

REGULATIONS OF DETERMINING LAW GOVERNING TO ARBITRABILITY

LA REGULACIÓN SOBRE LA LEY QUE RIGE EL ARBITRAJE

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Abstract: Determining the law applicable to arbitrability is of paramount importance because the procedures taken by the legal system are very different. In this way, some systems principally recognize any disputes eligible for referral to arbitration, while some other legal systems have put an emphasis on the general inapplicability of arbitrability to the disputes and only accepts it in a few exceptional cases. The remainder of legal systems have taken a position in the middle of these two theories. Therefore, it is clear that determining the applicable and governing law can also pinpoint the ultimate arbitrability (or not) of the case. The main challenge of this research is to examine the law governing the practice of arbitration and how proceeds the arbitrability at the courts of arbitration. At the end of this study, it will be known that there are several criteria for determining the law governing arbitrability, including the *lex fori*, the law of the parties' agreement, the law of the place of enforcement of the award, and the law of one or both of the parties. By the way, today transnational law principles seems to gain more importance. Each of these criteria has its own advantages and disadvantages. Moreover, the norms of human rights have also led to developments in the recognition and enforcement of foreign arbitration awards, in such a way that the tenets of human rights (in the domain of the recognition and enforcement of foreign arbitration awards) have also led governments to recognize acquired rights in foreign countries.

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Keywords: Arbitrability, Law governing the arbitrability, *Lex loci arbitri*, National Court, Human Rights

Resumen: *La determinación de la ley aplicable al arbitraje es de suma importancia porque los procedimientos adoptados por el sistema legal son muy diferentes. De esta manera, algunos sistemas reconocen principalmente cualquier disputa elegible para la referencia al arbitraje, mientras que otros sistemas legales han puesto énfasis en la inaplicabilidad de la arbitrabilidad general de las disputas y solo la aceptan en pocos casos excepcionales. El resto de los sistemas legales han tomado una posición que está en el medio de estas dos teorías. Por lo tanto, la determinación de la ley que rige el arbitraje es fundamental para determinar con precisión la posibilidad de un acceder a un procedimiento arbitral. El principal desafío de esta investigación es examinar la ley que rige la práctica del arbitraje y cómo procede éste en los tribunales de arbitraje. Al final de este estudio, se sabrá que hay varios criterios para determinar la ley que rige la arbitrabilidad, como, por ejemplo: la lex fori, la ley del acuerdo de las partes, la ley del lugar de ejecución del laudo y la ley de una o ambas partes. Por otro lado, hoy en día, los principios del derecho transnacional parecen cobrar mayor importancia. Cada uno de estos criterios tiene sus propias ventajas y desventajas. Además, las normas de derechos humanos también han conducido a avances en el reconocimiento y la ejecución de las sentencias arbitrales extranjeras, de tal manera que los principios de los derechos humanos (en el ámbito del reconocimiento y ejecución de los laudos arbitrales extranjeros) también han llevado a los gobiernos a reconocer derechos adquiridos en países extranjeros.*

Palabras clave: *Arbitrabilidad, ley que rige el arbitraje, ley loci arbitri, Corte Nacional, derechos humanos*

Summary. *I. Introduction. II. Arbitrability in national courts at preliminary phase of investigation. III. Appeal to the award in national courts of the seat. IV. Control of arbitrability by national courts in position of enforcement of the award. V. Bringing the dispute in an arbitral tribunal. VI. Applying the legal principles applicable to arbitrability in arbitral proceedings. VII. Human rights considerations in arbitral rules from the perspective of international arbitration. VIII. Conclusion. References.*

I. INTRODUCTION

The scope of inability to refer to arbitration usually becomes clear in two ways by national laws. First, there are rules that are normally found in regulations other than the arbitral rules and establish exclusive jurisdiction for national courts in relation to specific domains. The common instance in this case is Art. 22 of 2001/44 regulations of the European Union, which stipulates that particular national courts of a Member State will be given exclusive jurisdiction with regard to disputes over the credibility of regulations, the dissolution or termination of companies (§2) or with regard to disputes over records, validity of patents, trademarks or similar rights (§6)¹. Second, there are the rules that are not usually found within the provisions relating to arbitration and generally specify the areas where there are no grounds for arbitration. A common example of this selective approach is Art. 177 (1) of Swiss Federal Law on Private International Law Act, which stipulates that «any dispute relating to properties may be the subject of arbitration».

One may also refer to Art. 1030 (1) of German Procedure Code specifying that «any conflict that involves economic interests can be the subject of an arbitration agreement».

Ultimately, these two types of arbitral regulations are similar in nature. Despite the differences in their drafts, the two types of rules include regulations concerning the discrepancy of jurisdictions, and the jurisdiction is maintained for the national courts and arbitral tribunals for every particular dispute. In fact, their main objective is to protect the exclusive jurisdiction of their national courts in response to certain types of disputes. This objective is more evident in the first-hand national regulations, such as Art. 22 of Regulation 2001/44 of the European Union. These regulations explicitly describe specific differences (e.g. the regulations of the registration or the validity of patents) that can only be put into operational proceedings in the national courts of a Member State.

Therefore, exclusive jurisdiction will be granted to national courts where arbitral tribunals are prohibited from doing any interventions. It is notable that purely the same reasons of the arbitral regulations also support the second category.

