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Law Applicable to Arbitrability: Revisiting the Revisited *lex fori*

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1. INTRODUCTION

6-1 The question of what law applies to determine arbitrability is effectively related to the role and the interests that a State has in arbitration proceedings that take place within its territory. At a time when public policy was dominating the discussion on arbitrability, the argument that “*lex fori*”¹ should apply to determine arbitrability was based on sound territorial considerations: there would be a legitimate interest for a State to ensure that the subject matter of any arbitration proceedings taking place within its territory would comply with the public policy standards of that State, as these standards are reflected in its national laws. Thus, a State could forbid within its territory any arbitration whose subject matter was inarbitrable, i.e. at odds with the public policy of that particular State.

6-2 However, after a series of seminal national judgments in various jurisdictions holding that arbitrators are not excluded from deciding to apply national rules of public policy nature, it is safe to argue that the relevance of public policy to the discussion of arbitrability is now considered very limited.² As is discussed in detail in Chapter 2 above, the scope of inarbitrability is better determined by reference to the inherent characteristics of arbitration, such as its consensual nature, rather than public policy considerations.

¹ It must be noted from the outset of the paper that the term “*lex fori*” is used when the issue is examined from the perspective of a national court, referring exactly to the national law of this jurisdiction. Whereas, the term “*lex loci arbitri*” is used when the issue is examined from the perspective of an arbitral tribunal, referring to the national law of the seat of the tribunal.

² See the relevant cases in various jurisdictions: in the U.S., *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, (with regard to anti-competition claims); in France, Court of Appeal (CA) Paris, 29 March 1991, *Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT)*, (1991) Rev. Arb. 478, (with regard to fraud allegations) – with note L. Idot; also CA Paris, 19 May 1993 *Labinal v. Mors*, (1993) Rev. Arb. 645, (with regard to anti-competition claims) – with note Jarrosson; in England, Court of Appeal, *Fiona Trust & Holding Corporation and Others v. Privalov and Others*, [2007] 2 Lloyd’s Rep. 267 (with regard to fraud allegations) confirmed by the House of Lords, *Premium Nafta Products Limited (20th Defendant) and others v. Fili Shipping Company Limited (14th Claimant) and others*, [2007] UKHL 40; in Switzerland, Federal Tribunal, 23 June 1992, *Fincantieri- Cantieri Navali Italiani and Oto Melara v. M and arbitration tribunal*, (1995) XX YBCA 766 (with regard to claims arising out of illegal activities); in the context of the European Union, ECJ, 1 June 1999, C- 126/97, *Eco Swiss China Time v. Benetton International*, [1999] ECR I 3055 (with regard to anti-competition claims).

6-3 However, despite the waning role of public policy, the prominence of *lex fori* as the most relevant law to determine arbitrability remains unquestionable, especially when the issue arises before a national court at the stage of enforcement. Here, the express mandate of the New York Convention (NYC) Art. V(2)(a) leaves very little space, if any at all, for a different view.

6-4 In fact, this provision has a wider effect than the scope of its application, endorsing the *lex fori* even when the issue of arbitrability would arise before a national court at other stages than the stage of enforcement. In particular, the *lex fori* plays also a predominant role when national courts review arbitrability at the stage of challenge, since the majority of national provisions on challenge mirror the NYC Art. V, and they, thus, make express reference to *lex fori*.³ Similarly, national courts might also apply the *lex fori* when reviewing arbitrability at the stage of referral of a dispute, although here other views have been argued as well.⁴

6-5 Even arbitral tribunals usually take the *lex fori* into account when determining arbitrability. Although arbitral tribunals have no duty to apply the national law of the forum, it is accepted that the application of *lex fori* would be the safest option for a tribunal, in order to insulate the award against a potential challenge which would eventually bring the issue before the national courts of the place of the arbitration, which in turn would be bound to apply the *lex fori*.⁵

6-6 The aim of this paper is to re-examine the scope of the application of national provisions on inarbitrability in general and the scope of the application of *lex fori* in particular, under the light of new theories on the rationale behind inarbitrability. In particular, this paper argues that the scope of national provisions on inarbitrability has been significantly reduced: it is no longer determined by public policy considerations, which would call for an extensive application of the *lex fori* on a territorial basis. Rather, it is determined by jurisdictional considerations, which call for the application of the *lex fori* only when the exclusive jurisdiction of the national courts of the *lex fori* is at stake.

³ See, e.g., Model Law Art. 34(2)(b)(i): “the subject matter of the dispute is not capable of settlement by arbitration under the law of this State”, i.e. the *lex fori*. See in more details 2.2 *infra*.

⁴ See 2.1 *infra*.

⁵ See 2.3 *infra*.

2. LOOKING AGAIN INTO THE SCOPE AND THE RELEVANCE OF THE *LEX FORI*

6-7 The scope of inarbitrability is usually determined by national law in two different ways:

- First, by rules normally found in non-arbitration laws, which establish the exclusive jurisdiction of the national courts in relation to *specific* areas or subject matters. The typical example here is the EC Regulation 44/2001, Art. 22, providing that specific national courts of a Member State will have exclusive jurisdiction over disputes relating to the validity of the constitution, the nullity or the dissolution of companies (para. 2), or over disputes relating to the registration or validity of patents or trademarks or other similar rights (para. 4).⁶
- Second, by rules normally found in arbitration laws, which set out the scope of inarbitrability in *general* terms. A typical example of this drafting approach is the Swiss Private International Law Act (PILA) Art. 177(1), providing that “Any dispute involving property may be the subject-matter of an arbitration” or the German ZPO s. 1030(1) providing that “Any claim involving an economic interest can be the subject of an arbitration agreement”.

