Arbitrability and Foreign Law
An analysis of under which state’s law a dispute must be amenable to out-of-court settlement in order to be arbitrable under Swedish law

Author: David Gräslund
Supervisor: Doctoral Candidate, Victoria Bùi, Barrister
“Perhaps what I am about to say will appear strange to you gentlemen, socialists, progressives, humanitarians as you are, but I never worry about my neighbour, I never try to protect society which does not protect me – indeed, I might add, which generally takes no heed of me except to do me harm – and, since I hold them low in my esteem and remain neutral towards them, I believe that society and my neighbour are in my debt.”

- Alexandre Dumas, *The Count of Monte Cristo*
ABSTRACT

Which State’s law should determine if a dispute is amenable to out-of-court settlement and consequently whether a dispute is arbitrable under Swedish law? Some legal scholars reason that general principles of private international law should solve the question as a conflict-of-laws issue, while others believe that Swedish mandatory law should apply directly. The Swedish Arbitration Act is unclear and both solutions find support in contradictory case law. It is thus not only debatable what the law should be, but also what it is. The Supreme Court recently had an opportunity to clarify this point of law (NJA 2012 s. 790), but left us with a ruling that is reminiscent of the words by the Swedish poet Esaias Tegnér (own translation):

What you cannot say clearly, you do not know;

with thought the word is conceived on the lips of man;

words unclearly spoken are unclearly thought.

This paper attempts to bring clarity to what the law is (de lege lata), as well as a proposition to what the law should be (de lege ferenda). The suggested solution aims to be consistent with a number of concepts. These include; the underlying rationale of non-arbitrability, the obligations under the New York Convention, general principles of private international law, international trends and Swedish law in general.

First, it is held that non-arbitrability serves to protect the exclusive jurisdiction of the State’s own courts. There is therefore no need to investigate whether a dispute is amenable to out-of-court settlement, or apply the doctrine of non-arbitrability, in international disputes with little connection to Sweden. In these cases, there is no risk of collision with the exclusive jurisdiction of Swedish courts.

Second, the requirement that disputes must be amenable to out-of-court-settlement should be interpreted in light of its context. No duty exists to consider foreign concepts under general principles of private international law. For this reason, and others presented in this paper, the question of whether the parties can settle their dispute by agreement should be examined under Swedish mandatory law. This should only be examined when there is a collision between the exclusive jurisdiction of Swedish courts and a tribunal.

This solution is in line with the international trend of in favorem arbitrandum and the New York Convention. It is also the only practical solution since it would be unnecessarily complicated for Swedish courts to ex officio determine the content of foreign law. This would prolong the process and limit arbitration’s effectiveness.
TABLE OF CONTENTS

Abstract ........................................................................................................................... i
Table of Contents ................................................................................................................ ii
Abbreviations ...................................................................................................................... v

1. INTRODUCTION ............................................................................................................ 1
  1.1 Introductory Remarks ................................................................................................. 1
  1.2 Purpose and Research Inquiries .................................................................................. 2
  1.3 Methodology and Materials ......................................................................................... 3
      1.3.1 International Commercial Arbitration .............................................................. 4
      1.3.2 Swedish Law ...................................................................................................... 5
  1.4 Key Terms .................................................................................................................... 6
      1.4.1 Arbitrability ...................................................................................................... 6
      1.4.2 Settleability ..................................................................................................... 6
      1.4.3 Foreign Law ...................................................................................................... 7
      1.4.4 Overriding Mandatory Rules ........................................................................... 7
  1.5 Delimitations ................................................................................................................. 8
  1.6 Structure ....................................................................................................................... 8

2. ARBITRATION AND ARBITRABILITY ........................................................................ 9
  2.1 Introduction: Sense and Sensibility ............................................................................... 9
  2.2 The Idea of Arbitration ............................................................................................... 9
  2.3 Introducing (non-)Arbitrability .................................................................................... 13
      2.3.1 Defining non-arbitrability .................................................................................. 13
      2.3.1.1 The difference between non-arbitrability and public policy .......... 14
      2.3.2 The rationale of non-arbitrability ...................................................................... 15
      2.3.2.1 Arbitrators’ inability to apply mandatory law and public policy 16
      2.3.2.2 Arbitration as an inadequate process ....................................................... 18
      2.3.2.3 Interim conclusion: Limiting non-arbitrability ..................................... 19
  2.4 Conclusion: Finding balance ......................................................................................... 20

3. ARBITRABILITY AND FOREIGN LAW ...................................................................... 22
  3.1 Introduction: On Egoism ............................................................................................ 22
  3.2 The Obligations Under the New York Convention ...................................................... 23
      3.2.1 Introduction: Balancing national interest and global trade ......................... 24
      3.2.2 Methods of interpretation ................................................................................ 25
      3.2.2.1 The exceptional basis: Pro-enforceability ............................................. 26
      3.2.2.2 The evolving practice of other States: Uniform application .............. 27
      3.2.2.3 Non-discriminatory: Minimum, not maximum standards .................. 28
3.2.3 Should foreign non-arbitrability have any effect? .................................. 29
  3.2.3.1 Does non-arbitrability fall under Art. (V)(1)(a) and Art. II(3)?.. 31
3.2.4 Conclusion: Little room for foreign non-arbitrability .................. 33

3.3 Arbitration and Principles of Private International Law .............. 34
  3.3.1 Introduction: Joined but separate .............................................. 34
  3.3.2 The principle of ‘overriding mandatory rules’ .......................... 35
  3.3.3 The treatment of foreign law by courts .................................. 37
  3.3.4 Treatment of foreign public law ............................................ 37
  3.3.5 Conclusion: Same but different ............................................ 38

3.4 International Trends .............................................................. 38
  3.4.1 Introduction: About international standards ............................ 39
  3.4.2 A comparative outlook: Three methods used ............................ 39
    3.4.2.1 Settleability ........................................................................ 40
    3.4.2.2 Public Policy ...................................................................... 41
    3.4.2.3 Economic Interest .............................................................. 42
  3.4.3 Trendspotting: Three trends .................................................. 42
    3.4.3.1 Differentiating between domestic and international disputes .. 43
    3.4.3.2 The expansion of the scope of arbitrability: A ‘second look’ ... 43
    3.4.3.3 The need of the legislator’s clear intention ......................... 45
  3.4.4 Conclusion: A proposition coherent with international trends ...... 46

3.5 Conclusion: No Room For Altruism ............................................. 47

4. Arbitrability and Foreign Law in Sweden ................................. 48
  4.1 Introduction: The Problem .......................................................... 48
  4.2 The Background: Non-Arbitrability in Sweden ......................... 48
    4.2.1 Introduction: Arbitration and arbitrability in Sweden ............ 49
    4.2.2 When Swedish law applies on the issue of arbitrability .......... 49
    4.2.3 The method of determining arbitrability under Swedish law .... 51
      4.2.3.1 Main rule: Settleability ....................................................... 52
      4.2.3.2 The first exception: Non-settleable, but implicitly permitted ... 53
      4.2.3.3 The second exception: Settleable, but implicitly prohibited ... 54
      4.2.3.4 The third exception: Settleable, but explicitly prohibited ..... 54
      4.2.3.5 The fourth exception: Non-settleable, but explicitly permitted 54
    4.2.4 Understanding arbitrability: Accessory discussions ................. 55
      4.2.4.1 Overriding mandatory rules in Swedish arbitration law ........ 55
      4.2.4.2 International disputes treated differently ............................ 56
      4.2.4.3 Arbitrability and contract law ............................................ 57
      4.2.4.4 The new Government Report ............................................. 58
    4.2.5 Conclusion: No solution provided ......................................... 60
  4.3 The Two Alternative Interpretations .......................................... 60
    4.3.1 Introduction: The debate ...................................................... 61
    4.3.2 The case for directly applying Swedish law ............................ 61
    4.3.3 The case for the applying a conflict-of-laws rule .................... 63
    4.3.4 Summary: And the winner is ................................................ 65

4.4 The Application by Swedish Courts ........................................... 65
  4.4.1 Introduction: Two cases, two outcomes ................................. 66
4.4.2 The Archangel Case

4.4.2.1 Background: Shine on you crazy diamond

4.4.2.2 The issue before the court

4.4.2.3 The courts’ holdings

4.4.2.4 The rationale of the courts’ findings

4.4.2.5 Conclusion: Dazed and confused

4.4.3 The City Moscow Golf Case

4.4.3.1 Background: Back in the USSR

4.4.3.2 The issues before the court

4.4.3.3 The courts’ findings

4.4.3.4 The rationale

4.4.3.5 Conclusion: Definitely maybe

4.4.4 Conclusion: A bird in the hand…

4.5 Conclusion: Swedish Law Today

5. CONCLUSIONS AND PROPOSITIONS

5.1 The Problems of Today

5.2 The Recipe for a Solution

5.2.1 Practicality

5.2.2 Idea of non-arbitrability

5.2.3 Obligation under the New York Convention

5.2.4 Principles of private international law

5.2.5 International trends

5.2.6 Swedish law

5.3 The Proposition

5.3.1 Settleability does not equal arbitrability

5.3.2 Let Swedish law determine the settleability

5.3.3 Differentiate between domestic and international disputes

5.4 Conclusion: Certainty Requested

Concluding Remarks

List of Cited Works

Table of Court Cases

Appendix I
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brussels Regulation</td>
<td>Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce (in reference to the Arbitration Institute)</td>
</tr>
<tr>
<td>ICC Rules</td>
<td>Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012)</td>
</tr>
<tr>
<td>Lugano Convention</td>
<td>Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters</td>
</tr>
<tr>
<td>Model Law</td>
<td>The UNCITRAL Model Law on International Arbitration 1985, with amendments as adopted in 2006</td>
</tr>
<tr>
<td>NJA</td>
<td>Archive of Swedish Supreme Court Cases, sw. <em>Nytt Juridiskt Arkiv</em></td>
</tr>
<tr>
<td>Prop.</td>
<td>Government Bill, sw. <em>Proposition</em></td>
</tr>
<tr>
<td>SAA</td>
<td>Swedish Act on Arbitration, sw. <em>Lag (SFS 1999:116) om skiljeförfarande</em></td>
</tr>
<tr>
<td>SCA</td>
<td>Swedish Contracts Act, sw. <em>Lag (SFS 1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område</em></td>
</tr>
<tr>
<td>SOU</td>
<td>Official Swedish Government Reports, sw. <em>Statens offentliga utredningar</em></td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

1.1 Introductory Remarks

Arbitration is sometimes met with scepticism. Commercial parties generally welcome the opportunity of settling their disputes in efficient, confidential proceedings before judges of their own choice in a neutral forum. Legislators and courts do however not always share the same enthusiasm. Due to this suspicion of arbitration, some disputes fall under the sole domain of the courts and are consequently non-arbitrable. The significance of non-arbitrability should however not be exaggerated. Most commercial disputes are now arbitrable under the laws of most countries. Nevertheless, although the argument for the arbitrability of the vast majority of commercial disputes has largely been won, the discussion on the method of identifying non-arbitrable matters is far from settled.

The main rule in Sweden is that all subject matters that are amenable to out-of-court settlement are also arbitrable. This method of identifying non-arbitrable disputes has caused confusion among courts and commentators. Ultimately, the legislator is to blame for this uncertainty. Neither the wording of the law, nor the preparatory works clarify under which law the ‘settleability’ of a dispute should be assessed. Instead, the ambiguous passages of the travaux préparatoires have not only resulted in disparate opinions among legal scholars, but conflicting case law as well.

This paper is about whether the concept of non-arbitrability should be based on the sole protection of a state’s own interests or if it should also include concerns for the interests of other states. It is not about whether a foreign interest should be protected by applying its concept of arbitrability, but by applying its perception of what disputes are amenable to out-of-court settlement. However, the arguments of the debate on which State’s law apply to determine arbitrability are also relevant when discussing for or against the application of a conflict-of-laws rule to the question of ‘settleability’. These arguments are considered because the outcome would in most cases be the same, i.e. the law applied to ‘settleability’ often decides the non-arbitrability under the same law.

The author hopes to bring some clarity to the discussion on the criterion of settleability in the context of indirectly determining the non-arbitrability of a dispute. The purpose of the paper is to break down what the law is, and then to propose what it should be.
1.2 Purpose and Research Inquiries

Suppose that two parties enter an arbitration agreement and choose Sweden as the seat of arbitration (lex arbitri) and US law to govern the arbitration agreement (lex electionis). The parties also agree that Swiss law applies to the substantive contract (lex causae). To complicated matters, one of the parties is German and the other Italian (lex incorporationis). To increase the confusion, the dispute is about a Dutch patent (lex loci solutionis). Which law should the tribunal and Swedish courts (lex fori) apply – if it is found that Swedish law applies to the question of arbitrability – to determine whether the dispute is amenable to out-of-court settlement and consequently arbitrable? Hypothetically, at least six different national laws could be applied alternatively or cumulatively. It is also conceivable that international concepts may potentially apply.

The research inquiry of this paper is; under which law must a dispute be capable of settlement by the parties in order to be arbitrable under Swedish law? The problem today is not only that it is debatable what law should apply, but also what law actually is applied. The conflicting case law and ambiguous statements in the preparatory works have propelled confusion among legal scholars. This legal question requires a definite answer in order for a consistent application by courts and tribunals of the concept of non-arbitrability under Swedish law.

The purpose of this thesis is to offer a solution that is compatible with a set of objectives. The main research aims to identify the relevant and fundamental aims to which an answer should adhere. In this respect, it is insufficient to investigate the ambitions of the Swedish legislation on international commercial arbitration, but the goals promoted at an international level must also be examined. The identified objectives are then balanced, as far as they are conflicting, in order to form a foundation on which the final proposition is based.

There are a number of conceivable solutions that are more or less advocated. One approach is to apply Swedish mandatory law only. Another is to let a conflict-of-laws rule under Swedish international private law determine the applicable law. This paper examines the different solutions to conclude what the law is, and what the law should be. The conclusion is that the latter interpretation is de lege lata while the former better satisfies the identified objectives. The proposed solution de lege ferenda to the primary research inquiry of this thesis is therefore that Swedish mandatory law should apply.
1.3 Methodology and Materials

The overarching method used in this thesis is what may be called a legal dogmatic approach. The traditional sources of Swedish law are used to establish *de lege lata*, while a broader perspective determines what the law should be. The *de lege ferenda* outlook finds much of it its reasoning from international trends and authorities outside the traditional sources of Swedish law.

The separation between an investigation *de lege lata* and *de lege ferenda* is more appropriate in the context of Swedish law than in international arbitration law. International arbitration is, unlike national law, not governed by an overarching authority that may provide a final answer to what the law is. There is no absolute answer to this question. Instead, the question of *de lege lata* largely coincides with the question of *de lege ferenda*. In many ways, international arbitration law is what it is preferred to be. The law can be described as the product of a Darwinian selection that combs different solutions and elevate the best by reproduction to what is called an ‘international trend’. This does not make the law final, but adds weight to a conclusion on what it should be.

The aim of this thesis focuses on providing a practice-driven solution to the research inquiry. The purpose is clearly normative. Therefore, a pragmatic approach is used by first identifying that a problem exists and then finding a proper solution to the legal problem. That it is uncertain what the current state of the law is *de lege lata*, only gives more room to propose a solution *de lege ferenda* freely. It is however important to keep the two separated. There are arguments to what the law is, which makes it irrational to suggest that a favoured solution is the state of law – even if there are convincing arguments to what the law should be.

The sources used are briefly commented below. The hierarchy of norms is roughly the same as the order in which the sources are presented.¹ A minor reservation is that the sources of international commercial arbitration may not be suited for such rankings.²

---

² Strong (2009), para. 2.07.
1.3.1 International Commercial Arbitration

The New York Convention\(^3\) ("NYC") is ‘the’ convention. It has rightfully been described as one of the most successful international agreement to date with its 156 signatories.\(^4\) Its articles form the foundation of international arbitration law and it is thus important for a national solution to be consistent with the Convention.

Swedish law is the only national law discussed to a further extent. The aim of this paper is not to compare different approaches to arbitrability. The purpose is to find a suitable solution for Swedish law. However, it is important to identify ‘international trends’ and different national laws are consequently compared briefly.

Swedish law also includes elements of supra-national law. There exist a number of instruments on private international law under EU-law. These regulations form a necessary part of the analysis and are therefore discussed.\(^5\)

Arbitration rules from arbitral institutions are generally not relevant when discussing arbitrability. Non-arbitrability is a mandatory limit of the right to assign arbitrators exclusive jurisdiction over a dispute that the parties may not dispose of.\(^6\) Therefore, the arbitration rules form no major part of the analysis.\(^7\)

Arbitral Awards are only binding for the parties and only used in the analysis as an indication of how the research inquiry is treated by tribunals. In the same way, foreign case law is only used in order to identify an ‘international trend’.

The major treatises and monographs published in English on international commercial arbitration are heavily used as they form a special place of prominence in international arbitration law. There is very little authority available elsewhere and the authors hold a great deal of practical experience, which hopefully adds to the aim of a solution-driven analysis. A number of legal articles, which are prominently referred to in the legal debate on non-arbitrability are also used.

---

\(^6\) See Lindskog (2012), I §, para. 2.1.1.
\(^7\) They may however add to the discussion on the arbitrators’ duty to issue an enforceable award. Cf. 2012 ICC Rules, Art. 41; AAA/ABA Code of Ethics, Canons I(A), I(G); LCIA Rules, Art. 32(2); IBA Rules of Ethics, Art. 1; 2010 SCC Rules, Art. 47.
1.3.2 **Swedish Law**

*EU Law* and the *New York Convention* are part of Swedish law. The Convention was first transformed into the Code on Foreign Arbitration Agreements and Arbitral Awards (SFS 1929:147), which was later replaced by the Swedish Act on Arbitration (“SAA”).

The primary *Swedish law* on arbitration is the SAA. Arbitrability is determined according to Section 1 of the SAA by whether the dispute is amenable to out-of-court settlement. The law therefore requires an examination of other substantive laws to determine a dispute’s arbitrability. Nonetheless, for the purpose of this paper there is no need to examine other Swedish laws than the SAA more closely. The research inquiry is not about whether a certain substantive law prevents the parties from settling their dispute by an agreement, but questions under which State’s mandatory law it should be assessed.

*Travaux préparatoires* are of major importance to the interpretation of Swedish law. This is also true when it comes to the preparatory works of the SAA. The Government Bill stated on the other hand that *case law* might contradict statements of the preparatory works to the SAA in exceptional cases. There is thus a limited opportunity for the Supreme Court to create precedents that are contrary to the *travaux préparatoires*. The preparatory works form a strong argument to what the law is, but not necessarily, to what it should be. Recently a new Government Report was released with the purpose of improving the SAA. The report is discussed in the paper as it presents certain interesting suggestions to the doctrine of non-arbitrability.

The *legal literature* on arbitration in Sweden is quite developed with a number of published treatises and commentaries on the Swedish Arbitration Act. The major works are used in this paper. There is both an English and a Swedish version of the books by Finn Madsen and Lars Heuman, of which the latest editions are used.

---

8 *Sw.* Lag (SFS 1999:116) om skiljeförfarande.
11 SOU 2015:37 Översyn av lagen om skiljeförfarande.
12 *See* 4.2.4.3.
1.4 **Key Terms**

A number of terms used in this paper require a few comments in order to prevent any confusion as for their meaning. These are *arbitrability, settleability* and *foreign law and ‘overriding mandatory rules’*.

1.4.1 **Arbitrability**

This paper is about objective arbitrability in its narrower definition. The term ‘arbitrability’ is used in some countries to also include concerns over the scope of the parties’ consent to the arbitration agreement.¹³ The term arbitrability is in this paper exclusively used to describe which types of disputes may lawfully be resolved by arbitration and which belong exclusively to the domain of the courts.¹⁴ In other words, it deals with the restrictions imposed on the parties’ freedom to submit certain types of disputes to arbitration, irrespective of the scope of the parties’ consent.

There is also a distinction between *objective* and *subjective* arbitrability.¹⁵ This paper only concerns "objective" arbitrability, which refers to its independence of the quality of the parties or their will.¹⁶ Subjective arbitrability on the other hand relates to whether certain parties may settle disputes by arbitration, independent of the material dispute.¹⁷

1.4.2 **Settleability**

As the saying goes, necessity is the mother of invention. The term ‘settleability’ (sw. förlikningsbarhet) is a made-up word by the author in order to avoid repeating the phrase ‘amenable to out-of-court settlement’.¹⁸ I hope that this does not cause as much of a confusion, as it helps making the sentences more compact and less complicated.¹⁹ Some

---

¹³ Using the term arbitrability in this respect has caused some confusion and it has not only been done by US courts and commentaries, but also by Swedish commentators, see Lindskog (2012), 1 §, para. 4.1.1. Cf. Shore (2009), para. 4-1.
¹⁴ Redfern & Hunter (2009), para. 2.111.
¹⁵ The distinction between subjective and objective arbitrability is not always clear. In fact, it would be possible to achieve the same effect of prohibiting arbitration for certain categories of disputes by employing either subjective or objective criteria. See Böcksiegel (2008), p. 127.
¹⁶ Di Pietro (2009), para. 5-18.
¹⁷ Lindskog (2012), 1 §, para. 3.2, fn. 16.
¹⁸ The fact that the word settleability is used should in no way be interpreted as the author’s impossible attempt to free himself from what is described in social theory as ‘discourse’. It is only used as an invented synonym to the legal phenomenon of parties being capable of freely disposing certain disputes, including being permitted to agree on an out-of-court settlement. The existence of this freedom is dependent on the absence of mandatory law that limits the parties’ capacity.
¹⁹ Interestingly the term ‘arbitrability’ is not recognised by many dictionaries. The idea of the term ‘settleability’ is therefore not too far-fetched.
legal scholars have used the term ‘inalienable rights’. This term is however not completely satisfactory as it drifts too far from the concept and will therefore not be used.

### 1.4.3 Foreign Law

Generally, no law is ‘foreign’ in arbitration. This is true insofar that each law stands on equal footing since the parties are allowed to choose the law governing their arbitration. However, the concept of non-arbitrability is mandatory under most arbitration laws and the parties may therefore not dispose of it. Since the concept is bound to national law, any law other than that of the lex fori is in this paper described as ‘foreign law’. The term is mainly used as a synonym for ‘all other national laws than Swedish law’.

### 1.4.4 Overriding Mandatory Rules

There are two types of mandatory laws. Most mandatory rules are ‘regular’ and can be circumvented by the parties’ choice-of-law. A few mandatory rules are however treated as ‘super-mandatory’ and may ‘override’ the parties’ choice-of-law. In the legal literature and regulations of private international law, these are defined as ‘overriding mandatory norms’. Other terms used are Eingriffsnormen, lois de police, lois d’application immediate, ‘super-mandatory rules’ and ‘internationally mandatory norms’.

The two types of mandatory rules are relevant in two discussions of this thesis. The first is whether the regular mandatory rules of a foreign law should determine the settleability of a dispute through an application of a conflict-of-laws rule. A second supplementary discussion is whether the ‘overriding mandatory rules’ of a country shall affect the settleability of a dispute, even if a different regular mandatory law applies. This may be the case regardless of whether Swedish law is applied directly, or if a conflict-of-laws rule is used.

