INTERNATIONAL ARBITRATION AND ARBITRABILITY FROM THE UNITED STATES PERSPECTIVE

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ABBREVIATIONS

FAA	: Federal Arbitration Act
Panama Convention	: Inter-American Convention on International Commercial Arbitration
p.	: page
U.S.	: United States
AAA	: American Arbitration Association
UNCITRAL	: United Nations Commission on International Trade Law
UNCITRAL Model Law	:UNCITRAL Model Law on International Commercial Arbitration
UAA	: Uniform Arbitration Act
RUAA	: Revised Uniform Arbitration Act

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I. INTRODUCTION

Commercial arbitration is a very old and much relied upon practice of dispute resolution between national and international companies and corporations[1]. The modern development of international arbitration can be traced to the Jay Treaty (1794) between Great Britain and the United States, which established three arbitral commissions to settle questions and claims arising out of the American Revolution[2].

Arbitration is now generally accepted in the legal community as a typical method of alternative dispute resolution, and is widely used in a variety of contexts, including disputes involving commercial transactions, consumer transactions and employment relationships[3]. The United States' arbitration practice occupies an exceptional position in the global international arbitration system and in arbitration's historic advancement since there have been a vast number of U.S judicial decisions referenced by other countries'

[1] Robert V. Massey, History of Arbitration and Grievance Arbitration in the United States, http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003

[2] Enycyclopedia Britannica website: http://www.britannica.com/EBchecked/topic/32313/arbitration/27077/Historical-development

[3] W. Scott Simpson, Ömer Kesikli, The Contours of Arbitration Discovery, Alabama Lawyer, 2006, Vol. 67; No. 4, page 280-286, Alabama State Bar, USA

courts. The doctrine of freedom of contract is the driving force in American arbitration law and practice[4].

Given the complexity of the U.S legal system's adversarial and complicated structure, analyzing the legal background of the arbitration system carries a special importance for **a Non-U.S jurist indeed**. **Accordingly this document will briefly draw a general overview of the international commercial arbitration in the United States in terms of its legal framework, some selected precedents, arbitration agreement and the relevant arbitrability matters**.

II. ARBITRATION LEGISLATION IN THE UNITED STATES

In the United States, law derives from five sources: constitutions, international treaties, statutes, regulations promulgated by administrative agencies, and appellate opinions of courts[5]. The sources of the arbitration law therefore can be categorized in the foregoing order as well.

A. Federal Arbitration Act ("FAA")

Currently, the Federal Arbitration Act (FAA) is the controlling body of arbitration law at both the state and federal level in the United States. The FAA subjects most arbitration in the United States to a single standard for judicial review[6], regardless of whether the dispute is domestic or international. It was enacted by Congress in 1925 primarily to overcome judicial reluctance to enforce agreements to arbitrate and consists of three chapters[7]. Chapter 1 contains the basic provisions of the act regarding the making of arbitration agreements and the enforcement of awards, chapter 2 implements the New York Convention, and chapter 3 implements the Panama Convention. Chapter 2 and 3 together

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[4] Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell, Third Edition, 2008, Thomson/West, p. 159.

[5] See generally: James C. Duff, The Federal Court System in The United States, An Introduction for Judges and Judicial Administrators in Other Countries http://www.uscourts.gov/uscourts/FederalCourts/Publications/English.pdf , last visited on January 1st, 2012

[6] William W. Park, The Specificity of International Arbitration: The Case for FAA Reform," 36 Vanderbitl J. Transn'l L. 1241 (2003), p.1245

[7] See generally: Joel H. Samuels, Jan Kleinheisterkamp, U.S. Report on Commercial Arbitration - The Impact of Uniform Law on National Law: Limits and Possibilities (January 31, 2009). General Report for the 1st Intermediate Congress of the International Academy of Comparative Law, Mexico, 2008, Available at SSRN: http://ssrn.com/abstract=1394223

are often referred to as the "international FAA" even though an international arbitration agreement will also be subject to the "domestic chapter" to the extent it does not conflict[8].