6-8 Eventually though, the essence of these two types of national provisions on arbitrability is the same. Despite the difference in the drafting style, both types of arbitrability laws are effectively conflict of jurisdiction rules, allocating jurisdiction between national courts and arbitral tribunals over specific types of disputes. In fact, their main purpose is to safeguard the exclusive jurisdiction of their national courts on specific types of disputes.

6-9 This purpose is more obvious in national provisions of the first type, such as EC Reg. 44/2001 Art. 22. This provision expressly identifies specific disputes (e.g. disputes relating to the registration or validity of patents) that can only be submitted to the national courts of a Member State. Thus, national courts are

⁶ See also the Austrian Bankruptcy Code s. 43(5) KO and s. 111(1) and French Code de Commerce, Art. R662-3, providing for the exclusive jurisdiction of the Austrian and French national courts respectively over certain types of insolvency disputes. Similarly, the Belgian Law of 27 July 1961 on the Unilateral Termination of Exclusive Distributorship Agreements (M.B. 29.12.1961) provides that, from the moment the exclusive distributorship agreement is performed in Belgium, Belgian law applies and Belgian courts have exclusive jurisdiction, notwithstanding any contrary provision.

accorded exclusive jurisdiction, prohibiting arbitral tribunals to look into these disputes.

6-10 Exactly the same rationale underpins arbitrability provisions of the second type. Indeed, provisions, such as the Swiss PILA Art. 177, define which disputes are arbitrable, i.e. “any dispute involving property”, leaving all other disputes to the jurisdiction of national courts. In effect, the purpose of this provision is to ensure that any dispute not involving property can be determined by the national courts of Switzerland exclusively.

6-11 Thus, ultimately both types of national provisions aim to delineate the area of exclusive jurisdiction of their national courts. From this viewpoint, the differences between a provision such as the EC Reg. 44/2001 Art. 22 and a provision such as the German ZPO s. 1030 lie in

- first, their scope: the latter is wider than the former; and
- second, their drafting technique: the latter define which disputes are arbitrable (positive arbitrability norms), whereas the former eventually define which disputes are inarbitrable (negative arbitrability norms).

6-12 However, both types of provisions are in essence conflict of jurisdiction rules, which allocate exclusive jurisdiction to their national courts with regard to specific types of disputes. Thus, the aim of these provisions is to safeguard the exclusive jurisdiction of their national courts over specific disputes, *rather than to ban arbitration in general*.

6-13 Indeed, state laws on arbitrability do not suggest that a particular type of dispute is *altogether prohibited from being arbitrated within the territory of a particular state*. Rather they suggest that a specific dispute cannot be submitted to a tribunal because the state courts of a particular country have the exclusive jurisdiction to hear the specific dispute on the basis of the factual circumstances surrounding the dispute.

6-14 The following sections re-examine the scope of the application of *lex fori* at different stages:

- First, when the issue of arbitrability arises before national courts at a pre-award (i.e. referral) stage
- Second, when the issue of arbitrability arises before national courts at the stage of annulment proceedings
- Third, when the issue of arbitrability arises before national courts at the stage of enforcement proceedings

– Finally, when the issue of arbitrability arises before a tribunal

2.1 When Arbitrability Arises Before National Courts at a Pre-Award Stage

6-15 The issue of arbitrability might come up at the referral stage before a national court, which might be either the national court of one of the parties or the national court of the seat of the arbitration. Although different views have been argued here,⁷ the prevailing one seems to be that the national court reviewing an arbitration agreement should apply the *lex fori* to determine whether the pending dispute is arbitrable or not.⁸ This view is only partially

⁷ It has been argued, for example, that national courts should by analogy apply New York Convention (NYC) Art. V(1)(a) (providing for the application of law of the place “where the award was made”) and thus apply the law of the place where the award *shall* be made (see, A. van den Berg, *The New York Arbitration Convention: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 126; see also CA Paris, 4 December 2002, *American Bureau of Shipping v. Copropriété Maritime Jules Vernes*, 4 Rev. Arb. 1286 (2003)); this view refers to the case where the national court deciding on the case is the national law of one of the parties, rather than the national law of the seat of the arbitration, in which case the *lex fori* would apply. It has also been argued that arbitrability should be determined by the law applicable to the validity of the arbitration agreement (see here the decision of the Cour d’appel Brussels, 4 October 1985, *Company M v. M SA*, XIV YBCA 618 (1989)). Another view argues that the issue of arbitrability should be decided without reference to any domestic law, through the application of an international rule of substantive law (*Meadows Indemnity v. Baccala & Shoop Insurance Services*, 760 F Supp 1036, XVII YBCA 686 (1992) (EDNY 1991)). On all these views, see in detail, B. Hanotiau, “What Law Governs the Issue of Arbitrability?”, 12(4) *Arb. Int’l* (1996) 391 et seq and P. Bernardini, “The Problem of Arbitrability in General”, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New Convention in Practice*, E. Gaillard & D. Di Pietro (eds), (Cameron May 2008) 503 et seq.

⁸ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration*, (Kluwer 2003) para 9-13: “However, in the majority of cases courts have determined the question of arbitrability at the pre-award stage according to their own national law” and para 9-18

...the better view is that the law applicable to the question of arbitrability in court proceedings should be governed by the provisions of the law of the national court which determines the case.