¹ See also the Austrian Bankruptcy Code s. 43 (5) KO and s. 111 (1) and French Code de Commerce, Art. R662-3, providing for the exclusive jurisdiction of the Austrian and French national courts respectively over certain types of insolvency disputes. Similarly, the Belgian Law of 27 July 1961 on the Unilateral Termination of Exclusive Distributorship Agreements (M. B. 29-XII-1961) provides that, from the moment the exclusive distributorship agreement is performed in Belgium, Belgian law applies and Belgian courts have exclusive jurisdiction, notwithstanding any contrary provision.

Indeed, regulations such as Art. 177 of Swiss Federal Law on Private International Law Act determine the disputes that can be solved by arbitration, including any dispute over properties while the other disputes remain within the jurisdiction of national courts. In fact, the objective of these regulations is to ensure that the disputes not pertaining to properties will be dealt with exclusively by Swiss national courts. Thus, the two types of national regulations ultimately seek to describe the exclusive jurisdiction of national courts.

From this point of view, the difference between Art. 22 of the regulations of the European Union and a provision, such as Art. 1030 of the German Procedure Code lies firstly within their limits in that the second provision is broader than the former and secondly within their method of preparation drafts. The second provision defines the disputes that can be resolved by referring to an arbitral tribunal (i.e. the positive norms that can be referred to arbitration) whereas the first provision ultimately defines the disputes that cannot be referred to arbitration (i.e. the negative norms that cannot be referred to arbitration). Thus, the following topics and materials first review the scope of applying the *lex fori* in different stages and, then, discuss the legal principles existing in the area of arbitrability. Then, the pros and cons of these principles are critically discussed and, finally, human rights considerations in arbitration laws are examined from the perspective of international arbitration.

II. ARBITRABILITY IN NATIONAL COURTS AT PRELIMINARY PHASE OF INVESTIGATION

The issue of arbitrability may be raised at the preliminary phase of investigation in a national court which might be a national court of one of the parties or the national court of the seat of the arbitration.

Although different views are raised here (Van den Berg, 1981, p. 126)², the preferable view seems to be that the national court investigating an arbitration agreement must apply *lex fori* to determine whether the dispute in question can be referred to arbitration or not (Lew, Mistelis & Kröll, 2003; Arfazadeh, 2001, p. 76; Arfazadeh, 2005, p. 95)³.

² See also Court of Appeal, Paris, 4-XII-2002, *American Bureau of Shipping vs. Copropriétéé Maritime Jules Vernes*, 4 Rev. Arb. 1286 (2003).

³ Additionally, see European Convention on International Commercial Arbitration (1961), Art. VI (2) that states that «the courts may also refuse the recognition of the arbitration agreement if the dispute is not capable of settlement by arbitration» under the law of their country. Cfr. also Court of Appeal of Genoa, 7-V-1994, *Fincantieri-Cantieri Navali Italiani*

This view is only partially correct. *Lex fori* is only appropriate at the extent to which the jurisdiction of national courts (where the dispute has been referred to or the referral national courts) pertains to the specific dispute under investigation.

In other words, *lex fori* will be applied only when there exists a conflict of jurisdiction between the arbitral tribunal and the national courts to which the case has been referred. As it was mentioned earlier, the main goal of the government by legislations regarding arbitrability is to apply the legislated rules at the time of the occurrence of conflicts of jurisdiction between the courts of that country and the arbitral tribunal and also to assign the exclusive jurisdiction to national courts in relation to particular disputes.

However, these kinds of jurisdictional conflicts will occur only when the national courts which have been referred to have an exclusive jurisdiction in dealing with the dispute in question in an arbitral tribunal. This issue will in turn depend upon the question whether the dispute under investigation has any territorial connection with the country to which the national court belongs or not. The jurisdiction and qualification of the seat of the national courts are limited to the disputes relating to arbitration that take place within the jurisdiction of the seat of the court⁴.

Therefore, the requirement for the application of their version of the law by national courts is that the disputes in question must have a direct territorial link to national courts. The simple fact that arbitration takes place in the same place would not be convincing.

For further explanation, it is suggested to assume that an agreement on the acquisition of permission between the United States of America and Japanese party includes the condition of arbitration in Germany. At this time, a dispute may occur outside of the agreement that had been signed in the US and had been executed in Japan.

In general, this dispute had no other connection with Germany or Europe except the fact that it had been stipulated in the agreement that the arbitration must be done in Germany.

Before establishing the arbitral tribunal, one of the parties resorts to the German courts based on the German Procedure Code (the seat of the national courts) and argues that the dispute is directly related to the registration and validity of the patent and, thus, cannot be referred to arbitration (Böckstiegel, Kröll & Nacimiento, 2007).

SpA and Oto Melara SpA vs. Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq, XXI YBCA 594 (1996).

⁴ Model Law on International Commercial Arbitration, Arts. 5-6, or the EAA 1992 s. 1 (c).

