THE PROBLEM OF DETERMINATION OF ARBITRABILITY UNDER RWANDAN LAW

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ABSTRACT

In this article, the author explores the issues pertaining to determination of arbitrability under Rwandan law. In the process of arbitration proceeding the question of arbitrability is of utmost importance because arbitrability determines as to what matter can or cannot be arbitrable. If the subject matter is not found to be arbitrable, the arbitration agreement remains without effect.

The first issue to explore is the lack of specific criteria to determine whether a matter is or is not arbitrable under Rwandan law. The second issue relates to the appropriateness of having a law with limitation to commercial matters versus having a law on arbitration in general. Lastly, there is a debate on the competent court in the first place to determine the issue of arbitrability between states' court and arbitral tribunal. In a bid to fully analyse these underlining issues and recommend possible solutions to fill identified gaps, on the one hand, this article critically and comparatively analyses Rwandan, foreign and international arbitration legal texts. On another hand, the article examines how Rwandan and foreign courts have dealt with matter of arbitrability.

1. INTRODUCTION

Arbitrability can be defined as the absence to contest the *rationae personae et materiae* to the power conferred to the arbitral tribunal (by the arbitration agreement) to resolve a dispute. Arbitrability, in essence, limits the power of an arbitral tribunal and the power of the parties as to what subject matter can be arbitrated.[2] In other words, arbitrability involves the drawing of a line between what can and cannot be arbitrable. This definition suggests that there is a distinction between subjective arbitrability and objective arbitrability.[3]

Whether, under an applicable law, a particular entity, typically a State or other public body, may be a party to an arbitration agreement, and thus

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[2] See Loukas A. Mistelis and Stavros L. Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwers Law International, 2009, pp 121-122.

[3] See P. Fouchard, E. Gaillard and B. Goldman, *On International Commercial Arbitration*, Kluwers Law International, the Netherlands, 1999, pp 313-359.

whether a dispute to which such entity is a party may be submitted to arbitration, is referred to by commentators as subjective arbitrability (or arbitrability *rationae personae*).

Whether, under an applicable law, the particular subject matter of a dispute is capable of resolution by arbitration, in the light of relevant public policy consideration, is referred to by commentators as objective arbitrability (or arbitrability *ratione materiae*).

Arbitrability is a pertinent element that can have an impact on the validity of an arbitration agreement or clause and the competence of an arbitral tribunal. It has a predominant place in any legislation on arbitration. This article explores salient questions surrounding the principle of arbitrability in Rwanda and the jurisprudential analysis thereof. When deemed necessary, references are made to foreign and international legislations and jurisprudence.

2. STATEMENT OF THE PROBLEM

Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters is the main legal text regulating arbitration in Rwanda[4]. This law has two articles relating to arbitrability and those are as follows:

- Article 2, which states that[5]:

  > *This Law applies to domestic and international commercial arbitration and conciliation.*
  >
  > *This Law shall not prejudice enforcement of any other Rwandan Laws by virtue of which certain disputes may not be submitted to arbitration[6].*

- Article 51, which deals with grounds for refusing recognitionor enforcement of the arbitral award and one of them is the non-arbitrability of the dispute because it cannot be submitted to arbitration by virtue of the law or in consideration of public order.[7] This is to mean that an award on a matter which is declared to be not arbitrable cannot be enforced.

Both articles, *supra*, lack clarity on what matters are not arbitrable. This situation of uncertainty on arbitrable/non-arbitrable matters is also found

[4] Official Gazette *n° special of 06 March 2008*

[5] Art. 2 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters

[6] Emphasis added

[7] Art. 51 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters

in the UNCITRAL Model Law on International Commercial Arbitration, which is a guiding text in the drafting of national arbitration legal texts because (except in mentioning that an arbitral award may be set aside by the court if the court deems that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or the award is in conflict with the public policy of this State) there is not much detail on non-arbitrability.[8] Unlike in Rwanda, in a certain number of national jurisdictions, specific legislation on the question of arbitrability has been enacted to complement the Model law.[9] The local initiatives may be interpreted as a sign that UNCITRAL should indeed address the issue in order to provide universal guidelines. In terms of what is globally considered subject to arbitration, which lacks flexibility, a general rule providing a list of issues recognized as subject to arbitration – a 'lowest common denominator' approach - would enhance the certainty of awards.[10]

The absence of a clear picture of matters which are arbitrable and those which are not pauses the problem of determination criteria when assessing whether the dispute is worth arbitration and a number of questions need exploratory answers:

- What are the criteria of determining arbitrability in Rwanda?
- Are other matters rather than commercial matters arbitrable?
- How have Rwandan courts previously dealt with or how are they likely to deal with the matter of arbitrability?

The focus of this article is to respond to the above-listed questions and highlighting loopholes that are in Rwandan legislation and jurisprudence. Comparative analysis serves to have the same issue in other jurisdictions.

3. THE CONCEPT OF ARBITRABILITY IN RWANDAN LAW

3.1 Background of Arbitrability In Rwandan Law

Referring to arbitrability is referring to arbitration; hence the retrospective of arbitrability is connected to that of arbitration. It is not easy to fix the landmark of arbitration in Rwanda.

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[8] See Article 34 of UNCITRAL Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law General Assembly Resolution 40/72 of 11 December 1985 and amended by General Assembly Resolution 61/33 of 4 December 2006.

[9] It is the example of Tunisia, Zambia and Zimbabwe

[10] Frédéric Bachand, Fabien Gélinas, *The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration,* JurisNet LLC, New York 2013, p. 291 citing Fernando Mantilla-Serrano and John Adam in UNCITRAL *Model Law: Missed Opportunities for Enhanced Uniformity*

During the period of colonization, there were a number of legal texts from Belgium which were applicable in Rwanda and other colonized territories. More specifically, it is necessary to underline that Rwanda-Urundi[11] had accessed the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 by notification sent to the Secretary General of League of Nations[12] on the 5th of June 1930.[13] This convention has one provision on arbitrability where it states that, to obtain recognition or enforcement of foreign awards, it shall further be necessary that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.[14] Indirectly, this provision refers to arbitrability by setting the principle that awards on matters that are not arbitrable due to public policy or limitation of the law cannot be executed.

After independence, the first national legal text relating to arbitration is the Code of Civil and Commercial Procedure of 1964.[15] This code has a specific section on arbitration[16]. However, this section does not give much information on arbitration, and it differs from present-day arbitration. For example, there is one surprising part which indicates that the mission of the arbitrator is entirely free.[17] This is to say that arbitrators were not to be paid for their services. Article 398 related to arbitrability by providing that whosoever has the capacity or authority to compromise can conclude an arbitration convention, provided that the dispute is arbitrable, and article 401 subjected arbitration to the respect of Rwandan public order, good morals, and rights to defence.

