The law applicable to the arbitration agreement and the arbitrability of a dispute

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Abstract
Generally speaking, each individual jurisdiction has adopted its own approach as concerns the rules on the determination of the governing law applicable in proceedings in international matters. In the international practice, arbitral panels usually distinguish four relatively autonomous areas associated with the determination of the applicable law; including the possibility of choosing the lex arbitri, as
the areas come into consideration in connection with arbitration, namely: (i) determination (choice) of the substantive law applicable to the merits of the dispute, (ii) determination (choice) of the procedural law and procedural rules (standards) applicable to the procedure, (iii) determination (choice) of the conflict-of-laws rules regulating the determination of the applicable law (both the substantive law applicable to the merits of the dispute and the procedural law applicable to the procedural issues), and (iv) determination (choice) of the law applicable to the assessment of validity and effects of the arbitration agreement. The determination of the law applicable to the arbitration agreement is by no means an end in itself. If we accept the premise that the validity of the arbitration agreement is principally governed by substantive rules,¹ the scope of the law applicable to the arbitration agreement is relatively broad. It also encompasses, for instance, the authorization of an agent to enter into the arbitration agreement, etc. The specific features consisting in various approaches to the law applicable to the arbitration agreement as well as to the proceedings and to the law applicable to the assessment of the merits of the dispute in their mutual interaction, are especially (without limitation) the result of the fact that the principle stipulating that the applicable procedural law is the lex fori usually does not apply in arbitration. Similarly, it is possible to enumerate a number of qualifications, both conceptual and specifically relating to arbitration.

Keywords
Arbitration agreement, arbitration clause, applicable law, conflict-of-laws rules, validity and effects of arbitration agreement, lex arbitri, objective and subjective arbitrability, substantive law, customary law, case law, public policy (ordre public), international public policy, international treaties, New York Convention, European Convention on International Commercial Arbitration, EU law

I International dimension in arbitration

A The importance of distinguishing between the law applicable to the arbitration agreement, the arbitrability of a dispute, the proceedings and the merits of the dispute

The prevailing practice in most countries distinguishes between domestic arbitration and arbitration in international matters (in matters with an international dimension) which usually (though not exclusively) involves proceedings in which the parties’ residence, habitual residence, registered office, or place of business are located in the territories of different states. Such proceedings terminate with an international arbitral award. In this connection, it is interesting to study the

approach adopted by France, where Article 1504 of the NCPC defines the international arbitral award as an arbitral award touching upon matters of international trade. It is a very broad and objective concept unrelated to the subjective element or the seat of arbitration. However, most countries approach the definition of the international arbitral award (or international arbitration) by identifying the international dimension in the"domicile"of the parties, the seat of arbitration, or the place where the arbitral award is made. Where the national lex arbitri lacks any definition of international arbitration, we can usually adopt the broader concept, i.e., international arbitration encompasses any and all cases in which the status of the parties or the subject matter of the dispute have a specific and non-negligible connection to another state different from the seat of arbitration. The differentiation between a domestic arbitral award (whether in an international case or in a case without any international dimension) and a foreign arbitral award is usually dependent on the place where the award is made (the principle of territoriality of the award).

Generally speaking, each individual jurisdiction has adopted its own approach as concerns the rules on the determination of the governing law applicable in proceedings in international matters. In the international practice, arbitral panels usually distinguish four relatively autonomous areas associated with the determination of the applicable law, including the possibility of choosing the lex arbitri, as the areas come into consideration in connection with arbitration, namely: (i) determination (choice) of the substantive law applicable to the merits of the dispute, (ii) determination (choice) of the procedural law and procedural rules.

2 In the original version (cit.): "Est international l'arbitrage qui met en cause des intérêts du commerce international." A similar rule was incorporated in Article 1492 of the NCPC (France) until 30 April 2011.

3 Either this definition is explicitly incorporated in legislation, or it is derived from case law.

4 See Article 176 I of the IPRG (Switzerland) and many other examples.

5 In a dispute handled by the AC in 2003 between two legal persons both established in the Czech Republic, the parties acknowledged themselves that the dispute had a strong and prevailing international aspect. One of the reasons was the fact that the dispute also concerned important interests of the foreign partners (members) in these legal persons who were not themselves parties to the proceedings; the arbitration agreement also stipulated that the proceedings would be conducted in a foreign language, etc. After the commencement of the arbitral proceedings, the parties actually agreed to apply the Rules to the rest of the proceedings, i.e., rules generally applied to international disputes, not the domestic Rules; they even paid an extra fee for the arbitral proceedings, newly calculated and charged as if the dispute were an international dispute.

6 See the arbitral award rendered in the ICC proceedings under Case No. ICC 5505 of 1987 ("X" as the buyer with his registered office in Mozambique v. "Y" as the seller with his registered office in the Netherlands). The arbitral award was published (annotated) in Y.B. Comm. Arb., 13 (1988), 110, marg. 7.

(standards) applicable to the procedure, (iii) determination (choice) of the conflict-of-laws rules regulating the determination of the applicable law (both the substantive law applicable to the merits of the dispute and the procedural law applicable to the procedural issues), and (iv) determination (choice) of the law applicable to the assessment of validity and effects of the arbitration agreement.

Consequently, it is not possible to speak of any uniform status of the proceedings. There is usually no uniform law which would universally determine any and all issues relating to procedure, its commencement, conduct, course and termination, nor the effects of the decisions rendered in the course of such proceedings— all of which is, conversely, very frequently the case with court proceedings. Arbitration is, on the other hand, specific for the application of various intertwining rules governing the assessment of partial issues— procedural and substantive (usually relating to the merits). Such issues include, for instance: (i) personality of the parties, (ii) formal validity of the arbitration agreement, (iii) validity of the arbitration agreement according to substantive law, (iv) issues relating to the organizational-legal procedure; (v) determination of the conflict-of-laws rules applicable to the determination of the applicable substantive law; (vi) identification, application, and determination of the effects of the application of, or even the refusal to apply, the overriding mandatory rules, especially (without limitation): overriding mandatory rules applicable in: (+) the seat of arbitration, (+) the place exhibiting the closest connection to the dispute and/or the subject matter of the dispute, as well as (+) the place of the future enforcement of the award (which could frequently be subject to the application of various legal systems), (vii) determination of the scope of the domestic and international public policy (ordre public) and the effects thereof, and (viii) recognition and enforcement of the arbitral award. Proceedings with only a limited or absent international dimension are specific for the fact that all of the above-mentioned issues, significant from the perspective of the applicable law, usually converge. Conversely, in proceedings with an international dimension, all of the above issues, as well as some other relatively autonomous issues, are frequently subject to different legal systems. The key factor in all of these cases appears to be the assessment of which law applies to the arbitration agreement (necessary for the determination of jurisdiction) and, above all, which procedural law shall apply. This specifically means the determination of the conflict-of-laws rules which identify the rules for the determination of the law applicable to the proceedings themselves (procedural issues) and to all other issues relating to the proceedings. Such procedural rules are usually also determinative for the examination, determination, and application of the substantive law with respect to the merits of the dispute.

8 For example, in a series of arbitrations connected by the same subjective and objective element, involving several telecommunication companies, the arbitrators gradually identified and established the following legal systems as the applicable laws: Belgian, German, French, Italian, and Swiss law; the arbitrations were subject to the ICC Rules. Cf. Michael Goldhaber, The Court that Came in from the Cold, http://www.wimetherale.com/files/News/9d98da62-518b-4f40-83b3-a340da22c1fe9/ Presentations/NewsAttachment/7c2da51c-5017-4d18-a292-417dd0deflawcom_bom.pdf (18 August 2012).

9 Cf. Mateusz J. Pliś, Law Applicable to the Merits of the Dispute Submitted to Arbitration in the Absence of the Choice of Law by the Parties (Remarks on Polish Law),
Whereas the law applicable to the arbitration agreement and the law applicable to the merits of the dispute are two completely different issues, in practice they still exhibit a relatively strong interconnection. Besides, considering the international nature of arbitration and the degree of its internationalization, it is necessary to emphasize that there is by far no uniform dividing line between procedural law and substantive law at the international level. It differs from one jurisdiction to another and especially from one legal culture to another. If we compare common law and the continental European legal systems, we will soon realize that the continental approach of civil law clearly classifies a number of issues and institutions under the category of substantive law, whereas under common law, the same or comparable legal institutions have their roots primarily, or even exclusively, in the area of procedure – and vice versa.

