THE PROBLEM OF THE RELEVANT ARBITRABILITY

Francisco González de Cossío*

To Fritz Juenger.
In memoriam

I. THE CONTENT OF ARBITRABILITY

The validity of an award may be questioned on the ground that it involves a dispute that is not capable of settlement by arbitration.[1] Which subjects may be arbitrated depends upon the applicable law.[2]

Domestic law, when determining which subjects are capable of settlement by arbitration, is influenced by two broad variables. Their content is nourished by domestic sensibilities—hence the impossibility of generalization. First, the social impact of the subject-matter. Second, the level of trust the legislature and judiciary vest in arbitration.

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* GONZÁLEZ DE COSSÍO ABOGADOS, S.C. (www.gdca.com.mx). Advocate and arbitrator in national and international cases. Professor of Arbitration, Investment Arbitration and Antitrust. Author of *Arbitraje* (2004), *Competencia Económica: Aspectos Jurídicos y Económicos* (2005), *Arbitraje Deportivo* (2006), *Arbitraje y la Judicatura* (2007), *El Estado de Derecho: Un Enfoque Económico* (2007) and *El Árbitro* (2008).

1 Article V(2)(a) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "New York Convention").

2 Which may, according to the circumstances of the case, be one of many (eg., the parties' law, the law applicable to the contract, the law of the seat, the law of enforcement, etc.).

Different jurisdictions attribute different degrees of importance to certain subjects. This impacts arbitrability. For instance, if it is considered that a subject has social ramifications, it is likely that the subject will be characterized as non-arbitrable. The same is true if the dispute involves parties that have not executed the arbitration agreement. The reason is clear: arbitration is a *private* dispute resolution mechanism.

The trust vested in arbitration is also an important variable. It will influence the general permissive level of arbitrability. Hence, to the extent that the legislative and judicial branches accept arbitration as a reliable mechanism to solve disputes, arbitrability will be broad.

Both variables include one constant element domestic law dictates its content. This begs a question: What domestic law?

II. RELEVANT ARBITRABILITY

A. THE PROBLEM

The fact that the content and scope of arbitrability is a matter of domestic law generates conflict of laws issues given the internationality of arbitration.[3] Think about the (not infrequent) situation where parties come from different jurisdictions, the contract is subject to a third law, the seat of the arbitration differs, and several places of possible enforcement are extant (given that the parties have assets abroad). In this example, six different bodies of rules are relevant, all of which may—and frequently have—different positions involving arbitrability.[4]

Which of the relevant jurisdictions should be given more weight?

B. SOLUTIONS EXTANT

Is a dispute linked to different jurisdictions to be considered not arbitrable if *any* of the relevant laws consider the substance as not arbitrable?

The matter is unresolved. It has been the subject of expert debate. The theories posited to solve the matter may be summarized as follows:

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[3] Ie, the existence of several *points de rattachement,* as christened by conflict of laws argot.

[4] I have not complicated the analysis with factors that are occasionally present. For instance, multiparty arbitrations where parties come from different jurisdictions.

1. *Lex fori*: Dr. Albert Jan van den Berg[5] and several authors[6] argue that the arbitrability of a dispute must be determined under the law of the forum of the court asked to rule on the dispute as though there no arbitration agreement. The foregoing because: (a) the New York Convention's 'internal consistency' demands said outcome; (b) courts derive their jurisdiction from *their* law; and (c) the courts that have examined arbitrability have done so exclusively under *their* law.

2. *Law applicable to the arbitration agreement*: some authors advocate that arbitrability should be assessed exclusively under the law applicable to the arbitration agreement.[7]

3. *Lex fori + Law applicable to the arbitration agreement*: other authors support the view that the arbitrability of a dispute must be determined by making a joint analysis either of the forum's law and the law applicable to the arbitration agreement.[8]

4. *Presumption in favor of arbitrability unless both the lex contractus and the law of the arbitration agreement's forum consider the opposite:* Jan Paulsson considers that, for purposes of article II and V(1)(a) of the New York Convention, arbitrability should be upheld unless the party resisting arbitration, or challenging the award, proves that the arbitration agreement is invalid (due to unarbitrability) under (a) the law designated by the parties as applicable to the contract; and (b) the law of the arbitration forum. In case that there is no forum, under the

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5 Albert Jan Van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958. TOWARDS A UNIFORM JUDICIAL INTERPRETATION, Kluwer Law and Taxation Publishers, T.M.C. Asser Institute, The Hague, 1981, pgs. 152-153.