"FAA is not self-executing and it does not define or specify the controversies that are subject to arbitration, it does not prescribe any mandatory procedures for arbitration, nor does it confer jurisdiction on any particular court to enforce its purpose"[9]. In short, the groundwork for arbitration must be found in the agreement of the parties, and by virtue of the express language of the FAA.

"The purpose of the FAA is to compel courts to honor contractual covenants to arbitrate disputes, even in the face of state legislative efforts to restrict the enforceability of arbitration agreements"[10].

B. New York Convention - 1958

The text of the Convention was approved on June 10, 1958, by a unanimous vote of the Conference (with only the United States and three other countries abstaining).[11] The United States acceded to the New York Convention in 1970 by enacting the Chapter 2 of the FAA. The New York Convention applies to all foreign arbitration agreements, regardless of the subject matter of the dispute and the citizenship of the parties. However, countries can limit application of its enforcement requirements, on the basis of reciprocity, to awards rendered in other contracting states. Under the New York Convention, reciprocity refers to the place where the arbitration is conducted and the award is rendered, not to the parties' nationalities. The United States and many other Convention parties have made this reservation. Moreover, in accordance with the Convention, many ratifying states have limited its application to legal relationships regarded as "commercial" by the laws of the respective state. The United States' commercial reservation provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial, including a transaction, contract, or agreement described in section 2 of the FAA, falls under the Convention." We should importantly note that the

[8] Joel H. Samuels, Jan Kleinheisterkamp, U.S. Report on Commercial Arbitration, p.131

[9] Gavin J. Gadberry, Dan L. Schaap, Federal Arbitration Act Preemption of State Law, May 13, 2004, p.5, at: http://www.healthlawyers.org/Members/PracticeGroups/HLL/Toolkits/Documents/B_Fed_Arbitration_Act_FAA.pdf, last visited on January 1st, 2012

[10] Gavin J. Gadberry, Dan L. Schaap, Federal Arbitration Act Preemption of State Law, May 13, 2004, p.4.

[11] Introduction to International Arbitration, p.32 at: http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf , last visited on January 10, 2012.

United States has declared that it will apply the New York Convention only to recognition and enforcement of awards made in the territory of another contracting state.

While New York Convention can be categorized as one of the most successful mechanisms in place to promote international trade, its scope is limited, as it primarily focuses on creating a uniform standard for recognition and enforcement of the arbitration agreement and award, rather than the conduct of the proceedings. Likewise, the New York Convention does not include uniform rules for the procedure of enforcement, leaving that standard to national arbitration laws. However, in spite of its Title, New York Convention also sets forth the criteria that must be satisfied to determine the validity of the Arbitration Agreement.

When adopting the 1958 New York Arbitration Convention, the United States accepted its application not only to awards rendered abroad, but also to so-called "non-domestic awards. New York Convention, Article I(1) describes the foreign awards as "*made in the territory of a State other than . . . where the recognition and enforcement of such awards are sought*," while non-domestic awards are defined to include "*awards not considered as domestic awards in the State where recognition and enforcement are sought*." Therefore, New York Convention also applies to awards that are not considered as domestic awards in the state where their recognition and enforcement are sought. FAA section 202 makes clear that any award that involves a foreign party or foreign property, or envisages foreign performance or enforcement is non-domestic even if the arbitration takes place in the United States and is governed by United States law. Thus, Chapter 2 would apply, for example, to a transaction between United States parties that simply envisaged some foreign performance or potential enforcement against foreign assets.

C. Panama Convention

In 1990, the United States became a party to the Panama Convention, which specifically applies to commercial disputes. Concerned with the limited scope of the New York Convention, Latin American countries and the United States sought to harmonize both arbitral processes and the enforcement of foreign arbitral awards on a regional level. The result was the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). While the Panama Convention is similar to the New York Convention, there are some significant differences. Because the drafters of the Panama Convention sought to promote uniformity of arbitral procedure, if parties do not agree to

specific procedural rules to govern the arbitration, the rules of the Panama Convention will apply[12]. Further, the Panama Convention does not offer a reciprocity reservation like the New York Convention and only applies to arbitration agreements as to commercial transactions. Although the Panama Convention has nowhere near the same global effect as the New York Convention, it nevertheless plays a vital role in promoting international trade in the Western Hemisphere[13]. Seventeen Western Hemisphere countries have ratified the Panama Convention since its adoption, including the United States[14].