The determination of the law applicable to the arbitration agreement is by no means an end in itself. If we accept the premise that the validity of the arbitration agreement is principally governed by substantive rules, the scope of the law applicable to the arbitration agreement is relatively broad. It also encompasses, for instance, the authorization of an agent to enter into the arbitration agreement, etc.

10 For example, German case law has established the rule that the law applicable to the main contract usually also influences, due to their strong interconnection, the law applicable to the arbitration agreement, unless the agreements or the circumstances of the case suggest otherwise (see the decision of the BGH quoted in: SchiedsVZ, 2011, 46 et seq.). However, the German literature has not arrived at the same conclusion, or at least not unequivocally. See Richard Zöllner et. al., ZPO Kommentar, 29th ed., Köln 2012, Commentary on Section 1025, marg. 11 et al. Nonetheless, the German doctrine does not rule out the possibility that in a particular case, despite the separate status of the arbitration agreement and the main contract, the law applicable to the main contract can be decisive for the determination of the law applicable to the arbitration agreement. Depending on the circumstances of a particular case, such a close connection cannot be excluded.

From the more recent international case law, see also the final arbitral award in ICC Arbitration No. ICC 18.131 of 5 April 2012 (unrep.), in which the arbitrator concluded that in the absence of an explicit choice of the law applicable to the arbitration agreement, the presumption is that the choice of law for the main contract also implies the choice of law for the arbitration agreement. In said dispute between a German claimant and a Swiss respondent, the arbitrator referred to the German case law, namely the decision of the OLG Frankfurt a. M., Case No. 26 Sch 606 of 24 October 2006. The seat of arbitration was in this case located in Germany. The arbitrator did not, however, dispute the independence of the arbitration agreement vis-à-vis the main contract. The arbitration agreement was in this case concluded as an arbitration clause incorporated in the main contract.


12 From the more recent international case law, see also the interim arbitral award in the ICC Arbitration No. ICC 17822 of 5 April 2012, in which the plea of lack of juris-
The specific features consisting in various approaches to the law applicable to the arbitration agreement as well as to the proceedings and to the law applicable to the assessment of the merits of the dispute in their mutual interaction, are especially (without limitation) the result of the fact that the principle stipulating that the applicable procedural law is the lex fori usually does not apply in arbitration. Similarly, it is possible to enumerate a number of qualifications, both conceptual and specifically relating to arbitration. The determining factor is very often the procedure of establishing the applicable law (status), which is frequently much more complicated in arbitration than in court litigation. From the perspective of terminology, we encounter various terms designating the applicable procedural law or, conversely, the applicable substantive law (law applicable to the merits), which is being applied by the arbitrators with the use of the corresponding conflict-of-laws or other mechanisms. For instance, whereas the procedural law applicable to arbitration is usually referred to as lex fori or simply as the law applicable to arbitration, or curial law or simply procedural law, the applicable substantive law (law applicable to the merits) is referred to as the law applicable to substantive-law issues, the law applicable to the merits, or the applicable law with respect to the merits, etc.

B The law applicable to the arbitration agreement as an autonomous category between lex arbitri and lex causae

Lex arbitri (or lex loci arbitri) as a collection of laws, standards, and rules applicable to the arbitral proceedings, i.e. an exclusively procedural standard, is independent of the law applicable to the arbitration agreement. These are two different institutions based on different criteria, and it is irrelevant which concept of arbitration we adopt, i.e. whether the jurisdictional doctrine of arbitration, the contractual theory, or any other approach. On the other hand, the determination of the procedural law applicable to arbitration and especially the law applicable to the arbitration agreement is closely related to the concept of the arbitration agreement, i.e. whether it is a procedural or a substantive category. In other

dition was dismissed, together with the assertion that the arbitration agreement between the German and the Italian party was invalid. The seat of arbitration was Germany. The arbitration agreement was concluded by an agent who also contributed to the performance of the main contract as an independent party to the substantive-law relationship. Having determined that the law applicable to the arbitration agreement was German law, the arbitral panel also concluded that the agent had been authorized to enter into the arbitration agreement.


16 For more details regarding this issue, see Alexander J. Bělohlávek, The definition of procedural agreements and the importance to define the contractual nature of the
words, arbitration requires that we distinguish between (i) the law applicable to the arbitration agreement as a consensual act of the parties excluding the jurisdiction of the courts and (ii) the exclusively procedural lex arbitri, which could be identical to the law applicable to the arbitration agreement but must be determined separately. These categories are closely related, and connected, but are by no means identical.

II Correlation between the law applicable to the proceedings and the law applicable to the arbitration agreement

A Difference between the applicable procedural law and the law applicable to the arbitration agreement

The differentiation between the law applicable to the proceedings and the law applicable to the arbitration agreement first appeared in French case law. It makes sense that France was the first country to voice such opinions, because the arbitration agreement itself is regulated under substantive law (Code Civil). However, arbitral proceedings are governed by a procedural code (NCPC). Due to the high degree of autonomy enjoyed by the parties as concerns the determination of the law applicable to contracts as such, this approach also allows the parties to choose the law applicable to their arbitration agreement. If we accept the conclusion that the parties are free to choose the law applicable to their arbitration agreement, then, in the absence of any special rules incorporated in the lex arbitri or in the special procedural provisions, it is necessary to subject the arbitration agreement to substantive standards. Consequently, we must also accept a conflict-of-laws autonomy with respect to the arbitration agreement. The conflict-of-laws autonomy of the parties with respect to the arbitration agreement is, however, limited by special conflict-of-laws rules (if any) applicable in the state of the seat of arbitration. But special conflict-of-laws provisions relating to the law applicable to the arbitration agreement are very rare, despite the fact that it


19 For instance, Section 36 of the Czech Arbitration Act (Act No. 216/1994 Coll., as subsequently amended) which reads as follows (approximate translation, cit.):
is possible to choose a law different from the law applicable to the main contract and different from the law applicable to the proceedings and the conduct thereof. Whereas the determination of the law applicable to the arbitration agreement is in many respects similar to the assessment of the law applicable to the substantive contractual relationship (the merits of the dispute), the issue of procedure is exclusively procedural, which is also controlled by the autonomy of the parties. The agreement on procedure can be included in the arbitration agreement, but it is not an essential term thereof (it does not constitute "essentailia negotii of the arbitration agreement"). The arbitration agreement and the agreement on procedure are principally two different agreements. Whereas the arbitration agreement itself is a procedural contract in the broader sense and it is rather a substantive-law institution, albeit with pro futuro effects for the [potential] proceedings, the agreement on procedure is a procedural agreement, i.e. a procedural contract in the narrower sense. The effects of these two levels at which contractual autonomy is manifested are probably best demonstrated in the relationship between the parties and the arbitrators. Whereas the arbitration agreement has, as a rule, inter partes effects and the arbitrators only accept the agreement and, if necessary, decide on the validity and interpretation thereof (i.e. the arbitrators' role with respect to the fulfillment of this expression of autonomy is rather passive), the agreement on procedure, i.e. the agreement on the procedural standard applicable to the proceedings, signifies the active participation of the arbitrators within the framework of a particular procedural mechanism. Due to the fact that there are two autonomous levels of the parties' expressions of will, albeit with mutual interactive effects, it is necessary to allow a conflict-of-laws autonomy with respect to the law applicable to the arbitration agreement as well as to the procedural law [conflict-of-laws status] applicable to the proceedings.

"(1) The permissibility of the arbitration agreement is governed by this Act. Other requirements of the arbitration agreement are governed by this Act if the arbitral award is to be made in the Czech Republic. (2) The form of the arbitration agreement is governed by the law applicable to the other requirements of the arbitration agreement; it shall suffice, however, if the form complies with the law of the place or places where the will of the parties was expressed." With effect from 1 January 2014, this provision will be replaced with Section 117 of Act No. 91/2012 Coll., on Private International Law, which reads as follows (approximate translation, cit.):

"(1) The permissibility of the arbitration agreement is governed by Czech law. Other requirements of the arbitration agreement are governed by the law of the state in which the arbitral award is to be made. (2) The form of the arbitration agreement is governed by the law applicable to the other requirements of the arbitration agreement; it shall suffice, however, if the form complies with the law of the place or places where the will of the parties was expressed."

