On arbitrability: the arbitrator as problem solver

[Thoughts about the Applicable law on Arbitrability]

Introduction: the prerequisites of the analysis

1- Function of arbitrability: limitations to power to arbitrate
2- The differences of fora: Arbitrator and State Judge

A/ The arbitrator has no forum. He is a pragmatic problem solver

The state judge is a social engineer in the sense that it has the case within the boundaries of the general interest, the social, collective interest. The forum of arbitrator is autonomous the forum of the state judge is heteronomous

B/ The second main difference is that arbitrator expressing no collective legal order is limited to jurisdictio. He has no imperium, which is reserved, naturally to states.

3- A first appraisal of arbitrability seen as jurisdictional problem or seen as conflict of laws problem
A- The notion of arbitrability (What is arbitrability)

1-Distinction arbitrability and validity of the arbitration agreement

2-Distinction with other imperative notions
   - Distinction with public policy
   - Distinction with the _lois de police_. Arbitrability as _jurisdictional problem_ (even exclusive jurisdiction) to what extent should an arbitrator respect the rules on exclusive jurisdiction of another legal order and which?

3- Arbitrability seen as jurisdictional problem- Distinction internal and international jurisdictional exclusive rules

B- Arbitrability and Applicable law (How arbitrability has to be decided)

1- Arbitrability is a conflict of laws problem?

2- The relativity of the answer according to the stage and nature of the procedure in which the problem is raised

   A- Arbitrator [problem solver]

   B-State Judge [social engineer]

   a- Recognition and Enforcement- Annulment

   b- Pre- arbitral state control
Concluding remarks

Arbitrability became probably the most fashionable\(^1\) subject in the field of International Arbitration. One may say that actually is the corner stone of International Arbitration in the sense that it ties up the pole of autonomy of the parties and the pole of state’s mandatory area. In other words it is the area of tension between these two poles representing the general and the individual interest.

1- The concept and function of arbitrability: Limitation to power to arbitrate

Arbitrability in essence consists in putting limits to the power of the arbitral tribunal but also of the parties as to what subject matter can be arbitrate\(^2\). In that sense limitations can only arise from a state law tending to protect its own general [social or economical] interest\(^3\). They may concern either persons – subjective arbitrability- or more properly, matters – objective arbitrability\(^4\).

\(^1\) Jarroson, 
\(^2\) Redfern and Hunter, International Commercial Arbitration, 2\(^{nd}\) ed., p. 137, “The concept of arbitrability, properly so called, relates to public policy limitations upon arbitration as a method of settling disputes. Each State may decide, in accordance with its own economic and social policy which matters may be settled by arbitration and which may not”.
It is evident that these limitations are exclusively connected to a given state and mainly to its own specific general interest. They are not a natural phenomenon emanating from arbitration itself.

Thus, speaking above arbitrability is naturally trying to analyze limits to the power of the parties and arbitrators. One has to take into consideration that in an international arbitration the sources of limitations are various, multilevel and multipurpose – they can aim to protect a general interest of the State as such [taxation] or a collective social interest [categories of weak contractually parties] or a fundamental ethical norm [bribery contracts]. Schematically, we can describe three levels of sources of possible limitations: a-national-unilateral limitations from the State law, b- supranational – limitations emanating from regional or international statutes thus the European law and c- transnational – limitations emanating of a common core of public policy as it is perceived by the arbitrator often called following the suggestion of P. Lalive truly international public policy.

They can also be divided in two categories: internal limitations- coming from the law conferring power to arbitrate to the parties- if such law really exists, or as it seems to me been the most accurate analysis arbitral award been a floating norm5- and the arbitrator itself6 and external limitations of various sources and different even mechanisms as lois de police, international mandatory rules which of course gives rise to the question which of these multiform and multipurpose mandatory rules are relevant to the issue submitted to arbitration.

5 Ch. Pamboukis, Lex mercatoria as applicable law in international contractual arbitration, Athens, 1996,p. [in greek], idem,
The problem must be also examined through the different stages in which can be raised either in front of the arbitral tribunal or in front of a state judge.