---

20 Fouchard & Gaillard (1998), para. 573.
21 Hobér (2011), para. 2.51.
22 Ibid.
23 Lindskog (2013), 1 §, para. 2.2.
24 In these cases they ought to be treated as part of the State’s own public policy since it is up to each State to decide if a foreign rule is of an ‘overriding’ nature. See Lindskog (2011), para. 0-5.1.1.
1.5 Delimitations

The thesis attempts to be as streamlined as possible due to its pragmatic focus on finding an answer to a specific legal question. This means that a few areas, which are traditionally associated with the concept of arbitrability, are left out. These areas are not contributory to the answer to the research inquiry.

This paper is not about what disputes are arbitrable. Therefore, it does not discuss questions of whether an arbitral tribunal may rule on disputes that concern issues such as competition law, criminal law or intellectual property law. Instead, it focuses on the method of finding whether a dispute is arbitrable by examining the main rule under Swedish law that ‘settleability equals arbitrability’.

As previously mentioned the focus is on the method of finding objective arbitrability and does not discuss different limitation on the subjective scope of arbitrability.

The chronological dimension of arbitrability, \textit{i.e.} at what point in time the dispute must be settleable, will only be touched upon briefly. As previously held, this paper is not about what disputes are arbitrable, or when they must be, but whether foreign mandatory law should determine the settleability of a dispute and consequently its arbitrability under Swedish law.

1.6 Structure

The structure is based on a bottoms-up approach to the research inquiry.

First, the different ingredients to a suitable solution is identified. The second chapter discusses the idea of arbitration and the purpose of non-arbitrability in order to find out what interests non-arbitrability aims to protect. The third chapter discusses whether there exist any international obligations to apply other States’ notions of non-arbitrability under the New York Convention or general principles of private international law.

Second, in the fourth chapter the state of Swedish law is identified. The conclusion on \textit{de lege lata} is made in light of recent case law, the \textit{travaux préparatoires} and the different opinions in the legal literature as for where the law stands.

Last, a proposition is presented in chapter five. The aim of this thesis is to find the solution that best satisfies the different identified interests. These interests are weighed as far as they are contradictory in order to find a suitable answer. The proposition \textit{de lege ferenda} is then lined out in the ‘Concluding Remarks’ as pedagogically as possible.
2. ARBITRATION AND ARBITRABILITY

Before turning to the main research inquiry of this paper, it is important to understand the fundamentals of arbitrability. The criterion of settleability should be understood in light of its context, which is to determine if parties are permitted to exclude the jurisdiction of courts and settle their disputes by arbitration. Ultimately, the requirement of settleability is a method of identifying which matters are arbitrable. Settleability aims to identify the proper weighing of the interest of allowing arbitration against prohibiting it. That is why this chapter seeks to determine what these interests are.

2.1 Introduction: Sense and Sensibility

Supposedly, Jane Austen titled her book Sense and Sensibility after the two main characters Elinor and Marianne. Elinor embodies ‘sense’; she is practical, intellectual and logical in all things. Her younger sister Marianne on the other hand portrays the older definition of ‘sensibility’. She is sensitive, emotional and wrapped up in her feelings. The pivotal challenge of the novel is for the two sisters to cooperate and find a meeting point between reason and emotion.

The relationship between arbitration and non-arbitrability is similar to the sisters’ struggle. It is between on the one hand to allow the practical resolution of private disputes, while on the other to be sensitive to the public interest that may only be protected by litigation before courts. It is a balancing act between reason and emotion.

This Chapter examines the underlying rationale of why arbitration is permitted. It then turns to non-arbitrability to investigate what interests it intends to protect. The conclusions drawn are used in the final proposition, since they are necessary for a teleological solution that weighs the overall benefits of allowing arbitration with the protection of fundamental public interests.

2.2 The Idea of Arbitration

In order to find a teleological solution to the research inquiry of this thesis it is important to start with the fundamental question of what arbitration is and what purpose it serves.

First, what is an arbitration agreement and how should it be defined? It is fairly settled among Swedish legal scholars and the legislator that the arbitration agreement is a mixed
contract, which includes both jurisdictional and contractual elements.\textsuperscript{27} The jurisdictional effects of the agreement is that courts lose their jurisdiction over the dispute and empowers the arbitral tribunal to issue a binding award with a \textit{res judicata} effect. The arbitration agreement is thus a bar to court proceedings and can be enforced against an unwilling party, whose right to access to court is waived.\textsuperscript{28} The final award is also as an enforcement order that is internationally recognised. The contractual nature of the arbitration agreement is that principles of contract law determine its validity and content. A different contractual trait is that the agreement creates mutual obligations and rights both between the parties and with the arbitrators.

Arguably, the purpose of the non-arbitrability doctrine is not related to the contractual validity of the arbitration agreement, but more to its jurisdictional nature.\textsuperscript{29} Rules on the contractual validity determine the limits of the arbitration agreement and the award. Arbitration rests on consent, which makes an award unenforceable against a third party. This is however not to be confused with non-arbitrability, which determines whether a dispute falls under the exclusive jurisdiction of the national courts.\textsuperscript{30} Denying an arbitration agreement its procedural effects should not be equivalent to declaring it invalid due to principles of contract law.\textsuperscript{31}

This leads us to the next question; why is arbitration needed? Why are parties permitted to settle their disputes outside the courts at all? These questions are best answered if the purpose of arbitration is divided between the \textit{objectives of the parties} and the \textit{objectives of the state}.

The \textit{state’s objective} with allowing arbitration is primarily to provide the parties with an alternative dispute resolution method in order to increase the general interest of trade and commerce.\textsuperscript{32} By providing this alternative, the state may wish to relieve its own

---


\textsuperscript{28} This paper will not further discuss the relationship between arbitration and Art. 6 and Art. 13 ECHR. It may be noted that the right to access to court serves the individual interest of the parties, and not direct public interest. Cf. 3.3.2 and 3.3.3.

\textsuperscript{29} See 3.2.3.1 for the effect of this on the interpretation of the New York Convention.

\textsuperscript{30} It is argued by some that the rationale behind non-arbitrability today is not so much that it is underpinned by considerations of public policy, but more an effect of the natural limitations of arbitration’s consensual nature, \textit{i.e.} that it is only binding for the parties. \textit{See} Brekoulakis I (2009), para. 2-3. This is true with regard to many matters of non-arbitrability, but not all.

\textsuperscript{31} See 3.2.3.1.

\textsuperscript{32} Redfern & Hunter (2009), para. 2.114.
courts from costly proceedings, as well as to make commercial activities more appealable. It is necessary in international trade to allow parties to tailor a method of dispute resolution to their specific needs. Parties would otherwise be reluctant to participate in any commercial activity if they found barriers and increased costs, as well as insecurity to their investments. Trade and commerce is built upon *pacta sunt servanda*, which only exist when the parties are certain that their rights under a contract is protected by a proper dispute resolution mechanism. In short, allowing an alternative dispute resolution method tailored to the needs of the parties helps increase the commercial activity and lowers the costs associated to it. It also offers relief to the local courts and reduces the costs for the State.

The argument for arbitration is also based on ideology. It begins with a respect for private arrangement. Totalitarian states that do not share a liberal ideal of promoting free trade and commerce tend to prohibit arbitration. If the state portrays its role as a promoter of the freedom of the people to arrange their private affairs, then it would be contradictory to let arbitration exist on the margins of mandatory law and not the other way around. The fact that the state makes an exception to its monopoly on administration of justice is only an outflow from the principle of contractual freedom that is a tenet of capitalism. As the Government Bill preceding the Swedish Arbitration act put it (own translation):

“If we are to accept that parties may freely agree on how their dealings are handled, then it is consistent to also accept their agreement to let an outsider decide a dispute between them.”

The general interest of promoting commerce and trade is achieved by accommodating the parties’ objectives with arbitration. The objectives of the parties have generally been

---

33 This is not to say that the business community does not expect a degree of scrutiny of arbitral awards. It only means that the parties wish for enforceability and finality of their arbitration, but not without limits. This is exemplified by the failed experiment of the old Belgian arbitration law which included a mandatory non-review of arbitral awards. See Park (2001), p. 599.
34 Arguably it is also an objective of some states to attract international parties to choose their state as lex arbitri, which was expressed in the directives to the new Government report, Dir. 2014:16. This can be explained by a wish to attract foreign investment and improve the State’s image as business-friendly.
35 Paulsson (2014), p. 5
38 Friedman (1962), p. 50.
attributed to multiple reasons. These have eloquently been summarized by one national court (own emphasis):

“There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation… [A]n arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states.

One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step.”

Of the said objectives, it is the enforceability and finality of the arbitration agreement or arbitral award that are the most affected by non-arbitrability. Complicated rules could also prolong the proceedings and limit the foreseeability of the parties’ to predict if a dispute is arbitrable. This would of course also deter parties from choosing arbitration as their preferred method of resolving their disputes. The Swedish legislator has frequently held that the aim of the Swedish Arbitration Act is to promote international arbitration by respecting party autonomy and ensuring the enforceability and finality of arbitral awards.

To conclude, the purpose and idea of arbitration is to give the parties the freedom to exclude the jurisdiction of the courts to settle their dispute privately. To make it an attractive alternative dispute resolution method it needs to be fast, enforceable and final. This in order to achieve the overarching general interest of the State, which is to promote trade and commerce. Therefore, a simple rule that makes it easy for the parties to predict if a matter is arbitrable is preferred over a complicated rule, which may prolong the proceedings and threaten the finality of an award.

---

40 Born (2014), p. 73.
42 See Prop. 1998/99:35, p. 1 (own translation): “The [SAA] rests on […] the principle of party autonomy. The provisions of the legislation, which are mostly to the parties’ disposal, are framed in order for speedy, secure and suitable arbitrations, while as far as possible prevent obstruction of the proceedings.” See also Dir. 2014:16, p. 2 (own translation): “[…] to ensure that arbitration in Sweden continues to be a modern, efficient and attractive dispute resolution method for Swedish and foreign parties”.
44 See 5.2.1.
2.3  **Introducing (non-)Arbitrability**

It has justifiably been stated that non-arbitrability is the least of a modern practitioner's problem. In fact, public policy and arbitrability play a greater role in the theory of arbitration than in practice. This is due to the prevailing tendency to increase the scope of arbitrable disputes. However, the question of non-arbitrability is still important because national laws frequently differ from each other. Non-arbitrability is ultimately in the control of national courts and national laws and it continues to be unclear how non-arbitrability should be determined and which law should apply.

The issue of arbitrability may arise at various points in the procedure. At each stage, the question arises: what law governs the issue of arbitrability? Different laws have been contemplated to apply - alternatively or cumulatively - including the law of the forum (lex fori), the law chosen by the parties to govern the arbitration clause (lex electionis) or their contract (lex contractus), or, the law of the seat of the arbitral tribunal (lex arbitri) or the place of enforcement of the award (lex executionis). The same reasons and arguments for applying foreign non-arbitrability are apparent in the discussion of which law should determine settleability.

This section investigates what non-arbitrability is and examines the interests that the doctrine of non-arbitrability intends to serve. Ultimately, the question is asked; why is arbitration perceived as insufficiently equipped to address specific types of public policy disputes? An answer is required for a solution to the research inquiry that is teleological and stays true to the concept of non-arbitrability.

2.3.1  **Defining non-arbitrability**

Arbitrability establishes the respective domains of law between litigation and arbitration. It involves the simple question if a dispute may be submitted to arbitration, or if it is included in a class of disputes that are completely exempt from arbitration proceedings. It is the essential division between public and private justice, where the contractual and

---

45 Youssef (2009), para. 3-2.
47 Mistelis (2009), para. 1-4.
48 This is especially true if the requirement of settleability is shared by the States, since the result on arbitrability would be the same. See 3.4.2.
49 Mistelis (2009), para. 1-6.
jurisdictional natures of international commercial arbitration collide head on.\textsuperscript{50} It is where the exercise of contractual freedom ends and the public mission of adjudication begins.\textsuperscript{51}

Arbitrability functions as a prerequisite for the tribunal to assume jurisdiction over a particular dispute, \textit{i.e.} a jurisdictional requirement. It is debatable if it also functions as a condition for a valid arbitration agreement, \textit{i.e.} a contractual requirement.\textsuperscript{52} In any case, it is clear that non-arbitrability has closer connection to its function as promoting the exclusive jurisdiction of national courts, than a condition for the validity of an arbitration agreement.\textsuperscript{53}

\textbf{2.3.1.1 The difference between non-arbitrability and public policy}

The non-arbitrability doctrine is distinguishable from principles of public policy and mandatory law.\textsuperscript{54} The doctrine undeniably rests on the same rationale as public policy in that there are arbitration agreements and arbitral awards that conflict with fundamental public polices and legal norms.\textsuperscript{55} Both non-arbitrability and public policy act as justifications for a State to refuse recognition of an otherwise valid award or agreement.\textsuperscript{56}

The main difference between non-arbitrability and public policy is that the former precludes certain areas of public policy and mandatory law to be subdued an arbitration agreement at all. Public policy on the other hand allows for arbitration, but reviews the effects of the arbitration agreement or arbitral award.\textsuperscript{57} Thus, arbitrability intervenes at the beginning, \textit{i.e.} at the jurisdictional level, while public policy acts at the end.\textsuperscript{58} It is safe to assume that this has excluded disputes from being arbitrated, even though the following awards would not have been reviewed as contrary to public policy. There are

\begin{itemize}
\item \textsuperscript{50} See Mistelis (2009), para. 1-6 and Lew, Mistelis & Kröll (2003), §9-1. \textit{Cf. supra 2.2.}
\item \textsuperscript{51} Carbonneau & Janson (1994), p. 194.
\item \textsuperscript{52} Brekoulakis I (2009), para. 2-63. This debate also relates to the discussion on the mixed nature of the arbitration agreement, \textit{see 3.2.3.1.}
\item \textsuperscript{53} See Brekoulakis I (2009), para. 2-4.
\item \textsuperscript{54} Born (2014), p. 950 f.
\item \textsuperscript{55} Böckstiegel (2008), pp. 126-127.
\item \textsuperscript{56} \textit{See 3.2.}
\item \textsuperscript{57} Being a fan of allegories; Imagine a child asking her mother if she may buy her baby-brother a lollipop. The mother can either say no because she knows that the child will buy a lollipop not suitable for babies (\textit{non-arbitrability}), or she can allow the sister to try. It would save time and effort if the mother did not have to buy it, and she could in all likelihood review the choice of the sister (\textit{public policy}). But, the risk would be that the sister handed the baby a dangerous lollipop when the mother was not looking.
\item \textsuperscript{58} Pamboukis (2009), 7-18.
\end{itemize}
also awards that are arbitrable, but contrary to public policy. The Swedish legislator correctly concluded that there is a fine line between the two.\textsuperscript{59}

The fact that a dispute involve certain elements of mandatory law or public policy does not necessarily mean that the dispute is non-arbitrable.\textsuperscript{60} Mandatory law claims are in practice frequently arbitrated. A ruling by the Paris Cour d'appel sums up this idea:

"[T]he impact of public policy on the arbitrability of a dispute does not cause arbitrators to be prohibited from applying mandatory rules, but only from hearing cases which, because of their subject-matter, can only be heard by courts."\textsuperscript{61}

To conclude, public policy provides that an arbitrable award may not be recognized if its effect is contrary to fundamental public interests, the function of non-arbitrability is that the use of the arbitral process in itself is contrary to fundamental public interests.

\textbf{2.3.2 The rationale of non-arbitrability}

Arguably, it would be possible to settle almost any dispute by arbitration as a factual and logistical matter. In fact, different cultures have arbitrated all kinds of disputes, including criminal, family, inheritance, intellectual property and other matters that today are generally held as non-arbitrable.\textsuperscript{62} In principle, any dispute should be just as capable of resolution by a private arbitral tribunal as if it was litigated before of a national court.\textsuperscript{63}

However, the overriding majority of states retain the power to prohibit settlement of certain types of dispute outside the courts.\textsuperscript{64} In an attempt to create a totally neutral mechanism for dispute resolution, the parties may wish to make the arbitral proceedings independent of these national prohibitions. This can be regarded as an effort to make the arbitration delocalised, stateless or a-nationalised.\textsuperscript{65} The enforcement of such an agreement or award is however only possible insofar as a national law agrees to enforce it.\textsuperscript{66} The enforceability of arbitration agreements and awards are thus bound by the willingness of national courts to allow arbitration.

\textsuperscript{59} Prop. 1998/99:35 p. 140. The legislator also concluded that the delimitation between public policy and arbitrability had little practical relevance. It is however important to make it foreseeable for the parties to determine if their dispute is arbitrable at all, or if an eventual award may be contrary to public policy.

\textsuperscript{60} See 4.3.2.1.


\textsuperscript{63} Redfern & Hunter (2009), para. 2.112.

\textsuperscript{64} Hanotiau (2014), p. 874.


Non-arbitrability is in many ways an illustration of public policy.\textsuperscript{67} It is based upon the idea that some matters so pervasively involve ‘public’ rights and concerns that the resolution of such disputes should not be left to ‘private’ arbitration, but to the monopoly of state courts.\textsuperscript{68} The public interests are affected since arbitration is a private proceeding with public consequences. These public consequences consist of the enforceability and \textit{res judicata} effect of the award.\textsuperscript{69} Therefore, there is a perceived need to control the public consequences, which may only be satisfactorily done by the courts.

Non-arbitrability in a sense exists because legislators hold the realistic opinion that the world is not perfect. In a world where the law was easy to interpret and where no citizen would refuse to correctly apply principles of public policy, there would be no need to believe anything other than that arbitrators would be just as capable of administering justice as the courts. Non-arbitrability thus exists because there is a lack of confidence in the arbitrators and the proceedings. The underlying rationale for non-arbitrability is this perceived inability of arbitration to provide an adequate resolution of a dispute.\textsuperscript{70}

There are mainly two arguments for non-arbitrability. Both arguments find their basis in the difference between arbitration and litigation, where litigation is considered superior. The first argument is that arbitrators are incapable of applying mandatory provisions and public policy correctly. The second is that the arbitral procedure in itself is inadequate to protect public interests. These arguments are reviewed below in order to determine what importance non-arbitrability plays in comparison to the interest of allowing arbitration. Subsequently it is concluded if the criterion of settleability should identify many, rather than, few matters as arbitrable.

2.3.2.1 \textit{Arbitrators’ inability to apply mandatory law and public policy}

The fear that the arbitrators would refuse to apply public policy is the most valid objection to arbitrability.\textsuperscript{71} If that were the case, it would unavoidably lead to undesired public consequences. The argument is founded upon the belief that arbitrators refuse to apply

\textsuperscript{67} Cf. Lew, Mistelis & Kröll (2003), para. 9-32 and Redfern & Hunter (2009), para. 2.116.
\textsuperscript{68} Born (2014), p. 945.
\textsuperscript{69} Redfern & Hunter (2009), para. 2.113.
\textsuperscript{70} Brekoulakis I (2009), para. 2-46.
\textsuperscript{71} \textit{Ibid.}, 2-32.
public policy, either because they are not allowed or required to consider mandatory law *ex officio* or that they do not share the same allegiance to the national law as the courts.\(^72\)

The difference between an arbitrator and a judge is that arbitrators are committed to not only the cardinal idea of fairness, but also the will of the parties.\(^73\) The arbitrators are thus pragmatic problem solvers. A judge on the other hand is a social engineer who deals with a case within the boundaries of the general interest of society.\(^74\) The fear is that a choice-of-forum clause operating in tandem with choice-of-law clause may be used to circumvent the public policy of a specific state.\(^75\) Since arbitrators are generally only bound by the law agreed upon by the parties, and the arguments presented by them, it is held that arbitrators have no obligation to apply any public policy rules *ex officio*.\(^76\)

The strength of this argument rests on the presumption that arbitrators do not apply mandatory norms or principles of public policies since the arbitrators are obliged to apply the claims of the parties only. However, arbitrators’ assignment is arguably broader than that.\(^77\) The tribunal does have a duty to balance all the relevant factual circumstances of a dispute and to decide whether to apply and take account of the public policy or mandatory rules of a country.\(^78\) The ultimate goal of the arbitrators is to officiate the legitimate expectations of the parties by ensuring that the award is *enforceable*.\(^79\)

Furthermore, nothing indicates that arbitrators are inherently incapable of balancing the interest of the parties and the public interest protected by mandatory laws. Equally, nothing suggests that national judges are better at applying the mandatory rules of its state, or the mandatory rules of a different country for that matter.\(^80\) The fact is that international arbitrators do routinely apply mandatory norms, as well as *lois de police* and are not insensitive to considerations of equity or efficacy. Arbitrators are thus not indifferent and may even apply moral norms.\(^81\)

---

\(^{72}\) *Cf. ibid.*, 2-33.
\(^{73}\) *See* Hobér (2011), para. 2.65.
\(^{74}\) Pamboukis (2009), para. 7-10.
\(^{76}\) It is also held that they should not apply rules not explicitly presented by the parties. *Supra*, fn. 72.
\(^{77}\) Brekoulakis I (2009), para. 2-36.
\(^{78}\) *Ibid.*, 2-38.
\(^{79}\) This is also held in a number of arbitration rules, *supra*, fn. 7. *See* Pamboukis (2009), para. 7-32 and Brekoulakis I (2009), para. 2-36.
\(^{80}\) Brekoulakis I (2009), para. 2-38.
\(^{81}\) Youssef (2009), para. 3-50.
More importantly, the objective of public policy is clearly reflected in the wording of the relevant provisions.\(^\text{82}\) The materialisation of this objective does not depend on the condition that the adjudicatory body is favourably predisposed toward certain interests, but to the true wording of the provision. A mandatory rule would have been dangerously ill drafted if a certain predisposition were required for its interpretation.\(^\text{83}\)

In conclusion, arbitrators’ have proven themselves fully capable of handling disputes concerning sensitive issues of public interests. An allegiance to a national state is not required for the correct application of a public policy provision.\(^\text{84}\) This diminishes the need of non-arbitrability since arbitrators may be trusted with sensitive issues of public interest.

2.3.2.2 Arbitration as an inadequate process

Litigation and arbitration is not only divided by the dissimilarity between judges and arbitrators. Arbitration is also characterised by a different procedure that focuses more on confidentiality and finality than the procedural safeguards found in litigation. The fact-finding process is less intensive and the presentation of evidence is less rigorous. The award also lacks the reasoning of a court ruling.\(^\text{85}\) Furthermore, there is also no ‘real’ appeal process and only limited review of the award by national courts. If the limited procedural safeguards that exist are not followed, then it may potentially amount to a breach of a procedural public policy.\(^\text{86}\) These procedural ‘deficiencies’ led the US Supreme Court to conclude in 1973:

"Muffling a grievance in the cloakroom of arbitration would undermine confidence in the market, which could be restored in the light of impartial public court adjudication."\(^\text{87}\)

However, since then arbitration has proven itself to meet all the due process standards necessary to safeguard rigorous and uncompromised proceedings.\(^\text{88}\) In fact, the confidence in the market is better protected by satisfying the expectations of the parties to have a final resolution of their dispute. Of course, the protection of fundamental

\(^{82}\) Brekoulakis I (2009), para. 2-26.
\(^{83}\) Supra, fn. 65.
\(^{84}\) See Born (2014), p. 1041.
\(^{85}\) Brekoulakis I (2009), para. 2-42.
\(^{86}\) But, it does not result in the dispute being non-arbitrable. Born (2014) p. 952.
\(^{87}\) Merrill Lynch, Pierce, Jenner & Smith, Inc. v. Ware, 414 U.S. 117 S Ct (1973).
principles such as the right to be heard is also required.\textsuperscript{89} This can on the other hand be done by a review of the process after the award is made.\textsuperscript{90} There is no reason to presume that arbitrators will fail to administer justice fairly. A review of the process and a limited examination of the award quench the need of banning arbitration altogether to.