B Interrelation between the applicable procedural law and the law applicable to the arbitration agreement

Although the law applicable to the arbitration agreement and the law applicable to the proceedings represent two different categories, it is impossible to deny the existence of many contact points between both levels of the autonomy of the parties with respect to arbitration. The typical example is the issue of arbitrability — a condition for the validity of the arbitration agreement from the perspective of the law applicable to the arbitration agreement and a procedural condition (requirement) i.e. a prerequisite for the possibility to conduct the proceedings) from the perspective of procedural standards. Both cases concern two different levels. However, both objective and subjective arbitrability principally influence the possibility of submitting a dispute to arbitration and also determine the future enforceability of the award. In that connection, the existence — or, conversely, the absence — of arbitrability relates to the law applicable to the arbitration agreement and, at the same time, constitutes a requirement of the applicable procedural law. From the perspective of substantive law, the absence of arbitrability renders the arbitration agreement invalid. From the procedural perspective, the absence of arbitrability constitutes an obstacle to the proceedings (hinders the proceedings). This situation is equivalent to court litigation where the respondent challenges the jurisdiction of the court arguing that the subject matter of the proceedings and the dispute itself are covered by an arbitration agreement. However, it is by no means possible to argue that the law applicable to the proceedings would necessarily be determined by, or even always result from, the law applicable to the arbitration agreement and be consequent to the latter. It is even less possible to claim that the independence of the law applicable to the proceedings (lex fori) would be a direct consequence of the fact that the arbitration agreement is independent of the substantive law applicable to the main contract, in connection with which the arbitration agreement was entered into.

III Arbitrability from the conflict-of-laws perspective

A Approaches to the interpretation of arbitrability in arbitration agreements with an international dimension

The objective arbitrability of a dispute constitutes one of the conditions for the validity of the arbitration agreement; from the perspective of continental law (civil law), it is an essential procedural requirement, i.e. a condition for the validity of the arbitration agreement. From the perspective of substantive law, it deter-

21 Civil law differs from common law with respect to this issue. Civil law classifies arbitrability as a procedural requirement (the requirement for establishing jurisdiction, which is the necessary prerequisite for the possibility to conduct the proceedings). Conversely, common law perceives this issue rather as a component of the substantive law standard.

22 This is true at least from the perspective of civil law. Although common law interprets the absence of arbitrability in a different manner, the consequences are basically the same as under the civil law doctrines.

23 Cf. Alexander J. Bělohlávek, The definition of procedural agreements and the importance to define the contractual nature of the arbitration clause in international ar-
mines whether the subject matter of the contract is permissible, i.e. whether the juridical act is valid. Conversely, from the perspective of procedural law, it determines whether the arbitration agreement was validly entered into. Generally, the term "arbitrability" is interpreted as a delimitation of the disputes which can be submitted to arbitration. Sometimes, albeit rather exceptionally, the definition of arbitrability differs from the above and is associated primarily with the jurisdiction of the arbitrators.

Arbitrability in literature is examined at two different levels. The first level is the above-mentioned permissibility to submit the dispute to arbitration with respect to the subject matter of the dispute (objective arbitrability, arbitrability rationae materiae). The second level is the permissibility of the arbitration agreement with respect to the parties to the arbitration agreement (subjective arbitrability, arbitrability rationae personae). According to this approach, subjective arbitrability means the capacity of the person or entity to enter into the arbitration agreement. The differentiation between objective and subjective arbitrability requires that we understand the diverging perception of such differentiation under the individual theories applied in the international arena.

The concept of and the rules regulating arbitrability in the individual jurisdictions have been undergoing certain developments, and it is possible to conclude that the scope of the arbitrable disputes in the past years has become broader and that the arbitrability of international disputes has been subject to a double standard. This approach can be illustrated by developments in the U.S.

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24 Meaning the permissibility of "juridical acts" in terms of the NCC.
26 This approach is advocated by certain American authors; for instance, Leahy and Bianchi argue that the issue of arbitrability covers issues such as the existence and validity of the arbitration agreement, the issue of whether the arbitration agreement covers the dispute submitted to the arbitrators, the capacity of the parties, the issue of whether the dispute can be resolved in arbitration, and the issue of whether the claim is subject to limitation of actions (i.e. whether it is statute barred). Carlos Bianchi/Edward Leahy, The Changing Face of International Arbitration, JIA, 17 (2000) 4, 24-25.
28 It is necessary to highlight the differences in the understanding of this division from the perspective of the approach adopted by Czech and certain foreign academics. According to Czech doctrine, the objective arbitrability of disputes is defined by the legal system, whereas subjective arbitrability represents the will of the parties to submit the resolution of only certain selected disputes which are objectively arbitrable to arbitrators.
29 Both the French and Austrian approaches interpret objective arbitrability as a delimitation of the disputes which can be submitted to arbitration and subjective arbitrability as the capacity of the parties to enter into the arbitration agreement and be a party to arbitration.
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enced primarily by the decision in the *Mitsubishi* case. The *Mitsubishi* case is often referred to in connection with the theory that a dispute which is not arbitrable under national law can nonetheless be submitted to international arbitration. The proponents of this theory argue that an arbitration agreement invalid under national law can still be a valid basis for the jurisdiction of arbitrators in international arbitration. Another theory connected with this approach is called the "Second look doctrine." That approach does not hold the arbitration agreement invalid, but it does preserve the subsequent possibility to annul or refuse the recognition and enforcement of arbitral awards which would be contrary to the *lex fori* (the right of the state to recognize an arbitral award).

The delimitation of disputes which can be considered as arbitrable differs depending on the approach adopted by the individual states, and arbitrability is often defined by the criteria which determine the scope of arbitrability. The delimitation of the scope of arbitrability is principally different under continental law and under common law. Neither English positive law nor the approach adopted in the U.S. explicitly define the arbitrability of disputes; they leave the definition to customary law and especially case law. Conversely, continental legal doctrine strictly defines and delimits these criteria by explicit rules incorporated in positive law. The criteria usually include the nature of the dispute as to whether it is a property dispute and/or the possibility of the parties to make dispositions with their rights, or to make dispositions concerning the subject matter of the dispute, as the case may be. Special provisions may subsequently broaden the basic scope of arbitrability even further, or, conversely, exclude disputes which would be arbitrable.

31 U.S. Supreme Court, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 105 S. Ct. 3348, Judgment of 2 July 1985, p. 555, the U.S. Supreme Court in its decision in the *Mitsubishi* case explicitly ruled as follows: "...we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement even assuming that a contrary result would be forthcoming in a domestic context."


33 Further in the *Mitsubishi* case, the U.S. Supreme Court ruled (regarding the arbitrability of disputes under antitrust law) (cit.): "...having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."

34 The approach to arbitrability is based on Article 81(1)(a) of the AA [England and Wales].

35 See Section 2 of the FAA [USA].

36 This approach was inspired by Swiss law, namely Article 177(1) of the IPRG (Switzerland). This provision was also adopted in the new Austrian law, namely Section 582 of the ZPO [Austria]. Similarly, see also Section 1030 of the ZPO (Germany). See also Section 1(1) of the ArbAct and Section 2(1) of the Arbitration Act (Czech Republic).

37 See Section 2(1) of the Arbitration Act [Czech Republic].

38 This approach can be illustrated, for instance, by French law (specifically Article 2059 of the Code Civil) which, however, only applies to domestic arbitration.

39 For instance, the second sentence of Section 852 of the ZPO [Austria] also allows the parties to submit their non-property disputes which can be resolved by settle-
under the basic criterion but which are excluded from the arbitrable scope based on the negative definition \(40\). The reason for limiting arbitrability in arbitration consists primarily in the desire to protect the *public policy (ordre public)* of the individual states, which inheres both in the protection of the *public interest* of the state and, inter alia, in the protection of the weaker party in the proceedings. \(41\)

As concerns the assessment of the law applicable to arbitrability in the arbitral proceedings as such, the case law offers several possible approaches. \(42\) The greatest support is probably enjoyed by the law of the seat of arbitration. \(43\) Some legal systems contain only substantive rules on arbitrability which apply to all arbitrations held in their territory. For instance, Article 177 of the IPRG (Switzerland) stipulates that *any and all pecuniary claims are arbitrable*. This provision is applicable whenever an international arbitration is held in Switzerland (Article 176 of the IPRG [Switzerland]). Similarly, Section 1030 of the ZPO [Germany] provides that (approximate translation, cit.):
"... any claim concerning an economic [cf. property] interest is arbitrable..." In the absence of any economic interest, the parties are free to enter into an arbitration agreement if they have the right to resolve the case by settlement."