The same view is taken by H. Arfazadeh, “Arbitrability under the New York Convention: The *Lex Fori* Revisited”, 17 *Arb. Int’l* (2001) 76 et seq; H. Arfazadeh, *Ordre Public Et Arbitrage International À L’épreuve De La Mondialisation*, (2006) 95 et seq. See additionally, European Convention Art. VI(2) “The courts may also refuse recognition of the arbitration agreement if *under the law of their country* the dispute is not capable of settlement by arbitration”; Cf also Court of Appeal of Genoa, 7 May 1994, *Fincantieri–Cantieri Navali Italiani SpA and Oto*

correct: the *lex fori* will be relevant only to the extent that the jurisdiction of the national courts before which the dispute is referred (the national courts of referral) will be relevant for the specific dispute at hand.

6-16 In other words, the *lex fori* will apply only when there is a jurisdictional conflict between an arbitral tribunal and the national courts of referral. As was already mentioned, the legislative purpose of a state provision on arbitrability is to apply when there is a jurisdictional conflict between an arbitral tribunal and the courts of that state and allocate exclusive jurisdiction to the latter with regard to specific disputes.

6-17 However, this sort of jurisdictional conflict will occur only if the national courts of referral have in the first place exclusive jurisdiction over the specific dispute pending before the tribunal. This, in turn, will depend on whether the dispute at hand had any territorial link with the country of the national courts of referral.

6-18 To explain further: normally, national courts assume jurisdiction over a specific dispute on a territorial basis, namely whenever the pending dispute has a territorial link with the particular country of these national courts. Thus, if pending has no territorial connection with the national courts of referral, the national law of the courts of referral (*lex fori*) will be irrelevant to the matter of arbitrability. The national courts of referral would still have no jurisdiction over the pending dispute, even if an arbitration agreement covering the dispute did not exist. Thus, there would be no possible conflict of jurisdiction between the national courts of referral and an arbitral tribunal. Therefore, the national law of the courts of referral (*lex fori*), whose main objective is to safeguard the exclusive jurisdiction of its national courts over specific disputes, would have no *locus standi* to apply to determine the issue of arbitrability.

6-19 The above will apply even if the national court of referral is the national courts of the seat of the arbitration, rather than the national courts of one of the parties.⁹ The fact that the arbitration takes place within the territory of a particular country does not mean that the national courts of that country have jurisdiction over the pending dispute, which has been exclusively submitted to arbitration. The jurisdiction of the national courts of the seat is limited to

Melara SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq, XXI YBCA 594 (1996).

⁹ See for example, EAA s. 32.

disputes in relation to the arbitration proceedings taking place in the seat.¹⁰ Thus, for the national courts of the seat to apply their *lex fori*, the pending dispute needs to have an independent territorial connection with the seat. The fact that the arbitration takes place there will not be enough.

6-20 To illustrate, let us take the following scenario: a patent licence agreement between a U.S. and a Japanese party includes an arbitration clause providing for arbitration in Germany. A dispute arises out of the patent licence agreement, which was in fact concluded in the U.S. and performed in Japan. In general, the dispute has no other link with Germany or indeed Europe, apart from the fact that arbitration was agreed to take place in Germany. Prior to the constitution of the arbitral tribunal, one of the parties, by virtue of German ZPO s. 1032(2), resorts to the German courts (national courts of the seat), arguing that the dispute is directly relevant to the registration and validity of the patent, and thus not arbitrable.¹¹

6-21 In this scenario, there is no reason for the German courts to apply their *lex fori* (ZPO s. 1030 or EC Regulation 44/2001 Art. 22(4)) to determine whether the dispute is arbitrable or not. There is no scope for the German *lex fori* to apply here. It is not within the scope of the German *lex fori* to altogether prohibit the arbitration within German territory of any claim not involving an economic interest or any claim touching on the validity of patents. As explained above, public policy does not underpin arbitrability laws. Rather, the real meaning of the *lex fori* on arbitrability (in this example, the ZPO s. 1030 or EC Regulation 44/2001 Art. 22(4)) is to preserve the exclusive jurisdiction of its national courts (in this example, the German courts): i.e. to ensure that the German courts will finally determine any claim that

- first, does not involve an economic interest or touches on the validity of the patents, and
- second *would fall under the jurisdiction of the German courts* if it were not for the arbitration agreement.

¹⁰ However, their role is to supervise or assist the arbitral proceedings taking place in their territory. See for example, Model Law Art. 5-6, or the EAA 1996 s. 1(c).

¹¹ See about the arbitrability of these type of disputes in Germany Trittman/Hanefeld in K.-H. Böckstiegel, S. Kröll & P. Nacimiento (eds), *Arbitration in Germany – The Model Law in Practice* (Wolters Kluwer 2007) s. 1030, para 15-16.

6-22 However, in this case the exclusive jurisdiction of the German national courts would not be at stake. In fact it would not be relevant at all, since the German courts would have no jurisdiction over the actual dispute, even if there were no arbitration agreement. The fact that the arbitration has its seat in Germany simply confers jurisdiction to the German courts over the arbitration proceedings (e.g. ZPO s. 1032) rather than over the dispute on the merits. Therefore, there would be no jurisdictional conflict between the arbitral tribunal, taking place in Germany, and the German courts. Consequently, there would be no reason for the German courts to apply their *lex fori* (ZPO s. 1030 or EC Regulation 44/2001 Art. 22(4)) to safeguard the jurisdiction of the German national courts. Here, the dispute does not disturb the jurisdictional system set out by the German jurisdictional rules. In fact, from the viewpoint of the German courts, the particular dispute will be *jurisdictionally neutral*, and thus fall out of the scope of their *lex fori* altogether.

