# ON ARBITRABILITY IN COMPARATIVE ARBITRATION - AN OUTLINE

*Professor emeritus Krešimir Sajko* [*]

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*The objective arbitrability, which determines the range of arbitrable disputes, is set up by mandatory substantive, material rules of private international law. The comparison of different national arbitration laws shows that, mutatis mutandis, the mostly mentioned arbitrability is extended not only to pecuniary claims but also to non-pecuniary claims if parties are capable of concluding a settlement on the matter in dispute.*

*The critical issue in international arbitration, which may arise at different stages of arbitral and court proceedings, is to determine the applicable law that governs such arbitrability. The author, upon analyses of selected national laws, case law and the New York Convention, concludes that both arbitral tribunal and national courts, have to determine objective arbitrability according to the rules of lex fori.*

*Key words: international arbitration; objective arbitrability; mandatory substantive rules on arbitrability; applicable law for arbitrability; lex fori as applicable law for objective arbitrability*

## 1. INTRODUCTION AND GENERAL ISSUES

Both *subjective* and *objective* arbitrability are conditions of the validity of the arbitration agreement. Our analysis is focused only on the *objective* arbitrability which determines the range of arbitrable disputes, *i.e.,* determines generally which disputes can be submitted to arbitration, including disputes on intellectual property rights. Arbitrability restricts the autonomy of the parties. In the Swiss case law, arbitrability is defined as a quality of the subject of the dispute,

[*] Profesor emeritus Krešimir Sajko, Professor of the Faculty of Law of the University of Zagreb, Trg maršala Tita 14, Zagreb

*une condition de validité de la convention d' arbitrage*.[1] This concept has to be distinguished from the scope of the arbitration agreement, *i.e.,* from the question of which disputes fall within the terms of particular arbitration agreements.

In the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter: Model Law) there is neither a definition nor a provision on arbitrability, as the drafters could not reach consensus. However, Article 1(5) of the Model Law permits each implementing state to exclude from its scope of application all disputes which are not, in that state, capable of being submitted to arbitration, or are arbitrable only according to provisions other than those of the Model Law. Thus, it is up to the national arbitration laws to set criteria for arbitrability of disputes.

In comparative arbitration law there are different approaches to determining arbitrability. Most often, they directly consider the characteristics of claims, an approach which could be labelled as arbitrability *ratione materiae.* In addition, arbitrability limits are sometimes set by considering whether a court or administrative body has exclusive jurisdiction over a matter - arbitrability *ratione jurisdictionis.* If a law provides for exclusive jurisdiction over certain kinds of disputes, they are not arbitrable.

According to some modern laws, arbitrability is extended to all pecuniary claims (*cause de nature patrimoniale; vermögensrechtlicher Anspruch; pretesa patrimoniale) - e.g.,* Article 177(1) of the Swiss Statute on PIL, Article 1030(1) of the German ZPO and Article 582(1) of the Austrian Code on Civil Procedure. According to the last two mentioned laws, non-pecuniary claims are arbitrable as well, if parties are capable of concluding a settlement upon the matter in dispute. These laws are an example of how a general tendency in both statutory and case law can enlarge the range of arbitrable disputes in such a manner.

Returning to Article 177(1) of the Swiss Statute on PIL, it is a widely accepted view that both its rules regarding probate proceedings and inheritance litigation on immovable property, immovable property disputes and consumer contracts, and some provisions of the Swiss Civil Code providing mandatory *fora* are not binding on the question of arbitrability.[2]

Other legislation, case law, and commentary provide variations on the criteria for arbitrability. Matters considered arbitrable include, under Chinese law,

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1 Decision of the Swiss Federal Court of 23 June 1992 - DFT 118 II 353 *ad* 3a.