This provision applies only if the seat of arbitration is in Germany. Arbitrability in these cases is governed by the law of the seat of arbitration. The same applies if the arbitrability is regulated under a separate conflict-of-laws rule favoring the law of the seat of arbitration, or at least the law where the award is made. Theories published in international sources also support the possibility of choosing the law applicable to the arbitration agreement.

In this regard, a specific approach has been adopted by French law. Arbitrability in France is regulated under Articles 2059 and 2060 of the Code Civil. These provisions, however, do not apply to international arbitrations. Fouchard

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44 German law, just like Austrian law and many other legal systems, does not subject property disputes to the additional requirement of dispositions with the claim (the possibility to settle the dispute). Foreign laws usually impose the requirement of dispositions with the claim (the possibility to settle) only on non-property disputes. This has the result of significantly broadening the scope of arbitrability, which then covers, for instance, status disputes, especially family and employment disputes, as well as claims arising from antitrust law, etc. This is the consequence of an extensive application of the UNCITRAL Model Law which has not been explicitly adopted by the Czech Republic despite the fact that the structure of the Czech Arbitration Act is similar to the UNCITRAL Model Law.

45 This concept has also been adopted by Czech law (Section 36 of the Arbitration Act [Czech Republic]).


47 Code Civil [FRA] – Article 2059 (ct.): "Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition." (approximate translation, ct.): "All persons have the right to enter into an arbitration agreement concerning the rights which they are free to make dispositions with."

48 Code Civil [FRA] – Article 2060 (ct.): "On ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressent les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public." (approximate translation, ct.): "The arbitration agreement cannot be concluded with respect to the issues of status and capacity of a person, divorce and dissolution of marriage, or with respect to disputes involving public authorities and institutions, and generally in those matters which concern public policy (ordre public)."

49 Code civil, full text as of 26 November 2009. Available at: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=1F90D2C0D4A4C873C4B0829C7CFB81E.pdjtxfr1v_2;cidTexte=LEGITEXT000006070721&dateTexte=20091207.

In France, arbitrability and the arbitration agreement as a type of contract are regulated under substantive law (Code Civil), whereas procedural issues are incorporated in the French [new] Code of Civil Procedure (NCPC).

maintains that the French approach to arbitrability, or the absence thereof, is indicative of three methods. According to the first one, no disputes touching upon public policy (ordre public) are arbitrable. According to the second one, only disputes in which one of the parties breached the rules concerning public policy (ordre public) are non-arbitrable. The third method allows the arbitrators to resolve disputes touching upon public policy (ordre public); the courts may, however, subsequently review compliance with public policy in the proceedings on annulment of the arbitral award. As concerns international arbitration, French courts apply the third method, i.e. the approach most friendly towards the interpretation of the capacity to hear and resolve the case in arbitration. However, it is necessary to emphasize that the above-mentioned limitations enshrined in French law apply exclusively to domestic arbitration; almost no such limitations apply to international arbitration, and the French approach to international disputes is extremely liberal. It can be said that the trends in international arbitration are aiming at the confirmation of arbitrability in as many cases as possible. The result is a different approach to domestic arbitration as opposed to international arbitration, as concerns the latter, only those disputes the submission of which to arbitration would be contrary to international public policy (ordre public) are considered as non-arbitrable.

Explicit rules which would determine the law applicable to arbitration agreements (or even to arbitrability) are in most national leges arbitri rather exceptional. Consequently, most countries have not integrated any explicit rules on the law applicable to arbitration agreements in their lex arbitri, and the usual basis for the determination thereof is the conflict-of-laws autonomy of the parties. The Czech Republic is one of the exceptions. Rules analogous to the Czech approach were adopted, for instance, in Hungary, Italy, the Netherlands, Portugal,
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Ukraine, and Great Britain. Explicit rules regulating the law applicable to the arbitration agreement, as incorporated in Czech law, can probably be found only in Spain, Sweden, and Switzerland. However, Spanish law does not limit the autonomy of the parties and only identifies the connecting factor which applies in the absence of the parties’ agreement on the applicable law. Sweden does not limit the conflict-of-laws autonomy either, and Switzerland has adopted an identical approach. But no country has adopted any rules limiting the conflict-of-laws autonomy of the parties. Sometimes, although very exceptionally, the rules determining the law applicable to the arbitration agreement are also integrated in the [national] private international law (conflict-of-laws rules). In any case, the individual national legal systems treat the arbitration agreement, from the conflict-of-laws perspective, as an institution of substantive law, which also leads to the conclusion that the basic conflict-of-laws standards concerning the applicable law can be applied to the arbitration agreement, too. But the corresponding rules result from the case law in the individual countries. For example, the German practice is based on the presumption that the formation and the validity of an arbitration clause in cases with an international dimension is subject to, unless the agreement suggests otherwise, German rules on private international law providing the award is to be made in Germany and the proceedings are therefore covered by German lex arbitri. In other words, it is an approach analogous, or identical, to the explicit provision of Section 36(1) of the Czech Arbitration Act.

Cf. e.g. Part IV of the Ukrainian Act on International Commercial Arbitration adopted on 24 February 1994 and published in: Glosos Ukrainy, No. 73(823), 20 April 1994, which only explicitly declares the independence of the main contract.

Article 7 of the Arbitration Act 1996 (England and Wales) only explicitly declares that the arbitration agreement is independent of the main contract, unless the parties have agreed otherwise.

The Spanish Act No. 36 of 5 December 1988 contains the following rules (approximate translation, cit.) Article 5(2):
“if the arbitration clause is incorporated in an adhesion contract, the validity and interpretation thereof must comply with the law applicable to this contract. At the same time, Article 8 stipulates that the invalidity of the (main) contract does not render the arbitration clause invalid. Article 61 of said Act stipulates that the validity of the contract and its effects are governed by the law chosen by the parties providing the law is related to the main commercial transaction or dispute. In the absence of choice, the applicable law is the law of the place where the award was made or the place where the arbitration agreement was concluded.”

Article 48 of the Swedish Arbitration Act adopted on 4 March 1998 stipulates that if the agreement has any connection with a foreign country, it is governed by the law chosen by the parties; in the absence of choice, the agreement is governed by the law of the country in which the arbitral proceedings were or have been conducted.

IPRG [Switzerland] – Article 175(2) stipulates that the arbitration agreement is valid if it complies with (i) the law chosen by the parties; (ii) the law applicable to the subject matter of the dispute (if the main contract is invalid); or (iii) Swiss law.

See the decisions of the German BGH annotated or cited in (a more detailed specification of the decisions has not been verified as the purpose of this excursus is only to offer a comparison):
- SchiedsVZ, 2011, p. 46 et seq. (here p. 48);
- BGHZ, Vol. 49, p. 320 et seq. (here p. 322);

This provision is quoted above.
B Approaches to the assessment of arbitrability in international arbitration

International arbitration has adopted basically three fundamental theoretical approaches to the arbitrability of a dispute, these approaches influence the determination of the law governing arbitrability. The division is not dogmatic, and its purpose is to emphasize the basic characteristics of the individual theories. There is currently no uniform opinion on the determination of the law governing arbitrability. We distinguish the following three methods: (i) the conflict-of-laws method, (ii) the procedural method, and (iii) the internationally mandatory method.