2- The differences of fora: Arbitrator and State Judge

International arbitration is the jurisdictional expression of the increasing individual freedom, due, partially to the globalization and mainly to the rise of the individual, in a non-state free space. The natural tendency of international arbitrators, therefore, is to resist from the point of view of the international arbitration to any limitations not emanating from the parties themselves\(^7\) attached to the sacrosanct principle of *pacta sunt servanda*\(^8\).

It is of capital importance to repeat once again a qualitative difference between the judge and the arbitrator. The late has no *organic forum* meaning a prescriptive legal order in which he belongs and which is expressed by him, as the state judge. More precisely its one forum is created in fact by him but always in accordance of the immediate source of its power, the will of the parties. The center of the arbitrator’s *jurisdictio* is to decide a dispute in accordance to the will and the legitimate expectations of the parties. Every Arbitral Tribunal defines its jurisdictional mission in accordance primarily to the will of the parties, which technically constitutes its *ad hoc arbitral forum*. It is therefore of capital importance to distinguish the two possible *fora* in which the question of arbitrability can be raised because its treatment is totally different. The cardinal point of *arbitral jurisdictio* is fairness in accordance to the will of the parties and the prerequisites of the case. The arbitrator is *a*

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\(^7\) See Hanotiau, op.cit. p. 906 seq., *Mitsubishi v. Soller* can also be constructed in that sense.

\(^8\) In fact it is *that* principle from the point of view of international arbitration, which has been sometimes considered as *of truly international public order*. 

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pragmatic problem solver. The state judge is a social engineer in the sense that he deals with a case within the boundaries of the general interest, the social, collective interest. The forum of arbitrator is autonomous and the forum of the state judge is heteronomous.

The second main difference is that arbitrator expressing no collective legal power is limited only to jurisdictio. He has no imperium, which is reserved, naturally to states. He is incline therefore to take into consideration pragmatically different laws, which can destroy the enforceability of its award. In my opinion that type of considerations constitute external contingencies to arbitration norms perceived as floating norms logically unnecessary and often complicating erroneously the problem.

3- A first appraisal of arbitrability seen as jurisdictional problem or seen as conflict of laws problem

In order to finish that general premises tour d’ horizon one has to distinguish the problem of jurisdiction from the problem of the applicable law. Usually the first is referring to the power to decide the second is referring to how to decide. It has been correctly shown that arbitrability is a problem of lacking jurisdiction meaning from the scope of a national legal order that for certain matters or persons (objective and subjective arbitrability) the state forum has exclusive jurisdiction and thus does not recognize unilaterally jurisdiction to any other forum (arbitral or state). More commonly the problem of arbitrability is perceived as choice of laws problem. In that perspective an analysis of different possibilities is made in favor of one or another system.

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9 M. Alberstein, Pragmatism and Law, From philosophy to dispute resolution, Ashgate Datmouth, 2003
The latter approach is not satisfactory. Mainly because is confusing the problem of jurisdiction to the problem of choice of law through the notion of arbitrability. Confusion is often made between arbitrability, ordre public, lois de police and especially the validity of the arbitration agreement. The aim, thus, of this paper is to show that the title is erroneous.

It seems that two fundamental mistakes often disoriented the problem: an imprecise and broad notion of arbitrability which has not been elucidated in a clear way and a confusion with other notions and mechanisms is often made (I) The second refers to the very nature of the method because often arbitrability problem is seen as a conflict of laws problem and not as a conflict of jurisdictions problem (II). We will further examine/discuss these two aspects.

