

**ÉTUDE DE FAISABILITÉ SUR LE CHOIX DE LA LOI APPLICABLE
DANS LES CONTRATS INTERNATIONAUX**

- LE CONTEXTE DE L'ARBITRAGE INTERNATIONAL -

Note établie par Ivana Radic, Collaboratrice juridique

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**FEASIBILITY STUDY ON THE CHOICE OF LAW
IN INTERNATIONAL CONTRACTS**

- SPECIAL FOCUS ON INTERNATIONAL ARBITRATION -

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I. INTRODUCTION

1. In the context of globalisation, it is inevitable that private parties, and even organisations and States, consider *ad hoc* private dispute resolution *fora* to solve disputes that may arise from a contractual relationship. The success of international arbitration is especially due to its neutrality, its effectiveness, and above all, its confidential nature. Additionally, it is known as justice that is chosen by the parties; they choose the arbitrators, the seat of arbitration and the rules that will be applied by the arbitral tribunal to settle the dispute.

2. The idea to develop an international instrument in view of unifying international standards / rules on applicable law in international contracts in the context of international arbitration is by no means a new one. As a matter of fact, in 1980, a Working Group established by the Commission on Law and Commercial Practices of the International Chamber of Commerce submitted draft Guidelines concerning applicable law in international contracts to their National Committees in which it stated that "considering that [disputes among parties to international commercial relationships] often give rise to the questions concerning the law applicable to contracts ... [the International Chamber of Commerce] has found it appropriate to recommend arbitrators to consider the [proposed] conflict-of-law rules for cases where the law applicable to contracts is an issue."¹ However, this idea was not pursued any further at the time.

3. Despite the sustained recourse to international arbitration, the issue of unpredictability in cases where the parties have not chosen the law applicable² to their contract still appears to be present today. It is in this perspective that this paper will attempt to provide an overview of the situation by presenting the different methods for determining the applicable law that currently exist in international instruments, institutional arbitration rules and in national laws.

4. It is important to distinguish from the outset the law applicable to substantive law issues and the law applicable to the procedure of the arbitration; these laws are not necessarily the same and in most cases, the latter is specifically covered by national arbitration laws or institutional arbitration rules. This paper will focus on the substantive law applicable to the dispute.

5. Most arbitration laws and institutional rules will recognise the principle of party autonomy and will also include the method to follow in case of absence of a choice of law of the parties. This paper will present these two points while highlighting the relevance by international public policy and mandatory rules of law. The paper will also deal with the contractual provisions and trade usages which may influence the determination of the applicable substantive law.

¹ O. Lando, "Conflict-of-Law Rules for Arbitrators", *Festschrift für Konrad Zweigert zum 70. Geburtstag*, J.C.B. Mohr (Paul Siebeck) Tübingen, 1981, p. 157.

² Please note that for the purposes of this paper, the term "law" used in the expression "applicable law" should be understood in its widest sense, including laws, case law, general principles, customary law, etc.

II. CHOICE OF LAW OF THE PARTIES

A. General principle – party autonomy

6. The principle of party autonomy is widely acknowledged as a general principle of conflict of laws in international arbitration, as most laws, and rules of arbitration institutions recognise, in both civil law and common law systems.³

7. The choice of law can be explicit or implicit. An explicit choice can be contained in a choice of law clause in the contract, in the arbitration agreement or in the Terms of Reference or Written Submission of the Parties. This choice can be direct or indirect; the parties can designate the substantive law applicable (direct choice) or the parties choose a conflict of laws rule of a specific arbitration institution or of their own (indirect choice). An implicit choice of law results from the respective will of the parties and not from their hypothetical will.⁴

8. Some laws / rules will permit parties to choose only a national law.⁵ Other laws / rules will give freedom to parties to choose rules of law,⁶ and as it is widely accepted that “rules of law”⁷ include not only national laws but also a-national rules such as *lex mercatoria* (or general principles, international customary law or transnational law), parties may choose a-national rules as the substantive applicable law.

9. Parties may also empower arbitrators to decide *ex aequo et bono* or as *amiable compositeur*.⁸ This allows arbitrators to also apply a-national rules if their application leads to equitable results. Some laws / rules however require that the law applicable to the arbitral procedure permit such arbitration.⁹

³ Art. 28(1) UNCITRAL Model Law; Art. VII *European Convention on International Commercial Arbitration* (Geneva Convention); Art. 42 *Convention on Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention); Art. 33(1) UNCITRAL Arbitration Rules; Art. 17(1) ICC Arbitration Rules; Art. 15(1) OHADA Uniform Act on Arbitration; 2004 UNIDROIT Principles on International Contracts (UNIDROIT Principles). Please refer to the flow chart in Appendix 1, and for more examples of laws and arbitration rules please refer to Appendices 3, 4 and 5.

⁴ The implicit choice of law will be dealt with in III, Absence of choice of the parties.

⁵ Art. VII(1) Geneva Convention; Art. 33(1) UNCITRAL Arbitration Rules; Art. 33(1) Rules of Procedure of the Inter-American Arbitration Commission; Art. 33(1) Optional Rules of the Permanent Court for Arbitrating Disputes between two parties of which only one is a State; Art. 4(1) International Arbitration Rules of the Zurich Chamber of Commerce. Please refer to the flow chart in Appendix 1, and for more examples of laws and arbitration rules please refer to Appendices 3, 4 and 5.

⁶ Art. 28(1) UNCITRAL Model Law; Art. 46 Arbitration rules of the Netherlands Arbitration Institute (NAI); Art. 42(1) ICSID Convention; Art. 3(1) Arbitration Rules of the Milan Chamber of Commerce; Art. 1496 *al.1 Nouveau Code de procédure civile* (France, New Code of Civil Procedure); Art. 1054(2) Code of Civil Procedure (the Netherlands); Art. 1051 Code of Civil Procedure (Germany); Art. 187 (1) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law). Please refer to the flow chart in Appendix 1, and for more examples of laws and arbitration rules please refer to Appendices 3, 4 and 5.

⁷ *Infra* para. 39 for definition of “rules of law”.

⁸ Art. VII(2) Geneva Convention; Art. 42(3) ICSID Convention; Art. 28(3) UNCITRAL Model Law; Art. 33(2) UNCITRAL Arbitration Rules; Art. 59(a) WIPO Arbitration Rules; Art. 33(2) Rules of Procedure of the Inter-American Arbitration Commission; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between two parties of which only one is a State; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between International Organizations and Private Parties; Art. 17(3) ICC Rules of Arbitration; Art. 15(2) OHADA Uniform Act on Arbitration; Art. 3(1) International Arbitration Rules of the Milan Chamber of Commerce; Art. 1054(3) Code of Civil Procedure (the Netherlands); Art. 944.10(2) Code of Civil Procedure (Quebec); Art. 1051(3) Code of Civil Procedure (Germany); Art. 187(2) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law). Please refer to the flow chart in Appendix 1, and for more examples of laws and arbitration rules please refer to Appendices 3, 4 and 5.

⁹ Art. VII(2) Geneva Convention; Art. 33(2) UNCITRAL Arbitration Rules; Art. 33(2) Rules of Procedure of the Inter-American Arbitration Commission; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between two parties of which only one is a State; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between International Organizations and Private Parties. Please refer to the flow chart in Appendix 1, and for more examples of laws and arbitration rules please refer to Appendices 3 and 4.

10. Even where the provisions themselves do not explicitly¹⁰ allow *dépeçage*, it is generally admitted that parties may also choose different substantive laws applicable to different aspects of their contract. It is also important to note that when parties choose an applicable law, this choice usually does not extend to the conflict of laws rules of the chosen law but only to its substantive law, therefore avoiding *renvoi*.

B. Exception – disregard of choice by arbitrators

11. Although in most cases arbitrators will respect the choice made by the parties, there are some situations where the question of whether or not arbitrators can disregard that choice will arise.

12. This is the case when the mandatory rules, which include public policy rules, may be applicable *ex officio*. Although arbitrators do not have a forum *per se* as judges do,¹¹ and should therefore logically not be obliged to apply mandatory rules that are not part of the law chosen by the parties, by complying with mandatory rules of a State in certain circumstances, arbitration is more likely to be encouraged by States and the rate of recognition and enforcement of arbitral awards is likely to be higher. This is important if arbitration is to survive as a private dispute settlement system.¹² The questions that remain to be answered are which mandatory rules should the arbitrators apply and what are the effects of their application.

13. Another question is whether or not arbitrators may disregard the parties' choice and apply a-national rules without being expressly authorised to do so by the parties and if such an application affects the enforcement of the award.¹³

1. Mandatory rules

a. Sources

- Substantive law chosen by the parties

14. The mandatory rules of the law chosen by the parties and its public policy rules will be applied to the dispute by the arbitrators simply because these rules are part of the parties' choice. This application is reasonably expected. Even though the choice of law of the parties excludes *renvoi*, some claim that arbitrators may use the law chosen by the parties to help identify if foreign mandatory rules may be relevant to the dispute, especially since the scope of party autonomy is determined by the applicable (private international) law.¹⁴

¹⁰ They allow the choice of "laws" or "rules of law", meaning more than one.

¹¹ Arbitrators have a forum when it comes to the procedure (*lex arbitri*): the State of the seat of arbitration. However, since this paper only deals with the law applicable to the merits of the dispute, it is in that sense that it states that arbitrators have no *lex fori*.

¹² D. Wortmann, "Choice of Law by Arbitrators: The Applicable Conflict of Laws System", *Arbitration International*, Vol. 14, No 2, 1998, p. 99; N. Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", *The American Review of International Arbitration*, Vol. 7, Columbia University, 1996, pp. 319-357.

¹³ G. Cordero Moss, "Can an Arbitral Tribunal disregard the Choice of Law made by the Parties?", *Stockholm International Arbitration Review*, Vol. 1, 2005, p. 15.

¹⁴ *Idem*, pp. 8-11.

- International Public Policy Rules

15. Even though the parties have made a choice of law, arbitrators may feel obliged to apply certain mandatory rules contained in a law that the parties did not choose. This is the case for rules containing norms that have a transnational nature. These include fundamental principles that are widely acknowledged such as the non-violation and respect of human rights, and universally legally protected interests such as the protection of cultural heritage, the protection of endangered species and labour protection.¹⁵

16. It is important to note that an application of public policy rules would not completely disregard the law chosen by the parties. These public policy rules would be applied to a precise and specific point of the dispute.

17. It has to be noted that public policy rules of a State do not necessarily apply to international situations unless this intention is made clear in the provisions of the law containing the policy rule. This is often the case with consumer protection laws and labour laws.

- Substantive law having a close connection with the dispute

18. Mandatory rules are sometimes considered by arbitrators if the law containing mandatory rules has a close connection to the dispute. This may be the case of the law of the seat of arbitration and the law of the State or States of enforcement.

b. Impact of application or non-application of mandatory rules

19. Given the fact that arbitrators derive their power from the will of the parties, the parties will expect their choice to be recognised and therefore applied. However, arbitrators need to consider if the application of the law chosen by the parties will result in violation of certain mandatory rules, such as public policy rules.¹⁶

20. The importance of *ordre public* rules can come up at the stage of enforcement of the award as it is in the interest of all parties involved that the award be unchallengeable. The *United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention), to which 142 States are Party, sets standards for the recognition and the enforcement of arbitral awards. The New York Convention sets out the grounds for invalidity of an award.¹⁷ Even though the exhaustive list provided does not permit the review of the applicable law, there are two grounds of invalidity of the award under the New York Convention that are considered relevant:¹⁸ (1) excess of power by the arbitral tribunal and (2) procedural irregularity.¹⁹

21. In theory, the dilemma is the following: in a case where parties have chosen the law applicable to their dispute (law X), if arbitrators take into consideration the law that would have been applied had the parties not made such a choice of law²⁰ (law Y), its application may be construed as excess of power or procedural irregularity and may therefore render the award invalid. In the same situation, if arbitrators do not take into account the law that would have been applied (law Y) and completely respect the choice of law of the parties (law X), they may run the risk of having their award set aside by

¹⁵ For similar limitations in court proceedings, please see Preliminary Document No 22 B "Feasibility study on the choice of law in international contracts – Overview and analysis of existing instruments" (section III B 9, "Public law limitations to choice of law clauses", p. 12).

¹⁶ Art. V(2)b) *United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention); Art. 36(2)b)(ii) UNCITRAL Model Law; N. Vosser, *supra* note 11, pp. 332–337.

¹⁷ Art. V New York Convention.

¹⁸ Art. V(1)c) New York Convention; Art. 34 (2)a)(iii) and 36 (1)a)(iii) UNCITRAL Model Law.

¹⁹ J.G. Frick, *Arbitration and Complex International Contracts*, Kluwer Law International, 2001, pp. 130–136.

²⁰ *I.e.* following the method applicable to the arbitrators to determine the law applicable in case of absence of choice of the parties.

the enforcement authority if the law that would have been applied (law Y) is part of the mandatory rules of the State of that authority.²¹

22. However in practice, when it comes to the international public policy rules, arbitrators usually do not encounter difficulty or opposition to their application as long as the application is justified within the facts of the dispute. Arbitrators should however be wary of applying *ex officio* mandatory rules of national interests primarily, rules that do not have an international or at least regional character.

2. *Fraude à la loi*

23. The freedom given to parties in matters of choice of law may lead to evasion of the law, meaning that the parties may have purposely chosen a law to evade the application of another law otherwise applicable to their dispute. Therefore, non-recognition of the choice of law of the parties may arise in situations where the outcome of the application of the choice made by the parties is contradictory to mandatory rules which parties tried to evade. Such mandatory rules are found in competition laws, anti-trust laws and anti-corruption.²²

3. A-national rules and their application *ex officio*

24. If the parties have designated a-national rules as the law applicable to their contract or if they have allowed arbitrators to decide in equity provided that the applicable procedural law allows such a choice, arbitrators will be expected to apply such rules. On the other hand, if the parties have chosen a specific law or at least that it transpires that their implicit intention was to have their dispute decided by a national law and not transnational rules, can arbitrators still apply transnational rules?

25. The application of transnational rules in disregard of parties' choice of law became famous in the 1958 Aramco case.²³ Arbitrators stated that the law chosen by the parties contained loopholes which did not permit the arbitrators to solve the dispute, and therefore declared that transnational rules would make up for the shortcomings in the chosen law, even though the parties did not authorise arbitrators to solve their dispute with transnational rules. The delicate issue here is not the fact that arbitrators disregarded or somewhat supplemented the parties' choice of law but rather the idea of shortcomings or lacunas in a national law.²⁴ This method has been criticised²⁵ as discriminatory and damaging to international arbitration. However, the application of transnational rules is not really criticised as long as it is legitimate.

26. Nevertheless, the question remains whether the application of a-national rules can be regarded as an excess of power or procedural irregularity. As party autonomy is recognised by virtually all arbitration laws and arbitration rules, the application of transnational rules by arbitrators without authorisation from the parties could result in the rendering of an invalid and unenforceable award for excess of power because such an

²¹ *Eco Swiss China Time Ltd v. Benetton International NV*, European Court Reports 1999, I-3055: the European Court of Justice recognised the obligation of the arbitrators to apply *ex officio* Community public policy or see their award as unenforceable.