1 The conflict-of-laws method(s)

The conflict-of-laws method is considered to be the oldest and, according to some authors, an outdated method. This method is based on the premise that the examination of whether a dispute is arbitrable or not requires that we first determine the governing law, using the conflict-of-laws rules. The arbitrability of the dispute therefore represents the scope of the conflict-of-laws rule and the law applicable to the assessment of the former is determined by the corresponding connecting factor. The conflict-of-laws rules and the connecting factors which serve as the basis for the determination of the governing law vary depending on the stage of the arbitral proceedings in which the arbitrability is subject to examination. The conflict-of-laws rules applied in court litigation where the court uses the conflict-of-laws rules of the lex fori might not be identical to the rules applied in arbitration – the delocalization theories of arbitration might give precedence to the application of rules other than the conflict-of-laws rules of the lex loci arbitri. However, the author of this paper is of the opinion that the theory of delocalization, or anationality, of arbitration has been fully overturned. The reason consists in the required strongly guaranteed enforceability of the arbitral award necessitated by the fact that the willingness of the parties to provide voluntary performance under arbitral awards (just like under any other authoritative decisions) has been on the decline. The parties therefore also rely on the enforceability of arbitral awards with the help of a specific public authority, and arbitration has been adapting to the idea of arbitrability as perceived by the state (public authorities) in the seat of arbitration. Consequently, the author believes that anationality (or denationalization) of arbitration has become, from today’s perspective, completely passé and can be considered, due to its somewhat naive approaches, as a chimera lacking any connection with actual practice.

This theory also requires us to admit that the arbitrability of a dispute is an institution of private law, albeit naturally articulated by the legislator, i.e. the [public]

legislative power, which is also supported by the substantive-law nature of the arbitration agreement itself. Due to the fact that the legal systems which have adopted the conflict-of-laws approach usually do not explicitly mention the arbitrability of disputes, the law applicable to the arbitration agreement, i.e. the law chosen by the parties, is considered to be the primarily decisive law.\textsuperscript{70} The underlying presumption is that the parties have chosen the law precisely because the dispute is to be considered as (non)arbitrable under that law.\textsuperscript{71} However, in the absence of choice of the governing law by the parties, the range of the possible connecting factors is very broad,\textsuperscript{72} for instance \textit{lex causae}, \textit{lex loci arbitri}, \textit{lex executionis}, and \textit{lex fori}.\textsuperscript{73}

The conflict-of-laws approach would also permit that a foreign arbitral award rendered in a dispute which cannot be the subject of a valid arbitration agreement in the state of the seat of arbitration, could be recognized and enforced in the state where recognition of the award is sought, providing the dispute were arbitrable under the law determined on the basis of the conflict-of-laws rules of the \textit{lex fori}.

\textsuperscript{74} Indeed, this postulate is the cornerstone of the principle enshrined in the New York Convention (1958) which allows, but does not require, the states to refuse recognition/enforcement of a foreign arbitral award which was annulled in the state where it was rendered (Article V(1)(e) of the New York Convention). The concept of Article V(1)(a) of the New York Convention (1958) actually suggests that the parties may choose the law applicable to the arbitration agreement.

\section{Procedural approach}

The procedural approach perceives arbitrability as an institution of procedural law, or international procedural law, and arbitrability helps to define disputes which are not subject to the exclusive jurisdiction of courts. The basis of this approach is the very importance of objective arbitrability which means that certain disputes ought to be resolved (exclusively) in courts, because they concern public interests.\textsuperscript{75} The delimitation of arbitrability simultaneously indicates the state's confidence in arbitration. Consequently, this method means that arbitrability

\textsuperscript{70} One of the countries which adopted this approach was France; the applicable law was determined pursuant to Article 1496 of the NCPC [France] applicable until 30 April 2011. The French procedural rules on arbitration (NCPC) have been subject to a new amendment with effect since 1 May 2011 (Decree No. 2011-48 [FA] of 13 January 2011 which has implemented certain changes in the rules regulating arbitral proceedings).


\textsuperscript{72} This situation has become specifically noteworthy where the arbitration was held in France, because the above-mentioned provision enabled the arbitrators to apply the conflict-of-laws rules which they considered appropriate.


Jly is not subject to the autonomy of will of the parties to the arbitration agreement, and there is no possibility of a choice of law. As concerns the recognition and enforcement of an arbitral award rendered abroad, the arbitral award cannot be recognized if it was annulled in the state where it was made on grounds of lack of arbitramility (in this connection, Article V(1)(e) of the New York Convention leaves it at the discretion of the individual member states, i.e. the state may refuse recognition/enforcement of awards which were annulled in the state where they were made).

3 Internationally mandatory approach

This approach is based on the premise that arbitramility must be examined according to the lex loci arbitri, directly, without the application of the conflict-of-laws rules. Consequently, this theory stipulates that arbitramility is subject to mandatory rules which cannot be eliminated by the will of the parties. If the arbitration is held in a particular state, the arbitramility of the dispute ought to be assessed primarily according to the rules of that state. These rules can be designated as the rules of active public policy (internationally mandatory rules). Although the arbitramility of the dispute could be assessed according to a different law, the proceedings could not be held in the territory of the respective state if it were contrary to its public policy.

This approach is historically supported especially by Swiss law which, applying Article 177(1) of the IPRG [Switzerland] within the scope defined by Article 176 of the IPRG [Switzerland], has the result of basically excluding the effects of any other legal system. A similar conclusion can be derived from Article 1030 of the ZPO [Germany], or Section 5 of the Arbitration Act [Slovakia] as well as Section 36(1) of the Arbitration Act [Czech Republic].

The approach adopted by French law is influenced primarily by the decision in the Dalico case; the decision of the Cassation Court (Cass.) in the Dalico case resulted in the abandonment of the conflict-of-laws theory as the French court held that arbitramility had to be assessed according to French law which, in the case of international arbitration, subjects this issue only to international public

76  Arzadon Hamayoon, Arbitramility under the New York Convention: The Lex Fori Revised, Arbitration international, 17 (2001) 1, 73 et seq.
79  Article 177(1) of the IPRG [CHE] reads as follows (approximate translation, cit.): “All disputes relating to economic interests can be submitted to arbitration.”
80  Article 176 [Switzerland] reads as follows (approximate translation, cit.): “The provisions of this Chapter shall apply to any and all arbitrations which are seated in Switzerland and in those cases where one or more of the parties have neither their domicile nor their habitual residence in Switzerland at the moment of conclusion of the arbitration agreement.”
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policy. If the rules of any of the affected legal systems are not encompassed by this public policy, they cannot be applied. 81

Although the first theory has become rather obsolete, the other two approaches, i.e., the procedural theory and the theory tending towards the mandatory application of the rules regulating the arbitrability of the dispute, are considered equal. 82 However, the third approach requires that we also add a few words about the actual practice (supported, for instance, by voluminous Czech legal theory). 83 Neither the arbitrators nor the judges are bound to apply foreign mandatory rules and need not take into consideration whether the dispute is considered arbitrable or not under any foreign internationally mandatory rules. 84 The responsibility for the determination of the seat of arbitration, and consequently for the determination of the law applicable to arbitrability, therefore rests with the parties to the arbitral proceedings. Some lawyers argue, though, that these foreign internationally mandatory rules ought to be applied at least in those cases in which a refusal to apply the rules would result in a substantial breach of international public policy. 85

The obligation to apply these rules by the arbitrators was principally resolved both in the U.S. 86 and at the level of the European Union (or the European

82 For instance, Rogers says (cit.): "The restriction on arbitrability rests on the twin concepts imposed by the courts: First it is accepted that certain disputes, by reason of their very character, fail to be determined by the courts and are inappropriate for arbitration decision. Second, there is the requirement that disputes be determined in accordance with certain mandatory obligations of the municipal law." Catherine A. Rogers, Arbitrability, Arbitration International, 10 (1994) 3, 263.
83 Monika Paulinova, Tzv nutné pouběhné normy před Rozhodčím soudem při HK ČR a AK ČR [Translation: The Overriding Mandatory Rules before the Arbitration Court at the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic], Právní praxe v podnikání, (1996) 7-8. As concerns Czech arbitration practice, it is necessary to point out that arbitration in the Czech Republic is frequently employed, and the Ministry of Justice of the Czech Republic estimates the annual number of arbitral awards to be around 150,000. This implies that approximately one-sixth to one-fifth of all civil disputes in the Czech Republic are resolved in arbitration.
86 Dispute: U.S. Supreme Court, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 105 S. Ct. 3346, Judgment of 2 July 1985, in: Yearbook of Commercial Arbitration, 9 (1986). In said case, Soler, a Puerto Rican corporation, entered into a distribution agreement with Chrysler, based on the agreement, Soler was to be the exclusive seller of Mitsubishi cars in Puerto Rico. On the same day, a purchase contract was concluded with Mitsubishi Motors Corp., which undertook to sell to Soler a certain number of cars. The contract contained an arbitration clause according to which all disputes were to be resolved in arbitration in Japan, and a clause whereby the parties chose Swiss law as the applicable law. After some time, Soler encountered certain problems and was not able to meet its obligation regarding the agreed minimum sales. Soler tried to extend the territory of its exclusive sales to some states in the U.S. and Latin America and to reduce the supplies of cars, but all of its efforts
Communities, especially in connection with antitrust disputes. Both approaches (the European as well as the American), or rather the relevant case law, indicate that the arbitrators may resolve antitrust disputes, but it remains unclear whether they ought to make their decisions while taking into consideration the public policy rules enshrined in the laws of the state in the seat of arbitration, or of the state where recognition/enforcement of the arbitral award is sought. On the one hand, they could run the risk of having the award annulled or its recognition refused by the court; on the other hand, the application of the rules could result in the arbitrators exceeding the jurisdiction vested in them by the parties.