D. State Laws and FAA's Preemption

FAA does not preclude the application of state arbitration law, even in interstate arbitration cases, provided the state law is not inconsistent with the FAA. Parties may freely make an arbitration agreement to be governed by a state law.

We might briefly discuss about the preemption[15] of FAA over the states' arbitration law. In *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1988)*, the Supreme Court recognized that the FAA generates conflict preemption to the extent that it "contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. In a recent case, in *Preston v. Ferrer, 552 U.S. 346 (2008)* the Supreme Court held that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum are superseded by the FAA.

We would like to quote the following from the Prefatory Note of Uniform Arbitration Act, stating: "*Besides arbitration contracts where the parties choose to be governed by state law, there are other areas of arbitration law where the FAA does not preempt state law, in the absence of definitive federal law set out in the FAA or determined by the federal courts. First, the Supreme Court has made clear its belief that ascertaining*

[12] Winston Stromberg, Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes, Loyola of Los Angeles Law Review, Vol. 40:1337 (2007), p. 1347

[13] Winston Stromberg, Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes, p. 1347

[14] Winston Stromberg, Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes, p. 1347

[15] For detailed information about the FAA Preemption see: Christopher R. Drahozal, Federal Arbitration Act Preemption, Indiana Law Journal, Vol.79:393 (2004), p. 394 – 425.

when a particular contractual agreement to arbitrate is enforceable is a matter to be decided under the general contract law principles of each State. The sole limitation on state law in that regard is the Court's assertion that the enforceability of arbitration agreements must be determined by the same standards as are used for all other contracts."[16] This briefly explains that the preemption of FAA over the states' own arbitration law might have certain exceptions.

From the language of Section 2 of the FAA, courts have developed a basic framework to determine whether the FAA compels the enforcement of the arbitration agreement in the face of state law: 1) is the agreement in writing; 2) does it involve interstate commerce, and 3) can it withstand scrutiny under traditional defenses to contracts[17].

E. AAA-Commercial Arbitration Rules & International Dispute Resolution Rules

While the American Arbitration Association ("AAA") and its rules are not amongst the source of law under the arbitration law of the United States, it is important to mention about the AAA and its arbitration rules due to its wide application in the United States. AAA is a not-for-profit, public service organization offering a broad range of dispute resolution services[18]. AAA also serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

The parties can easily provide for arbitration of future disputes by inserting the following clause into their contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under

[16] Uniform Arbitration Act, Prefatory Note

[17] Federal Arbitration Act Preemption of State Law, p.4.

[18] http://www.adr.org/about_aaa, last visited on January 5th, 2012.

its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."[19]

AAA Commercial Arbitration Rule - R-7. Jurisdiction provides that:

"(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award."

It should be noted that AAA International Dispute Resolution Procedures provides almost the same provision.

F. Uniform Arbitration Act ("UAA") and Revised Uniform Arbitration Act ("RUAA")

The Uniform Arbitration Act was created to harmonize the states' arbitration legislation regarding the procedural arbitration law. UAA was promulgated in 1955 and the law in 49 jurisdictions, has been revised[20]. The new act also goes further than the 1955 act. It deals with the procedural side of arbitration that has been greatly improved to meet modern needs. The subject of international arbitration is not specifically addressed in the RUAA.

[19]AAA Commercial Arbitration Rules and Mediation Procedures, Rules Amended and Effective June 1, 2009, Standard Arbitration Clause Section, at: http://www.adr.org/sp.asp?id=22440 last visited on January 6th, 2012.

[20] Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, "Why States Should Adopt RUAA,
at: http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAA , last visited on January 14th, 2012.

