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Reasons in Arbitral Awards: Arbitration in Equity, Arbitration in Law and Arbitration without Law in International Trade

Sommario: 1. Introduction. – 2. Arbitration in Equity. – 3. Arbitration in (chosen) Law. – 4. Arbitration without (chosen) Law. – 5. Reasoning and overriding mandatory rules.

1. *Introduction.* – A comparative analysis reveals that the expression of reasons in arbitral awards constitutes a principle of international commercial arbitration[1]. Certainly, such a require-

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[1] See A. Beaumont, *Reasons and Reasons for Reasons Revisited: Has the Domestic Arbitral Award Moved Away from the Fundamental Basis Behind the Reasoned Award, and Is It Now Time for Realignment?*, in 32 *Arbitration International*, 2016, p. 523 ss.; J. Bingham, *Reasons and Reasons for Reasons: Differences between a Court Judgment and an Arbitration Award*, in 4 *Arbitration International*, 1988/2, p. 141 ss.; Id., *Differences between a Judgment and a Reasoned Award*, in *The arbitrator*, vol. 16, n. 1, May 1997; R. Canals Vaquer, *La falta de motivación del laudo como motivo de su impugnación por infracción del orden público*, in *Arbitraje*, vol. XI, n. 2, 2018, p. 547 ss.; T.E. Carbonneau, Étude historique et comparée de l'arbitrage. *Vers un droit matériel de l'arbitrage commercial international fondé sur la motivation des sentences*, in *Rev. int. dr. comp*., vol. 36, n. 4, 1984, p. 727 ss.; T.H. Cheng, R. Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, in 32 *Suffolk Transnational Law Review*, 2009, p. 409 ss.; J.L. Delvolvé, *Essai sur la motivation des sentences arbitrales*, in *Revue de l'arbitrage*, 1989, p. 149 ss.; E.A. Farnsworth, *Sufficiency of Reasons in Arbitration Awards*, in 26 *Austl. & N.Z. Mar. L.J.*, p. 69 ss.; J.C. Fernández Rozas, *Motivación del laudo arbitral en equidad (Sentencia del TSJ Galicia CP 1ª nº. 18/2012 de 2 de mayo*, in *Arbitraje*, vol. VI, n. 2, 2013, pp. 455-46; Id., *Motivación del laudo arbitral*, in *Anuario de Arbitraje 2018*, Cizur Menor, Aranzadi, 2018, p. 51 ss.; Ph. Francescakis, *Des sentences arbitrales non motivées*, *RCDIP*, 1960, p. 297 ss.; P. Gillies, N. Selvadurai, *Reasoned Awards: How Extensive Must the Reasoning Be?*, in 74 *Arbitration*, 2008, p. 125 ss.; P. Lalive, On the *Reasoning of International Arbitral Awards*, in *1 Journal of International Dispute Settlement*, 2010, p. 55 ss.; K. Landau, *Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration*, in *ICCA Congress Series* n. 14 (Dublin Conference, 2008), Kluwer, 2009, p. 187 ss.; A. Mourre, *Réflexions critiques sur l'abandon du contrôle de la motivation des*

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ment is not shared by all legal systems. In the USA, for instance, both main legal rules (Federal Arbitration Act, Uniform Arbitration Act) and the Supreme Court state that arbitrators are not obliged to give the reasons for their decisions[2]. The same criterion is included in institutional arbitration rules as significant as the Commercial Arbitration Rules of the American Arbitration Association. Rule 46 b) only requires arbitrators to give reasons in arbitral awards if parties have so agreed or arbitrators consider it as peremptory[3].

However, the majority of legal systems allow parties to agree the renunciation of reasoning in arbitral awards. This possibility would demonstrate that obligation to give reasons is not *per se* an international public policy requirement. Article 8 of the Geneva Convention on international commercial arbitration of 21 April 1961 provides a good example of this exemption[4]. Some legal

sentences arbitrales en droit français, in *Bull. ASA*, vol. 19, n. 4, 2001, p. 634 ss.; H. Motulsky, *L'exequatur des sentences arbitrales non motivées*, in Écrits, t. 2, Paris, Dalloz, 1974, p. 408 ss.; A.V. Schlaepfer, A.C. Cremades, *La motivación de los laudos en arbitraje comercial internacional y en arbitraje de inversión*, in *Arbitraje internacional: pasado, presente y futuro: Libro Homenaje a Bernardo Cremades e Yves Derains*, t. II, Instituto Peruano de Arbitraje, 2013, p. 1411 ss.

[2] «Arbitrators have no obligation to the court to give their reasons for an award», in *United Steelworkers of America v Entreprise Wheel Car Corp*, 363 US, 1960, 598; see also *Michael P. Pfeifle v Chemoil Corporation*, 73 Fed Appx, 720, 722 (5th Cir. 2003); *Gray v Noteboom*, 159 S.W.3d 750, 754; *Thomas v Prudential Sec., Inc.*, 921 S.W.2d 847; *Valentine Sugars, Inc. v Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993); *Anderman/Smith Operating Co. v Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n. 3 (5th Cir. 1990). This principle has been respected even in most of the few States having incorporated the UNCITRAL Model Law.

[3] Apart from some common law countries, the omission of a reasoning requirement is rather exceptional [IAA North Korea, ICAA Cuba, Art. 26 AA Ecuador, Art. 61 AA El Salvador (which seems to limit this requirement to dissenting opinions], AA Finland, AA Latvia, CCP Poland and AA Sweden. Sweden is the country usually cited as an example in this sense, maybe because of the relevance of Stockholm as a reputed international arbitration seat. In the Swedish legal system, silence about the expression of reasons usually leads to the conclusion that the absence of reasons is not a cause of nullity or irregularity of arbitral awards in Sweden (see J.F. Poudret, S. Besson, *Droit comparé de l'arbitrage international*, Bruxelles, Bruylant, 2002, p. 709; S. Jarvin, *La nouvelle loi suédoise sur l'arbitrage*, in *Revue de l'arbitrage*, 2000, p. 69).

[4] "The parties shall be presumed to have agreed that reasons shall be given for the award unless they

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systems even admit the validity of a tacit agreement derived from the choice of procedure regulations or a *lex arbitri* under which reasoning of arbitral awards is not mandatory.

Most legal systems, inspired by Article 31.2 UML include, together with the parties' agreement, the possibility of omitting reasoning in case of settlement awards. Obviously, the reason for settlement awards underlies in the mere parties' agreement included in the award, which is its only reason.

Finally, arbitrator acts sometimes as an expert. This is the so-called *expertise-arbitrage* or *look-sniff arbitration*. For instance, in disputes related to international sales, the participation of an expert is usual in order to determine the quality of goods in case of non-conformity (*quality arbitration)*. Such decisions entail a mere positive or negative assessment and no reasons are necessary[5]. That is why some legal systems expressly exclude the obligations to give reasons in this kind of arbitration [Art. 1057.5 a) CCP The Netherlands].

The obligation to give reasons in arbitral awards does not immediately imply a chance to revise or set aside an unreasoned arbitral award. Comparative analysis also shows a great diversity of options in this regard. This paper will be focused on particularities regarding the control of unreasoned awards derived from different possible solutions on the question of the law applicable to the merits of the dispute. This question requires the analysis of three hypotheses: arbitration in equity (II), arbitration in (chosen) law (III) and arbitration without (chosen) law (IV). Finally, reasoning based on overriding mandatory rules affects all of these hypotheses (V).

(a) either expressly declare that reasons shall not be given; or

(b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given".

[5] See A. Redfern, M. Hunter, *Redfern & Hunter on International Arbitration*, 5th ed., Oxford University Press, 2009, p. 555; A.V. Schlaepfer, A.C. Cremades, *La motivación…*, cit. supra n. 1; J.D.M. Lew, L.A. Mistelis, S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague/London/New York, Kluwer Law Int'l, 2003, p. 649.

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2. *Arbitration in equity.* – The most evident distinction points to opposition between arbitration in equity and arbitration in law. In international trade, in the absence of an express choice, arbitration is presumed to be in law, which is completely reasonable[6].

