

# UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Dispute Settlement

### International Commercial Arbitration

#### 5.5 Law Governing the Merits of the Dispute



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## NOTE

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## WHAT YOU WILL LEARN

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In the great majority of cases in which an international arbitration takes place, the arbitrator (or arbitrators) finds himself faced with a legal situation of an international nature. Even if the international character of the arbitration and that of the legal relationship on the merits often go together, the two questions need to be distinguished from each other.

The attention of the arbitrator will be unavoidably drawn to the question each time that the parties expressly request him to decide the question of the applicable law. For this reason, the parties can demand that the arbitrators decide this question by means of a partial award rendered at the outset of the procedure.

However, even when not faced with such a demand, the arbitrator must take a position on this point. The law applicable to the merits of the dispute will affect the approach of the arbitral tribunal to a significant degree. This must be carefully distinguished from the rules of law applicable to the procedure. In this way, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration deals with the determination of procedural rules. A different provision, Article 28 of the same Model Law, is devoted to the law governing the merits of the dispute.

The determination of the rules of law applicable to the merits of the dispute can be very simple to resolve in some cases, but a very complex matter in others. Arbitrators must, therefore, have an excellent knowledge and understanding of the principles which will enable them to perform as well as possible this sometimes delicate aspect of their task.

That is why the present chapter begins with a short explanation of the way in which the legal rules to be applied by the arbitrator are determined. That will be the subject of Part 1. Part 2 considers the basic rule, which is that of party autonomy. The arbitrator is required, whenever the issue arises, to give effect to the will of the parties concerning the applicable law.

Part 3 will consider the situation of the arbitrator deciding on the law applicable to the merits of the dispute where he cannot rely on any indications from the parties as to their intentions. In such circumstances, it is important to determine the principles that will guide the arbitrator in his choice of the applicable rules of law.

Part 4 is devoted to the specific role that may be played in all these situations by the provisions of the contract and trade usages.

Finally, Part 5 deals with the question of the application by the arbitrator of international public policy and mandatory rules of law, which must be applied even if the rules of law applicable to the merits of the dispute are determined on the basis of other considerations.



# 1. THE PRINCIPLES TO BE APPLIED BY THE ARBITRATOR IN THE DETERMINATION OF THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE

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## 1.1 Lex Arbitri

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Notwithstanding the many theories concerning the role of the arbitrator, which will not be reviewed in this paper, there is widespread consensus on one point: the international commercial arbitrator does not do justice in the name of any State. As a result, and unlike a national judge, the arbitrator does not have a *lex fori*, and therefore is not bound to apply any national system of conflict of laws rules.

Consequently, and to provide an example, the establishment of the seat of an arbitral tribunal in Switzerland or in France does not mean that the arbitrator will be required to apply the conflicts of law rules in force in Switzerland or in France. However, even though arbitrators do not have a *lex fori*, they are subject to a *lex arbitri*.

So, an arbitrator sitting in Switzerland or in France will be required to apply the legal rules governing international arbitration in force in that country. In contrast to national conflicts of law rules mentioned above, which apply to national judges, the rules of international commercial arbitration, the *lex arbitri*, apply to international commercial arbitrators. It is therefore in the applicable arbitration law that the arbitrator will seek the rules to be applied to the determination of the law applicable to the merits of the dispute.

## 1.2 Lex Arbitri and Institutional Arbitration

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One must also take into account the fact that in numerous cases, the parties decide to entrust the resolution of their dispute to an arbitration institution whose rules they have agreed to follow. In such cases, the arbitration rules of the institution must be applied by the arbitrators as reflecting the parties' intentions.

Consider as an example the case of a dispute between a Swiss party resident in Switzerland and a Spanish party resident in Spain, the parties having expressed their agreement to ICC arbitration, by means of an arbitration clause in their contract, with Geneva as the seat of arbitration. This arbitration would be governed by the Swiss law on international arbitration (Article 176 of the Swiss P.I.L Act of 18 December 1987), which functions as the *lex arbitri*. It would give full effect to the ICC Rules of Arbitration chosen by the parties in this example.

All arbitration rules used in international trade are designed to give effect to the wishes of the parties.

However, since the arbitration rules are only applicable by virtue of their selection by the parties, the latter – by making such a choice – are exercising the power to choose the applicable law within the constraints provided for by the institution’s rules. This power, though, is itself derived from the *lex arbitri*. The UNCITRAL Arbitration Rules are of particular importance in this regard.

**Article 33(1),  
UNCITRAL Arbitration  
Rules**

*“The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute...”*

In the end, arbitrators must remember that they are required to refer to the *lex arbitri* – which defines the framework within which they have to work – in order to come up with the solutions that are provided for them on the question of the applicable law. The formulation of the legal rules on the applicable law must not be allowed to mislead us: even though they appear to be addressed principally to the parties, they are in fact aimed at the arbitrators.

Since in general the provisions of the *lex arbitri* are suppletive, the parties, or in the end the arbitrators, can amend or derogate from them. So, when parties have decided to have recourse to international arbitration, the provisions of the arbitration rules of the institution they have chosen will become applicable from the point of view of the *lex arbitri*. The *lex arbitri* does not usually take away from the parties the option of organising their arbitration as they wish.

### 1.3 The Lex Arbitri and the Rules for Determining the law Applicable to the Merits of the Dispute

The *lex arbitri* therefore includes, in one form or another, the principal of autonomy, which allows the parties to choose the applicable law.

However, the *lex arbitri* (or the arbitration rules chosen by the parties to which the *lex arbitri* gives effect) also includes rules for the determination of the law applicable to the merits of the dispute when the parties have not made any choice in this respect.

Consequently, an arbitrator sitting in Switzerland is subject to chapter XII of the Swiss P.I.L Act as the *lex arbitri* and must observe Article 187 of that law.

**Article 187 of the  
Swiss P.I.L. Act**

1. *The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.*
2. *The parties may authorize the arbitral tribunal to decide ex aequo et bono.*

Whatever the origin of the rules to be applied by the arbitrator, when the parties have not designated the applicable law, we will see below (infra, Part 2) that these rules are not restrictive. They usually give the arbitrators broad discretionary powers in the determination of the applicable law, while providing guidance on the process involved in this intellectual task.