After the judicial reform of 2004, the part on arbitration was kept in the code of civil procedure, and it has introduced new elements, including the rule that arbitrators must be paid for their services. On arbitrability, there was no big change, because the only validity test continued to be public order, and it was not defined.[18]

In 2008, Law N° 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters were enacted. Under article 2(2), it simply provides

[11] A combination of Rwanda and Burundi as colonised territories of Belgium

[12] Predecessor of the United Nations (UN)

[13] Official Bulletin of Belgium of 1930, p.921 cited in *Codes et lois du Rwanda*, Volume II, 1995, p.580.

[14] See art. 1 (e) of Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

[15] Code of Civil and Commercial Procedure of 15 July 1964, Official Gazette of 1964, p.275.

[16] See art. 398-408: Title VIII-Arbitration.

[17] Art. 409 of Code of Civil and Commercial Procedure of 15 July 1964.

[18] See art. 365-398 of Law N°18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure.

that the enforcement of any other Rwandan Laws by virtue of which certain disputes may not be submitted to arbitration shall not be prejudiced, including the respect of the public policy and good morals of Rwanda[19]. Yet, there is no clear criteria of arbitrability in this law.

The code of civil procedure of 2012 came with particularity because it had a title of arbitration with only one article, which states that 'a specific law shall govern arbitration'.[20]

This provision of the 2012 code of civil procedure seems to envisage the enactment of a specific law to govern arbitration in general, not only to govern arbitration in commercial matters. Unfortunately, however, thislaw did not come into existence until the repealing of the 2012 code andits replacement by law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour, and administrative procedure. This new code did not have articles on specific law to govern arbitration.

The traceability of arbitrability in the Rwandan legal framework shows that there is still darkness on this concept. There are no defined criteriafor its determination. The next part of this article explores further issues surrounding this concept.

3.2 The Absence of Clear Criteria Applicable to Arbitrability

From both an international and national perspective, there is no clear and common standard for determining whether a given dispute is arbitrable or not.

3.2.1 A Look at International Conventions

The question of arbitrability has indeed remained undecided in the international conventions on international commercial arbitration. Thus, UNCITRAL Model Law[21] on International Commercial Arbitration contains no definition of arbitrability. On the contrary, article 1(5) provides that the Convention does not intend to affect the national laws of States under which a matter is not arbitrable. Also, the most important international convention to date, the New York Convention of 10 June 1958 on the recognition and enforcement of a foreign arbitral award, does not address the issue of arbitrability. It simply subjects it to the law of the forum in

[19] Emphasis added

[20] See art. 367 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[21] The United Nations Commission on International Trade Law (UNCITRAL) Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.

which recognition or enforcement of the award is sought and obliges states to recognize an arbitration agreement on a matter capable of settlement by arbitration.[22] Also, the European Convention on International Commercial arbitration of 21 April 1961 refers to national laws to determine exceptions to arbitration.[23]

The above-cited international legal texts do not define non-arbitrability. In other words, they do not indicate subject matters that are excluded from the arbitration process. They refer to national laws that deal with that matter.

3.2.2 A Look at Rwandan Law

The concepts of arbitrability and non-arbitrability are not well defined. In other words, there is no clear line drawn between matters that are arbitrable and those which are not arbitrable.

3.2.2.1 The Absence of a Single General Legal Text Regulating Arbitration in Rwanda

A quick look at the title of this section may attract many inquiries. However, it is not far from the truth to say that there is currently no general legal text on arbitration in Rwanda. This is not denying the existence of the Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters. It is rather confirming that arbitration is fully regulated only in commercial matters.

It was discussed in part in the background of arbitration in Rwanda that Civil Procedure Codes of 1964 and 2004 used to have a specific part on arbitration. That was a part on arbitration in general, not arbitration in a specific field. The specific law governing arbitration that was to follow the repealed code of civil procedure of 2012 did not come into existence as previously explained. Different countries have specific laws regulating arbitration in general (they are not limited to a given field):

- Uganda: The Arbitration and Conciliation Act of 2000
- Tanzania: The Arbitration Act of 2002 (Cap 15 RE 2002)
- Kenya: The Arbitration Act of 1995 as amended up to today
- Algeria: Legislative Decree No. 93-09 of 25 April 1993 amending and supplementing the Code of Civil Procedure (adding a part on arbitration)

[22] See article V of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.
[23] See article VI (2) of European Convention on International Commercial Arbitration of 21 April 1961.

- Morocco: Chapter III of Civil Procedure Code of Morocco of 28 September 1974 as amended up to today by Dahir No. 1-07-169 of 30 November 2007 relating to reform arbitration law in Morocco.
- Tunisia: Law No. 93-42 of 26 April 1993 promulgating Code of Arbitration
- United Kingdom: Arbitration Act of 1996

This indicative list of countries with law on arbitration suggests that having a general legal text regulating arbitration is the ideal solution, as this will not prevent some specific law that can come in to effect to give more details on arbitration in a given field. In his comparative study, Mr. Amazu A. Asouzu concluded that it can also be observed that some African arbitration laws do not contain any reference to 'commercial' arbitration anymore.[24]

Having a law on arbitration in commercial matters should imply that either commercial matters are the only arbitrable matters in Rwanda or that there is a need of having specific law for a field, i.e law on arbitration in civil matters, law on arbitration in sports matters, law on arbitration in employment matters, etc. However, the first hypothesis is not supported because there are other matters that can be arbitrable under specific law. It is that any disputes (not necessarily only commercial disputes) thatmay arise between the Cooperative Organization and its current or former members or the representatives of the deceased members, or between the Cooperative Organization and its debtors or creditors, or those arising out of the application of the by-laws or the activities of a Cooperative Organization, which the Board of Directors or the General Assembly of the cooperative organization cannot settle, that shall be referred to arbitrators appointed by the concerned parties.[25]

3.2.2.2 Scope of the Law on Arbitration in Commercial Matters and Arbitrability

Article 1 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters states that:

> This law determines the establishment of arbitration and conciliation procedure in commercial matters[26].

[24] See Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, 1st Ed., Cambridge University Press, Cambridge, UK, 2001, p.148

[25] Article 129 of law n° 50/2007 of 18/09/2007 determining the establishment, organization and functioning of cooperative organizations in Rwanda.

[26] Emphasis added.

> It is surprising to see that this law did not define commercial matters, and hence there is confusion as to what commercial matters are to be subjected to arbitration as provided by this law.

Under the definition given in UNCTRAL Model law, the term 'commercial' should be given a wide interpretation to ensure it will cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, and carriage of goods or passengers by air, sea, rail, or road.[27]

At the absence of definition of commercial matters in the Rwandan law on arbitration in commercial matters, it is necessary to try the law in the courts' jurisdiction[28] and see if there is a clear definition under the jurisdiction of the Commercial Court. This is because, as the name indicates, Commercial Courts should be dealing with commercial matters only.