²² It is interesting to note that in court proceedings such laws can also be considered public law limitations. In international arbitration, given that arbitrators do not have a forum, all public law is "foreign" to arbitral proceedings and therefore its application is limited. Please see Preliminary Document No 22 B ("Feasibility study on the choice of law in international contracts – Overview and analysis of existing instruments" (section III B 5, "Evasion of law" , p. 11 and 9, "Public law limitations to choice of law clauses", p. 12.)

²³ *Saudi Arabia v. Arabian American Oil* (23 August 1958), International Law Report No 117 (1963), also in *Rev. crit. DIP* (1963) p. 272; this was the same reasoning in an ICSID case, *SPP v. The Arab Republic of Egypt* (20 May 1992), *Journal du droit international* (1994) p. 229.

²⁴ *Petroleum Development Ltd v. The Sheik of Abu Dhabi*, *International and Comparative Law Quarterly* (1952) p. 247. This case was the first where the arbitral tribunal applied a different law stating that the chosen law was insufficiently developed to solve the dispute.

²⁵ Ph. Fouchard, E. Gaillard & B. Goldman, *Traité de l'arbitrage commercial international*, Litec 1996, pp. 855–856.

application is a result of a complete disregard of the parties' choice. Additionally, if the application of a-national rules is not permitted by the law applicable to the arbitration procedure, the award could be regarded as invalid and unenforceable for procedural irregularity.

III. ABSENCE OF CHOICE OF THE PARTIES

27. In the absence of choice of law of the parties, the applicable law will be determined by the arbitrators. Before analysing the variety of options that exist, it is important for arbitrators to ask themselves what is behind the absence of an explicit choice of law by the parties. Is it an oversight or is it due to the fact that the parties could not agree on the applicable law? The former is unlikely as international contracts and arbitration clauses are highly sophisticated and are usually written by experienced practitioners in the field. The latter is a situation that may arise where parties seek to finalise the contract even if they cannot agree on the applicable law. For this type of situations, the arbitrators assume that the parties have made an implicit negative choice of law where they do not wish their laws²⁶ to be applied to the dispute.

28. Most arbitration rules give great freedom of choice to arbitrators, some more than others. There are two questions that need to be analysed: (1) do the rules allow arbitrators to apply a law directly (*voie directe*) or do they need to identify the applicable law by using a conflict of laws rule first; and (2) can arbitrators apply rules of law, including a-national rules such as *lex mercatoria*, or only national laws.²⁷

A. Methods for determining the applicable law

1. Conflict of laws method

29. There are two different approaches to the conflict of laws method: (1) the rule that allows the arbitrators to freely choose conflict of laws rules to apply in order to determine the applicable law and (2) the rule that specifies which conflict of laws rule is to be applied to find the law applicable to the merits of the dispute.

a. Conflict of laws rules deemed applicable or appropriate

30. This first approach gives almost unlimited liberty to arbitrators even though it compels them to apply conflict of laws rules; the arbitrators are still free to apply the ones that they deem appropriate or applicable. This approach is contained in some international conventions,²⁸ as well as in some institutional arbitration rules.²⁹

31. A question remains: what is an applicable or appropriate conflict of laws rule? There are different methods to find such a rule:

- *Conflict of laws system at the place of arbitration* – This is the classical approach³⁰ which was used by many arbitrators before the 1960's. This method was criticised for forcing arbitrators to apply national laws to international arbitration, where in practice, the seat of arbitration was usually not chosen for its laws but was rather

²⁶ *I.e.* the national law of each party: law of nationality or domicile of the private person, or law of incorporation or law of the State of headquarters of the company.

²⁷ Please refer to the flow chart in Appendix 2.

²⁸ Art. VII(1) Geneva Convention; Art. 42(1) ICSID Convention.

²⁹ Art. 33(1) UNCITRAL Arbitration Rules; Art. 33(1) Inter-American Commercial Arbitration Association Rules; Art. 33(1) Optional Rules of the Permanent Court of Arbitration for Arbitrating disputes between two parties of which only one is a State.

³⁰ Art. 11 *al. 1 de la Résolution de l'Institut de droit international, Session d'Amsterdam* (Resolution of the Institute of International Law, Amsterdam Session), 1957: "The connecting rules in force in the State of the seat of arbitration must be followed to determine the law applicable to the merits of the dispute" [our translation].

for convenience purposes, if a seat of arbitration was chosen at all.³¹ Given the nature of international arbitration, this method was unacceptable as arbitrators have no *lex fori* and it was replaced by a new rule in the early 1960's which established a new approach based on conflict of laws rules which have no link to the *lex loci arbitri*.³² However, it is worth noting that legal provisions that regulate international arbitration at the seat of arbitration, the *lex loci arbitri*, do still exist. These provisions provide arbitrators with rule to apply to determine the applicable substantive law and most refer back to a conflict of laws rules method or the direct method. There are at least three arbitration institutions that still use this rule: the Zurich Chamber of Commerce, the Hungarian Chamber of Commerce, and the Riga International Arbitration Court.³³ This rule also still appears in certain national laws, e.g. in Costa Rica, the Czech Republic, Estonia, Malta and Yemen.³⁴

- *Cumulative or comparative method*³⁵ – This method consists of applying the conflict of laws rules of all the systems which have a connection with the dispute or that are common to the parties. However, this method is only effective as long as the conflict of laws rules applied have the same outcome.
- *General principles of private international law*³⁶ – This method consists of finding the applicable conflict of laws rules by using principles that are common to all systems. In most cases international instruments are considered sources of general principles, *inter alia* the *Hague Convention of 15 June 1955 on the law applicable to international sales of goods*, the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, the *European Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*³⁷ and the 2004 UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).

b. *Specific conflict of laws rule imposed*

32. This second approach restricts the arbitrators' choice as they are obliged to use the conflict of laws rule that is specified. This is the case namely under Croatian, Egyptian, German, Italian, Japanese, Swiss and Turkish national law: the applicable law will be determined by using the closest connection factor.³⁸ It is also the case under the international arbitration rules of the Milan Chamber of Commerce, the German Institution of Arbitration and others.³⁹ To name a few, such factors include the law of the domicile of the party which has to complete the performance which is characteristic of the contract, the law of the place of formation of the contract, and the law of the place of performance of the contract.

33. A similar approach is provided for in US law: the *Second Restatement (Law of Contracts)* requires the "most significant relationship" test.⁴⁰ However, it is more restrictive than the closest connection rule in the sense that a list of specific factors is

³¹ For other examples of difficulties of application *lex loci arbitri* see C. Croff, "The Applicable Law in an International Commercial Arbitration: Is it still a Conflict of Laws Problem?", *The International Lawyer*, Vol. 16, No 1, 1982, pp. 625–627.

³² Art. VII(1) Geneva Convention : "Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rules of conflict that the arbitrators deem applicable".

³³ Please refer to Appendix 4 for the full text.

³⁴ Please refer to Appendix 5 for the full text.

³⁵ J.G. Frick, *supra* note 19, p. 74; C. Croff, *supra* note 31, p. 629.

³⁶ J.G. Frick, *supra* note 19, p. 76; C. Croff, *supra* note 31, p. 631.

³⁷ Ph. Fouchard, E. Gaillard & B. Goldman, *supra* note 25, p. 888.

³⁸ Art. 187(1) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law); Art. 1051(2) Code of Civil Procedure (Germany); Art. 1445(2) Commercial Code of Mexico, Art. 834(3) Code of Civil Procedure (Italy), and Art. 39(2) Law concerning Arbitration in Civil and Commercial Matters (Egypt). Please refer to the flow chart in Appendix 2, and to Appendix 5 for the text.

³⁹ Art. 3 International Arbitration Rules for the Milan Chamber of Commerce, Art. 23(2) Arbitration Rules of the German Institution of Arbitration. Please refer to the flow chart in Appendix 2, and to Appendix 5 for the text.

⁴⁰ Section 188(1) *Law of Contracts, Second Restatement*.

provided for in the Statute⁴¹ and these must be used to determine which law has the most significant relationship.⁴²

34. This method requires an in-depth analysis of all relevant circumstances of the particular dispute. This type of rule avoids a discretionary choice of law by the arbitrators who use the *voie directe* method. It seemingly restricts the degree of liberty of the arbitrators compared to the first approach, however in practice, it still allows them to choose the law that they favour by simply indicating which wide criterion they must use to prove their choice.

2. “*Voie directe*” method

35. The difference between the direct method and the conflict of laws method is that the direct method allows arbitrators to apply a law or rules of law⁴³ without explaining their choice through a conflict of laws rule. This method allows the arbitrators to determine the applicable law by using “a substantive criterion and not a connecting factor”.⁴⁴

36. Many institutional arbitration rules opt for this method and do not restrict the arbitrators’ choice. This is the case for arbitration at the Court of Arbitration of the International Chamber of Commerce, the Arbitration and Mediation Center of the World Intellectual Property Organization, the London Court of International Arbitration and the Netherlands Arbitration Institute.⁴⁵ Some national laws also give this freedom of choice to arbitrators, namely France, the Netherlands and the Canadian Province of Quebec.⁴⁶

37. The main criticism of the *voie directe* method is that it makes it impossible for the parties to foresee the law which the arbitrator deems applicable to the merits of the dispute. It appears that such a wide discretion leads to uncertainty as opposed to the conflict of laws method which offers a certain degree of predictability.⁴⁷ In practice however, arbitrators will look at the most relevant connecting factors in order to decide which substantive law is applicable; in this perspective, the *voie directe* method is *de facto* a use of conflict of laws rules except that it does not require arbitrators to explain their choice.

B. Rules of law and the application of a-national rules

38. Many arbitration laws and arbitration rules allow arbitrators to apply “rules of law”⁴⁸ while others only allow the application of a State or national law.⁴⁹ By allowing arbitrators

⁴¹ Section 188(2) *Law of Contracts, Second Restatement*.

⁴² J.G. Frick, *supra* note 19, p. 63

⁴³ *Infra* para. 39 for definition of “rules of law”.

⁴⁴ J.G. Frick, *supra* note 19, p. 79.

⁴⁵ Respectively: Art. 17(1) ICC Rules of Arbitration; Art. 59(a) WIPO Arbitration Rules; Art. 22.1(c) LCIA Arbitration Rules; Art. 46 NAI Arbitration Rules.

⁴⁶ Art. 1496 *al.* 1 *Nouveau Code de procédure civile* (France, New Code of Civil Procedure), Art. 1054(2) Code of Civil Procedure (the Netherlands), and Art. 944.10(1) Code of civil procedure (Quebec).

⁴⁷ J.G. Frick, *supra* note 19, p. 86.

⁴⁸ Art. 17(1) ICC Arbitration Rules; Art. 59(a) WIPO Arbitration Rules; Art. 22.1(c) LCIA Arbitration Rules; Art. 46 NAI Arbitration Rules; Art. 3(3) Arbitration Rules of the Milan Chamber of Commerce; Art. 1496 *al.* 1 *Nouveau Code de procédure civile* (France, New Code of Civil Procedure); Art. 1054(2) Code of Civil Procedure (the Netherlands); Art. 944.10(1) Code of civil procedure (Quebec); Art. 187(1) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law); Art. 813(1) *Nouveau Code de procédure* (Lebanon, New Code of Civil Procedure); Art. 458 *bis* 14 *Code de procédure* (Algeria, Code of Civil Procedure). *Infra* para. 39 for definition of “rules of law”.

⁴⁹ Art. VII(1) Geneva Convention; Art. 28(2) UNCITRAL Model Law; Art. 28(1) UNCITRAL Arbitration Rules; Art. 33(1) Rules of Procedure of the Inter-American Arbitration Commission; Art. 33(1) Optional Rules of the Permanent Court for Arbitrating Disputes between two parties of which only one is a State; Art. 1051(2) Code of Civil Procedure (Germany).

to apply rules of law, these provisions are giving arbitrators the same freedom they give parties when it comes to choosing the applicable law.

39. It is important to define what “rules of law” mean. It is generally accepted that “rules of law” refer to national laws and to systems of transnational rules such as *lex mercatoria*, transnational law, general principles of law or the UNIDROIT Principles.

40. The application of a-national rules is an important question when it comes to the enforcement of the award. In cases where there is an implicit choice of a-national rules by the parties, where parties have allowed the arbitrators to decide in equity or where a-national rules are part of the applicable law or allowed by the arbitration rules, their application is not an issue. However, in all other cases, there is a possibility that the award may not be enforced if it is accepted that the outcome of the award violates the public policy of the State where the enforcement of the award is sought,⁵⁰ unless a-national rules are used as subsidiary solution when no national law has a close connection to the dispute.⁵¹ These are still controversial points among scholars.⁵² The award may also not be enforced if the application of a-national rules is considered an excess of power of the arbitrators or procedural irregularity.⁵³

IV. TRADE USAGES AND TERMS OF THE CONTRACT

41. Whether the applicable law is chosen by the parties or determined by the arbitrators, the terms of the contract and trade usages applicable to the transaction may be relevant to solving the dispute.

42. The majority of laws and arbitration rules provide that arbitrators must take into consideration the contractual provisions and the relevant trade usages in all cases,⁵⁴ while others only require them to take into account trade usages⁵⁵

⁵⁰ Art. IX Geneva Convention; Art. V(2)b New York Convention.

⁵¹ J.G. Frick, *supra* note 19, p. 125.

⁵² For an overview of the different positions see J.G. Frick, *supra* note 19, pp. 137–138.

⁵³ Art. V(1)c New York Convention; G. Cordero Moss, *supra* note 13, p. 15.

⁵⁴ Art. VIII(1) Geneva Convention; Art. 28(4) UNCITRAL Model Law; Art. 33(3) UNCITRAL Arbitration Rules; Art. 21(1) *Convention arabe sur l'arbitrage commercial* (Arab Convention on Commercial Arbitration); Art. 17(2) ICC Arbitration Rules; Art. 59(a) WIPO Arbitration Rules; Art. 30(2) CAMCA Arbitration Rules; Art. 33(3) Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration; Art. 24(2) International Arbitration Rules of the Canadian Commercial Arbitration Centre; Art. 13 Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Art. 23(3) Rules of the Council for National and International Commercial Arbitration (India); Art. 21(3) Arbitration Rules of the Addis Ababa Chamber of Commerce Arbitration Institute; Art. 16(5) Rules of Arbitration of the Conciliation and Arbitration Center of Tunis; Art. 23(2) Rules of the Arbitration Center of Mexico; Art. 28(2) International Arbitration Rules of the American Arbitration Association; Art. 117(3) General Arbitration Law (Peru); Art. 36(3) Arbitration Act (Bangladesh); Art. 49 Arbitration Act (Hungary); Art. 47 Arbitration and Conciliation Decree (Nigeria); Art. 34 Arbitration Act (Thailand); Art. 742(4) Code of Civil Procedure (Estonia); Art. 45 Arbitration Act (Yemen); Art. 28(4) Arbitration Act (Zimbabwe). Please refer to Appendices 3, 4 and 5 for the full text and more examples.