6 E. Minoli, L´ENTRATA EN VIGORE DELLA CONVENZIONE DI NEW YORK SUL RICONOSCIMENTO E L'ESECUZIONE DELLE SENTENZE ARBITRALI STRANIERE, 24 Rivista di Diritto Processuale (1969, pg. 539; J. Robert, LA CONVENTION DE NEW YORK DU 10 JUIN 1958 POUR LA RECONNAISSANCE ET L´EXECUTION DES SENTENCES ARBITRALES ÉTRANGÈRES, Revue de l'arbitrage (1958), pg. 70 ; F.E. Klein, LA CONVENTION DE NEW YORK DU 10 JUIN 1958 POUR LA RECONNAISSANCE ET L´EXECUTION DES SENTENCES ARBITRALES ÉTRANGÈRES, 57 Revue Suisse de Jurisprudence (1961), pg. 229.

7 Gerald Asken, AMERICAN ARBITRATION ACCESSION ARRIVES IN THE AGE OF AQUARIUS: UNITED STATES IMPLEMENTS UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 3 Southwestern University Law Review (1971), pg. 1; Phillippe Fouchard, L'ARBITRAGE COMMERCIAL INTERNATIONAL, Paris, 1965, No. 186.

8 Th. Bertheau, DAS NEW YORKER ABKOMMEN VOM 10 JUNI 1958 UBER DIE ANERKENNUNG UND VOLLSTRECKUNG AUSLANDISCHER SCHIEDSSPRUCHE, Wintherthur 1965, pg. 38; K.H. Schwab, SCHIEDSGEREICHTBARKEIT, 3d. Ed., Munich 1979, pg. 342 ; Peter Schlosser, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT, Tubingen, 1975, No. 312.

law of the country where the authority in charge of appointing the president of the arbitral tribunal.[9]

5. *International public policy*: to the extent arbitrators have no forum, they should apply what they consider to be the requirements of a true international public policy.[10]

C. A PROPOSAL

1. A conflicts solution for a conflicts problem

The problem canvassed above is in essence a conflict of laws problem. Hence, it deserves a conflict of laws solution. I wish to propose the following.

Courts analyzing whether the dispute is arbitrable should, when in presence of multiple possible applicable laws, seek to analyze the result stemming from applying the alternative approaches and choose the one more congruent with the *favor arbitrandum* principle. In performing this exercise, courts should be mindful of what appears to be the 'center of gravity' or the 'most significant connection' of the legal relation. However, the law to be held dispositive should be that which does not provoke an unwarranted result, or one that frustrates the intent of parties in executing an arbitration agreement. In other words, the court will perform a selection process based on the qualitative evaluation of conflicting laws on the matter of arbitrability *vis-à-vis* the circumstances at hand.

Allow me to call this the "teleological approach", in honor of a conflict of laws expert that believed in, and fought for, teleological solutions: Friedrich K. Juenger.[11]

2. Content

At first, the approach may seem rare, even troublesome. I submit it is not. To demonstrate why, I shall commence by addressing why the various competing options fall into the very pitfalls they seek to avoid.

My home jurisdiction (Mexico) and our northern neighbor (the US) provide the ingredients for a thought provoking example. Think of a case

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9 Jan Paulsson, STILL THROUGH A GLASS DARKLY, ICC International Court of Arbitration Bulletin, ARBITRATION IN THE NEXT DECADE, Special Supplement, 1999, pg. 104.

10 Phillipe Fouchard, Emmanuel Gaillard, Berthold Goldman, TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL, Ed. Litec, 1996, pg. 345. A su vez, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, Emmanuel Gaillard y John Savage editors, Kluwer Law International, 1999, pg. 330.

11 CHOICE OF LAW AND MULTISTATE JUSTICE, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993.

where a labor dispute in the United States is arbitrated between a US company ("Company") and a US employee ("Employee"). The award condemns Company and, upon execution, it becomes evident that it lacks assets in the US. All its assets are in Mexico. To enforce, Employee takes her award to a Mexican court asking for enforcement. Given that labor disputes are not arbitrable under Mexican law, Company argues before the enforcement court that the award may not be enforced in Mexico. Employee refutes that the matter was decided before a tribunal sitting in the US, under US law, between US parties; and that enforcement in Mexico is simply a monetary matter. Mexican sensibilities (public policy or arbitrability) are simply not at play. Hence, they should not jeopardize enforcement.