Ten years after its completion, the RUAA has only been adopted by fourteen states and the District of Columbia[21]. It is, thus, questionable whether it is realistic to expect that the RUAA could serve to provide a uniform default legal rules governing even "arbitration procedure" any time in the near future.

G. UNCITRAL Model Arbitration Law

UNCITRAL was established upon the adoption of United Nations General Assembly Resolution 225 (XXI) on December 17, 1966, as a result of the negotiations of fifty-eight states[22]. The main goal of creating UNCITRAL was to harmonize international arbitration procedure among nations and to free international arbitration from the various different requirements of the domestic laws of the nations[23].

"The UNCITRAL model introduces a three stage test within its scope: (1) "parties having places of business in different countries," (2) "the place of contract performance or the place of arbitration is outside the parties' home country," and (3) "the parties selection to treat the proceedings as international."[24] Further, because of UNCITRAL's focus on international commercial arbitration, it covers several key issues that are omitted from the FAA, including: disclosure by arbitrators, challenges to arbitrators, challenges to the tribunal's jurisdiction, the place for arbitration when parties fail to agree, applicable substantive law when parties fail to agree, interim measures of protection, and the tribunal's right to modify or correct its award. Unlike the RUAA, the UNCITRAL Model Law is a complete modern law governing all aspects of arbitration, from commencement through final award. The UNCITRAL Model Law (adopted, at least in part, by over fifty countries and seven U.S. states) contains a well-developed and reasonably comprehensive set of default provisions systematically addressing many of the issues that might arise

[21] Stephen K. Huber, Reassessing State Arbitration Legislation: The Revised Uniform Arbitration Act, State Bar Of Texas Alternative Dispute Resolution Section, Vol. 20, No.2 Winter 2011

[22] Daniel M. Kolkey, It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration, 8 TRANSNAT'L L. & CONTEMP. PROBS. 3, 5 (1998); Besson, supra note 8, at 21

[23] Joel H. Samuels, Jan Kleinheisterkamp, U.S. Report on Commercial Arbitration.

[24] William W. Park, Amending the Federal Arbitration Act, p.19; UNCITRAL Model Arbitration Law, § 1(3).

under an arbitration agreement that does not incorporate a complete set of private institutional or ad hoc rules[25].

III. ARBITRATION AGREEMENT

"*When drafting an arbitration agreement, parties enjoy the benefits of a wholly consensual process*"[26]. Accordingly, the most important phase for the parties to take control of their arbitration is in the drafting of their arbitration clause. As part of this stage, the parties have substantial freedom in tailoring the details of their arbitration subject to certain legal restrictions.

A. Substantive Federal Law on Validity & Enforceability of Arbitration Agreement

FAA Chapter 1 Section 2, provides that an agreement "*to settle by arbitration a controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract*." Accordingly, an arbitration agreement shall be binding to the extent that: (1) the parties agree in writing to final and binding arbitration and (2) the dispute in question falls within the scope of the arbitration agreement.

The most important law to govern the validity of the "arbitration agreement" is the New York Convention. In spite of its Title, its sets forth the criteria that must be satisfied to determine the validity of the Arbitration Agreement. The New York Convention and Panama Convention list the requirements that must be met for an arbitral agreement to be enforceable by the authority of the treaties. Both Conventions include similar requirements for enforcing arbitral agreements. The Agreement must i) be in writing, ii) deal with an existing or future dispute, iii) cover a dispute that arises in respect of the defined legal relationship, in other words: consensus on the scope of the arbitration agreement, concern a matter capable of settlement by arbitration. We can add to this a condition that the general requirements for construction of a contract to be met.