[6] This presumption is stated in most national arbitration rules: Art. 427 PCC Albania; Art. 49.3 and 68.2 AA Andorra; 24.1 and 43.4 AA Angola; Art. 81 ICAA Argentina; Art. 603.3 PCC Austria; Art. 28.3 IAA Azerbaijan; Art. 41 IAA Barbados; Art. 1710 JC Belgium; Art. 40.IV AA Bolivia; Art. 361 PCC Burundi; Sec. 1287:284 PCC California; Art. 363 CAA Cambodia; Art. 31 AA Cape Verde; Art. 55.3 AA Cayman Islands; Art. 28.3 ICAA Chile; Art. 3 and 101 AA Colombia; Art. 28.3 AA Cook Islands; Art. 19 ADRA Costa Rica; Art. 27.3 AA Croatia; Art. 22 ICAA Cuba; Art. 28.3 ICAA Cyprus; § 25.3 Czech Republic; Art. 28.3 AA Denmark (applicable in Faroe Islands); Art. 13 IAA Djibouti; Art. 33.1 CAA Dominican Republic; Art. 3 AA Ecuador; Art. 39.4 AA Egypt; Art. 742.3 PCC Estonia; Arts. 31.3 AA Finland; Art. 1512 PCC France; Sec. 42.4 ADRA Gambia; Art. 1051.3 PCC Germany; § 42A601 (c) PCC Guam; Art. 37.3 AA Guatemala; Sec. 40.4 AA Guernsey; Art. 974-1 PCC Haiti; Art. 66 AA Honduras; Art. 41.3 AA Hungary; Art. 28 (2) AA India; Art. 27.3 ICAA Iran; Art. 36.3 AA Japan; Art. 36 d. AA Jordan; Art. 29.4 AA Kenya; Art. 29.2 AA Kosovo; Art. 182 PCC Kuwait; Arts. 776, 777, 789 and 813 PCC Lebanon; Art. 761 PCC Libya; § 620.3 PCC Liechtenstein; Art. 39.3 CAA Lithuania; Art. 1240 PCC Luxembourg; Art. 28.3 ICAA Macedonia; Arts. 449 and 461 PCC Madagascar; Sec. 45 (2) AA Malta; Art. 28.4 AA Mauricio; Art. 56 AC Mauritania; Art. 1445 CC Mexico; Art. 28.3 ICAA Moldova; Art. 40 AA Montenegro; Art. 327-45 PCC Morocco; Arts. 34.2 and 54.3 AA Mozambique; Art. 32 b) AA Myanmar; Art. 18.2 AA Nepal; Sec. 28 Schedule 1 AA New Zealand; Art. 1054.1 and 3 PCC The Netherlands; Art. 54 AA Nicaragua; § 31 AA Norway; Art. 39.4 AA Oman; Art. 56.3 AA Panama; Art. 32 AA Paraguay; Art. 57.3 AA Peru; Art. 1194.1 PCC Poland; Arts. 39.1 and 52.1 AA Portugal; Art. 7.01 3) ICAA Puerto Rico; Art. 28.3 CAA Qatar; Art. 601.2 PCC Romania; Art. 40 CAA Rwanda; Art. 16.1 AA San Marino; Art. 22 AA Sao Tome & Principe; Rule 47.2 AA Scotland; Art. 49 AA Serbia; Art. 130 ComC Seychelles; Art. 38.4 AA Syria; Art. 31.4 AA Slovakia; Art. 32.3 AA Slovenia; Art. 34.1 AA Spain; Art. 29.3 AA South Korea; Art. 24.4 AA Sri Lanka; Art. 31 AA Sudan; Art. 187.2 LF-DIP Switzerland; Art. 31 AA Taiwan; Sec. 34 AA Thailand; Art. 14 and 73.3 AC Tunisia; Art. 12.C IAA Turkey; Art. 28.4 AA Uganda; Arts. 205.1 and 212.2 PCC United Arab Emirates; Art. 28.3 ICAA Ukraine; Art. 28.3 ICAA Uruguay; Art. 8 CAA Venezuela; Art. 45 AA Yemen; Art. 28.3 AA Zimbabwe. The same principle is followed by international Conventions [Art. 15 Uniform Act on Arbitration of OHADA; Art. 10 MERCOSUR Agreement on International Commercial Arbitration; Art. VII.2 Geneva Convention on International Commercial Arbitration of 1961; Art. 28 UNCITRAL Model Law] and by the main arbitral institutions [Art. 21.3 ICC Rules; Art. 22.3 Arbitration Rules of the Stockholm Chamber of Commerce; Art. 12.5 Rules of the European Court of Arbitration; Art. 31.1 ICDR Rules; Art. 16.4 Rules of The Abu Dhabi Commercial Conciliation and Arbitration

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But there are no obstacles to choosing some kind of arbitration in equity relating to commercial matters, particularly if the dispute is submitted to a sole arbitrator. It is true that arbitration in equity is usually recommended when the arbitrator plays the role of an expert or even mediator. In any case, the arbitrator in equity must issue an award on the basis of their knowledge and honest belief in accordance with their natural sense of justice. Thus, common sense is the basic ground of an arbitral award issued in equity.

One of the presumed advantages of arbitral awards in equity is the reluctance to be set aside due to the wide margin of action and reasoning that arbitrators enjoy. As a matter of fact, this conclusion is not self-evident, as recent Spanish judgments setting aside equity awards demonstrate[7]. Obviously, those systems that do not require giving reasons apply such principle regardless of whether the arbitration is in law or in equity. Otherwise, some institutional or national rules only permit arbitration in equity

Center; Art. 39.2 ACICA Rules; Art. 24.3 Rules of The Canadian Commercial Arbitration Center; Art. 33.2. Swiss Rules of International Arbitration; Art. 28.2 Rules of Madrid CIMA; Art. 29.3 Korean Commercial Arbitration Board Rules; Art. 33.4 Dubai AIC Rules; Art. 24.4 German DIS Rules; Art. 35.2 Hong Kong International Arbitration Center Rules; Rule 60.3 Japan CAA; Art. 11.1 Luxembourg Chamber of Commerce Rules; Art. 40.2 Rules of the National Chamber of Commerce of Mexico; Art. 3.1 Maitland Arbitration Chamber Rules; Art. 24.1. Mumbai Center for International Arbitration Rules; Art. 17 OHADA Arbitration Rules; Art. 30.1 OHADAC Arbitration Rules; Art. 42.1 and 3 of The Netherlands Arbitration Institute Rules; Art. 4.2. Spanish Court of Arbitration Rules; Art. 31.2 Singapore International Arbitration Center Rules; Art. 15.2.2. Arbitration Foundation of Southern Africa Rules; Art. 35.2 UNCITRAL Arbitration Rules; Art. 27.3 Vienna International Arbitration Center Rules]. Only exceptionally, arbitration is presumed to be in equity (e.g. Art. 59 AA El Salvador; Art. 2.2 Rules on Arbitration of the Qatar International Center for Conciliation and Arbitration). Under some legal systems, the choice depends on the parties' will, but there is not a particular presumption (Art. 2 AA Brazil; Art. 56.1 AA Indonesia). Under Art. 329 CCP Somalia, the arbitrator is authorized to make the choice, even if this faculty has not been conferred by the parties. In Ghana, only customary arbitrations are subject to equity (Sec. 93 ADRA Ghana).

[7] The decision of the Superior Court of Justice of Madrid (Civil and Criminal Ch., 1st Section) n. 1/2018, of 8 January 2018 stated: «Reasoning in equity is subject to reasoning requirements derived from due process (Article 21.1 Spanish Constitution): reasonability, internal consistency, sufficiency, respect for rules of logic, absence of patent mistake…» (translation by the author).

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without the need to state the reasons upon which the award is based [Art. 603.1 e) CCP Romania], or limit the obligation of giving reasons to factual aspects or evidenced facts (Art. 27.3 AA Angola). But most of them (actually, the great majority), require such expression of the reasons both in law and in equity arbitration and likewise parties are free to expressly renounce such obligation in both cases. The obligation to give reasons in arbitration in equity is expressly stated in some arbitration regulations[8], but it is also extended by implication in all systems establishing the reasoning obligation without any difference between arbitration in law and arbitration in equity. Some legal systems introduce particular nuances related to the effects of renunciation agreements, which are only permitted in case of arbitration in equity (Art. 52.4 AA Andorra; Art. 58 ADRA Costa Rica).

Then, the obligation to express the reasoning in the arbitral award is usually the same regardless of the legal or equity nature of the arbitration[9]. First on all, this is due to the fact that both arbitration awards in equity and in law must be based on reasoned circumstances or facts. Reasons in awards refer both to rules and to facts. The arbitrator must therefore give substantive and factual reasons.

Arbitrariness and unreasonableness of arbitral awards can derive both from lack of legal or factual reasons. Facts are equally necessary to know and understand substantive reasons of decisions, although in some legal systems a failure to mention facts or the absence of debate about its determination does not justify setting aside or denying recognition and enforcement of the award on the ground of international public policy[10]. In contrast, the judgment of the Superior Court of Madrid (Civil and Criminal Ch., 1st Section) n. 1/2018, of 8 January 2018 is particularly demanding in this sense: «an award that does not weigh up all

[8] E.g. Art. 20 of the MERCOSUR Agreement on International Commercial Arbitration; Art. 23.4 of the European Court of Arbitration Rules.

[9] See J.C. Fernández Rozas, *Motivación del laudo arbitral en equidad*…, cit. *supra* in note 1, pp. 455-467; Id., *Motivación del laudo arbitral.*, cit., *supra* in note 1, p. 99 ss.; J.C. Fernández Rozas, S. Sánchez Lorenzo, G. Stampa, *Principios generales del arbitraje*, Valencia, Tirant-lo-blanch, 2018, pp. 373-376.

[10] E.g. OLG Bremen (2000), *Yearbook of Commercial Arbitration*, vol. XXXI, 2006, p. 640.

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evidence given during the arbitral procedure is not sufficiently reasoned in equity»[11]. In any case, avoiding arbitrariness cannot put in question the arbitrator's freedom to evaluate and ponder evidence and does not require arbitrators to justify why some evidence has been better considered than other[12]. The arbitrator denial of the admission of some evidence does not affect the obligation to give reasons either[13]. But it is possible to consider reasons as arbitrary, for instance, if the arbitral award has omitted any reference o evaluation of evidence presented by a party that clearly contradict facts considered as proved by arbitrators[14].

