

**IBA SUBCOMMITTEE
ON RECOGNITION AND ENFORCEMENT
OF ARBITRAL AWARDS**

Report on the concept of ‘Arbitrability’ under the New York Convention

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September 2016

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¹ The author would like to express his gratitude to Maarten DRAYE, senior associate at HANOTIAU & VAN DEN BERG, Brussels, for his invaluable assistance in the preparation of the present report.

I. INTRODUCTION

1. In 2014-2015, the International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards (the “**Subcommittee**”) carried out the first stage of its comparative study of the exceptions to the enforcement of foreign arbitral awards that, under Article V (2) of the New York Convention (the “**Convention**”), may be raised by the enforcing court, focusing on the public policy exception set out in Article V (2) (b) of the Convention. This study culminated in the presentation at the IBA 2015 Conference in Vienna of a General Report and the posting on the website of the IBA Arbitration Committee of all country reports on the public policy exception.

2. The success of that project led the Subcommittee to continue its comparative study of the exceptions to enforcement of a foreign award set out in Article V (2) of the Convention, and to carry out a new research project on the non-arbitrability exception of Article V (2) (a). Non-arbitrability of a dispute is, however, not only a ground for refusing to recognize and enforce an arbitral award, but also a ground for refusing to recognize and give effect to an arbitration agreement, under Article II of the Convention. The scope of the research thus extends beyond the natural boundaries of the topics usually addressed by the Subcommittee.

3. The present report summarizes the findings of the country reports prepared by the different Members and Reporters of the Subcommittee² on the concept of ‘arbitrability’ under the Convention.

4. Article II of the Convention states:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, *concerning a subject matter capable of settlement by arbitration.*

[...]

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

(emphasis added)

² The members of the Subcommittee and country reporters are listed at the end of this report. Lawyers from jurisdictions not already covered are welcome to volunteer for preparing a memorandum addressing the arbitrability exception of the Convention under their jurisdiction’s law. Any interested volunteer should contact the chairman of the Subcommittee at pascal.hollander@hvdb.com.

5. Article V (2) (a) of the Convention reads:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The *subject matter of the difference is not capable of settlement by arbitration under the law of that country;*

(emphasis added)

6. Arbitrability is therefore, as mentioned above, one of the limited grounds put forward by the Convention to refuse both recognition of arbitration agreements and to refuse recognition and enforcement of arbitral awards. The Convention does not, however, define the concept of arbitrability. Consequently, it is up to individual States to determine whether there are any – and if so which – domains they consider non-arbitrable and consequently reserved for the exclusive jurisdiction of their State courts. The importance and scope of the notion of arbitrability may therefore vary considerably between jurisdictions.

7. With its arbitrability project, the Subcommittee aims at getting a better understanding of the concept of arbitrability, its scope and its importance, through a comparison of different jurisdictions. The project aims at identifying relevant provisions of statutory law as well as court decisions whereby enforcing courts have considered issues of arbitrability in the framework of the Convention. While this project focuses predominantly on objective arbitrability (i.e. whether the subject matter is capable of settlement by arbitration), attention is also given to subjective arbitrability (i.e. capacity of a person to be party to an arbitration).³

8. The arbitrability project carried out by the Subcommittee is an on-going one: its ambition is to give the members of the IBA Arbitration Committee an overview of the arbitrability exception as applied in as many jurisdictions as possible. At present, more than 30 jurisdictions, spanning over five continents, are covered. All country reports are available on the website of the IBA Arbitration Committee.⁴

9. After setting out the scope of the research that was conducted by the Subcommittee (II), this report will outline the following issues:

- Definitions of the notion of arbitrability by State courts when applying the Convention (III);

³ In some jurisdictions, subjective non-arbitrability is considered as being addressed by a separate ground for refusal of enforcement, being Article V(1)(a) of the Convention, pursuant to which recognition and enforcement of an arbitral award may be refused if “[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity.” A review of Article V(1) of the Convention and of the several grounds for refusal of recognition and enforcement it sets out, is, however, beyond the limits of the current project, and is therefore not addressed in the country reports or in this General Report.

⁴ http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx

- Legal qualification of arbitrability as an issue of validity of the agreement, or an issue of jurisdiction (**IV**);
- The law applicable to the assessment of issues of arbitrability under Article II of the Convention (**V**);
- Substantive content of (non-) arbitrability (**VI**)

II. SCOPE OF THE RESEARCH

10. As indicated above, this report aims at getting a better understanding of the scope and contents of the notion of arbitrability under the Convention in various jurisdictions around the world. For this purpose, a questionnaire with five questions was submitted to country reporters of various jurisdictions.⁵

11. First, the term ‘arbitrability’, which is not defined in the Convention, appears to be defined differently across jurisdictions. Country reporters were therefore asked to explain how courts in their jurisdiction define the notion of ‘arbitrability’ when applying the Convention. In addition, they were requested to identify whether courts in their jurisdiction make a distinction in defining the notion of arbitrability for the purposes of Article II (1), II (3) and V (2) of the Convention. In this context, they were further requested to comment on whether the courts in their jurisdiction distinguish between ‘subjective arbitrability’ (i.e. capacity of a person to be party to an arbitration) and ‘objective arbitrability’ (i.e. capacity of a subject matter to be resolved by arbitration).