[25] Jack M. Graves, Arbitration As Contract: The Need For A Fully Developed And Comprehensive Set Of Statutory Default Legal Rules, William & Mary Business Law Review, 2 Wm. & Mary Bus. L. Rev. 227 (2011), p.248

[26] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement, Dispute Resolution Journal 54 DISP. RESOL. J. 16 (1999) (American Arbitration Association)

B. Law Applicable to Validity of Arbitration Agreement

In general speaking, the parties shall have the right to choose whether to arbitrate their disputes, whom the decision-makers will be, where the arbitration will take place, and what procedures will be applied. Where the parties specify a governing law, their choice generally will be respected. United States has developed a strong policy favoring party autonomy in almost all respects[27]. To the extent that it reflects a party's express (or unequivocal) intent to do so, U.S Courts will wholly enforce a choice of law clause within a valid arbitration agreement, pertaining both the substantive and procedural elements of an arbitration[28]. Where parties have failed to specify a governing law, US courts have 'almost uniformly' held that arbitrators have broad freedom to determine the applicable choice of law rules and substantive law[29]. When it comes to the court review, one should note that one of the few grounds in the New York and Panama Conventions for refusing to enforce an arbitration award exists when the parties to the arbitration agreement are under some incapacity (pursuant to the law applicable to them) or when the arbitration agreement is invalid under the governing law agreed by the parties or, in the absence of an agreement, under the law of the country where the award is made.

Bearing in mind the foregoing paragraph, we need to answer arguably a more important question: Who will decide on validity of the arbitration agreement? The arbitral tribunal or the court? The law to be applied by the court and the arbitral tribunal might differ depending on where the case is brought as mentioned above. Let us explore certain precedents on the issue and decide on the question accordingly.

In (1967), Prima Paint Corp v Flood & Conklin Mfg Co, the validity of the main contract was challenged by alleging fraudulent acts. In this case, the Supreme Court repeated some controlling principles of federal arbitration law. The first one is that an arbitration provision is severable from the remainder of the contract; secondly, that unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance; third that federal arbitration law applies in state and federal courts. Interestingly the Supreme Court further concluded that because the

[27] See generally: Cindy G. Buys, The Arbitrators' Duty To Respect The Parties' Choice of Law In Commercial Arbitration, St. John's Law Review, 2005, Vol.79:59, p.59.

[28] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

[29] Gary B. Born, International Commercial Arbitration, Commentary and Materials, Second Edition, 2001, p.42

plaintiffs challenged the agreement, but not specifically its arbitration provisions, the rule of separability applied, and the arbitration provisions were enforceable "apart from the remainder of the contract. This means that an allegation of fraud in the inducement of the main contract, however, renders the arbitration agreement separable so that the parties may nevertheless proceed to arbitration[30]. This precedent also supports severability doctrine. As a matter of federal law, arbitration clauses are separable from the contracts in which they are embedded.

Here is a more recent decision. In *Buckeye Check Cashing, Inc. v. Cardegna 546 U.S. 440 (2006)*, the Court clarified that, when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court. The Supreme Court held that challenges to the legality of a contract as a whole must be argued before the arbitrator rather than a court. The opinion by Justice Antonin Scalia explained that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Here, the Supreme Court also expressed that Congress enacted the FAA to overcome judicial resistance to arbitration and to codify a national policy favoring arbitration.

In Re: Morgan Stanley & Co., Inc., Successor To Morgan Stanley DW, Inc., Relator No. 07-0665. (Tex. 2009), however the Texas Supreme Court held that:

> "[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator never had any authority to decide the issue. A presumption that a signed document represents an agreement could lead to this untenable result. We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute**."**

The above mentioned decision is interesting to note, since it substantially differs from the US Court decisions we have reached and referred to in this study.

In *Rent-A-Center, West, Inc. V. Jackson 130 S. Ct. 2772, No. 09-497 (2010)*, the Supreme Court strengthened its previous holdings and broadened it application. By this decision the Supreme Court reaffirmed the FAA's limited framework for judicial review of