However, in relation with substantive reasons, differences between arbitration in law and arbitration in equity are quite significant: While arbitrators in law must state their legal reasons for their decision, arbitrators in equity have only to express the natural criteria, moral or ethical principles upon which they have based the award.

Relationships between arbitration in law and arbitration in equity are not reciprocal. Arbitration in law must not be based on moral or equity principles chosen by arbitrators. Arbitrators are subject to parties' mandate, they shall decide according to applicable legal rules, they are obliged to express the legal reasons on which the selection of the applicable law and its interpretation are grounded and they will guarantee procedure rules allowing the parties to have an effective legal debate. On the contrary, arbitrator in equity is allowed to have recourse to legal sources that are not necessary subject to debate by the parties. Arbitrators in equity may invoke legal rules that represent in their opinion what

[11] ECLI: ES:TSJM:2018:46. CENDOJ 28079310012018100001. Translation by the author.

[12] See in English case-law *World Trade Corporation v C. Czarnikow Sugar Ltd* [2005] *1 Lloyd's Rep.*, 422. Among the most recent Spanish case law see TSJ Madrid (Civil and Criminal Ch., 1st Section) n. 32/2018, 18 June 2018, ECLI:ES:TSJM:2018:8105.

[13] OLG Stuttgart de 2001, *Yearbook of Commercial Arbitration*, vol. XXIX, 2004, 272; *Mary Decker Silany v International Amateur Athletic Federation* (Court of Appeal for the 7th Circuit, 2004), *Yearbook of Commercial Arbitration*, vol. XXIX, 2004, p. 1262.

[14] TSJ Madrid (Civil and Criminal Ch., 1st Section) n. 15/2018, 5 April 2018, ECLI:ES:TSJM:2018:3635.

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is just and fair from the point of view of common sense[15]. Then legal rules are brought up as *ratio scripta*[16]. That is why some authors consider that *Lex Mercatoria*, essentially constructed from general principles and trade usages, shows a high degree of compatibility with arbitration in equity[17]. This opinion seems irrelevant as far as arbitrator in equity simply needs to justify the criteria employed, so that the reference to legal rules serves to illustrate the equity bases of the award[18]. The recourse to the *Lex Mercatoria* in arbitration in law is much more controversial, as explained below.

Therefore, according to some arbitration legal systems, arbitration in equity is not limited to lawyers, as the arbitration in law is. Nevertheless, at least some jurisdictions have emphasised the fact that arbitration in equity cannot be immune to legal principles and rules, particularly in relation with overriding mandatory rules of the law applicable to the merits or of the law of the arbitration seat[19]. In this sense, arbitration is not completely

[15] See A. Atteritano, *L'enforcement delle sentenze arbitrali del commercio internazionale (il principio del rispetto della volontà delle parti)*, Milan, 2009, pp. 262-264.

[16] French case-law has specially underlined that arbitration in equity exclusively founded on legal reasons has to determine the coincidence between legal reasons and equity reasons grounding the arbitral award [*Cour de Cassation* (Civ. 2nd ch.) 15 February 2001 (*J.C.P.* G 2002, II, 10038, p. 450, commented by G. Chabot), 18 October 2001 (*Revue de l'arbitrage*, 2002, p. 359, commented by C. Jarrosson) and 2 July 2003 (*Revue de l'arbitrage*, 2003, p. 1361, commented by J.G. Betto]. However, such requirement has been tempered in later decisions, which have been admitted a mere reference to arbitration in equity without any obligation to demonstrate the real scope of this formula (see in particular the analysis thereon of C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Paris, 2013, p. 383 ss.). The most recent case-law simply states that equity reasons must be in some way evidenced in the award, even impliedly [*Cour de Cassation* (Civ. 1st ch.) 1 February 2012, *Revue de l'arbitrage*, 2012, p. 91 commented by E. Loquin; 21 November 2012, nº. 11-12145 and nº. 11-12197].

[17] See M. Checa Martínez, *Arbitraje internacional y ley aplicable por el árbitro*, in *Estudios sobre arbitraje: los temas clave*, Madrid, La Ley, 2008, p. 332, note 409.

[18] *E.g., Cour de Cassation* 20 July 2003.

[19] Art. 34.1 h) AA Angola; Art. 212.2 CCP United Arab Emirates; Art. 777 CCP Lebanon. The judgment of the Superior Court of Madrid 1/2018 is so demanding in this sense that finally leads to the denaturisation of arbitration in equity through a true revision of the legal reasonability of the award: "In this sense, the

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independent of legal rules[20]. Arbitrators must take into account overriding mandatory rules from the *lex arbitri*, as well as those from third States or international organizations closely connected with the subject of the dispute. Then, if an equity arbitrator has to solve a dispute related to a contract closely connected with the European market he will be obliged to take into consideration mandatory European rules on free competition. Finally, this limitation imposed by public policy reasons advises the choice of arbitrators with some legal knowledge, even in equity arbitration.

Therefore, the mere fact that arbitration in equity and arbitration in law use different reasoning criteria does not affect the requirement to give reasons in both cases. Both types of arbitration share the same factual reasoning. Relating to the substantive reasons, reasons must be "legal" in arbitration in law, and essentially, but not absolutely, "non legal" in arbitration in equity[21].

Consequently, the lack of reasons in arbitration in equity is apparently subject to the same reasons for cancellation than arbitration in law. Few legal systems provide specific reasons for cancellation referred expressly to unreasoned awards. There are references to unreasoned awards (Art. 26 of the Uniform Act on Arbitration Law of the OHADA[22]; Art. 1721.a.iv JC Belgium; Art. 1065 1 d) CCP The Netherlands); unreasoned or contra-

indissociable link between equity and the requirement of good faith in exercising its own rights is traditional and undisputed in case-law (Art. 7.1 CC), requiring a subjective behaviour just or fair and honest and according with the value judgment derived from society (e.g. Supreme Court, 1st Ch., 22 February 2001 and 13 April 2004). In short, judgment in equity, beyond the mere legal judgment (e.g. Supreme Court 29 October 2013, § 10 in fine, ROJ 5479/2013), must consider justice of the final result and consistency with substantive principles which must inspire the dispute resolution, among which is obviously included the principle of equivalence of obligations, to which the judgment in equity precisely pays attention (§ 7.4 of cited Judgment 62/2016)" (translation by the author).

[20] See F. Knoepfler, Ph. Schweizer, *Making of Awards and Termination of Proceedings*, in *Essays on International Commercial Arbitration*, London, 1989, p. 166, esp. note 19.

[21] See on this distinction between reasoning and legal reasoning in arbitration in equity the judgment of the Constitutional Spanish Court n. 43/1988 of 16 March *(BOE* n. 88, 12 April 1988).

[22] Applicable in Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

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dictory reasoned awards (Art. 1056.5 CCP Algeria; Art. 1244.8 and Art. 9 CCP Luxembourg); incomprehensible or contradictory awards (Article 897.7 CCP Greece); ambiguous, uncertain or contradictory awards (Art. 769.4 CCP Libya). In recognition and enforcement procedures, the lack of reasons as a challenging cause is limited to cases when the law applicable to the arbitral procedures requires giving reasons (e.g., Art. 1721.a.iv CJ Belgium). Finally, some legal systems allow an indirect cause of setting aside by reference to the respect of formal conditions of the award, among which the obligation of giving reasons is included [Sec. 68.2 h) AA England; Art. 829.5 CCP Italy; Art. 769.5 CCP Libya; Art. 90 (2) (h) AA Bahamas; Sec. 63.2 h) AA Guernsey; Art. 26.1 d) AA Sao Tome and Principe]. More frequently, legal systems apply the general causes for setting aside to unreasoned awards: lack of respect for terms of the submission to arbitration, omission of procedural rules of the *lex arbitri* and, above all, violation of due process or international public policy derived from a lack of reasoning or from arbitrary, absurd, irrational or openly contradictory reasons.

In relation with the content of the reasons for the award, arbitration in equity is, however, less vulnerable to cancellation due to defective reasons than arbitration in law. Indeed, in arbitration in law the omission of the law applicable to the merits could entail a serious inconsistency with the submission to the arbitration, particularly if it does not fit into the legal framework established by the parties in the arbitration agreement or in the terms of reference[23]. Under the schema proposed by authors such as Fouchard, Gaillard and Goldman[24], there are three hypotheses

[23] However, some national Courts have denied the annulment on the ground of the omission of the applicable law by arbitrators. See e.g. *Cour d'Appel de Paris* of 23 March 2006 relating to Art. 1.502 (3) French CCP, in a case where a party contested the application of French Law pushing the *Lex Mercatoria* into the background, contrary to contract agreement (*Yearbook of Commercial Arbitration*, vol. XXXII-2007, pp. 282-289). On the contrary, the judgment of the USA Supreme Court in *Stolt-Nielsen SA v Animal Feeds International Corp* (2010 WL 1655826) set aside an arbitral award because of mistakes in the determination of the applicable law to the possibility of an arbitral collective redress.

[24] *Ph. Fouchard, E. Gaillard, B. Goldman on International Arbitration*, Kluwer Law Int., 1999, pp. 943-947.