12. Next, country reporters were requested to comment on whether courts in their jurisdiction consider arbitrability to be an issue of validity of the arbitration agreement, or rather consider it to be an issue of jurisdiction of the arbitral tribunal.

13. Third, country reporters were invited to address the issue of which law the courts in their jurisdiction apply to assess the arbitrability or non-arbitrability of a dispute at the stage of recognizing and enforcing the arbitration agreement and referring (or not) the dispute to arbitration (Article II Convention). Again, reporters were requested to identify any differences in approach by courts in their respective jurisdictions depending on whether the issue relates to subjective or objective arbitrability.

14. The fourth part of the questionnaire seeks to investigate the substantive content of arbitrability. Country reporters were requested to look into statutory rules and court decisions in order to see whether a general standard for assessment of whether a dispute is arbitrable has been determined by the legislator or the courts in their respective jurisdictions. In addition, they were requested to identify categories of subject matters that are considered non-arbitrable under either statutory law, or by the courts.

⁵ The questionnaire is appended at the end of the General Report.

15. Finally, reporters were requested to append to their report a table of cases where arbitrability was addressed in the specific context of the Convention.

III. DEFINITION OF ARBITRABILITY

16. The first question is how State courts define arbitrability in the framework of the Convention. As indicated above, the Convention addresses the issue of arbitrability in both Articles II and V, without, however, defining it.

17. Article II (1) of the Convention requires members states to recognize arbitration agreements relating to “... *a subject matter capable of settlement by arbitration*” and refer the dispute to arbitration under Article II (3) “... *unless it finds that the said agreement is null and void, inoperative or incapable of being performed*”. Pursuant to Article V (2) (a) of the Convention, the enforcement of an arbitral award may be refused where “[t]he *subject matter of the difference is not capable of settlement by arbitration under the law of that country*”.

18. This section seeks to establish how courts in the jurisdictions covered by this report define the notion of arbitrability when applying the Convention.

19. As a general remark, to the extent that arbitrability is defined in national laws, courts appear to rely predominantly on such statutory definition, rather than providing a specific definition for the purpose of the Convention.⁶

20. As will be discussed under VI below, however, some jurisdictions do not have a general statutory standard on arbitrability to determine which subject matters are arbitrable. In such jurisdictions, State courts appear to have been more active in defining the notion of arbitrability. Courts in the United States, for example, use the term ‘arbitrability’ to refer to (i) whether the dispute falls within the scope of the parties’ arbitration agreement; (ii) whether the dispute concerns a matter that is capable of being resolved by arbitration; and (iii) whether the arbitration agreement is valid and enforceable.⁷

A. Distinctions in defining “arbitrability” when applying Article II (1), (3) and V (2) (a) of the Convention

21. While Articles II (1), (3) and V (2) (a) all concern arbitrability, there may be differences in the manner in which the notion of arbitrability in these provisions is applied, or in the scope of arbitrability as addressed in these provisions.

⁶ See e.g. Austria, para 4. See further also the discussion under VI below for the substantive content of these provisions.

⁷ USA, p. 2.

22. As a preliminary remark, it is worth noting that in many jurisdictions covered by this report, State courts appear to either not have addressed the notion of arbitrability in the specific contexts of Article II (1), (3) and V (2) (a) altogether,⁸ or to only have heard cases on arbitrability under one of these provisions, thus not allowing for any comparison.⁹

23. In many of the jurisdictions covered by this report where arbitrability has been addressed by courts under the Convention, courts do not appear to be making a distinction between the notion of “arbitrability” in Articles II (1), (3) and V (2) (a) of the Convention. In most of these jurisdictions, this question did not appear to have arisen specifically in case law. One notable exception is Italy, where the Italian Supreme Court addressed this issue specifically and held that arbitrability issues must be governed by the same law (and hence, presumably, the same standards) in both the context of recognition of the arbitration agreement (and thus of a denial of the State court’s jurisdiction) (Article II) and at the stage of recognition and enforcement of the arbitral award (Article V). According to the Italian Supreme Court, finding otherwise could lead to a situation in which an arbitration agreement is first upheld by applying a given foreign law to the question of arbitrability, and then the award originating from the same agreement could be denied recognition because it deals with a matter not capable of settlement by arbitration under Italian law as *lex fori*.¹⁰

24. Some courts do, however, distinguish, although the distinctions made and the reasons for such distinction appear to differ between jurisdictions.

25. One example is Finland, where differences in interpretation of arbitrability appear to exist between Article II (1) and (3) on the one hand and Article V (2) (a) on the other hand. Under the former, Finnish courts will look at the arbitrability of the subject matter under the law of the contract to determine the validity of the arbitration agreement. When applying Article V (2) (a), however, arbitrability is approached differently, as Finnish law does not consider the non-arbitrability of a subject matter to be a ground to deny recognition and enforcement of arbitral awards, unless it is simultaneously contrary to public policy.¹¹ A similar approach was reported for Lebanon, where Article 817 of the CCP does not list the non-arbitrability of a subject matter as a separate ground for refusal to enforce international or foreign arbitral awards, unless it also affects public policy. As Articles II and V of the Convention refer to national laws, however, Lebanese courts consider that no distinction between domestic and international public policy is necessary and will determine arbitrability by reference to domestic public policy.¹²

26. Egyptian courts distinguish between the notion of arbitrability in, on the one hand, Articles II (1) and V (2) (a) of the Convention and, on the other hand, Article II (3) of the Convention. Egyptian courts consider Article II (3) to be broader as it encompasses the nullity

⁸ Austria, para 3; Japan, para 2 ; Montenegro, p. 2; Paraguay, p. 1; Pakistan, Section 1; Portugal, p. 4; Serbia, Sections 1 and 3.