[30] Janet A. Rosen, Arbitration Under Private International Law: The Doctrines of Separability and Comp´etence de la Comp´etence, Fordham International Law Journal, 1993, Volume 17, Issue 3 1993 Article 6, p.622

parties' decisions to resort to arbitration. This case arose out of an employee's discrimination claim against its former employer. Upon the employee's filing of suit in U.S District Court for the Disctrict of Nevada, Rent-A-Center moved to compel arbitration under the FAA on the grounds that the employee signed a stand-alone agreement to arbitrate disputes related to his employment, after that employee opposed the motin, arguing that the agreement was unconscionable under Nevada Law. The Supreme Court ruled for Rent-A-Center, holding that where a stand-alone arbitration agreement includes a specific provision referring to arbitration the determination of the agreement's enforceability, a court can only resolve a challenge to that specific provision and nothing else. The Court stated that a party's challenge to another provision of a contract or to a contract in its entirety, consequently did not preclude enforcement of a specific arbitration clause. Since Jackson had challenged the entire contract, and not the specific portion delegating to arbitration the matter of whether the contract as a whole was valid, the Court, reversing the Ninth Circuit, ruled that arbitration had to proceed. The fact that the contract at issue was itself an arbitration agreement made no difference.

C. Binding Effect of the Arbitration Agreement Over Non-Signatories[31]

Individuals or entities who have not agreed to submit to arbitration generally cannot be required to submit to arbitration except in limited circumstances under agency and contract- law principles[32]. This requirement reflects the fact that arbitration is consensual in nature, and is dependent upon the parties' agreement. In determining whether a non-signatory should be joined to international proceedings, arbitrators usually look to theories related to implied consent and lack of corporate personality[33].

U.S. courts may require arbitration of claims by or against a non-signatory, affiliate company if the claims are "intimately intertwined" with, or are "inherently inseparable"

[31] See generally: Clint A. Corrie, Challenges in International Arbitration for Non-Signatories, Comparative Law Yearbook of International Business, at: http://www.bmpllp.com/files/1189004714.pdf , last visited on January 10, 2012.

[32] Peter J. Kalis, Roberta D. Anderson, The International Comparative Legal Guide to: International Arbitration 2011, Chapter 51, USA, p.434, at: http://www.iclg.co.uk/khadmin/Publications/pdf/4706.pdf , last visited on January 7th, 2012.

[33] William W. Park, Non-signatories and International Contracts: An Arbitrator's Dilemma, in Multiple Party Actions in International Arbitration 3 (2009); adapted from Non-Signatories and International Arbitration, Leading Arbitrators' Guide to International Arbitration 553 (L. Newman & R. Hill, 2nd ed. 2008); reprinted 2 Dispute Res. Int'l 84 (2008)

from, the claims brought by or against the affiliate signatory, provided the non-signatory affiliate consents to arbitration[34]. As some courts have said when a parent company was sued in tort as a means of circumventing an arbitration clause in a subsidiary's contract, "If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.[35]"

Some courts have based these holdings on a theory of equitable estoppel[36]. Courts articulated that non-signatory corporation that is held to be the alter ego of an affiliate company that signed an arbitration agreement may be required to participate in an arbitration proceeding involving claims against its alter ego. Another example is that an arbitral agreement may be held to include non-signatories when assent may fairly be implied by their conduct. An agent who does not disclose the fact it is acting as an agent in contracting will, of course, be bound to the arbitration agreement, while an agent who discloses its agency will not. Courts also held that third-party beneficiaries of a contract are bound to the arbitration clause because they cannot avoid the burdens of a contract while accepting the benefits. Some arbitral tribunals and courts have decided that an arbitration clause in one contract between the parties would also apply to other agreements between the same parties if the agreements relate to the same project[37].

IV. ARBITRABILITY

A. From substantive point of view

"Substantive arbitrability refers to the situation where the subject matter itself is not arbitrable even if there might be nothing wrong with the validity of the arbitration agreement per se"[38]. Substantial arbitrability is also set forth in New York Convention Article V(2)(a) which states that *recognition and enforcement of an arbitral award may be*

[34] R. Doak Bishop, A Practical Guide For Drafting International Arbitration Clauses, 1 Int'l Energy L. & Tax'n Rev. 16 (2000), p.5.

[35] Bishop, Practical Guide For Drafting International Arbitration Clauses, p. 6

[36] Bishop, Practical Guide For Drafting International Arbitration Clauses, p. 6

[37] Bishop, Practical Guide For Drafting International Arbitration Clauses, p. 7, 8.