C Law applicable to arbitrability under international treaties

1 The concept of international treaties and the approach to their interpretation (the New York Convention and the European Convention on International Commercial Arbitration)

From the perspective of arbitrability, the crucial provision is Article II(1) of the New York Convention which stipulates that states shall recognize an agreement in writing concerning a subject matter capable of settlement by arbitration. This provision alone, or combined with Article II(3) of the New York Convention, does not clearly answer the question of the law applicable to the arbitrability of a dispute; this situation has given rise to many contrasting opinions.

The main question is whether it is appropriate to interpret Article II of the New York Convention in connection with Article V(1)(a), or Article V(2)(a) of the New York Convention or Article V(1)(a) of the European Convention.
York Convention. The former allows arbitrability to be assessed according to the law governing the validity of the arbitration agreement, i.e., the law chosen by the parties (lex selecta) or the law of the place where the arbitral award was made (lex loci arbitri). Conversely, the latter approach indicates that arbitrability ought to be assessed according to the law of the place where recognition and enforcement of the arbitral award is sought (lex executionis). The solution to the problem also depends on whether it is possible to apply Article II(1) of the New York Convention on the recognition of arbitration agreements generally or only at the stage of recognition and enforcement of foreign arbitral awards.

When examining the validity of the arbitration agreement in the proceedings on recognition and enforcement of an arbitral award, the more proper alternative appears to be the interpretation using the explicit provision of Article V(2)(a) of the New York Convention, i.e., assessing arbitrability according to the lex fori.\(^{89}\) In this case, lex fori means the rules of the state which rules on the recognition/enforcement of a foreign arbitral award. Article V(1)(a) of the New York Convention only applies to the other issues relating to the validity of the arbitration agreement, but this provision is not applicable to issues relating to the arbitrability of the dispute. Nonetheless, even the first approach, which is more closely associated with the delocalization of arbitration, can apply on the basis of Article VII(1) of the New York Convention, to the detriment of the New York Convention. But it is not possible to conclude that the New York Convention would enshrine the pure concept of territoriality of arbitration.\(^{90}\) The reason is that Article V(1)(e) stipulates that the recognition and enforcement of a foreign arbitral award can be refused if the award was annulled (set aside) in the country in which the award was made. This reason can justify the decision for refusing recognition of the arbitral award only at the request of the parties, i.e., not ex officio (of the court's own motion), based on the court's own discretion.

If the validity of the arbitration agreement ought to be examined at the stage of annulment of the arbitral award or before the commencement of the arbitral proceedings when the jurisdiction of the court is subject to examination, the approach to the validity of the arbitration agreement and the determination of the applicable law ought to be reserved for the lex fori.\(^{91}\) A similar conclusion was reached by the Belgian Supreme Court,\(^{92}\) which held that Article II(3) of the New York Convention provides that

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89 In compliance with the internationally binding theory, Article V(2)(a) and (b) of the New York Convention can be perceived as a demonstration of laudatory Artazadeh Hamayoon, Arbitrability under the New York Convention: The Lex Fori Revisited, Arbitration International, 17 (2001) 1, 85. However, some authors argue that although the rules regulating the arbitrability of a dispute must be regarded as mandatory rules which cannot be excluded by the will of the parties, they cannot be considered identical to the rules of public policy. This is because not all public policy rules can be considered mandatory rules. ICCA Congress Series, 1996, No. 3, p. 183.


York Convention allows that the court which is called upon to rule, at a party's request, on the validity of the arbitration agreement, may assess the arbitrability of the dispute according to the provisions of the lex fori. However, if the parties have agreed that the arbitration agreement is to be governed by foreign law, the court can assert its jurisdiction and hold the dispute non-arbitrable only if the resolution of the dispute in arbitration were contrary to public policy (ordre public) under the lex fori. Consequently, the Belgian court admitted that arbitrability could be assessed according to foreign law unless it violated Belgian public policy (ordre public).

However, the desire to unify the individual approaches to the determination of the law applicable to the arbitration agreement, and therefore to the arbitrability of the dispute, has given rise to some more progressive trends. It is mainly the opinion advocated by Van Houtte who has proposed that the states of the then European Communities within the framework of the European Protocol of the New York Convention. Van Houtte has proposed that it is the lex loci arbitri, or the law governing the main contract in which the arbitration clause is incorporated, which ought to become the law applicable to the arbitration agreement. Van Houtte has also proposed to exclude the possibility of enforcement of an arbitral award which was annulled in the state in which it had been made. The author of this paper is of the opinion, though, that the approach proposed by Van Houtte is not viable and collides with the autonomous assessment of all issues relating to arbitration in each individual state, because arbitration is not regulated under EU law and, consequently, cannot be the subject of a uniform approach within the framework of the European Protocol.

The situation is somewhat clearer under the European Convention on International Commercial Arbitration (1961). Article VI(2) of the European Convention explicitly stipulates that the courts may examine the arbitrability of the dispute according to the lex fori, even if the validity of the arbitration agreement is subject to a different legal system, and subsequently refuse recognition of the arbitration agreement. If the courts have jurisdiction, they may resolve the dispute themselves. However, if the parties decide to subject the arbitration agreement to the law of a state different from the state of the seat of arbitration, the absence of arbitrability of the dispute according to the lex fori, or according to the lex loci arbitri, as the case may be, does not constitute grounds for annulment of the arbitral award pursuant to Article IX(1)(a) of the European Convention. In this connection, it is necessary to point out that in relations between the contracting states to the European Convention that are also parties to the New York Convention, Article IX(2) of the European Convention limits the grounds for annulment to the exhaustive list of grounds specified in Article IX(1) of the European Convention. Hence, a party may demand the refusal of recognition of an arbitral award.

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93 Due to the fact that arbitration agreements were excluded from the Rome Convention, the contracting parties have agreed to execute a special protocol focusing on the law applicable to arbitration agreements. However, this intention has not been implemented yet. See Mario Giuliano/Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, http://eui-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980Y1031%2801%29:EN:NOT (20 August 2012).

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award pursuant to Article V(1)(e) of the New York Convention only if the arbitral award was annulled on any of the specifically listed grounds.

Consequently, the arbitrability of the dispute represents the cornerstone of each arbitration. But it is necessary to solve the problem of differing national leges arbitri. The general understanding has clearly shifted from interpreting the rules regulating arbitrability from the conflict-of-laws perspective to identifying these rules with the public policy (ordre public) or the exclusive jurisdiction of the courts.