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where arbitrators' behaviour may be put in question in relation with the applicable law. The first one, maybe the least controversial, deals precisely with arbitration in equity. Apart from cases of lack of reasons, the flexibility inherent to equity arbitration makes the chances of setting aside awards on the ground of inequity to be remote, insofar as it would entail a forbidden substantial revision of the award.

3. *Arbitration in (chosen) Law.* – Arbitration in law is, then, the usual practice in international trade, while arbitration in equity is rather exceptional. However, the requirement of arbitral awards based on legal reasons, and consequently on an arbitral procedure characterized by legal debates varies depending on the existence of a choice of the law applicable to the merits by the parties.

All arbitration rules and national arbitration acts all over the world unanimously recognize the priority of the law chosen by the parties[25]. Older legal texts seem to reduce this choice to

[25] See the choice of law principle in Art. 43.1 CAA Afghanistan (except law that is not valid under Afghan law (Article 53.2 Law); Art. 441 CCP Albania; Arts. 49.1 and 68.3 AA Andorra; Art. 43.1° AA Angola; Art. 79 ICAA Argentina; Art. 32.2 AA Armenia; Art. 693.1 CCP Austria; Art. 28.1 IAA Azerbaijan; Art. 68 AA Bahamas; Art. 36 AA Bangladesh; Art. 41 IAA Barbados; Art. 36 IAA Belarus; Art. 1710 JC Belgium; Art. 130 ADRA Bhutan; Art. 38.1 ICAA Bulgaria; Art. 361 CCP Burundi; Sec. 1287:282 CCP California; Art. 36.1 CAA Cambodia; Art. 41.1 AA Cape Verde; Art. 55.1 AA Cayman Islands; Art. 28.1 ICAA Chile; Art. 28.1 ICAA Cyprus; Art. 101 AA Colombia; Art. 29.1 AA South Korea; Art. 28.1 AA Cook Islands; Art. 22 ADRA Costa Rica; Art. 27.1 AA Croatia; Art. 29 ICAA Cuba; § 25.3 AA Czech Republic by reference to the applicable law (Art. 3 EU Rome I Regulation); 28.1 AA Denmark (applicable in the Faroe Islands); Art. 12 IAA Djibouti; Art. 33.2 CAA Dominican Republic; art 39.1 AA Egypt; art 78 AA El Salvador; Arts. 46.1 and 46.2 AA England; Art. 742.1 CCP Estonia; Arts. 31.2 AA Finland; Art. 1511 CCP France; Sec. 42. 1 and 2 ADRA Gambia; Art. 1051.1 CCP Germany; Sec. 48 (1) and (2) ADRA Ghana; § 42A601 (a) CCP Guam; Art. 36.1 AA Guatemala; Sec. 40.1 a) AA Guernsey; Art. 974 CCP Haiti; Art. 88 AA Honduras; Art. 41.1 AA Hungary; Art. 28 (1) b) i) India; Art. 56.2 AA Indonesia; Art. 27.1 ICAA Iran; Art. 36.1 AA Japan; Art. 36 a. Jordan; Art. 44.1 AA Kazakhstan; Art. 29.1 and 2 AA Kenya; Art. 29.1 AA Kosovo; Art. 6.2 AA Kyrgyzstan; Art. 813 CCP Lebanon; § 7.45 (1) and (2) ComC Liberia; § 620.1 CCP Liechtenstein; Art. 39.1 CAA Lithuania; Art. 28.1 ICAA Macedonia; Art. 461 CCP Madagascar; Sec. 30 (2) and (3) AA Malaysia; Sec. 45 (1) AA Malta; Art. 28.1 and 2 AA Mauricio; Art. 56 CA Mauritania; Art. 1445 CC Mexico; Art. 28.1 ICAA Moldova; Art.

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the law of a State, while the most recent regulations clearly admit the choice of non-national rules or legal bodies, such as the UNIDROIT Principles, international conventions not in force, and so on. Sometimes, those bodies of rules suffice to solve a

34.1 and 2 AA Mongolia; Art. 40 AA Montenegro; Art. 327-44 CCP Morocco; Art. 54.1 AA Mozambique; Art. 32 a) AA Myanmar; Art. 18.1 AA Nepal; Art. 1054.2 CCP The Netherlands; Art. 54 AA Nicaragua; § 31 AA Norway; Sec. 28 Schedule 1 AA New Zealand; Art. 39.1 AA Oman; Art. 19 AA Palestine; Art. 56.1 AA Panama; Art. 32 AA Paraguay; Art. 57.2 AA Peru; Art. 1194.1 CCP Poland by reference to the applicable law (Art. 3 EU Rome I Regulation); Art. 52.1 AA Portugal; Art. 7.01 1) ICAA Puerto Rico; Art. 28.1 CAA Qatar; Art. 601.1 CCP Romania by reference to the applicable law (Art. 3 EU Rome I Regulation); Art. 28.1 IAA Russia; Art. 40 CAA Rwanda; Art. 38.1 AA Saudi Arabia; Rule 47.1 AA Scotland; Art. 50 AA Serbia; Art 31.1 AA Slovakia; Art 32.1 AA Slovenia; Art 34.3 AA Spain; Art. 24.1 AA Sri Lanka; Art. 187.1 LFDIP Switzerland; Art. 38.1 AA Syria; Sec. 34 AA Thailand; Art. 73.1 CA Tunisia; Art. 12.C IAA Turkey; Art. 28.1 and 2 AA Uganda; Art. 28.1 ICAA Ukraine; Art. 28.1 ICAA Uruguay; Art. 14.2 AA Vietnam; Art. 45 AA Yemen; Art. 28.1 AA Zimbabwe. Also in Article 15 of the OHADA Uniform Act, incorporated in Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo. The choice of law is stated in Art. 28 UML and therefore incorporated by reference in Australia, Bahrain, Bermuda, Canada, China-Macao, China-Hong Kong, Ireland, Singapore and Turkmenistan. Chosen law is also the first option in international conventions and institutional rules, such as Art. 10 MERCOSUR Agreement on International Commercial Arbitration; Art. VIII Geneva Convention; Art. 35.1 RUNCITRAL Rules; Art. 23.1 Mexico Center of Arbitration Rules; Art. 21.1 ICC Arbitration Rules; Art. 22 Arbitration Rules of the Stockholm Chamber of Commerce; Art. 11.4 Rules of the European Court of Arbitration; Art. 31.1 ICDR Rules; Art. 16.1 Rules of The Abu Dhabi Commercial Conciliation and Arbitration Center; Art. 39.1 ACICA Rules; Art. 24.1 Rules of The Canadian Commercial Arbitration Center; Art. 31.2. Swiss Rules of International Arbitration; Art. 28.1 Rules of Madrid CIMA; Art. 29.1 Korean Commercial Arbitration Board Rules; Art. 33.1 & 2 Dubai AIC Rules; Art. 24.1 German DIS Rules; Art. 35.1 Hong Kong International Arbitration Center Rules; Rule 60.1 Japan CAA; Art. 11.1 Luxembourg Chamber of Commerce Rules; Art. 40.1 Rules of the National Chamber of Commerce of Mexico; Art. 3.2 Maitland Arbitration Chamber Rules; Art. 24.1. Mumbai Center for International Arbitration Rules; Art. 17 OHADA Arbitration Rules; Art. 30.2 OHADAC Arbitration Rules; Art. 42.2 of The Netherlands Arbitration Institute Rules; Art. 36.1 Rules of The Qatar International Center for Conciliation and Arbitration; Art. 23.1 Arbitration Rules ICAC of the Russian Chamber of Commerce; Art. 4.3 Spanish Court of Arbitration Rules; Art. 31.1 Singapore International Arbitration Center Rules; Art. 15.1 Arbitration Foundation of Southern Africa Rules; Art. 27.1 Vienna International Arbitration Center Rules.

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dispute, but parties must be aware that gaps are usual, so that a subsidiary choice of a national law is advised. For instance, the Vienna Convention does not include clear rules on hardship nor does it deal with questions related to validity aspects of sale contracts.

The choice of law by the parties is, then, the first rule. But usually rules and regulations do not clarify if that choice must be express or tacit. An implied choice is always a great source of problems if such a choice is disputed. A tacit choice implies a choice that need be interpreted considering the wording of the contract, the behaviour of the parties, the arbitral seat[26], the usages between them, and so on. But the determination of a tacit choice is not a question of fact, but a question of law. Common law and civil law approaches to implied-terms are quite different. Therefore, arbitrators face a vicious circle, with unforeseen consequences. If they deny the argument of a party in order to recognise a tacit choice of the applicable law, the award could be attacked on the ground of lack of respect for the submission to arbitration by the parties. Their decision in order to accept a tacit choice is less problematic, given that in the absence of choice of law arbitrators are free to determine the law applicable to the merits. In any case, in my opinion tacit choice must be cast aside in the field of arbitration, because it is both irrational[27] and unnecessary, due to the wide powers of arbitrators for determining the applicable law in the absence of choice and taking into consideration all surrounding circumstances.