6-23 In our scenario, there might be a jurisdictional conflict between the arbitral tribunal in Germany and the national courts of a different country (probably the national courts of the U.S. or Japan, or a third country, that would have a territorial link with the pending dispute at hand; for example, the country where the main contact was concluded). However, it is arguable whether in such a case the German courts should intervene to resolve this jurisdictional conflict, and safeguard the exclusive jurisdiction of the national courts of another country. The jurisdictional rules of a third country have no extraterritorial power over the German courts. Only in exceptional cases a national law provides that its national courts have a duty to safeguard the exclusive jurisdiction of the national courts of another country. This, for example, is set out in the UNCITRAL Model Law on Cross-Border Insolvency, which is also pertinent to arbitrability. This Model law provides in Article 20 that upon recognition of insolvency proceeding before the courts of a foreign country the commencement or continuation of individual actions or proceedings before the national courts of the Model Law country concerning the debtor's assets, rights, obligations or liabilities must be stayed. As is generally accepted, the term "Individual actions or proceedings" in Article 20 therein includes arbitration proceedings.¹² Therefore, if the issue of arbitrability is referred to the national courts of a country that has adopted the above Model Law, that national courts will have the duty to apply this law (*lex fori*) and prohibit any arbitration proceedings taking place within its territory, on the basis that insolvency proceedings have commenced before the national courts of a

¹² See Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para 145.

foreign country. Otherwise, the exclusive jurisdiction of the latter would be violated, which is exactly what the Model Law Cross-Border Insolvency aims to avoid. But, unless such an express provision exists in the national law of the courts of referral (*lex fori*), its national courts will have no duty to protect the exclusive jurisdiction of the national courts of foreign country.

6-24 Still, the crucial question remains: if the national law of the place of referral (*lex fori*) is irrelevant for the determination of the arbitrability matter, which law should the German courts, in our example, apply to determine arbitrability? The answer here is that, in such a case, the German courts should not attempt to determine arbitrability at all. Since their exclusive jurisdiction is not at stake, they should refer the determination of the arbitrability issue to the tribunal. They should have no jurisdictional interest in the arbitrability matter whatsoever. True, the German courts have a duty to assist the arbitration, which takes place in their territory.¹³ However, in this case, it is arguable whether they are in a position to assist at all. Arbitrability here is an issue of jurisdictional conflict between the arbitral tribunal and the national courts of another country, and therefore, it is an issue effectively related to the *enforceability* of the award: if the tribunal proceeded with the merits of a dispute, which fall under the exclusive jurisdiction of the national courts of a particular country, the ensuing award will most likely not be enforceable in this country. However, this is a risk, which the tribunal is in a much better position to assess than the national courts of the seat. Therefore, here, the national courts should refrain from determining the issue of arbitrability altogether and refer the parties back to the tribunal.

6-25 To conclude, the national law of the place of referral (*lex fori*) will be relevant whenever there is a conflict of jurisdiction between the national courts of the place of referral and the tribunal. Only then should the national courts of referral apply their national law (*lex fori*) to safeguard their exclusive jurisdiction over the particular dispute. However, if there is no jurisdictional conflict between the national courts of the place of referral and the tribunal, the national law of the place of referral (*lex fori*) will be irrelevant, and these national courts should arguably refrain from determining the arbitrability of the dispute. Instead, they should refer the parties to the arbitral tribunal. Here, arbitrability is a matter that

¹³ German ZPO s. 1032.

relates to the enforceability of the award, which is a determination that the arbitral tribunal is in a better position to make.

2.2 When the Award is Challenged Before the National Courts of the Seat

6-26 When faced with an annulment action against the award on grounds of inarbitrability, the national courts of the seat will invariably apply their national law (*lex fori*). This is mainly because the majority of national provisions on challenge include a provision that mirrors the NYC Art. V(2)(a), which expressly refers to the national law of the seat. The typical example here is the Model Law Art. 34(2)(b)(i), providing that “the subject matter of the dispute is not capable of settlement by arbitration under the law of this State”, i.e. the *lex fori* of the national courts before which the award is challenged, which will effectively be the national courts of the seat.

6-27 Nevertheless, the national law of the seat will not always be relevant to the determination of the arbitrability issue. A similar approach to the one under section 2.1. of this paper should also be taken when arbitrability arises at the stage of award annulment proceedings. In particular, the national courts should examine whether the resolution of the dispute by the arbitral tribunal violated any jurisdictional rule of the seat (i.e. the *lex fori*), granting exclusive jurisdiction to the national courts of the seat over the dispute which was actually determined by the tribunal.

6-28 The answer to this question depends on whether the national courts of the seat had jurisdiction on the specific dispute in the first place; this in turn will depend on whether the dispute had any territorial link with the seat. If the answer to this question is negative, the national courts of the seat should refuse to set the award aside. In such a case, the national law of the seat on arbitrability will not have been violated. In fact, the national law of the seat will not come into play at all.

6-29 To illustrate by reference to the above scenario: if the tribunal sitting in Germany decided to proceed with the merits of the dispute, the ensuing award should not be annulled by the German courts. On the basis of the above factual scenario, the German courts do not have jurisdiction over the particular dispute,

since the dispute has no connection with Germany.¹⁴ Therefore, the determination of the dispute by the tribunal would not violate the German *lex fori*. As was explained, the scope of the *lex fori* (in this case ZPO s. 1030) is to preserve the exclusive jurisdiction of its national courts, in this case the German courts, rather than to ensure that no arbitration touching on the validity of a patent would take place within German territory. Therefore, there should be no reason for the German courts to apply the *lex fori* and set the award aside.