### Summary:

**Arbitrators are not required to apply the conflicts of law rules of the country of the seat of arbitration. The lex arbitri provides them with principles to help them decide the law applicable to the merits of the dispute. These rules, generally supplementary, allow arbitrators in institutional arbitration proceedings to apply the rules contained in the institutional rules. Part 2 will give an idea of the central role played by the principle of party autonomy.**



## 2. DETERMINATION OF THE RULES OF LAW APPLICABLE TO THE MERITS OF THE DISPUTE ON THE BASIS OF THE INTENTION OF THE PARTIES.

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When called upon to determine the rules of law applicable to the merits of a dispute, international commercial arbitrators encounter, in the vast majority of cases, clauses by which the parties declare their intentions concerning the law applicable to the contract or to the merits of the dispute. These clauses can provide great assistance to arbitrators in the performance of their duties. However, they can also cause great problems. This Part contains an overview of the principal questions that an arbitrator must consider when faced with this problem, and the generally accepted principal elements used to solve the problem.

### 2.1 The arbitrator is required to give effect to the intention of the parties.

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#### 2.1.1 *The basis of the rule*

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The UNCITRAL Model Law on International Commercial Arbitration, adopted by the United National Commission on International Trade Law, which has inspired numerous national arbitration laws, provides in its Article 28(1) :

**Article 28(1) of the  
UNCITRAL Model Law  
on International  
Commercial Arbitration**

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*“The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”*

The European Convention on International Commercial Arbitration of 21 April 1961, also called the Geneva Convention, includes an Article VII whose first paragraph states:

**Article VII, European  
Convention on  
International  
Commercial  
Arbitration**

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*“The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute ...”*

The same rule is found in Article 42 of the Washington Convention of 18 March 1965 (which created ICSID).

The Institute of International Law adopted during its session at St Jacques de Compostelle on 12 September 1989 a resolution which also concerns the role of party autonomy in arbitration between States or State entities and foreign enterprises.

**Article 6, ILC  
Resolution of 12  
September 1989, St  
Jacques de  
Compostelle**

*“The parties have full autonomy to determine the (...) substantive rules and principles that are to apply in the arbitration. ...”*

All national commercial arbitration statutes that contain a provision on this subject reproduce this rule with few variations.

**Article 15, OHADA  
Uniform Act on  
Arbitration 11/3/99**

*“The arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties or, in the absence of such a choice, according to those chosen by them as the most appropriate taking into account, where necessary, the international trade usages. ...”*

The arbitration rules that the parties may select use the same approach. To Article 33 of the UNCITRAL Arbitration Rules, mentioned above, can be added Article 17 of the 1998 ICC Arbitration Rules.

**Article 17.1 of the ICC  
Arbitration Rules**

*“The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. ...”*

The arbitrators are thus bound to apply to the merits of the dispute the rules of law chosen by the parties. This is a general rule of international arbitration law. This rule is not surprising in that most disputes submitted to arbitration are problems involving contractual matters, and the choice of the law applicable to the contract traditionally depends on the choice of the parties. The justification for this solution is reinforced by the influence of the parties' intentions in arbitration generally.

It is nonetheless true that the New York Convention of 1958 does not consider the application by the arbitral tribunal of rules of law different from those indicated by the parties to the merits of the dispute, as a ground for refusing enforcement of the award. However, it is difficult to see what reason a tribunal would have to overlook the intention of the parties on this point. Moreover, the New York Convention is not applied to every situation, even by Contracting States. Furthermore, the failure to observe the parties' intention concerning the applicable law can be dealt with by the setting aside of the award whenever the arbitration law whose rules are applicable for annulment purposes includes the failure to observe the scope of the arbitrators' task as one of the grounds for setting aside awards.

**Article 26, OHADA  
Uniform Act for  
Arbitration**

*“Recourse for nullity is only admissible in the following cases : (...) - if the arbitral Tribunal has settled without conforming to the assignment it has been conferred [sic];”*

### 2.1.2 The Meaning of the Rule

It follows from the texts just quoted that the freedom of the parties is not limited to the choice of the law of a State, as is often the case when a dispute is brought before a national court. The use of the expression “rules of law” in the UNCITRAL Model Law and the national laws that have followed it is generally interpreted as signifying that the contract must be subjected to some rules of law, but that these rules do not necessarily have to be part of a particular legal system or take the form of a national law.

The “lex mercatoria” is often presented as a body of rules of transnational law applicable in particular to international commercial contracts. Of recent origin, the “UNIDROIT Principles for International Commercial Contracts”, put together by a select group of independent specialists under the auspices of UNIDROIT, have the aim of providing a coherent set of rules, distinct from the law of individual States, providing proven solutions for international contracts.

The resort to arbitration enables full effect to be given to the parties’ decision to apply such rules. True, they do not enjoy the full recognition that States grant automatically to the national laws and rules of foreign States. But this recognition has already been received in certain countries where the courts have refused to set aside arbitral awards that were based on transnational rules or lex mercatoria.

In addition, an important resolution of the International Law Association (I.L.A.) adopts the following solution:

**International Law  
Association - Cairo  
1992**

*“The fact that an international arbitrator bases an award on transnational rules (general principles of law, common legal principles, international law, trade usages etc ...) rather than the law of a given State, should not, by itself, affect the validity or the enforceable character of the award (...) when the parties are in agreement that the arbitrator is to apply transnational legal rules.”*

The principle whereby the arbitrators are required to give effect to the wishes of the parties being clear now, it falls to the arbitrators to discover what that intention is.

## 2.2 The ways in which the arbitrator becomes aware of the parties’ intention

Practical experience shows that the wishes of the parties concerning the law applicable to the merits of the dispute can be expressed in three distinct ways.

### ***2.2.1 Choice of Law Clause in the Contract***

This situation is undoubtedly the most common. The contract in dispute contains a choice of law clause by which the parties have designated the law applicable to their contract. The chosen *lex contractus* is thus known to the parties from the time of conclusion of the contract. Of course, the parties can in some cases delay or modify this choice (cf: Article 3 of the Rome Convention of 19 June 1980 on Contractual Obligations). But in the absence of such a modification, the arbitrator has no reason to declare applicable any law other than the one governing the contract by virtue of the clause contained in it from the time of its conclusion. At the same time, any modification of this choice would also have to be observed.

### ***2.2.2 Arbitration Agreement***

The arbitration agreement can take the form of an arbitration clause in the contract or an agreement to submit an existing dispute to arbitration. In either case, the parties will have the right to establish the framework for their arbitration.

