
      (b) The Franchise Example: The Draft U.S.-Arbitration Fairness Act of 2007 328
      (c) The Sole-Distribution Example: The Belgian Law of 27 July 1961 on the Unilateral Termination of Exclusive Distributorship Contracts 330
5. The Likely Non-Application of Mandatory Provisions as a Ground to Refuse Enforcement of the Arbitration Agreement 336
   5.1. Distinguishing Factors from the “non-arbitrability” approach 336
   5.2. The Commercial Agent Example: § 89b German Commercial Code (HGB) 337
6. The “Second Look” Doctrine: Referral of all Control to the Post-Award Stage 342
   6.1. Underlying Rationale of the Second Look Doctrine in the Proper Sense 342
   6.2. “Nullité Manifeste”: the Second Look à la Française 344
7. Evaluation of the Different Approaches 345
7.1. The Unwarranted Limitations of Procedural Party Autonomy under the Non-Arbitrability Approach 346
7.2. Disadvantages of the Control at the Pre-Award Referral Stage 348

Table of National and International Court Decisions 351

Table of Arbitral Awards 363

Subject Index 367