Article 81 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts states that, subject to the provisions of Article 27, item 4°, the Commercial Court hears, in the first instance, all commercial, financial, and fiscal cases and other related matters in connection with:

1. Disputes arising from commercial contracts or commercial activities between individuals or business entities;
2. Disputes arising from the use of negotiable instruments;
3. Disputes arising from contracts between individuals and financial institutions;
4. Disputes related to liquidation, dissolution, and recovery of business firms facing bankruptcy;
5. Disputes related to insurance with the exception of those related to accident compensation claimed from insurance companies by those who have no contract with such companies;
6. Disputes related to taxes and duties;
7. Disputes related to the transportation of persons and goods;

[27] Definition of term commercial referred to in article 1 of UNCTRAL Model law
[28] Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts

8. Any dispute that may arise between persons who own or manage registered entities and other business companies, namely:

   a) members of the Board of Directors,

   b) directors,

   c) auditors,

   d) liquidators of a dissolved company,

   e) administrators of the property of a bankrupt firm;

9. Cases related to bankruptcy;

10. Disputes related to intellectual property, including trade marks and names;

11. Disputes related to registration and deregistration of business people from commercial registers;

12. Disputes related to the appointment or dismissal of auditors of firms;

13. Disputes related to business competition and consumer protection;

14. Business-related issues arising in cooperative organizations;

15. Any dispute arising from the preparation and execution of administrative contracts between public organs and the private sector on business and financial affairs;

16. Cases related to public tenders.

The task of discovering the definition of commercial matters is yet complicated by the above-reproduced provision because it is an amalgamation of commercial, financial, and fiscal cases and other related matters. There is no immediate filtering of commercial matters. Hence, it is incorrect to conclude that commercial matters referred to in laws on arbitration in commercial matters are the same as matters falling under the jurisdiction of Commercial matters.

Regarding the scope, the law on arbitration in commercial matters simply limits itself to stating that it applies to domestic and international commercial arbitration and conciliation and it excludes matters that are declared non-arbitrable under other legal texts.[29] In other words, with regards to the arbitrability of commercial matters, it is implicitly deduced that, in principle, all disputes over commercial matters are arbitrable, with exceptions where the law clearly states that a given dispute is not arbitrable.

In my opinion, there is not any inconvenience for parties to decide that their dispute can be submitted to arbitration on condition that it is not non-arbitrable *per se.* I am imagining a case wherein by X was cutting his tree and it accidently hits the empty and unfinished house of Y, and the house is destroyed. This is a tort liability case. Is there any problem if X and Y decide to recourse to an arbitrator to determine what X should pay to Y as compensation for the house and damages? In my view, nothing prohibits those parties from referring this civil case to arbitration. This point of view is supported by jurisprudence. For example, in Haas v. Gunasekaram, 2016 ONCA 744, the Ontario Court of Appeals held that tort claims do not automatically fall outside an arbitration agreement.[30]

To sum up regarding arbitration in Rwanda exclusively in the mirror of the law on arbitration in commercial matters, it is likely to be a mistake because there is no legal interdiction of arbitration of other matters.

3.3 Arbitrability in Some Foreign Jurisdictions

There are some countries whose legislations clearly indicate matters that are arbitrable and those which are excluded from the arbitration process. Hereafter there are some examples:

3.3.1 Tunisia

The Tunisian Code of arbitration has been promulgated by Law No. 93-42 of 26 April 1993[31]. Article 7 of this code states:

> No compromise:
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> - in matters relating to public order;
> - in disputes relating to nationality;
> - in disputes relating to personal status, with the exception of pecuniary disputes arising therefrom;

[29] Art. 2 Law of N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters.

[30] See Court of Appeal for Ontario, *Haas v. Gunasekaram*, 2016 ONCA 744, C61014, 13th October 2016, para 32.

[31] The official version of Tunisian legal texts is in French. The content in English is the result of the translation of the author.

- matters which cannot be compromised;
- in disputes involving State, public administrative institutions, and local authorities, with the exception of disputes arising from international economic, commercial, or financial relations, governed by the 3rd Chapter[32] of this Code.

From the above-mentioned article, it is clear that there is a distinction between objective and subjective arbitrabilty. On objective arbitrability, there is a list of matters that are non-arbitrable because of their nature; and on subjective arbitrability, it is indicated that disputes involving State and Public institutions are not arbitrable in domestic arbitration.

The existence of a list of non-arbitrable matters is a good development of the arbitration law of Tunisia. However, there are some issues that are not yet clear. For instance:

- determining if a dispute is related to public order. In fact, the most common obstacle to the arbitrability of a dispute is public order. The public order is not clearly defined. Generally speaking, one can differentiate between the general concept of public order and the issues that pertain to public order (such as exchange control, tax regulation, and customs law). The general concept of public order refers to the rules that are intended to govern life in society and aim to protect morality, economy, or safety. Any agreement which violates public order is void.[33]
- Stating that there is no possibility of compromise on matters which cannot be compromised seems to be confusing and creates unnecessary redundancy.
- It is also not clear why there is this kind of double standard when it comes to disputes involving state and public institution in domestic arbitration There is no justification for excluding state and public institutions in domestic arbitration and allow it in international arbitration.

3.3.2 Morocco

The main legal text on arbitration is Dahir No. 1-07-169 of 30 November 2007 relating to the reform of arbitration law in Morocco[34]. On arbitrability,

[32] This chapter relates to international arbitration.

[33] http://www.ghellal.com/publications/pdf/international%20arbitration.pdf accessed on 21 October 2018

[34] The official version of Moroccan legal texts is in French. The content in English is the result of

this law has to be read in conjunction with Law No. 53-95 establishing Commercial Courts in Morocco. In fact, article 308 of the law relating to arbitration states:

"…all capable persons or entities can sign an arbitration agreement on the rights they have free disposal of within the limits and according to the forms and procedures provided for in this chapter."

Notably, disputes within the jurisdiction of commercial courts under Article 5 of Law No. 53-95 establishing Commercial Courts may be subject to an arbitration agreement.

Article 5 Article 5 of Law No. 53-95 establishing Commercial Courts in Morocco states that:

> Commercial courts are competent to hear:
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> 1. Actions relating to commercial contracts;
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> 2. Actions between traders in the course of their business activities;
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> 3. Actions related to negotiable instruments;
>
> 4. Disputes between shareholders;
>
> 5. Disputes related to business
>
> Cases of traffic accidents are excluded from the jurisdiction of commercial courts.

The use of wording notably insinuates that the list of arbitrable disputes is not exhaustive, and yet the commercial nature is not the sole criteria. The main criteria of knowing whether a dispute can be subject to arbitration is that it concerns free disposal of claimed rights and that the dispute does not fall under one of the following:[35]

- disputes relating to the status and capacity of persons or personal rights that are not in commerce,
- Disputes relating to unilateral acts of the State, local authorities, or other institutions with public powers (However, the pecuniary disputes resulting from those unilateral acts can be subject to an arbitration agreement, except those concerning the application of tax law.)