2 Absence of arbitrability under Article V(2)(a) of the New York Convention

Article V(2)(a) of the New York Convention stipulates that recognition and enforcement of an arbitral award may be refused if the dispute is not arbitrable under the law of the state of enforcement. The provision refers to the assessment of arbitrability according to the law of the state in which recognition and enforcement of the arbitral award are sought. There is no universal consensus at present about which disputes are arbitrable. The definition of arbitrability is at the discretion of the individual jurisdictions and varies. Whereas all legal systems agree that criminal cases cannot be submitted to arbitration and that arbitrators are not allowed to rule on certain issues of personal status, especially the termination (dissolution) of marriage, etc., there are many areas in which the conclusion reached is not so unequivocal. These areas include traditionally sensitive areas such as antitrust law,59 intellectual property law, and bankruptcy law.59 The approach of the individual jurisdictions to the arbitrability of employment disputes57 and B2C disputes exhibits major differences.58


58 Antoine Kirby, Arbitrability: Current Trends in Europe, Arbitration International, 12 (1996) 4, 386; in greater detail also Alexander J. Bělohlávek, Ochrana spotřebitelů... 49
If we isolated Article V(2)(a) of the New York Convention from all other provisions, we would have to conclude that the court may refuse the recognition and enforcement of an arbitral award at any time if the award is the result of a dispute which is not arbitrable under the law of the forum. Consequently, recognition could also be refused if the state where enforcement of the arbitral award is sought adopted an unfriendly approach to arbitration and insisted on an unreasonably narrow definition of arbitrability. This would, however, run counter to the main objective of the New York Convention and its "pro-recognition" approach.

After the adoption of the New York Convention, both academic literature and case law have started to draw a dividing line between domestic (national) and international arbitration. Whereas it is accepted that domestic arbitration (lacking any specific international dimension) can be subject to stronger intervention by the state, interference in international arbitration should be minimal.

Many authors are of the opinion that arbitrability is part of public policy and maintain that Article V(2) of the New York Convention could contain only one reason, i.e., breach of public policy. For instance, Berg suggests that the reason why arbitrability "exists" separately is historical. It also constituted a separate reason in the Geneva Convention of 1927, in the ICC draft of 1953, as well as in the ECOSOC draft of 1955. Lew, Misteli, and Kröll also consider arbitrability to be one of the aspects of public policy. Conversely, Fouchard does not agree with the full classification of arbitrability under public policy. The reason for the absence of arbitrability is, in certain cases, indeed the protection of values enshrined in the public policy of the given state. But it does not apply in all situations. Public policy itself is not the decisive test for determining whether the dispute is arbitrable or not. Some legal systems delimit arbitrability by referring to public policy. Such a delimitation can be subject to various interpretations. The narrow interpretation means that only certain specific issues are not arbitrable, whereas the broad interpretation indicates that all disputes are arbitrable in which the arbitrators ought to apply any public policy rule(s); the latter is, in the author's opinion, unacceptable. For example, the Czech Republic — in an
extensive 2012 amendment to the Arbitration Act – unequivocally declared that arbitrators are not only authorized, they are actually obliged to apply public policy rules; if this imperative is breached in a B2C dispute, the deficiency is penalized by the potential annulment of the arbitral award pursuant to Section 31(g) of the Czech Arbitration Act. 107 Currently, the prevailing trend is to distinguish between a situation where the subject matter of the dispute concerns public policy and a situation in which the arbitrators ought to apply a public policy rule. Only the former case means that the dispute cannot be considered as arbitrable. 108

If we accepted only the New York Convention itself, the court would always assess arbitrability according to its national rules. Local differences in the rules regulating arbitrability could consequently hinder recognition and enforcement of arbitral awards. If we considered arbitrability as integrated into international public policy in terms of Article V(2)(b) of the New York Convention, recognition of an arbitral award could be refused only if the dispute were not arbitrable and if, at the same time, the absence of arbitrability were contrary to the fundamental principles of the legal system of the state of recognition / enforcement. 109 Even if we did not consider arbitrability as integrated into international public policy, Article V(2)(a) of the New York Convention can still be interpreted similarly to Article V(2)(b) of the New York Convention, i.e. we can differentiate between domestic arbitration and international arbitration. The fact that the dispute is not arbitrable under national law would not necessarily result in a refusal to recognize the arbitral award. 110

National courts apply Article V(2)(a) of the New York Convention only very rarely. Arbitrability has often been discussed by U.S. courts. A well-known case in which the court drew an explicit dividing line between arbitrability in domestic disputes and in international disputes is the decision of the U.S. Supreme Court in Fritz Scherk v. Alberto-Culver. 111 The case is not about the examination of


110 Ibid. at 995.

111 The decision of the U.S. Supreme Court [USA] of 17 June 1974 (Fritz Scherk v. Alberto-Culver Co.), cited according to Albert Jan van den Berg, The New York Arbitration Convention of 1958, The Hague 1981, 362-363. In 1969, Mr. Fritz Scherk, a German citizen, entered into a contract whereby he transferred the title of his enterprise to Alberto-Culver of Delaware [USA], together with all business [trademark] rights to cosmetic products. The contract contained an arbitration clause according to which the arbitration was to be organized under the ICC Rules. Alberto-Culver subsequently claimed that Mr. Scherk had fraudulently misinformed the company that the title to the trademarks was not encountered in any manner. Alberto-Culver therefore sued Mr. Scherk for compensatory damage and losses in the U.S. District Court in Illinois [USA]. Mr. Scherk pleaded the (non-)existence of the arbitration clause, whereupon Alberto-Culver demanded an anti-arbitration injunction. The court
arbitrability at the stage of recognition and enforcement of an arbitral award. The issue discussed by the court is the enforceability of an arbitration agreement which, however, has the same consequences in common law as the examination of arbitrability. In its decision, the court invoked the New York Convention. The court first defined the difference between the domestic nature of the transaction in Wilko v. Swan, to which the trial court referred, and the international nature of the present case. The court held that a contract with an international dimension fulfilled a substantially different purpose than the transaction in Wilko. In the Wilko case, the courts had no doubts that the contract was governed by U.S. law, specifically federal securities laws. But in the Fritz Scherk v. Alberto-Culver case, the court could not conclude with certainty that the federal securities rules would apply. The court ruled that contracts involving two or more countries, each with its own substantive laws and conflict-of-laws rules, are necessarily subject to uncertainty. A contractual provision specifying in advance the forum in which disputes shall be litigated is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but it would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. The U.S. Supreme Court also held that its conclusions were supported by the New York Convention, the main purpose of which is to enhance the enforceability of arbitration agreements in contracts with an international dimension and to unify the standards under which arbitration agreements will be respected and arbitral awards enforced. In the context of the New York Convention, the U.S. Supreme Court therefore recognized the difference between arbitrability in a domestic dispute and arbitrability in a dispute with an international dimension.

This distinction was further affirmed by the U.S. Supreme Court in Mitsubishi v. Soler. Although claims concerning antitrust issues are traditionally non-arbitrable in the U.S., the court ruled that they could be resolved in arbitration providing the transaction had an international dimension.

Another case concerning the arbitrability of an antitrust dispute was Audi v. Overseas Motor resolved by a U.S. District Court in Michigan [USA]. The dispute arose between Audi, a German car manufacturer, and its distributor in the

dismissed Mr. Scherk's objection and granted the petition filed by Alberto-Culver. The court invoked the decision of the U.S. Supreme Court in Wilko v. Swan according to which an arbitration agreement does not prevent the purchaser of securities from demanding, in case of fraud, judicial protection under the Securities Act [USA]. The Court of Appeals (U.S. Court of Appeals for the Seventh Circuit) affirmed the decision of the trial court. But, the U.S. Supreme Court reached a different opinion.

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U.S., Overseas Motor. The distributorship contract involved an arbitration clause. Overseas filed a lawsuit with the District Court due to an alleged tacit agreement restricting competition. The District Court dismissed the motion filed by Overseas demanding the issue of an anti-arbitration injunction. Arbitrators in Switzerland rendered an arbitral award favoring Audi. During the enforcement of the award in the U.S., Overseas again objected that the subject matter of the dispute was not arbitrable, because it involved antitrust issues. The court held that some facts of the case were common to the dispute under the contract and the claim under antitrust laws. This does not, however, render the former non-arbitrable. In the absence of allegations that the contract itself was intrinsically violative of antitrust laws, such actions are not preempted by the court's exclusive authority over them. In the present case, the antitrust issue was not the main subject matter of the dispute; it was only an issue involved in a dispute concerning a breach of contract. Furthermore, the U.S. Supreme Court later confirmed arbitrability even in a case in which the antitrust issue was the main subject matter of the dispute.