⁹ Uruguay, para 4.

¹⁰ Italy, para 8.

¹¹ Finland, Section 1(a).

¹² Lebanon, p. 4 -5.

of the arbitration agreement for reasons other than ‘*non-arbitrability*’.¹³ A similar approach was reported for courts in China.¹⁴

27. In the United States, courts have distinguished between Article II on the one hand, and Article V on the other. Reportedly, US courts have clearly affirmed that Article II, unlike Article V, does *not* contain an explicit or implicit public policy defense. US courts have thus narrowly interpreted “*null and void*” in Article II (3) to include only situations where (i) the arbitration agreement is subject to an internationally recognized defense such as duress, mistake, fraud or waiver, or (ii) it contravenes fundamental policies of the forum state.¹⁵

B. Distinction between objective and subjective arbitrability

28. In scholarly writings on international arbitration, a distinction is generally made between *objective arbitrability*, being the capacity of a subject matter to be resolved by arbitration, and *subjective arbitrability*, generally defined as the capacity of a person to be party to arbitration. The question is, however, whether State courts operate such a distinction when deciding on issues under Articles II and V of the Convention.

29. From the reports, it appears that in many jurisdictions, the concepts of what doctrine defines as objective and subjective arbitrability are governed by distinct statutory provisions. As a first remark, it appears that arbitrability is not defined along the same lines in all jurisdictions. In particular, the issue of subjective arbitrability does not always appear to be clearly defined, or is referred to differently (e.g. as capacity of the parties).¹⁶ Italian courts, for example, determine the notion of arbitrability by reference to the subject matter (i.e. as objective arbitrability) only.¹⁷ The same is the case for Serbia, where subjective arbitrability is discussed as part of capacity.¹⁸

30. In the vast majority of jurisdictions covered by this report, however, courts reportedly distinguish between objective and subjective arbitrability in some way.¹⁹ Nonetheless, other than in terms of applicable law (see V below),²⁰ courts appear to give limited attention to actually defining both notions. Rather, they appear to simply rely on and refer to the relevant statutory provisions, if any. Some country reporters have therefore highlighted that in their jurisdictions the terminological distinction between ‘objective’ and ‘subjective’ arbitrability appears to be mainly doctrinal, and that State courts give little attention to defining both notions separately, even if they do distinguish them in practice.²¹ In some of the reported jurisdictions, State courts appear to define both concepts in general terms as ‘arbitrability’

¹³ Egypt, Section 1(a).

¹⁴ P.R. China, Section 1.

¹⁵ USA, pp. 3.

¹⁶ See e.g. Greece, Section 1(b); Vietnam, para 15.

¹⁷ Italy, para 10 and 11.

¹⁸ Serbia, Section 2.

¹⁹ See e.g. Australia at 1, Austria, para 5; Canada, p. 3; P.R. China, Section 1; Finland, para 1(b); Egypt, Section 1(b); Serbia, Section 3.1.; UAE, para 12; Ukraine, para 2.

²⁰ See e.g. Poland, Section 1(b).

²¹ Romania, p. 2; Russia, Section 1(b).

only.²² In other jurisdictions, such as England, State courts deal with issues of subjective and objective arbitrability without, however, referring to these terms at all.²³ In France, State courts rarely define arbitrability as ‘objective’ or ‘subjective’.²⁴

31. Finally, it is worth noting that US courts, while construing both notions very narrowly, appear to make some specific distinctions between Articles II and V when dealing with objective and subjective arbitrability. When addressing the issue of subjective arbitrability, US courts broadly refer to Article II (3) of the Convention, and more specifically to the ‘*null and void*’ language. The subjective arbitrability defenses include issues of non-signatories to the arbitration agreement, unconscionability, and waiver of arbitration. Objective arbitrability, as applied by US courts, concerns generally Articles II (1) and V (2) (a) – although sometimes also Article II (3) – and refers to the limited instances in which the subject matter of the difference is not capable of settlement by arbitration.²⁵

IV. ARBITRABILITY AS CONDITION FOR VALIDITY OR REQUIREMENT FOR THE JURISDICTION OF THE ARBITRAL TRIBUNAL

32. Arbitrability may play a role at different stages of the arbitration proceedings, including before the arbitral tribunal. Depending on the stage, arbitrability may come up as an issue of validity of the arbitration agreement or jurisdiction of the arbitral tribunal. In the framework of the Convention, the issue of arbitrability may arise at two stages:

- When a court is seized despite the existence of an arbitration agreement (Article II);
- When recognition and enforcement of an arbitral award is requested at a place other than the seat of arbitration (Article V).

33. The question is therefore how State courts qualify issues of arbitrability under the Convention. Generally, three different approaches can be discerned.