From this perspective, the parties can agree on the nature of the rules of law that the arbitral tribunal will have to apply to the merits of the dispute. The application of such rules thus becomes, in the clearest way, an element which the arbitrators must take into account in carrying out their function.

### ***2.2.3 Terms of Reference, Written Submission of the Parties***

It also happens that the common intent of the parties concerning the choice of the law applicable to the merits of the dispute is expressed after the arbitration has commenced, unlike the two situations previously mentioned.

In some cases, the arbitration rules to which the parties have referred, such as, for example, the ICC Arbitration Rules, provide for the preparation of Terms of Reference (Article 18 the ICC Arbitration Rules). Terms of Reference are drafted by the arbitrators or sole arbitrator, after consultation with the parties. At this stage, the parties can express their wishes as to the law applicable to the merits of the dispute. The arbitrators may not disregard this expression of the parties' intention.

It can also happen that the common intention of the parties emerges from their exchange of written submissions during the course of the proceedings. It is not unusual to find in arbitral awards that the determination of the law applicable to the merits of the dispute has been made on the basis of agreement discerned from concordant statements contained in the written submissions of the parties. Agreement between the parties on the applicable law obtained during the course of the proceedings is no less indicative of their intention than an arbitration clause or an agreement to submit an existing dispute. Its lateness does not reduce the compulsion it imposes on the arbitrators with respect to the applicable rules of law.

Whatever the means by which the will of the parties is demonstrated to them, arbitrators must give effect to it, and therefore interpret it.

## 2.3 Interpretation of the will of the parties

Unfortunately, it would be illusory to think that recourse to the principle of party autonomy disposes of all the problems faced by arbitrators in determining the law applicable to the merits of the dispute. When the parties express themselves on this point, they do not always do so very clearly. When there is no express provision, the question of an implied choice always has to be considered.

### 2.3.1 *Interpretation of the Will of the Parties in the Presence of an Express Choice of Law*

The form in which the will of the parties is expressed makes no difference. Interpreting the choice of the parties can be a task for the arbitrators which varies considerably in its difficulty. We will begin by looking at clauses which appear from time-to-time in contracts or arbitration agreements.

The simplest clause, and undoubtedly the most common, is that by which the parties designate a national law. The parties are at complete liberty to select a law having no connection with their contract. In this way, parties can stipulate that their contract will be governed by Lebanese or German law. In such cases, the *lex contractus* will be the laws of Lebanon or Germany. Such laws will then be applied to most of the questions for which it is usual in private international law to apply the *lex contractus*. It should be noted that party capacity, as a general rule, is governed by the personal law of the party and not the *lex contractus*.

It is possible for the parties to consider that the provisions of their contract should take priority over those of the applicable law, or that the law chosen by them will only apply in the absence of a specific contractual provision. An international commercial arbitrator can give effect to such a stipulation because he is not required to apply systematically to an international contract all of the rules of the legal system governing the contract, but only specific rules of law.

However, if particular contractual provisions are to be excluded from the law chosen by the parties, those provisions will not be governed by any law. Although the question is controversial, it seems preferable to allow the arbitrator to apply legal rules to the whole contract. He can anyway choose to apply rules to the contractual provisions in question other than those which the parties wanted to exclude. He can even refuse to follow the will of the parties on this point if he can put forward convincing reasons for doing so. In any event, the arbitrator must not lose sight of international public policy or mandatory rules of law (cf. *infra* Part 5).

In the same way, the will of the parties must be observed when the applicable law clause refers only to particular aspects of a national law, such as those concerning force majeure or seller's guarantees. However, the problem of the law applicable to the merits of the dispute remains. The arbitrator can be tempted to interpret a reference to that law as a global reference, or to determine the law applicable to the contract on some other basis.

Parties can also stipulate in a contract term or an arbitration agreement that their contract is to be governed by the provisions of an international convention, such as the Vienna Convention on the International Sale of Goods even if the Convention is not in force in any relevant state. The Vienna Convention does not mention the will of the parties as a basis for its application. Furthermore, it cannot be assimilated to a *lex contractus*, and not just because of important questions it does not cover (validity, transfer of ownership ...). The arbitrator, unlike a judge, is not inhibited by these difficulties. Not being the organ of a State, he is not required to give effect to the conditions relating to the entry into force and application of the Convention as would a judge of a particular country. The arbitrator cannot be constrained by the fact that the Convention applied in this way, without the support of the law of a State, does not constitute a true *lex contractus*. It is sufficient that the Convention's rules be designated by the parties.

It also occurs that the applicable law clause designates non-State rules such as *lex mercatoria*, or "the general principles of international commercial law", or "the UNIDROIT Principles for International Commercial Contracts". Here again, the arbitrator must not hesitate to give effect to such clauses. As a matter of principle, the need to follow the wishes expressed by the parties should prevail over the concerns that an arbitrator might have about whether the award could be annulled on that basis. The arbitrator must be aware that the award he will render will not be under threat because of his application of non-State rules, at least not when the parties have expressly agreed to this. The award can only be set aside if the rules applied, whatever their origin, or the substantive provisions of the contract, are declared contrary to international public policy by the judge reviewing the content of the award.

Leaving aside these questions of principle, though, clauses which designate non-State rules (apart from easily-identified international conventions) are sometimes difficult to interpret by reason of their extreme vagueness or breadth.

The same is true of complex clauses which involve a combination of rules of different origins. While such clauses are often encountered in State contracts, they are also found in contracts between private parties. In such cases, the reference to international law, or principles of international law (i.e. public international law) is generally absent, or if stated, is not always followed to the letter by arbitrators.

References to the law of a State are conceptually straightforward and normally clearly stated. By contrast, complex and vague statements generally express

the desire of the parties to exclude certain or all national laws. They cannot really be understood as a reference to transnational principles or *lex mercatoria*. It is difficult to see on what basis public international law could be applied to individuals.

Such complex choice of law clauses constitute an expression of the parties' intentions that arbitrators have to interpret. Is it possible, though, for arbitrators to take into consideration an implied choice of law ?

### **2.3.2**     *The Implied Choice of the Parties*

It follows from the preceding discussion that the arbitrator faced with an applicable law clause included in the contract, the arbitration agreement, or even something done during the course of the arbitration, has no choice but to give effect to that clause. One of the strongest arguments in favour of this view is that the legitimate expectations of the parties are that the arbitrator will respect the terms of the parties' agreement.

