THE LAW APPLICABLE TO ARBITRABILITY

This article deals with the determination of the law applicable to the issue of arbitrability. A first distinction has to be made between subjective arbitrability – by reason of the quality of one of the parties, when this party is a State, a public collectivity or entity or public body; and objective arbitrability, by reason of the subject matter of the dispute which has been removed from the domain of arbitrable matters by the applicable national law. With respect to subjective arbitrability, it is generally accepted that a State, a state enterprise or a state entity may not invoke its incapacity to enter into an arbitration agreement to refuse to participate in an arbitration to which it has previously consented. On the other hand, the determination of the law applicable to objective arbitrability is more delicate since the solution to the issue may vary depending on whether it is decided by an arbitral tribunal, by a state court to which one of the parties has concurrently submitted the dispute or in the course of a setting-aside or enforcement procedure. If it is accepted that the *lex fori* generally applies to the issue when it has to be decided by a court in the context of a setting-aside or enforcement procedure or when the court is concurrently seized by a party which deems the dispute is non-arbitrable, the answer is not as clear when the question of arbitrability has to be decided by an arbitral tribunal: the law governing the arbitration agreement seems to be the prevailing answer but the law of the seat is also sometimes applied.

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I. Introduction

1 Although judicial power is an essential prerogative of States, the parties may, if they express the wish to do so, give jurisdiction to arbitrators to settle their disputes. However, the State retains the power to prohibit settlement of certain types of dispute outside its courts. It is then claimed that the dispute is not arbitrable. If an arbitration agreement is entered into, it will not be valid. Arbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrators' jurisdiction.

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2 This article will be devoted to the determination of the law applicable to the issue of arbitrability as it was just defined, namely, whether a particular dispute may be decided through arbitration and, consequently, whether the arbitration agreement is valid. We will not deal with the issue of arbitrability in the sense that the term is used principally in the US to cover the determination of the scope of the arbitration agreement. So understood, the issue arises when the wording of the arbitration clause is ambiguous or when the dispute is in tort while the clause seems to cover only contractual matters. The interpretation of the scope of the arbitration agreement does not generally raise questions of applicable law. In most cases, it is a plain "common sense" process. And if the question arises as to which rule of interpretation is applicable in a particular case, it should be resolved in accordance with the law governing the arbitration clause.

3 In its usual meaning, arbitrability can be challenged in two different ways: (a) by reason of the quality of one of the parties, when this party is a State, a public collectivity or entity or a public body. One refers in this case to subjective arbitrability or arbitrability *ratione personae*, which is directly related to the quality of the parties in dispute; and (b) by reason of the subject matter of the dispute which has been removed from the domain of arbitrable matters by the applicable national law. This is objective arbitrability or arbitrability *ratione materiae*.

4 The issue of arbitrability may arise at various points in the procedure: (a) it will often be invoked in the first place before the arbitral tribunal which will decide on it itself, in accordance with the principle of *Kompetenz-Kompetenz*; on the other hand, (b) the party which deems the dispute not to be arbitrable may submit it to the court and the court will have to decide upon the objection raised by the defendant on the basis of the arbitration agreement; (c) the non-arbitrability may also be invoked before a court as a ground for a setting-aside procedure; lastly, (d) the objection of non-arbitrability may be raised by the defendant before the court deciding on the recognition and enforcement of the award. At each stage the question arises: what law governs the issue of arbitrability?

II. Subjective arbitrability

A. In general

5 National statutes sometimes contain provisions which limit or exclude the submission of disputes to arbitration when the State or a

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public entity is a party. In some cases, they prohibit the recourse to arbitration, either in whole or in part.[1] In other cases, they subordinate the validity of the arbitration agreement concluded by a State or a public entity to the obtention of a prior authorisation.[2]

6 The issue of subjective arbitrability arises in particular when a State or a public entity which has signed an arbitration agreement subsequently avails itself of the above provisions to try to avoid the arbitration. In Singapore, the law is very liberal. Both the Arbitration Act[3] and the International Arbitration Act[4] provide that they are binding on the Singapore government.[5] Consequently, the State may enter into an arbitration agreement and will be bound by it in the same manner as any other party to an arbitration agreement to which either Act applies.[6]

B. The applicable law

7 Initially, the issue of subjective arbitrability was decided in accordance with the law determined by conflict of law rules, namely, the law governing capacity or the law governing the disputed agreement. This method has been progressively abandoned and today the issue is generally determined by the application of a substantive rule of international law.