2.3 Arbitrability Control by National Courts at the Place of Enforcement

6-30 Here, the view that the enforcement court is bound to apply their *lex fori* seems undisputable.¹⁵ This is mainly due to the express wording of NYC Art. V(2)(a), providing that “The subject matter of the difference is not capable of settlement by arbitration under the law of that country.” In principle, this view should not be challenged. The *lex fori* will be the sole point of reference for the enforcement courts to determine whether the award has violated any rule on inarbitrability.

6-31 However, it is questionable whether the *lex fori* will always be relevant for the determination of inarbitrability even at the enforcement stage. The enforcement courts should not engage in an examination of whether *the type of the dispute* determined by the tribunal was in general arbitrable in accordance with the notion of arbitrability determined by the *lex fori*. What is crucial for the enforcement courts is to examine whether the award, by determining a specific dispute, did *actually violate* the exclusive jurisdiction of the national courts of the place of enforcement.

6-32 Accordingly, the enforcement courts should examine whether the tribunal assumed jurisdiction over *a particular dispute*, notwithstanding the existence of a mandatory provision of the *lex fori* (i.e. the law of the enforcement courts) granting exclusive jurisdiction to the enforcement courts *over the same dispute*. Thus, the determination of whether the award is enforceable, must be made in the light of the dispute *actually determined* by the tribunal, rather than on the basis of the general arbitrability views prevailing in the place of the enforcement.

¹⁴ Apart from the fact that the arbitration took place in Germany, which however would not be enough to grant jurisdiction to the German courts over the merits of the dispute.

¹⁵ See P. Bernardini, *supra* note 7, at 516.

6-33 From this viewpoint, the *lex fori* will be relevant to the determination of enforceability only if the enforcement courts have originally had jurisdiction over the dispute actually determined by the tribunal. That will depend on whether the specific dispute had any jurisdictional link with the enforcement state in the first place, apart from the fact that the award is sought to be enforced there. Otherwise, the *lex fori* will be irrelevant for the determination of inarbitrability, and the award should pass through the enforceability check on this ground.

6-34 If the dispute had no territorial link with the enforcement state, the enforcement courts would never have jurisdiction over the dispute. Accordingly, no national rule of the enforcement state aiming to safeguard the exclusive jurisdiction of the enforcement courts (i.e. *lex fori* on inarbitrability) would have ever been violated. The jurisdictional regime of the enforcement state, set out by the *lex fori* on inarbitrability, will remain intact, and, thus, there will be no reason for the enforcement courts to resist the enforceability of the award.

6-35 For example, suppose that a tribunal in Switzerland decided on a dispute in connection with a patent registered with the Italian Patent Office. If one of the parties sought to enforce the award in Italy, the Italian courts will most likely resist the enforcement on the basis that the award violated the *lex fori*,¹⁶ granting Italian courts the exclusive jurisdiction over the specific dispute. Since the relevant patent was registered with the Italian patent authority, the Italian national courts would have exclusive jurisdiction over the particular dispute relating to the patent. The tribunal by assuming jurisdiction over this dispute violated the Italian *lex fori* and, therefore, the Italian courts would rightfully rely on the *lex fori* to resist the enforcement of the award in Italy.

6-36 However, if the dispute related to a patent registered, for example, in Japan, there would be no reason for the Italian courts to resist the enforcement of the award on the basis that this type of disputes “cannot be disposed by the parties” in Italy, in general. This would not be the purpose of the Italian Code of Civil Procedure Art. 806. Rather, its purpose is to allocate jurisdiction between arbitral tribunals and Italian courts, and in addition to preserve the exclusive jurisdiction of Italian courts on specific disputes. If the Italian courts never had jurisdiction on a particular dispute, which the award determined, there would be no reason

¹⁶ Italian Code of Civil Procedure Art. 806 or EC Reg. 44/2001 Art. 22(4).

for the Italian courts to apply the *lex fori* and refuse the enforcement of the award.

2.4 When the Dispute is Before an Arbitral Tribunal

6-37 Strictly speaking an arbitral tribunal has no *lex fori*. However, traditionally the national law of the seat of the arbitration (i.e. *lex loci arbitri*) always played a significant role in the determination of arbitrability by the tribunal. This is for two reasons: first, the law of the seat is expressly referred to in the NYC.¹⁷ Second and most importantly, the arbitrators tend to apply the law of the seat when deciding the arbitrability in order to avoid their award being annulled by the national courts of the seat.¹⁸

6-38 However, in accordance with what has been argued so far, the arbitrators should take the *lex loci arbitri* into account only when the pending dispute has a territorial connection with the seat of the arbitration. In particular, the tribunal should begin its analysis on the arbitrability by identifying the conflicting jurisdictions. The tribunal should answer the following questions:

- Is there any arbitrability rule of the national law of the seat, granting its national courts exclusive jurisdiction over a *type of dispute*, such as the one pending before the tribunal?
- If in the affirmative, is this national provision applicable to *the specific dispute pending* before the tribunal?

6-39 It is likely that the *lex loci arbitri* provides for the exclusive jurisdiction of its national courts over particular types of disputes, such as insolvency disputes, or disputes that the parties cannot be disposed of. However, the tribunal would be bound to apply this provision, only if the pending dispute had a territorial connection with the seat of the arbitration. Otherwise, no issue with regard to the jurisdiction of the national courts of the seat would arise at all, and therefore the *lex loci arbitri* on arbitrability (as a jurisdictional conflict of law rule) would not be relevant to the specific dispute.¹⁹ There would be no potential conflict between

¹⁷ Art. V(1)(a); Geneva Convention also makes reference to the *lex loci arbitri*, Art.IX(1)(a).