The arbitral process is however admittedly limited in that it is based on consent.\textsuperscript{91} This makes arbitration ill-suited for matters that require the involvement of unwilling third-parties.\textsuperscript{92} Therefore it is reasonable and important that some categories of cases fall within the scope of non-arbitrability.\textsuperscript{93} These include cases of declaring a company bankrupt, imposing a criminal sentence, approving a merger, or issue similar administrative acts.\textsuperscript{94} The question is however if the best method of identifying these cases is by using the rule of ‘settleability equals arbitrability’. There is a risk that other categories are declared non-arbitrable, even though they would be fully capable of being resolved by arbitrators.\textsuperscript{95}

\textbf{2.3.2.3 \hspace{0.5cm} Interim conclusion: Limiting non-arbitrability}

The arguments previously rooted for non-arbitrability have lost much of its fibre. It was once held by a US court that matters of war and peace are too important to be left to the generals, and that the same goes with leaving sensitive issues of public policy in the hands of arbitrators.\textsuperscript{96} This has changed. US courts now hold that there are no reason to believe that arbitrators would not satisfactorily apply mandatory provisions.\textsuperscript{97}

Even if an arbitration concerning sensitive topics of public interest were allowed to continue, it would not prevent the courts from examining the final award and the process at the stage of enforcement.\textsuperscript{98} True, it is uncertain if the award would ever cross the courts of the concerned State. It is possible that the award would be enforced in a different State. It is also true that the courts’ review of arbitral awards are not as thorough as appellate courts’ review of lower courts’ rulings.\textsuperscript{99} Since awards are presumed to be final, there

\begin{itemize}
\item \textsuperscript{89} Supra fn. 28.
\item \textsuperscript{90} See 3.4.3.2.
\item \textsuperscript{91} Cf. supra fn. 30.
\item \textsuperscript{92} Born (2014), p. 1042.
\item \textsuperscript{93} Ibid.
\item \textsuperscript{94} Ibid.
\item \textsuperscript{95} Cf. ‘Collateral damage’. See 5.1.
\item \textsuperscript{96} American Safety Equipment Corp. v. J.P. Maguire & Co, [1968] 391 F. 2d 821.
\item \textsuperscript{98} See 3.4.3.2.
\item \textsuperscript{99} Cf. judicial review for error of law under Section 69 of the UK Arbitration Act. See Cannon (2012).
\end{itemize}
would also be no ‘real’ remedy to an award in which the arbitrators have ignored mandatory law and public interest. However, an unwilling party would always have the availability of the courts’ review to set an award aside or resist enforcement. This means that most awards would pass the eyes of the courts and give the judges the opportunity to protect national public interest.

To conclude, there are three main reasons for limiting non-arbitrability. First, there is no reason at the outset to assume that arbitrators are irreconcilably incompetent to protect public policy, when the interests of the parties and the public interests may be protected by set-aside procedures or non-recognition. Second, there is furthermore no reason to assume that the legislator intended for a class of disputes to be non-arbitrable, when it is committed to international commercial arbitration unless it is clear. Third, the adjudicative mandate of the arbitrators is to resolve the submitted disputes in accordance with applicable law, including applicable mandatory law and to render an award on such matters that is binding and enforceable. This makes them capable of administering justice that is fair both to the parties and outside interests.

For these reasons non-arbitrability should only be triggered in very few occasions and such occasions should typically be more relevant for domestic disputes, and only rarely for international disputes. Therefore, the criterion of ‘settleability’ must be understood as including more, rather than fewer, disputes within the scope of arbitrability.

### 2.4 Conclusion: Finding balance

*Sense and Sensibility* does not conclude with one sister triumphing over the other. Instead, both Elinor and Marianne find happiness at the end of the novel by learning from one another. Together they discover how to express their feelings while also retaining self-control and dignity. This equilibrium must also be found between arbitration and non-arbitrability.

---

100 A party who is faced with an unfavourable award is most likely unwilling to have it enforced.
102 See 3.4.3.2.
103 See 3.4.3.3.
104 See 3.4.3.4.
105 See 3.4.3.1 and Mistelis (2009), para. 1-24.
106 See 5.2.2.
Arbitrability is a balancing act between the largely domestic importance of reserving certain matters exclusively to the decision of courts and the more general public interest of promoting trade and commerce through an effective means of dispute settlement.\(^{107}\) The international trend is to include more areas of law in the scope of arbitrability.\(^{108}\) Public interest may instead be protected by reviewing the award at the stage of enforcement or set-aside proceedings on the grounds of public policy.

To find equilibrium, ‘settleability’ should identify many rather than few disputes as arbitrable. This in order to include areas of law, which the legislator did not intend to be non-arbitrable. Furthermore, a complicated rule would prolong the process and affect the benefits of allowing arbitration negatively. Therefore, a simple rule should be used to identify the disputes that are non-arbitrable to increase the foreseeability for the parties.\(^{109}\)

\(^{107}\) Mistelis (2009), para. 1-27.
\(^{108}\) See 3.4.
\(^{109}\) See 5.2.1.
3. ARBITRABILITY AND FOREIGN LAW

Is there an obligation to consider if the dispute is non-arbitrable under a foreign law? A positive answer to this question could lead to the conclusion that mandatory provisions of foreign law should affect the settleability of a dispute in Sweden. An answer in the negative does not necessarily lead to the opposite conclusion, unless there is an obligation to not allow foreign non-arbitrability affecting arbitrability in Sweden.

This Chapter examines whether any obligations are present under the New York Convention or general principles of international private law. After that, a comparative outlook is made to determine how other States have approached the research inquiry. The Chapter closes with an observation of international trends in order to conclude if ‘settleability’ should be used to protect any interests other than Swedish.

3.1 Introduction: On Egoism

Understandably, the Count of Monte Cristo felt cynical about an obligation to protect other interests than his own. After all, his neighbour, colleagues and society, had betrayed him in his previous life as Edmond Dantès. In light of the lack of reciprocal kindness, it was reasonable for him to be contempt with limiting the harm done to others, rather than putting others’ interests before his own.

In the same way, it is reasonable to ask why the courts of a State should declare a dispute non-arbitrable because it collides with a foreign notion of settleability. An affirmative answer may be called egoistic. But, egoism is only ‘wrong’ where there is an obligation to care for others – be it a moral or contractual duty.

In the previous chapter, it was concluded that the scope of arbitrability should be determined by balancing the benefits of allowing arbitration with its perceived negative effects on public interests. If there is no public interest involved in a dispute, then there is little need to prohibit arbitration. But, what is the public interest?

The main rule under Swedish law is ‘settleability’ equals arbitrability. The rule is used to identify the cases where the public interest is so predominant that parties should be barred from arbitrating their disputes. But, must the parties be capable of settling their dispute under Swedish substantive law or the law of a foreign state?

110 See quote from the book on the back of the thesis’ front page.
It would on the one hand be egoistic to disregard all foreign law and only determine settleability according to mandatory provisions of Swedish law. That would only consider Swedish public interest. On the other hand, to consider foreign mandatory law would let foreign public interests affect settleability in Sweden. This could lead to a dispute becoming arbitrable, even if it would be non-settleable under Swedish law, if it were settleable under a foreign law. It could also lead to the opposite result. A dispute that is arbitrable under Swedish law could be non-settleable under foreign law and thus declared non-arbitrable. In both cases, it is the foreign interests reflected in its mandatory laws that limits, or increases, the parties’ contractual freedom, which would determine arbitrability under Swedish law.\textsuperscript{111} To consider foreign mandatory law would thus be selfless and elevate the interests of others. An application of foreign law would on the other hand be superfluous and altruistic if there in fact is no obligation to protect any other public interest than the state’s own. Even if it is due to a perceived need of supporting the development of a common international doctrine of non-arbitrability. It may even be contradictory to an obligation to apply its concept of non-arbitrability only.

This paper presupposes that Swedish law applies to the question of arbitrability and therefore does not focus on the question of which law should determine arbitrability.\textsuperscript{112} However, indirectly the non-arbitrability of a different State may apply under the guise of settleability and the focus of this paper is to discuss the rationale for why foreign law should determine this criterion in Swedish law.\textsuperscript{113}

3.2 The Obligations Under the New York Convention

This section explores how the non-arbitrability exception in the New York Convention should be understood. First, it discusses how the Convention should be interpreted. It then discusses if arbitrability should be considered a contractual or a jurisdictional limitation. The section then asks if there is an obligation to consider foreign concepts of non-arbitrability or if the Convention limits the freedom of Contracting States to determine what disputes are non-arbitrable. Last of all, it is concluded whether or not foreign law may have an effect on the settleability of a dispute under Swedish law.

\textsuperscript{111} What law that applies is effectively related to the role and interests that a state has in arbitration proceedings that take place within its territory. See Brekoulakis II (2009), para. 6-1.
\textsuperscript{112} Supra 2.3.
\textsuperscript{113} Supra fn. 48.
3.2.1 Introduction: Balancing national interest and global trade

Gary B. Born label The New York Convention as the "universal constitutional charter for the international arbitral process".¹¹⁴ The Convention has enabled the development of durable, effective means for enforcement of arbitration agreements and arbitral awards by both national courts and arbitral tribunals. The success of the Convention is justifiably described as the most important achievement in the world of international arbitration.¹¹⁵

The Convention establishes uniform rules for its 156 Contracting States in respect of (a) the validity and enforcement of arbitration agreements, (b) the formalities for enforcement of foreign arbitral awards; and (c) the grounds for which recognition or enforcement of awards may be refused.¹¹⁶ Contracting States are however free to unilaterally determine certain issues, including what disputes are non-arbitrable.¹¹⁷

The reason why the Convention did not create stricter and uniform standards of non-arbitrability is due to its universal nature.¹¹⁸ In order to create a convention which appeals to as many States as possible, it was important to not intrude on the autonomy of the States to protect their own public interests. The Convention’s success may be attributed to the inclusions of the public policy and non-arbitrability exceptions as safety valves.¹¹⁹ The fact that Contracting States are allowed to define non-arbitrability unilaterally, has not resulted in a total lack of uniformity, since most States share the interest of promoting arbitration since it also promotes commercial activity.¹²⁰

New York Convention is thus a system based upon the balancing of interests. It is a compromise between imposing a general obligation to enforce arbitration agreements and arbitral awards and allowing the Contracting States to adjust this obligation to avoid any conflicts with the core principles of its own legal systems.¹²¹

¹¹⁵ Mistelis (2009), para. 1-1.
¹¹⁷ This may be done in several ways. First by reserving the application of the Convention to only “commercial disputes” under Article I of the Convention. It is up to each Contracting State to create its definition since “commercial disputes” are not defined by the Convention. A state may also more directly refuse to enforce an arbitration agreement under Article II or an arbitral award under Art V by applying its concept of what matters may be subject to arbitration.
¹¹⁸ Di Pietro (2009), paras. 5.43-5.45.
¹¹⁹ Ibid.
¹²⁰ Ibid., para. 5-46.
¹²¹ Di Pietro (2009), para. 5-43.
In the following section the different articles of the Convention concerning non-arbitrability is analysed. The most important articles are Article II(1)\textsuperscript{122}, Article V(1)(a)\textsuperscript{123} and V(2)(a)\textsuperscript{124}. The objective is to answer the question: Is there an obligation to consider foreign States’ notions of non-arbitrability? If the answer is yes, then it leaves room for foreign mandatory law to determine the settleability of a dispute under Swedish law. If the answer is no, then it may be excessive to consider foreign notions of non-settleability.\textsuperscript{125}

3.2.2 Methods of interpretation

In the previous section, it was concluded that the New York Convention leaves it to the Contracting States to define non-arbitrability. This means that nothing prevents – under a literal interpretation of the Convention – a State to declare that all matters are non-arbitrable. This is of course an unreasonable understanding of the objective and purpose of the treaty. After all the New York Convention is about the enforcement of foreign arbitration agreements and awards. There are therefore further elements that must be considered for a ‘correct’ interpretation of the Convention.\textsuperscript{126}

Some legal scholars maintain that the New York Convention not only recognize and permit Contracting States to apply the non-arbitrability exception, but also imposes international limits on the scope that it may be applied.\textsuperscript{127} The argument is based on the context in which the exception appears as well as the objectives of the Convention.\textsuperscript{128}

---

\textsuperscript{122} “1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences […] concerning a subject matter capable of settlement by arbitration.[…]” – Article II(1) NYC (own emphasis).

\textsuperscript{123} “1. Recognition and enforcement of the award may be refused, at the request of the Party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a)[…] the said agreement is not valid under the law to which the parties have subjected it, or, falling any indication thereon, under the law of the country where the award was made;[…]” – Article V(1) NYC (own emphasis).

\textsuperscript{124} “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; […]” – Article V(2)(a) NYC (own emphasis).

\textsuperscript{125} Supra, fn. 48 and see 3.2.4.

\textsuperscript{126} Cf. Art. 31.1 of the 1964 Vienna Convention on the Law of Treaties (own emphasis): ”1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Interestingly there are more signatories to the New York Convention (156) than the Vienna Convention (127).

\textsuperscript{127} See Born (2014), p. 945.

\textsuperscript{128} Ibid.
The conclusion is that non-arbitrability should be interpreted according to its exceptional basis, be non-discriminatory and consistent with the evolving practice of other states.

3.2.2.1 The exceptional basis: Pro-enforceability

Public policy and non-arbitrability are treated separately within Article V(2) of the New York Convention, rather than under the general provisions of Article V(1). This indicates that these are "escape" provisions, which both reflects and confirms their common and exceptional character. Consequently, under the Convention the main rule is pro-enforceability. The enforceability of foreign arbitral awards has even been described by one court as a matter of public policy. An interpretation in good faith of the Convention is therefore that the non-arbitrability exception should be treated as an exception and must subsequently be limited to exceptional cases.

This means that the prohibition of broad categories of issues is only allowed under the Convention where arbitration actually is incapable of safeguarding relevant legislative objectives. This avoids unnecessary conflict with the objectives of the convention and the basic commitment of all Contracting States to recognize and enforce international arbitration agreements and arbitral awards. Since the Convention establishes a main rule of pro-enforceability it may even be contrary to public policy not to enforce an agreement or award.

National courts have admitted that the provisions of the Convention establish a pro-enforcement regime for international arbitration agreements and arbitral awards. Consistent with these international limits on the non-arbitrability doctrine, many courts of Contracting States rarely apply the non-arbitrability doctrine in international settings. The Swedish Supreme Court has subsequently held that the provisions of the SAA must be construed according to the goals of the Convention to facilitate the enforcement of foreign arbitral awards.

---

129 Ibid.
132 Di Pietro (2009), para. 5-41.
133 It has even been held that it may be contrary to public policy to not enforce an agreement or award, even if it has been declared non-arbitrable according to a foreign law. See Redfern & Hunter (2009), para. 11.105. Cf. Hilmarton and Chromalloy cases. Gaillard (1999), p. 16.
136 See Göttaverken Arendal AB v General National Maritime Transport Co. (NJA 1979 p. 527);
Arguably, the signatories to the Convention should uniformly apply the non-arbitrability exception due to its universal character and purpose.\textsuperscript{137} The underlying idea of the Convention was to establish a single, uniform set of rules that apply worldwide.\textsuperscript{138} National courts have also considered the evolving practice of other States in the application of the Convention’s articles.\textsuperscript{139} The US Supreme Court held in the \textit{Mitsubishi} case that the non-arbitrability exception must be narrowly applied under the New York Convention since it is "necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration".\textsuperscript{140} Otherwise, the competing public policies of the Contracting States diminish the international pro-arbitration attitude of resolution of international commercial disputes.\textsuperscript{141} Consequently, although the non-arbitrability by its nature is an exception that permits individual States to give effect to local public policies, it should not be a basis for deviating from a well-established consensus.\textsuperscript{142}

Some legal scholars even argue that the doctrine of non-arbitrability has been liberated from being chained to the political choices of individual States.\textsuperscript{143} Instead, they favour a global and internationalist development that is free from local norms.\textsuperscript{144} Therefore, it is proposed that an international and autonomous concept of non-arbitrability should evolve under the New York Convention due to its objectives of uniformity and ‘constitutional’ character.\textsuperscript{145} The argument for uniformity is mainly based upon policy justifications. It would make it foreseeable for the arbitrating parties to have one international standard only to abide by, rather than a number of national concepts. The pro-arbitration cause would be furthered. There is however no direct textual basis for interpreting the Convention as establishing a uniform international standard of non-arbitrability.\textsuperscript{146} The


\textsuperscript{137} van den Berg (1981), pp. 54-55.
\textsuperscript{138} Born (2014), p. 106.
\textsuperscript{139} \textit{Ibid.}
\textsuperscript{140} \textit{Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc.}, 473 US 628.
\textsuperscript{141} Born (2014), pp. 615
\textsuperscript{142} \textit{Ibid.}, p. 616.
\textsuperscript{143} Gaillard (2010), p. 54, para. 61.
\textsuperscript{144} Youssef (2009), para. 3-54. \textit{Cf.} Paulsson (2014), p. 50.
\textsuperscript{145} Born (2014), p. 611.
\textsuperscript{146} \textit{Cf.} \textit{ibid.}
little textual basis that may be found is the fact that Art. II(1) does not refer to *any* national law. This could be interpreted as requiring contracting states to respect an international definition of non-arbitrable disputes.\(^\text{147}\) Such an interpretation is on the other hand not supported by the Convention's drafting history. The expectation of the Contracting States was that national law would play a leading role in the application of the non-arbitrability doctrine.\(^\text{148}\)

To conclude, there is no international standard of non-arbitrability under the Convention. It is entirely up to the Contracting States to unilaterally apply the exception. However, this does not prevent that the evolving practice of other States may define the scope under which the doctrine of non-arbitrability may be applied by national courts.\(^\text{149}\) The aim of increasing commercial activity by permitting arbitration would in any case suffer if a State would diverge from a reasonable international consensus on the application of the non-arbitrability exception.\(^\text{150}\)

### 3.2.2.3 Non-discriminatory: Minimum, not maximum standards

A decision on non-arbitrability is limited to the State and does not affect the mandatory recognition of the arbitration agreement or arbitral award in other Contracting States.\(^\text{151}\) The Convention requires the Contracting States to treat international arbitration agreements and awards at least as favourably as domestic ones.\(^\text{152}\) The States must at minimum enforce an arbitration agreement or award when the conditions under the Convention are met.\(^\text{153}\) There are however no maximum standards which hinders a Contracting State from enforcing an arbitral award or arbitration agreement when these conditions are not met. An international arbitration agreement or award can thus only be more likely to be enforced than a domestic would.\(^\text{154}\)


\(^{149}\) *Cf.* Art. 31.3(b) Vienna Convention on the Law of Treaties: "There shall be taken into account, together with the context: […] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

\(^{150}\) See 3.4.

\(^{151}\) Born (2014), p. 607. *Cf.* 3.2.2.3 and *supra* fn. 133.

\(^{152}\) Article III of the Convention.


It also means *e contrario* that the Convention sets out maximum standards on Contracting States’ application of the non-arbitrability exception and not maximum.\(^{155}\) States are allowed to be more pro-enforcement than the Convention provides. This is evident by the use of the words *shall* and *may*.\(^{156}\) A Contracting State *may* refuse the recognition of an arbitration agreement or arbitral award under a few specific exceptions, but they *shall* recognize and enforce foreign arbitration agreements and awards. The requirement of non-arbitrability must be understood in light of this.\(^{157}\)

### 3.2.3 Should foreign non-arbitrability have any effect?

The previous Section established the method used to interpret the Convention. The focus now turns to the relevant articles to establish if an obligation exists to apply foreign non-arbitrability. If such an obligation exists, then it may be consistent with the Convention’s purpose and objective to construe a State’s own doctrine on non-arbitrability by considering foreign non-settleability.\(^{158}\) Conversely it would be inconsistent with the Convention to consider foreign non-settleability if it is explicitly prohibited to apply a different State’s notion of non-arbitrability.\(^{159}\)

The main rule under the New York Convention is that international arbitration agreements and awards *shall* be recognised and enforced.\(^{160}\) Only exceptionally *may* a State refuse to enforce or recognise a foreign arbitral award or arbitration agreement.\(^{161}\) This means that there exist an obligation under the Convention to recognise, but no duty to refuse recognition. In other words, the Contracting States are not compelled to consider other State’s notion of non-arbitrability, and *may* only under specific conditions.\(^{162}\)

Art. V(2)(a) allows a Contracting state to refuse enforcement of an award if it is contrary to its perception of arbitrability. The rule is clearly about arbitrability as it explicitly refers to ‘disputes capable of settlement by arbitration’. Only the arbitrability of *lex fori* is mentioned, *e.g.* the court faced with the case. This can be interpreted as

---

\(^{155}\) Mistelis (2009), para. 1-1.

\(^{156}\) This is also emphasised by Swedish legal scholars. See Heuman (2003), p. 721.

\(^{157}\) The Swedish legislator has also emphasised the importance of being in line with international trends. See Prop. 1998/99:35, p. 42 and Dir. 2014:16, p. 2.

\(^{158}\) With the reservation that settleability maybe does not equal arbitrability. See 4.1.

\(^{159}\) Supra. 3.1 and fn. 48.

\(^{160}\) Art. II(1) (“shall”) and Art V(1) (“may”...“only if”), supra fn. 122 and 123.

\(^{161}\) Art. II does not say “may” explicitly, but it should be assumed to be consistent with Art. V. Cf. supra. 3.2.2.3 and Wolf (2012), p. 144, paras. 158-163.

\(^{162}\) See 3.2.3.1.
excluding the possibility to refuse enforcement of an award by a different notion of arbitrability than the State’s own. However, as previously stated it is left to the Contracting States to determine what disputes are capable of settlement by arbitration.163 A literal interpretation of the Convention would lead to the conclusion that a State may extend its non-arbitrability exception to include considerations of whether the dispute is settleable under foreign laws.164 It is on the other hand questionable if such a definition of non-arbitrability would be coherent with the pro-enforceability purpose of the Convention, or in line with a duty to apply the Convention in good faith. A better interpretation of Art. V(2)(a) is that due to its exceptional character; it should only be exceptionally applied, which gives little room to declare an award invalid if it is non-arbitrable in a different State than lex fori.165 A dispute that is non-arbitrable according to a foreign law may however be grounds for refusal of recognition or enforcement of an arbitral award under Art. V(1)(a).166

While Art. V defines the obligation to recognise and enforce foreign arbitral awards, Art. II refers to the duty to enforce and recognise arbitration agreements. Art. II(1) corresponds to Art. V(2)(a) and Art. II(3) is the counterpart to Art. V(1)(a). Interestingly Article II does not state that Contracting States may refuse to recognise an arbitration agreement under these Articles, but only what they shall recognise an agreement. This could be interpreted as establishing an obligation not to recognize an arbitration agreement, which concerns a dispute that may not be settled by arbitration167 or is null and void.168 This interpretation would however be inconsistent with the pro-enforceability purpose of the Convention.169 Another difference between Art. V and II is that the latter does not indicate which law should be applied to the arbitrability of the dispute. The prevailing view is to apply Art. V(2)(a) analogously, i.e. lex fori.170

Contracting States are consequently not obligated to give effect non-arbitrability, but are only permitted to under Article II(1) and Article V(2)(a). Foreign non-arbitrability

163 Supra 3.2.2.
165 In many cases non-arbitrability equals non-settleability, see 3.4.2.1. This means that the conclusion on non-arbitrability also affects the answer to whether Contracting States are allowed to consider foreign non-settleability under the Convention.
166 See 3.2.3.1.
167 Art. II(1).
168 Art. II(3).
169 Supra 3.2.2.1.
could potentially amount to non-arbitrability under rules of the judicial enforcement forum itself. The scope of applying non-arbitrability is however limited by the pro-enforceability objective of the Convention and non-arbitrability’s exceptional character. The explicit mentioning of only one State’s notion of arbitrability in Art V(2)(a), *i.e.* *lex fori*, makes it also inappropriate to circumvent this rule by applying foreign non-arbitrability under the guise of the State’s own. For the research inquiry, this means that the criterion of settleability should not be used as a Trojan horse to declare a dispute non-arbitrable according to a foreign law.  