⁵⁵ Art. 47 NAI Arbitration Rules; Art. 3(4) International Arbitration Rules of the Milan Chamber of Commerce; Art. 28 Arbitration Rules of the Portuguese Chamber of Commerce and Industry; Art. 27 *al. 2 Règlement d'arbitrage de la Cour d'Arbitrage de Côte d'Ivoire* (Arbitration Rules of the Court of Arbitration of Côte d'Ivoire); Art. 1496 *al. 2 Nouveau Code de procédure civile* (France, New Code of Civil Procedure); Art. 1051(4) Code of Civil Procedure (Germany); Art. 813 *al. 1 Nouveau Code de procédure civile* (Lebanon, New Code of Civil Procedure); Art. 458 bis 14 Code de procédure civile (Algeria, Code of Civil Procedure). Please refer to Appendices 4 and 5 for the full text and more examples.

or only the terms of the contract.⁵⁶ Some do not even refer to either contractual provisions or trade usages.⁵⁷

43. There is no definition of “trade usage” *per se*. The *United Nations Convention on Contracts for the International Sale of Goods* (Vienna Convention) states that a usage will be considered if “the parties knew or ought to have known [it] and [...] is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”.⁵⁸ Similarly, the UNIDROIT Principles declare that “parties are bound by any usage to which they have agreed and by any practices which they have established between themselves [and] by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned”.⁵⁹ However trade usages should not be confused with predefined standard clauses (*e.g.* the International Chamber of Commerce’s INCOTERMS), *lex mercatoria* or the UNIDROIT Principles.⁶⁰

44. The consideration of contractual provisions is logical, the contract being the basis of the relationship between the parties and consequently the basis of their dispute. It is essential that arbitrators understand the contractual relationship between the parties and the coherence between the contractual provisions.

45. Regarding trade usages applicable to the dispute or the transaction, arbitrators will take them into consideration even if the law applicable to the dispute does not require their consideration or if the contract does not explicitly instruct arbitrators to apply them. However, the UNIDROIT Principles go further than the Vienna Convention by explicitly adding that applicable usages and practices will not be considered if their application would be unreasonable. If parties explicitly exclude trade usages in their contract, the arbitrators will not be able to take them into account when making a decision.

V. OTHER MATTERS COVERED BY CHOICE OF LAW

46. Although this paper only deals with the law applicable to the merits of a dispute, others matters exist in which the question of applicable law may arise. It is important to specify that it is not necessarily the law that governs the contract or the one that is applicable to the dispute that applies to the issues of validity of the arbitration agreement.

⁵⁶ Art. 28(1) Arbitration Rules of Procedure for the Gulf Cooperation Council Commercial Arbitration Centre. Please refer to Appendix 4 for the full text.

⁵⁷ Art. 22 LCIA Arbitration Rules; Art. 24 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Art. 4 International Arbitration Rules of the Zurich Chamber of Commerce; Art. 41 Rules of the Japanese Commercial Arbitration Association; Art. 16 Rules of Arbitration of the International Arbitral Center of the Austrian Federal Economic Chamber; Art. 15 Arbitration Rules of the Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry; Art. 187 Loi fédérale sur le droit international privé (Switzerland, Federal Statute of Private International Law); Art. 36 Arbitration Law (Japan); Art. 12 International Arbitration Law (Turkey). Please refer to Appendices 3, 4 and 5 for the full text and more examples.

⁵⁸ Art. 9(2) *United Nations Convention on Contracts for the International Sale of Goods* (Vienna Convention).

⁵⁹ Art. 1.9 UNIDROIT Principles.

⁶⁰ J.-M. Jacquet, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property; International Arbitration, Module 5.5 Law Governing the Merits of the Dispute*, 2005, p. 24 (UNCTAD/EDM/MISC.232/Add.40).

A. Formal validity of the arbitration agreement⁶¹

47. Under most arbitration rules, an arbitration agreement must be in written form to be valid. The difficulty with this requirement is that it is interpreted differently.⁶² The New York Convention provides that an arbitration agreement “in writing”⁶³ includes “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.⁶⁴ The UNCITRAL Model Law states that the arbitration agreement is “in writing” but goes further in explaining what “in writing” entails: the agreement is “contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and denied by the other.”⁶⁵ The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”.⁶⁶

48. The *United Nations Convention on the Use of Electronic Communications in International Contracts* provides that an electronic document containing an agreement will be considered in written form as long as the “information contained therein is accessible so as to be usable for subsequent reference”.⁶⁷ The Explanatory note states that “the requirement of a *writing* should be considered as the lowest layer in a hierarchy of form requirements, which provides distinct levels of reliability, traceability and integrity with respect to paper documents. The requirement that data be presented in written form (which can be described as a ‘threshold requirement’) should thus not be confused with more stringent requirements such as ‘signed writing’, ‘signed original’ or ‘authenticated legal act’. [...] Article 9 focuses on the basic notion of the information being reproduced and read. That notion is expressed in Article 9 in terms that were found to provide an objective criterion, namely that the information in an electronic communication must be accessible so as to be usable for subsequent reference.”⁶⁸

49. In cases where the formal validity arises, given the fact that arbitrators have no forum when it comes to substantive matters of law, some advocate that reference to any national law is not necessary and that arbitrators may use international standards⁶⁹ or take into account the common will of the parties.⁷⁰ There appears to be a tendency to soften the rules.

B. Substantive validity of arbitration agreement

50. Arbitrators may need to decide (1) whether the parties have actually agreed to arbitration, (2) whether the parties had the capacity to enter into an arbitration

⁶¹ M. Blessing, “The Law Applicable to the Arbitration Clause”, *International Council for Commercial Arbitration Congress* series No 9; Kluwer Law International, 1999, pp. 171–174; J.D.M. Lew, “The Law Applicable to the Form and Substance of the Arbitration Clause”, *International Council for Commercial Arbitration Congress* series No 9; Kluwer Law International, 1999, pp. 128–136.

⁶² E.g. Art. 5 & 6 Arbitration Act of 1996 (England); Art. 1021 Code of Civil Procedure (the Netherlands); Art. 178(1) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law).

⁶³ Art. II(1) New York Convention.

⁶⁴ Art. II(2) New York Convention.

⁶⁵ This only refers to the form; whether there is agreement is a matter of substantive validity which is discussed below under para. 50 to 57.

⁶⁶ Art. 7(2) UNCITRAL Model Law.

⁶⁷ Art. 9(2) *United Nations Convention on the Use of Electronic Communications in International Contracts*.

⁶⁸ See para. 143 to 146 of the Explanatory note by the UNCITRAL Secretariat < <http://www.uncitral.org/uncitral/en/index.html> > under “UNCITRAL Texts and Status” then “Electronic Commerce” and “2005 - United Nations Convention on the Use of Electronic Communications in International Contracts” and “Text - Explanatory note”.

⁶⁹ *Isover Saint-Gobain v. Dow Chemical*, ICC Case No 4131.

⁷⁰ *Khoms El Mergeb v. Société Dalico*, 26 March 1991, *Rev. arb.* (1991) p. 456.

agreement (subjective arbitrability) and (3) whether the claim can be referred to arbitration (objective arbitrability).

1. Will of the parties

51. In deciding whether or not there is an arbitration agreement between the parties, arbitrators will need to look into the manifestation of the will of the parties and determine which law is applicable in order to decide whether there was a will to submit the dispute to arbitration. Many approaches are possible however three are frequently used in practice: the *lex contractus*, the *lex loci arbitri*, and general principles of law and trade usages.⁷¹

52. "The valid and effective consent of the parties to submit their dispute to arbitration is the cornerstone of an arbitration agreement. A valid consent depends on whether the parties are entitled to submit to arbitration and on whether the existence and scope of this consent may be established and under what circumstances such consent is to be evidenced."⁷² It is also interesting to note that the question of whether or not an arbitration agreement was concluded is closely linked to the formal validity of the agreement.

2. Subjective arbitrability

53. The New York Convention⁷³ and the Geneva Convention⁷⁴ both state that the law applicable to the capacity of the parties is the personal law of the parties. Therefore, capacity is not determined by law chosen by the parties (*lex contractus*) or in absence of such a choice, by the law of the country of the seat of arbitration (*lex loci arbitri*).

54. The personal law of a private person is the law of his / her nationality (in civil law systems) or of his / her domicile (common law systems). The personal law of a company is most often the law of the State in which it has its headquarters (civil law systems) or the law of the State of incorporation (common law systems).

55. However "it is a fundamental notion that arbitral tribunals will disregard limitations of (or pleas grounded in) national law aiming to invalidate an arbitration clause"⁷⁵ especially when State or State owned companies invoke that following their national law, they did not have the capacity to enter into agreement.

3. Objective arbitrability

56. Arbitrators may have to evaluate whether the right concerned by the dispute may be referred to arbitration. This issue is usually closely linked to international public policy rules and mandatory rules.⁷⁶

57. Although approaches based on transnational rules exist, the prevailing trend is to apply the *lex loci arbitri* to find the law applicable to the arbitrability of the claim. In order to determine the law applicable to objective arbitrability, an arbitrator may use one of two existing methods: a conflict of laws rule or a direct substantive rule.⁷⁷ The *lex loci arbitri* most often provides that arbitration is allowed if the right concerned by the dispute is within free disposal of the parties, which is the French solution.⁷⁸ The second

⁷¹ P. Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause", *International Council for Commercial Arbitration Congress series No 9*; Kluwer Law International, 1999, pp. 201–202.

⁷² J.D.M. Lew, *supra* note 61, pp. 119–120.

⁷³ Art. V(1)a New York Convention.

⁷⁴ Art. VI(2) Geneva Convention.

⁷⁵ M. Blessing, *supra* note 61, p. 182.

⁷⁶ *I.e.* competition rules, anti-corruption rules, embargo rules, intellectual property rules.

⁷⁷ M. Blessing, *supra* note 61, pp. 182–183.

⁷⁸ Art. 2059 *Code civil* (France, Civil Code).

possible solution is a substantive rule which clearly identifies whether a right may be arbitrable, which is the Swiss and German solution.⁷⁹

VI. CONCLUSION

58. In developing a new international instrument dealing with choice of law in international contracts, consideration would need to be given to its use in the context of international arbitration. If such rules were to reflect arbitration practice, party autonomy would be an essential principle, but like all principles, it would be subject to exceptions. Therefore, if a possible Hague instrument were to go further than existing laws and arbitration rules, it may need to elaborate on the restrictions that may be taken into account, such as the application of mandatory rules which are not part of the chosen law and public policy rules which are also excluded by the choice, but impose themselves nonetheless.

59. A second principle that may be contemplated is one which will provide the method in determining the applicable law in the absence of choice of the parties. This method should avoid mechanical solutions in order to provide arbitrators with freedom to determine the applicable law, without the related uncertainty and unpredictability such wide freedom may cause to the parties. It is interesting to note that at a recent session, the United Nations Commission on International Trade Law submitted a report on the revision of the UNCITRAL Arbitration Rules in which:

*"a proposal was made to replace the default provision that reference be made to conflict of laws rules failing designation by the parties with a reference to a direct choice of rules of law most closely connected to the dispute."*⁸⁰

60. The instrument would also need to clarify the application of a-national rules, meaning (1) whether it is permissible for parties to choose not only national laws but also transnational rules to govern the dispute, (2) whether in absence of choice of the parties, arbitrators may base their award solely on transnational rules ("law" versus "rules of law"), and (3) whether arbitrators may use a-national rules to fill in gaps in the event that the chosen law does not provide for a complete solution (application "*ex officio*").

61. The last element that needs to be considered is the form that such an instrument could take. There are several options: (1) an international treaty which would be a binding instrument, (2) a Model Law which could be used a basis for national laws, (3) a set of non-binding Legal Principles, and (4) a Guide to Good Practice. Even though almost three decades ago the Commission on Law and Commercial Practices of the International Chamber of Commerce did not pursue the idea of Guidelines further, the Working Group that it established favoured guidelines containing general principles only.⁸¹ It may be useful, three decades later, to check whether this view is still the predominant one. In this perspective, and amongst other questions relating to applicable law in international contracts, the Hague Conference on Private International Law has asked its Member States and many stakeholders, such as international arbitration centres, and through the International Chamber of Commerce, the international business community, to indicate their preference as to the possible form and content of an instrument.

⁷⁹ Art. 177(1) *Loi fédérale sur le droit international privé* (Switzerland, Federal Statute of Private International Law); Art. 1030 Code of Civil Procedure (Germany).

⁸⁰ Report of the Working Group on Arbitration and Conciliation on the work of its 45th session, Vienna, 11-15 September 2006, p. 25. This proposal is under discussion.

⁸¹ See O. Lando, *supra* note 1, p. 160.

ANNEXES / APPENDICES

Appendix 1

Flowchart: Choice of the Parties

* * *

Annexe 1

Organigramme : Choix des parties

Choice of the parties

National law(s)

Rules of law (including national and a-national rules)

Amiable compositeur

VII(1) Geneva Convention; 33(1) UNCITRAL Arbitration Rules; 21(1) Arab Convention on Commercial Arbitration

INSTITUTIONAL RULES
30(1) Rules of Procedure of the Inter-American Arbitration Commission; 33(1) PCA Optional Rules for Arbitrating Disputes between two parties of which only one is a State; 10(1) IMO Arbitration Rules; 30(1) CAMCA Arbitration Rules; 4(1) International Arbitration Rules of the Zurich Chamber of Commerce; 34(1) ACICA Arbitration Rules; 33(1) Arbitration Rules of the Cairo Regional Center for Commercial Arbitration; 32(1) CIDRA Arbitration Rules; 27(1) Arbitration Rules of the Portuguese Chamber of Commerce and Industry; 33(1) St-Petersburg International Commercial Arbitration Court; 16(1) Rules of Arbitration of the International Arbitral Center of the Austrian Federal Economic Chamber; 8 Rules of Riga International Arbitration Court; 21(1) Arbitration Rules for the Addis Ababa Chamber of Commerce Arbitration Institute; 15 Arbitration Rules of the Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry; 28 Arbitral Rules for the Gulf Cooperation Council Commercial Arbitration Center; 32(2) Rules of Board of Arbitration of the Central Chamber of Commerce of Finland.

NATIONAL RULES: Bulgaria; Cost Rica; Czech Republic; England; Malta; New Zealand; Nigeria; Singapore; Turkey.

28(1) UNCITRAL Model Law; 42(1) ICSID Convention

INSTITUTIONAL RULES
17(1) ICC Rules of Arbitration; 59(a) WIPO Arbitration Rules; 46 Netherlands Arbitration Institute Arbitration Rules; 30(1) CAMCA Arbitration Rules; 3(2) International Arbitration Rules of the Milan Chamber of Commerce; 24(1) Rules of Arbitration of the Stockholm Chamber of Commerce; 28(1) AAA International Arbitration Rules; 23(1) Arbitration Rules of the German Institution of Arbitration; 41(1) Commercial Arbitration Rules of the Japan Commercial Arbitration Association; 30(1) BCICAC Arbitration Rules; 24(1) CCAC Arbitration Rules; 22(1) Arbitration Rules of the Italian Arbitration Association; 23(1)b)i) CNICA Rules; 16 (2) Rules of Arbitration of the Conciliation and Arbitration Center of Tunis; 27 *Règlement d'arbitrage de la Cour d'Arbitrage de Côte d'Ivoire*; 23 *Règlement d'arbitrage du Centre d'arbitrage du Groupement interpatronal du Cameroun*; 23 Rules of the Arbitration Center of Mexico.