8 More particularly, there seems to be a general agreement to the effect that the subjective arbitrability of international disputes to which a State, a public collectivity or entity or a public body is a party, is, notwithstanding the contents of the domestic law of the State or entity

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1 See, *eg*, Art 2060 of the French Civil Code: "*On ne peut compromettre … sur les contestations intéressant les collectivités publiques et les établissements publics.*"

2 See, for example, Art 132 of the Iranian Constitution of 15 November 1979 which requires that the submission to arbitration of disputes concerning state property be approved by the Council of Ministers. See also Art 3 of the Royal Decree of 25 April 1983 in Saudi Arabia which requires that before submitting to arbitration, the governmental authorities obtain the prior approval of the President of the Council of Ministers.

3 Cap 10, 2002 Rev Ed.

4 Cap 143A, 2002 Rev Ed.

5 Section 64 of the Arbitration Act (Cap 10, 2002 Rev Ed) and s 34 of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

6 According to *Halsbury's Laws of Singapore, Arbitration, Building and Construction* vol II (Lexis Nexis, Butterworths, 2003 Reissue) at p 26, para 20.019:

> The Singapore Government is bound to any contract so long as it is entered into with proper authority. It is entitled to commence and defend civil proceedings and has participated in numerous arbitrations. In international agreements, the International Arbitration Act expressly provides that it is binding on the Government. This means that the state is bound in the same manner as any other party to an arbitration agreement to which the International Arbitration Act applies. The Government has never raised the issue of immunity in arbitration proceedings.

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concerned, a principle of international public policy of the law of international arbitration.[7]

9 For decades, the arbitral case law has been consistent on this issue. For example, in *ICC Case No 1939 of 1971*, the arbitral tribunal dismissed the objection of the State – the defendant in the procedure – according to which administrative contracts could not be submitted to arbitration according to its own law.[8] The arbitrators declared that:

> If various legislations of French inspiration … prohibit the State or other public entities to enter into an arbitration agreement, it is admitted that this prohibition does not apply to international contracts. Indeed, since it is a rule of public policy, this prohibition can only apply in the internal public order. This is the position of the French case law, which is now well established and undisputed … Art X of the code of civil procedure of 'the State concerned' should not be interpreted differently.

10 The arbitrators also added that:

> International public policy would strongly oppose that a State organ, dealing with persons who are foreign to the country, could openly, knowingly and willingly, enter into an arbitration agreement with the contracting party who puts his confidence into it, and could therefore, either in the arbitration procedure or at the stage of enforcement, avail itself of the nullity of its own undertaking.

11 In the award rendered on 30 April 1982 in *Framatome v Atomic Energy Organization of Iran*, the arbitral tribunal rejected the argumentation of nullity of the arbitration clause invoked by the Iranian Organization based on Art 139 of the Iranian Constitution.[9] The arbitral tribunal gave the following reason:

> A general principle, which is today universally recognized in private inter-State as well as international relationships (either as a principle of international public policy, or a principle pertaining to the usages

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7 See *Société Gatoil v National Iranian Oil Co* of the Paris Court of Appeal, 17 December 1991 (1993) Rev Arb 280 at 281 with note H Synvet and 7 *Mealey's International Arbitration Report* (1992, No 7) at p B-5; Art II(1) of the European Convention on International Commercial Arbitration of 21 April 1961 to the effect that: "In the cases referred to in article I, paragraph 1, of this 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"; and Art 177(2) of the Swiss Private International Law Act of 18 December 1987: "If a party to the arbitration agreement is a State or an enterprise held, or an organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement."