There are consequently strong reasons why the arbitrator should be inspired by the same approach even when the parties have not expressly indicated their view on the applicable law. On that basis, it is necessary, before seeking an objective perspective on the applicable law, to try to find the implied intentions of the parties with respect to this question.

The principal texts on international arbitration are silent on this possibility. They content themselves by contrasting, **in a fairly summary fashion**, the expressed will of the parties with the situation where there is an absence of such an expression, and say nothing about implied intention.

The spirit of international arbitration, as well as that of international contract law, supports a degree of flexibility in the application of this distinction (cf: Article 4.1 of the Rome Convention of 19 June 1980 on Contractual Obligations). Consequently, it does not seem unreasonable for arbitrators to take into account the implied wishes of the parties.

Unfortunately, the concept of an implied intention can be understood in a number of different ways, none of which is definitely correct. A strict approach does not permit an implied intention to be deduced from anything other than the contract itself or the conduct of the parties. Thus, an agreement referring to, or reproducing a standard-form contract, itself usually governed by a particular national law, can be considered as containing an implied choice of that particular law. Also, a contract repeatedly referring to a certain national law could provide in this way an indication of an implied intention of the parties to have their contract governed by that law.

On a less strict view, implied intention can be inferred from all the elements of the contract which, depending as they do on the will of the parties, establish a kind of link desired by the parties between the contract and the rules of a

particular legal system. In such a case, account can be taken of specific elements of the contract, as in the first hypothesis, a passing reference to a given law, or a standard-form contract or extrinsic elements such as the place of performance, the main feature of the contract if there is one, or the domicile or place of incorporation of the parties. There is no doubt that the extraneous elements, just referred to, do not express, as such, the wish of the parties to refer to the rules of a given legal system, but they nonetheless depend on the will of the parties. The parties will not find their plans or expectations disrupted if the arbitrator takes into account the close links that they themselves have created between their contract and a given legal system.

Given that the rules which apply to the determination of the law applicable to the merits of the dispute in international commercial arbitration are generally silent on the question of implied choice of law, it is inevitable that they do not contain any clarification concerning the elements to be taken into account by the arbitrator in identifying the presence or absence of any implied intention.

In summary, the arbitrator is at liberty to seek out or not the implied wishes of the parties. The availability of this option suggests that it should be used. The arbitrator is also free, if he decides to undertake the search, to decide how to go about determining the existence or otherwise of an implied intention.

However, it is preferable for an arbitrator not to disguise the objective connecting elements as evidence of an implied intention. Since all texts on the law applicable to the merits of the dispute give the arbitrator the power to determine the applicable law without establishing the wishes of the parties, it is unnecessary to resort to fictitious intentions. Recognition of the implied wishes of the parties is justified above all else to avoid a formal approach to the choice of applicable law that is not required by any of the rules. This forces arbitrators to accept sometimes that the parties have not designated the law applicable to the merits of the dispute.

## **2.4 Amiable Composition.**

### **2.4.1 The concept of Amiable Composition**

Amiable composition entitles the arbitrator not to be bound by any process of strict legal reasoning – of which the rules of law and the contract are the principal points of reference – if the requirements of equity call for a different solution.

The right to act as an amiable compositeur cannot be presumed and must result from an express authorisation by the parties.

When that is the case, amiable composition is not incompatible with the application by the arbitrator of rules of law. But the arbitrator derives from his powers as amiable compositeur the right to ignore a legal rule if it would otherwise lead to a result contrary to equity. This means that he can perfectly well apply a rule of law without resorting to his powers as an amiable compositeur. He must, though, satisfy himself of the compatibility of the resulting solution with equity. Otherwise he has not have performed the task the parties expected of him. Amiable composition is as much a responsibility as a power.

The arbitrator also derives from amiable composition a power to modify the contract. From this point of view, amiable composition has as its foundation “the waiver by the parties of the right to rely on the benefits given to them by the contract”. Equity thus enables the arbitrator to reduce the excessive consequences that may flow from a strict application of the agreement. The arbitrator can even openly ignore certain contractual stipulations: for example excluding the charging of interest at bank rates provided for in the agreement or awarding an indemnity on the termination of a contract even though the contract expressly provides for no payment in such circumstances.

#### ***2.4.2 Amiable Composition and Equity***

In certain legal systems, one finds references to “equity” rather than amiable composition. Parties often use one formula or the other without fully understanding the possible differences. An equitable (or ex aequo et bono) clause must be understood as wider in scope. According to various writers, equity must be understood as “a decision taken on the specific facts of the case without regard to any prescribed general rules, even mandatory ones.”

Amiable composition implies a resort to rules, whereas ex aequo et bono involves ignoring them entirely. Either way, neither an amiable composition nor an ex aequo et bono clause can be assimilated in any sense to a choice by the parties of non-state rules.

Finally, the presence in a contract of an ex aequo et bono or amiable composition clause does not relieve the arbitrator of the need to take into account international public policy (cf: infra Part 5).

#### **Summary:**

**Arbitrators must always look carefully at clauses that provide for amiable composition. If such a power has been conferred on them, it does not exclude the application of legal rules. It merely requires the verification of their compatibility with the requirements of equity.**



### 3. DETERMINATION OF THE RULES OF LAW APPLICABLE TO THE MERITS OF THE DISPUTE IN THE ABSENCE OF A CHOICE MADE BY THE PARTIES

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The approach of respecting the wishes of the parties concerning the law applicable to the merits of the dispute has necessarily some limits. Where the parties have not chosen the applicable law, even implicitly, it is for the arbitrators to make this decision themselves. One constantly finds this rule in the principal international texts governing international arbitration and numerous national laws that contain a provision on this question. Since the arbitrator is involved in determining the law applicable to an international dispute, his first instinct is to look towards the conflict of laws approach. However, he can also use the direct method.

#### 3.1 Determination of the Rules of Law Applicable to the Merits of the Dispute by the Conflicts of Law Method

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The time has now passed since the Institute of International Law wanted to require international commercial arbitrators to apply the conflicts of law rules in force in the country of the seat of the arbitration (Resolution of Amsterdam, 1957). The idea that international commercial arbitrators do not have a *lex fori* comparable to judges is well on its way to universal acceptance. The choice of the seat of the arbitral tribunal, made for reasons of mere convenience or neutrality with respect to the parties, does not imply in the least that the arbitrators are obliged to apply the rules of conflict of laws of that country.