3.2.3.1 Does non-arbitrability fall under Art. (V)(1)(a) and Art. II(3)?

It is questionable if a contracting state is permitted to consider the non-arbitrability of *lex arbitri* and *lex electionis* under Art. V(1)(a) and Art. II(3). This depends on whether non-arbitrability is seen as a condition for the validity of the arbitration agreement, which is expressly referred to under the articles. If non-arbitrability is defined as a jurisdictional requirement, then there is no room for the exception under the articles. The effect on the research inquiry is that the former interpretation allows foreign non-arbitrability to affect the non-arbitrability of *lex fori*, which also leaves room for non-settleability of a different state may be considered.  

The prevailing view among legal scholars is that enforcement *may* be refused if the dispute is non-arbitrable under *lex electionis* or *lex arbitri*. Contrary to Art. V(2)(a), there is no express reference to arbitrability in Art. V(1)(a) or Art. II(3). Instead it is stated that the recognition and enforcement of an arbitral may be refused if the arbitration agreement is not *valid* under the law that the parties have subjected it to (*lex electionis*), or, falling any indication thereon, under the law of the country where the award was made (*lex arbitri*). It is argued by most legal scholars that arbitrability should be seen as a requirement for the validity of the contract, and therefore Art. V(1)(a) apply to arbitrability. Others – including this author – believes that arbitrability differs from

---

171 *See* 3.3.2.  
172 *See* 5.2.3.  
173 *Supra* Fn. 122 and 123.  
174 Although it is limited to *lex arbitri* or *lex electionis*, Art. I(a). A conflict-of-laws rule to the question of settleability would on the other hand  
176 *Supra* Fn. 164.
other substantive criteria on the validity of the arbitration agreement and therefore Art. V(1)(a) may not be applied to refuse recognition or enforcement of an award due to foreign non-arbitrability. 177

Defining non-arbitrability as a criterion for the validity of an arbitration agreement would allow a Contracting State to refuse the enforcement and recognition of an award or arbitration agreement based on foreign considerations of non-arbitrability. The number of foreign laws that may be considered is however limited to *lex electionis* or *lex arbitri*, whereby *lex arbitri* may only be considered if there is no *lex electionis*. 178 This would also mean that the dispute must be arbitrable according to both the law governing the arbitration agreement, 179 as well as the law of the deciding court. 180

However, there is no textual basis for considering non-arbitrability as a criterion of validity. In fact, it would be superfluous to mention non-arbitrability in Art. II(1), if it was also included as a condition for validity under Art. II(3). 181 It is also clear from the fact that non-arbitrability is treated in the Convention as to not giving effect to an otherwise valid arbitration agreement. 182

Non-arbitrability also differs from contractual validity since the rules derive from different types of legal sources. 183 Rules on substantive validity are determined by principles of contract law. Non-arbitrability is defined by legislation directed specifically at the possibility of resolving a particular type of dispute by arbitration. 184 All national provisions on non-arbitrability are effectively conflict-of-jurisdiction rules. 185 The main purpose of these rules are to safeguard the exclusive jurisdiction of the State’s own courts over certain categories of disputes and not intended to be a ban on arbitration in general. 186

---

178 Parties generally do not choose a different law to apply than *lex arbitri*, Heuman (2003), p. 669.
179 Art. II(3) and Art. V(1)(a).
180 Art. II(1) and Art. V(2)(a). For this ‘maximum judicial’ review see Bertheau (1965), p. 38 *et seq*; von Hülsen (1973), p. 135 *et seq*; Sandrock/Kornmeier (1980), para 210; see also the proposed Article 44 of the Japanese Arbitration law according to which the arbitration agreement is only valid if it fulfils the requirements of both the law of Japan and the law applicable to the arbitration agreement.
183 Ibid.
184 Under Swedish law a contract contrary to mandatory law does not automatically result in the contract’s invalidity. Instead a weighing of interest *in casu* is required. See NJA 1997 p. 93 and Adlercreutz (2012), p. 288. Cf. Danish and Norwegian law, which have an explicit rule under which a contract contrary to mandatory norms are invalid. Grönfors (1995), p. 181 and Ramberg (2012), p. 205 and 4.2.4.3.
185 Cf. Rome I and Brussels I.
186 Brekoulakis II (2009), para. 6-63 and 5.2.2.
It has considerable appeal to apply non-arbitrability under *lex fori* only and exclude the consideration of non-arbitrability under *lex arbitri* or *lex electionis*. It would be consistent with the exceptional character of non-arbitrability as a local "escape device", as well as under more general private international law notion of public policy as a rare exception. This would limit the number of cases where non-arbitrability could apply, and is therefore coherent with the pro-enforceability character of the Convention.\(^\text{187}\)

To apply the law *chosen* by the parties to govern their arbitration agreement would also be contradictory to the mandatory nature of non-arbitrability. It is understandable why the parties made an express choice of a certain contract law for the interpretation of the consent and subsequently the scope of the agreement. It makes however little sense why the parties would choose a law that invalidates their agreement altogether, since this would only open up to claims in court that are contrary to good faith. Reasonably, it cannot be presumed that the parties agreed to an invalid agreement.

To conclude, the better view is that the national law of the court faced with the question of arbitrability should exclusively determine the case, *lex fori*. This is in line with Article V(2)(a) and Art. II(1) of the Convention as well as the fact that each country determines for itself which disputes it considers being arbitrable.\(^\text{188}\)

### 3.2.4 Conclusion: Little room for foreign non-arbitrability

There is no obligation to apply foreign notions of non-arbitrability. The New York Convention even restricts the grounds on which a Contracting State may refuse to enforce or recognise a foreign arbitral award or arbitration agreement. The scope for applying foreign non-arbitrability is limited by its exceptional nature, the pro-enforcement aim of the Convention and the explicit reference to *lex fori* in Art. V(2)(a). Furthermore, there should be no room to consider the non-arbitrability under *lex arbitri* or *lex electionis*.

The conclusion relevant for the research inquiry is that a literal interpretation of the Convention does not prevent Sweden from construing the criterion of settleability to give effect to foreign law by applying a conflict-of-law rule. It is however not consistent with the pro-enforceability purpose of the Convention if it leads to more disputes falling outside the scope of arbitrability. Furthermore, it is arguably contrary to an interpretation

---


\(^{188}\) Lew, Mistelis & Kröll (2003), §9-18; Reithmann (1996), para 2380; *see also* Arfazadeh (2001), p. 76.
of the Convention in good faith. Art. V(2)(a) only allows for considerations of non-arbitrability under *lex fori*. It would circumvent this explicit rule if a different State’s non-arbitrability were considered as part of Swedish arbitrability. This would indirectly be the case if foreign mandatory law had an effect on settleability.\(^{189}\)

### 3.3 Arbitration and Principles of Private International Law

Arbitration is in many ways separate from other areas of private international law. Many of the principles embodied under private international law are not transferable to arbitration. Others however express deeply rooted principles of public policy. This Section examines the principles that are most relevant to the research inquiry in order to examine if any provide for an obligation to consider foreign interests in the assessment of a dispute’s arbitrability.

#### 3.3.1 Introduction: Joined but separate

Arbitration is a distinctive and autonomous discipline, specially designed to achieve a particular set of objectives that cannot be satisfactorily resolved by other branches of private international law.\(^{190}\) This is one of the reasons why arbitration is exempted from the major European regulations on private international law.\(^{191}\) A different reason is that arbitration is considered regulated enough by the New York Convention.\(^{192}\)

This does not however prevent certain general principles found in private international law from being relevant to the research inquiry. Private international law and arbitration may be separate, but they are still joined by similar issues of law. Therefore, there may exist arguments in these general principles that potentially have an effect on whether foreign law should apply to determine if a dispute is amenable to out-of-court settlement under Swedish law.

In this Section, a few principles and trends in private international law are discussed. These have been chosen due to their connection to the research inquiry and the author’s conviction that they may contribute to a better proposition. The list does not claim to be exhaustive and its composition is limited by the author’s imaginative capability.

---

\(^{189}\) See 5.2.3.


\(^{191}\) Cf. the Rome and Brussels regulations.

\(^{192}\) See Huber (2011), p. 75.
3.3.2 The principle of ‘overriding mandatory rules’

Some legal scholars hold that it is not satisfactory for the *lex fori* to apply its notion of arbitrability only.\(^{193}\) This could frustrate the parties’ objectives in agreeing to arbitrate.\(^ {194}\) It has therefore been proposed that the courts should also exceptionally consider *overriding mandatory rules* of the most affected state.\(^ {195}\) It is reasoned that this would be allowed under Article VII(1) of the Convention and that it reflects a general principle of private international law.\(^ {196}\) The principle is that some rules transcend national barriers. The rules are to be applied regardless of the choice-of-law made by the parties or their choice of forum.\(^ {197}\)

There are two criterions to the principle. First, a rule of a third country must not only be mandatory, but also of an *overriding* character. This means that it must have a significant connection to the third State and serve an interest of particular weight.\(^ {198}\) It is left to the discretionary powers of the *lex fori* to find if the provisions are of such weight, which may be both public and private laws.\(^ {199}\) Second, it is only the rules of the foreign jurisdiction that have the *closest connection* to the issue that may come into question.\(^ {200}\)

The ‘overriding’ character of the rules makes it possible to distinguish and separate the principle from the general doctrine on non-arbitrability. The principle of overriding mandatory rules is a second-tier test, which is applied after a dispute is found to be arbitrable.\(^ {201}\) It is a principle that on grounds of public policy finds that the choice-of-law and/or choice-of-forum by the parties is illicit.\(^ {202}\) It is more closely connected to speak of the principle as part of the ‘public policy’, since this is how the closely connected doctrine of *fraude à la loi* is perceived.\(^ {203}\) Public policy is also different as it generally has a

\(^{193}\) Born (2014), p. 1043. These rules may not only be discussed in the context of arbitrability, but also when discussing settleability. See 4.2.3.

\(^{194}\) Ibid., p. 604.

\(^{195}\) For a definition, *supra* 1.4.4.

\(^{196}\) Ibid., p. 606.

\(^{197}\) Pålsson (1998), p. 115. *See* Appendix 1 for a comparison between different


\(^{200}\) *See* Appendix 1.

\(^{201}\) The methodology is however more difficult than it seems. *See* Caliess (2011), p. 208.

\(^{202}\) Ibid., p. 199.

\(^{203}\) It would therefore fall under the public policy exception in Art. V(2)(b) of the Convention. *See* Craig, Park & Paulsson (2001), p. 112.
negative effect, which makes a choice-of-law invalid due to its effects. Overriding mandatory rules have a positive effect, which forces foreign rules to be applied.\textsuperscript{204} The idea of considering overriding mandatory rules have been heavily criticised.\textsuperscript{205} There is a tendency in Sweden at least to be cautious with finding a mandatory rule to have an overriding effect.\textsuperscript{206} The application of the principle inevitably results in delays of the proceeding and additional expense, not to mention the uncertainties arising from the fact that national courts must attempt to second-guess and evaluate foreign mandatory law.\textsuperscript{207} Whether a mandatory rule is ‘overriding’ is not decided by regulations or conventions, but by the laws of \textit{lex fori}.\textsuperscript{208} This puts exceptionally high demands on the competence of the courts to apply the principle:

First, the court must initially determine whether a provision of a foreign law is mandatory and then if it is overriding. This is done in the context of the case at hand with legal questions that the foreign courts may not even have been confronted with. The difficulty of determining foreign law creates uncertainty.\textsuperscript{209} It could also lead to diverging case law.\textsuperscript{210}

Second, the court must determine whether the connection to the foreign state is significant enough to apply the foreign provision.\textsuperscript{211} It has proven been proven difficult to determine which state is \textit{lex loci solutionis}.\textsuperscript{212}

Third, the vagueness of the principle demands that the court weighs interests that may be politically coloured, which the courts are not suited to make.\textsuperscript{213} The court must then weigh this foreign interest with the interests and principles of its own law. In effect, this means that the predictability for the parties is diminished.\textsuperscript{214}

\begin{flushleft}
\textsuperscript{204} Pålsson (1998), p. 115.
\textsuperscript{205} Not only its use in private international law, but also in arbitration. See Ulrichs (2012), p. 949.
\textsuperscript{206} \textit{Ibid}, p. 119.
\textsuperscript{207} Born (2014), p. 609. See 3.3.3.
\textsuperscript{209} \textit{Ibid}.
\textsuperscript{211} Different versions of the principle of ‘overriding mandatory rules’ provide for different solutions. Born proposes that only the law of the \textit{closest} connected State may be considered, while Rome Convention allows for \textit{any} foreign law with a close connection may be applied. See Appendix I.
\textsuperscript{212} Difficulties of this close connection test is evident in the Case law of the European Court of Justice. \textit{E.g.} cases C-305/13 Haeger & Schmidt, C-64/12 Schlecker and C-386/05 Color Drack.
\textsuperscript{213} Ulrichs (2012), p. 949.
\textsuperscript{214} This is even more severe in the context of arbitration since the parties are generally allowed to make a choice-of-law in order to escape any unpredictability.
\end{flushleft}
To conclude, there is no reason to deny the existence of the principle, it is however questionable if it serves any relevant purpose in the doctrine of non-arbitrability. The courts of lex loci solutionis may always apply its concept of non-arbitrability, when faced with a dispute at the stage of enforcement. The protection by a court of foreign States’ interests may prove to be a disservice if the court fails in its assessment.

3.3.3 The treatment of foreign law by courts

A court is expected to know and apply the law autonomously in many jurisdictions. However, this principle of iura novit curia faces difficulties when the court is asked to apply foreign law.\textsuperscript{215} Judges of the courts do generally not have the competence or training to apply a law different from their own. It would furthermore be burdensome for a court to investigate the content of foreign law for just the case at hand. Therefore, foreign law is treated as circumstantial and left to the parties to provide evidence of its content.\textsuperscript{216} Nevertheless, how does this work together with the courts’ obligation to apply certain legal principles \textit{ex officio}?

A number of national laws require that non-arbitrability is applied by the court’s own motion.\textsuperscript{217} Should the national courts in these cases – if the courts are required to apply a foreign law to determine non-arbitrability – investigate the content of foreign law? This would of course be time-consuming and give an unwilling party the ultimate tool to delay the proceedings. This must be taken into account in the weighing of interests required for finding if a dispute should be arbitrable or not.\textsuperscript{218}

3.3.4 Treatment of foreign public law

Legislators are generally wary of expenses. This economical prudence together with political considerations also affect the scope of the courts’ authority. Courts are limited to promoting the public interests of the own State, and not the egoistic interests of other.\textsuperscript{219} It is also arguable whether it lies within the interest of a state to uphold the public laws of

---

\textsuperscript{215} An example of this is the Swedish case NJA 1987 p. 885, where the Supreme Court had to interpret Panaman law. See Fitger (2014), Chapter 35 § 2 CJP.

\textsuperscript{216} Cf. Swedish Code on Judicial Procedure, Chapter 35 § 2, which maintains \textit{iura novit curia}.

\textsuperscript{217} See Article 34(2) Model Law and Section 33 and 55 SAA.

\textsuperscript{218} Supra, 2.4.

\textsuperscript{219} Andersson (2011), pp. 60-61
a third state, since there is no reason to act as intermediaries for the public interests of a third state.\textsuperscript{220} This is in contrast to the respect of foreign ‘overriding mandatory rules’.\textsuperscript{221}

A basic principle is that Swedish courts will not concern itself with issues, which have no connection with Sweden, since the State is not willing to make any resources available if the dispute is of no legal interest in Sweden (sw. rättskipningsintresse).\textsuperscript{222} Therefore some authors propose it that public and private laws ought to be treated differently, and that public laws do not fall inside the scope of the normal conflict-of-laws rules in private international law.\textsuperscript{223}

\subsection*{3.3.5 Conclusion: Same but different}
Private international law and arbitration are often faced with similar legal questions. The two exist however under different legal regimes. In light of the difference between the treatment of private international law and arbitration, one may question if a principle such as ‘overriding mandatory rules’ really have a place in arbitration. First, the principle is very burdensome to apply. Second, it is even more difficult to apply within the doctrine of non-arbitrability which is applicable \textit{sua sponte}. And third, it would put national courts in the role of intermediaries to foreign interests.

To conclude, for the local courts to apply non-arbitrability in a satisfactory manner and not act as middlemen to foreign public law, the criterion of settleability should not be affected by ‘overriding mandatory rules’. There exists no obligation to consider such rules under the Convention, nor any other international instrument. It would also be burdensome for courts to apply foreign mandatory law \textit{ex officio} and contrary to the Convention’s purpose of pro-enforceability.

\subsection*{3.4 International Trends}
This section explores how the research inquiry is approached internationally. It first investigates how other countries treat arbitrability and then tries to identify international

\begin{footnotesize}
\begin{enumerate}
\item Bogdan (2014), p. 75, with references to NJA 1961 p. 141 (The Takvorian case), where the Supreme Court found that the claim of the Bulgarian state was of an overweighing nature of public law and could therefore not be tried by Swedish courts.
\item Supra 3.3.2.
\item See Bogdan (2014), p. 85-90.
\end{enumerate}
\end{footnotesize}
trends. The conclusion aims to ascertain which answer to the research inquiry best corresponds to the international developments.

3.4.1 Introduction: About international standards

Just as any other barrier on trade, it is detrimental to diverge substantially from an international practice in arbitration. It makes it even more difficult to depart from a legal solution without frustrating the expectations of the parties if a majority of other States embraces it. International parties would be reluctant to choose the State as their seat of arbitration if its laws were easy to misunderstand and the enforceability of the parties’ arbitration agreement difficult to foresee. It is therefore important for a State to accommodate international trends as far as they are reasonable.224

There is of course no motive to follow the example of others if they are bad examples. However, the adoption of a certain legal solution by many is generally an indication that it is reasonable. A solution to the research inquiry that is in line with international trends is therefore presumptively better than one that is not.

3.4.2 A comparative outlook: Three methods used

There are a number of methods that are used to identify the arbitrability of a dispute.225 The most straightforward method would be for the legislator to list all categories of disputes that falls under the exclusive jurisdiction of the courts.226 It would however be practically difficult, if not an impossibility to make an exhaustive list. The courts would in any case have to interpret the list. A better method is instead to find a common denominator for all disputes that are considered non-arbitrable first, and then prohibit these from being settled by arbitration. The difficulty then is of course to identify a criterion for arbitrability that is capable of making a clear division between arbitrable and non-arbitrable disputes.227

Mainly three different methods are used to determine arbitrability. The first is to apply the same requirement of settleability as in Sweden, the second to apply public policy

---

224 Supra 3.2.2.2.
226 Fouchard & Gaillard (1999), § 573.
227 Supra 2.4. The weighing of interests between arbitrability and non-arbitrability includes many aspects. These are difficult to reduce to one criterion, especially in international cases where the interest of non-arbitrability is weaker. See also 5.1.
directly and the third to allow all disputes that have an ‘economic interest’. They are commonly unified by the overarching intention to limit the number of non-arbitrable disputes.\textsuperscript{228}

\subsection*{3.4.2.1 Settleability}

A number of legislations use the criterion of settleability. These include the Netherlands, the Nordic countries and Italy.\textsuperscript{229} Switzerland uses the method with regard to domestic disputes, but adopts the criterion of ‘economic interest’ for international disputes.\textsuperscript{230}

The Swedish legislator explained its choice of the criterion of settleability on a number of grounds. First, it was held that it is coherent with arbitration’s contractual basis. The parties’ autonomy and contractual freedom is limited by what they may freely dispose of and therefore the same should limit arbitraribility.\textsuperscript{231} This \textit{ratio legis} has been expanded by some authors stating that the parties should not be ‘better off’ with an arbitral award, than they would be by an agreement.\textsuperscript{232} Second, if the parties were allowed to enter an arbitration agreement on matters outside their contractual freedom it would increase the need of an extensive control of the award by the courts. This would contradict the aim of finality of the process.\textsuperscript{233} Third, it would be difficult to find a more precise method of determining non-arbitrability. \textit{Ordre Public} was considered too imprecise under Swedish law and it was argued that ‘economic interest’ does not delineate the scope of arbitraribility.\textsuperscript{234} Last, it was held that there was no need of reform.\textsuperscript{235} The Swedish legislator thus settled for settleability, even though it was even admitted that this method could be too constraining on the scope of arbitraribility.\textsuperscript{236}

The criterion of ‘settleability’ also results in its own dilemmas, which were not addressed by the Swedish legislator.\textsuperscript{237} First, it leads to the very reason why this thesis

\begin{itemize}
\item \textsuperscript{228} Born (2014), p. 959
\item \textsuperscript{229} Fouchard & Gaillard (1999), § 573.
\item \textsuperscript{230} See 3.4.2.3.
\item \textsuperscript{232} Lindskog even states (own translation): “Although the having settleability determine the scope of arbitraribility seems \textit{entirely obvious} do other approaches exist in other legislations”. Lindskog (2011), 1 §, 4.1.1 fn 30.
\item \textsuperscript{234} \textit{Ibid}.
\item \textsuperscript{235} The rule of ‘settleability equals arbitraribility’ has existed since the 19\textsuperscript{th} century, see fn. 324, and no wish for a different order had been expressed. Prop. 1998/99:35, p. 48.
\item \textsuperscript{236} \textit{Ibid}.
\item \textsuperscript{237} See 4.2.3.
\end{itemize}
exists. The approach to rely on the parties’ power to dispose of the rights involved may require a conflict-of-laws analysis. This issue is not thoroughly discussed in the international literature. This may be explained by not only the lack of contemplation of the issue, but also that it reflects the little practical relevance of the non-arbitrability doctrine. Second, the criterion of settleability is somewhat elusive. It is held by some authors that the legal system cannot be described by subjective ‘rights’ and that it therefore would be preferable to adopt more direct criteria.

To conclude, as with any legal solution there are arguments for and against using a rule of ‘settleability equals arbitrability’. Much of the elusiveness created by the criterion of settleability would be solved by a clear and simple instruction on which law should be applied. Others may not.

### 3.4.2.2 Public Policy

France is one of the few countries, which have a rule that uses the principle of public policy to decide the scope of arbitrability. French courts have however held that these rules do not apply to international arbitration agreements. Instead, the courts have rested upon an idea of international public. The judicial development has substantially narrowed the scope of non-arbitrability in international context. Matters are considered non-arbitrable only where mandatory statutory text expressly requires this result.

The concept of *ordre public* has gradually been developed by French courts and has a clearer definition than any other State. It is however still an elusive concept. To differentiate between domestic and international public policy makes it even more elusive. Ultimately, this limits the foreseeability of whether a dispute is arbitrable or not.