In this case, there is no reason for the German courts to exercise their own established law and decide whether the dispute can be referred to arbitration or not. Here, there is no reason for the application of the German law of the seat of the court in the German court for making the decision whether the case is arbitrable or not. This is not placed within the legal realm of the German law of the court seat to generally prohibit arbitration on any claim which does not include the economic interests or disputes over the patents in the German territories. Therefore, the actual meaning of the *Lex fori* with respect to the likelihood of being referred to arbitration refers to the protection of the exclusive jurisdiction of national courts.

This means that the German courts will ultimately decide on each claim with the following features: 1) The claim should not involve economic profits or validity of patents, and 2) If it has not been mentioned in the agreement, it will be put within the jurisdiction of German courts. Nonetheless, the exclusive jurisdiction of German national courts will not be at risk.

In fact, this is not by any means related to the subject since the German courts will not have any jurisdiction over the existing dispute even if there is no arbitration agreement. Therefore, there will be no jurisdictional disputes between the arbitral tribunal in Germany and German courts.

Consequently, there will be no reason for German courts to exercise their established law for the protection of the jurisdiction of German national courts. In our assumption, there might be a jurisdictional dispute between the arbitral tribunal in Germany and the national courts of another country (probably the national courts of the United States, Japan or a third country that has a territorial connection with the dispute in question or the country wherein the main relation has been formed).

But it is a controversy to determine whether the German courts should intervene to solve this jurisdictional conflict and protect the exclusive jurisdiction of the national courts of another country.

The jurisdictional rules of the third country have no cross-border power over the German courts. Only in exceptional cases, a national law asserts that national courts are bound to protect the exclusive jurisdiction of the national courts of another country.

For instance, this has been stipulated in the UNCITRAL Model Law about the cross-border insolvency, which is also related to arbitration. This law stipulates in its 20 articles that by the confirmation of the insolvency of disputes before the courts of a foreign country, the initiation and continuation of legal proceedings and the award in the individual's case by the national courts of the country must be suspended in relation to indebted assets, rights, commitments or responsibilities.

As it is generally accepted, the terms «individual actions or proceedings» includes arbitration disputes in Art. 20⁵. Thus, if the issue of arbitrability is directed to the national courts of a country that has enacted the UNCITRAL Model Law, the national courts are obliged to implement this law (*lex fori*). They prohibit any kind of arbitration in their territorial jurisdiction on the grounds that the insolvency disputes have been initiated by lodging the case in the national courts of a foreign country; otherwise, the exclusive jurisdiction of the foreign country will be violated, and this is precisely something that the Model Law intends to prevent about cross-border insolvency.

However, until there are not such explicit regulations in the referral national courts of law, these courts will have no responsibility to protect the exclusive jurisdiction of the national courts of foreign countries.

The main question still remains at play: if the national law of a court to which the case has been referred is not applicable to determining the issue of arbitrability (as German courts in our example), which law should be exercised to determine this issue? The answer is that the German courts should not attempt to decide on the arbitrability of the case because their exclusive jurisdiction is not at risk.

They must assign determination of this issue to the arbitral tribunal. They must have no jurisdictional interest whatsoever in the issue of arbitrability. In fact, German courts have the responsibility to assist the arbitration of the cases that occur in their territorial jurisdiction⁶. However, it is doubtful whether they are in a position to help or not.

Arbitrability is here an issue conflict of jurisdictional which exists between the arbitral tribunal and the national courts of a country and, therefore, this matter is basically related to the enforceability of the award. If the arbitral tribunal gets involved in a dispute that is under the exclusive jurisdiction of the national courts of a certain country, it will be more likely that the award that will be issued subsequently will not be enforceable in that country.

III. APPEAL TO THE AWARD IN NATIONAL COURTS OF THE SEAT

When an award is annulled due to non-arbitrability, the national courts of the seat always apply their national law (*lex fori*). This is mostly due to the fact that the majority of national regulations in lodging an appeal against

⁵ Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, United Nations. New York, 2014, p. 145.

⁶ German Tenth Book of the Code of Civil Procedure (Zivilprozeßordnung; ZPO) s. 1032.

the award have a provision that reflects Art. V (2) (a) of New York Convention; in fact, it refers explicitly to the national law of the seat. A common example here is Art. 34 (2) (b) (i) of UNCITRAL Model Law, which stipulates that the «subject of the dispute cannot be solved by arbitration in accordance with the law of this country». This means that the *lex fori* of the national courts where the award has been criticized will be the national courts of the seat.

However, the national law of the seat is not always qualified in determining the arbitrability of disputes when the issue of arbitrability is raised at the stage of proceedings regarding the annulment of an award.

In particular, national courts must examine whether dispute settlement through arbitral tribunal will be a violation of the jurisdictional rules of the court of the seat that grant exclusive jurisdiction to the national courts with regard to the dispute that has been resolved by the arbitral tribunal.

Response to this question depends on whether the national courts of the seat have jurisdiction over specific disputes in the first place. This, in turn, rests upon the fact whether or not the dispute has any territorial link with the seat of the court. If the answer to this question is negative, the national court of the seat should not reject the arbitral award. In such a case, the national law of the seat will not be violated regarding the arbitrability of the case. In fact, the national law of the seat will not have any role at all.

For further explanation on the above assumption, if the arbitral tribunal based in Germany ever decide to investigate the nature of dispute, the award that will be subsequently issued should not be invalidated by the courts in Germany. Based on the above assumption, the German courts do not have any jurisdiction over this particular dispute because it has no connection with Germany. Therefore, decision-making about the dispute would not be a violation of *lex fori* in Germany.