It is also important for the parties to distinguish between the law applicable to the contract and the law applicable to the merits of an arbitral dispute. When the arbitral agreement is included

[26] This circumstance is particularly significant if the arbitral seat is London or any other English city, insofar as far as English Law is prone to interpret the choice of an English seat as a strong signal of tacit choice of English law, although this presumption is tempered in recent times. See *Tzortis and Another v Monark Line A/B*, 1968, 1 *All ER*, p. 949. On the contrary side, see ICC Award n. 5.717/1988 *(ICC Bull.*, 1999, vol, 1, n. 2, p. 22). See the critique from J.D.M. Lew, L.A. Mistelis, S.M. Kröll, in *Comparative International Commercial Arbitration*, The Hague, Kluwer Law International, 2003, pp. 415-416.

[27] See in this sense J.D.M. Lew, *Applicable Law in International Commercial Arbitration*, New York, Oceana, 1978, p. 183.

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in a contract, the choice of law applicable to the merits must be included in the arbitral agreement itself, as the law applicable to the merits in the arbitral dispute. Sometimes, parties forget this, because the contract includes a specific choice of law clause. The problem usually derives from the hypothetical different wording of both clauses. The arbitral agreement is commonly written in general terms, including any dispute between the parties regardless of its legal characterization. Of course, this includes contract disputes, but also any dispute in the fields of torts, intellectual property or any other subject connected with the contract. On the contrary, the choice of law clause is possible in the field of contracts, even including tort disputes. But it could be limited in disputes affecting other fields, such as company law, competition law or industrial property, which are however capable of being submitted to arbitration.

Moreover, parties must carefully ponder any open reference to the *Lex Mercatoria* or the general principles of trade law or of contract law. The *Lex Mercatoria* is a notion born in arbitration practice, whose function is just to serve as an escape device. There are many different understandings about the meaning of this *Lex Mercatoria.* In the strict sense, the notion only includes rules derived from trade usages and consolidated practices in international trade. But trade usages are always applicable, even if the parties have chosen a national law as applicable to the merits[28]. The notion is often invoked by arbitral tribunals in a wider

[28] Most national legal systems state that arbitrators must apply contractual terms and trade usages, regardless of the applicable law to the merits, following a general principle of international arbitration included, e.g., in Art. VII.2 Geneva Convention or in Art. 28 UML: Art. 441 CCP Albania; Art. 49.3 and 68.4 AA Andorra; Art. 43.5 AA Angola; Art. 82 ICAA Argentina; Art. 28.1 IAA Azerbaijan; Art. 41 IAA Barbados; Art. 36 IAA Belarus; Art. 1710 CJ Belgium; Art. 132 ADRA Bhutan; Art. 38.3 ICAA Bulgaria; Art. 361 CCP Burundi; Art. 36.4 CAA Cambodia; 1287,285 CCP California; Art. 55.4 AA Cayman Islands; Art. 28.4 ICAA Chile; Art. 101 AA Colombia; Art. 28.4 AA Cook Islands; Art. 22 ADRA Costa Rica; Art. 27.4 AA Croatia; Art. 30 ICAA Cuba; Art. 28.4 ICAA Cyprus; Art. 28.4 AA Denmark (applicable in Faroe Islands); Art. 12 IAA Djibouti; Art. 33.4 CAA Dominican Republic; Art. 39.3 AA Egypt; Art. 742.4 CCP Estonia; Art. 1511 CCP France; Sec. 42.5 ADRA TGambia; Art. 1051.4 CCP Germany; Sec. 48 (4) ADRA Ghana; § 42A601 (a) CCP Guam; Art. 36.2 and 3 AA Guatemala; Sec. 40.5 AA Guernsey; Art. 974 CCP Haiti; Art. 41.4 AA Hungary; Art. 28 (3) AA

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sense[29], that includes *soft law* as the UNIDROIT Principles on international commercial contracts, but it is above all a tool providing arbitral freedom and sometimes arbitral arbitrariness. We can imagine three European arbitrators obliged to apply Turkish

India; Art. 27.4 ICAA Iran; Art. 36.4 AA Japan; Art. 36 c. Jordan; Art. 44.3 AA Kazakhstan (only in the absence of express rules in the applicable law); Art. 29.5 AA Kenya; Art. 6.4 AA Kyrgyzstan (only in the absence of express norms in the applicable law); Art. 29.3 AA Kosovo; Art. 813 CCP Lebanon; § 7.45 (4) ComC Liberia; Art. 28.3 ICAA Macedonia; Art. 461 CCP Madagascar; Sec. 30 (5) AA Malaysia; Sec. 45 (3) AA Malta; Art. 28.5 AA Mauritius; Art. 56 CA Mauritania; Art. 1445 CC Mexico; Art. 28.4 ICAA Moldova; Art. 34.4 AA Mongolia; Art. 40 AA Montenegro; Art. 327-44 CCP Morocco; Art. 54.4 AA Mozambique; Art. 32 a) AA Myanmar; Art. 18.3 AA Nepal; Art. 54 AA Nicaragua; Sec. 28 Schedule 1 AA New Zealand; Art. 1054.4 CCP The Netherlands; Art. 39.3 AA Oman; Art. 19 AA Palestine; Art. 56 AA Panama (includes reference to UNIDROIT Principles); Art. 32 AA Paraguay; Art. 57.2 AA Peru; Art. 1194.2 CCP Poland; Art. 52.3 AA Portugal; Art. 7.01 4) ICAA Puerto Rico; Art. 28.4 CAA Qatar; Art. 601.1 CCP Romania; Art. 28.3 IAA Russia; Art. 40 CAA Rwanda; Art. 38.1 AA Saudi Arabia; Rule 47.1 AA Scotland; Arts. 49 and 50 AA Serbia; Art. 31.1 AA Slovakia; Art. 32.4 AA Slovenia; Art. 34.3 AA Spain; Art. 29.4 AA South Korea; Art. 38.3 AA Syria; 24.3 AA Sri Lanka; Art. 31 AA Sudan; Sec. 34 AA Thailand; Art. 73.4 CA Tunisia; Art. 12 CIAA Turkey; Art. 28.5 AA Uganda; Art. 28.4 ICAA Ukraine; Art. 28.4 ICAA Uruguay; Art. 8 CAA Venezuela; Art. 14.3 AA Vietnam (only in case of gaps in the *lex causae*); Art. 45 AA Yemen; Art. 28.4 AA Zimbabwe. The same rule is observed in institutional regulations: Art. 35.3 UNCITRAL Rules; Art. 23.2 Mexico Center of Arbitration Rules; Art. 21.2 ICC Arbitration Rules; Art. 31.2 ICDR Rules; Art. 16.3 Rules of The Abu Dhabi Commercial Conciliation and Arbitration Center; Art. 39.3 ACICA Rules; Art. 24.2 Rules of The Canadian Commercial Arbitration Center; Art. 33.3 Swiss Rules of International Arbitration; Art. 28.3 Rules of Madrid CIMA; Art. 29.2 Korean Commercial Arbitration Board Rules; Art. 33.3 Dubai AIC Rules; Art. 24.2 German DIS Rules; Art. 35.3 Hong Kong International Arbitration Center Rules; Art. 11.1 Luxembourg Chamber of Commerce Rules; Art. 40.3 Rules of the National Chamber of Commerce of Mexico; Art. 3.4 Maitland Arbitration Chamber Rules; Art. 24.1. Mumbai Center for International Arbitration Rules; Art. 30.3 OHADAC Arbitration Rules; Art. 42.4 of The Netherlands Arbitration Institute Rules; Art. 36.2 Rules of The Qatar International Center for Conciliation and Arbitration; Art. 23.3 Arbitration Rules ICAC of the Russian Chamber of Commerce; Art. 4.3 Spanish Court of Arbitration Rules; Art. 31.3 Singapore International Arbitration Center Rules. In certain cases, this reference is omitted, but it is surely implied: e. g. Rule 60.1 Japan CAA; Art. 27.1 Vienna International Arbitration Center Rules.

[29] See the description of the *Lex Mercatoria* in the wider sense in E. Gaillard, *La distinction des principes généraux du droit et des usages du commerce international*, in Études offertes à Pierre *Bellet*, Paris, Litec, 1991, p. 203; O. Lando, *The Lex Mercatoria in International Commercial Arbitration*, in 34 *ICLQ.*, 1985, p. 748 ss.

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law in *Palbak v. Norsolor.* In this case, the *Lex Mercatoria* device served to flight from that exotic law, completely unknown, and to have recourse to more familiar western resources or simply to solve the dispute on the ground of equity, good faith or common sense, that is, transforming an arbitration in law into an arbitration in equity or even without law.

Selection of legal rules applicable to the merits by the parties provides of course legal certainty, but in the field of arbitration it also accomplishes an additional function: it serves to guarantee a special reason to control the arbitral award. Actually, one of the most important motive for the annulment of arbitral awards deals with the exceeding powers of arbitrators, insofar as the arbitral award exceeds, alters or does not solve all questions included in the arbitral submission (*ultra, extra* or *infra petita*). When parties have chosen the applicable law to the merits, this choice is a crucial part of the submission to arbitration, and arbitrators are obliged to base their award in such rules. If not, parties could claim for the award to be set aside[30].

First of all, it is necessary to determine if arbitrators have failed to decide in law instead of in equity[31]. An award in equity where the parties' submission points to arbitration in law is voidable. The sole parameter to prevent awards from being set aside is the award being apparently based on legal rules, regardless of the correction in their application[32].