NATIONAL RULES: Algeria; Australia; Bahrain; Bangladesh; Brazil; Canada (federal level, Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario); China (Hong Kong SAR); Croatia; Cyprus; Denmark; Egypt; Estonia; France; Germany; Greece; Hungary; India; Ireland; Italy; Japan; Kenya; Lebanon; Mexico; Netherlands; New Zealand; Peru; Russian Federation; Scotland; Spain; Sri Lanka; Switzerland; Thailand; Tunisia; Uganda; Ukraine; Zimbabwe.

Art. 28(3) UNCITRAL Model Law; Art. 33(2) UNCITRAL Arbitration Rules; Art. VII(2) Geneva Convention

INSTITUTIONAL RULES
Art. 17(3) ICC Rules of Arbitration; Art. 59(a) WIPO Arbitration Rules; Art. 33(2) Rules of Procedure of the Inter-American Arbitration Commission; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between two parties of which only one is a State; Art. 33(2) Optional Rules of the Permanent Court for Arbitrating Disputes between International Organizations and Private Parties; Art. 42(3) ICSID Convention; Art. 15(2) OHADA Uniform Act on Arbitration; Art. 3(1) International Arbitration Rules of the Milan Chamber of Commerce.

NATIONAL RULES: Argentina, Canada (British Columbia, Quebec), Germany, Croatia, Denmark, Egypt, Estonia, Greece, Hungary, India, Indonesia, Italy, Japan, Kenya, Lebanon, Libya, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Nigeria, Peru, Portugal, Spain, Sri Lanka, Switzerland, Thailand, Tunisia, Turkey, Uganda, Ukraine, Yemen, Zimbabwe.

Additional condition: allowed by applicable procedure law

VII(2) Geneva Convention; 33(2) UNCITRAL Arbitration Rules

INSTITUTIONAL RULES
15 CEPANI Arbitration Rules; 30(2) Rules of Procedure of the Inter-American Arbitration Commission; 33(2) PCA Optional Rules for Arbitrating Disputes between two parties of which only one is a State; 34(2) ACICA Arbitration Rules; 32(2) CIDRA Arbitration Rules.

Terms of contract

Trade usages

Will always be taken into consideration by the arbitral tribunal

Mandatory Rules of Law

Transnational Public Policy

Important to render an effective award – V (2) b) 1958 New York Convention

Appendix 2

Flowchart: Absence of choice of law of the Parties

* * *

Annexe 2

Organigramme : Absence de choix des parties

Absence of choice of law of parties

Conflict of laws rules which arbitrators consider applicable / appropriate

Voie directe

Law(s)

Rules of law

Specific conflict of laws rule "Closest connection"

Law(s) which arbitrators consider appropriate

Rules of law which arbitrators consider appropriate

Lex loci arbitri

Specifically designated law

34(2) Rules of Arbitration Procedure of the Danish Institute of Arbitration

Law(s) applicable

Rules of law applicable

INSTITUTIONAL RULES
30(1) CAMCA Arbitration Rules; 27(2) Arbitration Rules of the Portuguese Chamber of Commerce and Industry.

NATIONAL LAWS:
Hungary; Portugal.

INSTITUTIONAL RULES
17(1) ICC Rules of Arbitration; 59(a) WIPO Arbitration Rules; 22.1(c) LCIA Arbitration Rules; 46 Netherlands Arbitration Institute Arbitration Rules; 24(1) Rules of Arbitration of the Stockholm Chamber of Commerce; 28(1) AAA International Arbitration Rules; 34(1) ACICA Arbitration Rules; 30(3) BCICAC Arbitration Rules; 24(1) CCAC Arbitration Rules; 23(1)b)iii) CNICA Rules; 21(1) Arbitration Rules for the Addis Ababa Chamber of Commerce Arbitration Institute; 16(3) Rules of Arbitration of the Conciliation and Arbitration Center of Tunis; 27 *Règlement d'arbitrage de la Cour d'Arbitrage de Côte d'Ivoire*; 23 Rules of the Arbitration Center of Mexico.

NATIONAL LAWS: Algeria; Bangladesh; Belgium; Canada (Alberta; British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, Quebec); Djibouti; Estonia; France; India; Indonesia Kenya; Lebanon; Luxembourg; Netherlands; Tunisia; Uganda.

42(1) ICSID Convention

4(2) International Arbitration Rules of Zurich Chamber of Commerce; 14 (2) Rules of proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce; 8 Rules of Riga International Arbitration Court.

NATIONAL LAWS: Costa Rica; Czech Republic; Estonia; Malta; Yemen.

VII(1) Geneva Convention; 28(2) UNCITRAL Model Law; 33(1) UNCITRAL Arbitration Rules

INSTITUTIONAL RULES
10(1) IMO Arbitration Rules; 30(1) Rules of Procedure of the Inter-American Arbitration Commission; 33(1) PCA Optional Rules for Arbitrating Disputes between two parties of which only one is a State; 30(1) CAMCA Arbitration Rules; 33(1) Arbitration Rules of the Cairo Regional Center for Commercial Arbitration; 32(1) CIDRA Arbitration Rules; 33(1) St-Petersburg International Commercial Arbitration Court; 16(1) Rules of Arbitration of the International Arbitral Center of the Austrian Federal Economic Chamber; 23 *Règlement d'arbitrage du Centre d'arbitrage du Groupement interpatronal du Cameroun*; 15 Arbitration Rules of the Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry; 28 Arbitral Rules for the Gulf Cooperation Council Commercial Arbitration Center

NATIONAL LAWS: Australia; Bahrain; Bermuda; Bulgaria; Canada (federal level); China (Hong Kong SAR); Colombia; Cyprus; Czech Republic; Denmark; England; Finland; Greece; Ireland; New Zealand; Nigeria; Peru; Russian Federation; Scotland; Singapore; Spain; Sri Lanka; Thailand; Ukraine; Zimbabwe.

21(1) Arab Convention on Commercial Arbitration

INSTITUTIONAL RULES
23.2 Arbitration Rules of the German Institution of Arbitration; 41(2) Commercial Arbitration Rules of the Japan Commercial Arbitration Association; 22(1) Arbitration Rules of the Italian Arbitration Association.

NATIONAL LAWS: Croatia; Egypt; Germany; Italy; Japan; Turkey; United States of America.

INSTITUTIONAL RULES
3(3) International Arbitration Rules of the Milan Chamber of Commerce.

NATIONAL LAWS:
Switzerland.

Terms of the contracts

Trade usages

Mandatory Rules

Transnational Public Policy

Please note that the articles in Appendices 3, 4 and 5 are provided in both English and French where possible.

In all other situations, they are either only in English or only in French.

Veillez noter que les articles dans les annexes 3, 4 et 5 sont disponibles en anglais et en français lorsque cela est possible.

Dans toute autre situation, ils sont disponibles soit en anglais soit en français

Appendix 3 – Annexe 3

INTERNATIONAL INSTRUMENTS – INSTRUMENTS INTERNATIONAUX*

* Legend for articles / Légende des articles

Pink / <i>Rose</i>	Rule for choice of law of parties / <i>Règle de l'autonomie des parties</i>
Red / <i>Rouge</i>	Rule in absence of choice of law of parties / <i>Règle en cas d'absence de choix</i>
Bold / <i>Gras</i>	Law or Rule of law / <i>Loi ou Règle de droit</i>
Green / <i>Vert</i>	Rule for decisions in equity / <i>Règle pour les décisions en équité</i>
<u>Underlined green / <i>Souligné en vert</i></u>	Arbitral procedure must permit decisions in equity / <i>Procédure arbitrale doit permettre décisions en équité</i>
Blue / <i>Bleu</i>	Rule for terms of contract / <i>Règle pour les stipulations contractuelles</i>
Orange / <i>Orange</i>	Rule for trade usages / <i>Règle pour les usages commerciaux</i>
Violet / <i>Violet</i>	Other consideration / <i>Autre considération</i>

Accord du Mercosur sur l'arbitrage commercial international (Buenos Aires 23 juillet 1998)

Article 10

Les parties peuvent *choisir le droit applicable* pour trancher le différend avec pour base le droit international privé et ses principes, ainsi que le droit du commerce international. Si les parties n'ont rien convenu sur cette matière, les arbitres décident selon les *mêmes sources*.

Arab Convention on Commercial Arbitration (Amman 14 April 1987)

Article 21

1. The arbitral tribunal shall settle the dispute in compliance with the *contract* entered into between the parties and the *provisions of the law on which they may expressly or tacitly have agreed*, or else with the *law which has the closest relation with the subject matter of the dispute* provided that the well-established rules of *international commercial usages* are respected.

2. The arbitral tribunal must settle the case *ex aequo et bono* if the parties expressly so agree.

Convention arabe sur l'arbitrage commercial (Amman, 14 avril 1987)

Article 21

1. Le tribunal arbitral statue sur le différend conformément aux *termes du contrat conclu entre les parties et aux dispositions de la loi dont elles sont convenues expressément ou tacitement*, sinon de la *loi la plus en rapport avec l'objet du différend* sauf à respecter les règles bien établies en matière *d'usage commercial international*.

2. Le tribunal arbitral doit statuer selon les règles de *l'équité* si les parties en conviennent expressément.

Convention on the settlement of Investment Disputes between States and Nationals of Other States

Article 42

1. The Tribunal shall decide a dispute in accordance with such *rules of law as may be agreed by the parties*. In the absence of such agreement, the Tribunal shall apply *the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law* as may be applicable.

2. The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

3. The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États

Article 42

1. Le Tribunal statue sur le différend conformément aux **règles de droit adoptées par les parties**. Faute d'accord entre les parties, le Tribunal applique le **droit de l'Etat contractant partie au différend — y compris les règles relatives aux conflits de lois—ainsi que les principes de droit international en la matière**.
2. Le Tribunal ne peut refuser de juger sous prétexte du silence ou de l'obscurité du droit.
3. Les dispositions des alinéas précédents ne portent pas atteinte à la faculté pour le Tribunal, si les parties en sont d'accord, de statuer **ex aequo et bono**.

European Convention on International Commercial Arbitration (Geneva, April 21, 1961)

Article VII

1. The **parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute**. 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**.
2. The arbitrators shall act as **amiables compositeurs** if the parties so decide and if they may do so under the law applicable to the arbitration.

Convention européenne sur l'arbitrage commercial international (Genève, du 21 avril 1961)

Article VII

1. Les **parties sont libres de déterminer le droit que les arbitres devront appliquer au fond du litige**. À défaut d'indication par les parties du droit applicable, les arbitres appliqueront la **loi désignée par la règle de conflit que les arbitres jugeront appropriée en l'espèce**. Dans les deux cas, les arbitres tiendront compte des **stipulations du contrat** et des **usages du commerce**.
2. Les arbitres statueront en "**amiables compositeurs**" si telle est la volonté des parties et si la loi régissant l'arbitrage le permet.

UNCITRAL Arbitration Rules

Article 33

1. The arbitral tribunal shall apply the **law designated by the parties as applicable to the substance of the dispute**. Failing such designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules** which it considers applicable.
2. The arbitral tribunal shall decide as **or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

2. 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.

Règlement d'arbitrage de la CNUDCI

Article 33

1. Le tribunal arbitral applique la **loi désignée par les parties comme étant la loi applicable au fond du litige**. À défaut d'une telle indication par les parties, le tribunal arbitral applique la **loi désignée par la règle de conflit de lois qu'il juge applicable en l'espèce**.

2. Le tribunal arbitral ne statue en **qualité d'«amiable compositeur»** (ex aequo et bono) que si le tribunal arbitral y a été expressément autorisé par les parties et si ce type d'arbitrage est permis par la loi applicable à la procédure arbitrale.

3. Dans tous les cas, le tribunal arbitral décide conformément aux **stipulations du contrat** et tient compte des **usages du commerce applicables** à la transaction.

UNCITRAL Model Law

Article 28

1. 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.

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

3. The arbitral tribunal shall decide **ex aequo et bono** or **amiable compositeur** only if the parties have expressly authorized it to do so.

4. In all cases, the 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.

Loi type de la CNUDCI

Article 28

1. Le tribunal arbitral tranche le différend conformément aux **règles de droit choisies par les parties comme étant applicables au fond du différend**. Toute désignation de la loi ou du système juridique d'un Etat donné est considérée, sauf indication contraire expresse, comme désignant directement les règles juridiques de fond de cet Etat et non ses règles de conflit de lois.

2. A défaut d'une telle désignation par les parties, le tribunal arbitral applique la **loi désignée par la règle de conflit de lois qu'il juge applicable en l'espèce**.

3. Le tribunal arbitral statue **ex aequo et bono ou en qualité d'amiable compositeur** uniquement si les parties l'y ont expressément autorisé.

4. Dans tous les cas, le tribunal arbitral décide conformément aux **stipulations du contrat** et tient compte des **usages du commerce applicables** à la transaction.

Appendix 4 – Annexe 4

INSTITUTIONAL ARBITRATION RULES – RÈGLEMENT D'ARBITRAGE INSTITUTIONNEL*

* Legend for articles / Légende des articles

Pink / *Rose*

Red / *Rouge*

Bold / *Gras*

Green / *Vert*

Underlined green / *Souligné en vert*

Blue / *Bleu*

Orange / *Orange*

Violet / *Violet*

Rule for choice of law of parties / *Règle de l'autonomie des parties*

Rule in absence of choice of law of parties / *Règle en cas d'absence de choix*

Law or Rule of law / *Loi ou Règle de droit*

Rule for decisions in equity / *Règle pour les décisions en équité*

Arbitral procedure must permit decisions in equity / *Procédure arbitrale doit permettre décisions en équité*

Rule for terms of contract / *Règle pour les stipulations contractuelles*

Rule for trade usages / *Règle pour les usages commerciaux*

Other consideration / *Autre considération*

Arbitration Rules for the Addis Ababa Chamber of Commerce Arbitration Institute

Article 21

1. In international arbitration, the arbitral tribunal shall apply **the law designated by the parties** as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the **rules of law which it determines to be appropriate**.
2. The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so.
3. 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.

International Arbitration Rules of the American Arbitration Association

Article 28

1. The tribunal shall apply the **substantive law(s) or rules of law designated by the parties** as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such **law(s) or rules of law as it determines to be appropriate**.
2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the **terms of the contract** and shall take into account **usages of the trade** applicable to the contract.
3. The tribunal shall not decide as **amiable compositeur or ex aequo et bono** unless the parties have expressly authorized it to do so.

Rules of the Arbitration Center of Mexico

Article 23

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. In the absence of any such agreement, the Arbitral Tribunal shall apply the **rules of law that it determines to be appropriate**.

In all cases, the Arbitral Tribunal shall take into consideration the **provisions of the contract** and the **trade usages**.

The Arbitral Tribunal shall assume the powers of an **amiable compositeur** when the parties have agreed expressly to give it such powers.