---

238 This is one of the reasons for why the Swiss legislator chose ‘economic interest’ for international disputes. See 3.4.2.3 and fn. 249.
239 It has been submitted it is generally settled by a conflict-of-laws rule of the seat of the arbitration, which usually refers to the law applicable to the relevant legal relationship. See Lew, Mistelis & Kröll (2003), §9-22. The same authors fail however to refer to any authority.
241 Fouchard & Gaillard (1999), § 573.
242 Born (2014), p. 963. Article 2059 of the French Civil Code provides that “all persons may submit to arbitration those rights which they are free to dispose of”, while Article 2060(1) reads (own emphasis) “[o]ne may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or to disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned”.
243 Cf. 3.4.3.1.
245 See 3.4.3.3.
The differentiation does however create a presumption that a dispute is arbitrable. Courts only declare certain disputes as non-arbitrable on an exceptional basis and only where there is a general consensus among States. This promotes a common, international definition of non-arbitrability.

### 3.4.2.3 Economic Interest

The Swiss and German arbitration legislations adopt broad definitions of arbitrability. This leaves it to the courts to make interpretations on a case-by-case basis. Article 177(1) of the Swiss Law on Private International Law provides that "any dispute involving an economic interest can be the subject-matter of an arbitration". This approach is applied in international matters and in contrast with the law applied on domestic matters. The reason the legislator chose to have different standards was to avoid the conflict-of-laws issue present in using a criterion of settleability. In international matters, this would require an examination of the material law applicable to the legal relationship submitted to arbitration, which was not the intention of the legislator.

An indication that ‘economic interest’ is becoming a preferred method for defining arbitrability is the fact that Belgium has switched from the criterion of settleability to ‘economic interest’ in its new Arbitration Act.

### 3.4.3 Trendspotting: Three trends

There is no exact number of adopting States needed for a legal solution to be an international trend. Instead, it is arbitrarily decided by the examiner. Even the choice of which international trends to highlight is largely subjective. However, the author hopes

---

246 Fouchard & Gaillard (1999), paras. 563-564.
248 The 1998 German version of the UNCITRAL Model Law provides that any claim for an economic interest is arbitrable in arbitrations seated in Germany in the absence of any contrary statutory provisions. Just like the Swiss approach, the scope of the non-arbitrability doctrine is intended to be limited. Born (2014), pp. 960-961.
249 Swiss Code of Civil Procedure Art. 354 reads (own emphasis): "any claim over which the parties may freely dispose may be the object of an arbitration agreement".
250 Lindskog believes that a consequence of the method of ‘economic interest’ is that the tribunal has to apply the mandatory rule, and that its application is only tried after the award is made by courts. Lindskog (2011), para. 0-5.1.3 fn. 1.
251 Judgment of 23 June 1992, DFT 118 II 353, 868 (Swiss Federal Tribunal). The Swiss Supreme Court also refused to equate the two methods, but instead held that they are two distinct criterions.
252 The Belgian Arbitration Act of 24 June 2013, art. 1676 § 1.
253 For example, it would be possible to focus on certain occurrences, which indicate a trend of non-arbitrability. Including the US Arbitration Fairness Act of 2007.
that the rationality of the following identified international practises are convincing enough to contribute to the proposed solution to the research inquiry.

3.4.3.1 **Differentiating between domestic and international disputes**

Non-arbitrability rules are in many States materially broader in domestic than in international matters.\(^{254}\) In these States, non-arbitrability is triggered in very few cases and typically only for domestic disputes, while only rarely for international disputes. The differentiation either is made by using two different methods, or apply the method used differently between domestic and international disputes.\(^{255}\)

An example of this is the position of US Courts. In the *Mitsubishi* case, the rationale behind a narrow view of non-arbitrability under the New York Convention was presented. The court held that it "necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration".\(^{256}\) This in order to not let the competing public polices of other states and the shared international public policy diminish the international pro-arbitration attitude of resolving international commercial disputes through arbitration.\(^{257}\)

To differentiate between domestic and international disputes is natural if the doctrine of non-arbitrability is seen as a protection of the State’s own interests.\(^{258}\) In international disputes, which may not affect the public interest of the State to the same extent as in domestic, there is not the same urgent need to prohibit arbitration. The fewer connections the dispute has with a State, the greater the likelihood that the considerations underlying the rules for non-arbitrability are not applicable to the case.\(^{259}\)

3.4.3.2 **The expansion of the scope of arbitrability: A ‘second look’**

Historically arbitrators have been viewed with suspicion. This led some courts to declare certain subject matters as non-arbitrable, since arbitrators were not considered competent enough to protect ‘public’ rights and that some areas of laws were too important to be left

---


\(^{255}\) Switzerland is an example of the first, and France of the second. See 3.4.2.3 and 3.4.2.2.


\(^{258}\) Supra 2.3.2.3.

\(^{259}\) Mistelis (2009), para. 1-35.
to ‘private’ arbitration.260 Today the international trend is that more and more areas of mandatory law claims are considered arbitrable.261 Instead of prohibiting arbitration altogether, awards are scrutinized under public policy. This trend is clearly summed up by the words of one author:

"There is nowadays...a general consensus that arbitrators have the power to apply mandatory rules, either principally or incidentally, and to draw the civil consequences of a violation of said rules, under the control of the judge who will be called upon to assess the award's validity and/or enforceability." 262

This expansion of arbitrability can be explained by mainly three arguments that have gained recognition.263 First, there is an increased faith in freedom of contract. This may be attributed to the fall of totalitarian States and the triumph of liberal capitalist democracy.264 Second, the protection of the principle of good faith has been listed as a public interest. Even if there are other legitimate public interests involved, an unwilling party should not illicitly be capable of seeking refuge in domestic limitations. The party did at one time freely consent to an arbitration clause. Therefore, it should be held to it under *pacta sunt servanda*.265 Third, the protection of the parties’ legitimate expectations have gradually outweighed the invocation by States of public policy.266 This is a marginalisation of public policy and a growing trust in international arbitration. This has happened through an assimilation of arbitrators to judges, which in turn has allowed the domain of arbitration to be extended to areas with significant public interest.267

The expanding scope of arbitrability is however not limitless. Instead, it has been coupled with a reservation by the courts that the award may be reviewed with a judicial "second look" in annulment, recognition or other proceedings.268 This trend builds upon the premise that it is better to let the arbitral proceedings continue when it is unclear whether the arbitral tribunal will actually apply mandatory national law, rather than exempt classes of disputes from arbitration.269 The arbitral tribunal is then given the

261 Redfern & Hunter (2009), para. 2.144.
262 Mourre (2011), p. 3.
263 Youssef (2009), para. 3-6.
264 What has been described as the end of history. See Fukuyama (1993).
265 Brekoulakis I (2009), para. 2-84.
266 Youssef (2009), para. 3-13.
267 Youssef (2009), para. 3-15.
269 This ‘second look’ doctrine has been adopted by the U.S. Supreme Court in the classic *Mitsubishi Motors* case and by the European Court of Justice in the seminal case *EcoSwiss*. 
chance to consider the mandatory law claims in a manner that does not violate those mandatory laws or public policies. It is thus assumed by the courts that the arbitral tribunal may be capable of giving appropriate effect to mandatory laws, but even if they are not – there is still the availability of a limited court review.\textsuperscript{270} It is a recognition of the fact that arbitration is generally not used by parties to avoid or circumvent the application of mandatory rules.\textsuperscript{271} Even if that would be the case, there is no guarantee that the arbitrators would give effect to such an agreement. The arbitrators are in fact loyal to the cause to issue an enforceable award.\textsuperscript{272}

The relevance for the research inquiry is that it is more in line with an international trend to construe the requirement of settleability broadly. This in order to include disputes in the scope of arbitrability, rather than excluding them. The answer to the research inquiry most coherent with this international trend is therefore the solution that limits, rather than expands, the area of non-arbitrability.\textsuperscript{273}

3.4.3.3 \textit{The need of the legislator's clear intention}

A number of national courts have held that a dispute should not be held as non-arbitrable unless the legislator has expressly intended for it to be.\textsuperscript{274} Arguably, an express dictation of this intent is needed.\textsuperscript{275} The overarching commitment to arbitration by a legislator requires that courts are careful in deducing a legislative intention of a specific dispute’s non-arbitrability. The presumption is that arbitration is allowed rather than the other way around.\textsuperscript{276} It is therefore more in line with the intent of the legislator to be wary of prohibiting areas of law from arbitration. In fact, it must be held that arbitration in and of itself is no longer considered contrary to public order, and courts ought therefore not to declare a dispute as non-arbitrable unless it is explicitly excluded.\textsuperscript{277} It could be argued

\begin{itemize}
\item \textsuperscript{270} Born (2014), p. 981.
\item \textsuperscript{271} Mistelis (2009), para. 3-59.
\item \textsuperscript{272} See 5.2.
\item \textsuperscript{273} Supra 2.3.2.1.
\item \textsuperscript{274} See Supreme Court of Canada, Sedek v. TELLUS Communications Inc., [2011] SCC 15.
\item \textsuperscript{275} Ibid.
\item \textsuperscript{276} Born (2014), pp. 958-959.
\item \textsuperscript{277} Ibid.
\end{itemize}
that the legislator’s express dictation of a method to determine non-arbitrability is enough.\textsuperscript{278} That is of course correct, but only to a certain degree.\textsuperscript{279}

\subsection*{3.4.4 Conclusion: A proposition coherent with international trends}

The three identified international trends have a pro-arbitration tendency in common. This may be seen as argumentative, rather than investigative. There are however important conclusions to be drawn from the logic behind these trends, which originate from national courts. The conclusions are relevant for the final proposition \textit{de lege ferenda}. A proposition to the research inquiry should however only be coherent with an international practise, if there is a logical foundation for the legal solution.

First, it is better to construe settleability as including rather than excluding areas of law from the scope of arbitrability. A solution that expands the scope of arbitrability is therefore better in line with the international trend. Second, international disputes should be treated differently than domestic due to their lesser connection to the national interests the doctrine of non-arbitrability aims to protect. A solution that enables a distinction is therefore better than one that does not. Third, there is no reason to presume that the legislator intended for an international dispute to be non-arbitrable. The intention of either the Swedish or any foreign legislator should not be second-guessed.

It is not evident which of the alternative propositions to the research inquiry best conforms to the international trends.\textsuperscript{280} Applying Swedish law directly should, considering the respect for the parties’ contractual freedom and thus result in a wider scope of arbitrability. On the other hand, it is conceivable that there are foreign laws that are even more arbitration-friendly. The proposition argues that it is most coherent with the pro-arbitrability tendencies not to discuss non-arbitrability at all in international cases where there is no conflict with the jurisdiction of Swedish courts. Only when there is a collision should it be examined whether the dispute is settleable by applying Swedish law directly.

\textsuperscript{278} Cf. Lindskog (2012), 33 §, para. 3.2. and fn. 9.

\textsuperscript{279} The fact that the courts are given a tool does not always render straightforward answers. A carpenter that is given a handsaw and told by the supervisor to cut a plank in two may yield a number of different results. The carpenter would need more instructions in order to cut the plank where the supervisor intended. In a similar way arbitrators and judges cannot decide the scope of arbitrability unless clues are given to where the line should be drawn. The presumption of the legislator’s commitment to arbitration and the consequent need of clear intention are such clues.

\textsuperscript{280} See Chapter 5.
3.5 Conclusion: No Room For Altruism

The relationship between arbitrability and foreign law has been discussed in this chapter. It was concluded that there exists no obligation to refuse enforcement or recognition of an arbitration agreement or arbitral award due to foreign notions of non-arbitrability. The New York Convention only imposes obligations to construe non-arbitrability narrowly. Nor is there an obligation to apply the principle of ‘overriding mandatory rules’. In fact, an application of the principle of ‘overriding mandatory rules’ is awkward in arbitration. It does not fit well with how foreign law is usually treated, the mandatory character of the non-arbitrability exception and the pro-enforcement objective of the Convention.

The non-arbitrability doctrine have evolved materially over time. Historic scepticism about the arbitral process' ability to resolve particular categories of disputes is now replaced by an increased confidence in the competence of the arbitrator to apply the law in a fair manner. The consequence of this trend is that most developed jurisdictions now impose very few and limited restrictions on the subjects that may be arbitrated. This is reflected by the different treatment of international and domestic disputes, as well as requiring a clear statement of legislative intent for a subject matter to be non-arbitrable.\textsuperscript{281}

Chapter 5 examines which of the two proposed solutions best conforms to the findings of this chapter. It is not obvious which of the two conforms the most.\textsuperscript{282} It can however be concluded that there is no obligation to apply a conflict-of-law rule on the issue of settleability. In fact, it would arguably be more in line with the pro-enforcement hegemony to defend one's own interests only where they are affected.

Egoism prevail because there is no mutual agreement to protect each other’s public interests. Thus, the lack of reciprocity also diminishes the existence of a moral obligation to uphold the doctrine of non-arbitrability of a foreign State. Just as the Count of Monte Cristo advocated.

\begin{flushright}
\footnotesize
\begin{itemize}
\item \textsuperscript{281} Born (2014), p. 957.
\item \textsuperscript{282} As is shown in 4.3, there are arguments for both solutions.
\end{itemize}
\end{flushright}
4. **ARBITRABILITY AND FOREIGN LAW IN SWEDEN**

In this chapter, the insights from the previous chapters are applied in an analysis of Swedish law. This Chapter focuses on finding where the law stands while the next chapter discusses what the law should be.

4.1 **Introduction: The Problem**

Suppose that two parties enter an arbitration agreement choosing Sweden as the seat of arbitration (*lex arbitri*) and US law to govern the arbitration agreement (*lex electionis*). The parties also agree that Swiss law apply to the substantive contract (*lex causae*). To make it more complicated, one of the parties is German and the other Italian (*lex incorporationis*). The confusion is amplified by the fact that the dispute is about a Dutch patent (*lex loci solutionis*). The adjudicatory body decides that Swedish law applies to the question of arbitrability. But, under which law must the parties be free to settle their dispute by agreement? Hypothetically, at least six different national laws could be applied alternatively or cumulatively, as well as any potential international concept.

The silence of the law and the muffled statements in the preparatory works on this issue is similar to being handed a map of a forest without a compass. Sure, a method is given to navigate the landscape, but one is left to search for clues as to which direction to go. This Chapter begin its search for clues of the legislator’s intention in an examination of how arbitrability in general is treated under Swedish law. It then turns to different propositions presented in the literature on how these clues should be interpreted and subsequently to the case law to see if the courts have handed down a compass. Last of all, the map is laid out and a conclusion is made on where Swedish law stands.

4.2 **The Background: Non-Arbitrability in Sweden**

This Section explores the doctrine of non-arbitrability in Sweden today. Its purpose is to examine the intentions of the legislator to find clues to the direction in which an application of the method ought to be heading.
### 4.2.1 Introduction: Arbitration and arbitrability in Sweden

Sweden is often described as an arbitration-friendly country. This may be evident by the success of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) that attracts a number of international commercial parties to choose Sweden as their preferred seat of arbitration. The legislator has welcomed the appeal of Sweden as seat for arbitration and therefore instigated an inquiry in 2014 to determine if the current Arbitration Act could be improved. The findings of the investigators was summed up in a Government Report that was released in the spring of 2015.

Arbitration is regulated in Sweden under a single act, The Swedish Arbitration Act. It is inspired by the Model Law, and does not contain many provisions that deviate from international practise. The Model Law does however not include any provisions on arbitrability, and it is instead left to the enacting states to decide.

In this Section, the question of when Swedish law applies to the question of arbitrability is first discussed. The focus is then turned to the method used to determine arbitrability. This will be discussed in light of the SAA and its preparatory works. In order to understand the concept of arbitrability under Swedish law a few accessory topics are discussed. Last of all a conclusion is made on whether the law or the preparatory works provide an answer to the research inquiry.

### 4.2.2 When Swedish law applies on the issue of arbitrability

The research inquiry of this thesis presupposes that Swedish law applies to the question of arbitrability. However, since it is important for understanding settleability in its context, a brief discussion on when Swedish law is applicable is needed. The issue of whether a dispute is arbitrable is relevant at different stages, including:

- When arbitrators rule on their jurisdiction.

---

286 SOU 2015:37.
288 Cf. Lindskog, 1 §, para. 2.3.3, who believes that there is an indirect requirement of settleability due to its application to commercial disputes only. This is contradicted by the German law, supra 3.4.2.3.
289 Section 1 SAA: “Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution.”
291 Section 2(1) p. 1 SAA: “The arbitrators may rule on their own jurisdiction to decide the dispute.”
• When a court is faced with a question if an arbitration agreement is valid.\textsuperscript{292}
• When a court is faced with whether an award should be set-aside.\textsuperscript{293}
• When a court is faced with the enforceability of a dispute.\textsuperscript{294}

In every instance, the adjudicatory body must decide what law or laws determines if the dispute is arbitrable. Swedish law in light of the New York Convention decides this. The Convention leaves room for national law to decide that no law apply, but not that \textit{any} law apply to this question.\textsuperscript{295}

\textit{If the arbitration is seated in Sweden}, then Swedish law should determine the question of arbitrability.\textsuperscript{296} The Arbitration Act’s provision on setting aside arbitral awards is inspired by the grounds for non-enforcement under Art. V of the Convention.\textsuperscript{297} This raises the question of whether arbitrability under the law agreed upon by the parties to govern the arbitration agreement (\textit{lex electionis}) should also be considered.\textsuperscript{298} There are differing opinions in the literature. The majority of legal scholars hold that both the \textit{lex electionis} and Swedish law apply.\textsuperscript{299} The better view is however, that only Swedish law should be relevant.\textsuperscript{300}

The wording of the provisions on the \textit{enforcement of arbitral awards} also share the wording of Art. V. This means that Swedish law should apply under Section 55 SAA, and that \textit{lex electionis} or \textit{lex arbitri} arguably apply under Section 54 SAA.\textsuperscript{301}

There is no provision under the SAA that corresponds to Art. II of the Convention. Generally, it is however held that a court or tribunal that is faced with the \textit{validity of an arbitration agreement} should determine the arbitrability of the agreement similarly to an

\begin{footnotesize}
\begin{enumerate}
\item[292] Section 2(2) p. 2 SAA: “The aforesaid shall not prevent a court from determining such a question at the request of a party”. \textit{See also} Section 10:17 a CJP. \textit{Cf.} 4.2.4.4.
\item[293] Section 33(1) SAA: “An award is invalid: 1. if it includes determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators;”
\item[294] Section 55 SAA: “Recognition and enforcement of a foreign award shall also be refused where a court finds: 1. that the award includes determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators;[…]”
\item[295] \textit{Supra}, 3.2.4.
\item[296] Section 33 SAA fn. 293.
\item[297] Lindskog (2001), 54 §, para. 3.2.
\item[298] It is rare that parties choose a different law to \textit{lex electionis} than \textit{lex arbitri}. Heuman (2003), p. 669.
\item[300] \textit{Supra}. 3.2.3.1.
\item[301] Heuman (2003), p. 721.
\end{enumerate}
\end{footnotesize}
arbitral award.\textsuperscript{302} The new Government Report suggests that the principle of \textit{kompetenz-kompetenz} should be refined and that courts shall not rule on the validity of an arbitration agreement before the arbitrators have made a decision.\textsuperscript{303}

Based on this it can be concluded that Swedish law applies to the question of arbitrability whenever a Swedish court is faced with an arbitration agreement or arbitral award. An arbitral tribunal seated in Sweden is also expected to apply the Swedish perception of non-arbitrability \textit{ex officio}.\textsuperscript{304} Most legal scholars also argue that \textit{lex electionis} or \textit{lex arbitri} is also relevant to determine the arbitrability of a dispute.\textsuperscript{305} The better view is that only \textit{lex fori} should apply.\textsuperscript{306}

4.2.3 \textbf{The method of determining arbitrability under Swedish law}

After having determined that Swedish law applies to the question of arbitrability, the adjudicatory body must then decide if the dispute is arbitrable under Swedish law. The main rule under Swedish law is that all disputes that are amenable to out-of-court settlement may be submitted to arbitration.\textsuperscript{307} This rule is not without its exceptions. Some of these exceptions either explicitly permit arbitration in law – even if it concerns a non-settleable dispute, or prohibit arbitration – even if the dispute is settleable. Other exceptions follow from the preparatory works and are thus ‘implicit’. These exceptions may declare either a dispute that is settleable as non-arbitrable or a dispute that is non-settleable as arbitrable. This can be illustrated by the following figure:

---

\textsuperscript{302} \textit{Cf.} Lindskog (2011), 1 §, para. 4.1.8. Lindskog believes that Section 33 does not refer to ‘settleability’ when it states “what according to Swedish law may not be decided by arbitrators”. He is however incorrect, see Prop. 1998/99:35 p. 140 and SOU 1994:81 p. 172, which explicitly refers to settleability.

\textsuperscript{303} See 4.2.4.4.


\textsuperscript{306} This finds no basis in the preparatory works however which explicitly refers to the arbitrability of \textit{lex arbitri} or \textit{lex electionis}. See prop. 1998/99:35

\textsuperscript{307} Section 1 SAA, fn. 289
4.2.3.1 Main rule: Settleability

According to Section 1 SAA,\(^{308}\) a dispute is arbitrable if the parties are at liberty to reach a settlement on the matter. This means that the limits of arbitrability coincides with the limits of the parties’ freedom of contract.\(^{309}\) There is thereby a connection between arbitrability and the principle of party autonomy under Swedish Law.\(^{310}\) It also follows from this that the parties cannot achieve more by an arbitral award than they would through an agreement.\(^{311}\) Other methods of determining arbitrability were considered in the preparatory works, including having arbitrability determined by public policy or a requirement of ‘economic interest’.\(^{312}\) However, the legislator decided to stay with the order under the old law.\(^{313}\)

The fact that a dispute is contrary to mandatory rules does not automatically make it non-settleable.\(^{314}\) There are many different types of mandatory provisions, some of which allow the parties to reach a settlement of after a dispute has arisen.\(^{315}\) The rule is in these cases only mandatory in the sense that they prevent the parties from waiving them before any dispute. An example is Section 36 of the Swedish Contracts Law. The parties are not allowed to waive the right to invoke this rule before a dispute, but may do this after there is a dispute. Such mandatory rules allows settleability, but not those where the parties may never freely dispose of the legal effects of a mandatory rule.\(^{316}\)

It is difficult to determine if a mandatory provision makes a dispute non-settleable and thus non-arbitrable. Justice Lindskog proposes that whether mandatory provisions allow for a waiver of its legal effects must be determined in light of the interests the provision aims to protect.\(^{317}\) Accordingly, all disputes should be considered as settleable as long as it cannot be excluded that an interest would not be affected by the parties’ agreement.

---

\(^{308}\) See fn. 289.

\(^{309}\) Supra 3.4.2.1.

\(^{310}\) Heuman (2003), p. 139.


\(^{312}\) Supra 3.4.2.1.

\(^{313}\) The requirement of settleability in Swedish law dates back to the 19th century, see NIA II 1897 nr 4 p. 12. This solution was also found to be coherent with the Swedish Code on Judicial Procedure (sv. Rättegångsbalken (SFS 1942:740)), where the requirement of settleability is held to indirectly apply for the validity of a choice-of-forum clause under 10:16 CJP. See Lindskog (2013), § 1, para. 2.3.1, with references to NIA 2010 s. 734 p. 4 and Dennemark (1961), p. 288.


\(^{315}\) Andersson (2011), pp. 59-60

\(^{316}\) Lindskog (2011), 1 §, para. 4.1.3 fn. 47, Hobér (2013), para. 3.82 and 8.30.