Secondly, arbitrators are obliged to give reasons based on the applicable law chosen by the parties or, otherwise, to express the reasons to cast aside this law[33], for instance because they are

[30] See J.C. Fernández Rozas, Le *rôle des juridictions étatiques devant l'arbitrage commercial international*, in *R. des C.*, t. 290, 2001, p. 203; J. Hill, *Some Private International Law Aspects of the Arbitration Act 1996*, in 46 *ICLQ.*, 1997, pp. 303-304.

[31] Thus, the Superior Court of Montreal in *Louis Dreyfus & Cir. v Holding Tusculum* (2008, QCCS 5903) set aside an arbitral award where arbitrators have decided in equity and ignored the law chosen by the parties.

[32] German case-law illustrates this restriction: *OLG Frankfurt* 26 October 1983 *(RIW*, 1984, 400) and *BGH* 29 September 1985 *(RIW*, 1985, p. 970).

[33] Some cases are suspected and criticized because of westernization of arbitrators and awards, where choice-of-law clauses of African or Asian legal systems are disregarded, e. g., ICC Award 5030/1992.

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contrary to international public policy[34]. Chances for annulment are clear if arbitrators have reasoned on the basis of national laws different from that chosen by the parties, or they cast aside a determined non-national law chosen by the parties, such as the OHADAC Principles on International Commercial Contracts, without explicit and justified reasons[35].

Cancellation of arbitral awards seems more complicated if a party invokes a "tacit choice" or the parties have used a vague formula for the choice of law, such as a reference to the general principles of international trade, the *Lex Mercatoria* or trade usages[36]. Chances for setting aside are also reduced if arbitrators have applied international trade usages, even *contra legem.* As a matter of fact, there is a trend to make trade usages, like parties'

[34] See L. Silberman, F. Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in *Conflicts of Laws in International Arbitration*, Munich, Sellier, 2011, pp. 312-313; S. Bollée, *L'impérativité du droit choisi par les parties devant l'arbitre International*, in *Revue de* l'arbitrage, 2016/3, p. 695; C. Seraglini, Livre V: *Le contentieux du commerce international. Tritre III: L'arbitrage commercial international*, in *Droit du commerce international (sous la dir. de J. Béguin et Michel Menjucq)*, Paris, Litec, 2005, p. 1046.

[35] Thus, Art. 53.1° d) AA Egypt; judgment of the Supreme Court of Finland of 2 July 2008 in *Werfen Austria GmbH v Polar Electro Europeo BV.* See L. Silberman, F. Ferrari, cit. *supra* in note 34, p. 316; C.P. Alberti, *Iura novit Curia in International Commercial Arbitration*, in *International Arbitration and International Commercial Law (Liber Amicorum Eric Bergsten)*, Wolters Kluwer, 2011, pp. 18-19; G. Bermann, *International Arbitration and Private International Law (General Course of Private International Law)*, in *R. des C.*, vol. 381, 2015, pp. 293-296; also the more skeptical reflections of G. Cordero-Moss, *Limitations of Party Autonomy in International Commercial Arbitration*, in *R. des C.*, vol. 372, 2014, p. 197.

[36] In *Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems Inc*, the District Court of California considered that, as the parties have agreed the complementary and supplementary application of general principles of international law and trade usages, the arbitral tribunal had respected the conditions of the submission to arbitration by applying the UNIDROIT Principles and the good faith and fair dealing principles (*Yearbook of Commercial Arbitration*, vol. XXIV, 1999, p. 875). Likewise, given the absence of a clear choice of law by the parties, a judgment of the *Landsgericht* of Hamburg in 1997 legitimated the application of the *Lex Mercatoria* by arbitrators (*Yearbook of Commercial Arbitration*, vol. XXV, 2000, p. 710). See H. Kronke *et al.*, *Recognition and Enforcement of Foreign Arbitral Awards (A Global Commentary on the New York Convention)*, Wolters Kluwer, 2010, p. 272 s.

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agreements, prevailing[37]. But the possibility of annulment cannot be disregarded even in these cases[38].

The impossibility of revision or of substantive control of arbitral awards, as a general principle of procedures for setting aside or for the recognition and enforcement of arbitral awards, sometimes is invoked to unduly avoid the control of the obligation to give reasons for arbitral awards. This is the case when arbitrators "interpret" the chosen law (e.g. the Egyptian law) on the ground of the presumed identity or inspiration by another law (e.g. French law), as happened in *Crocodile Tourist Project C. (Egypte) v Aubert*[39]. Likewise, annulment must be successful if arbitrators unduly invoke the impossibility to know the chosen law to justify its substitution by their own understanding of the *Lex Mercatoria.* The ICC Award of 20 May 1992[40] is a good example of disregard of the chosen law grounded on the excuse that Egyptian law does not determine the *dies a quo* for the calculation of interests, which has been qualified by E. Gaillard as absurd enough to discredit the method[41].

[37] In the ICC Award n. 8873/1997 (*Journ.dr.int.*, 1998, p. 1017) this is just the reason for avoiding Spanish Law that contradicts international trade usages in building contracts on the ground of Art. 7 of the Geneva Convention of 1961 and the power of arbitrators in order to establish the scope, function and hierarchy of trade usages, insofar as the overriding mandatory rules of the applicable law are respected. See also ICC Awards n. 7518 /1994 (*Journ. dr. int.*, 1998, p. 1034); n. 6527/1991 (*Yearbook of Commercial International*, vol. XVIII, 1993, p. 44); n. 8486/1996 (*Journ. dr. int.*, 1998, p. 1047), cit. by A.M. López Rodríguez, *Ley aplicable al fondo de la controversia en el arbitraje comercial internacional. El enfoque transnacional de la nueva Ley española de Arbitraje*, in *Cuestiones actuales de Derecho mercantil internacional*, Madrid, Colex, 2005, p. 711, n. 65.

[38] See J. Béguin, M. Menjucq (dirs.), *Droit du commerce international*, Paris, Litec, 2005, p. 1057.

[39] *Cour d'Appel* Paris, 1 March 1988, in *Revue de l'arbitrage*, 1989, p. 269.

[40] Case n. ARB/84/3.

[41] E. Gaillard wonders how the Egyptian judges act every time they need to pronounce on the calculation of interest. The recurrent idea of gaps actually entails a prejudice about the insufficient development of the law of some legal systems in non-developed countries (see *Trente ans de Lex Mercatoria: Pour une application sélective de la méthode des principes* généraux du droit, in *Journ. dr. int.*, 1995, p. 13).

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Likewise, the omission of the chosen law or the undue conversion of arbitration in law in arbitration in equity have been considered as a violation of procedural rules established by the parties or in the *lex arbitri*, rather than for violation of the submission to arbitration [Art. V. 1 d) of the New York Convention, instead of Art. V.1. b)][42]. This remedy has also been invoked, particularly in relation with legal systems incorporating the UNCITRAL Model law, when the applicable law in the absence of choice is determined through an indirect way (by reference to appropriate conflict-of-laws rules) and arbitrators disregard the determination of this appropriate conflict-of-laws rule and directly apply substantive rules on the merits[43].

4. *Arbitration without (chosen) Law.* – Finally, the last hypothesis to be analyzed deals with arbitration in law when parties have not determined the applicable law, so that arbitrators may apply whatever national law, non-national rules or the *Lex Mercatoria.* In the absence of choice of law, arbitrators have a wide power to determine the law or rules applicable to the merits, particularly if the applicable law is determined by virtue of a direct way, that is where there is no need to establish the appropriate conflict-of-law rules[44] or the national law most closely

[42] On German case law (particularly BGH of 26 September 1985), see S. Kröll, *Recognition and Enforcement of Awards*, in *Arbitration in Germany. The Model Law in Practice*, Kluwer Law International, 2007, p. 1061.

[43] See in this sense the analysis and graphic Appendix to apply for setting aside on the ground of such reasons of B. Hayward, *Conflict of Laws and Arbitral Discretion (The Closest Connection Test)*, Oxford University Press, 2017, pp. 128-143 and 301-306.