[38] Michael Hwang S.C. and Shaun Lee, Survey of South East Asian Nations on the Application of the New York Convention, (2008) 25 J. Int. Arb. 6, Kluwer Law International, p.877, may also be found at: http://www.arbitration-icca.org/media/0/12641377935370/survey.pdf , last visited on January 16, 2012.

refused if the court where such recognition and enforcement is sought finds that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country." Under subject matter inarbitrability, a dispute can not be submitted to arbitration as a matter of law because it involves matters directly linked to the public interest[39]. Traditionally, certain kinds of claims such as antitrust or competition law issues, securities issues, intellectual property disputes, and personal status and employment issues were deemed as inarbitrable matters, which view has been eroding for the past quarter century[40]. The United States Supreme Court has rejected the traditional view that regulatory and statutory matters are inarbitrable, starting with its decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 632 (1985). United States precedents proved that both antitrust and competition law issues and securities law questions have been arbitrable for a quite long period of time[41]. The question of statutory non-arbitrability has become mostly academic in the United States since the federal courts have deemed virtually every statutory cause of action to be arbitrable[42]. It might be important to quote a part of the holding in *(1985) Mitsubishi Motors V. Soler Chrysler-Plymouth* as follows:

> "Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. By agreeing to arbitrate a statutory claim, a party does not give-up the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial

[39] Thomas E. Carbonneau, Arbitration in a Nutshell 2007 Thomson/West, p.14

[40] Bishop, Practical Guide For Drafting Internationa Arbitration Clauses, p.9.

[41] See generally Bishop, Practical Guide For Drafting Internationa Arbitration Clauses

[42] George A. Bermann, Restating the U.S. Law of International Commercial Arbitration, International Law And Politics Vol. 42:175 (2009), p177; Gary B. Born, International Commercial Arbitration 767-72 (2009)

forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."

B. Are the parties free to choose the law to be applied on arbitrability matters?

Ideally, a dispute that parties have agreed to arbitrate should be handled within the confines of arbitration, without resorting to litigation either before or after the hearing[43]. However this is not happening most of the time since in practice it is common for parties to litigate the arbitrability of their dispute in court before submitting to arbitration; or after an arbitral award is given, parties tend to attack the award in court alleging various legal grounds at law. The fact that the content and scope of arbitrability is a matter of domestic law of each separate state creates conflict of laws issues given the internationality of arbitration.

It is an accepted principle in the United States that a claimant may choose from fifty jurisdictions within the United States, each of which applies its own set for choice-of-law rules[44]. However it is not the same when we are talking about the arbitrability matters. In the United States, the main dilemma about the applicable law of arbitrability is centered around the question of whether the law expressly chosen by the parties to govern a dispute should be respected by a U.S Court to govern the procedural issues, such as arbitrability, or is limited to the interpretation of the substantive rights of the parties under the relevant agreement. The question might be rephrased as follows: Is party autonomy applicable to the arbitrability of a matter? Historically U.S. courts have ignored the parties' express choice of law and have applied only federal law to questions regarding the arbitrability of a dispute or the validity of an arbitration agreement[45]. However, the more recent court decisions show that this view has been changing if not consistent.

[43] W. Scott Simpson, Ömer Kesikli, The Contours of Arbitration Discovery, p. 280

[44] Chetan Phull, Journal of Internation Arbitration 28 (1): 21-50, 2011, p.24; Gary Born & Peter B. Rutledge, International Civil Litigation in United States Courts 4 (2007).