The UNCITRAL Model Law, repeating the same provision found in its own Arbitration Rules of 1976, demonstrates very clearly the evolution that has taken place.

**Article 28(2) of the  
UNCITRAL Model Law**

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*“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”*

The arbitrators are free to choose the conflict rule or rules to apply. Deprived of any mandatory element in this respect, conflict of law rules become here, in the hands of arbitrators, more tools of legal reasoning than a source of restrictions.

In practice, arbitrators can favour two different approaches.

In the first, the arbitrators may consider the points of contact that the case has with different States in order to eliminate the conflict of law rules of countries without links, or with only very tenuous links, and retain those with substantial

connections to the case. This process can leave the arbitrators with the conflict rules of only one country: for example, that of the place of performance of the principal feature of the contract, or that of the habitual residence or place of incorporation of a party, combined perhaps with another element such as the place of signature or performance of the contract.

However, in most cases, significant links exist with several States and the arbitrators can take into account the conflict rules in force in those different places. They may then look to see whether these rules would produce the same solution, in which case they duly adopt it.

So, in certain circumstances, the conflict rules of two different States may lead to the application of the laws of the place of habitual residence or the place of incorporation. In another example, a contract may have been concluded in the country where it is to be performed, which is not the place of incorporation of the parties. If the conflict rules of State A provide for the place of signature of the contract as a connecting factor and the conflict rules of State B provide for the place of performance, these rules are different but they lead to the same result. The arbitrator will apply the law designated by these different conflict rules.

However, the arbitrators can adopt a different approach. They can decide to leave aside the specific conflict of laws rules of those States with a connection to the case and refer to general principles of private international law or to conflict rules taken from a review of the private international laws of several countries.

Thus the rule “*locus regit actum*” is of such widespread application with respect to the formal requirements for legal acts that an arbitrator could easily decide to apply this conflicts rule as a general principle of private international law without referring to the laws of any particular State. However, there are not many conflict rules that can be said to have acquired this status of generally accepted principle. It is, therefore, not surprising that arbitrators increasingly recognise the advantages of the “direct method”.

## **3.2 Determination of the Rules of Law Applicable to the Merits of the Dispute by the Direct Method**

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### ***3.2.1 Admissibility of Resort to the Direct Method***

The direct method was not included in either the UNCITRAL Model Law or the 1961 Geneva Convention. However, international conventions place very few restrictions on arbitrators in this area.

Article VII of the Geneva Convention is only a default provision and it is always possible for the parties to require the arbitrators to apply a different rule on the applicable law. This comes about each time that they choose to subject their arbitration to a more liberal set of arbitration rules.

As for the UNCITRAL Model Law, it entitles adopting States to modify or to exclude its provisions as much as they like when enacting their own arbitration legislation. Many recent statutes on international arbitration have abandoned the relatively rigid approaches to the determination of the law applicable to the merits of the dispute by the arbitrators, which are contained in the Model Law and the Geneva Convention.

**Section 28 of the Indian Arbitration and Conciliation Act, 1996, based on the UNCITRAL Model Law but modifying the question treated in Article 28-b-iii**

*“-Rules applicable to the substance of the dispute-*

*(1) Where the place of arbitration is situated in India (...)*

*(b) in international commercial arbitration,-*

- (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;*
- (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not its conflict of law rules*
- (iii) failing any designation of the law under sub-clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.”*

On the other hand, the direct method appears in the new ICC Rules of Arbitration and this has the effect of expanding considerably the scope of application of this method.

*...In the absence (ICC Rules Article 17.1) of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*

### **3.2.2 Meaning of Recourse to the Direct Method**

The direct method gives the arbitrator maximum freedom. It does not stop him from using a conflict-of-laws-based approach. The arbitrator may consider that the applicable rules should be those of the State with which the contract is most closely connected, and determine this freely without reference to any pre-established conflicts rule. This is, in one sense, a use of the direct method.

The direct method, though, does not prevent the arbitrator from using a conflicts analysis. It also gives the arbitrator a great deal of freedom to search for appropriate rules. These rules may be those of a legal system with a very close connection to the contract just as much as rules whose nature or substance render them particularly appropriate to be applied to the disputed contract. On that basis, the arbitrator could consider as most appropriate the rules of a legal system which recognises and contains specific rules on the type of contract in question, rather than a system that does not (e.g. in the case of a franchising contract, or a trust). Likewise, he could consider more suitable rules that enforce the contract rather than make it null and void. However, recourse to

the direct method raises certain specific questions on the selection of non-State rules.

### **3.2.3     *The Direct Method and Designation of Non-State Rules of law***

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When the international arbitrator resorts to the direct method, he can apply the laws of a State or non-State rules to the dispute.

However, in the absence of a choice by the parties, the arbitrator may hesitate before rejecting the application of a national law in favour of the *lex mercatoria* or other more or less similar rules. On which elements should he base his decision?

On this point, an analysis of ICC arbitral awards is instructive. The debate on this point has been modified and enlivened somewhat by the appearance and discussion in academic and arbitration circles of the UNIDROIT Principles for International Commercial Contracts.

One cannot approve the fortunately rare awards which apply *lex mercatoria* or the UNIDROIT Principles without giving any reasons for doing so.

It is equally difficult not to have reservations about awards which justify the exclusion of any national law on the basis of the difficulty, or even impossibility, of determining the applicable law because the contract is linked to several legal systems. Is this not the whole point of having conflict of laws rules? However, this solution could be understandable where the conflicts rule would lead to the designation of a law whose application would come as a great surprise to the parties.

It is surprising that arbitrators can be tempted to justify their choice of the UNIDROIT Principles (or other non-State rules) by the absence of choice of law by the parties. There is no fundamental, a priori reason for arbitrators to try to give effect to a negative choice. All too often, arbitrators conclude from the absence of any choice of law that the parties intended to exclude all national laws.

However, a negative choice is not always easy to interpret. First of all, care must be taken not to confuse the absence of choice with a negative choice. A negative choice requires at a minimum that in their submissions or the Terms of Reference, the parties advance arguments against the application of certain national laws or demonstrate an unwillingness to have any municipal law applied to the case.

A negative choice must not be confused with total disagreement on the applicable law. It is not possible to conclude from that fact that each party has excluded the national laws of the other party, or its own national laws, or that the parties have declared their opposition to the application of any national law. Some additional elements appear to be necessary.

It is noticeable that a negative choice occurs most frequently in State contracts. This can be dictated by each party's wish to exclude the application of the other party's law.