A- The notion of arbitrability (What is arbitrability)

1-Distinction arbitrability and validity of the arbitration agreement

The validity of arbitration agreement belongs to the private and regulation sphere while arbitrability belongs to the public/ mandatory sphere. The validity of arbitration agreement poses problems of choice of law while arbitrability, as jurisdictional problem, is governed by the lex fori. Thus, even a valid arbitration agreement can pose problem of arbitrability of the dispute. The arbitrability is closely related to the appropriate forum and thus is relative by its own nature. Definitively arbitrability is a “public” law problem of posing limits to private power close related to the forum instead validity is a private problem related to parties (qualities).
2-Distinction with other imperative notions

a- Distinction with *international public policy*. International public policy as exception mechanism belongs normally to the conflict of laws method. In the conflict of jurisdiction is a ground of refusal of the recognition or setting aside the arbitral award. Thus international public policy mechanism is expressing fundamental principles of a *given state legal order*. Often also we distinguish internal public policy (applied thus to domestic arbitrations) and international public policy (applied to international arbitrations). It is then at least disputed if a truly international public order exists as Professor P. Lalive claimed independently of any given legal order, *in vacuum*. Arbitrability deals to the power of arbitrate not as protection mechanism of the forum. It intervenes at the jurisdictional level at the very beginning not at the end. It refers to the power of the arbitrators not to the award changing rights and obligations of the parties. Clearly there is a notional and methodological difference.

b- Distinction with the *lois de police*. Here of course the answer is easy. As it is not a choice of law problem the *lois de police* can intervene at two stages: the arbitrators could take into consideration foreign *lois de police* if the parties expected to do so and state judge could refuse the recognition of an award which did not take into consideration the *lois de police* of the *lex executionis*. But in any case that does not affect in any sense the power of the arbitral tribunal to decide the case but rather how the case has to be decided.

3- Arbitrability seen as jurisdictional problem- Distinction internal and international jurisdictional exclusive rules

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All the above distinctions become evident if arbitrability is seen as *jurisdictional problem* (even exclusive jurisdiction) as it deals to the power to arbitrate. From the point of view of the arbitral tribunal the problem is to what extend should an arbitrator respect the rules on exclusive jurisdiction of another legal order.

In that perspective on has to distinguish internal and international jurisdictional exclusive rules. All jurisdictional rules – as for the public policy rules - have not been made in order to embrace international disputes. So generally speaking one has to examine if the purpose of the jurisdictional rule in question is aiming to embrace international disputes as well or reserved only to domestic.

**B- Arbitrability and Applicable law (How arbitrability has to be decided)**

1- *Arbitrability is a conflict of laws problem?*

Often the problem of arbitrability is analyzed as a conflict problem indistinctively of the procedure and the authority. Thus national courts have contemplated mainly the *lex fori, the lex contractus, the lex arbitrii or the lex executionis*\(^\text{11}\).

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That palette of choice of law possibilities gives rise to inconsistency of court decisions as Jan Paulsson traced\textsuperscript{12} especially regarding the application of New York Convention.

2- It has recently been correctly pointed out\textsuperscript{13}, by Arfazadeh, that at least at the stage of enforcement of the award the non-arbitrability issue has been regarded erroneously as problem of conflict of laws instead of problem of conflict of jurisdiction. Some Courts followed that approach\textsuperscript{14} and other can be construed in that sense\textsuperscript{15}.

The jurisdictional correct approach constitutes the foundation of the application of the \textit{lex fori}, which in fact, excludes the conflict of laws approach.

3- An accurate answer cannot be given without distinguishing the authority and the procedure in which the problem of arbitrability arises. As arbitrability deals in fact with the mandatory domain, the difference between a state judge and an arbitrator becomes of capital importance regarding what is or is not permitted. If one accepts that a judge being a social engineer needs not only to decide a case but also to protect the coherence of its own legal order comprising rules defending general interest and the arbitrator being a problem solver does not need \textit{a priori} to protect any kind of general interest we understand that an arbitrator will be reluctant not to arbitrate a matter – except for reasons related to its own concept of justice– because of the protection of the general interest of a legal order and thus refusing the

\textsuperscript{12} Jan Paulsson, Arbitrability, Still Through a Glass Darkly, in Arbitration in the Next Decade Special Supplement ICC Int’l Ct of Arb. Bull. 1999 at 95