2 More about it, Briner, in: Berty(ed.) International Arbitration in Switzerland, 320 *et seq.* (2000).

contractual disputes and other disputes over rights and interests in property;[3] under Bulgarian law, civil property disputes;[4] under Russian law, disputes arising from contractual and other civil-law relations in foreign trade and other types of international economic relationships;[5] and under Spanish law, disputes relating to matters within free disposition (*libre disposition*) of the parties.[6] Swedish and Hungarian law provide that matters in respect of which the parties may reach a settlement are arbitrable;[7] Croatian law provides that matters regarding rights of which parties may freely dispose are arbitrable[8]; arbitrable disputes include not only disputes regarding pecuniary claims, but also those non-pecuniary claims in respect of which parties may reach a settlement (*Vergleich)*, *i.e*., conclude such a private law contract defined by the law governing such a contract. In Croatian law, it is governed by Articles 150 *et seq.* of the 2005 Croatian Law on Obligation. In Article 1020(3) of the Dutch Arbitration Law, it is provided that the arbitration agreement shall not serve to determine the legal consequences which parties cannot freely dispose of.

Some commentators have expressed the opinion that the formulations 'rights of which parties may freely dispose' and 'claims in respect of which parties may reach a settlement' are synonymous.'[9] I am also of this opinion. However, there is a difference between the criterion of 'the pecuniary nature of the dispute' and that of 'the possibility of free disposition of a right.' The former is a mandatory and well-defined substantive rule that avoids the difficulties of a conflict of law approach, whereas the latter determines arbitrability by applying the *lex causae*, *i.e.* the law governing the rights *in casu.* Expressed otherwise, the latter criterion would presuppose a conflict of law solution, since the definition

3 *See* Article 2 the Chinese Arbitration Law of 1994. In this Law there are specific provision on disputes which may not be arbitrated; these are disputes on the status of physical persons - marital, adoption, guardianship, support and succesion and administrative diputes (Article 3).

4 Article 1(2) of the Bulgarian Law on International Commercial Arbitration.

5 Article 1(2) of the Russian Arbitration Act.

6 Article 2(1) of the Spanish Law on Arbitration.

7 Article 1 of the Swedish Arbitration Act, Article 4 of the Hungarian Law on Arbitration.

8 Article 3(1) of the Croatian Arbitration Act.

9 For such views in comparative law, *compare*, Triva/Uzelac, Hrvatsko arbitražno pravo (Croatian Arbitration Law), 18 *et seq.* (2007); Sajko, Međunarodno privatno pravo (Private International Law), 306 *et seq* (5th ed.2009).

of a legal relationship submitted to arbitration requires an examination of the substantive law applicable to it.[10]

There are provisions in several arbitration laws on the exclusive jurisdiction of courts and/or administrative authorities as an obstacle to arbitrability. Pursuant to Article 5(1) of the Serbian Arbitration Law, pecuniary claims cannot be settled by arbitration if they are submitted to the exclusive courts jurisdiction, and Article 1030(2) and (3) of the German ZPO contains an exception to the general principle of arbitrability for matters over which a court has exclusive jurisdiction, such as disputes regarding leases for residential accommodation and employment contracts. Article 4 of the Hungarian law also contains an explicit exception to arbitrability for matters over which a court has exclusive jurisdiction. Such rules preserve a state monopoly over resolving some specific types of disputes.

According to Article 3(2) of the Croatian Arbitration Act, exclusive Croatian court jurisdiction is an obstacle for arbitrability only for arbitration that takes place in a foreign country,[11] and has no importance in determining (2009) the arbitrability of the same types of disputes when the arbitration takes place in Croatia. Such a limitation on arbitrability cannot be productive, and its aim - to hinder arbitration abroad - cannot always be successfully sanctioned. Let us illustrate this assertion by considering the following hypothetical case. The parties, a Croatian company and a Belgium company, have concluded, under the Vienna Rules, an arbitration agreement on settlement of disputes arising from a contract regarding immovable property in Croatia; the designated location of arbitration is Vienna. The arbitral proceedings have been terminated by the rendering of the award. If recognition and enforcement of such an award were to be sought in Germany, it would be granted under conditions set in the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards - furthermore: the New York Convention (Article 1061 of the German ZPO). With regard to the arbitrability issue, Article V(2)(a) of the New York Convention provides the application of *lex fori;* thus, *in casu* German law would be applicable.[12] In the same case, the above-mentioned Croatian

[10] *Compare*, Podret/Besson, Comparative Law of International Arbitration, n.332 *et seq.* (2nd ed. 2007)*; see* also Swiss Federal Court, June 23, 1992 - ATF 118 II, 353 *et seq.*; English translation, Yearbook Comm. Arb'n, XX, 766 *et seq.*(1995).