34. First, in some jurisdictions covered by this report,²⁶ arbitrability is considered as a condition of validity of the arbitration agreement, rather than a requirement for the jurisdiction of the arbitral tribunal. In those jurisdictions, State courts will in principle only give effect to the arbitration clause if the dispute involves an arbitrable subject matter.

²² See Albania, Section IV.C; Germany, Section 1(b).

²³ England, para 19 et seq.

²⁴ France, para 12.

²⁵ USA, p. 4.

²⁶ Austria, para 13 et seq.; Belgium, Section 2; Germany, Section 2; P.R. China, Section 1; Egypt, Section 2; Italy, para 12; Japan, para 21; Lebanon, p. 7; Mexico, p. 2; Serbia, Section 3; Sweden, para 7; Ukraine, para 1.

35. Second, in other jurisdictions, however, courts generally consider arbitrability as a requirement for jurisdiction of the arbitral tribunal.²⁷ In these jurisdictions, the fact that a dispute between two parties is not arbitrable does not in principle affect the validity of the arbitration agreement.²⁸ Some exceptions, however, apply: in Canada, for example, arbitration agreements involving consumers may lead to invalidity.²⁹ Moreover, it should be noted that in some jurisdictions, priority is given to the arbitral tribunal to decide on competence-competence.³⁰

36. Finally, in other jurisdictions, depending on the circumstances, the issue of arbitrability can be considered to be an issue of jurisdiction of the arbitral tribunal or of validity of the arbitration agreement.³¹ Sometimes the validity of arbitration agreements and jurisdiction of arbitral tribunals may also intertwine: this is notably the case where the subject matter of the arbitration agreement would be contrary to international public policy.³²

V. THE LAW APPLICABLE TO ISSUES OF ARBITRABILITY UNDER ARTICLE II OF THE CONVENTION

37. Article V (2) (a) determines that the court where recognition of enforcement is sought may refuse to enforce the arbitral award, where the subject matter of the dispute is not arbitrable “*under the laws of that country*”. The enforcing court will therefore rely on its own law, the so-called *lex fori*, when assessing whether awards for which recognition and enforcement is sought under the Convention deal with non-arbitrable issues.

38. Article II of the Convention, however, does not specify by reference to which law or laws a court will have to assess the arbitrability of the dispute that has arisen between the Parties. In principle, the assessment of whether a dispute is arbitrable at the stage of recognition of the arbitration agreement and reference to arbitration under Article II of Convention can, therefore, be carried out by reference to various laws, including the *lex fori* (law of the deciding court), the law of the place of arbitration or the *lex contractus* (law of the contract). Country reporters were therefore asked to identify the law applied by the courts in their jurisdiction when applying Article II of the Convention, both for issues of objective and subjective arbitrability.

A. Objective arbitrability

39. In most jurisdictions covered by the report, there appears to be a clear trend for courts to rely on their own law (i.e. the *lex fori*) to assess a dispute’s objective arbitrability at the stage of recognition and enforcement of the arbitration agreement (thus when a State court

²⁷ Albania, section IV.B; Argentina, para 10; Australia, Section 2; Canada, p. 1; Finland, Section 2; France, para 14; Poland, para 2; Uruguay, para 13.

²⁸ Australia, Section 2.

²⁹ Canada, p. 1.

³⁰ Canada, p. 21; France, para 19;

³¹ England, para 23-25; Greece, Section 2 ; Portugal, p. 6 ; Romania, p. 2-3; UAE, para 16 ; USA, p. 5; Vietnam, para 16 *et seq.*

³² France, para 15.

which has been seized in spite of the existence of an arbitration agreement must decide whether or not it will refer the matter to arbitration).³³

40. In this connection, it is worth further noting that some jurisdictions appear to adopt a higher threshold when assessing the non-arbitrability of certain subject matters. In France, for example, it is considered that substantive principles of *international* arbitration law govern the validity of an arbitration agreement. Hence, such agreements are generally considered to be *prima facie* valid, unless there is a lack of valid consent or French international public policy is violated.³⁴ A comparable approach appears to be adopted by some other jurisdictions, such as England and the United States, where validity of the arbitration agreement is measured by reference to *internationally recognised defenses* (duress, mistake, fraud or waiver) or fundamental policies at the *lex fori*.³⁵

41. The reliance on the *lex fori* in applying Article II of the Convention, is, however, not universal.

42. In some of the jurisdictions covered by this report, courts tend to look at the law of the contract (*lex contractus*) to determine issues of arbitrability of subject matter when deciding on the recognition of arbitration agreements, possibly together with the *lex fori*. Australian courts, for example, rely on the law of the contract to determine whether the dispute that has arisen is arbitrable. Absent a choice by the parties, they rely on Australian law as *lex fori*.³⁶ A similar approach appears to be followed in P.R. China, where courts will apply the law applicable to the contract. Absent such a choice, it is the law of the chosen arbitration institution or the law of the place of arbitration. Only if neither of those choices have been made by the parties, will Chinese courts apply the *lex fori*.³⁷ In Poland, courts tend to look first at the law of the contract, but appear to also take into account public policy of the *lex fori*.³⁸ Similarly, Serbian courts cumulatively apply the *lex fori* and law governing the arbitration agreement.³⁹ In some jurisdictions, the discussion whether the *lex fori* or *lex contractus* should be applied is not yet settled.⁴⁰

43. A particular case is Belgium, where the Supreme Court held that the arbitrability of disputes arising out of exclusive distribution or of commercial agency agreements must be determined on the basis of the *lex fori*. Belgian courts may, however, assess arbitrability pursuant to the *lex contractus*, where Belgian law (as *lex fori*) does not prevent parties from submitting the dispute to the laws of another jurisdiction.⁴¹

³³ See e.g. Albania, Section IV.C.; Argentina, para 15; France, para 19; Italy, paras 6-9 and 12-14; Paraguay, Section 3(a); Romania, p. 3; Russia, Section 3(a); Ukraine, para 2 ; Uruguay, para 16 ; USA, p. 6; Vietnam, para 19; Portugal, p. 8.

