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LAW APPLICABLE TO ARBITRABILITY AND CONFLICT OF LAW RULES. HOW TO OPT FOR THE RIGHT ONE?

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Scope of the Presentation

- Arbitrability (A.)
- Applicable law (B.)
- *De lege lata* and *de lege ferenda* (C.)

A. Arbitrability – Two Aspects

1. Objective: subject-matter capable of being resolved by arbitration
2. Subjective: parties entitled to submit their disputes to arbitration

B. Applicable Law

- Conflict of law rules
 - Law governing the dispute (*lex causae*)?
 - Law of the place of arbitration: *lex loci arbitri*
 - Law of the national court: *lex fori*
- Substantive rule: Swiss law (Art. 177 PILA 1987) and German law (Art. 1030 ZPO 1998)

Art. 177 Swiss PILA (“Arbitrability”)

1. Every pecuniary claim may be the subject of arbitration. (*objective arbitrability*)
2. A party which is a state, a state-dominated enterprise or a state-controlled organization may not assert its own law to contest its capacity to be a party in the arbitration or to contest the arbitrability of a dispute which is the subject of an arbitration agreement. (*subjective arbitrability*)

A. Subjective Arbitrability - The Choice of Law Method

- A matter of the party's capacity or power to enter into an arbitration agreement
or
- A matter of arbitrability?
- *Dalico* case (CA Paris, 26 March 1991)

A. Subjective Arbitrability - Other Substantive Rules

- International conventions (1961 European Convention; 1965 Washington Convention)
- International arbitral case law
- Non-binding texts (1989 Institute of International Law, Bull. ASA 1990, 203)

A. Subjective Arbitrability - Art. II, para. 1 of the 1961 European Convention

In the cases referred to in Article I, paragraph 1, of this Convention [*i.e. arbitration agreements and awards within the scope of the Convention*], legal persons considered by the law which is applicable to them as “legal persons of public law” have the right to conclude valid arbitration agreements.

A. Subjective Arbitrability - International Arbitral Case Law

- ICC Case No. 1939 (international public policy)
- ICC Case No 1526 (interpretation of arbitration agreements in international commercial contracts)
- ICC Case No 2521 (international public policy)
- ICC Case No 4381 (good faith and international public policy)

A. Scope of Objective Non-Arbitrability

- Confidence placed in arbitration as a dispute resolution mechanism?
- Two types of situations:
 1. The subject-matter in itself suffices to render the dispute non-arbitrable
 2. The review of compliance with public policy will be exercised in the context of an action to set aside or enforce the award

A. Objective Arbitrability - Specific Applications

- Matters which do not involve economic interest? Administrative, family and criminal law?
- Inalienable rights?
- Antitrust law? *Paris CA 1993 (Labinal)*; *1992 Bull. ASA 368*; *Mitsubishi Motors Corp., 473 US 614 (1985)*
- Intellectual property? *Paris CA, 24 March 1994*
- Bankruptcy procedures? *Syska&Elektrim SA v. Vivendi&Others (2008) EWHC 2155 (Comm)*
- Corruption?
- Taxation disputes?
- Company law?
- Trusts and inheritance?

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B. Applicable Law - Council Regulation (EC) No 44/2001 of 22 December 2000

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights **in rem in immovable property** or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object **the validity of the constitution, the nullity or the dissolution of companies** or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
3. in proceedings which have as their object **the validity of entries in public registers**, the courts of the Member State in which the register is kept;
4. in proceedings concerned with the registration or validity of **patents, trade marks, designs, or other similar rights** required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the **enforcement of judgments**, the courts of the Member State in which the judgment has been or is to be enforced.

B. Applicable Law - The UNCITRAL Model Law on Cross-Border Insolvency

Art. 20 (Effects of recognition of a foreign main proceeding)

Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed.

B. Applicable Law - Control of Arbitrability by National Courts (Challenge or Enforcement)

- *Lex fori*
- Art. V(2)(a) New York Convention: *The subject matter of the difference is not capable of settlement by arbitration under the law of that country*
- Art. 34(2)(b)(i) UNCITRAL Model Law

C. De lege ferenda

- Departing from public public considerations...
 1. Conflict with exclusive jurisdiction of the national court?
 2. Center of gravity or the most significant connection of the legal relation?

CONCLUSION

- *Swiss solution: most modern and most “arbitration-friendly”*
- Look for a Swiss banking account of your opposing party...

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Thank you for your attention.

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