8 Cited by Y Derains, "Le statut des usages du commerce international devant les juridictions internationales" (1973) Rev Arb 122.

9 JDI 1984 at p 58.

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of international trade or to the principles recognized by the *ius gentium* as well as by the law of international arbitration or the *lex mercatoria*) would in any case prohibit the Iranian State – even if it had intended to do so, which is not the case – from denying the arbitration undertaking which it had itself signed or that a public entity like AEOI would have previously signed.

12 It should also be noted that in 1988, the Institute of International Law adopted a resolution according to which a State, a state enterprise or a state entity, may not invoke its incapacity to enter into an arbitration agreement to refuse to participate in an arbitration to which it has previously consented (Art 5).[10]

III. Objective arbitrability

A. In general

13 The practice of international arbitration proves that the issue of which law governs arbitrability is not an easy one and that the answer to it may depend upon the tribunal or court before which it is raised. In other words, the solution to the issue may vary depending on whether it is decided by an arbitral tribunal, by a state court to which one of the parties has concurrently submitted the dispute or in the course of a setting-aside or enforcement procedure.

B. Objective arbitrability before the arbitral tribunal

14 According to which law shall the arbitrator determine the arbitrability of the dispute? The following hypothetical case gives an example of the complexity of the issue and of the numerous interrelated problems which it raises.

15 A French company and an Italian company enter into a trademark licence agreement. A dispute arises which involves the validity of the trademark and arbitrators are appointed. The arbitral tribunal has its seat in Geneva. According to the law governing the licence agreement, the issue of validity of the trademark is not arbitrable. On the other hand, according to Art 177 of the Swiss Private International Law Act, all disputes involving pecuniary matters may be submitted to arbitration. The dispute is therefore arbitrable in Switzerland. Should the arbitrators decide the issue of arbitrability by application of the law governing the agreement or in accordance with the law of the seat of the arbitration? Should the arbitral tribunal take

10 (1990) Rev Arb 931 with note by Ph Fouchard and XVI YB Com Arb 233 (1989) with note by A T von Mehren.

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into consideration the fact that the award would subsequently have to be enforced in the country whose law governs the licence agreement, with the consequence that the award might not be recognised or enforced by the courts of this country?

(1) Application of the law governing the arbitration agreement

16 The answer to the issue of applicable law is that the arbitral tribunal will decide it by application of the law which governs the arbitration agreement, *ie*, the autonomously chosen law. This is the solution which is expressly provided by Art II(1) and Art V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[11] ("New York Convention") and by Art VI(2) of the European Convention on International Commercial Arbitration of 21 April 1961.

17 However, in most cases, it is not easy to determine the law which is proper to the arbitration agreement, because the parties have not furnished any express indication in this respect. It is often considered that the parties have submitted their arbitration agreement to the same domestic law as the main agreement although other solutions have been retained, such as the law of the seat of the arbitration. When the parties have not expressed their will as to the law applicable to the arbitration agreement, the arbitrators have freedom to determine the applicable law, especially since the arbitration agreement is autonomous from the main agreement. In exceptional cases, arbitrators have even considered that the arbitration agreement was not governed by domestic law but by international trade usages, for example, in ICC Award No 4131 of 1982.[12]

18 Once the arbitrators have determined the law applicable to the arbitration agreement, they will, depending upon the substance of this law, conclude that the dispute may or may not be submitted to arbitration.