³⁴ France, para 2.

³⁵ England, para 26; USA, p. 3.

³⁶ Australia, Section 3(b).

³⁷ P.R. China, Section 3.

³⁸ Poland, Section 3(a).

³⁹ Serbia, Section 4.

⁴⁰ Austria, para 19 et seq.; Greece, Section 3(a) ; Japan, para 22 ; UAE, para 18.

⁴¹ Belgium, para 3(a).

44. Finally, it is worth noting that some jurisdictions apply the law of the place of arbitration (*lex loci arbitri*). Canadian courts, for example, will generally look at the law of the seat of arbitration, as law chosen by the parties, in order to determine whether a subject matter is capable of being arbitrated, except when the subject matter is contrary to Canada’s public policy, in which case the *lex fori* takes precedence.⁴² A similar approach is reported in Egypt, where courts look at the law of the place of arbitration to assess the validity of the arbitration agreement, including whether the subject matter of a dispute is capable of being settled by arbitration.⁴³

B. Differences in approach in the assessment of subjective and objective arbitrability

45. In many jurisdictions covered by this report, however, courts adopt a different approach in terms of applicable law when assessing issues of subjective arbitrability at the stage of recognition of arbitration agreements under Article II of the Convention. Three approaches emerge from the report.

46. Courts in most reported jurisdictions deviate, when assessing subjective arbitrability, from the approach of applying the *lex fori* or *lex contractus* (as is prevalent when assessing objective arbitrability), and look at the “personal law” applicable to the Parties, i.e. to the law applicable to them, possibly after application of the conflict of law rules of the *lex fori*.⁴⁴ Exceptions are sometimes made for specific categories, such as consumers.⁴⁵

47. This approach is not universal, though, and Ukrainian courts, for instance, while also distinguishing the law applicable to objective and to subjective arbitrability, apply the *lex arbitri* to determine issues of subjective arbitrability.⁴⁶

48. Finally, some courts do not distinguish between subjective arbitrability and objective arbitrability.⁴⁷ Interestingly, courts in France initially made that distinction, but no longer follow a differentiated approach and now apply the *lex fori* also to issues of subjective arbitrability.⁴⁸

⁴² Canada, pp. 8 and 9.

⁴³ Egypt, Section 3(a).

⁴⁴ Austria, para 26 et seq. ; P.R. China, Section 3; Finland, Section 3(b); Germany, Section 3(b); Greece, Section 3(b); Egypt, Section 3(b); Japan, para 24 and 25; Poland, Sections 3(a) and (b); Portugal, p. 9; Russia, Section 3(b); Serbia, Section 5.1.; Slovakia, p. 7; Vietnam, para 21

⁴⁵ Austria, para 30 (this is the view taken by the courts with regard to arbitrations seated in Austria).

⁴⁶ Ukraine, p. 1 para 2.

⁴⁷ See e.g. Paraguay, Section 3(b); USA, p. 6.

⁴⁸ France, para 22.

VI. SUBSTANTIVE CONTENT OF ARBITRABILITY

49. As discussed above, the Convention does not provide a definition of arbitrability. In the same vein, the Convention also leaves it to the Contracting States whether to set general standards to assess arbitrability and to determine which subject matters are reserved for State courts and under what conditions. Country reporters were therefore requested to identify whether general standards are established by statutory law or by the courts, and to identify non-arbitrable subject matters. Both issues will be dealt with in turn below.

A. General standards for the assessment of arbitrability

50. In the vast majority of jurisdictions covered by this report, provisions of the national arbitration law set a general standard to determine which subject matters are arbitrable. As can be seen from the list below, such provision is generally contained in the law on arbitration or the local code of civil procedure. The question whether such general standard is met in a given case, is left to the assessment of the courts.

51. General standards can, for example, be found in the following jurisdictions and provisions:

Country	Provision
Argentina	Article 1649 of the Civil and Commercial Code of Procedure
Austria	Section 582 ZPO
Belgium	Article 1676, §1 B.J.C
Canada	Section 1(6) of the British Columbia ICA Act
Columbia	Article 1 of Arbitration Statute (Law 1536)
P.R. China	Article 3 of the Arbitration Law of China
Egypt	Article 11 of the Egyptian Arbitration Law No. 27
Finland	Section 2 Finnish Arbitration Act
France	Articles 2059 and 2060 of the Civil Code
Germany	Section 1030 ZPO
Italy	Article 806(1) of the Code of Civil Procedure
Greece	Article 867 of the Code of Civil Procedure / Article 1.4 of Law 2735/1999 on International Arbitration
Japan	Article 13(1) Japanese Arbitration Act
Lebanon	Article 762 CCP
Mexico	Article 615 of the Code of Civil Procedure for Mexico City
Montenegro	Article 3(2) Montenegro Arbitration Act
Paraguay	Article 2 of Arbitration and Mediation Law Nr. 1879
Poland	Article 1157 PCCP
Portugal	Articles 1(1) and (2) of the Portuguese Arbitration Law
Romania	Article 1.111 New Code of Civil Procedure
Russia	Article 1(3) of the 2016 ICA Law
Serbia	Article 5 Serbian Arbitration Act
Slovakia	Section 1(2) of the Slovakian Arbitration Act
Sweden	Section 1(1) Swedish Arbitration Act
UAE	Article 203(4) of the UAE Civil Procedural Law
Uruguay	Article 476 Commercial Code of Procedure
Vietnam	Article 2 Law on Commercial Arbitration