[44] This is the rule established in Art. 28.2 of the UNCITRAL Model Law and, consequently, in legal systems incorporating this law by reference: Australia, Bahrain, Bermuda, Canada, China-Macao, China-Hong Kong, Ireland, Singapore and Turkmenistan. The same indirect way is envisaged in Art. 43.3 AA Angola; Art. 28.2 IAA Azerbaijan; Art. 68 AA Bahamas; Art. 41 IAA Barbados; Art. 36 IAA Belarus; Art. 131 ADRA Bhutan; Art. 38.2 ICAA Bulgaria; Art. 55.2 AA Cayman Islands; Art. 28.2 ICAA Chile; Art. 28.2 Cook Islands; Art. 28.2 ICAA Cyprus; Art. 28.2 AA Denmark (applicable in Faroe Islands); Art. 46.3 AA England; Sec. 42.3 ADRA Gambia; Sec. 48 (3) ADRA Ghana; § 42A601 (b) CCP Guam; Sec. 40.3 b) AA Guernsey; Art. 41.2 AA Hungary; Art. 27.2 ICAA Iran; Art. 29.1 AA Kosovo; § 7.45 (3) ComC Liberia; Art. 461 CCP Madagascar;

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connected[45]. If arbitrators are authorized to apply the substantive rules (national or not) they consider most appropriated[46], there is

Sec. 30 (4) AA Malaysia; Art. 28.3 AA Mauritius; Art. 28.2 ICAA Moldova; Art. 40 AA Montenegro; Art. 54.2 AA Mozambique; Sec. 28 Schedule 1 AA New Zealand; Art. 32 AA Paraguay; Art. 7.01 2) ICAA Puerto Rico; art, 28.2 CAA Qatar; Art. 28.2 IAA Russia; Rule 47.1 AA Scotland; Art. 50 AA Serbia; Art. 31.1 AA Slovakia; Art. 24.2 AA Sri Lanka; Sec. 34 AA Thailand; Art. 28.2 ICAA Ukraine; Art. 45 AA Yemen; Art. 28.2 AA Zimbabwe. The reference to conflict rules is also present in international conventions and institutional regulations: Art. 10 MERCOSUR Agreement on International Commercial Arbitration; Art. VII.1 Geneva Convention on International Commercial Arbitration of 1961; Art. 11.4 of the European Court of Arbitration Rules (with particular mention of the "tronc commun" doctrine); Art. 17 OHADA Arbitration Rules; Art. 23.2 Arbitration Rules ICAC of the Russian Chamber of Commerce; Art. 15.1 Arbitration Foundation of Southern Africa Rules. Other legal systems state the application of the conflict-of-law rules of the forum (Art. 22 ADRA Costa Rica; Art. 30 ICAA Cuba; Art. 742.2 CCP Estonia; Art. 29.1 AA Kosovo; Sec. 45 (1) AA Malta; § 31 AA Norway; Art. 19 AA Palestine; Art. 1194.1 CCP Poland; § 25.3 AA Czech Republic; Art. 601.1 CCP Romania), the substantive rules of the forum (Art. 44.2 AA Kazakhstan; Art. 18.1 AA Nepal) or the law of the forum including international conventions (Art. 40 CAA Rwanda).

[45] This option can be found in Art. 427 CCP Albania (for domestic arbitration); Art. 603.2 CCP Austria; Art. 39.2 AA Egypt; Art. 1051.2 CCP Germany; Art. 36.1 AA Guatemala; Art. 36.2 AA Japan; Art. 36 b. AA Jordan; Art. 28.2 ICAA Macedonia; Art. 1445 CC Mexico; Art. 52.2. LA Portugal; Art. 38.1 AA Saudi Arabia; Art. 29.2 AA South Korea; Art. 187.1 LFDIP Switzerland; Art. 38.2 AA Syria; Art. 12.C IAA Turkey. Also in Art. 11.4 European Court of Arbitration Rules; Art. 16.2 Rules of The Abu Dhabi Commercial Conciliation and Arbitration Center; Rule 60.2 Japan CAA; Art. 33.1 Swiss Rules of International Arbitration.

[46] The direct way is the most recent option in many legal systems, including Article 15 of the OHADA Uniform Act, incorporated in Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo; Art. 43.2 CAA Afghanistan; Art. 441 CCP Albania; Art. 49.2 and 68.3 AA Andorra; Art. 80 ICAA Argentina; Art. 38 AA Bangladesh; Art. 1710 JC Belgium; Art. 361 CCP Burundi; Art. 36.2 CAA Cambodia; Sec. 1287:283 CCP California; Art. 41.2 AA Cape Verde; Art. 101 AA Colombia; Art. 27.2 AA Croatia; Art. 12 IAA Djibouti Art. 1511 CCP France; Art. 33.3 CAA Dominican Republic; Art. 974 CCP Haiti; Art. 28 (1) b) iii) AA India; Art. 29.3 AA Kenya; Art. 6.3 AA Kyrgyzstan; Art. 813 CCP Lebanon; § 620.2 CCP Liechtenstein; Art. 39.2 CAA Lithuania (including Lex Mercatoria, but arbitrator must justify or motivate the election); Art. 56 AC Mauritania; Art. 34.3 AA Mongolia; Art. 327-44 CCP Morocco; Art. 34.3 AA Mozambique; Art. 32 a) AA Myanmar; Art. 1054.2 CCP The Netherlands; Art. 54 AA Nicaragua; Art. 39.2 AA Oman; Art. 56.2 AA Panama; Art. 57.2 AA Peru; Art. 32.2 AA Slovenia; Art. 73.2 AC Tunisia; Art. 28.3 AA Uganda; Art. 28.2 ICAA Uruguay; Art. 14.2 AA Vietnam.

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little room to challenge the award[47]. However, the conversion or denaturalization of arbitration in law into arbitration in equity as a reason for setting aside the resulting arbitral award[48] has been debated, especially in relation with arbitral awards applying the *Lex Mercatoria*[49]. Certainly, since the *Norsolor*[50] case decided by the Austrian Supreme Court[51], there are many court decisions in different national systems recognizing the availability of the *Lex Mercatoria* as a way to give reasons *secundum ius*[52]. Nevertheless, the inherent vagueness of the *Lex Mercatoria* avoids a general and unconditioned recognition of the legal and non-equitable scope of the *Lex Mercatoria.* Depending on circumstances, it is possible that an arbitral award inspired by the *Lex Mercatoria* merely conceals arbitration in equity, avoiding then arbitration in law derived from the parties' submission, which would entail a rea-

Among institutional texts the same solution is found in Art. 35.1 UNCITRAL Rules; Art. 23.1 Mexico Center of Arbitration Rules; Art. 21.1 ICC Arbitration Rules; Art. 22 Arbitration Rules of the Stockholm Chamber of Commerce; Art. 31.1 ICDR Rules; Art. 39.1 ACICA Rules; Art. 24.1 Rules of The Canadian Commercial Arbitration Center; Art. 28.1 Rules of Madrid CIMA; Art. 29.1 Korean Commercial Arbitration Board Rules; Art. 33.1 Dubai AIC Rules; Art. 24.1 German DIS Rules; Art. 35.1 Hong Kong International Arbitration Center Rules; Art. 11.1 Luxembourg Chamber of Commerce Rules; Art. 40.1 Rules of the National Chamber of Commerce of Mexico; Art. 3.3 Maitland Arbitration Chamber Rules; Art. 24.1. Mumbai Center for International Arbitration Rules; Art. 17 OHADA Arbitration Rules; Art. 42.2 of The Netherlands Arbitration Institute Rules; Art. 36.1 Qatar International Center for Conciliation and Arbitration; Art. 4.3 Spanish Court of Arbitration Rules; Art. 31.1 Singapore International Arbitration Center Rules; Art. 27.2 Vienna International Arbitration Center Rules.

[47] See e.g. *Abu Dhabi Investment Authority v Citigroup Inc* (2nd Cir. 2014), 557 Fed Appx 66. J. Lew, *op. cit.* in n. 27, p. 537; Y. Derains, *Possible Conflict Rules and the Rules Applicable to the Substance of the Dispute*, UNCITRAL's Project for Model Law in International Commercial Arbitration (ICA Congress Series, vol. 2), Lausanne, Kluwer, 1984, p. 173.

[48] See e.g. French *Cour de Cassation* (1ss ch. Civ.), 1 February 2012 (*Société d'Experts en tarification de l'énergie (ETE) v société Gascogne Paper)*, in *Revue de l'arbitrage*, 2012/1, p. 91, commented by E. Loquin, cit., p. 95 ss.

[49] See J. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law Internacional, 2012, pp. 993-994; W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, in 32 *ICLQ.*, 1983, pp. 50-51.

[50] ICC Award n. 3131/1979, *Yearbook of Commercial Arbitration*, vol. IX, 1984, p. 109.

[51] OGH, 18 November 1982, *IPRax*, 1984, p. 99 ss.

[52] See A. Atteritano, *op. cit.* in n. 15, pp. 260-262.

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son for setting aside the arbitral award[53]. In other words, equity reasons instead of legal reasons may be challenged, so that an accurate scrutiny of the pertinence and content of the *Lex Mercatoria* is peremptory. In practice, arbitral awards based on the *Lex Mercatoria* or trade usages will seldom be cancelled[54], unless the award grossly entails an arbitration in equity contrary to the parties' submission to arbitration in law[55]. A minimal reasonable reasoning of used rules or usages will suffice to attack the annulment remedy[56].

Finally, there is another chance to challenge arbitral awards on the ground of a violation of due process when the award includes legal arguments or reasons that have not be invoked, argued or on which the parties have not the chance to debate during the arbitral proceeding. Generally, arbitrators are not obliged to give reasons according to the arguments or legal interpretations made by the parties, but they cannot introduce the applicable law in an unexpected manner, so that parties have not the chance to debate thereon[57]. Thus, the District Court of California in *Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems Inc*

[53] See C. Borris, R. Hennecke, Article V (1) (c), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Commentary*, München, CH Beck, 2012, p. 321 ss.

[54] The case *Valenciana de Cementos v. Primary Coal* (French *Cour de Cassation*, 22 October 1991), related to the ICC Award n. 5953/1989 of 1 September, is paradigmatic in this sense (see the analysis by Y. Derains, in *Journ. dr. int.*, 1990, p. 1061 ss.; B. Goldman, in *Journ. dr. int.*, 1990, p. 433 ss.; P. Lagarde, in *Revue de l'arbitrage*, 1990, p. 666 ss.; and B. Oppetit, in *Rev. crit. dr. int. pr.*, 1990, p. 307 ss.