19 In Singapore, there is no exhaustive list of non-arbitrable matters with respect to subject matter arbitrability. It is generally said that issues that may have public interest elements such as citizenship or legitimacy of marriage, trade union disputes, validity of intellectual property rights, winding up of companies, bankruptcies of debtors,[13]

11 (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).
12 JDI 1983 at p 899; see also *Award in ICC Case No 1512 of 1970* in *Collection of ICC Arbitral Awards 1974–1985* (S Jarvin & Y Derains eds) (1990) at p 39, n 50.
13 According to *Halsbury's Laws of Singapore, Arbitration, Building and Construction* vol II (Lexis Nexis, Butterworths, 2003 Reissue) at p 26, para 20.019: "Bankrupts and companies in liquidation would require leave of their legal representatives and the court to enter into an arbitration agreement and participate in arbitration."
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antitrust regulatory issues, consumer protection, environmental protection and planning may not be arbitrable.[14]

20 The state of the law on the question of ascertaining the law applicable to the arbitration agreement is as follows:[15]

> The law applicable to the arbitration agreement determines the validity of the arbitration agreement, from which the authority of the arbitrator flows. It is also applicable to questions as to whether a dispute lies within the scope of the agreement and the agreed qualifications or constitution of the tribunal.
>
> Where an issue which requires the determination under the law of the arbitration agreement (in the absence of an agreed proper law of the arbitration agreement) arises before the commencement of arbitral proceedings, such as during an application for stay of proceedings, *the approach should be to subject the arbitration clause to the same law that governs the substantive rights of the parties as the implied choice of law or the law which has the closest and most real connection*. Such questions could also be raised before the Singapore court at the stage when an award made in Singapore is sought to be set aside or when a foreign award which is sought to be enforced in Singapore is resisted on the ground of the invalidity of the arbitration agreement. In the case of an application to set aside an award made in Singapore on the ground of invalidity of the agreement, the court could, in the absence of any indication as to the agreed proper law of the arbitration agreement, determine these questions under 'the law of this State (Singapore)'. *It follows that in the absence of an agreed law that governs*

According to Lim Wei Lee & Alvin Yeo in *Asia Arbitration Handbook* (Michael Moser & John Choong eds) (Oxford University Press, 2011) at para 15.68:

> If a party to a contract containing an arbitration agreement is subsequently declared bankrupt, the trustee in bankruptcy may choose whether or not to adopt the contract. If the trustee adopts the contract, the trustee will be bound by the arbitration agreement in relation to matters arising from or connected with the contract. Otherwise, the trustee or any other party to the agreement may apply to the court for a determination as to whether the matter should be referred to arbitration.

In the recent case *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [46], the Court of Appeal drew a distinction which is totally in line with contemporary international practice. It held that the courts should treat "[d]isputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement". At the same time, it decided that whilst disputes involving pre-insolvency rights and obligations are arbitrable, such agreements to arbitrate "should not be allowed to be enforced against the liquidator where the agreement affects the substantive rights of other creditors" (at [50]).

14 Hwang, Boo & Han, "National Report for Singapore" in *International Handbook on Commercial Arbitration* (Jan Paulsson ed) (Kluwer Law International, 1984) (May 2011 Supplement No 64) at p 7.

15 *Halsbury's Laws of Singapore, Arbitration, Building and Construction* vol II (Lexis Nexis, Butterworths, 2003 Reissue) at pp 9–14 and p 26, para 20.006.

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> *the arbitration agreement, the court would need to consider the issue of the validity of the agreement in accordance with Singapore law as* lex fori.
>
> Where the enforcement of a foreign award is resisted on the ground of the invalidity of the arbitration agreement, the court could in the absence of any indication as to the agreed proper law of the arbitration agreement, determine these questions under the law where the award was made.
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> [emphasis added]

21 According to Lim Wei Lee and Alvin Yeo SC:[16]

> The law governing the arbitration agreement generally follows that of the substantive law of the main contract. Parties are generally well advised to specify the law governing the arbitration agreement; omitting to do so may open the door to arguments over the applicable law (*eg* the applicable law may well determine whether the arbitration agreement is void).