52. In some, mainly common law, jurisdictions covered by this report, however, the arbitration laws do not put forward a direct general standard of arbitrability.⁴⁹ In these jurisdictions, the standards for arbitrability appear to be established by the courts through precedent. In England, for example, courts reportedly follow the general common law approach whereby the question of arbitrability is predominantly assessed by reference to custom and the body of judicial precedent developed by the courts. English courts have construed arbitrability broadly.⁵⁰ A similar approach appears to exist in the United States, where the Supreme Court has repeatedly reported a strong federal policy in favour of arbitration, hence reducing the number of non-arbitrable matters.⁵¹

53. Mexico also does not have a statutory provision setting a general standard. Issues of arbitrability can, however, be found spread out over various specific laws.⁵² Mexican courts have established a general criterion allowing arbitration of matters involving waivable or disposable rights.⁵³

54. From the statutory provisions and case law referred to above, it appears that the general standards can generally be divided into the following broad categories:

- Claims involving an economic interest (sometimes also referred to as patrimonial or pecuniary matters);⁵⁴
- Claims relating to matters of which the parties have the free disposal;⁵⁵
- Claims which may be settled by agreement;⁵⁶
- Commercial disputes.⁵⁷

The difference between “*matters which may be settled*” and “*rights of which the parties may dispose*” appears to be largely a question of semantics. In Italy, for example, the question of what are disposable rights is debatable, and generally answered by reference to rights that may be the object of settlement.⁵⁸

55. In some jurisdictions, the general standards are a combination of several of the broad categories above. These include for example:

- Claims involving an economic interest (sometimes also referred to as patrimonial or pecuniary matters) as well as claims not involving economic interests, provided that

⁴⁹ Australia, para 4(a); England, para 36-37; Pakistan, Section 4(a). Mexico.

⁵⁰ England, para 34-35.

⁵¹ USA, p.6.

⁵² Mexico, p. 3.

⁵³ Mexico, p.1.

⁵⁴ Paraguay, Section 4(b).

⁵⁵ Colombia, para 2; France, para 23; Greece, Section 4(a) ; Italy, para 15.

⁵⁶ Egypt, Section 4(b); Finland, Section 4(a); Japan, para 5; Slovakia, p. 5; Sweden, para. 2; UAE, para 5; Uruguay, para 19.

⁵⁷ Canada, p. 10; Vietnam, p. 3.

⁵⁸ Italy, para 16.

the parties to the dispute are entitled to enter into a settlement agreement on the subject matter;⁵⁹

- Claims involving an economic interest (sometimes also referred to as patrimonial or pecuniary matters), of which the parties have the free disposal;⁶⁰
- Civil relationships in the course of carrying foreign trade and other types of international economic relations.⁶¹

56. General standards are sometimes further qualified, for example as follows:

- Including declaratory relief;⁶²
- Unless reserved exclusively to state courts by the *lex loci arbitri*;⁶³
- Unless they involve or relate to public order;⁶⁴
- As long as there is no definite judicial ruling on the issue.⁶⁵

57. Finally, a notable example is the recent Montenegro Arbitration Act, under which any matter is arbitrable unless otherwise prescribed in another statute.⁶⁶

B. Categories of disputes that are held to be non-arbitrable under statutory or case law

58. In addition to a general standard of which types of disputes may be arbitrated, most jurisdictions have also defined specific subject matters which are reserved for the state courts. Generally, two approaches can be seen in such determination.

59. A first category concerns general exclusions. As discussed in Section A above, most jurisdictions put forward a general standard of arbitrability. In most cases, such general standard also imposes a general limitation: for example, many jurisdictions exclude subject matters “*on which parties cannot reach a settlement agreement*” or subject matters of which parties “*cannot dispose*”. As a result of such exclusions, criminal matters are for example not arbitrable in any of the reported countries.⁶⁷

60. In addition, many jurisdictions also provide for specific exclusions: such exclusions can be found in the arbitration law and/or in specific laws. Moreover, they may be phrased

⁵⁹ Austria, para 38 and para 64 et seq.; Germany, para 4(a); Belgium, para 4(a); Poland, Section 4(a); Portugal, p. 3.

⁶⁰ Romania, p 5; Serbia, Section 5.1.

⁶¹ Russia, Section 4(b).

⁶² Slovakia, p. 5.

⁶³ Romania, p 5.

⁶⁴ Argentina, para 20.

⁶⁵ Paraguay, Section 4(b).