Rule of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic

Article 8

1. The Arbitration Court shall decide disputes in accordance with the **rules of the applicable material law**, guiding themselves, within the scope thereof, by the **contract** concluded between the parties and having regard to the **custom of trade**.

2. A dispute may be decided also *ex aequo et bono*, however, such decision shall be admissible only if the parties expressly confer this power on the arbitrators.

Rules of the Arbitration Institute of the Stockholm Chamber of Commerce

Article 24

1. The Arbitral Tribunal shall decide the merits of the dispute on the basis of the **law or rules of law agreed by the parties**. In the absence of such an agreement, the Arbitral Tribunal shall apply the **law or rules of law which it considers to be most appropriate**.

2. Any designation made by the parties of the law of a given state shall be construed as directly referring to the substantive law of that state and not to its conflict of laws rules.

3. The Arbitral Tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

Arbitration Rules of the Italian Arbitration Association

Article 22

1. Where the parties have not agreed upon the law applicable to the merits or have not agreed that the arbitrator shall decide *ex aequo et bono*, the arbitrator shall apply the **law most closely connected to the contract**.

2. The arbitrator shall decide *ex aequo et bono* only if the parties agree thereto.

3. In all cases, the arbitrator shall take into account the **provisions of the contract** and the **customs concerning the matter in dispute**.

Règlement d'arbitrage de l'Association italienne pour l'arbitrage

Article 22

1. *Si les parties ne sont pas parvenues à un accord sur les règles applicables au fond ou si elles ne sont pas convenues que l'arbitre ait recours à l'équité, l'arbitre applique la loi avec laquelle le rapport est le plus étroit.*

2. *L'arbitre décide en l'équité seulement si les parties en sont d'accord.*

3. *Dans tous les cas, l'arbitre tient compte des stipulations du contrat et des usages en vigueur dans le domaine du différend.*

Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules

Article 34

1. The Arbitral Tribunal shall apply the **law designated by the parties** as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the **rules of law which it considers applicable**.

2. The Arbitral Tribunal shall decide **as amiable compositeur or ex aequo et bono** only if the parties have, in writing, expressly authorized the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. 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.

Belgium Center for Mediation and Arbitration (CEPANI) Arbitration Rules

Article 15

4. The Arbitral Tribunal shall have the power to decide on an **ex aequo** basis only if the parties have allowed it to do so in accordance with the provisions of the applicable law.

In that event, the Arbitral Tribunal shall nevertheless abide with these Rules.

Règlement d'arbitrage du Centre belge d'arbitrage et de médiation (CEPANI)

Article 15

*4. Le tribunal arbitral n'exerce les pouvoirs d'**amiable compositeur** que si les parties les lui confèrent dans les conditions prescrites par la loi applicable. Le tribunal arbitral se conforme néanmoins, dans ce cas, aux dispositions du présent règlement.*

Rules of the Board of Arbitration of the Central Chamber of Commerce of Finland

Article 32

The arbitrators shall decide the dispute in accordance with the law.

If the parties have agreed that the **law of a particular country** should be applied to the dispute, the arbitrators shall base their award on the law of such country.

If the parties have so agreed, the arbitrators may, however, decide **ex aequo et bono**.

Arbitration Rules of the British Columbia International Commercial Arbitration Center

Article 30

1. 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.

2. Any designation by the parties 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.

3. Failing any designation of the law under (1) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate** given all the circumstances surrounding the dispute.

4. The arbitral tribunal shall decide **ex aequo et bono or as amiable compositeur** if the parties have expressly authorized it to do so.

5. 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.

Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration

Article 33

1. The arbitral tribunal shall apply the **law designated by the parties** as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of law rules** which it considers applicable.

2. The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so.

3. 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.

International Arbitration Rules of the Canadian Commercial Arbitration Centre

Article 24

1. The parties shall be **free to agree upon the rules of law to be applied by the Tribunal to the merits of the dispute**. In the absence of such agreement, the Tribunal shall apply the **rules of law which it determines to be appropriate**.

2. In all cases the Tribunal shall take account of the **provisions of the contract** and the **relevant trade usages**.

3. The Tribunal shall assume the powers of an **amiable compositeur** or decide **ex aequo et bono** only if the parties have agreed to give it such powers.

Règle d'arbitrage internationale du Centre canadien d'arbitrage commercial

1. Les parties sont **libres de choisir les règles de droit que le tribunal applique au fond du litige**. À défaut d'un tel choix par les parties, le tribunal applique **les règles de droit qu'il juge appropriées**.

2. Dans tous les cas, le tribunal tient compte des **dispositions du contrat** et des **usages du commerce pertinents**.

3. Le tribunal statue en **amiable compositeur** ou décide **ex aequo et bono** seulement si les parties ont convenu de lui en donner le pouvoir.

Règlement d'arbitrage du Centre d'arbitrage du Groupement interpatronal du Cameroun

Article 23

Les **parties sont libres de déterminer le droit** que le tribunal arbitral devra appliquer au fond du litige. A défaut d'indications par les parties du droit applicable, le tribunal arbitral appliquera **la loi désignée par la règle de conflit qu'il jugera appropriée en l'espèce**.

Dans tous les cas, le tribunal arbitral tiendra compte des *stipulations du contrat* et des *usages du commerce*.

L'arbitre reçoit les pouvoirs *d'amiable compositeur* ("ex æquo et bono") si les parties ont donné leur accord sur ce point dans la convention d'arbitrage, ou postérieurement.

Règlement d'arbitrage du Centre d'arbitrage et de médiation de Madagascar

Article 24

1. Le tribunal arbitral applique la *loi désignée par les parties* comme étant la loi applicable au fond du litige. A défaut d'une telle indication par les parties, le tribunal arbitral applique la *loi désignée par la règle de conflit de lois qu'il juge applicable en l'espèce*.
2. Le tribunal arbitral statue en qualité *d'amiable compositeur* " (ex aequo et bono) que si le tribunal arbitral y a été expressément autorisé par les parties.
3. Dans tous les cas, le tribunal arbitral décide conformément aux *stipulations du contrat* et tient compte des *usages du commerce* applicables à la transaction.

Arbitration Rules of Chicago International Dispute Resolution Association (CIDRA)

Article 32

1. The arbitral tribunal shall apply the *law designated by the parties* as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the *law determined by the conflict of laws rules* which it considers applicable.
2. The arbitral tribunal shall decide *as amiable compositeur or ex æquo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. 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.

Commercial Arbitration and Mediation Center for the Americas (CAMCA) Arbitration Rules

Article 30

1. The tribunal shall apply the *laws or rules of law designated by the parties* as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such *law or laws as it determines to be appropriate*.
2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the *terms of the contract* and shall take into account *usages of the trade* applicable to the contract.
3. The tribunal shall not decide as *amiable compositeur or ex aequo et bono* unless the parties have expressly authorized it to do so.

Rules of Arbitration of the Conciliation and Arbitration Centre of Tunis

Article 16

The arbitral tribunal shall decide the substance of the dispute, and examine all the issues of the arbitration.

The arbitral tribunal shall decide the dispute in accordance with the **law or rules chosen by the parties**.

Failing a choice by the parties, the tribunal shall apply the **law or rules that it determines to be appropriate**.

The tribunal may decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized it to do so. The tribunal shall, then, decide in accordance with rules of justice and equity.

In all cases, the tribunal shall have due regard to the **terms of the contract**, and take into account any **applicable trade usages**.

Règlement du Centre de conciliation et d'arbitrage de Tunis

Article 16

Le Tribunal arbitral doit obligatoirement statuer sur le fond ainsi que sur toutes les questions qui lui sont soumises.

*Le Tribunal arbitral statue conformément aux **règles de droit choisies par les parties** et, à défaut d'un tel choix, **les règles de droit qu'il juge appropriées**. Le tribunal arbitral peut également se voir confier par les parties, la mission de statuer comme **amiable-compositeur**. Dans ce cas, le tribunal peut statuer selon les règles de l'équité.*

*Dans tous les cas, le Tribunal arbitral doit respecter les **dispositions du contrat** et prendre en considération les **usages du commerce applicables** à la transaction.*

Rules of the Council for National and International Commercial Arbitration (India)

Article 23

1. Where the place of arbitration is situated in India: -
 - (b) in an 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 to its conflict of laws/rules;
 - (iii) falling any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate** given all the circumstances surrounding the dispute.

2. The arbitral tribunal will decide **ex aequo et bono** or **as amiable compositeur** only if the parties have expressly authorised it to do so.

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

Acte uniforme relatif au droit de l'arbitrage de la Cour commune de justice et d'arbitrage de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)

Article 15

1. Les arbitres tranchent le fond du litige conformément aux **règles de droit désignées par les parties** ou à défaut **[les règles de droit]** choisies par eux comme les **plus appropriées** compte tenu le cas échéant des **usages du commerce international**.

2. Ils peuvent également statuer en **amiable compositeur** lorsque les parties leur ont conféré ce pouvoir.

Règlements d'arbitrage de la Cour d'Arbitrage de Côte d'Ivoire

Article 27

L'arbitre tranche le litige, conformément aux **règles de droit que les parties ont choisies**, à défaut d'un tel choix, conformément **à celles qu'il estime appropriées**.

Il tient compte le cas échéant, des **usages du commerce**.

Rules of proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry

Article 14

1. The arbitral tribunal and the sole arbitrator (hereinafter the "arbitral tribunal") shall apply the **law stipulated by the parties**. The stipulation of a given legal system is to be understood to be the stipulation that refers directly to the substantive law and not to the conflict of law norms of the given state.

2. Failing stipulation by the parties, the arbitral tribunal shall apply **the law which it considers to be applicable according to the rules of Hungarian private international law**.

3. The arbitral tribunal renders a decision on the basis of **equity** (ex aequo et bono) or as a friendly intermediary (amiable compositeur) only if it has been expressly authorized to do so by the parties.

4. In each case, the arbitral tribunal makes its decisions in compliance with the **stipulations of the contract** and by taking into consideration **applicable commercial customs**.

Regulations of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of the Republic of Moldova

Article 27

The Arbitral Tribunal shall settle the disputes based on the **applicable substantive law, determined by the parties'** agreement as the law applicable in case of disputes.

In case such agreement does not exist, the substantive **law is determined in accordance with the conflict rules**, which arbitral tribunal considers applicable for the resolution of dispute shall be applied.

The decision concerning the applicable law shall be taken in accordance with the **agreement provisions** and with regard for **trade customs** and **international arbitration practice**.

Rules of Arbitration of the Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania and Bucharest

Article 73

1. The parties shall be free to determine, by their agreement, **the law** applicable to the merits of the case.
2. In default of such agreement, the Arbitral Tribunal shall decide on the **applicable law, according to the pertinent conflict of laws rules**.

Rules of Arbitration Procedure of the Danish Institute of Arbitration

Article 34

1. The arbitral tribunal shall decide the dispute in accordance with such **rules of law as have been chosen by the parties** as applicable to a decision of the substance of the dispute. Unless otherwise expressed, any references to a country's legislation or legal system shall be construed as directly referring to the substantive law of that country and not to its rules on international private law.
2. Failing a choice by the parties of the rules of law applicable to the decision of the substance of the dispute, the arbitral tribunal shall apply the **rules of law which follow from the conflict of laws rules** which it considers applicable.
3. The arbitral tribunal shall decide the dispute on the principles of **equity** only if the parties have expressly authorised it to do so.
4. The arbitral tribunal shall in any *case* decide the case in accordance with the **provisions of the contract** and with due regard to the **usages of the trade** applicable to the case.

Arbitration Rules of the German Institution of Arbitration

Article 23

1. 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.

2. Failing any designation by the parties, the arbitral tribunal shall apply the **law of the State with which the subject-matter of the proceedings is most closely connected**.
3. The arbitral tribunal shall decide **ex aequo et bono or as amiable compositeur** only if the parties have expressly authorized it to do so. The parties may so authorize the arbitral tribunal up to the time of its decision.
4. In all cases the arbitral tribunal shall decide in accordance with the **terms of the contract** and shall take into account the **usages of trade applicable** to the transaction.

Règlement d'arbitrage de l'institut allemand d'arbitrage

Article 23

1. *Le tribunal tranche le différend conformément aux **règles de droit choisies par les parties comme étant applicables au fond du différend**. Toute désignation d'un droit ou d'un système juridique d'un État est considérée, sauf indication contraire expresse, comme désignant directement les règles de droit substantielles de cet État et non ses règles de conflit de lois.*
2. *À défaut d'une telle désignation par les parties, le tribunal arbitral applique la **loi du pays avec lequel l'objet du litige présente les liens les plus étroits**.*
3. *Le tribunal arbitral ne statue en **équité** (ex aequo et bono, amiable composition) que si les parties l'y ont expressément autorisé. L'autorisation peut être donnée à tout moment jusqu'à la décision du tribunal arbitral.*
4. *Dans tous les cas, le tribunal arbitral décide conformément aux **dispositions du contrat** et tient compte des **usages du commerce applicables**.*

Arbitral Rules of Procedure for the Gulf Co-operation Council Commercial Arbitration Centre

Article 28

The Tribunal shall settle disputes in accordance with the following:

1. The **contract** concluded between the two parties as well as any subsequent agreement between them.
2. The **law chosen by the parties**.
3. The **law** having most relevance to the issue of the dispute **in accordance with the rules of the conflict of laws deemed fit by the Tribunal**.
4. **Local and international business practices**.

Règles de procédure arbitrale du centre d'arbitrage commercial du conseil de coopération du Golfe

Article 28

Le tribunal arbitral règle les différends selon ce qui suit :

1. Le **contrat** conclu entre les parties et tout accord antérieur entre elles.
2. La **loi choisie par les parties**.
3. La **loi** qui se rattache le plus au fond du litige, **par le jeu des règles de conflits de lois que le tribunal arbitral estime les plus appropriées**.
4. Les **usages locaux ou internationaux commerciaux**.

Rules of Procedure of the Inter-American Arbitration Commission

Article 30

1. The arbitral tribunal shall apply the **law designated by the parties** as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules that it considers applicable**.
2. The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. *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.

Optional Rules of the Permanent Court of Arbitration for Arbitration disputes between international organisations and private parties

Article 33

1. In resolving the dispute, the arbitral tribunal shall have regard both to the **rules of the organization concerned and to the law applicable to the agreement or relationship out of or in relation to which the dispute arises and, where appropriate, to the general principles governing the law of international organizations and to the rules of general international law**.
2. The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. In all cases, the arbitral tribunal shall decide in accordance with the **terms of the agreement** and shall take into account the **usages of the trade applicable** to the transaction or relationship.

Règlement facultatif de la Cour permanente d'arbitrage pour l'arbitrage des différends entre les organisations internationales et les parties privées

Article 33

1 Pour résoudre le différend, le tribunal arbitral tient compte à la fois des **règles de l'organisation en question, du droit applicable à l'accord ou à la relation et, le cas échéant, des principes généraux applicables au droit des organisations internationales et des règles de droit international général.**

2. Le tribunal arbitral ne statue en qualité d'**amiable compositeur** (ex aequo et bono) que si le tribunal arbitral y a été expressément autorisé par les parties et si ce type d'arbitrage est permis par la loi applicable à la procédure arbitrale.