\textsuperscript{14} Swiss Federal Supreme Court, ATF 118 II 353 \textit{Fincantieri}, Paris Court of Appeals, 16 February 1989, \textit{Almira}, Rev arb 1989,711

\textsuperscript{15} US Supreme Court 437 US 614 (1986) \textit{Mitsubishi}, Arfazadeh, op.cit. 77
expressed – presuming not vitiated- will of the parties to arbitrate their different. Thus of course the arbitration agreement is for the arbitrator a clear indication if not a presumption that the parties wish to arbitrate the referred different\textsuperscript{16}. What is important for the arbitrator is not to check if the subject matter is arbitrable but if the parties wished to arbitrate it. On the contrary for the judge it is important first to check if the arbitrator had the jurisdictional power to decide the case\textsuperscript{17}. Arbitrability deals with jurisdictional power. Therefore, what is prohibited is defined unilaterally by the law of the forum (a short of jurisdictional mandatory rule) –except bilateral or multilateral international convention-. There is no space for choice of law problem. The judge will apply its own law.

2- The relativity of the answer according to the stage and nature of the procedure in which the problem is raised

These considerations lead us to the second variable parameter, which is the stage and the nature of the procedure. Indeed the problem of arbitrability can be raised either in front of the arbitral panel or in front of a state court during a declaratory pre-arbitral [referral] procedure or as a ground of annulment or ground of refusal recognition of the arbitral award.

As it has been developed earlier, regarding procedure, the arbitrability should be distinguished from the validity of the arbitration agreement. It deals merely to a problem of relevance or, put in another way, a problem of jurisdictional power. One legal order does not recognize that certain matter


\textsuperscript{17}We will not deal with the question who should determine arbitrability, the arbitrator or the judge which relates to the Kompetenz-Kompetenz doctrines. See Alfaro and Guimarey, Who Should Determine Arbitrability? Arbitration in a Changing Economic and Politics Environment, Arbitration International, 1996, 415.
could be either arbitrate or decided by another jurisdictional organ but its own. In front of the state judge all that can be decided in the pre-arbitral stage is that the matter is not arbitrable according to the law of the forum and that, therefore, the arbitral tribunal lacks of jurisdiction, its award won’t be recognized. In fact that does not invalidate the arbitration agreement –the decision of the judge will be irrelevant to another jurisdiction- but is decided preemptively if the award will or not be recognized in that forum.

1- Arbitrability and Arbitrator seen as problem solver

We can distinguish ad hoc arbitration from institutional arbitration. The reason is mainly that in the latter the arbitrator has to comply by the will of the parties to the regulation of the institution, which has been chosen.

If the correct jurisdictional approach is adopted no problem of applicability arises at the arbitral tribunal level as the arbitrators have to decide in accordance to the will of the parties at hand and as they have no limitations emanating from the arbitral forum. Is that broad freedom unlimited? Should an arbitral tribunal to decide any matter because only the parties have submitted it to the panel? There are not any limitations to the power of the arbitrators? The question cannot be answer without an accurate analysis of the arbitral forum or in other more appropriate terms of its arbitral jurisdictional mission.

In general terms and following the analysis of H.L.A Hart on this point, the power conferred to arbitrators is a power norm giving the power thus to

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18 The concept of law, [in French], Bruxelles, 1976, p.103 seq.
produce other norms. The freedom to the arbitral tribunal\textsuperscript{19} is consisting then not only to arbitrate but also to constitute its ad hoc jurisdictional frame. Of course parties can limit that power by choosing also the \textit{way} of deciding (for instance in accordance to x law). That means that the arbitrators they have the freedom to construct their own jurisdictional frame almost freely\textsuperscript{20}. In doing so arbitrators have to take into account the will of the parties but also their legitimate expectations. They can also construct by their own or refer to a state law normally the law of the seat of the arbitration. That also means that arbitrators they have a \textit{forum} –not necessarily state forum- constituted on the basis of the will of the parties but \textit{broader} of that expressed will as it has to take into account the legitimate expectations of the parties among them is to see their award materialized by enforcement. A non-enforceable award anywhere clearly is not what parties expect by submitting their dispute to arbitration.