⁶⁶ Montenegro, pp 1 and 5.

⁶⁷ This is not necessarily the case for the civil consequences of criminal matters which, in some jurisdictions, may be submitted to arbitration (see e.g. England, para. 16-18).

negatively (i.e. as an exclusion of a certain subject matter from arbitration), or positively (i.e. by reserving specific subject matters exclusively for the jurisdiction of State courts).

61. From the various reports received, a number of categories were reported to be non-arbitrable or subject to certain limitations, which will be listed below. While this list appears at first glance impressively wide in scope, it does not purport to give uniform or global trends, as arbitrability remains broadly defined, as seen above, by provisions of the *lex fori* which may vary from one country to another.

The following categories of disputes were reported in one or several of the covered jurisdictions as being non-arbitrable:

- Administrative law issues;⁶⁸
- Antitrust matters;⁶⁹
- Bankruptcy and insolvency;⁷⁰
- Carriage of goods by sea/Transportation;⁷¹
- Civil status and legal capacity;⁷²
- Commercial agency agreements;⁷³
- Distributorship agreements;⁷⁴
- Disputes with consumers;⁷⁵
- Intra-company and shareholders' disputes;⁷⁶
- Employment/Labour law;^{77/78}
- Environmental damage disputes;⁷⁹
- Family law and status of persons;⁸⁰
- Financial market regulations;⁸¹
- Real estate/Property law⁸²

⁶⁸ Austria, para. 42 ; Colombia, para 5; Finland, Section 4(c); Egypt, Section 4(c) ; Mexico ; P.R. China, Section 4 ; Paraguay, Section 4(b).

⁶⁹ Austria, para 62; Belgium, para 4(c); Colombia, para 5; France, para. 43 ; Italy, para 17 ; Japan, para 9 ; Slovakia, p. 9.

⁷⁰ Austria, para 56 ; Belgium, para 4(c) ; Egypt, Section 4(c); France, para 30; Italy, para 18 ; Lebanon, p 9 ; Montenegro, p. 5 ; Portugal, p. 11 ; Romania, p. 6 ; Russia, Section 4(c) ; Serbia, Section 5.2 ; Slovakia, p. 9 ; UAE, para 20; England, para 41; Ukraine, p. 4;

⁷¹ Australia, Section 4(c); Vietnam, p. 5 footnote 8.

⁷² Argentina, para 21; Mexico.

⁷³ Belgium, para 4(c) ; Colombia, para 5; Italy, para 22 ; Lebanon, p 9; Paraguay, Section 4(b); UAE, para 20

⁷⁴ Belgium, para 4(c), where arbitrability of disputes about termination of commercial distribution agreements depends on whether the arbitrators are bound to apply substantive Belgian law on the merits of the dispute; Paraguay, Section 4(b).

⁷⁵ Argentina, para 21; Austria para 51 ; Belgium, para 4(c); Canada, p. 7; France, para 55 ; Greece, Section 4(c); Japan, para 6-7; Paraguay, Section 4(b); Poland, Sections 4(a) and (c) ; Slovakia, p. 9.

⁷⁶ Colombia, para 4; Italy, para 17; Japan, para 9; Montenegro, p. 6; Romania, p. 6 ; Russia, Section 4(c) ; Ukraine, p. 4.

⁷⁷ Argentina, para 21; Austria, para 54; Belgium, para 4(c) ; England, para 42 ; Egypt, Section 4(c); France, para. 54; Germany, para 4(c); Greece, Section 4(c); Italy, para 18 and 22; Japan, para 6-8; Lebanon, p 9; Poland, Sections 4(a) and (c); Russia, Section 4(c); Slovakia, p. 9; UAE, para 20; Uruguay, para 22.

⁷⁸ Notable exception is Portugal, which provides for compulsory arbitration in relation to certain labour related matters (see Portugal, p. 10).

⁷⁹ Russia, 4(c).

⁸⁰ Argentina, para 21; Austria, para. 68 ; P.R. China, Section 4 ; Colombia, para 5; Egypt, Section 4(c); England, para 42 ; Finland, Section 4(a); France, para 29; Germany, para 4(c); Greece, Section 4(c); Italy, para 18; Japan, para 5 and 9; Lebanon, p 8; Mexico; Paraguay, Section 4(c); Poland, Sections 4(a) and (c); Russia, Section 4(c) ; Sweden, para 13; UAE, para 20 ; Vietnam, p. 5 footnote 8.

⁸¹ Italy, para 17; Japan, para 9.

- Residential leases;⁸³
- Insurance;⁸⁴
- Intellectual property rights;^{85/86}
- Privatization disputes;⁸⁷
- Public procurement disputes;⁸⁸
- Standard form contracts;⁸⁹
- Taxation.⁹⁰

62. Two important observations should be made regarding the above list.

63. First, many reporters highlighted that courts in their jurisdiction generally adopt a pro-arbitration approach. In the discussion on arbitrability, this appears to manifest itself through the adoption of new laws abolishing prior restrictions on arbitrability and new, wider, standards of matters that can be decided through arbitration.⁹¹

64. Moreover, in many jurisdictions, the subject matters listed above are not excluded from arbitration altogether. Rather, arbitration of such subject matters may be restricted in various ways. Example of such restrictions include:

- Disputes that are not arbitrable, unless arbitration is seated in the country in question;⁹²
- Disputes that are not arbitrable, unless the arbitral tribunal is bound to apply the law of that jurisdiction or another law that offers similar protection to the presumably weaker party;⁹³
- Disputes in relation to which no arbitration agreement can be concluded, until after the dispute has arisen;⁹⁴
- Disputes that are arbitrable, unless certain relief is sought that may not be ordered by the arbitral tribunal;⁹⁵
- Disputes that are not arbitrable as such, but the economic/financial consequences of which may be arbitrated.⁹⁶

⁸² Egypt, Section 4(c); Montenegro, p. 6; Russia, Section 4(c) ; Serbia, Section 5.2.; Slovakia, p. 8; Ukraine, p. 4

⁸³ Austria, para 70; Germany, para 4(c).