[11] For more about this issue, see Sajko, Das neue kroatische Recht der Schiedsgerichtsbarkeit, in: Razprawy pravnicze Pazdan (Festschrift Pazdan), 487 *et seq.*(2005).

[12] Of course, the *lex fori* for determining of the dispute arbitrability would be applied in all member states of the New York Convention when recognition and enforcement of the mentioned Austrian arbitral award would be sought there.

rule on arbitrability would be applied, also in accordance with the cited rule of the above-mentioned Convention, only if the recognition and enforcement of that award were to be sought in Croatia.

Under Article 1(2)(d) of the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters No. 44/2001 arbitration is outside the scope of this Community instrument. However, as in proceedings which are, *i.a.,* concerned with registration or validity of patents, trade marks, design or other similar rights required to be deposited or registered, Article 22(4) of that Regulation provides for exclusive jurisdiction of the courts of the Member state in which the deposit or registration has been applied for, that Article's impact on arbitrability has to be examined, *i.e.,* whether Article 22 (4) constitutes a barrier to arbitrability in such cases. [13] Without entering into all details on the scope of application of this rule, let me give a brief overview of these issues.

The exclusive jurisdiction embraces disputes regarding the proceedings on registration or validity of patents, trade marks, designs, or similar rights required to be registered or deposited.[14] By contrast, disputes regarding intellectual property rights arising from contracts are not within this exclusive jurisdiction.[15] Neither are claims for infringement of such rights;[16] claims on granting, revocation or remuneration of compulsory licenses; infringement of rights where the defendant raises invalidity as a defence; or claims for a declaration on non-infringement where the author alleges invalidity of the rights.[17]

Is an arbitrator sitting in country X required to take into account foreign legal restrictions on arbitrability, *e.g.,* of the law of the probable place of enforcement of the arbitral award? In Swiss commentary it is argued that the answer has to be positive, if such foreign restrictions qualify as *loi de police international* or *loi d' application immédiate.* However, in the *Fincantieri* case, decided in 1992,

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[13] Such exclusive jurisdiction was already provided for in Article 16(4) or the Brussels and Lugano Conventions, but the above-mentioned Regulation formulation embraced, in addition, the rights whose register is regulated by a Community instrument.

[14] *See* ECJ Case C-288/82, *Ferdinand Duijnstee v. Lodewijk Goderbauer,* (1983) ECR 3663,3676 para 19. *Cf., i.a.,* Magnus/Mankowski (ed.), Brussels I Regulation, Article 22, n. 63 *et seq.* (2007).

[15] *See*, *e.g.,* Fawcett/Torremans, Intellectual property and Private International Law 19 *et seq.* (1998); ECJ, November 15, 1983, Case 288/82, ECR 3663, 367 sec. 28.

[16] *See* Kropholler, Internationales Privatrecht, Article 22, n. 50 (5th ed., 2004).

[17] For all details as regards the case law of the European Court and legal writing, *see supra* note 14, at n. 64 *et seq.*

the Swiss Federal Tribunal held that arbitrability may not be denied for the sole reason that mandatory provisions or another legal system imply that the claim which is raised is invalid or impossible to enforce.[18]

## 2. APPLICABLE LAW FOR ARBITRABILITY

The rules on arbitrability analyzed above are substantive, material rules of private international law (*règle materielle)* and not conflict of law provisions. The critical issue in international arbitration is to determine the applicable law that governs such arbitrability. That issue may arise at different stages of the proceedings: before the arbitral tribunal; before a court from whom the enforcement of arbitration agreement is sought; before a court that decides whether an award will be set aside; and finally, before a court from which enforcement of an award is requested.