Is that admitting that the arbitrators are \textit{absolutely free} to arbitrate any dispute submitted to them by the parties only and simply because the parties wishes so? The answer is negative. It is true that international arbitration evolutes in a non-state space. But that does not mean that arbitrators have no constraints. These constraints are internal, but remain nevertheless constraints.

How then the problem of arbitrability has to be decided by the arbitrator’s perspective? Is it a choice of law problem? Certainly not as all state laws stands on an equal foot from the arbitrators perspective and it is thus impossible to find criteria in order to give application to one of them. The answer is that arbitrators have to decide in accordance to their jurisdictional

\textsuperscript{19} P. Mayer, L’autonomie de l’arbitre international dans l’appréciation de sa propre compétence, RCADI 217 (1989-V), 319 seq.

\textsuperscript{20} Ch. Pamboukis, Lex mercatoria, op.cit. p. 172-173.
mission. And consequently they have to avoid to render an award likely unenforceable. In those sense arbitrators also have to follow a *lex fori* approach but not a conflict of laws approach.

The foundation, thus, is the arbitral forum on the basis of *reasonable* expectations of the parties. It must be accepted that it comprises to a certain extent of probability the understanding not to render an award which cannot be enforced any ware. Therefore arbitrators should *take into consideration* [not properly apply] different jurisdictions, which would not accept arbitrator’s jurisdiction. That can be made in regard to the facts of the case and by an exercise of comparative law. There are indeed some areas, which are generally admitted to be non-arbitrable\(^\text{21}\).

From a comparative law perspective a common core or at least a general guidance is offered as to which matters is generally admitted as arbitrable\(^\text{22}\). Some national laws refer to broad notions as “disputes involving economic interest”[Germany, ZPO section 1030(1)] or “dispute involving property” [Art. 177 Swiss Private International Law] or “rights of which he has full disposition” [art. 2059 French Civil Procedure Code]\(^\text{23}\). Arbitrator been a

\(^{21}\) In a similar direction, Fouchard, Gaillard, Goldman, On International Commercial Arbitration, par. 559 even if the thesis of a genuine international public policy is not defendable because international arbitration is evolutes in a non-state space and constitutes a “droit individual”. There is no expression of general interest in that space, there is no mandatory rules neither limitations. It is the space of pacta sunt servanda.

\(^{22}\) Lew/Mistellis/Kroll, Comparative International Arbitration, Kluwer, 2003, p.194. These authors they are distinguishing between two main approaches of national laws. The first one relies on substantive criteria and the second relies on the parties power to dispose freely their rights. The second approach requires a conflict of law analysis according to the authors. In my opinion it requires in fact a comparative analysis as it is not possible to make a choice of law all laws been in an equal footing and having no criteria to proceed to a such analysis from the point of view of the arbitral forum.

\(^{23}\) A similar approach is the one of Belgian Law art. 1676 Civil Procedure Law and of Italian law [art. 806 of Civil Procedure Law]. See for a comparative study on the recent trends in United States, Switzerland and Germany, Baron and Liniger, A Second Look at Arbitrability, ArbIntl 2003, 27 seq.
pragmatic and a cosmopolitan problem solver have to follow these general guidance but not necessarily apply one of these national laws.

Following that analysis we should then also distinguish internal from external constraints from the point of view of the arbitrator. As to the former in fact internal constraints emanates mainly from the will of the parties and from the fairness and moral duty of the arbitrator.

As to the latter we should discuss certain cases covered often over the controversial term introduced by P. Lalive of truly international public policy comprising, for instance, bribery contracts disputes. Sometimes it has been decided that consultancy contracts relating to public procurement are not arbitrable24. It is today correctly admitted after the famous Lagergens award that the immoral undercover relation does not neutralize the arbitrator’s power to arbitrate and to decide the nullity or the annulment of the contract under the applicable law25. It is not a problem of arbitrability thus.