As it was explained earlier, the scope of *lex fori* is the maintenance of the exclusive jurisdiction of the national courts rather than to ensure on the assumption that no arbitration should be pursued about the validity of patents in German territory. Hence, there is no reason for the German courts to apply the *lex fori* and set the award aside.

IV. CONTROL OF ARBITRABILITY BY NATIONAL COURTS IN POSITION OF ENFORCEMENT OF THE AWARD

Here, the view that the court responsible for the enforcement of the award is required to apply its *lex fori* seems to be undeniable (Bernardini, 2008, p. 516). This is mainly due to the explicit words of Art. V (2) (a) of

New York Convention which stipulates that «the subject matter of the difference is not capable of settlement by arbitration under the law of that country».

In principle, this view should not be questioned. The *lex fori* is the only authority to which the enforcement courts are referred in order to determine whether the arbitral award has violated the laws concerning the impossibility of arbitrability. Nevertheless, the question is whether the *lex fori* is always suitable in determining non-arbitrability even at the enforcement stage. The enforcement courts should not get involved in an examination of whether the type of the dispute determined by arbitral tribunal was in general arbitrable in accordance with the notion of arbitrability determined by the *lex fori*.

The central issue for these courts is to examine whether the arbitral award in resolving a dispute has violated the exclusive jurisdiction of the national courts of the place where enforcement of award takes place. Moreover, the enforcement courts must investigate whether the arbitral tribunal has considered a default jurisdiction with regard to a particular dispute despite a binding regulation in the *lex fori* (i.e. the law of the enforcement courts) which grants these courts a jurisdiction over similar disputes.

From this perspective, the *lex fori* would be suitable in determining the applicable law only if the enforcement courts have a basic jurisdiction over the dispute that has been already settled by arbitral tribunal. This will depend on whether or not the specific dispute has had any jurisdictional link other than the fact that the award is supposed to be enforced with the enforcement state in the first. Otherwise, the *lex fori* will be inappropriate in determining the non-arbitrability.

If the dispute had absolutely no territorial link with the enforcement state, the enforcement courts would never have jurisdiction over the dispute. None of the national rules of the enforcement state that seek to protect the exclusive jurisdiction of the enforcement courts would have ever been violated (i.e. *lex fori* on non-arbitrability).

The jurisdictional regime of the enforcement state which has been established through the *lex fori* on non-arbitrability, will remain intact and, therefore, there will be no reason for these courts to resist the enforceability of the award.

For example, suppose that a tribunal in Switzerland gives an award on a dispute over the patent which has been registered by the patent office in Italy. If one of the parties wishes to enforce this award in Italy, it is possible that the Italian courts resist with its enforcement on the grounds that the

award has violated the *lex fori*⁷ which gives exclusive jurisdiction over that particular dispute to the Italian courts. Since relevant patent was registered with the Italian patent authority, the Italian national courts would have exclusive jurisdiction over the specific disputes relating to that patent. Under the assumption of jurisdiction over this dispute, the arbitral tribunal has violated “the Italian *lex fori*” and, thus, the Italian courts would rightfully rely on the *lex fori* to resist the enforcement of the award in Italy.

However, if the dispute is related to a patent registered, for example, in Japan, there would be no reason for the Italian courts generally to oppose the enforcement of the award in Italy based on the principle that this kind of dispute «cannot be raised by the parties». This is not the purpose of the Italian Code of Civil Procedure Art. 806, but its purpose is that to allocate the jurisdiction to arbitral tribunal and Italian courts and also to maintain the exclusive jurisdiction of the Italian courts with regard to specific disputes. If the Italian courts never had jurisdiction on a particular dispute that has been resolved by arbitral tribunal, there would be no reason to apply their *lex fori* and oppose the enforcement of the award.

V. BRINGING THE DISPUTE IN AN ARBITRAL TRIBUNAL

In the strict sense of the word, the arbitral tribunal has no *lex fori*. Nevertheless, the national law of the seat of the arbitration (that is, *lex loci arbitri*) conventionally plays an important role in determining the arbitrability by the tribunal.

This is for two reasons: First, the law of the seat has been explicitly referred to in the New York Convention, in Art. V (1) (a)⁸. Second, and also more importantly, the arbiters tend to refer to the law of their own seat in deciding on the arbitrability of a dispute in order to prevent the annulment of their award by the national courts of the seat (Bernardini, 2008, p. 513).

However, according to what has been discussed thus far, the arbiters must consider the *lex loci arbitri* only when the dispute in question has a territorial connection with the law of the seat. There is a possibility that the *lex loci arbitri* establishes exclusive jurisdiction for the national courts over a particular kind of dispute (e.g., disputes over insolvency or disputes that the parties cannot solve). However, the arbitral tribunal is obliged to apply this provision so long as the dispute in question is concerned with the law of

⁷ Italian Code of Civil Procedure, Art. 806 or EC Reg. 44/2001 Art. 22 (4).