Subject to these reservations, the concept of a negative choice remains something worth considering for arbitrators.

Nevertheless, one would prefer a set of objective criteria to support or reinforce a negative choice that could reveal that the *lex mercatoria* or UNIDROIT Principles were particularly appropriate for the resolution of the merits of the dispute.

This would be the case where the arbitrators consider that no decisive element tips the balance in favour of one law rather than another.

It would also be the case where the arbitral tribunal needs to fill a gap in an international treaty, such as the Vienna Convention, or in an otherwise applicable national law, and the available non-State rules provide a solution to the question.

It also happens that arbitrators, even though they have decided to apply to the merits of the dispute the provisions of a national law or the common elements of several national laws, rely on the UNIDROIT Principles to buttress or verify the solution reached. One cannot criticise arbitrators who have taken the trouble to check that the "rules" applied to the merits of the dispute are in harmony with the requirements of international trade, which happen to have been taken into account in non-State rules.

### Summary:

**Wherever the parties have not chosen the law applicable to the merits of the dispute, the arbitrators may have recourse to the conflict rules of one or more States, or to general principles of private international law. They can also resort to the direct method, which enables them to avoid using a conflicts approach and to select the appropriate rules for the purpose of resolving the dispute. Appropriate rules can come from the law of a State, an international convention, or the *lex mercatoria*.**

**Regardless, however, of whether the parties have expressed their intentions with respect to the law applicable to the merits of the dispute, the arbitrators are required to take full account of contractual stipulations and trade usages.**



## 4. CONTRACTUAL PROVISIONS AND TRADE USAGES

Contractual provisions and trade usages: these two expressions are found together in most texts devoted to international arbitration.

**Article 28(4) of the  
UNCITRAL Model Law  
on International  
Commercial  
Arbitration**

*“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”*

This provision, whose two elements appear in numerous national arbitration statutes and arbitration rules, is worth comparing to the corresponding article of the European Convention on International Commercial Arbitration.

**Article VII, European  
Convention on  
International  
Commercial  
Arbitration**

*“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.”*

Undoubtedly, the international commercial arbitrator has to take into account the provisions of the contract and trade usages. This remains true whether or not the parties have chosen the law applicable to the merits of the dispute.

### 4.1 The Provisions of the Contract

The reference to the contract provisions is not, strictly speaking, relevant to the question of the law applicable to the merits of the dispute. Legal rules must be clearly distinguished from contractual provisions. It is, however, worth recalling that the first duty of the arbitrator is to study the contract carefully in order to deduce its implications. The arbitrator must above all understand the contract and work with its internal logic. There cannot be a clash between the need for the arbitrator to focus on interpreting the contract and his duty to apply to it the relevant rules of law. Not only are the methods not mutually exclusive, but they are intimately related to each other. The arbitrator must adjudicate on the contract to exactly the same extent that as he needs to refer to the law applicable to it.

### 4.2 The Role of Trade Usages

The significance of the reference to trade usages varies depending on its context. The immediate impact of the rule is as follows: the arbitrators must take into account trade usages applicable to the contract, whatever the law applicable to it, and even where that law results from a choice made by the parties without any particular mention of usages of the trade.

The reference to trade usages is of even greater significance where the parties have decided that their contract, instead of being governed by the law of a State, will be governed by non-State rules, such as general principles generally accepted in international trade law, UNIDROIT Principles, *lex mercatoria*, or an international convention.

Article 9 of the Vienna Convention on International Sales is of similar effect when it correctly notes in its sub-paragraph 2 that:

**Article 9(2) of the United Nations Convention on Contracts for the International Sale of Goods**

*“The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned..”*

However, trade usages must also be applied when the parties have decided that their contract will be subject to the law of a State. It is, consequently, a duty of an arbitral tribunal to give effect to trade usages in order to fill a gap in or alongside the application of a national law to the contract.

**ICC Award in Case no. 1472, in 1968, cited in Y. Derains : “Le statut des usages de commerce international devant les juridictions arbitrales” Rev. arb. 1983. p. 122**

*“Considering that, in the case under consideration, the contracts were signed in Paris, French national law should apply, supplemented, if necessary, by international custom and practice governing international contracts.”*

The application of a well-established trade usage that is widely known in the economic field or branch of commerce in which the parties are involved cannot really come as a surprise to them. Given that they always have the option of excluding the application of a trade usage, notably by adopting contractual provisions to the contrary, their freedom is sufficiently protected. Besides, any usage of the trade established in this way will take precedence over any non-mandatory provision of the *lex contractus*.

However, arbitrators must take care not to confuse trade usages with certain standard clauses found regularly in international commercial contracts. If a clause frequently used in international commercial contracts in general, or those of a particular branch of activity, is not included in the contract, arbitrators should resist the temptation to consider, on the basis of usage, that it is an implied term. Even clauses as widely used as the INCOTERMS of the ICC must be expressly incorporated into the contract, which tends to suggest that they should not be applied as trade usages, even if it is undoubtedly common to refer to them.

There is, in addition, another tendency in international arbitration to adopt a broad concept of trade usages. This tendency leads people to include within trade usages rules and principles of various origins, and, in this way, to assimilate “trade usages” to all transnational rules (the “*lex mercatoria*”) or to a collection of rules more or less representative of these, such as the “UNIDROIT Principles”.

This view of trade usages is unacceptable. It misunderstands completely the role played by trade usages in international commercial arbitration law. If trade usages could be assimilated to the general rules and principles applicable in the law of international trade, the result would be that the application of the *lex contractus* chosen by the parties could always be challenged with unpredictable results on the sole basis of trade usages, functioning as something of a “Trojan Horse”.

To the best of our knowledge, no international convention, statute, model law or arbitration rules has ever tried to provide a definition of trade usages.

The task is a delicate one. Article 9 of the Vienna Convention, cited above, lists the conditions for the application of trade usages, but does not define them. Nonetheless, that is not a sufficient reason to misunderstand the distinction. Usages arise exclusively from the behaviour of the participants in international trade. They are rules of law that arise spontaneously. They may be connected to a type of contractual relation as much as a sector of activity (customs of the petroleum industry, the grain trade, banking relations, the diamond trade, etc.). By contrast, the transnational rules and principles that constitute the main elements of *lex mercatoria*, or the UNIDROIT Principles, are norms created or accepted after deliberation by a group of people brought together for this purpose. These norms pass through a different process than trade usages to become part of the legal world and applied.