22 Consistent with the passages cited above, the Singapore High Court in *Piallo GmbH v Yafriro International Pte Ltd*[17] seemed content to accept that (in the absence of an express choice of law by the parties to govern the arbitration agreement) the law governing the substantive obligations between the parties applied also to the agreement to arbitrate.[18]

23 It should, however, not be forgotten that the Singapore judicial system is a common law system inherited from the English common law tradition. English decisions are not strictly binding in Singapore. However, they are persuasive. With respect to the law governing the arbitration agreement, English courts have traditionally adopted the view that the law chosen to govern the main contract also governs the arbitration agreement.[19] In other cases, English courts have also held

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16 In *Asia Arbitration Handbook* (Michael Moser & John Choong eds) (Oxford University Press, 2011) at pp 675–684, para 15.43.

17 [2013] SGHC 260 at [20].

18 The court found that the scope of the arbitration agreement was a matter to be determined in accordance with Swiss law as the underlying agreement between the parties was expressly stated to be governed by Swiss law. However, on the separate question of proof of foreign law, the court proceeded on the basis that Swiss law was the same as Singapore law as the parties did not address the court on the relevant provisions of Swiss law: see *Piallo GmbH v Yafriro International Pte Ltd* [2013] SGHC 260 at [24].

19 According to *Halsbury's Laws of England, Arbitration* vol 2 (Lexis Nexis UK, 5th Ed, 2008) at para 1208:

> The proper law of the arbitration agreement governs its validity, interpretation and effect. *That proper law is determined in accordance with the general principles of the conflict of laws, namely the law chosen by the parties or, in the absence of such choice, the law of the country with which the agreement is*

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that the law of the seat (*ie*, England) was to resolve the question.[20] However, the English approach to the issue has changed fundamentally most recently.

24 In *Sulamérica CIA Nacional De Seguros SA v Enesa Engenharia SA*[21] ("*Sulamérica*"), the English Court of Appeal established a threefold test to determine the proper law of the arbitration agreement.

(a) Have the parties made an express choice of law to govern the arbitration agreement?

(b) If not, have the parties made an implied choice?

(c) If not, what law has the closest and most real connection with the arbitration agreement?

25 The *Sulamérica* decision establishes a rebuttable presumption that the substantive law of the underlying contract will indicate the parties' implied choice of law to govern the arbitration agreement. Choosing a different seat of arbitration will not of itself be enough to rebut this presumption. In other words, at the second stage, the real issue is whether other factors (in addition to a contrary choice of the seat) are present to rebut the presumption in favour of the substantive law of the contract applying also to the arbitration agreement. Only if no choice of law can be so implied will the third limb of the test be applied and, at that stage, the seat is the determinative factor in the "closest and most real connection" test.

26 The *Sulamérica* test was recently applied by the English High Court in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*,[22] in which the court upheld a challenge under s 67 of the UK Arbitration Act 1996[23] and overturned an arbitral award on the grounds that the tribunal did not have substantive jurisdiction. With respect to the law governing the arbitration agreement, the court had to resolve the issue of whether to follow the law of the underlying contract (India) or the law of the seat

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most closely connected. An agreement to submit future disputes to arbitration usually forms part of a substantive contract, for example a contract of sale, but is to be treated as a separate contract. *Normally the proper law of the arbitration agreement will be the same as the proper law of the substantive contract of which it forms part, but exceptionally this may not be the case.* [emphasis added]

20 *C v D* [2007] EWCA Civ 1282. See also *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530.

21 [2012] EWCA Civ 638; [2013] 1 WLR 102. See Charles B Rosenberg, "*Sulamérica v Enesa*: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement" (2013) 29 *Arbitration International* 115.

22 [2012] EWHC 3702 (Comm) (20 December 2012).

23 c 23.

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(England). The court found it relevant that the parties had expressly excluded interim relief in India and excluded Pt I of the Indian Arbitration and Conciliation Act 1996 noting that "the natural inference is that they understood and intended that otherwise that law would apply". On this basis, the court decided that the parties had impliedly chosen the governing law of the arbitration agreement to be Indian law. Interestingly, the court also noted that had it been required to decide which system of law had the closest and most real connection with the arbitration agreement, it would have decided in favour of English law.