3. Dans tous les cas, le tribunal arbitral décide conformément aux **stipulations de l'accord** et tient compte des **usages du commerce applicables** à la transaction ou à la relation.

Optional Rules of the Permanent Court of Arbitration for Arbitration disputes between two parties of which only one is a State

Article 33

1. The arbitral tribunal shall apply the **law designated by the parties as applicable to the substance of the dispute.** Failing such designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules which it considers applicable.**

2 The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. 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.

Règlement facultatif de la Cour permanente d'arbitrage pour l'arbitrage des différends entre deux parties dont l'une seulement est un Etat

Article 33

1. Le tribunal arbitral applique la **loi choisie par les parties comme étant la loi applicable au fond du litige.** A défaut d'une telle indication par les parties, le tribunal arbitral applique la **loi désignée par la règle de conflit de lois qu'il juge applicable en l'espèce.**

2. Le tribunal arbitral ne statue en qualité d'**amiable compositeur** (ex aequo et bono) que si le tribunal arbitral y a été expressément autorisé par les parties et si ce type d'arbitrage est permis par la loi applicable à la procédure arbitrale.

3. Dans tous les cas, le tribunal arbitral décide conformément aux **stipulations du contrat** et tient compte des **usages du commerce applicables** à la transaction.

Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber

Article 16

1. As to the substance of the case, the sole arbitrator (arbitral tribunal) shall apply the **law that the parties have designated** as applicable. Failing such designation by the parties, he (it) shall apply the **law that is designated by the choice of law** that he (it) considers to be applicable.
2. The sole arbitrator (arbitral tribunal) may base his (its) decisions on **equity** if he (it) has been expressly empowered by the parties.

Arbitration Rules of International Chamber of Commerce

Article 17

1. 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. In the absence of any such agreement, the Arbitral Tribunal shall apply the **rules which it determines to be appropriate**.
2. In all cases the Arbitral Tribunal shall take into account the **provisions of the contract** and the **relevant trade usages**.
3. The Arbitral Tribunal shall assume the powers of an **amiable compositeur** or decide in **ex aequo et bono** only if the parties have agreed to give it such powers.

Règlement d'arbitrage de la Chamber de commerce internationale

1. *Les **parties sont libres de choisir les règles de droit** que le tribunal arbitral devra appliquer au fond du litige. A défaut de choix par les parties des règles de droit applicables, l'arbitre appliquera les **règles de droit qu'il juge appropriées**.*
2. *Dans tous les cas, le tribunal arbitral tient compte des **dispositions du contrat** et des **usages du commerce pertinents**.*
3. *Le tribunal arbitral statue en **amiable compositeur**, ou décide **ex aequo et bono**, seulement si les parties sont convenues de l'investir de tels pouvoirs.*

Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation

Article 13

The ICAC shall settle disputes on the basis of the **applicable rules of substantive law determined by an agreement of the parties**. Failing any designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules which it considers applicable**. 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.

Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry

Article 8

1. The Arbitration Court shall decide the dispute in accordance with such **rules of the 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 as directly referring to the substantive law of that State and not to its conflict of laws rules.
2. Failing any designation by the parties, the Arbitration Court shall apply the **law determined by the conflict of laws rules which it considers applicable**.
3. The Arbitration Court shall decide *ex aequo et bono* or as **amiable compositeur** only if the parties have expressly authorised it to do so.
4. In all the cases, the Arbitration Court shall decide in accordance with the **terms of the contract** and shall take into account the **usages of the trade** applicable to the transaction.

International Maritime Organisation Arbitration Rules

Article 10

1. The parties shall be **free to determine the law to be applied** by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the **law designated as the proper law by the rule of conflict of laws which he deems appropriate**.
2. The arbitrator shall assume the powers of an **amiable compositeur** only if the parties have agreed to give him such powers.

Rules of the Japanese Commercial Arbitration Association

Rule 41

1. The arbitral tribunal shall decide the dispute in accordance with such **rules of law as are agreed by the parties** as applicable to the substance of the dispute.
2. Failing agreement provided for in the preceding paragraph, the arbitral tribunal shall apply the **law of the country or state to which the dispute in the arbitral proceedings is most closely connected**.
3. Notwithstanding the provisions contained in the preceding two paragraphs, the arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly requested it to do so.

Arbitration Rules of the London Court of International Arbitration

Article 22.1

Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the **law(s) or rules of law applicable** to the arbitration, the **merits of the parties' dispute** and the Arbitration Agreement;

Rules of the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry

Article 8

1. The Maritime Arbitration Commission shall decide the dispute in accordance with such **rules of the 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 as directly referring to the substantive law of that State and not to its conflict of laws rules.
2. Failing any designation by the parties, the Maritime Arbitration Commission shall apply the **law determined by the conflict of laws rules which it considers applicable**.
3. The Maritime Arbitration Commission shall decide **ex aequo et bono or as amiable compositeur** only if the parties have expressly authorize it to do so.
4. In all the cases, the Maritime Arbitration Commission shall decide in accordance with the **terms of the contract** and shall take into account the **usages of the trade** applicable to the transaction.

Arbitration Rules of the Milan Chamber of Commerce

Article 3

1. The Arbitral Tribunal shall decide on the merits of the dispute in accordance with the rules of law unless the parties expressly provided that the Tribunal decide **ex aequo et bono**.
2. The Arbitral Tribunal shall decide in accordance with the **rules chosen by the parties in the arbitration agreement or subsequently** until the Arbitral Tribunal is constituted.
3. In the absence of an agreement pursuant to paragraph 2, the Arbitral Tribunal shall choose the **rules with which the subject matter of the dispute has its closest connection**.
4. In any case the Arbitral Tribunal shall take into account **trade usages**.

Netherlands Arbitration Institute Arbitration Rules

Article 45

1. The arbitral tribunal shall decide as amiable compositeur unless the parties agreed to authorise it to make its award in accordance with the rules of law.
2. In an international arbitration, the arbitral tribunal shall make its award in accordance with the **rules of law** unless the parties agreed to authorise it to decide as **amiable compositeur**.

Article 46

If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the **rules of law chosen by the parties**. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the **rules of law which it considers appropriate**.

Article 47

In all cases the arbitral tribunal shall take into account any applicable **trade usages**.

Arbitration Rules of the Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry

Article 15

The Arbitral Tribunal shall apply the **substantive law which the parties have designated** as the governing law of their Contract or in the absence of such designation, the **law which it finds applicable in accordance with the rules of conflict of laws which it deems appropriate**.

The Arbitral Tribunal may act as an "**amiable compositeur**" only with the express agreement of the parties.

Arbitration Rules of the Portuguese Chamber of Commerce and Industry

Article 26

The arbitrators shall decide in accordance with law, unless the parties have, in the arbitration agreement or in a document signed before the acceptance of the first arbitrator, authorised them to decide according to **equity**.

Article 27

1. If the dispute concerns the international trade, the **parties may choose the law to be applied** by the arbitrators, unless they have authorised them to decide according to equity.

2. Failing such choice, the arbitrators shall apply the **most appropriate law** to the dispute, **taking in consideration namely the placement of the interests at stake and the specific nature of the law issues to be settled**.

Article 28

The tribunal shall *always*, in the award, take in consideration the **trade usage**.

Rules of Riga International Arbitration Court

Article 6

By concluding of the Arbitration Agreement, the **parties may** in addition agree upon the number of arbitrators, the procedure of arbitration, to choose verbal or written process, the place of arbitration, the language of arbitration, the **applicable law** as well as on other issues according to the law.

Rules of Arbitration Procedure of the Santiago Arbitration and Mediation Center

Article 34

The arbitration tribunal shall decide as an arbitrator **ex aequo et bono** unless the parties have mutually decided otherwise, provided such procedure adheres to the law. *In all cases*, the arbitration tribunal shall abide by the **contract stipulations** and take into account the **mercantile uses** applicable to the case.

Rules of the St-Petersburg International Commercial Arbitration Court

Article 33

1. The arbitral tribunal shall apply the **law designated by the parties as applicable to the substance of the dispute**. Failing such designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of law rules which it considers applicable**.
2. The arbitral tribunal shall decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized the arbitral tribunal to do so.
3. 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.

Arbitration Rules of the World Intellectual Property Organization

Article 59

(a) The Tribunal shall decide the substance of the dispute in accordance with the **law or rules of law chosen by the parties**. Any designation of the law 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. Failing a choice by the parties, the Tribunal shall apply the **law or rules of law that it determines to be appropriate**. In all cases, the Tribunal shall decide having due regard to the **terms of any relevant contract** and taking into account **applicable trade usages**. The Tribunal may decide as **amiable compositeur or ex aequo et bono** only if the parties have expressly authorized it to do so.

Règlement d'arbitrage de l'Organisation mondiale de la propriété intellectuelle

Article 59

*(a) Le tribunal statue sur le fond du litige conformément **au droit ou aux règles de droit choisies par les parties**. Toute désignation du droit d'un État donné est interprétée, sauf avis contraire, comme se référant au fond et non à la règle de conflit de lois de cet État. À défaut de choix des parties, le tribunal applique **le droit ou les règles de droit qu'il juge appropriées**. Dans tous les cas, le tribunal statue eu égard aux **stipulations de tout contrat pertinent** et des **usages du commerce applicables**. Le tribunal ne peut statuer en qualité d'**amiable compositeur ou ex aequo et bono** que si les parties l'ont expressément autorisé à le faire.*

International Arbitration Rules of Zurich Chamber of Commerce

Article 4

The Arbitral Tribunal decides according to the **substantive law declared applicable by the parties**.

If the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the **law applicable according to the rules of the Private International Law Statute**.

If however, the application of the PIL at the seat, domicile or habitual residence of all parties leads similarly to a different result, the case must be decided accordingly on motion of one of the parties.

Appendix 5 – Annexe 5

NATIONAL LAWS – LOIS NATIONALES¹

Algeria - *Algérie*
Argentina - *Argentine*
Bangladesh - *Bangladesh*
Belgium - *Belgique*
Brazil - *Brésil*
Bulgaria - *Bulgarie*
Canada – *Canada*
Alberta / *Alberta*
British Columbia / *Colombie britannique*
Manitoba / *Manitoba*
New Brunswick / *Nouveau Brunswick*
Newfoundland and Labrador / *Terre-Neuve-et-Labrador*
Nova Scotia / *Nouvelle Écosse*
Ontario / *Ontario*
Quebec / *Québec*
Costa Rica – *Costa Rica*
Croatia – *Croatie*
Czech Republic – *République tchèque*
Denmark – *Danemark*
Egypt – *Égypte*
Estonia – *Estonie*
France – *France*
Germany – *Allemagne*
Greece – *Grèce*
Hungary – *Hongrie*
India – *Inde*
Indonesia – *Indonésie*
Italy – *Italie*
Japan – *Japon*
Kenya – *Kenya*
Lebanon – *Liban*
Libya – *Libye*
Luxembourg – *Luxembourg*
Malta – *Malta*
Mexico – *Mexique*
Netherlands – *Pays-Bas*
New Zealand – *Nouvelle-Zélande*
Nigeria – *Nigéria*
Peru – *Pérou*
Portugal - *Portugal*
Russian Federation – *Fédération russe*
Singapore – *Singapour*
Spain – *Espagne*
Sri Lanka – *Sri Lanka*
Switzerland – *Suisse*
Thailand – *Thaïlande*
Tunisia – *Tunisie*
Turkey – *Turquie*
Uganda – *Ouganda*
Ukraine – *Ukraine*
United Kingdom / England – *Royaume Uni / Angleterre*
Yemen – *Yemen*
Zimbabwe - *Zimbabwe*

¹ Legend for articles / Légende des articles

Pink / Rose

Red / Rouge

Bold / Gras

Green / Vert

Underlined green / Souligné en vert

Blue / Bleu

Orange / Orange

Violet / Violet

Rule for choice of law of parties / Règle de l'autonomie des parties

Rule in absence of choice of law of parties / Règle en cas d'absence de choix

Law or Rule of law / Loi ou Règle de droit

Rule for decisions in equity / Règle pour les décisions en équité

Arbitral procedure must permit decisions in equity / Procédure arbitrale doit permettre décisions en équité

Rule for terms of contract / Règle pour les stipulations contractuelles

Rule for trade usages / Règle pour les usages commerciaux

Other consideration / Autre considération

Algeria - Algérie

Code de procédure civile

Article 458 bis 14

Le tribunal arbitral tranche le litige en application des **règles de droit que les parties ont choisies**, ou, à défaut d'un tel choix, selon les **règles de droit** et **usages** qu'il estime appropriés.

Argentina – Argentine

National Code of Civil and Commercial Procedure

Article 766

1. All matters which can be submitted to arbitration can be decided by **amiables compositores**.
2. If the terms of reference do not say whether arbitration is to be *de iure* or *amiable composition* or if arbitrators have been authorized to decide *ex aequo et bono*, it shall be understood that they shall decide as **amiables compositores**.

Bangladesh – Bangladesh

2001 Arbitration Act

Article 36

1. The arbitral tribunal shall decide the dispute in accordance with the **rules of law as are designated by the parties** as applicable to the substance of the dispute; provided that 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.
2. Failing any designation of the law under sub-section (1) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate** given all the circumstances surrounding the dispute.
3. The arbitral tribunal shall decide in accordance with the **terms of the contract** taking into account the **usages** of the concerned matter, if any, for ends of justice.

Belgium – Belgique

Belgium Judicial Code

Article 1700

1. Unless the parties have agreed otherwise, the arbitrators shall decide the dispute in accordance with **rules of law**.
2. When a public law legal person is a party to the arbitration agreement, the arbitrators shall decide in accordance with rules of law, without prejudice to special laws.

Code judiciaire belge

Article 1700

1. Sauf convention contraire des parties, les arbitres statuent selon les **règles du droit**.
2. Lorsqu'une personne morale de droit public est partie à la convention d'arbitrage, les arbitres statuent toujours selon les règles de droit, sans préjudice des lois particulières.

Brazil – Brésil

1996 Law on arbitration

Article 2

At the parties' discretion, arbitration may be conducted under the rules of law or in **equity**.

§ 1. The parties may **freely choose the rules of law applicable** in the arbitration provided that their choice does not violate good morals and public policy.

§ 2. The parties may also agree that the arbitration shall be conducted under the **general principles of law, customs, usages and international rules of trade**.

Loi sur l'arbitrage de 1996

Article 2

L'arbitrage peut se faire en droit ou en **équité**, selon la volonté des parties.

§ 1. Les parties peuvent **choisir librement les règles de droit applicables** à l'arbitrage, à condition qu'il n'y ait pas d'atteinte aux bonnes mœurs ni à l'ordre public.

§ 2. Les parties peuvent également convenir que l'arbitrage se réalise selon les **principes généraux du droit, des usages et coutumes et les règles internationales du commerce**.