⁸⁴ Australia, Section 4(c); Belgium, para 4(c).

⁸⁵ Austria, para 58, Belgium, para 4(c); Germany, para 4(c); France, para. 48 et seq. ; Italy, para 17 footnote 14; Japan, para 9; Montenegro, p. 7 ; Russia, Section 4(c) ; Serbia, Section 5.2; Slovakia, p. 9 ; Sweden, para 13 ; Ukraine, p. 4

⁸⁶ Again, Portugal deserves to be mentioned as a notable exception: disputes arising out of certain intellectual property rights relating to reference medicinal products or to generic medicinal products are subject to compulsory arbitration (see Portugal, p. 10).

⁸⁷ Russia, Section 4(c) ; Serbia, Section 5.2.

⁸⁸ Russia, Section 4(c) ; Ukraine, p. 5.

⁸⁹ Argentina, para 21.

⁹⁰ France, para 36 *et seq.*

⁹¹ See e.g. France, para 25-26.

⁹² Australia, Section 4(c).

⁹³ Belgium, p. 4, for disputes over the termination of distribution agreements or over commercial agency agreements.

⁹⁴ Australia, Section 4(c).

⁹⁵ Australia, Section 4(c).

⁹⁶ See e.g. France, para 29; Lebanon, p 9; Mexico (contracts entered into under the new oil and gas regime).

- Disputes that are arbitrable, unless they would be against public policy in the enforcing State.⁹⁷

VII. CONCLUSION

65. While restrictions on the ability to arbitrate appear to be reducing, it remains important to give sufficient attention to issues of arbitrability in the framework of the Convention. Both at the outset of the arbitration, where a party may initiate court proceedings despite an arbitration clause, and at the stage of the enforcement of the award, the non-arbitrability of the dispute under one of the laws relevant to the dispute may lead to non-recognition of the arbitration agreement or non-enforcement of the arbitral award.

66. Already from a comparison of the limited number of jurisdictions included in this report, it is clear that different laws may be of relevance in different jurisdictions, and that important differences in terms of arbitrable matters exist between jurisdictions. While this is often a very difficult exercise, parties will wish to be mindful when drafting arbitration agreements and may wish to try and anticipate problems by attempting to envisage which types of disputes may arise out of their agreement, and subsequently verify whether such disputes could give rise to issues of arbitrability under the law of the contract, the law of the seat and (if known) the law of (likely) enforcement. In this connection, the general standards and non-exhaustive list of arbitrable and non-arbitrable matters in this report may give general guidance.

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⁹⁷ See e.g. England, para 40.

APPENDIX 1: Country Reporters – September 2016

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* Member of the IBA Subcommittee on Recognition and Enforcement of Awards

APPENDIX 2: Arbitrability Questionnaire

1. How do courts in your jurisdiction define the notion of ‘arbitrability’ when applying the New York Convention?
 - (a) Do they make a distinction in defining the notion for the purposes of Article II (1) of the New York Convention (“... *a subject matter capable of settlement by arbitration*”), of Article II (3) (“... *unless it finds that the said agreement null and void, inoperative or incapable of being performed*”) and of Article V (2) (a) (“*The subject matter of the difference is not capable of settlement by arbitration under the law of that country*”)?
 - (b) Do they make a distinction between ‘subjective arbitrability’ (capacity of a person to be party to an arbitration) and ‘objective arbitrability’ (capacity of a subject matter to be resolved by arbitration)?
2. Do the courts in your jurisdiction consider that arbitrability is a condition of validity of the arbitration agreement, or rather a requirement for the jurisdiction of the arbitral tribunal?
3. Applicable law
 - (a) Which law do the courts in your jurisdiction apply to assess the arbitrability or non-arbitrability of a dispute at the stage of recognizing and enforcing the arbitration agreement and referring (or not) the dispute to arbitration (Article II NY Convention)? The *lex fori* (law of the deciding court)? The law of the place of arbitration? The *lex contractus*? Another law?
 - (b) Is there a difference of approach when assessing subjective and objective arbitrability?
4. Substantive content of arbitrability/non-arbitrability
 - (a) In your jurisdiction, does statutory or case law set a general standard for assessing whether a dispute is arbitrable or not?
 - (b) If there is a statutory source for arbitrability in your jurisdiction, please indicate it below (if not, indicate “non-applicable”):
 - (c) Which disputes are held to be non-arbitrable under the statutory or case law of your jurisdiction?
5. Table of cases

Please append to the report a table of cases where arbitrability was addressed in the specific context of the New York Convention.