¹⁸ See P. Bernardini, *supra* note 7, at 513.

¹⁹ Even if this rule has a mandatory character in general, say EAA s. 2-4 or Model Law Art. 1

the jurisdiction of the tribunal and the national courts of the seat, and, thus, the *lex loci arbitri* on inarbitrability would have no *locus standi* to apply and prevent the tribunal from assuming jurisdiction over the specific dispute.

6-40 Conversely, if the pending dispute had a territorial link with the seat of the arbitration, this link might trigger the exclusive jurisdiction of the national courts of the seat. In this case, the *lex loci arbitri* will be relevant, and the tribunal will have to take it into account to determine arbitrability.

6-41 Let us illustrate by reference to the same factual scenario above on a dispute related to the validity of a patent: if the tribunal had its seat in Germany but the pending dispute had no connection with Germany, there would be no basis for the tribunal to take the relevant *lex loci arbitri* on arbitrability²⁰ into account. From a jurisdictional point of view, the *lex loci arbitri* on inarbitrability would be irrelevant for the resolution of the pending dispute. The German courts would never have had jurisdiction over the dispute pending before the tribunal. Therefore, there would be no jurisdictional conflict between the German courts and the tribunal, and thus there would be no scope for the *lex loci arbitri* on arbitrability to apply.

6-42 By the same token, the tribunal should not be concerned that the award might be annulled by the national courts of the seat. As explained above,²¹ there would be no basis for the national courts to set the award aside, as no national rule on arbitrability would have been violated.

6-43 Now, provided that the *lex loci arbitri* is not relevant, the following crucial questions would still remain open for the tribunal: against which standards should the tribunal determine the arbitrability of the pending dispute? Which rules should the tribunal seek guidance from to decide whether it has jurisdiction over the pending dispute?

6-44 The law applicable to the merits will not be relevant, as the issue of arbitrability is a matter of jurisdiction rather than substance. Thus, tribunals should avoid determining the arbitrability of the pending dispute by reference to the applicable substantive law. Similarly, the law applicable to the validity of the

²⁰ German ZPO s. 1032 and EC Reg. 44/2001 Art. 22(4).

²¹ See *supra* 2.2.

arbitration agreement will not be relevant, as arbitrability is not a matter related to the validity of an arbitration agreement.²²

6-45 The dispute pending before the tribunal will probably have a territorial connection with a country other than the seat of the arbitration. This territorial connection might well trigger the exclusive jurisdiction of the national courts of *that country*. In other words, there might be a jurisdictional conflict between the tribunal and the national courts of a country other than the seat, and there might be an arbitrability provision of this country granting its national courts exclusive jurisdiction over the dispute pending before the tribunal. However, it is questionable whether the tribunal is bound by this national rule. In fact, this issue relates to the pervasive debate on whether a tribunal should be bound by mandatory rules of a country other than that of the seat.²³

6-46 In the above example where the tribunal sits in Germany, it is likely that the dispute has a jurisdictional link with the U.S. or Japan, whose arbitrability law will grant their national courts exclusive jurisdiction over the specific dispute. *Prima facie*, there will be no legal basis for the tribunal sitting in Germany to decline jurisdiction over the pending dispute, on the basis that the dispute will be inarbitrable in Japan or the U.S. The mandatory jurisdictional rules of Japan or the U.S. have no extra-territorial power over a tribunal sitting in a different country. Thus, there will be no obligation for the tribunal to apply these rules.

6-47 Eventually, the tribunal should determine arbitrability on the basis of the inherent or practical limitations of arbitration as a dispute resolution mechanism.²⁴ The crucial arbitrability question for the tribunal should be whether an arbitral award is able to successfully dispose of the dispute. If the answer to this question is in the affirmative, the dispute should be considered arbitrable by the tribunal.

²² S. Brekoulakis, Chapter 2 “On Arbitrability: Persisting Misconceptions And New Areas Of Concern”, above.

²³ See, in more detail here various authors discussing the issue, in 18 (1-2) *Am. Rev. Int’l Arb.* (2007) and in particular at 51-155.

²⁴ Cf S. Brekoulakis, Chapter 2 “On Arbitrability: Persisting Misconceptions And New Areas Of Concern”, above.

6-48 For example, if the pending dispute related to the ownership of a patent is registered with the Swiss Patent Office,²⁵ the arbitrator should declare the dispute arbitrable, even if the tribunal sits in a country that does not generally accept the arbitrability of this type of dispute. In such a case, the Swiss Patent Office would accept the arbitral award to amend its registry, and thus the dispute will be successfully resolved.

6-49 However, if the pending dispute relates to the ownership of a patent, which is registered with a national patent authority that does not accept arbitral awards as a valid legal reason for the amendment of its record, the tribunal should declare the dispute inarbitrable, even if the arbitration takes place in a country that accepts arbitrability of such type of disputes, for example Switzerland. In this case, only a national court could successfully resolve the dispute over ownership of the patent; thus, the dispute will in effect be inarbitrable.

3. A BRIEF LOOK INTO RELEVANT CASE LAW

6-50 Before concluding, let us examine two recent cases (an arbitral award and a national judgement) looking into the issue of applicable law on arbitrability.