⁸ Geneva Convention on the Execution of Foreign Arbitral Award (1927) also makes reference to the *lex loci arbitri*, Art. IX (1) (a).

the seat in terms of territory; otherwise, no issue will be raised in relation to the jurisdiction of the national courts of the seat. Therefore, the *lex loci arbitri* (as a jurisdictional conflict of law) will not be suitable for that specific dispute⁹.

There would be no potential conflict of jurisdiction between national courts of the seat and the arbitral tribunal and, thus, the *lex loci arbitri* on arbitrability would have no locus standi to apply.

In contrast, if the dispute had a territorial connection with the seat of the arbitration, this link might provide an exclusive jurisdiction for the national courts of the seat. In this case, the *lex loci arbitri* would be appropriate and the arbitral tribunal will consider it to determine the arbitrability.

Let us illustrate by reference to the same presumptive case above on a dispute to the validity of a patent: if the seat of the tribunal is in Germany but the pending dispute has no connection with Germany, there will be no basis for the tribunal to take the relevant *lex loci arbitri* on arbitrability into account¹⁰.

In terms of jurisdiction, the *lex loci arbitri* about the arbitrability will be irrelevant regarding the settlement of the dispute in question. The German courts would never have jurisdiction over the disputes filed in the arbitral tribunal. Hence, no conflicts of jurisdiction will be created between courts in Germany and the arbitral tribunal and, additionally, there will be no chance to apply the *lex fori* regarding the arbitrability. In that case, the arbitral tribunal should not be concerned that its award may be annulled by the national courts of the seat.

As it was explained above, there is no justification for the national courts to neglect the arbitration award since none of the national rules concerning the arbitrability have been violated. Then, if the *lex loci arbitri* is irrelevant to the dispute, the following important question still remains at play for the arbitral tribunal: Which rule should be taken as a guideline in deciding whether the arbitral tribunal has jurisdiction over the raised dispute?

The applicable substantive law would not be appropriate because the issue of arbitrability is a matter of jurisdiction rather than a matter of substance. Therefore, arbitral tribunals must refuse to decide on the arbitrability of the pending case by reference to the applicable substantive

¹¹ The Statutes of the European Acoustics Association, sections 2-4, or the UNCITRAL Model Law, Art. 1.

¹² German Tenth Book of the Code of Civil Procedure (Zivilprozeßordnung; ZPO) s. 1032 and EC Reg. 44/2001, Art. 22 (4).

law. Additionally, the applicable law will not be appropriate with regard to the validity of the arbitration contract because arbitrability is not a subject that can be related to the validity of the arbitration agreement (Brekoulakis, 2009).

The dispute brought to the arbitral tribunal will be properly connected to a country other than the one where the seat of arbitration is based through a territorial connection. This territorial connection may lead to the exclusive jurisdiction of the national courts of that country. In other words, it is possible that there is a conflict of jurisdiction between the arbitral tribunal and the national courts of a country other than the one where the seat of the arbitration is based. Moreover, there might be a provision about the arbitrability of the case in this country that is the cause of the filed dispute over the arbitral tribunal and the jurisdiction has been assigned to the national courts. Nevertheless, it is doubtful whether the arbitral tribunal is bound to comply with these national regulations. In fact, this issue is relevant to the broad question whether an arbitral tribunal should comply with mandatory rules of a country other than the country where the seat of the arbitral tribunal is located (Mistelis, 2007, pp. 217-229; Brekoulakis & Mistelis, 2009, pp. 51-155). In the above instance, when the arbitral tribunal is held in Germany, the dispute in question might have a territorial connection with the US or Japan whose arbitrability rules confer exclusive jurisdiction upon their national courts in case of specific disputes. Apparently, there is no basis for the arbitral tribunal held in Germany to reject its jurisdiction over the dispute in question because non-arbitrability has been considered for the dispute in Japan or the United States. The mandatory jurisdictional regulations in Japan or the United States have no extra-territorial power over the arbitral tribunal held in a foreign country. Therefore, the arbitral tribunal is not required to apply these rules. Ultimately, the arbitral tribunal must determine the arbitrability of disputes on the basis of fundamental or practical limitations of arbitration as a mechanism for the settlement of disputes (Brekoulakis, 2009).

VI. APPLYING THE LEGAL PRINCIPLES APPLICABLE TO ARBITRABILITY IN ARBITRAL PROCEEDINGS

The arbitration institution should seek for a solution other than the one set out in international arbitration conventions and UNCITRAL Model Law. If the responsible institution pays attention to the theory of arbitration, it will encounter several scattered ideas.

If one party, due to the non-arbitrability nature of the dispute, claims the invalidity of the arbitration clause, many arbitration institutions will enforce the law of the country whose tribunal has jurisdiction to review the arbitration. However, in the international arbitration procedure, the *lex fori* has been chosen by many courts, which has nothing to do with the subject of litigation and is the common practice in the courts (Craig, Park & Paulsson, 1990, p. 82). In addition, the responsible court can be changed during the judicial process. Moreover, in virtual arbitral proceedings, no physical investigation is made. The location of the arbitral tribunal is a very random criterion that arbitrability depends on (Craig, Park & Paulsson, 1990, p. 82). Other arbitration awards determine the law applicable to arbitrability in accordance with the intentions of the parties. Referring to this view is rooted in the fact that it derives from the independence of the parties and the comprehensive principle of international commercial arbitration. However, this issue has been subject to criticism since the rules on arbitrability are of an imperative nature (Lalive, Poudret & Reymond, 1989, p. 309). The view that the parties can avoid compulsive rules of arbitrability only by choosing a different law to be applied to their arbitration agreement has been attributed to Baron Von Munchhausen's viewpoint (Lalive, Poudret & Reymond, 1989, p. 309). The application of parties' self-autonomy towards arbitrability does not take into account the public interests lying at the center of the laws or the awards of the courts that exclude disputes from resolution through arbitration. These interests are so important that they cannot be selected by the parties (Lehmann, 2004, p. 755).