As an arbitral tribunal is bound to apply mandatory provisions of the *lex arbitri* of the place of arbitration, it has to respect the provisions on arbitrability of that state, and examine them without a motion by the parties. Such applicable law for arbitrability *i.e., lex fori,* has to be inferred from Article 15(1) of the Croatian Arbitration Law, and is widely accepted in comparative arbitration law, case law and legal writing.[19] However, as we have already pointed out above, one must distinguish between two different criteria of arbitrability: the *pecuniary nature of the dispute* and *the possibility to dispose of rights*. The former criterion is a substantive law rule, and the latter refers, for determination of arbitrability, to the law governing rights *in casu*, *i.e.,* to *lex causae* of such rights.[20]

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[18] Affirmative, Bucher/Bonomi, *Droit international privé,* 323 (2001). On this issue compare deliberation of Schnyder, Rechtskollision durch Verfahrenskollision - Herausforderung für die internationale Schiedsbarkeit der Schweiz, in: Rechtskollisionen, Festschrift Heini, 376 *et seq.* (1995). Swiss Federal Tribunal - ATF II 118, 353. However, in this case the problem was not of determination of arbitrability *ratione materiae*, but *ratione personae.*

[19] For the Croatian law, see, Sajko, *o.c., supra* note 9, at 306 *et seq.* ; see ICC case no. 4604 in Arnaldez/Derain/Hascher, ICC Awards 1986-1990, 545; further ICC case no 6149, in Yearbook Comm.Arb'n, XX, 41 et seq. (1995); Lew/Mistelis/Kroll, Comparative Iinternational Commercial Arbitration, n. 9-29 *et seq.* (2003).

[20] *Compare*, Bucher, Le novel arbitrage international en Suisse - as to application of *lex causae,* if the criterion is *possibility to dispose of rights* - 'Il convient donc de se referer a la

Another approach, under which the issue of arbitrability before the arbitral tribunal has to be decided according to the law chosen by the parties to the arbitration agreement,[21] in my opinion should not be accepted, as it does not take into account that the rule on the arbitrability of *lex arbitri* is stringent and that it aims to restrict the autonomy of the parties.

What about the application of the governing law on arbitrability by the courts that have jurisdiction over the setting aside of arbitral awards or over the recognition and enforcement of foreign awards?

As the courts are bound to all mandatory rules of their *lex fori*, they also have to apply their rules on arbitrability that are set forth in their respective arbitration laws or in international conventions dealing with this subject matter. For the stage of setting aside of arbitral awards, such a solution is explicitly provided in many national arbitration laws - Article 36(2)(a) of the Croatian Arbitration Law, Article 1059(2) (a) of the German ZPO, just to mention a few of the many examples - and it is very widely accepted.

As regards the enforcement stage, the application of *lex fori* is provided by Article V(2)(a) of the New York Convention.

In my opinion, the same method of determination of applicable law must be adopted when applying Article II (3) of the New York Convention, which provides - when a court is seized of an action in a matter in respect to which parties have made an arbitration agreement - that jurisdiction must be denied if the arbitration agreement is null and void, inoperative or incapable of being performed. Although in this Convention rule there are no indications on applicable law, the Italian courts,[22] the Belgium *Cour de cassation*[23] and the U.S. Supreme Court[24] have applied its *lex fori.* Such an approach is a logical consequence of the courts' obligations to apply in all proceedings the stringent rules on arbitrability,

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loi applicable au fond du litige, loi qui est determinée conformément aux règles de droit international privé appliquées par le tribunal arbitral', n. 88 (1988).

21 *See* more about such solutions, *e.g.,* Chukwumerije, Choice of Law in International Commercial Arbitration 54 *et seq.* (1994).

22 Corte di cassazione, April 27, 1979, Yearbook Comm.Arb'n, VI, 229 *et seq.*(1981), followed by the decisions of Bologna Court of first instance, July 18, 1987, Yearbook Comm.Arb'n, XVII, 534 *et seq.* (1992) and of Genova Court of Appeal, February 3, 1990, Yearbook Comm.Arb'n, XVII, 542 *et seq.* (1992).