6-50 In first case, an arbitral tribunal sitting in Helsinki, Finland, applied the law of the seat to determine whether it had jurisdiction when the respondent in liquidation argued that the dispute was, in accordance with its national law, inarbitrable.²⁶

6-52 More specifically, the respondent, a Latvian bank which was declared insolvent and put into liquidation, employed the claimant, a Swedish law firm, to represent it with respect to litigation before Stockholm Courts. The retainer agreement, signed after the respondent was put into liquidation, contained an arbitration clause providing for arbitration under the expedited arbitration rules of the arbitration institute of the Stockholm Chamber of Commerce (SCC). When the claimant commenced arbitration proceedings for unpaid legal fees, the Latvian bank objected to the jurisdiction of the tribunal on the basis that the

²⁵ As is known, the Swiss Patent Office accepts the award as a valid reason to amend the registry.

²⁶ Final Award in 2006 in SCC Arbitration O53/2005, published in 1 Stockholm Int'l Arb. Rev. (2007) 211 et seq., with note C. Wallgren, H. Lindegaard & P. Franke, at 226 and E. Runesson, at 235.

dispute was inarbitrable, since under Latvian Law Latvian state courts had exclusive jurisdiction over any dispute involving the Latvian insolvent bank.²⁷

6-53 The tribunal, in a majority decision, held that the issue of arbitrability should be determined in accordance with Finnish law, on the basis of two arguments: first, by reference to the doctrine of separability the tribunal noted that the law applicable to the merits, in this case Swedish law, should not automatically be applicable to determine the arbitrability of the dispute. Therefore, since the tribunal was unable to infer any implied intention of the parties with regard to the law applicable to determine the arbitration agreement, the “law at the place of arbitration appears to be a viable and transparent link for the determination of the law applicable to the arbitration agreement.”²⁸ Second, the tribunal referred to NYC Art. V(2) and the Finnish Arbitration Act s. 40(1) providing that

An award shall be null and void to the extent that the arbitral tribunal has in the award decided an issue not capable of settlement by arbitration under Finnish law.

Thus, the tribunal jumped to the conclusion that “in arbitrations conducted in Finland the arbitrators should be guided by Finnish law when determining whether or not the dispute is arbitrable.”²⁹

6-54 Both arguments of the tribunal are questionable. First, as was showed in Chapter 2,³⁰ the matter of arbitrability is not related to the validity of an arbitration agreement. Accordingly, it does not follow that the law applicable to the determine arbitrability should be the law applicable to determine the validity of an arbitration agreement. Second, the tribunal’s reading of Finnish Arbitration

²⁷ S. 487 of the Latvian Civil Procedure Law provides:

Any civil dispute may be referred for resolution to an arbitration court with the exception of a dispute: 1) the adjudication of which may affect the rights and interests protected by the law of a person who is not a party to the arbitration agreement; [...] 8) regarding rights and obligations of the persons who have been declared insolvent before the arbitration award is passed.

²⁸ *Ibid.* para 46.

²⁹ *Ibid.* para 47.

³⁰ Cf S. Brekoulakis, Chapter 2 “On Arbitrability: Persisting Misconceptions And New Areas Of Concern”, Section 2 above.

Act s. 40(1) is not correct. In accordance with what was argued above, the relevant section of the Finnish Arbitration Act does not aim to prohibit tribunals sitting within Finnish territory from deciding arbitrability differently from what is the meaning of arbitrability in Finland. Arbitrability is not considered a matter of public policy any more. Rather, the aim of the Finnish Arbitration Act is not to allow a tribunal to decide on a specific dispute which falls under the exclusive jurisdiction of Finnish courts. However, in view of the factual scenario of the case, the Finnish courts have no jurisdiction over the particular dispute anyway, as the dispute has no jurisdictional link with Finland. Neither party was Finnish; the conclusion and performance of the contract, including the arbitration agreement, did not take place in Finland. It seems very unlikely that the Finnish courts could have assumed jurisdiction, had there not been an arbitration agreement. The fact that the arbitration takes place in Finland does not alter the above conclusion: apart from the fact that Helsinki was determined by the SCC rather than by the parties, Finnish courts would only have jurisdiction to assist the arbitration proceedings, rather than to determine the merits of the disputes.

6-55 Thus, there was no risk that the exclusive jurisdiction of the Finnish courts would be circumvented, and therefore there was no *locus standi* for the Finnish law to apply and determine arbitrability. In fact, Finnish law was largely irrelevant to the arbitrability issue here.

6-56 Instead, the tribunal should have looked into the inherent limitations of arbitration and the factual circumstances of the case to determine arbitrability on the basis of whether an arbitral award would be able to effectively resolve the specific dispute, in which one of the parties was put into liquidation. More specifically, the tribunal should have examined whether the particular claim would be inextricably linked with any collective insolvent proceedings already pending before a national court. In such a case, the resolution of the dispute by the tribunal might affect the allocation of the limited funds to the several creditors in accordance with the security that each of the creditors had originally obtained. As was explained above,³¹ arbitration has inherent limitations to accommodate this type of collective proceedings, and the claim should be considered inarbitrable. The resolution of this dispute could more efficiently be achieved by collective litigation proceedings where all the relevant parties may be brought before the same court. By contrast, if the tribunal found that the

³¹ *Ibid.* Section 1.

particular claim against the insolvent Latvian bank did not affect any collective insolvency proceedings, the dispute should be considered arbitrable.