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the translation of the author.

[35] See art.309 and 310 of Dahir No. 1-07-169 of 30 November 2007 relating to reform arbitration law in Morocco

Arbitration in the Moroccan context seems to be clearer on arbitrability. However, it is more oriented to commercial matters.

3.3.3 Switzerland

In Switzerland, domestic and international arbitrations are regulated in two different legal texts. Domestic arbitration is regulated by the Swiss Civil Procedure Code of 19 December 2008. International arbitration is regulated by Switzerland's Federal Code on Private International Law of 18 December 1987.[36]

On arbitrability, the Civil Procedure Code states that:[37]

> Any claim over which the parties may freely dispose may be the object of an arbitration agreement. (L'arbitrage peut avoir pour objet toute prétention qui relève de la libre disposition des parties).[38]

Whereas Switzerland's Federal Code on Private International Law provides that:

> All claims of patrimonial nature may be subject to arbitration (Toute cause de nature patrimoniale peut faire l'objet d'un arbitrage.)[39]

It is not easier to notice the resemblance between the two provisions in English. However, the French terms *libre disposition* (free disposal) and *patrimoine* refers to patrimonial rights which are characterized by the alienability and the possibility of waiving those rights.[40] To put it in other words, in principle, disputes over patrimonial rights are arbitrable whereas extra-patrimonial rights are not arbitrable. The distinction between patrimonial and extra-patrimonial rights is commonly met in the civil law system. In a nutshell, patrimonial rights, on one hand, refer to all rights which are mainly of pecuniary nature and give its holder material benefit.[41] This is to say that they have economic content and, for this reason, can be transferred. Non-patrimonial rights, on the other hand, are subjective rights, such as the right to life, the right to health, the right to corporal integrity, and family rights.[42]

[36] The official version of Switzerland legal texts is in French.

[37] Art. 354 Swiss Civil Procedure Code of 19 December 2008 as amended up to today.

[38] The official version of Switzerland legal texts is in French. I find it necessary to keep this version because its content is more understandable in French.

[39] Keeping the French version

[40] CASSIUS Jean, *Etude comparée de la réglementation de l'arbitrage international dans l'OHADA et en Suisse*, Université de Genève - DEA Droit de l'arbitrage international 2007, p.40.

[41] Those are divided into real and personal rights. Real rights (*res=thing*) are those right that are attached to things such as property ownership. Personal right refers to the right to demand that a person render a specific service or benefit. It is the case of debt.

[42] Alessandro Stasi, *Elements of Thai Civil Law*, Leiden, Netherland, 2015, p.34

> After setting the principle that all patrimonial rights are arbitrable (objective arbitrability), the Switzerland law on international private law has gone far

to point out some disputes in which if a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.[43] This clarification excludes the concept of subjective arbitrability if the other criteria of arbitrability are met.

3.3.4 France

Arbitration is mainly regulated by Articles 2059 to 2061 of the French Civil Code and Decree No. 2011-48 of 13 January 2011 on the reform of arbitration. This decree has brought changes to Book V of the Civil Procedure Code[44] and introduced a part on domestic and international arbitration. This part on arbitration is in articles 1442-1576 of the French Civil Procedure Code. Article 1442 (2) states:

> An arbitration clause is an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contract(s).

The reform of arbitration did not say too much on arbitrability except where it states[45]:

> When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.
>
> A court may not decline jurisdiction on its own motion.
>
> Any stipulation contrary to the present article shall be deemed not written.

One of the causes for an agreement to be manifestly void is subject matter which is not arbitrable *per se.* The Civil Code gives an idea of matters that are not arbitrable, i.e. arbitration agreements relating to rights of which persons do not have the free disposal, arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation, or on controversies concerning public bodies and institutions

[43] Art. 177 (2) Switzerland's Federal Code on Private International Law of 18 December 1987 as amended up to today.

[44] The official version of legal texts in France is in French. The content in English is the result of the translation of the author.

[45] Article 1448 of the French Civil Procedure Code.

and more generally in all matters in which public policy is concerned.[46]

The above-mentioned criteria of arbitrability are applicable to domestic arbitration and much has been said about them when discussing the absence of a definition of the concept of public policy (Tunisia) and the concept of free disposal of rights (Switzerland).

As a general rule set out in Article 2061 of the French Code Civil, arbitration agreements in domestic arbitration are valid in contracts concluded "by reason of a professional activity". In other words, regardless of the object of the contract (e.g. sale of goods, shareholders' agreement or partnership, etc), parties are free to arbitrate as long as the contract containing the arbitration agreement is concluded in the course of the professional activity of the parties. This means that consumer contracts are not arbitrable. It also means that the scope of arbitrability is no longer limited to commercial contracts. Disputes relating to civil contracts, as long as they are entered into for professional purposes, can also be submitted to arbitration.[47]

In France, there are some matters qualified as not arbitrable scattered in different legal texts:

- As far as domestic arbitration is concerned, the labour code of France has expressly excluded labour disputes from arbitrable disputes by stating that the Labour Court has exclusive jurisdiction, regardless of the amount of the claim, to hear disputes between employers, or their representatives, and employees. Any agreement to the contrary shall be disregarded.[48] Disputes relating to international employment contracts are arbitrable. However, only the employee can initiate such kinds of arbitration, and in case the employee decided to go to court, the employer cannot argue in defense that the matter was to be sent to arbitration.[49]

- The European Union Directives on Unfair Contract Terms Directives of 1993 lists the arbitration clause among the unfair terms when it is contained in a consumer contract.[50] The French Consumer Code

[46] Articles 2059 and 2060 of Civil Code of France

[47] Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, *Arbitration in France,* CMS Guide to Arbitration VOLUME I, 4th Ed. p.339 available at https://eguides.cmslegal.com/pdf/arbitration.pdf, visited 13th November 2018.

[48] Article L1411-4 of Law 2008-67 of 21 January 2008 ratifying Ordinance No. 2007-329 of 12 March 2007 on the Labour Code

[49] Cour de cassation (Soc.), 16 February 1999, No 90-40.643, Rev Arb, 1999, p 289 – 290 cited by Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, Arbitration in France, CMS Guide to Arbitration VOLUME I, 4th Ed. p.362 available at https://eguides.cmslegal.com/pdf/arbitration.pdf , visited 13th November 2018.