Arbitrator is bound only by the will of the parties. And that will is to arbitrate the submitted dispute. That is the theoretical foundation of the favor arbitratum. In that approach no conflict of laws problem arises except a possible construction of the will of the parties to that regard if not clear. It is a pure substantive approach.

If one adds to the criterion of the will of the parties the respect of their legitimate expectations, arbitrator may opt for or choose a broader approach. He might include to its jurisdictional mission the legitimate expectation of the

parties understood also as the maximization of possibilities to be respected by state legal order. It is a pragmatic interest of high legal efficiency of he’s award. In pure logic this view is external, as the arbitrator should anticipate what the parties would do.

In that respect the problem of applicable law to arbitrability is raised. And of course arbitrator willing to proceed to that road, is facing a peculiar problem: what should be the applicable law and in accordance to which criteria? He will embark on an adventure with no evidently satisfactory result. And it is explainable: because the conflict of laws approach is wrong as there is no indication from the point of view of the arbitral forum which state law is better suited to answer this problem. Neither indication is given by the future where the award will be enforced or whether the award could be challenged. The arbitrator should answer to this problem referring to its one forum, in other words accomplishing its own jurisdictional mission, in accordance to the jurisdictional approach.

In a majority of cases arbitral tribunals determine the arbitrability of a dispute on the basis of the provision of the place of arbitration regarded as the arbitral lex fori. In other words the arbitrator instead of constructing its own arbitral forum may choose as such, the forum of the seat of the arbitration [lex loci arbitri]. There are reasons militating in that sense. Been in conformity to the law of its seat gives him a clear overall procedural legal reference and avoids the award to be set aside. Of course that option gives rise to some problems

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26 ICC 6162 YBCA 1996, 153, ICC 4604, YBCA 1985,975, ICC
27 Dr Mann defended that view by saying that an arbitration cannot exist outside a state legal order, Lex facit arbitrum, in Liber amicorum for Martin Domke, Martinus Nijhoff, The Hague, 1967, 157 seq. Even if we do not agree to that basic thesis of Dr Mann the possibility of the arbitrator to choose as its own lex fori the law of the seat of the arbitration remains a coherent possibility. Some legislations as the According to some legislations, such as Article
as well as for instance practically in some cases as for instance the
determination of the seat of arbitration if the parties omitted to do so,
theoretically it is disputed the significance of the seat choice as been merely
hazardous but still remains a solid option for the arbitrators.

If the arbitrator opts for a choice of law approach [not including the lex fori
approach] he will face serious difficulties in electing the proper law.

- *Lex loci executionis* [mainly irrelevant as that place is or will be
anywhere and lack of elements by the parties- on the other hand it is
part of legitimate expectation of the parties]

- *Lex arbitri* [applicable law to arbitration agreement- it is the source of
power of the arbitrator. According to that view the Arbitral Tribunal
will decide the issue of arbitrability by application of the law that
governs the arbitration agreement, the law of autonomy, been, often,
the law that governs the main agreement. But why should we submit
the will of the parties to a state legal order necessarily? The will of the
parties can also be viewed as substantial direct norm independently of
a state legal order28. In other terms why let from the point of view of
the Arbitration Tribunal let the state law prevails over the will of the
parties, *pacta sunt servanda*? There is no logical foundation in admitting
that the parties located their relationship in a system which will not
give effect to their will29

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177 of the Swiss Law on Private International Law [arbitrability has to be decided in
accordance with the law of the seat].