In addition, the other view maintains that arbitrators should consider issues of arbitrability in accordance with the law of the country where the probability of the enforcement of an award is much greater (Lehmann, 2004, p. 755). This theory is based on the argument that the arbitration institution is expected to ensure that its award is enforceable as far as possible. However, this view faces practical problems. Firstly, it is required that the arbitration institution determines in which country there are the assets of the losing party in order to be able to determine the country that is more likely to be the place of enforcing the award. This is difficult and often an impossible task (Lehmann, 2004, p. 756). The more important point is that the arbitral tribunal at the beginning of the proceedings should also be aware that the losing party is capable of determining the jurisdiction of the arbitral tribunal. Finally, the party that establishes an arbitration agreement should not be allowed to object to the jurisdiction of the arbitral tribunal later on based on the fact that the arbitral award is not enforceable. Therefore, the current theory is not convincing.

A very different approach is to consider the applicable substantive law. The current approach has been defended by Pierre Mayer in his speech at the Hague International Law Academy.

Mayer argues that arbiters should enforce the regulations that exclude arbitrability like any substantive rule of preemptory law. His view is based on the premise that arbiters should respect any conflicts within the scope of their power; otherwise, they will not validate the legitimate role of the government (Mayer, 1989, p. 438). While this theory holds true in terms of revealing the relationship between the substantive law and arbitrability, it also has some shortcomings and gaps.

First, this theory does not stipulate the applicable law in the case of a dispute over the conflicting rules governing arbitrability. Second, this theory permits the abuse of a government in that the claims that the law of that state asserts their non-arbitrability should be applied even in situations where there is no connection or there is only a weak and indirect connection, or in situations where the state itself or one of its affiliated companies is present as a party. As a result, the governments that restrict arbitrability often find their own laws more applicable than other laws that have adopted a more liberal approach to arbitrability (Mayer, 1989, p. 439).

Other pertinent methods for determining the applicable law are the application of the law of one or both of the parties and the application of the law of the state whose courts are usually responsible for determining the jurisdiction over the dispute. In a report released by Goerges Sauser–Hall in early 1952, it was referred to the International Law Institute and stated that the application of the laws of the parties and application of the law of the State whose courts are competent to exercise jurisdiction are inappropriate. These views have never been of importance in the practical procedure of arbitration institutions (Sauser-Hall, 1952, pp. 550-554).

In sum, none of the above theories adequately specify the law applicable to arbitrability. As one of the commentators has pointed out, «there is a consensus on this conclusion that controversy seems to be the only common criterion that can be found between arbiters, courts, and legal writers in relation to what law is applicable to arbitrability» (Böckstiegel, 1987, p. 184). This would be less surprising if it were to be taken into account that the rules governing arbitrability reflect the various public interests that are largely dependent on public policy. Governments are competing with each other to make their own laws applicable to arbitration. The arbitral tribunal should select the most suitable law among those rules and its responsibilities will be much easier if it is able to find and apply the principles of transnational law that govern the arbitrability (Lehmann, 2004, p. 758).

VII. HUMAN RIGHTS CONSIDERATIONS IN ARBITRAL RULES FROM THE PERSPECTIVE OF INTERNATIONAL ARBITRATION

It was generally speculated that human rights had little or no connection with international arbitration, which was due to the fact that the international trading community used arbitration to resolve international trade disputes. The parties did not need the support of human rights regimes, and it was assumed that the parties would be backed up by remaining committed to the legal process and fair trial that had been approved by the New York Convention. In addition, since the parties reached a common agreement on referral to arbitration, they effectively abolished the rights supported in the courts. This perspective was strongly confirmed by the fact that no reference has been made to arbitration in human rights documents. On the other hand, fair trial has been considered as one of the most recognized and fundamental rights of human beings and has also been emphasized in international documents and human rights conventions. The realization of such a right in courts' proceedings and arbitration requires the observance of the principles of the proceedings (Khedri, 2015, p. 520). In the discussion of fair trial in human rights documents, it is possible to refer to Art. 10 of the Universal Declaration of Human Rights and Art. 6¹¹ of the European Convention on Human Rights¹². Many legal authors have carefully analyzed these documents and have inferred these principles as the ones that courts and arbitration institutions are required to deal with: the principles of independence and impartiality of the court and the arbitrator (UNCITRAL Model Law, Art. 12), equality in treating the dispute parties, public proceedings, adversarial proceedings (UNCITRAL Model Law, Art. 8, and Rules of Arbitration of the International Chamber of Commerce, Art. 22), and the right of appeal against the award. The observance of equality in treating the parties and the adversarial proceedings are among the mandatory principles of the proceedings and the standards accepted for the fair trial in arbitration proceedings. In international arbitral rules, some guarantees have been predicted for the realization of these principles. These guarantees are categorized in two groups of guarantees before and after issuing the awards.