Bulgaria – Bulgarie

Law on International Commercial Arbitration

Article 38

1. The arbitral tribunal shall decide the dispute in accordance with the **law chosen by the parties**. Unless otherwise agreed, the choice of law refers to the substantive law and not to the conflict of laws rules.
2. If the parties have failed to designate the applicable law, the arbitral tribunal shall apply the **conflict of laws rules which it considers applicable**.
3. In all cases the arbitral tribunal shall apply the **terms of the contract** and shall take into account **trade usages**.

Loi sur l'arbitrage commercial international

1. Le tribunal arbitral tranche le litige en appliquant la **loi choisie par les parties**. Sauf convention contraire, le choix de la loi se rapporte aux règles substantielles et non pas aux règles de conflit de lois.
2. A défaut d'indication de la loi applicable par les parties, le tribunal arbitral applique la **loi désignée par les règles de conflit de lois qu'il juge appropriées**.
3. Dans tous les cas le tribunal arbitral applique les **stipulations du contrat** et tient compte des **usages du commerce**.

Canada – Canada

Alberta – Alberta

International Commercial Arbitration Act

Article 7

Notwithstanding article 28(2) of the International Law [UNCITRAL Model Law], if the parties fail to make a **designation pursuant to article 28(1) of the International Law**, the arbitral tribunal shall apply **the rules of law** it considers to be appropriate given all the **circumstances respecting the dispute**.

Loi sur l'arbitrage commercial international

Article 7

Malgré le paragraphe 28(2) du Code [Loi type CNUDCI], à défaut par les parties de procéder à la **désignation prévue à son paragraphe 28(1) [du Code]**, le tribunal applique les **règles de droit** qu'il estime indiquées compte tenu des **circonstances de l'espèce**.

British Columbia – Colombie britannique

International Commercial Arbitration Act

Article 28

1. The arbitral tribunal must decide the dispute in accordance with the **rules of law designated by the parties as applicable to the substance of the dispute**.
2. Any designation by the parties of the law or legal system of a given state must be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.
3. Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal must apply the **rules of law** it considers to be appropriate given all the circumstances surrounding the dispute.
4. The arbitral tribunal must decide **ex aequo et bono or as amiable compositeur** if the parties have expressly authorized it to do so.
5. In all cases, the arbitral tribunal must decide in accordance with the **terms of the contract** and must take into account the **usages of the trade** applicable to the transaction.

Loi sur l'arbitrage commercial international

Article 28

1. Le tribunal arbitral tranche le différend, conformément aux *règles de droit choisies par les parties comme étant applicables au fond du différend*.
2. Toute désignation de la loi ou du système juridique d'un Etat donné est considérée, sauf indication contraire expresse, comme désignant directement les règles juridiques de fond de cet Etat et non ses règles de conflit de lois.
3. A défaut d'une désignation par les parties de la loi visée au paragraphe (1) du présent article, le tribunal arbitral applique les **règles de droit qu'il juge appropriées dans toutes les circonstances du différend**.
4. Le tribunal arbitral statue *ex aequo et bono ou en qualité d'amiable compositeur*, uniquement si les parties l'y ont expressément autorisé.
5. Dans tous les cas, le tribunal arbitral décide conformément aux *stipulations du contrat* et tient compte des *usages du commerce applicables* à la transaction.

Manitoba – Manitoba

International Commercial Arbitration Act

Article 7

Notwithstanding article 28(2) of the International Law [UNCITRAL Model Law], if the parties fail to make a *designation pursuant to article 28(1) of the International Law*, the arbitral tribunal shall apply the **rules of law** it considers to be appropriate given all the *circumstances respecting the dispute*.

New Brunswick – Nouveau Brunswick

International Commercial Arbitration Act

Article 7

Notwithstanding Article 28(2) of the International Law [UNCITRAL Model Law], if the parties fail to make a *designation pursuant to Article 28(1) of the International Law*, the arbitral tribunal shall apply the **rules of law** it considers to be appropriate given all the *circumstances respecting the dispute*.

Loi sur l'arbitrage commercial international

Article 7

*Nonobstant le paragraphe 28(2) de la Loi internationale [Loi type CNUDCI], si les parties font défaut de procéder à une désignation conformément au paragraphe 28(1) de la Loi internationale, le tribunal arbitral applique les **règles de droit qu'il estime indiquées compte tenu de toutes les circonstances concernant le différend**.*

Newfoundland and Labrador – Terre-Neuve-et-Labrador

International Commercial Arbitration Act

Article 8

Notwithstanding article 28(2) of the international law [UNCITRAL Model Law], where the parties fail to make a **designation under article 28(1) of the international law**, the arbitral tribunal shall apply the **rules of law** it considers to be appropriate given all the circumstances respecting the dispute.

Nova Scotia – Nouvelle-Écosse

International Commercial Arbitration Act

Article 8

Notwithstanding Article 28(2) of the International Law, if the parties fail to make a **designation pursuant to Article 28(1) of the International Law**, the arbitral tribunal shall apply the **rules of law** it considers to be appropriate given all the circumstances respecting the dispute.

Ontario – Ontario

International Commercial Arbitration Act

Article 6

Despite article 28(2) of the [UNCITRAL] Model Law, if the parties fail to make a **designation pursuant to article 28(1) of the Model Law**, the arbitral tribunal shall apply the **rules of law** it considers to be appropriate given all the circumstances respecting the dispute.

Loi sur l'arbitrage commercial international

Article 6

*Malgré l'article 28 (2) du Code [Loi type CNUDCI], à défaut par les parties de procéder à la **désignation prévue à son article 28 (1) [du Code]**, le tribunal arbitral applique les **règles de droit** qu'il estime indiquées compte tenu des circonstances de l'espèce.*

Quebec – Québec

Code of Civil Procedure

Article 944.10

The arbitrators shall settle the dispute according to the **rules of law which they consider appropriate** and, where applicable, determine the amount of the damages.

They cannot act as **amiables compositeurs** except with the prior concurrence of the parties.

They shall in all cases decide according to the **stipulations of the contract** and take account of **applicable usage**.

Code de procédure civile

Article 944.40

*Les arbitres tranchent le différend conformément aux **règles de droit qu'ils estiment appropriées** et, s'il y a lieu, déterminent les dommages-intérêts.*

*Ils ne peuvent agir en qualité d'**amiables compositeurs** que si les parties en ont convenu.*

*Dans tous les cas, ils décident conformément aux **stipulations du contrat** et tiennent compte des **usages applicables**.*

Costa Rica – Costa Rica

Law on Alternative Resolution of Disputes and Promotion of Freedom from Social Unrest

Article 22

The arbitral tribunal shall apply the **substantive law selected by the parties**. If the parties have not done so [selected the applicable law], the arbitral tribunal shall apply **Costa Rican law, including the provisions on conflict of laws**.

In all cases, the arbitral tribunal shall reach a decision as prescribed by the **stipulations of the arbitration agreement** and shall additionally consider the **uses and practices applicable** to the case, including written regulations, when appropriate.

Croatia – Croatie

Law on Arbitration

Article 27

1. 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.

2. Failing any designation by the parties under paragraph 1 of this article, the arbitral tribunal shall apply the **law which it considers to be most closely connected with the dispute**.

3. The arbitral tribunal shall decide **ex aequo et bono or en qualité d'amiable compositeur** only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the **terms of the contract** and shall take into account the **applicable usages**.

Czech Republic – République tchèque

1994 Act on Arbitral Proceedings and Enforcement of Arbitral Awards

Article 37

1. If the arbitral proceedings involve relations containing an international element, the arbitrators shall take their decision under the **law, selected by the parties** (proper law). Proper law or law applicable under the conflict of laws rules shall denote, unless another solution is contained in the parties' agreement, the material law. Conflict of laws rules of the proper or otherwise applicable law shall not be taken into consideration.
2. Unless the parties choose the proper law under paragraph (1) of the present Article, the arbitrators shall apply the **local conflict of laws rules for the determination of the applicable law**.

Denmark – Danmark

2005 Danish Arbitration Act

Article 28

1. 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 country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules.
2. Failing any designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules which it considers applicable**.
3. The arbitral tribunal shall decide **ex aequo et bono or as amiable compositeur** only if the parties have expressly authorized it to do so.
4. 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.

Egypt – Égypte

1994 Law Concerning Arbitration in Civil and Commercial Matters

Article 39

1. The arbitral panel shall apply to the substance of the dispute the **rules chosen by the two parties**. If they agree on the applicability of the law of a given State, only the substantive rules thereof shall be applicable and not its conflict of laws rules, unless otherwise agreed by the parties.
2. If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral panel shall apply the **substantive rules of the law it considers most closely connected to the dispute**.
3. The arbitral panel, when adjudicating the merits of the dispute, shall decide in accordance with the **terms of the contract** in dispute and the **usages of the trade** applicable to the transaction.

4. The arbitral panel may, if it has been expressly authorized to act as an “**amiable compositeur**” by agreement between the two parties to the arbitration, adjudicate the merits of the dispute in conformity with the rules of justice and fairness (*ex aequo et bono*), without being restricted by the legal provisions.

Loi relative à l'arbitrage en matière civile et commerciale de 1994

Article 39

1. *Le tribunal arbitral applique au fond du litige les **règles sur lesquelles les deux parties se sont mises d'accord**. Si elles se sont mises d'accord sur l'application de la loi d'un Etat déterminé, application sera faite des règles de fond de cette loi à l'exclusion des règles de conflit de lois, à moins que les parties n'en soient convenues autrement.*

2. *Si les deux parties ne se sont pas mises d'accord sur les règles de droit applicables au fond du litige, le tribunal arbitral applique **les règles de fond de la loi qui lui paraît avoir les liens les plus étroits avec le litige**.*

3. *Le tribunal arbitral doit, lorsqu'il tranche le fond du litige, prendre en considération les **stipulations du contrat** objet du litige ainsi que les **usages du commerce** dans ce type d'opération.*

4. *Le tribunal arbitral peut, si les deux parties l'ont autorisé expressément à statuer en **amiable composition**, trancher le fond du litige en appliquant les règles de la justice et de l'équité, sans être lié par les dispositions d'une loi.*

Estonia – Estonie

Code of Civil Procedure

Article 742

1. In resolving a dispute, an arbitral tribunal shall apply **the legislation, application of which was agreed upon by the parties**. In making reference to the law of a state, an agreement is not presumed to include the conflict of laws rule of such state unless the parties have expressly agreed otherwise.

2. An arbitral tribunal shall apply **Estonian law** if the parties have not agreed on applicable law and applicable law does not arise from an Act.

3. An arbitral tribunal may resolve a dispute based on the principle of **justice** if the parties have expressly agreed on it. An agreement can be made until the time the arbitral court makes its decision. In resolving a dispute based on the principle of justice, an arbitral tribunal shall not deviate from the imperative provisions of the law of the state which would be applied in case the dispute would be resolved without the agreement on application of the principle of justice.

4. In resolving a dispute in the case provided in subsections (1) or (2) of this section, an arbitral tribunal shall take account of the terms and conditions of contracts and of customary practices regarding contracts in so far as this is possible under the legislation which is applied.

France – France

New Code of Civil Procedure

Article 1496

The arbitrator shall decide the dispute in accordance with the **rules of the law chosen by the parties** or, in the absence of such choice, in accordance with **the rules of the law he considers appropriate**.

In all cases he shall take the **usages of the trade** into consideration.

Nouveau Code de procédure civile

Article 1496

*L'arbitre tranche le litige conformément aux **règles de droit que les parties ont choisies** ; à défaut d'un tel choix, conformément à **celles qu'il estime appropriées**.*

*Il tient compte dans tous les cas des **usages du commerce**.*

Germany – Allemagne

Code of Civil Procedure

Article 1051

1. 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.

2. Failing any designation by the parties, the arbitral tribunal shall apply the **law of the State with which the subject-matter of the proceedings is most closely connected**.

3. The arbitral tribunal shall decide **ex aequo et bono or as amiable compositeur** only if the parties have expressly authorized it to do so. The parties may so authorize the arbitral tribunal up to the time of its decision.

4. 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.

Code de procédure civile

Article 1051

1. *Le tribunal arbitral tranche le différend conformément aux **règles de droit choisies par les parties comme étant applicables au fond du différend**. Toute désignation de la loi ou du système juridique d'un État est considérée, sauf indication contraire expresse, comme désignant directement les règles juridiques de fond de cet État et non ses règles de conflit de lois.*

2. *A défaut d'une telle désignation par les parties, le tribunal arbitral applique **la loi du pays avec lequel l'objet du litige présente les liens les plus étroits**.*

3. Le tribunal arbitral statue en *équité* uniquement si les parties l'y ont expressément autorisé. L'autorisation peut être donnée jusqu'à la décision du tribunal arbitral.

4. Dans tous les cas, le tribunal arbitral décide conformément aux *stipulations du contrat* et tient compte des *usages du commerce* applicables à la transaction.

Greece – Grèce

1999 Law on International Commercial Arbitration

Article 28

1. 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.

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

3. The arbitral tribunal shall decide **ex aequo et bono or as amiable compositeur** only if the parties have expressly authorised it to do so.

4. 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.

Loi sur l'arbitrage commercial international de 1999

Article 28

1. Le tribunal arbitral tranche le différend conformément aux **règles de droit choisies par les parties comme étant applicables au fond du différend**. Toute désignation de la loi ou du système juridique d'un Etat donné est considérée, sauf indication contraire expresse, comme désignant directement les règles juridiques de fond de cet Etat et non ses règles de conflit de lois.

2. A défaut d'une telle désignation par les parties, le tribunal arbitral applique **la loi désignée par la règle de conflit de lois qu'il juge la plus appropriée en l'espèce**.

3. Le tribunal arbitral statue selon la **justice** (en tant qu'amiable compositeur) uniquement si les parties l'y ont expressément autorisé.

4. Dans tous les cas, le tribunal arbitral décide conformément aux **stipulations du contrat** et tient compte des **usages du commerce** qui sont appropriés à la transaction en question.

Hungary – Hongrie

1994 Act on Arbitration

Article 49

1. 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 the parties have agreed otherwise - as one referring to the rules in the given state's law, relating directly to the points in issue.

2. Failing any designation of law by the parties, the **applicable law shall be determined by the arbitral tribunal**.

3. The arbitral tribunal may only decide *ex aequo et bono*, instead of the application of a law, if it was expressly authorized to do so by the parties."13"

Article 50

The arbitral tribunal shall decide in accordance with the **terms of the contract** as well as by taking into account the **trade practices applicable** to the transaction.

India – Inde

1996 Arbitration and Conciliation Act

Article 28

1. Where the place of arbitration is situate 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 to its conflict of laws rules;

(iii) failing any designation of the law under sub-clause (i) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate given all the circumstances surrounding the dispute**.

2. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

3. 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.

Indonesia – Indonésie

Code of Civil Procedure

Article 631

The arbitrators shall decide according to the rules of law, unless they have been authorized to decide as good men in **equity** (*amiabes compositeurs*).

Italy – Italie

Code of Civil Procedure

Article 834

The **parties may agree** among themselves upon the **rules** which the arbitrators shall apply to the merits of the dispute or provide that the arbitrators shall decide **ex æquo et bono**.

In both cases the arbitrators shall take into account the **provisions of the contract** and **trade usages**.