23 More about this recent decision, Poudret/Besson*, supra* note 10, at n. 335.

24 *Mitsubishi v. Solar Chrysler-Plymouth* - U.S. Supreme Court, July 2, 1985, 105 SCR (1985), Yearbook Comm.Arb' n, XI, 555 *et seq.* (1986).

thus not only at the stage of award enforcement, which is explicitly provided in Article V(2) (a) of the New York Convention, but also at the pre-award stage *i.e.*, within the framework of Article II(3) of that Convention. This is because, although Article II and V of the Convention concern two different aspects of arbitral proceedings, they require the same interpretation.

## 3. CONCLUDING REMARKS

The objective arbitrability, which determines the range of arbitrable disputes, is set up by mandatory substantive, material rules of private international law. The comparisons of different national arbitration laws shows that, *mutatis mutandis*, mostly mentioned arbitrability is extended not only to pecuniary claims but also to non-pecuniary claims if parties are capable to conclude a settlement upon the matter of the dispute.

The critical issue in international arbitration, which may arise at different stages of arbitral and court proceedings, is to determine the applicable law that governs such arbitrability. Upon analyses of selected national laws, case law and the New York Convention, it could be concluded that both arbitral tribunal and national courts, determine objective arbitrability according to the rules of *lex fori*.

Zusammenfassung

**Krešimir Sajko** [*]

**DIE SCHIEDSFÄHIGKEIT IM RECHTSVERGLEICH - EIN ABRISS**

*Die objektive Schiedsfähigkeit bestimmt, welche Streitigkeiten einem Schiedsverfahren unterworfen werden können. Sie ist durch zwingende materielle Vorschriften des Internationalen Privatrechts geregelt. Der Vergleich verschiedener nationaler Schiedsrechte zeigt, dass sich Schiedsfähigkeit nicht nur auf geldliche, sondern auch auf nichtgeldliche Streitigkeiten beziehen kann, die sich für einen Vergleich eignen.*

[*] Dr. Krešimir Sajko, Professor emeritus an der Juristischen Fakultät in Zagreb, Trg maršala Tita 14, Zagreb

*Die Analyse auserwählter nationaler Rechtsordnungen, Rechtsprechungen und Schiedssprüche sowie des New Yorker Schiedsübereinkommens legt den Schluss nahe, dass die Schiedsgerichte und die ordentlichen Gerichte die objektive Schiedsfähigkeit durch Anwendung der lex fori festlegen.*

*Schlüsselwörter: internationale Schiedsgerichtsbarkeit; objektive Schiedsfähigkeit; zwingende materielle Vorschriften zur Schiedsfähigkeit; maßgebliches Recht zur Schiedsfähigkeit; lex fori als maßgebliches Recht für die objektive Schiedsfähigkeit*

Sažetak

**Krešimir Sajko** [**]

## O ARBITRABILNOSTI U KOMPARATIVNOJ ARBITRAŽI - NEKE NAPOMENE

*Objektivna arbitrabilnost određuje koji se sporovi mogu podvrgnuti arbitražnom rješavanju, a utvrđena je prinudnim materijalnim pravilima međunarodnog privatnog prava. Poredba različitih nacionalnih arbitražnih prava upućuje na to da se ta arbitrabilnost ne odnosi samo na novčane sporove već i na nenovčane ako se o njima može zaključiti nagodba.*

*Na osnovi analize izabranih nacionalnih prava, sudske i arbitražne prakse te Newyorške konvencije nameće se zaključak da arbitražni i nacionalni sudovi utvrđuje objektivnu arbitrabilnost primjenom* legis fori.

*Ključne riječi: međunarodna abitraža; objektivna arbitrabilnost; obvezna materijalna pravila o arbitrabilnosti; mjerodavno pravo za arbitrabilnost; lex fori kao mjerodavno pravo za objektivnu arbitrabilnost*

[**] Krešimir Sajko, profesor emeritus Pravnog fakulteta Sveučilišta u Zagrebu, Trg maršala Tita 14, Zagreb