(2) Effect of the law of the seat of the arbitration

27 Another important issue also arises frequently with respect to the law applicable by the arbitral tribunal on the issue of arbitrability: what is the effect of the law of the seat of the arbitration to the extent that its provisions are different from those of the otherwise applicable law?

28 The issue arises when the law of the seat of the arbitration includes (with respect to arbitrability) a substantive rule of private international law fixing for all the arbitration cases having their seat in this particular State the criteria on the basis of which the arbitrability of the dispute should be considered. This was the case of Art 5 of the Swiss Concordat. Today this is the case of Art 177(1) of the Swiss Private International Law Act. In the case of Art 177, arbitrability must be decided in accordance with the law of the seat of the arbitration and any provisions of foreign law governing the issue are not relevant, with the exception of an eventual incompatibility with public policy to the extent, for example, that the applicable foreign law would give exclusive jurisdiction to foreign courts for the decision of the dispute.[24] Consequently, an arbitral tribunal sitting in Switzerland must decide the issue of arbitrability in accordance with Swiss law and therefore conclude that the subject matter is arbitrable if it involves an "economic interest" even if the dispute is not arbitrable under the law governing the arbitration agreement, subject to the above proviso.

C. Arbitrability and the national court concurrently seized of the case by a party which deems the dispute non-arbitrable

29 Suppose one of the parties has commenced the arbitration procedure in accordance with the arbitration agreement and the other party considers that the dispute is not arbitrable and starts a procedure before a national court. How is the national court going to decide this

24 *Fincantieri-Cantieri navali italiani SpA and Oto Melara SpA v M and Arbitral Tribunal* (Swiss Federal Court, 23 June 1992) (1993) *ASA Bulletin* 58.

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issue of arbitrability? Subject to any contrary solution under an applicable international convention, it will in principle apply its national law. This is the better view[25] even if it has been argued by some authors and decided by various courts that arbitrability should be determined by the law applicable to the validity of the arbitration agreement.[26]

D. Arbitrability before the court of annulment or of enforcement

30 Many statutes provide for the possibility of setting aside an award if it is contrary to public policy or if the dispute is not capable of settlement by arbitration. The national court concerned will invariably apply its own national law to decide the issue.

31 Following the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985, the Singapore IAA provides in Art 34(2)(*b*) of the First Sched that an arbitral award may be set aside by the Singapore courts if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Singapore or if the award is in conflict with the public policy of the State.

32 As far as the enforcement judge is concerned, he will normally apply Art V(2) of the New York Convention.[27] It is generally considered that the grounds of Art V(2) should be narrowly construed. Reference is often made to the decision of the US Second Circuit Court of Appeals in *Parsons and Whittemore Overseas Co Inc v Société-Générale de L'Industrie du Papier (Rakta)*,[28] in which the Court of Appeals decided that the arbitral award should be refused enforcement only to the extent that the public policy referred to "would violate the forum State's most basic notions of morality and justice".[29] There have been so far very few cases

25 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) at paras 9-13 and 9-18: "the better view is that the law applicable to the question of arbitrability in court proceeding should be governed by the provisions of the law of the national court which determines the case".

26 See, *eg*, *Company M v M SA* (Court of Appeal of Brussels, 4 October 1985) XVI YB Com Arb 618 (1989).

27 See also Art 36(1)(*b*) of the First Sched to the International Arbitration Act (Cap 143A, 2002 Rev Ed) providing that recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that "(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State".

28 508 F 2d 969 (2d Cir, 1974).

29 I YB Com Arb 205 (1976).

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in which Art V(2) has been applied to refuse enforcement on the basis of non-arbitrability.[30]

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30 The most famous case is a Belgian Supreme Court decision in relation to the Belgian statute on exclusive distributorship agreements: *Cour de Cassation*, 28 June 1979, V YB Com Arb 257–259 (1980).

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