If the parties are silent, the **law with which the relationship has its closest connection** shall apply.

Japan – Japon

2003 Arbitration Law

Article 36

1. The arbitral tribunal shall decide the dispute in accordance with such **rules of law as are agreed by the parties as applicable to the substance of the dispute**. In such case, 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.

2. Failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the **substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected**.

3. Notwithstanding the provisions prescribed in the preceding two paragraphs, the arbitral tribunal shall decide **ex aequo et bono** only if the parties have expressly authorized it to do so.

4. Where there is a contract relating to the civil dispute subject to the arbitral proceedings, the arbitral tribunal shall decide in accordance with the **terms of such contract** and shall take into account the **usages**, if any, that may apply to the civil dispute.

Kenya – Kenya

1995 Arbitration Act

Article 29

1. The arbitral tribunal shall decide the dispute in accordance with the **rules of law chosen by the parties** as applicable to the substance of the dispute.

2. The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not to its conflict of laws rules.

3. Failing a choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate** given all the circumstances of the dispute.

4. The arbitral tribunal shall decide on the substance of the dispute according to **considerations of justice and fairness** without being bound by the rules of law, only if the parties have expressly authorized it to do so.

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

Lebanon – Liban

Nouveau Code de procédure civile

Article 813

*L'arbitre tranche le litige conformément aux **règles de droit choisies par les parties** et à défaut d'un tel choix, conformément à **celles qu'il estime appropriées**. Il tient compte, dans tous ces cas, des **usages commerciaux**.*

*L'arbitre tranche le litige comme **amiable compositeur** si la convention des parties a précisé sa mission dans ce sens.*

Libya – Libye

1953 Code of Civil and Commercial Procedure

Article 754

In the agreement to arbitrate or arbitration clause or any other later agreement executed before the arbitrator starts to consider the case, the **parties may fix the rules** and procedure which must be applied by the arbitrators.

If they do not do so, the arbitrators may determine the **rules which they consider appropriate**, and failing this, one must apply the procedure and time-limits which apply for court proceedings.

Article 755

Arbitrators acting as "**amicales compositeurs**" are freed from any duty relating to the respect of the law or legal procedures.

Article 761

The arbitral award must be made within Libyan territory otherwise it will be governed by the rules applicable to judgments made abroad. The arbitrators must settle the case in law unless the parties authorize them to settle the case "**ex aequo et bono**" and in compliance with **custom**.

Luxembourg – Luxembourg

Code of Civil Procedure

Article 1019

Arbitrators and umpires shall make their awards in accordance with the rules of law unless the submission empowers them to give a decision as *amicales compositeurs*.

Malta – Malte

1996 Arbitration Act

Article 45

1. The arbitral tribunal shall apply, subject to the provisions of this Act, the **law designated by the parties as applicable to the substance of the dispute**. Failing such designation by the parties, the arbitral tribunal shall apply Maltese law including the rules of Maltese law relative to the conflict of laws.

2. The arbitral tribunal shall decide as *amicable compositeur or ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so.

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

Mexico – Mexique

Commercial Code

Article 1445

1. The arbitral tribunal shall decide the dispute in accordance with such **rules of law as are chosen by the parties** as applicable. 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.

2. Failing any designation by the parties of the law applicable to the merits of the dispute the arbitral tribunal, **taking regard to the characteristics and connections of each case, shall determine the applicable law**.

3. The arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* only if the parties have expressly authorized it to do so."8"

4. 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.

Code commercial

Article 1445

1. *Le tribunal arbitral tranche le différend conformément aux **règles de droit choisies par les parties**. Toute désignation de la loi ou du système juridique d'un Etat donné est considérée, sauf indication contraire expresse, comme désignant directement les règles juridiques de fond de cet Etat et non ses règles de conflit de lois.*

2. *A défaut de désignation par les parties de la loi applicable au fond du différend, le tribunal arbitral détermine quel est le droit applicable, en prenant en compte les caractéristiques et les points de rattachement du cas considéré.*

3. *Le tribunal arbitral statue en qualité d'amiable compositeur ou en conscience, uniquement si les parties l'y ont expressément autorisé.*

4. *Dans tous les cas, le tribunal arbitral décide conformément aux stipulations conventionnelles et tient compte des usages du commerce applicables à la convention.*

Netherlands – Pays-Bas

Code of Civil Procedure

Article 1054

1. The arbitral tribunal shall make its award in accordance with the rules of law.
2. If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the **rules of law chosen by the parties**. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the **rules of law which it considers appropriate**.
3. The arbitral tribunal shall decide as **amiable compositeur** if the parties by agreement have authorised it to do so.
4. In all cases the arbitral tribunal shall take into account any **applicable trade usages**.

Code de procédure civile

Article 1054

1. *Le tribunal arbitral statue conformément aux règles de droit.*
2. *Si les parties ont fait choix d'un droit applicable, le tribunal arbitral statue conformément aux **règles de droit retenues par les parties**. A défaut d'un tel choix de droit applicable, le tribunal arbitral statue conformément **aux règles de droit qu'il juge appropriées à l'espèce**.*
3. *Le tribunal arbitral statue en qualité d'amiable compositeur si les parties sont convenues de lui conférer cette mission.*
4. *Dans tous les cas, le tribunal arbitral tient compte des **usages du commerce applicables**.*

New Zealand – Nouvelle-Zélande

1996 Arbitration Act

Article 28

1. 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.

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

3. The arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* (according to considerations of general justice and fairness) only if the parties have expressly authorised it to do so.

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

Nigeria – Nigeria

1988 Arbitration and Conciliation Decree

Article 47

1. The arbitral tribunal shall decide the dispute in accordance with the **rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute**.

2. Any designation of the law or legal system of a country shall, unless otherwise expressed, be construed as directly referring to the substantive law of that country and not to its conflict of laws rules.

3. Where the laws of the country to be applied is not determined by the parties, the arbitral tribunal shall apply **the law determined by the conflict of laws rules which it considers applicable**.

4. The arbitral tribunal shall not decide *ex aequo et bono or as amiable compositeur* unless the parties have expressly authorised it to do so.

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

Peru – Pérou

1996 General Arbitration Law

Article 117

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 rules on conflict of laws.

Failing any designation by the parties, the arbitral tribunal shall apply **the law it deems proper**. The arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized it to do so.

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

Loi générale sur l'arbitrage de 1996

Article 117

Le tribunal arbitral tranche le litige conformément aux règles de droit choisies par les parties comme étant applicables au fond du litige. Sauf stimulation contraire, il est entendu que toute référence au droit ou à l'ordre juridique d'un Etat déterminé vaut référence au droit matériel de cet Etat et non à ses règles de conflit de lois.

Si les parties ne désignent pas de loi applicable, le tribunal arbitral applique la loi qu'il estime appropriée. Le tribunal arbitral ne décide en conscience et en équité que si les parties l'y ont expressément autorisé.

Dans tous les cas, le tribunal arbitral décide conformément aux stipulations du contrat et tient compte, si l'affaire a un caractère commercial, des usages commerciaux applicables à l'espèce.

Portugal – Portugal

1986 Law No 31/86

Article 22

The arbitrators shall decide in accordance with the law, unless the parties have authorized them to decide according to equity in the arbitration agreement or in a document signed before the acceptance by the first arbitrator.

Loi No 31/86 de 1986

Article 22

Les arbitres tranchent le litige conformément au droit, à moins que, dans la convention d'arbitrage ou dans un document souscrit jusqu'à l'acceptation du premier arbitre, les parties les aient autorisés à juger en équité.

Russian Federation – Fédération de Russie

Law on International Commercial Arbitration

Article 28

1. 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 as directly referring to the substantive law of that State and not to its conflict of laws rules.

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

3. 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.

Singapore – Singapour

2001 Arbitration Act

Article 32

1. The arbitral tribunal shall decide the dispute in accordance with the **law chosen by the parties** as applicable to the substance of the dispute.
2. If or to the extent that the parties have not chosen the law applicable to the substance of their dispute, the arbitral tribunal shall apply the **law determined by the conflict of laws rules**.
3. The arbitral tribunal may decide the dispute, if the parties so agree, in accordance with such **other considerations** as are agreed by them or determined by the tribunal.

Spain – Espagne

2003 Arbitration Act

Article 34

1. The arbitrators shall decide in **equity** only if the parties have expressly authorized them to do so.
2. Subject to the previous paragraph, where the arbitration is international, the arbitrators shall decide the dispute in accordance with such **rules of law as are chosen by the parties**. Any designation of the law or legal system of a given State shall be construed, unless otherwise stated, as referring to the substantive law of that State and not to its conflict of laws rules.

Failing any designation by the parties, the arbitrators shall apply the **law that they consider appropriate**.

3. In all cases, the arbitrators shall decide in accordance with the **terms of the contract** and shall take into account the **applicable usages**.

Sri Lanka – Sri Lanka

1996 Arbitration Act

Article 24

1. An 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 referring to the substantive law of that State and not to its conflict of laws rules.
2. Failing any designation by the parties to an arbitration agreement, the arbitral tribunal shall apply **the law determined by the conflict of laws rules which it considers applicable**.
3. The provisions of subsections (1) and (2) shall apply only to the extent agreed to by the parties.

4. The arbitral tribunal shall decide according to considerations of general **justice** and fairness or **trade usages** only if the parties have expressly authorised it to do so.

Switzerland – Suisse

Federal Statute of Private International Law

Article 187

1. The Arbitral Tribunal shall decide the case according to the **rules of law chosen by the parties** or, in the absence thereof, 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**.

Loi fédérale sur le droit international privé

Article 187

1 *Le tribunal arbitral statue selon les **règles de droit choisies par les parties** ou, à défaut de choix, selon les **règles de droit avec lesquelles la cause présente les liens les plus étroits**.*

2 *Les parties peuvent autoriser le tribunal arbitral à statuer en **équité**.*

Thailand – Thaïlande

Arbitration Act

Article 34

1. 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.

2. Where the parties fail to designate the law applicable to the dispute, the arbitral tribunal shall apply **Thai law to the dispute, except where there is a conflict of laws the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable**.

3. The parties may expressly authorize the arbitral tribunal to decide **ex aequo et bono** or as **amiable compositeur**.

4. The decision of the arbitral tribunal shall be in accordance with the **terms of the contract**, and in the case of a commercial dispute, it shall take into account the **usage of the trade applicable** to the transaction.

Tunisia – Tunisie

Arbitration Code

Article 73

1. The arbitral tribunal shall decide the dispute in accordance with the **law chosen** (should read “**rules of law chosen**” instead of “law chosen”) **by the parties**.
2. Failing any such designation, the arbitral tribunal shall apply the **law it deems appropriate**.
3. The arbitral tribunal may decide *ex aequo et bono* only if the parties have expressly authorized it to do so.
4. 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.

Code de l'arbitrage

Article 73

1. *Le tribunal arbitral tranche les différends conformément à la **loi désignée** (Il faut lire <aux **règles de droit désignées**>, plutôt que <à la loi désignée>) **par les parties**.*
2. *A défaut d'une telle désignation, le tribunal arbitral applique la **loi qu'il estime appropriée**.*
3. *Le tribunal arbitral peut statuer selon les règles de **l'équité** si les parties l'y ont expressément autorisé.*
4. *Dans tous les cas, le tribunal arbitral statue sur le différend conformément aux **stipulations du contrat**, en tenant compte des **usages du commerce** applicables à la transaction.*

Turkey – Turquie

International Arbitration Law

Article 12 C

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**. The **applicable trade usages** under the law shall be taken into account in construing the provisions of the underlying contract and for filling gaps. 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 or its rules of procedure.

Failing any designation by the parties of the applicable substantive law, the arbitral tribunal shall apply the **substantive law of a State, which has the closest connection with the dispute**. The arbitral tribunal shall decide *ex aequo et bono* or *as amiable compositeur* only if the parties have expressly authorized it to do so.

Loi sur l'arbitrage international

Article 12 C

*L'arbitre unique ou le tribunal arbitral rend sa décision en se conformant aux dispositions admises par les parties pour leur contrat et aux **dispositions légales choisies par ces parties pour la solution du litige**, pour interpréter ou pour combler les lacunes du contrat ; il sera tenu compte des **usages du commerce**. Si le droit d'un pays a été choisi par les parties, sauf convention contraire, ce sont non pas les règles de conflit ou de procédure mais directement ses règles de droit matériel qui sont considérées comme choisies.*

*A défaut d'une telle désignation par les parties, l'arbitre unique, ou le tribunal arbitral applique les **dispositions du droit matériel de l'Etat avec lequel l'objet du litige a les liens les plus étroits**.*

Uganda – Ouganda

2000 Arbitration and Conciliation Act

Article 29

1. The arbitral tribunal shall decide the dispute in accordance with the **rules of law chosen by the parties as applicable to the substance of the dispute**.
2. The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not to its conflict of laws rules.
3. If there is no choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the **rules of law it considers to be appropriate given all the circumstances of the dispute**.
4. The arbitral tribunal shall decide on the substance of the dispute according to considerations of **justice** and fairness without being bound by the rules of law, only if the parties have expressly authorised it to do so.
5. In all cases, the arbitral tribunal shall decide in accordance with the **terms of the particular contract** and shall take into account the **usages of the trade applicable** to the particular transaction.

Ukraine – Ukraine

Law on Commercial Arbitration

Article 28

1. 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 as directly referring to the substantive law of that State and not to its conflict of laws rules.
2. Failing any designation by the parties, the arbitral tribunal shall apply **the law determined by the conflict of laws rules which it considers applicable**.

3. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

4. 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.

United Kingdom / England – Royaume Uni / Angleterre

1996 Arbitration Act

Article 46

1. The arbitral tribunal shall decide the dispute -

(a) in accordance with the **law chosen by the parties** as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such **other considerations** as are agreed by them or determined by the tribunal.

2. For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

3. If or to the extent that there is no such choice or agreement, the tribunal shall apply the **law determined by the conflict of laws rules** which it considers applicable.

Yemen – Yémen

Arbitration Act

Article 45

The arbitral Tribunal shall settle the award in compliance with the **legal rules chosen by the parties**. Should the parties agree to apply a law different from that of the Republic of Yemen, the Arbitral Tribunal shall apply the substantial rules of this law. Failing such and appointment of an applicable law, the Arbitral Tribunal applies **the law held to be correct by the Yemeni Rules of Conflict of Laws**. The Arbitral Tribunal shall settle the dispute in compliance with the **rules of international law and those of fairness and justice** if the parties authorize it to so. In all cases, the Arbitral Tribunal must settle the dispute in compliance with Yemeni law, the **provisions of the contract** by taking into account general **social customs and the commercial customs** applicable to the operation.

Zimbabwe – Zimbabwe

1996 Arbitration Act

Article 28

1. 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.

2. Failing any designation by the parties, the arbitral tribunal shall apply **the law determined by the conflict of laws rules which it considers applicable**.
3. The arbitral tribunal shall decide *ex aequo et bono or as amiable compositeur* only if the parties have expressly authorised it to do so.
4. In all cases, the arbitral tribunal shall decide in accordance with the **terms of any contract** and shall take into account **any usages of any trade applicable** to the transaction.