[50] Annex 1 (q) of article 3 (3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms

> has adopted the provision of these directives and stated clearly that unfair terms (including arbitration clauses in consumer contracts[51]) are deemed to be null and void.[52] Where the consumer contract can be characterised as an international consumer contract, i.e. where international trade interests are at stake, the *Cour de Cassation* has found that an arbitration provision incorporated into these contracts can be valid.[53]

The French legal position is that there is a net difference between arbitrability in domestic and international arbitrations. Restrictions on arbitrability imposed by article 2060 of the French Civil Code do not apply to international arbitration to the same extent as they do in domestic arbitration; either they are not applicable at all, or their effect is tempered. The justification of this kind of double standardisation resides in the fact that an agreement providing for submission of international disputes to arbitration in France is not necessarily governed by French law, and the law applicable to it may itself contain restrictions on arbitrability of the relevant dispute. Thus, whenever French courts are required to make decisions in this area, in support of an international arbitration taking place in France, they are bound to give effect to any such restrictions under the foreign law governing the arbitration agreement.[54]

3.3.5 Belgium

On objective arbitrability, article 1676 of Belgium Judicial Code states that:[55]

> All claims of patrimonial nature may be subject to arbitration. Extra patrimonial claims with regard to which a settlement agreement may be made may also be submitted to arbitration.

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in consumer contracts, Official Journal of the European Communities No L 95/29 of 21st April 1993.

[51] See annex 1(q): terms referred to in the third paragraph of article L. 132-1 of French Consumer Code

[52] See article L. 132-1 of French Consumer Code.

[53] See Cour de cassation (Civ. 1ere), 29 June 2007, Société PT Putrabali Adyamulia c/ Société Rena Holding et autre, Rev Arb, 2007, pp 645 – 646, Bull. 2007, I, No 250; Cour de cassation (Civ. 1ere), 23 March 1994, Société Hilmarton c/ Société OTV, Bull. 1994, I, No 104, Rev Arb, 1994, pp 327 – 328 cited by Jean de la Hosseraye, Stéphanie de Giovanni and Juliette Huard-Bourgois, Arbitration in France, CMS Guide to Arbitration VOLUME I, 4th Ed. p.361 available at https://eguides.cmslegal.com/pdf/arbitration.pdf , visited 13th November 2018.

[54] Jean-Louis Delvolvé, Jean Rouche, Gerald Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd revised edition, Kluwer Law International BV, the Netherland, 2009. p.40.

[55] Art. 1676 (1) of Belgium Judicial Code of 1967 as amended up today

On subjective arbitrability it states that:[56]

> Whosoever has the capacity or is empowered to make a settlement may conclude an arbitration agreement.
>
> Without prejudice to specific laws, public legal entities may only enter into an arbitration agreement if the objective thereof is to resolve disputes relating to an agreement. The conditions that apply to the entering into of the agreement, which constitutes the object of the arbitration, also apply to the entering into of the arbitration agreement. Moreover, public legal entities may enter into arbitration agreements on all matters defined by law or by royal decree decided by the Council of Ministers. The decree may also set forth the conditions and rules to be respected for the entering into of such an agreement.

Belgian law does not indicate an indicative list of non-arbitrable disputes. However, it specifies that the above-mentioned provisions shall apply without prejudice to the exceptions provided by law and an arbitration agreement entered into prior to any dispute that falls under the jurisdiction of the Labour Court shall be automatically null and void.[57] The literal interpretation of this exception relating to labour disputes suggests that parties can agree to submit their labour dispute to arbitration after the dispute has arisen.

3.3.6 United States of America

The notion of arbitrability is not defined by the U.S. Federal Arbitration Act. It is left to jurisprudence. Arbitrability is tested under two angles: First, the arbitrability means the parties' agreement to submit their dispute to arbitration. Second, it means that the matter can be settled by arbitration in light of existing legal restrictions. Nevertheless, the jurisprudence of the Supreme Court greatly expanded the field of arbitrability and took a clear stance in favor of arbitration. Therefore, arbitrability shall be refused only if there is an express restriction contained in federal law.[58]

Traditionally, certain kinds of claims, such as antitrust or competition law issues, securities issues, intellectual property disputes, and personal status and employment issues have been deemed as non-arbitrable matters, however this view has been eroding for the past quarter century.[59] U.S.

[56] Art. 1676 (2), idem

[57] Art. 1676 (3) of the Belgian Judicial Code of 1967 as amended up to today

[58] Tatiana Goloubtchikova- Ernst, *L'extension de l'arbitrabilité dans l'arbitrage commercial international* available on www.warvarbitration.com/pdf/Arbitrabilité_art.pdf, accessed on 31 October 2018.

[59] R. Doak Bishop King & Spalding, *Practical Guide For Drafting International Arbitration Clauses*, p.9, available on http://hoghooghi.nioc.ir/article/pdf/Practical%20Guide.pdf, visited

courts have reversed this trend by declaring most of those matters that were excluded from the scope of arbitration. It is in this regard that both antitrust and competition law issues and securities law questions have been held by courts to be arbitrable.[60]

In Mitsubishi Motors Corp. v. Soler Chrysler (1985), the U.S Supreme Court established the doctrine named Second-Look. Under this doctrine, all disputes are arbitrable, and the American judge is empowered to review the issue of arbitrability at the stage of execution. The U.S. Supreme Court has ruled:[61]

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country.

More particularly, in Mitsubishi Motors Corp. v. Soler Chrysler, the Court demonstrated that it is pro-arbitration where it ruled that:[62]

> "Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. By agreeing to arbitrate a statutory claim, a party does not give-up the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to

on 21st October 2018.

[60] See Mitsubishi Motors Corp. v. Soler Chrysler, 473 U.S. 614, 628-29 (1985); Attorney General of New Zealand v. Mobil Oil New Zealand, Ltd., [1989] 2 NZLR 64d, Scherk v. Alberto-Culver Co., 417 U.S. 506, 515, reh'g denied, 419 U.S. 885 (1974), Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477, 480 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, reh'g denied, 483 U.S. 1056 (1987).

[61] Mitsubishi v. Soler Chrysler-Plymouth 473 U.S. 614 (1985)

[62] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985). U

> preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."

From the U.S. perspective, all claims are arbitrable unless otherwise provided by the law or decided by the court with the evolution of the times.

3.3.7 China

Article 2 of Chinese arbitration law[63] states that:

> Contractual disputes and other disputes over rights and interests in property between citizens, legal persons, and other organizations that are equal subjects may be arbitrated.

This article poses the principle that all disputes are arbitrable on the condition that it be between equal subjects. The only problem is defining the equality here invoked.

This article must be read in conjunction with article 1 of China's law of arbitration, which states that:

> This Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes[64], to protect the legitimate rights and interests of the parties and to safeguard the sound development of the socialist market economy.

The purpose of China Arbitration law suggests that all arbitrable disputes have a common element of being economic disputes. However, that law did not define economic disputes.

Article 3 addresses a list of non-arbitrable disputes by stating that[65]:

The following disputes may not be arbitrated:

> (1) Marital, adoption, guardianship, support, and succession disputes;

[63] Arbitration Law of the People's Republic of China (Adopted at the Ninth Meeting of the Standing Committee of the Eighth National Peoples' Congress on August 31, 1994, promulgated by Order No.31 of the President of the People's Republic of China on August 31, 1994, and effective as of September 1, 1995).