\(^{317}\) Lindskog (2011), 1 §, para. 4.1.5. Cf. infra 5.1. The interests protecting non-settleability may not be the same as the interests protecting non-arbitrability.
Möller proposes an even looser interpretation of settleability and holds that all disputes are settleable and thus arbitrable as soon as the possibility of the parties to dispose of the dispute freely is *not completely* ruled out.\(^\text{318}\) The requirement of settleability under Swedish law has however been held by some authors to be stricter and that even the slightest connection to mandatory provisions make the dispute non-settleable.\(^\text{319}\) Even if a dispute includes certain elements that are not settleable, it may still be arbitrable.\(^\text{320}\)

Neither the law, nor the preparatory works states under which law the dispute must be settleable. Before continuing this discussion, the four identified exceptions to the main rule of ‘settleability equals arbitrability’ is presented to show the context of which an answer to the research inquiry appears. The treatment of ‘overriding mandatory rules’ is discussed as an accessory discussion.\(^\text{321}\)

4.2.3.2  *The first exception: Non-settleable, but implicitly permitted*

A dispute may be arbitrable even when it is *per se* non-settleable. The preparatory works states that a dispute may still be arbitrable “if the public interests can be safeguarded in a separate action or by a different procedure”.\(^\text{322}\) Since the award would only bind the parties, then public interests or the interests of a third-party could be satisfactorily safeguarded by other proceedings in certain cases.\(^\text{323}\) Heuman makes an *e contrario* interpretation of this citation of the *travaux préparatoires* and holds that if there is no protection in other proceedings, then the dispute is non-arbitrable.\(^\text{324}\) This would be especially true when there is a risk that the arbitrators will commit a substantive error and thereby sanction agreements, which involve a criminal activity.\(^\text{325}\) There are however other exceptions to the main rule that makes a dispute arbitrable, even where no alternative proceedings exist.

The preparatory works also hold that mandatory rules that make a dispute non-settleable may be limited to Swedish territory and general Swedish interests.\(^\text{326}\)


\(^\text{320}\) Lindskog (2012), § 1, para. 4.1.6, Heuman (2003), p. 145.

\(^\text{321}\) See 4.2.4.1.

\(^\text{322}\) SOU 1994:81, pp. 78-79.

\(^\text{323}\) Heuman (2003), p. 143.


would allow the courts in international disputes to declare a dispute arbitrable, even if it is not settleable between Swedish parties. It could of course also be argued that it is not a question of making a non-settleable dispute arbitrable. The dispute would be settleable because Swedish courts would permit the foreign parties’ out-of-court settlement of the dispute. This shows in any case how complicated it is to apply settleability to international arbitrations.\(^{327}\)

4.2.3.3 \textbf{The second exception: Settleable, but implicitly prohibited}

There is also room to argue at the backdrop of the \textit{travaux préparatoires} that there may exist implicit prohibitions when there is “notable public interests or interests of third parties”.\(^{328}\) The statement gives the impression that a dispute may be non-arbitrable even though it is amenable to out-of-court settlement – if the interests of third parties or the public are manifest. Heuman believes that third-party and public interests must make themselves felt on a “fairly conspicuous plane” in order for the dispute to be deemed non-arbitrable, even if it is settleable.\(^{329}\) Lindskog argues that such weighing of interests is not possible when applying settleability.\(^{330}\)

4.2.3.4 \textbf{The third exception: Settleable, but explicitly prohibited}

Certain provisions in Swedish law explicitly forbids arbitration even though the parties would have been capable of entering into an out-of-court-settlement. A list of these laws are provided in the preparatory works, which notably includes issues such as collective labour agreements.\(^{331}\)

4.2.3.5 \textbf{The fourth exception: Non-settleable, but explicitly permitted}

Some laws explicitly permit arbitration, even when the dispute arguably is non-settleable. It is for instance clarified in the Swedish Arbitration Act that disputes concerning the civil law effects of competition law are arbitrable.\(^{332}\) It was held in the preparatory works that it was of practical necessity to make the disputes explicitly arbitrable, as parties could

\(^{327}\) Not only must the courts first find if Swedish law applies, but if they do the courts must then interpret the mandatory provisions in light of the nationality of the parties. This in order to determine if the mandatory character of the rules are limited to protect only Swedish interests.


\(^{330}\) Lindskog (2012), 1 §, para. 4.1.7 fn. 80 and 81.


\(^{332}\) \textit{Cf.} Lindskog (2012), 1 §, para. 4.3.3 fn. 124.
otherwise easily obstruct proceedings and prevent the resolution of the arbitration by alleging that the agreement was invalid due to competition law.\textsuperscript{333} It would also be difficult to determine in advance if there in fact is a breach of mandatory competition law, or whether the invalidity rules of competition law is applicable.\textsuperscript{334}

\textbf{4.2.4 Understanding arbitrability: Accessory discussions}

In the previous section, the method used in Swedish law to determine arbitrability was explored. With the many exceptions to the main rule of ‘settleability equals arbitrability’, it is clear that the courts have been given a wide discretion to determine if a dispute is arbitrable or not. In fact, the court may even step outside the confinements of the main rule and make a weighing of the interests involved in order to determine arbitrability.\textsuperscript{335} This of course limits the use of having a simple rule – ‘settleability equals arbitrability’ – as a method for determining arbitrability. It also limits the foreseeability for the parties. This is the case regardless of which law is considered to apply to determine settleability.

This section searches for clues to the research inquiry in accessory discussions on arbitrability. To return to the allegory with the map without a compass, it is now time to navigate by the stars.

\textbf{4.2.4.1 Overriding mandatory rules in Swedish arbitration law}

This paper is not directly about ‘overriding mandatory rules’. This is a separate discussion, since it is not a question of “under which state’s law a question must be settleable”, but rather “should the settleability or arbitrability of a dispute be affected by overriding mandatory rules regardless of what law applies?”.

Overriding mandatory rules exist in Swedish arbitration law. This is clear from the preparatory works, even if the rules have not been recognised by their name by many authors. In the appendix a comparison is made between the statements in the Government Bill, a rule proposed by Gary B. Born and Art. 9 of the Rome I Regulation.\textsuperscript{336} Overriding mandatory rules raise a number of questions on how they ought to be applied.

\textsuperscript{333} Prop.1998/1999:35, p. 57 and SOU 1994:81 s 83..
\textsuperscript{334} This line of reasoning should not be limited to competition law, but is an illustration of the increased pro-arbitration attitude of certain areas of law. The Government Bill also held that an award infringing competition law outside the EU are not considered to fall within the scope of the public policy concept in Swedish Law. \textit{Supra} 3.4.3.2.
\textsuperscript{335} Cf. \textit{supra} fn. 330.
\textsuperscript{336} See Appendix I.
First, should overriding mandatory affect the settleability or the arbitrability of a dispute? Born argues in his rule that it is the foreign non-arbitrability rules that are relevant, while the preparatory works only discuss foreign rules that affect settleability.\textsuperscript{337}

Second, which States’ overriding mandatory rules are relevant? The preparatory works are silent,\textsuperscript{338} while both Born’s rule and Art. 9 have a criterion of connectivity to the dispute. Under Born’s rule it is only the law with the closest connection that may be applicable, while Art. 9 allows for rules at the place of performance to apply.\textsuperscript{339}

It is argued in this paper that ‘overriding mandatory rules’ are clearly recognised \textit{de lege lata} in Swedish arbitration law. It is however questionable if they should apply. Art. 9 of the Rome I Regulation is one of the most criticised provisions in the regulation.\textsuperscript{340} The inclusion of such rules should be even more questioned in the field of arbitration. As previously concluded, there exist no duty to protect foreign interests and it would only complicate matters and prolong the proceedings to include them as a requirement for arbitrability.

\textbf{4.2.4.2 International disputes treated differently}

Most legal scholars in Sweden agree that international disputes ought to be treated differently than national.\textsuperscript{341} The opinions differ however on which method should be used to make the standards for non-arbitrability different between the two.\textsuperscript{342} Justice Lindskog has described the difficulties with being bound to the criterion of settleability well. He holds that it would be reasonable to let a dispute be arbitrable if it is arbitrable under foreign laws, but that it would be contrary to the clear legal principle of ‘settleability equals arbitrability’ in Swedish law.\textsuperscript{343} Lindskog then finds the clear legal principle superior and thus seem to advocate a pure test of settleability in the sense that no other weighing of interests whether the dispute should be arbitrable or not may be allowed.\textsuperscript{344}

\textsuperscript{337} \textit{See also} Heuman (2003), p. 691.
\textsuperscript{338} It only mentions any ‘applicable’ foreign law.
\textsuperscript{339} \textit{See} Appendix I.
\textsuperscript{340} \textit{Supra} 3.3.2.
\textsuperscript{342} Lindskog argues that international disputes are treated differently because a different law apply to determine settleability, \textit{see} 4.3.3., while Heuman argues that it is possible to weigh the interest of arbitrability versus non-arbitrability by arguing that the grounds for invalidity are to be applied rarely.
\textsuperscript{343} Lindskog (2013), 1 §, 4.1.7, fn. 80.
\textsuperscript{344} The answer to the question “is the dispute settleable?” would thus be binary, yes or no. \textit{See} 4.3.3.
The legislator’s intention of differentiating between national and international disputes may also be found in the SAA. There are certain provisions in the Act which only apply if both parties are domiciled abroad.\textsuperscript{345} These rules include the possibility for the parties to waive the right to challenge the award. This could be interpreted as reflecting the opinion of the legislator that such disputes do not require the same protection as Swedish parties, especially when national interests are not as involved. Such an interpretation would favour a solution to the research inquiry that differentiates between national and international disputes. The preparatory works also include statements that indicate that settleability should be treated depending on if it is an international or domestic dispute.\textsuperscript{346}

A conflict-of-laws application to the question of settleability would set a different standard for arbitrability than if Swedish law always applied. However, the differentiation of international and national disputes in the SAA is due to considerations that international parties require less protection than national. In the majority of cases applying the notion of settleability of a foreign State would mean that the foreign parties were more ‘protected’.\textsuperscript{347} Swedish law gives the parties a wider scope of freedom of contract compared to other jurisdictions and a conflict-of-laws rule would therefore generally make more disputes non-arbitrable.\textsuperscript{348}

The solution proposed in this paper is that international and national disputes should be differentiated in line with international trends.\textsuperscript{349} This should however not be done by applying foreign laws to the question of settleability, but not to apply the doctrine of non-arbitrability at all when the exclusive jurisdiction of Swedish courts is not threatened.\textsuperscript{350}

4.2.4.3 Arbitrability and contract law

Due to the contractual nature of an arbitration agreement, general principles of contract law applies. In Danish and Norwegian law, there is a general rule that states that an agreement contrary to mandatory law is invalid between the parties.\textsuperscript{351} Such a rule does not exist under Swedish law. Instead, the Supreme Courts has held that an agreement

\textsuperscript{345} Sections 46-51 SAA.
\textsuperscript{346} Prop. 1998/99:35, p. 49. See 4.3.
\textsuperscript{347} This since Sweden offers the parties’ extensive contractual freedom. See
\textsuperscript{348} An example of this is the two analysed cases in this paper, where it was Russian and Soviet law that would potentially make the disputes non-settleable. See 4.4.
\textsuperscript{349} Supra 3.4.3.1.
\textsuperscript{350} See 5.3.
\textsuperscript{351} Ramberg (2012), p. 205.
contrary to mandatory law does not necessarily make it invalid between the parties.\textsuperscript{352} This must instead be determined after an analysis of the purpose of the rule, the need of invalidity to sanction the rule and the consequences that may follow from invalidity.\textsuperscript{353} In cases where invalidity is motivated by public interests, it shall be determined \textit{ex officio}.

Non-arbitrability should also be coherent with this interpretation of contractual invalidity. An arbitration agreement should only be invalid when the purpose of a mandatory provision is to exclude arbitration, when there is a need for referring the parties to courts and when the negative consequences to the parties are outweighed by the harm to public interests. This weighing of interest is however arguably not allowed under the legal principle of ‘settleability equals arbitrability’.\textsuperscript{354} After all, when determining the settleability of the dispute in hand, it is the substantive contract that is analysed and not the arbitration agreement. The risk is then that Swedish interests of allowing arbitration diminish in favour of foreign interests of limiting the contractual freedom of the parties.\textsuperscript{355}

\textbf{4.2.4.4 The new Government Report}

In 2014, the government instigated an inquiry (“the Inquiry”) on whether there was a need of reforming the Swedish Arbitration Act.\textsuperscript{356} There was no direct mentioning of non-arbitrability in the directives to the Inquiry, but the Inquiry was encouraged to review the grounds for setting-aside an award of a tribunal seated in Sweden. The Inquiry presented its findings in a Government Report in spring 2015.\textsuperscript{357} It was proposed that the new legislation should come into force on 1 July 2016.

Mainly two findings of the Government Report are interesting to the research inquiry. The first is the proposition that non-arbitrability ought to be removed as an explicit ground for setting an award aside.\textsuperscript{358} The second is that the \textit{kompetenz-kompetenz} principle is proposed to be perfected under Swedish law.\textsuperscript{359}

First, the Inquiry proposes that the invalidity rules in Section 33 SAA ought to be repealed. Under the current regulations, there is no time limit on when an application for

\begin{verbatim}
\textsuperscript{352} Ibid. see NJA 1997 p. 93.
\textsuperscript{353} Ibid.
\textsuperscript{354} Supra 4.2.4.2.
\textsuperscript{355} See 5.1.
\textsuperscript{356} Dir. 2014:16. 6\textsuperscript{th} of February 2014.
\textsuperscript{357} SOU 2015:37. April 2015.
\textsuperscript{358} SOU 2015:37, pp. 32-33.
\textsuperscript{359} SOU 2015:37, pp. 29-30.
\end{verbatim}
invalidity of an award can be brought. This is one of the distinctions in the Arbitration Act between grounds for invalidity under Section 33 and grounds for setting aside in Section 34 SAA.\textsuperscript{360} The other main two are that the parties are precluded from making a claim under Section 34 if it did not make it within a reasonable time and that the court should not examine the grounds for setting aside an award \textit{ex officio}.\textsuperscript{361}

The Inquiry proposes that this should be changed by making the public policy a ground for setting-aside instead, and removing non-arbitrability as a ground for invalidity altogether.\textsuperscript{362} The reason presented was that the invalidity rule was been perceived as problematic by both Swedish and foreign actors.\textsuperscript{363} Interestingly, the Inquiry also found that there was no need for an explicit mention of non-arbitrability, since a document concerning such issue could not be considered an award at all and should be considered a nullity.\textsuperscript{364} The fact that such documents or declarations lack legal force as awards, should be clear without any special provision according to the Inquiry. This means that non-arbitrability of a dispute should not lead to the invalidity of an arbitration agreement, but that it is a nullity.\textsuperscript{365}

The second proposal was that once arbitral proceedings have been convened, declaratory claims concerning the arbitral tribunal’s jurisdiction may not be raised other than by a consumer.\textsuperscript{366} At present, under Section 2 SAA allows the arbitrators to rule on their own jurisdiction to decide the dispute, but a court is not prevented from examining the question at the request of a party. At any time during proceedings, the parties are considered eligible to bring a positive or negative declaratory claim before a district court concerning the jurisdiction of the arbitrators.\textsuperscript{367}

The Inquiry proposes that the parties should continue to have the opportunity to bring a declaratory claim in court with respect to the validity or applicability of an arbitral agreement, but only before arbitral proceedings have been convened.\textsuperscript{368} Once arbitral proceedings have commenced, however, it is held by the Inquiry that here may be serious

\textsuperscript{360} This distinction has no support in the Model Law, and does not appear to be found in any foreign legal system other than in Finland. SOU 2015:37, p. 32.
\textsuperscript{361} Heuman (2003), pp. 572-573.
\textsuperscript{362} SOU 2015:37, pp. 123-124.
\textsuperscript{363} SOU 2015:37, p. 124
\textsuperscript{364} The same applies with respect to awards that are not issued in written form or not duly signed.
\textsuperscript{365} Cf. earlier discussions on how non-arbitrability ought to be understood. \textit{Supra} 3.2.3.1.
\textsuperscript{366} SOU 2015:37, pp. 111-118.
\textsuperscript{367} Only Sweden and possibly Finland and Austria seem to permit this order. SOU 2015:37, pp. 112-113.
\textsuperscript{368} \textit{Ibid.}, pp. 114-118
concerns about this possibility. It could lead to dual proceedings ongoing with respect to the same matter, which foreign arbitrators and representatives seem to consider quite anomalous. Such proceedings would furthermore tend to be complicated and time-consuming. Therefore the Inquiry proposed to limit the possibility of bringing declaratory claims by only allowing the parties to turn to the courts after the arbitrators have ruled on their jurisdiction.\textsuperscript{369} This is a refinement of the principle of \textit{kompetenz-kompetenz}, which leaves it to the competence of the tribunal to rule on its jurisdiction, before the court takes advantage of its competence to review this ruling. It can also be seen as a recognition of the arbitrators’ competence to rule on their own jurisdiction of the matter.\textsuperscript{370}

\textbf{4.2.5 \hspace{1em} Conclusion: No solution provided}

No solution to which law should apply to the question of settleability is presented in law or the preparatory works. Nor is there a clarification proposed in the new Government Report. Instead, we are left with a complicated rule on settleability with many exceptions. We are also left with an uncertain application of the principle of ‘overriding mandatory rules’. The reason for this jungle is that the weighing of interests required to distinguish non-arbitrable disputes from arbitrable is not perfectly made by having a rule that equals settleability to arbitrability.\textsuperscript{371}

On the one hand, it could be argued that the legislator intended only for Swedish law to apply. This since the legislator only discusses foreign law in the context of ‘overriding mandatory rules’, \textit{i.e.} if foreign law affect settleability under \textit{Swedish law}.\textsuperscript{372} On the other, it could be argued that a choice-of-law rule should apply following a different statement in the Government Bill.\textsuperscript{373} This debate is analysed further in the next section, together with the policy justifications presented by legal scholars to the respective solution.

\textbf{4.3 \hspace{1em} The Two Alternative Interpretations}

There are different opinions not only regarding which path to choose in order to reach the destination intended by the legislator, but also on whether to go somewhere else. This

\textsuperscript{369} \textit{Ibid.}

\textsuperscript{370} \textit{Supra} 3.4.3.2.

\textsuperscript{371} \textit{See} 5.1.

\textsuperscript{372} \textit{See} 4.3.2, Prop. 1998/99:35, p. 49.

\textsuperscript{373} \textit{See} 4.3.3 and Lindskog (2013), 1 §, para. 4.1.7 fn. 76.
section explores the debate on the former, focusing on the arguments of where Swedish law is located, rather than where it should be destined. 374

### 4.3.1 Introduction: The debate

It might be wrong to call it a debate. After all, only a few of the legal scholars in Sweden have actually identified that it is uncertain which law ought to apply to determine settleability. Some fail to discuss the issue at all, while others are muffled in their opinions. It is however possible to distinguish two line of thoughts.

On the one side, it is argued that settleability ought to be determined only by mandatory Swedish law. On the other, it is held that a literal interpretation of the wording of the SAA, together with statements in the Government Bill, leads to the conclusion that a conflict-of-laws rule should apply.

The different interpretations are reviewed below before concluding on which solution finds most support in the preparatory works and the law. Policy justifications may also support an interpretation of where the law stands, insofar it is proof of the legislator’s intention, i.e. if it proves that it is reasonable to believe that the legislator intended for such an interpretation. The policy justifications on grounds that it is a better solution on the other hand is more relevant in the discussion on what the law should be.

### 4.3.2 The case for directly applying Swedish law

A majority of legal scholars believe that settleability should be determined by Swedish mandatory rules directly. 375 Some argue for it explicitly, 376 others seem to take it for granted. 377 Those that make a case for Swedish law generally refer to the following passage from the Government Bill (own translation and emphasis):

"Of special importance for international disputes is the scope of the legislation which mandatory laws would make the dispute non-settleable. It should on a case-by-case basis be determined if the corresponding applicable foreign law..."

---

374 Chapter 5 deals with the latter.
376 Hobér (2013), para. 3.79: “The answer is to be found in the substantive provisions of Swedish law”.
377 Franke et al. (2013), p. 292: “[…] in cases where the arbitral award conflicts with Swedish mandatory provisions (so that the issue may not be settled through arbitration). Cars (1999), p. 211: “[…] question of arbitrability, e.g. if it is dispositive according to Swedish law.
378 These authors only discuss settleability under Swedish mandatory law and do not identify that the question may be determined by foreign law. Madsen (2006), pp. 53-54, Heuman (2003), p. 693-695, Kwart & Olsson (2000), p. 29-32.
is of such kind that a settlement before a Swedish court would not be accepted. 

[…] Does the case on the other hand only concern economic or political rules of a foreign State, then there is generally no need to let these mandatory rules affect the settleability in Sweden and thus the arbitrability under Swedish law.”

It is very important to make two distinctions with regard to this text. The first is the difference between settleability and arbitrability. The cited passage refers to foreign rules on settleability, not arbitrability. The second distinction is between foreign mandatory rules that may affect the settleability under Swedish law, i.e. ‘overriding mandatory rules’, and foreign mandatory rules that have no effect on settleability under Swedish law. Few authors recognise or identify that this passage is about the treatment of ‘overriding mandatory rules’.

Seemingly, the cited passage does not deal with the question under which State’s regular mandatory law the dispute must be settleable. Instead its focus is on how foreign ‘overriding mandatory rules’ may affect settleability, regardless of which ‘regular’ mandatory rules apply. However, the argument can be made that since the passage only speaks of settleability under Swedish law, then it can be assumed that the legislator intended for Swedish law to apply always. This is also supported by a passage in the Government Report that was not included in the Government Bill (own translation):

“It may be clear that this [the mandatory law that may make the dispute non-settleable] is limited to Swedish territory or Swedish interests.”

This passage could be interpreted as Swedish mandatory rules apply to the question of settleability, but that a case may be settled under Swedish mandatory rules when the dispute falls outside the interests the mandatory rules intend to protect. It is also reasonable to ignore the choice-of-law of the parties to their substantive contract and apply Swedish mandatory law if settleability is understood in the context of arbitrability. An autonomous examination of the dispute in light of Swedish mandatory law weighs the Swedish interest involved better than only applying the ‘overriding mandatory rules’ of

---

380 Lindskog is the only one who expressly speaks of ‘overriding mandatory rules’ (sw. supertvingande). Lindskog (2012), 1§, para. 4.1.3 fn. 46.  
381 Cf. Appendix 1.  
382 SOU 1994:81, p. 79.
Swedish law. A ruling also supports this interpretation, the Archangel case, which is thoroughly analysed below.\textsuperscript{383}

An argument for Swedish law to apply directly could also be based on the reasonable expectations of the parties. If the parties have chosen Swedish law to apply to arbitrability by choosing Sweden as \textit{lex arbitri} they have impliedly made a choice of applicable substantive law, and not that Swedish conflict-of-laws rules shall be used.\textsuperscript{384} A different argument is its consistency with the doctrine of separability and treatment of the arbitration agreement as a separate agreement from the substantive main contract.\textsuperscript{385} Of course in order to determine the settleability of a \textit{dispute}, the dispute must be identified. But, on the other hand it should be identified on objective grounds, independent of the will of the parties.

\textbf{4.3.3 \textit{The case for the applying a conflict-of-laws rule}}

The preparatory works are contradictory and allows for a different interpretation at the backdrop of other passages in the \textit{travaux préparatoires}. A number of legal scholars have therefore concluded that the legislator’s intention was for settleability to be determined by a conflict-of-laws rule.\textsuperscript{386} The passage that may support this interpretation is (own translation and emphasis):\textsuperscript{387}

"If the dispute concerns questions of status, \textit{i.e.} custody of children, then the Swedish position should apply even if the dispute lacks any connection to Sweden. [...] This view [that a case may be arbitrable under Swedish law even if it is not settleable under a foreign law] is coherent with the international trend to accept an international dispute to be arbitrable, even if the same national dispute would fall outside the scope of arbitrability."