Under a *lex fori* test, the matter would be stricken as not arbitrable. And textual support could be found for such outcome. After all, the New York Convention allows non-enforcement when "The subject matter of the difference is not capable of settlement by arbitration *under the law of that* [enforcement] *country*".[12] But the result would be jingoistic.

One may counter that said outcome points in the direction of the other solutions advocated by the eminent intellectuals and practitioners I have cited above.[13] However, there is a lose end in the *lex contractus* and *lex arbitrii*[14] approaches (as well as those that suggest joining them): they invite *fraude à la loi*. When in presence of a matter that should not be arbitrated, parties—if said theories were to prevail—would only have to select another jurisdiction (that allows circumventing domestic limitations) as applicable law or the seat of the arbitration. Surely a court analyzing the arbitrability of the matter would not deem itself constrained from deciding against the validity of the award because the parties, at the stroke of a pen, opted for a law or seat that allowed them to circumvent what the relevant jurisdiction believes to be a matter that should not be arbitrated.

Perhaps shifting around the same above example may illustrate the point. Think of an award issued by an arbitral tribunal seated in Mexico that solves a dispute between a Mexican individual and a Mexican company, under Mexican law which enforcement is sought in the US. Given the US permissiveness on the matter, Mexican arbitrability-concerns would be circumvented: a textbook example of the mischief known in private international law as *fraude à la loi*. And the method would be arbitration!

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12 Article V(2)(a) of hte New York Convention.

13 Section II.B above.

14 The reference herein to *lex arbitrii* is a shorthand for the law of the seat. To be clear, I admit that they are not the same.

Hence, the model tailored by the described theories is incomplete. Moreover, it is not bulletproof.[15]

3. Benefits

In essence, a method must be found that does not give too much weight to what, from an international perspective, may be deemed a *statutum odiosum*,[16] but that is not so simplistic or mechanical that lends itself to abuses (such as *fraude à la loi*).

I submit that the teleological method I am advocating for nips the issue in the bud.

One may be tempted—as I was—to refer to more frequently cited conflict of laws methods, such as the 'most significant relation test', the 'proper law approach', the 'balance of interest theory'; and I could go on. I wish to take another route, one that benefits from the lessons comparative *conflits de lois* has thus far distilled.

To begin with, arithmetical conflict of laws solutions should be avoided for they quickly become obsolete. Second, solutions that seek preferring jurisdictions that seem to be the 'center of gravity' run the risk of becoming of limited use when faced with truly plurinational cases. Thirdly, solutions tending to defer to the jurisdiction that, upon performance of a balancing exercise, seems to have the most salient interest, tend to give too much weight to a factor of secondary importance in international cases: the views of one single jurisdiction.[17] Focus should therefore be given to what the parties intended and the needs of the international business and arbitration community.

And it is such background that militates in favor of teleological approaches which, although requiring more from the court, are better solutions to problems such as that of the relevant arbitrability.

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15 I have received thought-provoking views from Jan Paulsson which stimulated coming up with this solution. Nonetheless, any mistake is attributable solely to the author.

16 A jurisdiction which takes an excessively narrow view on arbitrability which has only accidental links to the dispute at hand.

17 In fact, this is a valuable lesson to be learned from cases such Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth (473 US 614 (1985)) and Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer et al (115 S.Ct. 2322 (1995)). Courts should factor the international ingredient into their decisions involving arbitration to come up with intelligent solutions.

IV. FINAL COMMENT

The problem of the relevant arbitrability has attracted the interest of the most acute minds in the arbitration world—theoretical as well as practical. The reason is obvious: it is an issue that resembles the Alps, it can only be seen from high platitudes.

The problem of the relevant arbitrability issue is *in essentia* a conflict of laws problem. It deserved a conflict of laws solution.

I have argued in favor of a teleological approach that may advance the *favor arbitrandum* principle.

If adopted, the solution will strike a middle ground between two competing concerns: nationalism and circumvention. That is, on the one hand, preventing jeopardizing the efficient solution of a dispute because of a parochial approach of a jurisdiction that happens to have an accidental or tenuous link to the matter, and has taken a narrow view on arbitrability. On the other, overlooking what could very well be cherished domestic policies of a certain forum.

If so, arbitrability will be cease to be seen 'through a glass darkly'.[18]

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[18] As Jan Paulsson points out in saying "the international regime of arbitrability is in fact incoherent". (STILL THROUGH A GLASS DARKLY, ICC International Court of Arbitration Bulletin, ARBITRATION IN THE NEXT DECADE, Special Supplement, 1999, pg. 102.)