Unsurprisingly, in reaction to poorly-reasoned awards, some arbitrator’s decisions show a clear refusal to confuse the concepts in the way criticised above.

**Extract from the ICC Award in Case no. 8873 (1999), published in ICC Bulletin, Vol. 10, No. 2, p. 81 ; JDI 1998, p. 1017 - obs. D.H**

*“In this case, a contract had been concluded between Spanish and French companies with a view to undertaking construction work in a third country. The contract contained a clause worded as follows: ‘The present contract shall be governed entirely by Spanish law, to the exclusion of all other law.’ The arbitral tribunal refused to apply the UNIDROIT Principles concerning hardship, as requested by one of the parties: ‘The parties have made no reference to the Principles in question and (...) it may be concluded with certainty from the wording of the clause on the applicable law that the parties did not wish to submit their contract to *lex mercatoria* or other general principles of law.”*

*The arbitral tribunal then considered whether the UNIDROIT Principles specially incorporated in the case under consideration could have been applied as codification of existing practice and concluded that they did not.*

What has just been said does not signify that arbitrators, bound to apply to an international contract a national law on the basis of the will of the parties, may not refer to the UNIDROIT Principles or other general principles of law in carrying out their task. One should only be careful not to confuse these principles with trade usages, with a view to conferring on them the status of trade usages in international commercial arbitration.

The arbitrator, though, will not exceed his authority by applying some of the rules contained in the UNIDROIT Principles if the national law governing the contract is obscure or incomplete, or contains non-mandatory rules which are clearly contrary to the interests of international trade. One cannot criticise an arbitral tribunal for using the UNIDROIT Principles to fill a gap in the Vienna Convention on the International Sale of Goods. However, the justification for this should be based on the arbitrator's freedom to apply the UNIDROIT Principles, not on his obligation to give effect to trade usages.

### Summary:

**Above all, arbitrators must take pains to give full effect to the contract because that is the principal aspect of the task entrusted to them by the parties. However, the arbitrators' role includes the application of relevant trade usages. It is not necessary for the parties to refer specifically to trade usages for them to be applied. On the other hand, any exclusion of such usages decided upon by the parties should bind the arbitrators. An all too frequent and regrettable mistake in arbitration practice is to assimilate usages to rules of transnational law. This can only serve as a source of confusion.**

## 5. INTERNATIONAL PUBLIC POLICY AND MANDATORY RULES OF LAW

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The question of international public policy and mandatory rules of law is too vast and controversial for us to pretend to be able to provide a comprehensive answer herein. The international commercial arbitrator, though, must be conscious of the impact of this question on the determination of the applicable law.

### 5.1 International Public Policy: some Clarifications of its Role

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In private international law, international public policy has the function of protecting the legal system of the national judge dealing with the dispute from the application of certain foreign laws. These foreign laws are “normally applicable”, in the sense that their applicability is dictated by the conflict of laws rules of the forum. International public policy thus provides the forum judge with a mechanism for the exceptional exclusion of those provisions of the applicable law that are incompatible with the legal system of the forum. In this way, for example, the forum judge can ignore a foreign law that allows for the seizing of property without compensation.

The international public policy exception cannot play the same role for international commercial arbitrators. The main reason is that the arbitrator, who does not deliver justice on behalf of any State, does not have a national *lex fori* and, therefore, does not have to defend the international public policy of a given State against a foreign law. Indeed, the best view is that all laws are foreign laws for an arbitrator.

It is true that the arbitrator could be led to come to the defence of a truly international, or transnational, public policy. In this sense, it is often asserted that transnational public policy requires that no effect be given to contracts involved in setting up corrupt transactions or traffic in human beings or organs. However, this does not involve the arbitrator in excluding certain laws on the basis of public policy. Public policy here performs a positive function and affects the reasoning of the arbitrator independently of the applicable law. It determines directly what is illicit or immoral and what is to be done in the face of such agreements to deal with their invalidity, without going through the process of excluding an otherwise applicable law.

In reality, in the area of the law applicable to the merits of the dispute, the international commercial arbitrator must pay attention to the public policy of the national judge, as is shown by the effect of mandatory rules of law.

## 5.2 International public policy and mandatory rules of law in international commercial arbitration.

### 5.2.1 *The arbitrator must try to render an enforceable award*

Mandatory rules of law (also known as laws of immediate application) belong to the category of internationally imperative provisions. In international commercial arbitration, we know that the arbitrator is required in the first place to apply to the merits of the dispute the law chosen by the parties. The question arises as to whether the arbitrator can or must apply to the merits of the dispute a mandatory provision of a legal system that does not form part of the law chosen by the parties. Even leaving aside the theoretical aspects of the debate, we must not lose sight of the fact that the arbitrator has the duty to perform his task in accordance with the wishes of the parties. This would argue in favour of the exclusion of mandatory rules of law that the parties have declined to adopt or which do not form part of the law applicable to the merits of the dispute, as chosen by the parties.

However, arbitrators must not lose sight of the fact that it is their duty to render an effective award, that is an award capable of avoiding annulment and of being enforced.

#### Article 35, ICC Rules of Arbitration

*“ In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.”*

The 1958 New York Convention includes in Article V(2)(b) the violation of public policy (of the country in which recognition or enforcement is sought) among the grounds for challenging the recognition and enforcement of an award. This is where the relationship between public policy and mandatory rules of law comes into focus.

The public policy in question here is that of the national judge, not that of the arbitrator. Nonetheless, the arbitrator must try to anticipate this public policy which constitutes a shadowy threat to his award. In fact, the international public policy of the judge – such as it is used in the review of arbitral awards rendered in international cases – is not very demanding. Nonetheless, this public policy is capable of including mandatory rules of law. An arbitral award which violated a mandatory rule of law that was applicable to the contract in question could be set aside or deprived of any effect due to its breach of international public policy.

The arbitrator must therefore be particularly aware of two points. He must identify the international public policy to be taken into consideration. He must also identify the mandatory rules of law capable of being taken into account on the basis of international public policy.

### **5.2.2** *Public Policy to be Taken into Consideration by the Arbitrator*

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The arbitrator must take into account the fact that the award he renders may be subject to setting aside proceedings. Such proceedings will always be brought before a national court at the place of arbitration. It follows that the international public policy of a judge sitting there must be taken into account. It is more difficult to anticipate the country in which enforcement of the award might be sought. It will usually be the country in which the losing party has its residence or principal place of business. However, there is nothing to stop the claimant from applying to the courts of any country in which the respondent has assets that can be seized. It is much more difficult to predict all of the places where this might be the case.