[64] Emphasis added.

[65] Article 3 Arbitration Law of the People's Republic of China (Adopted at the Ninth Meeting of the Standing Committee of the Eighth National Peoples' Congress on August 31, 1994, promulgated by Order No.31 of the President of the People's Republic of China on August 31, 1994, and effective as of September 1, 1995).

> (2) administrative disputes that shall be handled by administrative organs as prescribed by law.

At least, the Chinese law has clearly listed disputes that are not arbitrable *per se*. This can inspire other countries, including Rwanda.

3.3.8 India

The main legal text regulating arbitration in India is the arbitration and conciliation act of 16th August 1996 (Act No. 26 of 1996). This act does not clearly define the concept of arbitrability. It refers to it where it states that:[66]

An arbitral award may be set aside by the court only if the court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

The above-mentioned article is not clear on whether to consider a matter as not arbitrable *per se*. Jurisprudence of the Supreme Court of India in Booz-Allen & Hamilton Inc. vs Sbi Home Finance Ltd. & Ors has played a great role by defining this concept and by listing matters that are not arbitrable. For good measure, allow me to reproduce paragraph 21 of this case so as to not lose its originality[67]:

> 21. The term `arbitrability' has different meanings in different contexts.
>
> The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:
>
> (i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).
>
> (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are

[66] Art. 34(2) (b) of Indian arbitration and conciliation act of 16th August 1996 as amended up to today.

[67] Supreme Court of India, Booz-Allen & Hamilton Inc. vs Sbi Home Finance Ltd. & Ors, judgment of 15 April 2011, para. 21

enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the `excepted matters excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be `arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

The first facet is of paramount importance in our analysis. The other facets are also worth notice, but the first one is likely to cause different interpretations as it relates to matters that are to be not arbitrable *per se*. Considering the first facet, the Supreme Court of India has listed the following as non-arbitrable matters *per se*[68]:

1. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

2. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

3. guardianship matters;

4. insolvency and winding up matters;

5. testamentary matters (grant of probate, letters of administration and succession certificate); and

6. eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The court has fully motivated its decision to make the above-mentioned list by stating:[69]

[68] Booz-Allen & Hamilton Inc. vs Sbi Home Finance Ltd. & Ors, para. 22
[69] Idem, para.23

> 23. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.
>
> Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right, or status, and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally, and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

This differentiation is very important, and I find it very relevant. In fact, there are cases that might involve interest beyond those of who are directly involved, such as criminal matters; the case is not between the victim and the accused only; it is the case of society and there is no justification for submitting it to a private forum.

In another case, the Supreme Court of India has added a 7th non-arbitrable matter: cases arising out of trust deeds and the Trust Act. It is in Shri Vimal Kishor Shah & Ors v Mr. Jayesh Dinesh Shah & Ors where the court stated that:[70]

> The question to be considered in this appeal is whether the disputes relating to affairs and management of the Trust including the disputes arising inter se trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal etc. are capable of being settled through arbitration by taking recourse to the provisions of the Act, if there is a clause in the Trust Deed to that effect or such disputes have to be decided under the Trust Act with the aid of forum prescribed under the said Act.

[70] Supreme Court of India, CIVIL APPELLATE JURISDICTION, CIVIL APPEAL NO.8164 OF 2016 Shri Vimal Kishor Shah & Ors v Mr. Jayesh Dinesh Shah & Ors, judgment of August 17, 2016., para. 50.

Deciding on this the court has ruled that affairs and management of the Trust are not capable of settlement through arbitration because sufficient and adequate remedy is provided under the Trust Act for deciding the disputes in relation to Trust Deeds, Trustees, and beneficiaries.[71] I was curious to look at this act and see if it really bars other forums from hearing disputes related to trusts. This act does not expressly provide for absolute jurisdiction of the Civil Court. The court has also found this issue.[72] However, the court has demonstrated the dominance of involvement of the Civil Court in the trust act and has finally decided that even if there is no clear provision on exclusivity in dealing with disputes, those disputes are not arbitrable based on the extent of involvement of the court in different aspects of the trust issues. In fact, I find this reasoning solid because the court has enormous jurisdiction in the creation of trusts, sales by trustees directed to sell within a specified time, liability for breach of trust, etc.[73]

3.4 Partial Conclusion

The comparative analysis of foreign legislation demonstrated that there are some jurisdictions which adopted the listing of non-arbitrable disputes. This is the practice that may be useful to Rwanda. However, it is not about just adopting those practices; there should be an adoption of a practice that may fit within the Rwandan context. Also, it is quite impossible to list all non-arbitrable disputes. Therefore, the best way should be addressing an indicative list on non-arbitrable disputes and give latitude to courts to decide whether a non-listed dispute may be arbitrable or not on a case by case basis.

4. WHO DECIDES ARBITRABILITY? THE COURT OR THE ARBITRAL TRIBUNAL?

There is a debate in the competent court in the first place to determine the issue of arbitrability between states' court and arbitral tribunal. There are divergent ideas on this issue. In some jurisdictions, it is in the competence of the arbitrator to decide the arbitrability, in others it is in the competence of the classic court, whereas in others it can depend on the arbitration agreement itself.

The supporters of the idea of decision by the arbitrator back their position with the principle of *kompetenz-kompetenz*. In general, *kompetenz-kompetenz* recognizes the authority of arbitral tribunals to determine their own jurisdiction. It provides arbitrators with the authority to determine

[71] See Shri Vimal Kishor Shah & Ors v Mr. Jayesh Dinesh Shah & Ors, para. 60.
[72] Idem, para. 59.
[73] See sections 4, 22, 23 of the Indian Trusts Act of 13th January 1882 as amended up to today.

their own jurisdiction to increase the efficiency of the arbitral system without judicial interference.[74] All jurisdictional decisions made by a tribunal under its *kompetenz-kompetenz* are subject to judicial review, and courts have the final word on jurisdiction.[75] The arbitrability or inarbitrability of a given matter automatically has a consequence on the competence of the arbitral tribunal. Arbitrability of the matter opens the door to the competence of the arbitrator, whereas non-arbitrability closes this door.

It is necessary to distinguish positive and negative *kompetenz-kompetenz*. The positive dimension consists of granting arbitrators the power to determine their own jurisdiction, whereas the negative dimension consists of prohibiting courts from interfering with arbitrators' *kompetenz-kompetenz* power at the outset of the arbitral process.[76] Proponents of negative *kompetenz-kompetenz* assert two primary arguments in its favor: (1) recourse to courts during arbitral proceedings permits judicial interference into what should be an autonomous process; and (2) recourse to courts before the issuance of a final award encourages delaying tactics.[77] Considering the importance of this principle (especially its negative dimension), it is recommendable to avoid unnecessary involvement in the arbitration process. This seems to be the position in France where, in a more recent *Cour de Cassation* judgment, a party contested the validity of an arbitration agreement on the grounds that the dispute was not capable of being resolved by arbitration. The Court found that this did not amount to a 'manifestly null' arbitration agreement; therefore, the ruling pertaining to validity would be exclusively for an arbitral tribunal to determine.[78]This is a consecration of *kompetenz-kompetenz* by letting the arbitrator decide on arbitrability, and then parties can challenge their decision.