In several situations, however, the U.S. courts did find certain disputes non-arbitrable. The first such case was LIAMCO v. Libya, although it is necessary to emphasize that this case principally involved an investment dispute, i.e., a public-law dispute; nevertheless, from a comparative perspective, it is still an interesting case. LIAMCO was a U.S. company whose assets were nationalized in Libya in 1973. As a result thereof, LIAMCO initiated arbitration pursuant to an arbitration clause incorporated in its concession. The arbitrators in Geneva rendered an arbitral award in favor of LIAMCO; LIAMCO then requested enforcement of the award in the U.S. The U.S. District Court of Columbia refused enforcement of the award pursuant to Article V(2) of the New York Convention, holding that nationalization is a non-arbitrable "act of state". The subject matter of the dispute was the nationalization of LIAMCO's assets and the determination of the amount of compensation. If the issue were to be resolved by the court (District Court of Columbia), the court could not compel arbitration, because the court would have to assess the validity of the Libyan nationalization laws. These laws cancel all concessions and vest exclusive jurisdiction regarding compensation in a special commission. In the court's opinion, the reluctance of the court preventing it from assessing the acts of a foreign state is justified by the acta imperii doctrine. The


118 This does not, however, exclude arbitrability under the instruments of public international law.
acta imperii doctrine articulated by the U.S. Supreme Court means that each
state is obliged to respect the independence of other states and that no court
shall make judgments on the acts of the state power of another country. This
decision is not considered to be very fitting, because it applied institutions specific-
ly to the U.S. and those concerning only U.S. law and the jurisdiction of U.S.
courts.

The United States made a reservation under Article 1 of the New York Con-
vention, and it consequently only applies the New York Convention to commer-
cial matters. This is the reason why the U.S. District Court held the dispute non-
arbitrable even in the Wijsmuller v. United States case. Wijsmuller and the
captain of a U.S. warship ran aground on the Dutch coast and signed "Lloyd's
Open Form salvage agreement". The agreement contained an arbitration clause
for the salvor's claims for compensation of the salvage costs. The arbitration was
to be held in London pursuant to English law. The District Court dismissed
Wijsmuller's objection regarding the existence of the arbitration agreement,
because the Public Vessels Act allows claims to be made against the U.S. only by
way of a lawsuit filed with the competent District Court. The court held that by
adopting the Public Vessels Act, the United States did not intend to waive their
immunity to such extent as to be obliged to submit the dispute to arbitrators. In
the court's opinion, the relationships concerning the activities of warships are not
commercial relationships, and the reservation prevents them from falling within
the scope of the New York Convention. This case concerned the scope of the
New York Convention, rather than the issue of arbitrability.

The absence of arbitrability of a dispute resulted in a refusal to enforce an ar-
bitral award by the Belgian Cour de Cassation in the famous case Audi v. Adelin
Petit. The case concerned the Belgian Law of 1961 on the unilateral termina-


120 For more details, see Philippe Fouchard/Emmanuel Gaillard/Berthold Goldman/John
Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration, The
Hague 1999, 995; Albert Jan van den Berg, The New York Arbitration Convention of

121 Decision of the U.S. District Court of New York [USA] of 21 December 1976 (in B.V
Bureau Wijsmuller v. United States of America); cited according to Albert Jan van


123 Decision of the Cass. [BEL] of 28 June 1979 (in Audi-NBSU Union AG v. SA Adelin
Petit & Cie.), cited according to Albert Jan van den Berg, The New York Convention:
Reports and Materials Delivered at the ASA Conference held in Zurich on 2nd
February 1996, Zurich 1996, 47, and Albert Jan van den Berg, The New York Arbi-
tration Convention of 1958, The Hague 1981, 370-371, Audi, the German manufac-
turer of cars, informed its exclusive distributor in Belgium, Adelin Petit, of the intend-
ed termination of the contract. Adelin Petit was not willing to accept the termination
without reasonable compensation. Audi initiated arbitration in Switzerland in compli-
ance with an arbitration clause contained in the contract. The parties had agreed on
German law. Adelin Petit challenged the jurisdiction of the arbitrators. The arbitrators
made a decision on their jurisdiction and rendered an arbitral award according to
which the contract was terminated, and Adelin Petit was not entitled to any compen-
tion of an exclusive distributorship agreement entered into for an indefinite period of time. The Cour de Cassation refused the recognition and enforcement of an arbitral award rendered in Switzerland which concerned the termination of the distributorship agreement. The court reached the following conclusions:

According to the Law of 1961, in terminating a distributorship agreement which is wholly or partially realized in Belgium, a distributor may sue its contracting partner in a Belgian court which applies Belgian law. The provisions of this Law apply irrespective of any contrary agreement of the parties. The objective of these mandatory rules is to enable the Belgian distributor to invoke the protection afforded by Belgian law.

The Belgian court applied its domestic standard of public policy. If the court had differentiated between a domestic situation and a situation with an international dimension, the result would probably have been different.

The Swiss Bezirksgericht Zürich (district court of Zurich) examined arbitrability in Italian party v. Swiss company. The court held that in said case the arbitrators rendered a decision on pecuniary claims which could be submitted to arbitration under Swiss law. The court clearly applied the Swiss substantive rules on arbitrability incorporated in Article 177(1) of the IPRG [Switzerland]. Although the court did not explicitly refer to any difference between domestic and international arbitration, it is necessary to bear in mind that Article 177 of the IPRG [Switzerland] applies exclusively to international arbitration and that Swiss courts apply the Article to any international arbitration held in Switzerland as well as to the recognition and enforcement of any foreign arbitral award.

French laws do not specify arbitrability as a reason for the refusal to recognize a foreign award, but many authors maintain that it will be examined as a component of international public policy. However, Fouchard maintains that arbitrability ought to be classified under invalidity of the arbitration agreement (Article 1502(1) of the NCPC [France]). But French courts assess the validity of the arbitration agreement according to the substantive rule of the French law on international arbitration. The validity and the existence of the arbitration agreement are subject only to the overriding mandatory rules of French law and to international public policy.

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124 The law stipulates that an exclusive distributor in the territory of Belgium is entitled to compensation in case the contract is terminated. If the parties fail to agree on the compensation, the ruling is made by a Belgian court on request.
126 All pecuniary claims are arbitrable.
128 Ibid. at 932.
Arbitrability in terms of Article V(2)(a) of the New York Convention is assessed according to the law of the state where the enforcement is sought. *Lex loci arbitri* is irrelevant. Most national courts clearly distinguish between international and domestic disputes — this holds true both for *public policy* and for arbitrability. When applied to international disputes, the grounds under Article V(2)(a) of the New York Convention are interpreted narrowly. A dispute which would not be arbitrable in a domestic case, could be arbitrable in a case (in a dispute) with an international dimension.

IV Exclusion of the law applicable to an arbitration agreement from the scope of the Rome I Regulation and the Rome Convention

The obvious differences in the international and national approaches to the determination of the law applicable to the arbitration agreement were also the reason why it was excluded from the scope of the Rome Convention¹³¹ and the Rome I Regulation.¹³² Apart from the fact that one of the objectives of the European legislation was to secure compliance of the Rome I Regulation with the Brussels I Regulation, it was also a very pragmatic solution. The reason for excluding the application of the Rome Convention and the Rome I Regulation to the law applicable to arbitration agreements was primarily the effort to achieve a consensus with respect to said instruments. This would be rather complicated in the case of arbitration agreements, because the contracting parties cannot even agree on whether the arbitration agreement is an institution of substantive contract law or of procedural law. Similarly, the issue of the nature of arbitration, meaning the conflict between the jurisdictional approach and the contractual approach, would give rise to even more heated debates. It was the effort to achieve compatibility with other instruments of EU law which resulted in a negative definition (i.e. limitation) of the scope of the Rome I Regulation with respect to the law applicable to arbitration agreements. The Brussels I Regulation also excludes arbitration from the scope of this EU law instrument, and arbitration as such is considered an institution which is unregulated by EU law. However, this has been subject to lengthy discussions in connection with potential amendment to the Brussels I Regulation.¹³³

¹³¹ Rome Convention – Article 1(2)(d) (cit.): “They shall not apply to… (d) arbitration agreements and agreements on the choice of court.”
¹³² Rome I Regulation – Article 1(2)(e) (cit.): “The following shall be excluded from the scope of this Regulation… (e) arbitration agreements and agreements on the choice of court.”
The law applicable to the arbitration agreement and the arbitrability of a dispute