Even if the arbitrator cannot know where enforcement of the award might be sought, he has to decide during the arbitration what to do with any mandatory rules of law that do not form part of the law applicable to the merits of the dispute.

### **5.2.3** *The mandatory rules of law that may be applied by the arbitrator*

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In practice, the question of the possible application of mandatory rules of law can come up in front of the arbitrator in two ways.

In the first case, one of the parties – it is rare for it to be both of them – considers that the mandatory rule of law should be applied. In such a case, the arbitrator has only to decide whether or not to apply a mandatory rule of law, that has come into the discussion by reason of a request formulated by one of the parties. Even if the law does not belong to the *lex contractus*, the arbitrator must consider whether or not it should be applied. At least, if he does consider it, he cannot be criticised for not dealing with the question.

In the second situation, none of the parties requests the application of the mandatory rule of law and there is no basis to consider it under the law applicable to the contract, which is a different law. For example, the parties may have concluded a distribution agreement containing certain conditions prohibited by a mandatory rule of law of State A but declared that their contract is subject to the law of State B.

It is prudent for an arbitrator to take account of the possible incompatibility with international public policy of an award in deciding whether or not to give effect to the mandatory rule of law in question.

In this search, the arbitrator must not overlook the question of whether the mandatory rule of law in its own words actually covers the situation of the case. If he arrives at the conclusion, after an examination of the facts, that the scope of the mandatory rule does not extend to facts in question, either as a

matter of substance or territoriality, he can consider that he has correctly fulfilled his task by not applying it. Such would be the case of a provision of the competition law statute of a State which would not invalidate the contract in view of its insignificant impact or the absence of any anti-competitive effect on the territory of the State whose law is in question.

If the arbitrator arrives at the opposite conclusion, he should already know the elements favouring the application of the relevant statute. That, though, is not necessarily enough to cause him to override the wishes of the parties. A certain subjectivity enters the equation at this point. The arbitrator may, on the basis of the facts of the case, consider that it is necessary, in any event, to declare invalid an illegal or immoral contract concluded by the parties. The mandatory rule of law will then serve, in his hands, as the basis for reaching this conclusion. By acting in this manner, the arbitrator knows that he will probably not fulfil the expectations which the parties had in resorting to arbitration. That, though, is his choice. However, the arbitrator must also know that the judge who may be asked to review the award might not share the same views as the arbitrator, and therefore annul the award or refuse its enforcement.

The arbitrator can choose to avoid this element of subjectivity and err on the side of caution. Prudence would suggest that he only give effect to a mandatory rule of law if he is virtually certain that it will be taken into consideration as part of international public policy by a judge with jurisdiction to review the award. An important consideration will then enter into account. This involves knowing whether the mandatory rule of law is, for the national judge, a mandatory rule of his forum or a foreign one.

There is a good chance that the judge, dealing with an application to set aside the award, will refuse to give effect to an arbitral award enforcing a contractual obligation which would violate a mandatory rule of law of his own legal system, and will set aside the award. On the other hand, national jurisdictions are more divided over the fate of an arbitral award that contravenes a foreign law. Everything depends on whether the interests protected by the mandatory rule of law are closely linked to the unique interests of the foreign State that has adopted the law, for example a law restricting foreign exchange movements or investment. If these interests are shared equally by the judge's State, or generally by the international community (for example the fight against corruption), the chances, or the risk, that the reviewing judge might set aside the award on the grounds of a failure to apply a mandatory rule of foreign law increase considerably. The arbitrator must therefore take this into account.

**Summary:**

**Arbitrators are not relieved of all responsibility with respect to international public policy. Even if the international public policy that is developing in international arbitration is still at the embryonic stage, arbitrators must respect the international public policy of those judges who may find themselves reviewing the award later on. It is also true that this must be adapted to arbitration. Judges, though, will set aside awards or refuse to enforce awards on the basis of public policy where they enforce contractual obligations undertaken in breach of the mandatory rules of law of the forum. The question is more complex with respect to foreign mandatory rules of law.**



## 6. TEST YOUR KNOWLEDGE

- 1 • Must the definition of the international character of a given arbitration be sought in the provisions of the *lex arbitri* or in those of the law of the contract?
- 2 • Must the arbitrators verify the international character of the contract before agreeing to apply the choice of law made by the parties?
- 3 • Is there a risk for the parties in deciding that their contract will be submitted to the law of a State, fixed as that law stood at a specific date?
- 4 • Is there a difference between the selection of the law applicable to a contract and the law applicable to a dispute?
- 5 • Can the parties validly decide to subject their contract to several laws?
- 6 • Can the parties validly decide to exclude all laws?
- 7 • Is the principle of good faith applicable in all circumstances to all international contracts?
- 8 • How should a clause declaring that the contract is subject to international law be interpreted?
- 9 • How should a clause declaring that the contract is subject to international trade usages be interpreted?
- 10 • May a contract to which the UNIDROIT Principles are applicable escape from mandatory rules of State laws?
- 11 • May an arbitrator apply the UNIDROIT Principles or *lex mercatoria* on his own initiative?
- 12 • May an international commercial arbitrator declare that a contract is invalid?
- 13 • Must an international commercial arbitrator declare the invalidity of a contract in certain circumstances?
- 14 • Is an international commercial arbitrator required to respect the mandatory provisions of the contract law in force at the place of the seat of arbitration?
- 15 • May an international commercial arbitrator declare that it is inappropriate to apply to the merits of the dispute the law chosen by the parties?
- 16 • May an international commercial arbitrator exclude the provisions of a national law by reason of their incompatibility with the international public policy of the country of the seat of arbitration?
- 17 • What must an arbitrator do if one of the parties asks him to decide *ex aequo et bono* and the other party refuses?
- 18 • Can the validity of an international contract depend on non-State rules?
- 19 • If the parties to an international contract for the sale of goods have expressly excluded the Vienna Convention, does this mean that the arbitrators must not apply any transnational rules?

- 20•** If a contract includes a clause referring to the UNIDROIT Principles, may the arbitrator ignore them or supplement them by other provisions of lex mercatoria?

## 7. FURTHER READING

### 7.1 Books

#### 7.1.1 General Works

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