UNCTRAL Model law has a provision and it was reproduced in many national texts (including Rwanda) [79]:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

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[74] George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 2012, pp.14-15.

[75] Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, Pepperdine Law Review, Volume 2014, Issue 1, Article 2, p.20.

[76] Idem

[77] Ibidem, p.21

[78] French Court of Cassation, Case No. 07-13927 judgement of 12 December 2007.

[79] Art. 8 of UNCTRAL Model law and art. 10 of Rwandan law on arbitration

This article pauses the principle that when there is arbitration agreement, the parties have to be sent to arbitration. The exception is that in case the agreement is null and void the court will not send them to arbitration. Non-arbitrability renders the arbitration agreement void and null and the above-mentioned article suggests that the court which seized a suit may proceed with deciding on the merit of the case instead of sending parties to arbitration because the non-arbitrability *per se* renders the arbitral tribunal incompetent.

The U.S. approach to who decides arbitrability is somehow different. The first option is to leave the issue of arbitrability in the hands of the court when the parties did not agree otherwise when they were signing the arbitration agreement, or in cases where the arbitration agreement is silent on the question "who decides arbitrability". The second option is to leave the issue of arbitrability to arbitrators. In fact, the U.S. Supreme Court has held that when the parties' intent to empower the arbitrator to determine arbitrability is clear and unmistakable, the arbitration agreement should be enforced.[80]

In the U.S. perspective, the short answer to the question of who decides substantive arbitrability is whomever the parties say. But if there is any doubt about the parties' intended decisionmaker or about whether an arbitration agreement applies to a particular dispute, the determination should be made by a court.[81]

The analysis of Rwandan arbitration law in commercial matters leads to the following findings:

- In light of the competence, in cases where parties agreed to submit their dispute to arbitration, it is always the arbitral tribunal which shall decide on all issues, including the issue of arbitrability. [82] In cases where the party is not satisfied with the decision, he/she can attack the award through the process of requesting the court to set aside the award.[83]

- The court can take the decision on arbitrability only when the case is requested so by any party unless the court finds that the agreement is null and void, inoperative, or incapable of being performed.[84]

[80] *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)*; *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648–649 (1986).
[81] Michael L. Moffitt, Andrea Kupfer Schneider, *Examples & Explanations for Dispute Resolution*, 3rd Ed., Wolters Kluwer Law & Business, New York, 2014, p. 221.
[82] See article 10 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters
[83] See article 47 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters

- Also, the court can determine arbitrability issues at the time of deciding the recognition or enforcement of the arbitral award, as non-arbitrability is one of the grounds for refusal of this recognition.[85]

5. ANALYSIS OF RWANDAN JURISPRUDENCE

The common questions to be considered by a court when deciding arbitrability are:

(i) Whether the disputes are covered by the arbitration agreement?

(ii) Whether the parties have referred the disputes to arbitration?

(iii) Whether the disputes are capable of adjudication and settlement by arbitration?

Among the above-mentioned questions, the last one is of paramount importance, and it merits particular attention. Unfortunately, there is not much jurisprudence on this question in the Rwandan context. There are some cases on the first two questions and only one case on the third question.

In Minani Valens vs COGEBANQUE Ltd, the Commercial Court of NYARUGENGE ruled on arbitrability by determining that there was a valid arbitration agreement and that the dispute at hand was covered by that agreement. Consequently, by application of negative *kompetenz kompetenz*, the court compelled parties to the arbitration tribunal as it was provided for in their arbitration agreement.[86]

In CREATIVE COMMUNICATIONS vs RWANDA GAMING CORPORATION, the Commercial High Court compelled the parties to go arbitration in application of their arbitration agreement. In fact, this case is more interesting because the plaintiff was advancing that the submitting of their case was due to the reason that their agreement was dated 2007, and it was before the enactment of the law on arbitration in commercial matters. Besides, the agreement was referring to institutional arbitration, whereas there was no arbitration centre. On this, the court ruled that the parties must go to arbitration in accordance with their agreement.[87] In this case, the court did

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[84] See article 10 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters

[85] See article 51 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters

[86] Commercial Court of Nyarugenge, RCom 1173/14/TC/Nyge, judgement of 05/01/2015, para. 6-9

[87] High Commercial Court of Nyarugenge N° RCOM 0327/10/HCC judgement of 10/01/2011, para. 4-7

not stick on the idea of matching arbitration with the Rwandan arbitration law in commercial matters of 2008. In fact, the court upheld the philosophy of arbitration, i.e. that of allowing parties to submit their cases to arbitration and not being closed to the scope of this law.

On the issue of knowing if disputes are capable of adjudication and settlement by arbitration, there is only one case which is related to this issue, even if the language used in the judgment does not expressly reflect this concept of arbitrability as such. It is an appeal case between the employer/appellant (PREMIER CONSULTING GROUP Ltd.) and the employee/defendant (MURENGEZI Jean Luc), and it was about a labor dispute. In this case, the appellant demonstrated that he contested the competence of the first court on the grounds that the parties had an agreement stipulating that any dispute relating to their labor contract was to be submitted to arbitration. The court of first instance rejected this objection and tried the case on merit. In the motivation, the first court ruled that there was no need for submitting the case to arbitration because the agreement was contrary to the law, the reason being that the contract provided for arbitration, whereas the labour code provided for a specific mechanism of labour dispute resolution. The court added that arbitration, which is provided for in Rwandan law, is arbitration in commercial matters.[88]

It is worth briefly commenting on this case law. In fact, the court has not clearly ruled if labour matters are not arbitrable *per se* because it has only limited its position to ruling out that the agreement was contrary to the old labour code of 2009. It could be better to clearly denote that labour matters are not arbitrable, and that could be a contribution to the development of law through well thought out case law. Yet, the court has invoked the issue of having commercial matters as the only arbitrable matters; whereas the law on arbitration in commercial matters only sets its scope, but its existence cannot imply that those are the only matters that are arbitrable in Rwanda, as we have other matters to be submitted to arbitration before taking any other step.[89] It is also necessary to analyse the wording of the invoked provision of the old labour code:[90]

> Should there be any individual labour dispute between a worker and an employer; the concerned party shall request the workers' delegate to settle it amicably.