It is reasonable to ask how there may be a Swedish position that applies; unless the legislator believes that, there are cases where Swedish law does not determine settleability

\begin{itemize}
\item \textsuperscript{383} Supra. 4.4.2.
\item \textsuperscript{384} Heuman (2003), p. 685.
\item \textsuperscript{385} Heuman (2003), p. 688.
\item \textsuperscript{387} Other passages may also support this view. In the commentary to Section 48 SAA, it is expressly stated that international parties choice of applicable law to the arbitration agreement may be rejected under "general principles of Swedish private international law". It is thus clear that these apply to the question of \textit{arbitrability}, which indicates that they may also be applied to the question of \textit{settleability}. Prop. 1998/99:35, p. 242.
\item \textsuperscript{388} Prop. 1998/99:35, p. 49.
\end{itemize}
directly. However, it could also reasonably be argued that the legislator intended for an interpretation of Swedish mandatory rules’ territorial limits.\footnote{Lindskog (2012), 1 §, para. 4.1.3 fn. 46.} The interests protected under Swedish mandatory rules could potentially include the interest of not having international disputes concerning such issues, settled by arbitration in Sweden, or \textit{vice versa}.\footnote{I.e. that a Swedish mandatory rule may make a dispute ’settleable’ in Sweden if it is not intended to protect an extra-territorial interest.}

Justice Stefan Lindskog also argues from a literal interpretation of Section 1 SAA and declares that its requirement of settleability expresses a clear principle of law. According to him this legal principle may at times conflict with arguments that call for a different and more reasonable outcome, but that the clear principle of law is supreme.\footnote{Lindskog (2011), 1 §, 4.1.7 fn. 80.} He also finds this position to be reasonable. If Swedish law accepts that foreign substantive legislation is applicable in Swedish arbitrations, \textit{i.e.} that the dispute circumvents Swedish mandatory law, then it is reasonable to only subject the parties to the mandatory rules of the applicable foreign law.\footnote{Lindskog (2011), 1 §, para 4.1.7.}

The criterion of ‘settleability’ is seen as hypothetical question of whether the parties would have been capable of having a settlement of the dispute enforced. Some authors argue that the question is whether it would be settleable before Swedish courts.\footnote{Lindskog (2011), 1 §, para. 4.1.7 fn. 76. He also makes a reservation for ’overriding mandatory rules’. This argument’s strength lies on the belief that parties generally do not choose a law that invalidates their arbitration agreement.} Lindskog on the other hand believes that the hypothetical is whether the court of the applicable law would accept it.\footnote{Andersson, p. 58 and Prop. 1998/99:35, p. 49.} This would mean that the context of settleability to determine arbitrability was ignored, and only applicable substantive laws, which specifically addresses the settleability and not the arbitrability of the dispute, may be considered.\footnote{Cf. Andersson (2011), p. 59.} When a Swedish court is faced with a settlement, it would generally turn to the Rome I regulation to determine first which State’s law apply to the dispute.\footnote{A different question is whether a the Brussel and Lugano regulations may affect settleability. Arguably a literal interpretation would call for this hypothetical case to also investigate if the court has jurisdiction to enforce the parties’ out-of-court settlement. One court held that a circumvention of the Brussel I Regulation by arbitration does not make a dispute non-settleable, \textit{Silver Lining Finance SA v. Perstorp Waspik B.V.}, Judgement by the Scania and Blekinge Court on July 17, 2009 (Case No. T 1689-09), p. 12.} The main rule under the regulation is that the parties have the freedom to choose the applicable
Consequently, the conflict-of-laws rule under the regulation could potentially lead to foreign mandatory rules determining the settleability of a dispute before Swedish courts. That is the law chosen by the parties to apply to their legal relationship. This would however not prevent Swedish mandatory law that is considered ‘overriding’ to apply.  

Lars Ulrichs finds it difficult to understand how the Rome I regulation is relevant when determining settleability under Section 1 SAA, since arbitration agreements are exempted from the regulation. It is true that the regulation is not directly applicable to arbitration agreements. However, this should not prevent a State from indirectly and hypothetically consider if the parties would be able to enforce a settlement of the dispute before Swedish courts, and subsequently let this determine the arbitrability of a dispute.

Support for this interpretation is found in the City Moscow Golf case, which is examined below.

4.3.4 **Summary: And the winner is…**

A literal interpretation of Section 1 SAA points to an application of conflict-of-laws rules. If one stays true to the wording however, the question must be whether Swedish courts would accept the parties’ agreement to settle their dispute. Even if the preparatory works do not elaborate on the application of this method, there is no indication on the contrary. However, there is room for both interpretations in light of different passages in the travaux préparatoires, and ultimately it is in the hands of the courts to decide one way or another. This is the topic of the next section.

4.4 **The Application by Swedish Courts**

The courts do not only serve as authoritative cartographers of what the law is, but have also been given a limited discretion to determine what it should be.

---

397 *Cf.* Art. 3 Rome I Regulation.
400 *Cf.* Andersson (2011), p. 58, which only states that standard private international rules apply. This without the necessary reservation that they do in fact not apply directly, but only hypothetically.
401 As previously stated, *supra* 1.3.2 fn. 10, the courts have been giving the freedom to exceptionally contradict the preparatory works if they find necessary.
4.4.1 Introduction: Two cases, two outcomes

In the previous sections, it was concluded that there was no answer to what law apply to the question of settleability. The vacuum of a solution in the law or preparatory works has led to a debate by legal scholars on where the law stands. This debate would of course be of little relevance if the Supreme Court had issued a clear ruling on this issue. As will be discussed in this section, there is conflicting case law and the muffled ruling of the Supreme Court may not carry the weight of precedent.

Parties generally do not invoke non-arbitrability under Swedish law as a ground for setting aside an arbitral award before Swedish courts. In fact, it has been invoked in only ten out of 190 cases to have a Swedish award set-aside between the years 2004 to 2014. In none of these cases was the award found to concern a non-arbitrable dispute. In fact, arbitrability has only been successfully invoked in one case. The award was overturned in the Archangel case, because the court of appeal found that the dispute was arbitrable, contrary to the findings of the tribunal in its decision on jurisdiction.

The courts found in both cases that the disputes were arbitrable. In Archangel only Swedish mandatory law was applied directly to determine the settleability of the dispute. The Supreme Court did also apply Swedish law to determine settleability in City Moscow Golf, but arrived to this conclusion in a way that indicated an application of a conflict-of-laws rule. The cases are thoroughly analysed to both highlight the conflicting interpretation of settleability made by Swedish courts and to examine if there is any precedent that has determined where the law stands.

4.4.2 The Archangel Case

The Archangel Case is a ruling from 2005 made by the Svea Court of Appeal. The dispute between a Russian and a Canadian party concerned a diamond mine in

---

402 There is after all a doctrine of *stare decis* under Swedish law. See Bernitz (2014), p. 23.
403 It could be argued that a fulfillment of criteria similar to the doctrine created by the *CILFIT* ruling in EU-law, should be required for a ruling to be considered a ‘precedent’ by lower instances. In that case it is difficult to see that this case
404 Section 33 § 1.
405 OAO Arkhangel'skoe Geologodobychnoe Predpriyatie v Archangel Diamond Corporation,
Judgement by the Svea Court of Appeal on November 15, 2005 (Case No. T 2277-04)
406 Neither has there been any reported cases where an arbitral award has been refused recognition or enforcement in Sweden due to non-arbitrability. Hobér (2013), para. 9-52.
407 OAO Arkhangel'skoe Geologodobychnoe Predpriyatie v Archangel Diamond Corporation,
Judgement by the Svea Court of Appeal on November 15, 2005 (Case No. T 2277-04)
Arkhangelsk, Russia. The parties had chosen Russian law to apply to the main contract, and Stockholm as the seat of arbitration. The court found that Swedish law applied both to the question of arbitrability and settleability. Contrary to what the tribunal had found in its award, the court ruled that the dispute was arbitrable and the tribunal thus had jurisdiction over the dispute. Consequently, the award was set aside.

4.4.2.1 Background: Shine on you crazy diamond

In 1993, a Canadian company (Archangel Diamond Corporation, “ADC”) and a Russian state owned enterprise (Arkhangelskoe Geologodobychnoe Predpriyatie Troitskij, “AGD”) entered a Diamond Venture Agreement (“DVA”). The contract included an arbitration clause, which appointed the SCC as the administering body in light of the UNCITRAL rules. Russian law was chosen to govern the substantive contract.

AGD had according to ADC an obligation to transfer a licence to a joint-venture company created by the two, which the Russian company failed to do. AGD therefore instigated arbitration proceedings against ADC in 1998. The tribunal found in a decision that it had jurisdiction over the dispute in 1999. The arbitral proceedings was thereafter halted because the parties entered discussions on a settlement of the dispute. These discussions failed and the arbitration proceedings continued. The arbitral tribunal issued an award in 2001 where it found that it had no jurisdiction over the dispute. It had found the dispute to be non-arbitrable under Russian mandatory law, which conferred exclusive jurisdiction to Russian courts.

In 2001, ADC initiated proceedings before Stockholm District Court to have the award set aside.

4.4.2.2 The issue before the court

The courts were faced with many complicated issues, including; whether the parties had waived the right to have the award set-aside by courts; whether the arbitration agreement was waived by ADC by commencing proceedings before US courts; whether the decision by the tribunal to apply Russian law to the question of non-arbitrability could be overturned by the courts; and what law applied to the arbitration agreement.\[408]\ The most

---

\[408]\ What waters the endless river of confusion; the parties had only chosen the SCC to administer the arbitration, but no seat for the arbitration was chosen, nor a law to govern the arbitration agreement.
The relevant issue for this paper was how the courts approached the question of whether the dispute was arbitrable under Swedish law.

4.4.2.3 The courts’ holdings

The District Court found that ADC had not waived its rights under the arbitration agreement, nor to have Swedish courts overturn the decision of the tribunal on its jurisdiction. It then turned to the question of what law applied to the arbitration agreement. It found the lex arbitri was Sweden and that Swedish law should determine the question of non-arbitrability. All that remained was therefore to determine if the dispute was non-arbitrable under Swedish law.

The District court examined the Swedish mandatory law that would apply if the dispute were in Sweden, the Swedish Minerals Act (sw. minerallagen (1991:45)). It concluded that even if a permission by an organ of the state was required for the transferral of a licence, this did not prevent the parties from freely disposing of other issues related to the transaction. Therefore, it was concluded that the dispute was arbitrable since the dispute was amenable to out-of-court settlement under Swedish mandatory law.

AGD appealed the ruling of the District’s court after it was made in 2004. The Svea Court of Appeal upheld the ruling in 2005.

4.4.2.4 The rationale of the courts’ findings

After the courts had found that Swedish law applied to the arbitrability of the dispute, it gave no reason for why Swedish law also applied to determine settleability. Both courts seem to have taken it for granted that Swedish mandatory law applied to determine settleability because Swedish law applied to the arbitrability of the dispute.

The Court of Appeal did however highlight the passage of the preparatory works, which states that the settleability of a dispute is generally not affected by foreign mandatory law based upon foreign economic and political interests. The passage was falsely cited as an argument for not applying foreign notions of arbitrability.

409 Interestingly the courts did not consider if not the scope of the protected interests under the Swedish Minerals Act was limited to Swedish territory. This may be explained by the fact that the courts found that the dispute was settleable under the law and did not have to examine it further.

410 There was thus an intermingling of settleability and arbitrability. Bogdan was correctly cited that it was clear that Russian law should not determine non-arbitrability, but it is questionable if he excludes the possibility that it might affect settleability under Swedish law. Cf. Bogdan (2013), p. 938.
did not evaluate the Russian law further to see if it could affect the settleability under Swedish law.

Some of the grounds presented by the courts as for why Swedish law should apply to the question of arbitrability is just as relevant for why it should apply to determine settleability. The Court of Appeal shared the findings of the District Court that it is more coherent with the principle of separability to let the law applicable to the arbitration agreement determine arbitrability. It was also held that the procedural character of arbitrability required an application of the same law as the applicable law to the arbitration agreement, rather than the law chosen to apply to the substantive contract.

4.4.2.5 Conclusion: Dazed and confused
The courts seem to have intermingled the concepts of settleability and arbitrability. It is one question to determine under which law the dispute should be arbitrable and another to determine what mandatory law applies to determine if a dispute is settleable. While there was plenty of reasons given for why Swedish law applies to determine arbitrability, no none was given to why mandatory Swedish law applies to settleability.411

4.4.3 The City Moscow Golf Case
In 2012, the Supreme Court had the chance to clarify how settleability ought to be interpreted.413 The dispute concerned a loan agreement between the Swedish bank Nordea Bank AB ("Nordea") and Moscow City Golf Club OOO ("City Golf"). The arbitration agreement specified Stockholm as the seat of arbitration. The parties also chose Swedish law to govern their substantive contract. The tribunal found that the dispute was arbitrable and that it had jurisdiction. The Supreme Court applied Swedish mandatory law to both the question of arbitrability and settleability. Disputably this was done after an application of a conflict-of-laws rule. The award was upheld since the Supreme Court found that the tribunal was correct in its assertion of the dispute’s arbitrability.

411 An issue which the Courts correctly found to be Swedish law. The reasoning for why it applied is however questionable. It would have been easier for the court to refer to the New York Convention and the set-aside grounds in the SAA which explicitly refers to lex fori, and possibly lex arbitri or lex electionis. In this case it could only be Swedish law. Cf. 3.2.3.1
412 This planted a seed for discussion. But, the Supreme Court did not adress the case on any page of the City Golf Club case.
413 Moscow City Golf Club OOO v Nordea Bank AB (NJA 2012 p. 790).
4.4.3.1 **Background: Back in the USSR**

In 1990, after the fall of the Berlin Wall – but before the collapse of the Soviet Union – a loan agreement was signed between the parties. The loan of 22 million Swedish crowns was made for the construction of a golf club in Moscow. City Golf also entered a contract with a Swedish construction company in connection to this agreement. In practice, money was directly transferred between Nordea and the Swedish construction company without ever crossing Swedish borders. In 2008, Nordea who demanded payment under the loan agreement from City Golf initiated arbitration. City Golf objected to the claim and argued that the tribunal lacked jurisdiction since mandatory Soviet currency law made the dispute non-arbitrable. The sole arbitrator found that he had jurisdiction and issued an award in 2010 in favour of Nordea. City Golf initiated proceedings to set the award aside before Svea Court of Appeal.

4.4.3.2 **The issues before the court**

In summary, City Golf argued non-arbitrability in every way possible. It claimed that the dispute was not only non-arbitrable under both Swedish and Russian law, but that it was also non-settleable according to both States’ mandatory currency laws. This was done under both Section 33 SAA, as well as Section 34 SAA. The Courts therefore had to examine first which law(s) determined the *arbitrability* of the dispute. Second, it had to assess under which law(s) the dispute should be *settleable*. Third, if the dispute was settleable under the relevant law, as well as at when it had to be settleable. And last, if any ‘overriding mandatory rules’ affected the settleability of the dispute.

4.4.3.3 **The courts’ findings**

The Court of Appeal began by concluding that Swedish law applied to determine the arbitrability of the dispute. The court then applied Swedish mandatory law directly to determine the dispute’s settleability, without explicitly discussing the possibility of applying any other law. The only discussion on whether Russian mandatory law applied was in the context of ‘overriding mandatory rules’. The court found that the dispute was settleable under Swedish currency law at the point in time of the loan agreement in 1990 and therefore upheld the award.

---

414 One can imagine that this was done by the parties to beat less stringent currency laws.

The Judge Referee found that arbitrability was to be determined under Swedish law. Regarding the settleability of the dispute, she argued that it ought to be determined by the law applicable to the substantive contract, *i.e. lex causae.* Subsequently it was found that Swedish law applied to the settleability of the dispute, since the conflict-of-laws rules by the time of the loan agreement allowed the parties to choose the law applicable to their contract. With regard to the overriding nature of Russian mandatory law, it was held that (own translation and emphasis):

"When determining if the dispute is settleable, one must also consider the principles of Swedish international private and procedural law that determines what effect foreign public laws may have (cf. prop. 1998/99:35, p. 49 and Bogdan (2008), p. 85)."

The Judge Referee found that Swedish law does not indicate any interest of upholding foreign currency laws. Since the dispute was settleable under Swedish law when the award was made, the dispute was held as arbitrable.

The Supreme Court found that Swedish law applied to the arbitrability of the dispute. The Court then discussed what disputes are settleable, and which are not. It never gave a straightforward answer like the Judge Referee, but seems to have applied a similar rule as it concluded that the parties have agreed that Swedish law applies to the loan agreement. However, other statements in the ruling indicates that a different method was used. In the end, the Court found that the dispute was settleable according to Swedish law at the time of when the award was made. Russian mandatory law was not considered ‘overriding’. Therefore, the dispute was held as arbitrable and the award was consequently upheld.

4.4.3.4 The rationale

There has never been a clearer answer to the research inquiry than that of the Judge Referee. She was clear in declaring that conflict-of-laws rules under Swedish private

---

417 No referral was made to any specific conflict-of-laws rule, but it can be assumed that the Rome Convention was intended.
419 Ibid., p. 803, para. 16. Furthermore, the Court referred to Pålsson’s book on the Rome Convention, *ibid.*, p. 802, para. 13, as well as concluding that the parties had agreed that Swedish law applied to the contract, *ibid.*, p. 803, para. 16.
420 See fn. 426.
international law should determine settleability.\textsuperscript{421} No special reason was given for why a conflict-of-laws rule applied and not Swedish law directly. She did however refer to Andersson (2011), which also declares \textit{lex causae} to the relevant law to the question of settleability.\textsuperscript{422} The basis for this interpretation seems to have been the wording of Section 1 SAA.\textsuperscript{423}

In contrast to the clear answer by the Judge Referee, the Supreme Court was muffled in what law applied to settleability and why. The court, just like the preparatory works, only discussed foreign rules in the context of whether they could affect the settleability when mandatory Swedish rules determines settleability, \textit{i.e.} ‘overriding mandatory norms’.\textsuperscript{424} The Court did not discuss if regular foreign mandatory rules could apply directly to determine settleability in this case, \textit{i.e.} whether the criterion of settleability required that the dispute was amenable to out-of-court settlement under Russian laws. A problem of the case was that Swedish law was chosen by the parties to govern the substantive contract. An application of a conflict-of-laws therefore had the same result as applying Swedish law directly to the settleability of the dispute.\textsuperscript{425} Therefore it is understandable that the Court ignored examining what the result may have been if Russian law was \textit{lex causae}. The case has however been understood by legal scholars to favour the application of a conflict-of-laws rule.\textsuperscript{426}

Interestingly the court introduced a new step to the issue. After discussing when mandatory rules makes a dispute non-settleable, the court concluded that (own translation):

“For an award to be declared invalid, it should be required that the mandatory element is of a certain degree. It would have dire consequences if the parties’ legal relationship were displaced – not least in long-standing contractual relations. It should therefore be required for the invalidity of the award that there is a distinct public interest.”\textsuperscript{427}

\textsuperscript{421}\textit{Ibid.}, p. 798 (own translation): “According to Swedish conflict-of-laws rules […] Swedish law applies to determine if the parties could settle their dispute.”

\textsuperscript{422} NJA 2012 p. 790, p. 798, with references to Andersson (2011), p. 58 \textit{et seq}.

\textsuperscript{423} Andersson \textit{et al.} even admits that there is contradictory case law in the Archangel case. Andersson (2011), p. 59 fn. 89.

\textsuperscript{424} It is questionable if foreign public law should ever be considered in this context since they do not fall within the scope of the conflicts-of-law rules. \textit{See} Bogdan (2013), p. 939 and \textit{supra} 3.3.4.

\textsuperscript{425} This was correctly concluded by the Judge Referee, NJA 2012 p. 790, p. 798.


\textsuperscript{427} \textit{Ibid.}, p. 802, para. 11.
This relates to an earlier discussion in this paper on how invalidity of contracts generally is perceived.\textsuperscript{428} The problem is of course that this clouds the method further on how arbitrability should be decided, and undermines the method of having a criterion of settleability.\textsuperscript{429} It is difficult to place the Court’s weighing of interest under the main rule, which also has led Lindskog to question why his book was referred to since he argues the opposite.\textsuperscript{430}

4.4.3.5 Conclusion: Definitely maybe

One could have hoped that the Supreme Court would have led us to an oasis, but instead it took us even deeper into the unknown. Definitely maybe was choice-of-law supported.

4.4.4 Conclusion: A bird in the hand…

The main conclusion that can be drawn from these cases is the difficulties the courts have in applying the concept of non-arbitrability structurally. There are many different aspects that need to be considered. The question of under which law a dispute must be amenable to out-of-court settlement should be easier to answer than what it has proven to be. The Supreme Court did not contribute with its ruling in the City Moscow case. It is therefore concluded that there is no precedent on this issue and thus the answer \textit{de lege lata} is up in the air.

4.5 Conclusion: Swedish Law Today

We have now reached journey’s end and it is time to conclude where the law stands today \textit{de lege lata}. However, it has proven extremely difficult to state what it is. Therefore, the state of the law is described step-by-step with a pair of words of reservation – most likely.

Step 1 – Arbitrable according to Swedish law?

This is an easy step. Swedish law explicitly apply in set-aside procedures before Swedish courts under Section 33(1). It is also explicit in enforcement proceedings under Section 55(1).

\textsuperscript{428} \textit{Supra} 4.2.4.3.
\textsuperscript{429} See 5.1.
\textsuperscript{430} Lindskog (2011), 1 §, para. 4.1.3 fn. 46. Lindskog argues that the question of whether a dispute is settleable is binary, either it is settleable or it is not (cf. half-pregnancy). This illustrates in any case the difficulty the Supreme Court has to fit in valuable considerations and weighing of interests, that may not be allowed if the rule of ‘settleability equals arbitrability’ is strict, see 5.1.
**Step 2 – Is the dispute settleable?**

This assessment should be hypothetical as if a Swedish court was faced with the enforcement of an out-of-court settlement between the parties. In most cases this would mean that the conflict-of-laws rules under the Rome I Regulation apply hypothetically, which subsequently in the majority of cases refers to the law chosen by the parties to their substantive contract. The dispute would have to be coherent with this law to be settleable before Swedish courts. This requires that the mandatory provisions of the applicable law is examined to see what interests they intend to protect, including whether it is extra-territorial. This is generally not a problem since parties do not typically choose a law that makes their substantive contract invalid.

**Step 2.1 – Are any overriding mandatory provisions applicable?**

Art. 9 of the Rome I Regulation must then be examined and applied hypothetically.\(^{431}\) This may under certain limited condition result in overriding mandatory provisions of a law different from *lex causae* having an effect on the settleability of the dispute. The only laws that may come into question is Swedish law (Art. 9.2) or the law of the State where the contract is performed (Art. 9.3). Overriding mandatory provisions of Swedish law is mainly issues of status. Foreign laws of economic or political nature are generally not considered overriding.

**Step 3 – Do any exceptions to the main rule apply?**

First, arbitration may explicitly be permitted or forbidden in law, even if it is settleable or non-settleable otherwise. Second, even if it is non-settleable, it may not be non-arbitrable if public interests may be protected in other proceedings, or if the interests do not outweigh the interest of the parties to not have their dispute declared non-arbitrable (*cf. City Moscow Golf*). And even if the dispute is settleable, it may still not be arbitrable if public or third party interests outweigh the interest of the parties.