28 Craig/Park/ Paulsson, International Chamber of Commerce Arbitration, 2nd., p.81
29 Derains, Détermination de la lex contractus, in L’apport de la jurisprudence arbitrale, ICC,
1986, 28.
• Lex contractus – lex causae [only to the extent that the law applicable to arbitration agreement has not been
• Lex mercatoria (combination of the above) [no lex mercatoria is conceivable as the arbitrator is not a social engineer. The lex mercatoria approach supposes a legal order in which the arbitrator belongs which is totally artificial and probably adds nothing practically]
• Substantive approach- what it deems fair to arbitrator/ arbitrators freedom

2- Arbitrability and State Judge seen as social engineer

The application of the lex fori is a natural application by the judge as expresses unilaterally the international mandatory jurisdictional rules. The inconvenient of that approach is the lack of uniformity but that is a given problem because states interests and understanding on the general interest diverge.

State judge is bound to apply its own law on jurisdiction at least at the stage of recognition or annulment. The lex fori is the only possible solution.

A- Recognition and Enforcement- Annulment

It is normal to consider that arbitrators and foreign state judges should be treated on an equal footing regarding their jurisdictional function. In international jurisdiction a delimitation of powers to decide has to be make. Delimitation in that field is unilateral, meaning that every legal system – and in that sense only state law systems can be conceived as such- determines
following its own criteria the matters for which reserves to him a jurisdictional monopoly save of course international Convention. That determination comprises of course international arbitrator.

State law

1- First of all the notion of mandatory rules is conceivable only in relation to a system of law in which the jurisdictional authority belongs. And that is the case obviously of the state judge.

The matter of which should be considered as mandatory jurisdiction rules excluding jurisdiction of arbitrators – and other state judges- has been discussed by Arfazadeh\textsuperscript{30}. That author makes a distinction between two categories of mandatory jurisdictional rules, but he reaches a false conclusion. The first one is the category of “pure” mandatory jurisdictional rules from which no derogation by the will of the parties is admitted. More often that category is called more properly exclusive jurisdiction rules. Undoubtedly disputes which falls into that category (for example art. 22 of the Brussels I Regulation) a jurisdictional monopoly of a given state is clearly established. And thus the \textit{forum executionis} will not recognize the arbitral award if that violated its own exclusive jurisdiction rule.

The judge of the \textit{forum executionis} is also obliged to refuse recognition if the award violated the exclusive jurisdictional rule of a third state? The answer should be positive if the \textit{forum executionis} is tied up by an International Obligation (Convention, EEC law) and if not the judge of the forum executionis has no strict obligation but a simple faculty to refuse it if it deems

\textsuperscript{30} Arbitrability under the New York Convention, Op.cit,77 seq
to him that a third state exclusive jurisdictional rule had to be respected. In any case that will be decided in accordance to the unilateral exclusive jurisdiction rules of the forum executionis.

2- Coming now to the second category the quasi mandatory jurisdictional rules which affords special jurisdictional protection of the weaker party usually the consumer, the worker, the insurer. Arfazadeh\textsuperscript{31} is of the opinion that arbitrability should not be restricted because there is no valid reason to adopt a more cautious attitude towards international arbitrators than to foreign judges.

That position does not take into account the following considerations: the protection of the weaker party in the contractual field is a manifestation of a general social interest. The judge of the forum executionis will have to preserve the aim of the aforesaid general interest of its own legal system. Therefore no general rule could be drawn, but the general idea is that the forum executionis will decide what are the limits of arbitrability in accordance to its own criteria. Technically also speaking either the rule would be considered as exclusive jurisdictional basis either concurrent. In that last case the parties probably have the power to submit their dispute to arbitration as the state legal system does not impose a jurisdictional monopoly. The argument of equality does not stand because the arbitration agreement is mainly considered as instituting an exclusive jurisdiction in favor of the arbitrator. Thus the main limit should be drawn by the legal system of the forum executionis on the basis of the limitation of the autonomy of the will of the parties and for the reason of jurisdictional protection of the weaker party which serves some general

\textsuperscript{31} Op.cit. 78
social interest\textsuperscript{32} in which in my opinion falls the protection of the weaker party or at least requiring special protection in referring their different to arbitration which normally disfavor them because at least of the cost.