¹¹ The Universal Declaration of Human Rights stipulates that «everyone has the equal right to lodge his/her claim during a fair trial in an independent, impartial, and public court, and such a court shall make a decision in respect of his/her rights and obligations or each charge levelled against him/her» (art. 10).

¹² The European Convention on Human Rights stipulates: «Everyone has the right to have his/her claim be heard during a fair trial in an independent, impartial, and public court, and such a court should issue a public award about the disputes pertaining to his/her civil rights and obligations or any criminal charge against him/her» (art. 6).

The obligation to disclose and the right to challenge the arbitrator are among the important guarantees before the issuance of the award.

In this regard, if, after the issuance of the arbitrator's award, it is revealed that the arbitrator has not observed the equality or the adversarial proceedings, in arbitration law, it will be attempted to prevent the violation of the losing party's rights through requesting the revocation, or the application for non-recognition and non-enforcement of the foreign arbitration award. However, in Art. 34§2 of the UNCITRAL Model Law, there are indications of the request for the revocation of the arbitral award. Since arbitration is a part of the legal order of the country where the award has been issued, it must be said that if the arbitrator's decision is against the legal order, it should be possible to override the award in order to safeguard public policy in the area of jurisdiction (Born, 2009, pp. 2620-2921; Gaillard & Savage, 1999, pp. 947-960)

Moreover, as the aim of the plaintiff's lawsuit in courts' proceedings is to obtain an award and enforce it, it is also important to enforce the issued award in arbitral proceedings because the enforcement of the award can lead the winning party to reach his/her right. In most cases in international commercial arbitration, the parties or the arbitration institution usually choose a neutral country as the seat of arbitration with which it has no relation. Therefore, since the losing party usually does not have any properties for the enforcement of the award in the country where the award is issued, the winning party should ask for the enforcement of the award in the country or the countries where the losing party owns properties. Meanwhile, if the winning party requests the enforcement of the award in another country and the losing party believes that the issued award is void in the light of the non-compliance with the principle of equality or the non-observance of the principle of the adversarial proceedings, s/he cannot ask for the annulment of the award in the courts of that country under the excuse that the award has not been issued in that country. This is so because the annulment of the arbitrator's award is restricted to the jurisdiction of the court of issuing the award or the place where the award has been issued in line with the law governing the country's arbitral proceedings. However, the losing party can ask for the non-recognition and non-enforcement of foreign arbitration award in accordance with Art. 36, clause 1, of UNCITRAL Model Law and Art. 5 of New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards with respect to the violation of the mandatory principles of the proceedings which have led to the elimination of a fair trial. It is worth noting that one of the representations of the non-recognition and non-enforcement of foreign arbitration awards in international documents is the non-arbitrability of the dispute and the

award's contrast to the public policy of the country in which the foreign arbitral award is enforced.

Of course, the authors of the current study believe that although arbitration tribunals should be inspired by human rights laws, the direct application of human rights will not be appropriate because Art. 6 of the European Convention on Human Rights, for example, speaks of public trials, while everyone has accepted that arbitration is private and usually confidential. Although the European Convention on Human Rights is not directly enforced relative to arbitration, it has an indirect effect on arbitrators and arbitration institutions. In addition, the authors of this study believe that the effect of public policy is different in the stage of establishing the right (the stage of issuing a foreign arbitral award) and in the stage of the effectiveness of the right (the stage of the enforcement of the foreign arbitral award); and it may get diminished or increased. In general, it can be argued that public policy produces an attenuated effect, and should be less used in the stage of the effectiveness of the right (the stage of the enforcement of the foreign arbitral award); however, public policy produces a strong effect in the stage of establishing the right (the stage of issuing a foreign arbitral award). This means that the arbitrator cannot recognize a right in contradiction to the material laws and the right creator for the parties or one of the parties in the face of an issue contrary to the public policy.

However, if such an award is issued, it can be revoked because of the violation of public policy (Art. 34, clause 2, of the International Commercial Arbitration Law of Iran (1997) and Art. 34 of UNCITRAL Model Law). But, if a right has been obtained abroad, the arbitrator may also refer to the doctrine of the attenuated effect of the public policy and can recognize the right, even if the *lex loci arbitri* does not consider that right to be producible. For example, we assume that a commercial contract is concluded between an Iranian businessman and an American one. In this contract, the parties agree that in the event of a dispute in the appearance of any damage resulting from the cancellation of the contract and its determination, the arbitrator should deal with the dispute between them and the seat of arbitration is determined in the United States. In this assumption, the Iranian businessman becomes bankrupt after the cancellation of the contract. In the United States, pure bankruptcy issues, such as establishing a manager and lodging a bankruptcy lawsuit, which are not arbitrable are considered to be different from other issues, such as standardized and common financial lawsuits against the bankrupt party or claims for determining the losses arising from the contract cancellation that do not impose any problem to the main topic of the bankruptcy issue.