[45] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

Bearing in mind that New York Convention affects both the non-domestic and foreign matters, New York Convention should be interpreted first. Article II of New York Convention specifically deals with the enforcement of the arbitration agreement. The New York Convention provides that a court of a contracting state, when confronted with a dispute that is arbitrable under the Convention, must refer the parties to arbitration unless the agreement is "null and void, inoperative or incapable of being performed. Accordingly, in accordance with their duty to refer under the New York Convention, U.S. courts must determine the arbitrability of certain claims under international arbitration agreements. Article II/3, however, does not answer which nation's laws apply in determining whether a particular dispute is arbitrable or whether the entire agreement to arbitrate is valid**.** This begs the question: What if a U.S Court confronts with a dispute that is arbitrable under U.S arbitration law, but not arbitrable under the law selected by the Parties' agreement?[46] The answer will determine whether the court will refer the parties to arbitration or not. While it might be thought to read Article II/3 and Article V together and conclude that the Parties' agreement on the applicable law will determine arbitrability, since the original drafters rejected such a proposal to incorporate choice of law language[47] into the enforcement of arbitration agreements due to a concern that a forum may feel obligated to enforce arbitration clauses despite contrasting rules of local law, such a conclusion will not be correct. Accordingly, in the earlier stages, U.S Courts resolved issues of arbitrability under the New York Convention in accordance with federal law and not the express choice of the Parties.

Let us explore some of the court decisions starting with *BeckerAutoradio U.S-A. Inc. v. Becker Autoradiowerk GmbH 585 F.2d 39 (3d Cir. 1978),* the 3rd Circuit, acknowledging the inclusion of express choice of law clauses within international arbitration agreements, discussed the application of such clauses to questions involving the interpretation and construction of arbitration agreements." The court reasoned that while the law chosen by the parties certainly governs the resolution of the parties' underlying dispute, the arbitrability of a particular matter would always be, at this preliminary stage, a matter of federal law. This meant that neither the law of a foreign country or particular state can ever govern the scope or construction of an arbitration clause -only federal law is

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[46] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

[47] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

controlling. This early standard of view may have changed the parties' original agreement and intention by limiting the scope of choice of law provisions within arbitration agreements.

In *Volt Information Sciences Inc. v. Leland Stanford Junior University 489 U.S. 468 (1989),* the Supreme Court changed its previous policy favoring the strict application of federal law to issues regarding the scope of arbitration agreements. Volt was a leading U.S. case to favor application of an express choice of law clause to the procedural aspects of arbitration instead of federal substantive arbitration law under the FAA. By this decision the Supreme Court created a new rule on the scope and application of choice of law clauses that precluded the application of substantive federal arbitration principles." Consequently, no longer were validity, enforceability, and procedure purely federal matters. Upon incorporation by the parties of an express choice of law clause, an entire set of procedural rules could now be incorporated into both domestic and international arbitration agreements**.** "In the years immediately following Volt, many courts extended its holding by applying the law specified within the parties' agreement to the interpretation of subjects such as statute of limitations determinations, the timeliness of petitions to vacate arbitration awards, notice requirements for arbitration, procedural requirements for modification of arbitral awards and disputes concerning the validity of entire contracts"[48].

In *Mastrobuono v. Shearson Lehman Hutton 514 U.S. 52 (1995)*, the Supreme Court limited and redefined the scope of choice of law clauses after the Volt decision. In this decision the Supreme Court made an interpretation of the Parties' intentions by inserting an arbitration clause. The basic question was what the contract itself had to say about the parties' intent to arbitrate the issue of punitive damages. Absent an "unequivocal exclusion" of punitive damages, the Court refused to read the choice of law provision so broadly as to include an intent by the parties to incorporate the New York arbitration rule excluding punitive damages[49]. Resolving the ambiguity in accordance with the federal rule, the Court held that the parties had not intended to exclude punitive damages from the scope of arbitrable issues.

[48] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

[49] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement

"After Mastrobuono, U.S. courts have generally declined to interpret a general choice of law clause within an arbitration agreement as an indication of the parties' intent to incorporate the arbitration rules of that particular forum. Moreover, in international arbitration disputes, most courts that have dealt with the issue have considered themselves bound by Mastrobuono to interpret questions on the construction and validity of arbitration agreements in accordance with federal law and not the parties' express choice of law."[50]

[50] Jessica Thrope, A Question of Intent: Choice of Law and the International Arbitration Agreement