[88] Intermediate Court of Gasabo, RSOC 0160/13/TGI/GSBO, Judgment of 10/02/2013
[89] See Law n° 50/2007 of 18/09/2007 determining the establishment, organization and functioning of cooperative organizations in Rwanda and
[90] Art.140 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda (repealed by Law N° 66/2018 of 30/08/2018 regulating labour in Rwanda)

> Where the workers' delegates fail to settle the dispute, the concerned party shall refer the matter to the Labour Inspector for an out-of-court

settlement.

When conciliation efforts fail, the dispute may be taken before the competent court.

When all the steps referred to above have not gone through, the court may declare the claim inadmissible.

On appeal, the High Court upheld the reasoning of the court of first instance.[91]

The reading of this article does not expressly indicate that courts have exclusive jurisdiction to try labour cases. In fact, the exclusive jurisdiction must be very well expressed as it bars the jurisdiction of any other adjudicator on the matters. After seeing this decision, it is worth looking out of the box and bringing another article for a comparative reading. This is article 81 of determining the jurisdiction of courts[92]:

> "Subject to the provisions of Article 27, item 40, the Commercial Court hears in the first instance all commercial, financial, and fiscal cases and other related matters in connection with…"

If one is to look at the previous article to decide that only labor courts have jurisdiction on labor matters, as the court did, and if the same appreciation could apply in respect to this article 81 of the law determining the jurisdiction of courts, then the conclusion could be that even commercial matters are not arbitrable, because this article reserves them to commercial courts as has been enacted after 2008. With this, my point of view is that the invoked article of the Rwandan labor code did not establish the exclusive jurisdiction of labor courts in individual labor disputes[93]. Hence, there is no legal restriction to have an arbitration agreement on this. However, if the court could decide on the arbitrability of labor matters with a well-motivated judgment, it would be helpful as a jurisprudential reference. A court decision would have stated the justification in the sense that individual labor disputes are not arbitrable, for example, because of public policy.

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[91] High Commercial Court,ty543 PREMIER CONSULTING GROUP Ltd (PCG) vs MURENGEZI Jean Luc **RSOCA 0045/14/HC/KIG, judgement of 10/10/2014.**

[92] Art. 81 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts.

[93] As opposed to the situation in France and Belgium where the laws clearly have stated that only labour courts are competent to try individual labour disputes. See Article L1411-4 of Law 2008-67 of 21 January 2008 ratifying Ordinance No. 2007-329 of 12 March 2007 on the Labour Code in France and Art. 1676 (1) of Belgium Judicial Code of 1967 as amended up today.

It is true that labor matters are classically not arbitrable in some jurisdictions, i.e. France and Belgium, but this is looked at as an old-fashioned philosophy.[94] In France, as a general rule, arbitration concerning individual employment contracts is prohibited. This holds true even in cases where the parties have included an arbitration agreement and a validchoice of law clause designating that foreign law applies to the entirety of the employment contract. Such a strict interpretation is seen as a public policy measure intended to protect employees who are considered to be in aweaker bargaining position compared to their employers. By giving LabourCourts the unique competency to adjudicate such matters, France can effectively safeguard its workforce.[95] This position is reinforced by French jurisprudence where the Court of Cassation has ruled that arbitration is a costly procedure that the employee cannot cope with financially.[96]

Hoverer, this philosophy has been contradicted because:

- French jurisprudence poses a double standard because it strictly bars arbitration in domestic labour disputes, and exceptionally, the Court of Cassation has recognised international arbitration in labour matters when the employee did not challenge it and when the later estimates that arbitration is in his interests.[97]

- There are exceptions with regard to some professions in which arbitration of labour disputes is recognised and is even mandatory, i.e. journalists[98] and advocates who are employed on a permanent basis.[99]

With regard to those exceptions, on one hand, one could question the non-arbitrability of labour dispute because it is quite clear how to conciliate the two. On the other hand, even if one stands for the view that arbitration can be extended to labour disputes, some exceptions may be imposed in order to guarantee equality between employer and employee. For example, it may be quite inappropriate to choose the physical seat of the arbitral

[94] There is a trend toward the abandonment of this philosophy of listing labour matters in non-arbitrable matters because of public policy.

[95] International Labor and Employment Arbitration: A French and European Perspective available at http://www.americanbar.org/content/dam/aba/events/labor_law/2012/05/international_labor_employment_law_committee_midyear_meeting/mw2012int_arbitration_tarasew.authcheckdam.pdf accessed on 05 November 2018.

[96] Cass. soc., 30 novembre 2011, n° 11-12.905 FS-PB

[97] *Cass. soc., 16 février 1999, n° 96-40.643*

[98] Law of 29 March 1935 on the professional status of journalists in France as amended up to today

[99] Art. 7 Act 71-1130 of 31 December 1971 reforming certain judicial and legal professions in France as amended up to today.

tribunal in Asia for an employer who is in Rwanda and whose salary cannot cover the cost of the flight. There are even different legislations that prefer

arbitration in labour matters rather than privileging courts. That is the case of South Africa, where there is even the incorporation of a Commission for Conciliation Mediation and Arbitration in the legal text.[100]

The analysis of Rwandan jurisprudence has revealed that generally, Rwandan courts are pro kompetenz kompetenz principle. They have referred parties to arbitration in accordance with their agreement. The case on arbitrability of labour matters has many issues as it did not clearly indicate if those disputes are non-arbitrable with a well thought motivation.

6. CONCLUSION AND RECOMMENDATIONS

A brief analysis made in this work has discovered that Rwandan legislation is silent on the list of matters that are not arbitrable. There is a law on arbitration in commercial matters. One of the challenges of this law is the absence of the definition of the term commercial matter, and it may create confusion in the application. The existence of this law does not mean that commercial matters are the only matters that are arbitrable. It is regrettable that the Rwandan Code of Civil Procedure of 2012 has stated that arbitration shall be governed by the specific law of arbitration, and till the enactment of the new code of civil procedure of 2018 this implementing law has not been enacted (the law on arbitration, not the law on arbitration in commercial matters!).

The analysis of some foreign jurisdictions has demonstrated that the issue of arbitrability is treated differently. In some countries, the law clearly defines matters that are excluded in the scope of arbitration (China, Switzerland, Morocco, etc) whereas in others it is silent like it is in Rwanda (France, United States of America, etc). The Indian Supreme Court has listed seven matters which are not capable of being settled through arbitration and this is a good initiative.

As way forward, the following solutions to the problems and challenges discussed in this work are proposed:

- There is a need of having a law governing arbitration in general.
- The law governing arbitration in general should clearly define matters which are not arbitrable and make an indicative list of those matters. The list does not have to be exhaustive, but with flexibility

[100] Labour relations act 66 of 1995 of South Africa as amended up to today (Gazette No. 16861, Notice No. 1877, dated 13 December 1995)

given to the Court (preferably the Supreme Court) which can be given the task of deciding on new matters that can be added to the list from time to time.

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