On the other hand, since such disputes are clearly arbitrable on their own and do not become non-arbitrable due to one's bankruptcy, they are considered to be different in terms of judgment. In contrast, clause 1, Art. 496 of the Iranian Civil Procedure Code has made no distinction between pure bankruptcy issues and other issues and does not consider all the claims against a bankrupt businessman to be arbitrable and it has been asserted that any dispute against a bankrupt businessman will be in the jurisdiction of the court and cannot be referred to the arbitration. Now, in this case (the lawsuit for damages arising from contract cancellation), the seat of arbitration is the United States and the arbitral proceedings will begin in that country. Assume that the arbitrator eventually issues the award in favor of the American businessman and condemns the Iranian bankrupt businessman to pay an amount as the compensation for the damage arising from the contract cancellation; and the losing party (Iranian bankrupt businessman) has no properties in the United States. But, if the American businessman wishes to enforce the award through the courts of Iran where the losing party owns properties, the Iranian court judge naturally cannot refer to Clause 496 of the Civil Procedure Law of Iran and refuse to recognize and enforce the foreign arbitral award under the pretext that the claims against the bankrupt businessman are not arbitrable. This is so because here the issue of the creation of the right is not at play; instead, the aim is to enforce the obtained right to the property that has been legally established in the United States in the past. Therefore, now in Iran, the issue of the enforcement of the obtained right is at play public policy creates an attenuated effect in the stage of the right enforcement.

On the other hand, public policy has both positive and negative effects in terms of the enforcement of the foreign law. The effect of public policy will be negative when the arbitration authorities can rule out some aspects of the law governing the arbitration agreement under the pretext of public policy even if these aspects have been chosen by the parties; hence, the negative effect of public policy is clearly observable. Arbitrators can reject the law that is really against the public policy with reference to the two laws, namely the *lex fori* based on their national law or a law they deem appropriate and can replace the rejected law with the two said laws. Therefore, it will be possible to consider a positive effect for the public policy. Anyway, public policy, which can have a positive or a negative effect as a result of the enforcement of foreign law, will have only a negative effect when it comes to the enforcement of foreign arbitral awards because it is mostly asserted that the award cannot be enforced due to its contrary with public policy and no other awards will be issued. In fact, solely the enforcement of the foreign award is refused.

It seems that the foundation of all these principles in the law of hearing and arbitral proceedings is the decree of reason and wisdom as a divine gift, which is common to all human beings and has been confirmed by natural rights and moral.

VIII. CONCLUSION

1. In this study, it was shown that arbitrability refers to some limitations that are imposed by the legal systems to protect the public interests and create order in the referral of some particular issues to arbitration. Some have considered arbitrability as a broad concept and have discussed the state restrictions or the limitations arising from the lack of capacity under the title of arbitrability. Some others have generally brought all the cases to which arbitration contract cannot be applied under this discussion. However, what many experts in the field of arbitration have accepted is that arbitrability only relates to the restriction in referring some issues to the arbiter.

2. In terms of the law governing the arbitrability, this study indicated that there is a controversy over this subject in that some use the *lex fori*. Proponents of this criterion have considered the connection of arbitrability with public policy as the reason for their support for this criterion. On the other hand, criticisms have also been levelled against this criterion. In fact, the lack of connection between the *lex fori* and the subject of the dispute in some cases, change of the court investigating the subject of the dispute during the proceedings, and the lack of physical examination of the subject of the dispute in virtual arbitration are among the criticisms levelled against this criterion.

3. Some believe that it should be referred to the parties' intents in order to determine the law governing arbitrability, and state their reason for their support of this criterion in that the criterion is rooted in the independence of the parties and has originated from the principle of international commercial arbitration. In addition, since the subject of arbitrability is related to preemptory rules and internationally agreed laws, and the parties' agreement in some cases may violate the preemptory laws pertaining to arbitrability, this criterion has been criticized.

4. Some others believe that we should refer to the law pertaining to the law of the place of enforcement of the award in order to determine the law governing arbitrability. The foundation of this theory is the guarantee of enforcing the awards issued by arbitration institutions. However, this criterion has also received some criticisms because its application is subject

to the premise that it is necessary to determine who is the losing party in the beginning of the hearing, which is impossible to determine in most cases.

5. The law governing the nature of the disputes is also another criterion that may be used in the issue of the law governing arbitrability. One of the disadvantages of this criterion is that it facilitates the abuse of a state by resorting to its own law for determining the arbitrability of a subject although there may be no connection or a very weak connection.

6. There are other common theories, such as the application of the desired law of one or both parties, each with its own advantages and disadvantages. In brief, none of the aforementioned theories have not clearly identified the law governing arbitrability. The arbitral tribunal should be able to find and apply the legal transnational principles that govern the arbitrability and are shared between the countries.

7. Moreover, if the arbitrator or arbitral tribunal has not complied with the principles of fair trial, the losing party is allowed to ask for the revocation of the award in the country where the award has been issued after the issuance of the decision. Plus, the losing party requests the non-recognition and non-enforcement of the award due to the violation of the principles of fair hearing. In the area of the recognition and enforcement of foreign arbitral awards, the indirect role of human rights has become important, and governments facilitate the recognition and enforcement of these awards in regard to the obtained rights by accepting the theory of *doctrine of attenuated effect of the exception*.

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