6-57 In the second case, *Syska & Elektrim SA v. Vivendi & Others*,³² Elektrim, a Polish company, entered into an agreement with Vivendi containing an agreement to arbitrate in London. After Vivendi commenced arbitration proceedings against Elektrim, the latter was declared insolvent. The question was whether the Polish Bankruptcy and Reorganisation Law, the application of which would annul the arbitration agreement, was relevant to determine the arbitrability of the dispute.³³

6-58 The Tribunal, by a majority, rejected Elektrim's objections to the Tribunal's jurisdiction. Elektrim sought to set the award aside by English courts. The English court looked into *the lex fori*, and in particular into the European Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, which forms part of English Law. Article 4 of the Insolvency Regulation (EC No 1346/2000) provides that the law of the country where the insolvency proceedings are started (in this case Poland) will determine among others

2(e) the effects of the insolvency proceedings on current contracts to which the debtor is a party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending,

while Article 15 provides that

the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.

Thus, under the Regulation, the matter boiled down as to whether the term "lawsuit" in Article 15 would include an arbitration claim, in which case the law of England would be applicable.

³² *Syska & Elektrim SA v. Vivendi & Others* [2008] EWHC 2155 (Comm).

³³ Polish Bankruptcy and Reorganisation Law, Art. 142:

Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.

6-59 Clarke J saw no reason why the term “lawsuit” should not include arbitration claims, particularly as other regulations, when they intend to exclude arbitration, do so expressly.³⁴ Here, the question of whether Clarke J correctly applied Art. 4 and 15 of EC Regulation, which lead to the English law is not the main question. In fact, it is questionable whether the term “lawsuit” in the above EC Regulation should include an arbitration claim. This is especially so, if the term is read in its proper context: “law of the Member State in which the lawsuit is pending”. Arbitration proceedings have no forum, and therefore the phrase “law of the Member State in which the lawsuit is pending” makes no sense in arbitration. There is no obvious analogy between “the Member State in which the lawsuit is pending” and “the state in which arbitration takes place”. Nevertheless, the crucial issue here is the fact that Clarke J applied the *lex fori*, namely the EC regulation on Insolvency Proceedings, to determine the arbitrability issue in the first place. In view of the factual circumstances of the particular case, the application of the EC Regulation must be considered the right approach.

6-60 The purpose of the EC Regulation is, *inter alia*, to determine the effects of insolvency proceedings on other contracts or other proceedings to which the debtor is party. Therefore, provided that the wide interpretation to include arbitration given by Clark J is correct, the Regulation is also legislation closely relevant to arbitrability. The Regulation is relevant to the question of whether national courts of any Member State will have exclusive jurisdiction to determine a claim involving an insolvent party.

6-61 Moreover, the dispute largely falls within the scope of the territorial application of the regulation, since first, both parties were European based companies,³⁵ and second the original commercial activity between the claimant and the respondent took place in Poland.³⁶ Therefore, here the *lex fori*, i.e. the EC Regulation on Insolvency Proceedings, was relevant to the dispute, and the English courts rightly applied it to determine the effect of insolvency proceedings on arbitration. It is, of course, another issue, which goes beyond the scope of this paper, whether Clarke J correctly applied the conflict of laws provisions of the

³⁴ The Judge here referred to Article 1(2)(d) of EC Regulation No. 44/2001; Article 1(2)(d) of the Rome Convention on the Law Applicable to Contractual Obligations.

³⁵ Elektrim was a Polish company, whereas Vivendi is a French based company operating through other European subsidiaries.

³⁶ They entered into an agreement by which Vivendi was intended to acquire an interest in a Polish mobile telephone company in which Elektrim owned a substantial shareholding.

Regulation, deciding that English law rather than Polish law would eventually determine the issue.

4. CONCLUSION

6-62 As the relevance of public policy in the arbitrability discussion has been considerably waned in the last decades, the significance of the *lex fori* as the law applicable to arbitrability makes less and less sense. The aim of the paper was to re-examine the scope of application of the *lex fori* by looking into the rationale and the scope of application of national laws on arbitrability in general.

6-63 As was shown, all national provisions on inarbitrability, irrespective of any difference in the drafting style, are effectively conflict of jurisdiction rules, allocating jurisdiction between national courts and arbitral tribunals over specific types of disputes. Their main purpose is to safeguard the exclusive jurisdiction of their national courts on specific types of disputes, *rather than to ban arbitration in general*. State laws on arbitrability do not suggest that a particular type of dispute is *altogether prohibited from being arbitrated within the territory of a particular state*. Rather they suggest that a specific dispute cannot be submitted to a tribunal because the state courts of a particular country have the exclusive jurisdiction to hear the specific dispute on the basis of the factual circumstances surrounding the dispute.

6-64 From this jurisdictional point of view, the application of the *lex fori* to determine the arbitrability matter seems less justified. The *lex fori* will be relevant only to the extent that the exclusive jurisdiction of the national courts of the *lex fori* is at stake, which presupposes that the national courts have exclusive jurisdiction over the specific dispute pending before the tribunal. This, in turn, will depend on whether the dispute at hand has any territorial link with the country of the national courts, before which the issue of arbitrability arises.

6-65 This applies to all different stages where the issue of arbitrability may come up before national courts. If, for example, the arbitrability question arises before the courts of the seat at the stage of annulment proceedings, and neither the dispute nor any of the parties thereto have any jurisdictional connection with the seat of the arbitration, the *lex fori* will usually be irrelevant to determine arbitrability.

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6-66 The same approach should be taken by an arbitral tribunal, which usually tends to apply the *lex loci arbitri*. There is no reason for a tribunal to take the law of the seat into account, unless the exclusive jurisdiction of the national courts of the seat is at stake, which would depend on whether the dispute pending before the tribunal has any jurisdictional link with the seat.

6-67 Issues related to applicable laws are by nature technical and complex matters. Eventually, the right answer to these issues depends on which viewpoint one would take. As the paper argued, a jurisdictional rather than a public policy viewpoint is more suitable for the purposes of international arbitration.