---

\(^{431}\) See Appendix I.
5. CONCLUSIONS AND PROPOSITIONS

In this chapter, the conclusions from previous chapters are compiled in order to find a satisfactory answer to the research inquiry *de lege ferenda*. First, the state of Swedish law is discussed. Second, the necessary ingredients for a good solution are identified. Last, a preferred proposition to the research inquiry is presented which balances the different interests an answer should be coherent with.

5.1 The Problems of Today

Aside from the obvious problem of uncertainty, there are mainly two concerns with *de lege lata*. The first is complexity. The rule of settleability is complicated by its many exceptions and layers. It is a jungle that has not yet been mapped. The second is inconsistency. There is no equilibrium between arbitration and non-arbitrability, since the rule of settleability in itself is inconsistent.

The main critique is that having settleability identify arbitrable disputes reduces the proper weighing of interest and ignore that arbitral tribunals, just like courts are adjudicatory bodies. It is a blunt instrument, since it does not weigh arbitration against non-arbitrability, but instead the settleability of a dispute against non-settleability. This makes the requirement of settleability inconsistent with non-arbitrability. Settleability is different from arbitrability and there are different interests involved. The importance of allowing arbitration, is not the same as allowing parties to settle their disputes out-of-courts. In fact it would be more consistent to have a test of whether the dispute was settleable out-of-an adjudicatory body. The reason is that tribunals may in fact be trusted with issues of mandatory law, and are capable of apply the law correctly without treading over the public interest of States in the same way a settlement agreement may do.

The number of exceptions to the main rule also undermine the method of having settleability determine arbitrability. The critique presented in the preparatory works against having ‘economic interest’, or ‘public policy’ as the preferred method may also be said about the criterion of settleability. The courts are handed broad powers to decide the arbitrability of a dispute and ultimately fail to delineate the scope of

---

432 See 5.1.
433 Supra 3.4.2.1.
The principle that the parties should not be better off by an arbitral award than they would by a settlement agreement may be criticised for ignoring the arbitral process.\textsuperscript{435} The complexity has made it impossible for the parties to foresee which disputes are arbitrable. Courts are not only burdened by having to investigate foreign mandatory law \textit{ex officio} to determine settleability under the regular mandatory rules – the courts have also been vested with the task to determine what laws are ‘overriding’ and which law(s) the dispute is closely connected to. This heavy workload is inconsistent with the idea of arbitration, to have a fast, effective and final resolution of the dispute.

On these grounds, a better alternative is proposed.

\subsection{5.2 The Recipe for a Solution}

A number of aspects are lifted below which an answer should be coherent with. They all find their basis in different sections of the paper.

\subsubsection{5.2.1 Practicality}

A simple rule is more practical than a complex. It limits the possibility of diverging case-law and the problems inherent with merits review, which puts the finality and effectiveness of the arbitration at risk. This is one of the main reasons why arbitration was chosen in the first place and need to be limited if arbitration is not to lose its appeal.\textsuperscript{436}

\subsubsection{5.2.2 Idea of non-arbitrability}

The arbitrability of a dispute is a matter, which concerns the fundamental convictions of each jurisdiction, and it would undoubtedly be inappropriate to abandon that issue to the skill or good fortune of parties in choosing the law governing their contracts. It is also contrary to the autonomy of the arbitration agreement in its traditional sense.\textsuperscript{437} Therefore, it is better to apply the mandatory law that is most coherent with the main

\textsuperscript{434} Another problem is that if the settleability of a dispute is to be determined by a different law than Swedish – do these exceptions remain? It is conceivable that the exceptions still apply and most likely they would, but it complicates matters even more.

\textsuperscript{435} After all, even arbitrators may and should consider issues of public policy. Furthermore, if there is no real dispute, then there can be no real arbitration agreement or arbitral award. Last, national courts may still review the award on grounds of public policy at the enforcement stage or in setting aside procedures.

\textsuperscript{436} Youssef (2009), para. 3-52.

\textsuperscript{437} Fouchard & Gaillard (1999), § 588.
reason why a dispute is non-arbitrable in the first place, which is to protect the exclusive jurisdiction of the state’s own courts. Arbitration in itself should not be seen as an evil that each State has an obligation to protect the World from.

5.2.3 **Obligation under the New York Convention**
The New York Convention has established a pro-arbitration hegemony. It only allows the Contracting States to be more liberal with their policy on enforceability of arbitral awards and arbitration agreements, without creating any obligations to refuse enforcement. Part of the duty to enforce agreement is that non-arbitrability may only be exceptionally used, and a State is only allowed to apply its notion of non-arbitrability as a safety valve, and arguably that of *lex arbitri* or *lex electionis*. An interpretation of the articles of the Convention in good faith is that other States’ interests may not be considered, *i.e.* the interests reflected in national limitations of the parties’ contractual freedom. The reason is that it would guise foreign non-arbitrability in foreign settleability. Therefore it is contrary to the obligations under the New York Convention to apply a conflict-of-laws rule.

5.2.4 **Principles of private international law**
There is no obligation under any law to consider ‘overriding mandatory provisions’. Nor should it be applied in the field of arbitration. Every state is given a chance to protect its interests when they are faced with recognising or enforcing arbitral awards. The interests of one state would not ‘suffer’ by foreign enforcement of arbitral awards, which are connected to its territory. Furthermore, as a principle, courts do not consider themselves to be middlemen to foreign interests in other cases, and there is no reason to be that in these.

5.2.5 **International trends**
Arbitrability is trending. This is especially true in international arbitrations where the State does not have the same interest in the dispute, due to its limited connection to that State. Ther is therefore also a trend of differentiating between international and national disputes, with lower standards required for an international dispute to be arbitrable.
5.2.6 Swedish law

Swedish contract law does not automatically declare a contract invalid if it is in conflict with mandatory law. This is however the case with the rule of ‘settleability equals arbitrability’. In fact, Swedish law generally makes a weighing of the public interest at hand of invalidating a contract, with the interest of not disrupting a long-standing contractual relationship between the parties. This weighing is diminished if foreign law applies to the question of settleability, and replaced by foreign limitations on parties contractual freedom.

5.3 The Proposition

Not it is time to present a proposition de lege ferenda. First of all, it is proposed that the requirement of settleability is replaced by ‘economic interest’. This would however require a revision of the Swedish Arbitration Act. The second proposition would however be available for application by courts under the current Act.

5.3.1 Settleability does not equal arbitrability

The most favoured solution to the research inquiry is to replace settleability with ‘economic interest’. The rule of settleability inconsistently reduces the weighing of interests for and against arbitrability to the balance of whether the parties should be free to dispose of the dispute. There are however different interests involved between the two. It also ignores the arbitral tribunal as an adjudicatory body that is fully capable of administering justice.

5.3.2 Let Swedish law determine the settleability

An easy rule does not involve the assessment of foreign mandatory law. Especially not when this assessment must be made sua sponte, which risks prolonging the proceedings. Therefore, it is better to apply Swedish law only, as long as it is as good as the alternative. The interest that the doctrine of non-arbitrability aims to protect is the exclusive jurisdiction of the State’s own courts. This jurisdiction is not decided by foreign substantive law, but by national procedural law. It is therefore better to not apply a hypothetical of Rome I regulation, but ask if Swedish courts have jurisdiction under the Brussels I regulation. Swedish substantive law is therefore more capable of protecting the intended interest of non-arbitrability. However, Swedish law should only be applied when
Swedish courts have the jurisdiction over the dispute, in order to determine if the courts also have exclusive jurisdiction.

This even if the arbitration has its seat in Sweden, as this simply confers jurisdiction to the courts over the arbitration proceedings, but not over the dispute on the merits. The answer is here that the courts should not determine arbitrability at all.\footnote{Brekoulakis II (2009), para. 6-24.} The tribunal should instead determine it since the courts of lexis arbitri have no jurisdictional interest in the arbitrability matter whatsoever. It is an issue of jurisdictional conflict between the arbitral tribunal and the national courts of another country. This country would in turn be capable of assessing the enforceability of the award even if the tribunal proceeded with the merits of the dispute, and consequently determine that the case is not enforceable in this country. The tribunal is in a much better position to assess whether it is enforceable or not in any relevant State, than the national courts of the seat. National law of the place of referral will therefore be irrelevant. The same goes when the award is challenged.\footnote{Ibid., para. 6-29.}

To conclude, even when a basic requirement of freely dispose of the subject matter is used to determine non-arbitrability, it must be determine on a case to case basis whether it is called for a case to be non-arbitrable. This line of thinking can also be found in the preparatory works of the SAA, which does not exclude the possibility of a case being arbitrable, even though it may not be settleable before Swedish courts.

### 5.3.3 Differentiate between domestic and international disputes

The interests are generally not the same in international arbitration as they are in national proceedings. This is not only due to the fact that the nature of the parties to international arbitration, which are generally multi-national companies capable of protecting themselves compared to consumers, but also that there is not as much Swedish interests involved.

It could be argued that a conflict-of-laws rule do differentiate between domestic and international disputes, since it generally means that the law chosen by the parties determine the issue of settleability. Parties tend to choose a law to govern their arbitration agreement that does not invalidates their contract. However, it would on the other hand in many cases lead to unreasonable outcomes.
First, it is conceivable that a foreign law does not have the rule of settleability to determine arbitrability. Suppose that the foreign law has a criterion for arbitrability that is much more liberal than the contractual freedom granted to the parties. A dispute that may not be settleable under this law, may on the other hand still be arbitrable. Would it in this case be sensible that the dispute is non-arbitrable under Swedish law if it is arbitrable under both the foreign and Swedish law (if Swedish law had been applicable?).

Second, suppose that an application of the foreign law limits the contractual freedom and makes their dispute non-arbitrable. Why would it be in the interest of Sweden to protect a foreign State’s interest of confining the economic freedoms of the parties? The legitimate expectations of both parties must have been at one point that their dispute was arbitrable. There is no logical foundation to believe that the parties located their relationship in a system, which in fact will not give effect to their will.

Third, arbitrability is a mandatory requirement. Why should the parties be allowed to govern its application by a choice of applicable law to their arbitration agreement?

It is therefore better to make a differentiation between international and domestic disputes by applying a different standard with Swedish law as the starting-point.

5.4 Conclusion: Certainty Requested

Arbitration is no longer perceived as a tolerated encroachment upon the monopoly over justice held by the State’s courts, but as the common method of resolving international commercial disputes. This because arbitration affords legal protection and security to the parties, which is equal to, if not greater than, that offered by State courts.

The many concepts and interpretations still found in practice and legal writings produce an unwarranted insecurity and lack of predictability. National courts need to improve the efforts and focus on the application of the Convention. The exclusive application of the lex fori offers a simple, clear and uniform approach to the issue of arbitrability under the Convention.

The law that applies to determine if a dispute is amenable to out-of-court settlement and consequently arbitrable under Swedish law is unknown. The answer to the research inquiry is therefore that I am not sure what it is today, but there are reasons for why it should be different in the future. Therefore, I ask for certainty to where the law is, or a revision to what the law should be.
CONCLUDING REMARKS

Which state’s law should determine if a dispute is amenable to out-of-court settlement and consequently if it is arbitrable under Swedish law? Below a conclusion on de lege lata is first presented and then a proposition de lege ferenda is offered.

De lege lata

Swedish law as it is answers the question by applying conflict-of-laws rules. It is a hypothetical that asks the question: “Would the parties have been capable of settling their dispute by agreement before Swedish courts?” In most cases the applicable law is then determined by the Rome I regulation. Generally, it points to the law chosen by the parties to their substantive contract (lex causae). However, the mandatory norms of lex causae must be interpreted to determine whether the protected interests are limited to the territory of that state or if they also affect the settleability of the dispute before Swedish courts.

Subsequently, the courts and tribunal must determine if the choice of law is contrary to ‘overriding mandatory provisions’. This affects the settleability of the dispute. The law of every State affected by the dispute, including Swedish law, must be examined in order to find if its provisions is of such weight that the law chosen by the parties should be overridden. This may only be done in rare cases, and not if the mandatory provisions of a foreign State solely protect its own economic and political policies.

De lege ferenda

The answer de lege lata is for reasons presented in this thesis not satisfactory. Preferably, the criterion of settleability should be replaced by ‘economic interest’. Alternatively, the Supreme Court may under the current law rule in line with this proposition:

First, it should be examined if the dispute falls under the exclusive jurisdiction of Swedish courts. If not, there would be no need to apply the doctrine of non-arbitrability, nor to investigate whether a dispute is amenable to out-of-court settlement. The non-arbitrability doctrine aims to protect the exclusive jurisdictions of the States’ own courts. Therefore, it shall not apply if the jurisdiction of a tribunal do not collide with the courts’.

Second, if there is a collision between jurisdiction of Swedish courts and a tribunal, the question of settleability should be determined by mandatory provisions of Swedish law only. There is no need to apply any overriding mandatory provisions, since arbitration in itself is not harmful to other States.
LIST OF CITED WORKS

Books and Articles

Adlercreutz, Axel,
Avtalsrätt I,

Andersson, Fredrik, et al. (eds.),
Arbitration in Sweden,

Arfazadeh, Homayoon,
Arbitrability under the New York Convention: the Lex Fori Revisited,

Bantekas, Illias,
The Foundations of Arbitrability in International Commercial Arbitration,

Becker, Joseph & Kleyn, Joosje,
Public Policy and Arbitration - The 'Unruly Horse' and the Arbitrability of Claims in America,

Bennett, Ulf, et al. (eds.),
Förrättskällor och arbetsmetoder,

Bertheau, Theodor R.,
Das New Yorker Abkommen vom 10 Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedsverträge,

Blessing, Marc,
The Law Applicable to the Arbitration Clause and Arbitrability,
in 40 Years of Application of the New York Convention, ICCA Congress Series No. 9, 1999. Cit.: Blessing (1999)

Bogdan, Mikael,
Svensk och EU-domstolens rättspraxis i internationell privat- och processrätt 2011-2012,

Bogdan, Mikael,
Svensk Internationell privat och processrätt,

Bolding, Per Olof,
Skiljeförfaran och rättegång,

Born, Gary B.,
International Commercial Arbitration,

Brecooulakis, Stavros L.,
Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori,

Brecooulakis, Stavros L.,
On Arbitrability: Persisting Misconceptions and New Areas of Concern,
Brekoulakis, Stavros L. & Mistelis, Loukas A. (eds.),
*Arbitrability: International and Comparative Perspectives*,

Böckstiegel, Karl-Heinz,
*Public Policy as a Limit to Arbitration and its Enforcement*,
IBA Journal of Dispute Resolution, Special Issue 2008, The New York Convention – 50 Years,

Caliess, Grafl-Peter (ed.),
*Rome Regulations: Commentary*,

Cannon, Andrew,
*Appeals on a Point of Law in the English Courts: Further Restrictions*,

Carbonneu, Thomas Edgar & Janson, Francois,
*Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*,

Cars, Thorsten,
*Lagen om skiljeförfarande – En Kommentar*,

Cheshire, G. C., North, Peter & Fawcett, James,
*Private International Law*,

Cordero-Moss, Giuditta,

Craig, Lawrence W., Park, William W. & Paulsson, Jan,
*International Chamber of Commerce Arbitration*,

Dennemark, Sigurd,
*Om Svensk domstols behörighet i internationellt förmögenhetsrättsliga mål*,

Dillén, Nils,
*Bidrag till läran om skiljeavtalet*,
Gustav Larssons bokhandels förlag, Stockholm, 1933. Cit.: Dillén (1933)

Di Pietro, Domenico,
*General Remarks on Arbitrability under the New York Convention*,

Franke, Ulf, et al. (eds.),

Fitger, Peter, et al.,
*Rättsegångsbalken*,

Fukuyama, Francis,
*The End of History and the Last Man*,

Friedman, Milton,
*Capitalism and Freedom*,
Gaillard, Emmanuel & Savage, John (eds.),
   Fouchard, Gaillard, Goldman on International Commercial Arbitration,

Gaillard, Emmanuel,
   Legal theory of Arbitration,

Gaillard, Emmanuel,
   The Enforcement of Awards Set Aside in the Country of Origin,

Grönfors, Kurt,
   Avtalslagen,

Hanotiau, Bernard,
   The law applicable to arbitrability,

Hassler, Åke & Cars, Thorsten,
   Skiljeförfarande,

Heuman, Lars,
   Arbitration Law of Sweden: Practice and Procedure,

Hobér, Kaj,
   International Commercial Arbitration in Sweden,

Huber, Peter,
   Rome II Regulation: Pocket Commentary,

Kvart, Johan & Olsson, Bengt,
   Lagen om skiljeförfarande: en kommentar,

Leijonhufvud, Madeleine,
   Förarbeten in Bernitz, Ulf, et al. (eds.), Finna rätt,

Lew, Julian D. M., Mistelis, Loukas A. & Kröll, Stefan,
   Comparative International Commercial Arbitration,

Lindskog, Stefan,
   Skiljeförfarande, En kommentar,

Madsen, Finn,
   Commercial Arbitration in Sweden: a Commentary on the Arbitration Act (1999:116) and the
   Rules of the Arbitration Institute of the Stockholm Chamber of Commerce,

Mistelis, Loukas A.,
   Is Arbitrability a National or an International Law Issue?
Mourre, Alexis,
*Arbitrability of Antitrust Law From the European and US Perspectives*,

Möller, Gustav,
*Om skiljeförfarande och talan om ogiltigförklarande eller ändring av bolagstämmobeslut*,

Nerdrum, Gunnar,
Review of Stefan Lindskog: *Skiljeförfarande. En kommentar*,

Pamboukis, Charalambos P.,
*On Arbitrability: The Arbitrator as a Problem Solver*,

Park, William W.,
*Why Courts Review Arbitral Awards*,

Paulsson, John,
*Idea of Arbitration*,

Port, Nicola Christine et al.,
*Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*,

Pålsson, Lennart,
*Romkomventionen – tillämplig lag för avtalsförpliktelser*,

Ramberg, Jan & Ramberg, Christina,
*Allmän Avtalsrätt*,

Redfern, Alan & Hunter, Martin, et al. (eds.),
*Redfern and Hunter on International Arbitration*,

Reithmann, Christoph & Martiny, Dieter,
*Internationales Vertragsrecht: Das internationale Privatrecht der Schuldverträge*,

Sandrock, Otto & Kornmeier, Udo,
*Handbuch der Internationalen Vertragsgestaltung*,

Shelkoplyas, Natalya,
*The Application of EC Law in Arbitration Proceedings*,

Shore, Laurence,
*The United States’ Perspective on ‘Arbitrability’*,

Ulrichs, Lars,
*Ny HD-dom om tillämpligheten av främmande rätt vid prövning av skiljedoms ogiltighet*,

van den Berg, Albert Jan,
von Hülsen, Hans-Viggo,  
*Die Gültigkeit von internationalen Schiedsvereinbarungen*,  

Walker, Janet,  
*Arbitrability: Are There Limits?*  

Wolf, Reimar,  
*The New York Convention: A Commentary*,  

Youseff, Karim,  
*The Death of Inarbitrability*,  

**Preparatory Works**

NJA II 1897 nr 4  
Cit.: Prop. 1998/99:35

Cit.: SOU 1994:81

Cit.: SOU 2015:37

Kommittédirektiv 2014:16 En översyn av lagen om skiljeförfarande  
Cit.: Dir. 2014:16

**Other**

Status of the New York Convention, UNCITRAL website.  

### TABLE OF COURT CASES

**Australia**
*Rinehart v. Welker*, [2012] NSWCA 95

**Canada**
*Sedek v. TELLUS Communications Inc.*, [2011] SCC 15

**European Court of Justice**
- C-283/81 – *CILFIT*
- C-126/97 *Ecoswiss*
- C-386/05 *Color Drack*
- C-64/12 *Schlecker*
- C-305/13 *Haeger & Schmidt*

**France**

**Netherlands**

**Singapore**

**Sweden**
*Supreme Court*
- *Takvorian v Bulgaria* (NJA 1961 p. 145)
- *Forenede Cresco Finans AS v Datema AB* (NJA 1992 p. 733)
- *Lemnorniiprojekt OAO v Arne Larsson & Partner Leasing AB* (NJA 2010 p. 219)
- *Moscow City Golf Club OOO v Nordea Bank AB* (NJA 2012 p. 790)

*Court of Appeal*
- *OAO Arkhangelskoe Geologodobychnoe Predpriyatie v Archangel Diamond Corporation*, Judgement by the Svea Court of Appeal on November 15, 2005 (Case No. T 2277-04)
- *Silver Lining Finance SA v. Perstorp Waspik B.V.*, Judgement by the Scania and Blekinge Court on July 17, 2009 (Case No. T 1689-09)

**Switzerland**
Judgement of 23 June 1992, DFT 118 II 353 (Swiss Federal Tribunal)
Judgement of 23 May 2012, DFT 4A_654/2012 (Swiss Federal Tribunal)

**UK**

**USA**
Citation from the Swedish preparatory works*

"Of special importance for international disputes is the scope of the law, which mandatory character would potentially make the dispute indisputable (3). It should be determined on a case-by-case basis, if the corresponding applicable foreign rules are of such nature that a settlement before a Swedish court would not be accepted (1). When it concerns questions of status, e.g. custody of children, should the Swedish position apply even if the dispute lacks any connection to Sweden (2). If it on the other hand concerns economical and political regulation in a foreign state, then there is often no reason to let the mandatory rules affect the settleability in Sweden – and thus arbitrability under Swedish law. This view is coherent with the tendency on the international plane to accept that an international dispute is resolved by arbitration, even if an identical national dispute would fall outside the scope of arbitrability.”

Rome I Regulation Art. 9

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Rule proposed by Gary B. Born†

The possibility that a foreign nonarbitrability rule might be applied in another state (or an arbitration) does not mean that it necessarily will, or should, be applied. Only where the foreign jurisdiction has a materially closer connection (3) to the issues in question than other jurisdictions and where the application of that jurisdiction’s laws would not be exorbitant (1) would it be legitimate even to consider applying its nonarbitrability rules. In other cases, there is no basis even to consider applying a foreign nonarbitrability rule.

The forum court is also fully entitled to deny effect to a foreign nonarbitrability rule if it conflicts with a mandatory law or public policy of the forum itself (2) – including specifically with public policies of the forum that favor international arbitration. Thus, even if the laws of State B provide that particular statutory claims under State B’s laws may not be resolved by arbitration, State C courts may properly decide that State C’s public policy is to give broad effect to international arbitration agreements, including with regard to particular categories of disputes.

Cf. (3) and Art. 9.3, (1) and Art. 9.1, (2) and Art. 9.2.

Cf. (3) and Art. 9.3, (1) and Art. 9.1, (2) and Art. 9.2.

---


“I am not here today to declare that the Emperor has no clothes; although, I must say that lately he seems rather scantily clad. And with each new judicial appraisal of the limits of arbitrability, he seems to be wearing less and less. But in case you are tempted in your passion for international commercial arbitration to join the chorus of those chanting “take it off”, I would like to introduce a note of restraint. There will always be arbitral awards that we might want to reserve the right to censor for public policy reasons. But beyond that, it is not clear to me what independent value there might be to the cautionary effect of a concern for arbitrability that would prevent matters from being submitted to the parties’ chosen forum, where that forum is an arbitral forum. Indeed, the Emperor, at least as I see him, is clothed only in public policy.”

- Janet Walker, ‘Arbitrability: Are There Limits?’