[55] See A. Giardina, *La lex mercatoria e la certezza del diritto nei commerci e negli investimenti internazionali*, in *Riv. dir. int. priv. proc.*, 1992, p. 467 ss.

[56] That is why under some opinions in the absence of choice the determination of the applicable law by arbitrators is completely free, as it is not subject to the control of national courts, maybe apart from Art. 68 AA England (see J.F. Poudret y S. Besson, *op. cit. supra* n. 3, pp. 623-624). The wording of Art. 39.2 CAA Lithuania is particularly interesting: «If the parties have failed to agree on the applicable law, the arbitral tribunal shall apply the law, which in the justified opinion of the arbitral tribunal, is applicable in resolving a particular dispute, including trade customs (lex mercatoria)». Finally, the arbitrator's powers in this regard are wide, but their selection must be to some extent «justified».

[57] See D. Moura Vicente, *La aplicación del principio iura novit curia en el arbitraje internacional*, in *Anuario IHLADI*, vol. 23, 2017-2018, pp. 71-72.

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(1998)[58] empowers arbitrators to base their decisions on legal theories and rules different from those invoked by the parties, as far as it does not violate the limit of the arbitral submission. In French Law, arbitrators must not give reasons for legal arguments implied in the debate, as far as they are consistent with the applicable law, but many doubts arise about the effects of unexpected omissions of the applicable law or the attribution to the applicable law of a content or sense completely unexpected during the arbitral procedure[59].

Therefore, if parties have chosen the applicable law, they have to present their arguments and interpretations providing evidence of its content during the procedure, but not extemporarily (e.g. in final written conclusions). Arbitrators cannot accept such unexpected evidence on applicable law without giving the other party the chance to argue or contradict that evidence or argument[60]. Likewise, in the absence of choice, arbitrators are not obliged to reveal their legal reasons before the award, buy they cannot surprise the parties thereto by applying an unexpected law[61]. After a comparative analysis of this question Poudret and Besson conclude that if arbitrators intend to apply a different law than that invoked by the parties, they must reveal it in good time. They are free to choose any of the applicable law invoked by the parties during the arbitral proceeding, and in any case they will

[58] *Yearbook of Commercial Arbitration*, vol. XXIV, 1999, p. 875.

[59] See M. Scherer, Article V (1) (b), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Commentary*, Munich, CH Beck, 2012, pp. 307-308.

[60] *Cour d'Appel de Paris* of 18 April 1991 (*Supermarket Systems).* French case-law is very clear in considering questions referred to foreign applicable law as a fact, so that if a party present a proof or evidence supporting its interpretation on the applicable law it must be in a procedural time permitting the other party to argue against it (e.g. *Cour d'Appel de Paris*, 6 April 1995: *Thyssen Stahlunion; Cour d'appel* de Paris, 25 November 1997: *VRV SpA; Cour de Cassation*, 16 March 1999: *affaire Etat du Qatar v Creighton).*

[61] That is the rule in German or Swiss Law [e.g. Swiss Federal Court, 30 September 2003, *ASA Bull.*, 2004, p. 544; and 9 February 2009 (*José Urquijo Goitia v Liedson da Silva Muñiz)* 4A_4000/2008, *ASA Bull.*, 2009, p. 495 ss.]. English Law is even more demanding in this sense. In Finland, the Supreme Court judgment of 2 July 2008 (*Werfen Austria GmbH v Polar Electro Europeo BV)* show the same rigor, as well as the Court of Appeal of Svea (Sweden) of 1 December 2009 (*Systembolagest v V&S Spirit*). See. C.P. Alberti, *op. cit.* in n. 35, p. 20 s.

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apply the law applicable to the merits *ex officio* and they are not determined by the interpretation argued by the parties, but they must guarantee the parties an adequate debate thereon[62].

5. *Reasoning and overriding mandatory rules.* – A difficult (a final) question deals with overriding mandatory rules. We have pointed out that the need for arbitrators to consider in any case some public policy rules avoids a pure non-legal consideration of arbitration in equity. But the most frequent problem arises in arbitration in law, relating to the obligation of the arbitrator to apply overriding mandatory rules, even if those rules are not part of the applicable law chosen by the parties[63].

Rules on competition, environmental and health protection, free trade, human rights, and so on are considered as overriding mandatory rules, whose application must be expected and foreseen by the parties. First of all, overriding mandatory rules of the applicable law must be considered. To avoid the possibilities of annulment or non recognition of arbitral awards, arbitrator must also take into account overriding mandatory rules and public policy principles from the law of the arbitral seat and also of the most probable place of recognition or enforcement. German authors speak in this sense about the capability of arbitral awards to be exported (*Exportfähigkeit*).

But particularly in the field of international contracts, overriding mandatory rules of third States closely connected, especially those of the law of contract's performance, must be taken into account. This possibility has been expressly stated by the ECJ in the "ECO Swiss" case in 1999 in relation with anti-trust European rules[64]. However, the most liberal legal systems, such as the French, are reluctant to allow this application, insofar as it

[62] *Op. cit. supra* n. 3, p. 785.

[63] See L.G. Radicati di Brozolo, *Arbitrage commercial international et lois de police (considérations sur les conflits de juridictions dans le commerce international)*, in *R. des C.*, vol. 315 2005, p. 53 ss.; C. Seraglini, *Lois de police et justice arbitrale internationale*, Paris, Dalloz, 2001.

[64] ECJ C-129/9, 1 June 1999, *Eco Swiss*; ECJ C-102/81, 23 March 1982, *Nordsee.* See C. Liebscher, *European Public Policy*, in *Journ. Int'l. Arb.*, 2000, p. 73 ss.; D. Hochstrasser, *Choice of Law and Foreign Mandatory Rules in International Arbitration*, in *Journ. Int'l. Arb.*, 1994, p. 85; H. Verbist, *The Application of Eu-*

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implies straying away from the mission entrusted by the parties. International arbitral practice, however, demonstrates that application of overriding mandatory rules of third States constitutes a general principle of comparative private international law. At least, this is the opinion of the International Chamber of Commerce, acting as *amicus curiae* before the USA Supreme Court in the case *Mitsubishi Motors Corp. v. Soler Chrysler – Plymouth*: «there is a growing tendency of international arbitrators to take into account the antitrust laws and other mandatory legal rules expressing public policy enacted by a State that has a significant relationship to the facts of the case, even though that State's law does not govern the contract by virtue of the parties' choice or applicable conflicts rules»[65].

Recently, this principle has been recognised for the first time in an arbitral regulation. Article 30, paragraph 4, of the Draft Rules of Arbitration and Conciliation of the Organization for the Harmonization of Business Law in the Caribbean states: «The arbitral tribunal may take into account the peremptory rules of a State which is closely related to the contract out of which the dispute arises, where the parties have to perform their obligations in the said State, and provided that the content of such rules is in accordance with generally-acknowledged public interests».

To some extent, the tendency to increase consideration of overriding mandatory rules in international commercial arbitration is a logical counterweight to another increasing tendency, consisting in the extension of arbitrability. In most legal systems arbitrability was limited to subjects characterized by a wide party autonomy. However, it is more and more usual to extend the validity of arbitral agreements referred to matters usually linked to public interests, such as company law, antitrust law, bankruptcy or industrial property. The possibility to submit subjects highly connected with public interests to arbitration requires arbitrators to be willing to apply overriding mandatory rules and public policy principles from the supranational, international and national legal systems involved.

ropean Community Law in ICC Arbitration, *Bull. CIA/CCI (Special Suplement: International Commercial Arbitration in Europe)*, 1994, p. 33 ss.

[65] *Mitsubishi Motors Corp. v. Soler Chrysler – Plymouth*, 473 US 614.

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However, the behaviour of arbitrators in this regard is far for being uncontroversial. If arbitrators opt for applying overriding mandatory rules *ex officii*, although these are not invoked by the parties, the door is open to a claim for the award to be set aside as an *ultra petita* award. Besides this, such rules must be incorporated in the arbitration procedure in a moment permitting an adequate debate between the parties thereon. Finally, if the parties have expressly excluded the application of overriding mandatory rules of a determined legal system, which arbitrators are inclined to apply in a peremptory way, the only chance for arbitrators could be the renunciation due to illegality of the arbitral agreement. Most audacious authors support the possibility of stating an effective, executive award founded on such overriding mandatory rules, facing the possibility of an annulment remedy on the ground of exceeded submission[66].

In short, there is no pure arbitration without law. Arbitration in law chosen by the parties, arbitration in non-national law chosen by arbitrators, and even arbitration in equity require all a fine consideration of different overriding mandatory rules.

It is said that the value of an arbitration procedure depends on the value of arbitrators. So, the key for the success on any arbitration procedure is a good selection of arbitrators who must be specialized not mainly in arbitration law, but rather in the specific subject the arbitration deals with. That is why experts in comparative private law, such as the members of the REDPREA network, are welcome in the new age of arbitration.

[66] See L.G. Radicati di Brozolo, *op. cit.* in n. 62, pp. 476-481.

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