Furthermore the cases in which jurisdictional monopoly is justified are broader than the contractual area.

We can reach the conclusion and propose that the exclusive jurisdictional area would emerge by a comparative exercise and some how it will be mainly uniform in the future either by unilateral convergence either by progressive unification by Convention.

3- Jurisdictional monopoly – exclusive jurisdiction rules- is not the only ground to refuse of course according to the forum executionis the recognition of the award. If also a lois de police of the forum had not been taken into account or an international public procedural or more rarely substantial public policy constitute also a ground of refusing because in fact of the violation of mandatory substantial rule of the forum or violation of general principles. One has in that respect to note that these grounds does not constitute properly speaking a non –arbitrability ground, they are not comprised in the arbitrability notion as it has been explained above. The result is almost the same except for the important practical consequence that these grounds of refusal cannot be evoked under the New York Convention in the pre- arbitral stage but only in the recognition or during the annulment procedure meaning the post- arbitral stage.

\textsuperscript{32} Meaning in fact that a “weaker party” is the one who normally has not the same bargain power which is important also in the field of jurisdiction especially in the case that the “weak” party looses the right to see hes case decided by hes natural judge.
Uniform law

a-Construction of art. II(1) of New York Convention: Under New York Convention a specific problem of construction of art. II and art. V has been debated. Article II(1) states that arbitration agreements has to be recognized so that courts have to deny jurisdiction under Article II(3), unless the dispute is not capable of settlement by arbitration. According to which law the dispute has to be arbitrable, however, is not expressly provided for and has given rise to a number of divergent views in national court practices.

Two main approaches have been suggested. According to the first one the same law should resolve the issue of arbitrability whether article II or V is applied. Since Article V refers explicitly to the law of the forum it is that law which prevails. Needless to say that in accordance to the jurisdictional approach the application of the lex fori constitutes the only conceivable solution.

According to the second, a distinction should be drawn depending on whether the issue of arbitrability is raised at the level of validity of the arbitration agreement, in which case arbitrability should be determined in accordance to the law of autonomy or in the context of the recognition or enforcement of the award. In my opinion validity has nothing to do with arbitrability. We may have a valid arbitration agreement, which refers to arbitration a non-arbitrable dispute.

b-UNCITRAL Model Law

34 Arfazadeh, op.cit.,p. 80, states that nothing in Article II of the Convention indicates that arbitrability per se is subject to any law other than the lex fori and that all decisions can be construe as simply permitting arbitrability under the lex fori.
The lack of arbitrability constitutes in accordance of Article 34(2) of Uncitral Model Law a specific reason for annulment besides public policy.

**B- Pre-arbitral state control**

Here comes the problem of construction of article II New York Convention. In accordance to article II (1) a court should recognize the parties’ agreement to refer to arbitration any differences relating to a subject matter capable of settlement by arbitration article II (3). The construction of that article plays in practice a role only if a party seize the state court either in order to obtain a declaratory decision deciding that the arbitration agreement is null and void either the court is seized of an action on the merits of the dispute and of course incidentally the same question arises.

It is therefore important first to define what that article allows to the judge to control [validity] and second comprising clearly the arbitrability in accordance to which law should this matter be decided. As to the second question it is clear that it should be decided only in accordance to the *lex fori* as it is a problem of power to decide for the judge the matter should be decided. The true meaning of article II is that the arbitration agreement should be enforced save if the dispute falls into the scope of an exclusive basis of jurisdiction of the forum.

The controlling jurisdiction is the one of the forum whether the judge is enforcing an arbitration agreement under article II or an arbitration award under article V35. That reading of the Convention provides internal consistency.

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Of course the consequence would not be to proclaim the nullity of the arbitration clause. The state judge has no such power. Simply the arbitration agreement would not produce any effect regarding the power to decide of the state judge accordance to its forum jurisdictional rules.

**Concluding remarks**

It has to be noted the problem of lack of uniformity which damaged arbitration. Thus a possible solution is the uniform law