

# Table of Contents

ABBREVIATIONS	xi
INTRODUCTORY NOTE	xiii
ACKNOWLEDGEMENTS	xv
CHAPTER I: INVESTOR/STATE ARBITRATION AND THE APPLICABLE SUBSTANTIVE LAW	1
1 Generally	1
2 Applicable Substantive Law and the ICSID Convention	4
3 Applicable Substantive Law in Context of Other Arbitration Systems	6
(a) Additional Facility arbitration rules	6
(b) UNCITRAL arbitration rules	7
(c) ICC arbitration rules	8
(d) Iran–United States Claims Tribunal	9
4 The Methodology Employed by the Arbitral Tribunal	11
CHAPTER II: AGREED CHOICE OF LAW	13
1 The Principle of Party Autonomy	13
2 Choice of Law Modalities	15
(a) Direct agreement between the host state and the investor	15
(i) <i>Law of the host state as the law chosen by the parties</i>	16
(ii) <i>The host state's law subject to a stabilization clause</i>	16
(iii) <i>Law of a third state as the law chosen by the parties</i>	17
(iv) <i>International law alone as the law chosen by                 the parties</i>	18
(v) <i>The law of the contract as the law chosen by the parties</i>	18
(vi) <i>Compound choice of law clause in the                 direct contract between the parties</i>	19



	<i>AGIP V. CONGO</i> (APPLICATION OF THE HOST STATE'S LAW TESTED AGAINST INTERNATIONAL LAW)	21
	(vii) <i>Concluding remarks</i>	24
(b)	Choice of law in treaties	25
	(i) <i>Choice of law clauses in multilateral treaties</i>	26
	(ii) <i>Choice of law clauses in BITs</i>	27
	(iii) <i>Arbitral practice</i>	29
	<i>MAFFEZINI V. SPAIN</i> (APPLICATION OF THE HOST STATE'S LAW ONLY)	29
	<i>ANTOINE GOETZ V. BURUNDI</i> (APPLICATION OF BOTH THE HOST STATE'S LAW AND INTERNATIONAL LAW)	32
	<i>CME V. THE CZECH REPUBLIC</i> (REFUSAL TO APPLY THE HOST STATE'S LAW)	39
	(iv) <i>Concluding remarks</i>	56
(c)	Choice of law provisions in domestic legislation	56
3	Explicit or Implicit Choice of Law?	57
	(a) Expression of implicit choice of law	57
	(b) Arbitral practice	59
	(i) <i>SPP v. Egypt (reference in the parties' agreement to domestic law as implicit choice of law)</i>	59
	(ii) <i>LETCO v. Liberia (reference in the parties' agreement to domestic law as implicit choice of law)</i>	64
	(iii) <i>AAPL v. Sri Lanka (the parties' conduct and submissions as proof of an implicit choice of law)</i>	66
	(iv) <i>Wena Hotels v. Egypt (the parties' conduct and submissions as proof of an implicit choice of law)</i>	74
	(c) <i>Concluding remarks</i>	79
4	Subsequent Choice of Law	80
	(a) Overview of the arbitral practice	80
	(b) <i>Concluding remarks</i>	83
5	Stabilization Clauses	84
	a) Meaning and types	84
	b) Arbitral practice	85
	(i) <i>TOPCO v. Libya (stabilization clauses valid and binding under international law)</i>	85
	(ii) <i>AMINOIL v. Kuwait (breach of a stabilization clause does not lead to unlawfulness of nationalization as long as it is not expressly prohibited)</i>	86



(iii)	AGIP v. Congo ( <i>breach of a stabilization clause leads to unlawfulness of nationalization</i> )	91
(iv)	LETCO v. Liberia ( <i>in the presence of a stabilization clause nationalization is justified if it meets required criteria</i> )	92
(v)	Amoco v. Iran ( <i>breach of a stabilization clause does not lead to unlawfulness of nationalization as long as it is not expressly prohibited</i> )	93
c)	Concluding remarks	96
6	Limitations on the Parties' Freedom to Choose the Applicable Law	98
(a)	Relevance of mandatory norms and public policy	98
	CHAPTER III: ABSENCE OF AGREED CHOICE OF LAW	103
1	Methods for Determining the Absence of the Parties' Agreement on Choice of Law	103
2	Application of the Residual Rule of Article 42(1) of the ICSID Convention	106
(a)	Arbitral practice	107
(i)	Amco v. Indonesia ( <i>parallel application of the host state's law and international law</i> )	107
(ii)	SOABI v. Senegal ( <i>application of the host state's law only</i> )	113
(iii)	Tradex v. Albania ( <i>international law used as guidance for the interpretation of the host state's law</i> )	116
(iv)	CDSE v. Costa Rica ( <i>in the event of concurrence between the two legal systems international law may be applied only</i> )	119
(b)	Concluding Remarks	122
3	Absence of the Parties' Agreement on Choice of Law in Other Arbitration Systems	123
(a)	Arbitral practice	127
(i)	Sapphire v. National Iranian Oil Company ( <i>the parties' intention excludes the application of any national legal system</i> )	127
(ii)	Wintershall v. Qatar ( <i>application of the closest connection test led to the applicability of the host state's law only</i> )	133
(iii)	The Rakoil Case ( <i>a-national law determined as the applicable law</i> )	139



(iv) <i>Amoco v. Iran (even in case of a contractual choice of domestic law an expropriation claim will be examined under international law only [Including the Treaty of Amity])</i>	142
(v) <i>Mobil Oil v. Iran (even in case of a contractual choice of domestic law an expropriation claim will be examined under international law only)</i>	149
(vi) <i>Phelps Dodge Corp. and OPIC v. Iran (international law and the Treaty of Amity apply to the issue of expropriation)</i>	151
(b) Concluding remarks	152
CHAPTER IV: THE ROLE OF INTERNATIONAL LAW AND ITS RELATION TO DOMESTIC LAW	155
CHAPTER V: ISSUES OF ANNULMENT	165
1 Necessity of the Review Process	165
2 Annulment Under the ICSID Convention	166
(a) Generally	166
(b) Manifest excess of powers and the Non-application of the proper law	168
(c) Arbitral Practice	169
(i) <i>Klöckner v. Cameroon (failure to rely on specific legal source led to annulment)</i>	169
(ii) <i>Amco v. Indonesia (failure to apply one important provision led to annulment)</i>	174
(iii) <i>MINE v. Guinea (technical error does not warrant annulment)</i>	178
(iv) <i>Wena Hotels v. Egypt (in case of collision between the two legal systems international law prevails)</i>	181
(d) Concluding remarks	185
3 Setting Aside of Arbitral Awards in Non-ICSID Investment Arbitration	187
(a) Generally on review of non-ICSID arbitral awards	187
(b) Proper law and nullity	190
(c) Arbitral practice	192
(i) <i>The Czech Republic v. CME (decision based on part of applicable law only does not warrant annulment)</i>	192
(ii) <i>Mexico v. Metalclad (a mere reference to the wrong provision of the applicable treaty led to annulment)</i>	201
(iii) <i>Mexico v. Feldman (no reference to the provision of the applicable treaty does not warrant annulment)</i>	207
(d) Concluding remarks	214



---

CHAPTER VI: PROHIBITION OF A <i>NON-LIQUET</i>	217
CHAPTER VII: DECISION <i>EX AEQUO ET BONO</i>	219
1 Generally	219
2 <i>Amiable Composition</i> or <i>ex aequo et bono</i>	221
3 Express Agreement on a Decision <i>ex aequo et bono</i>	222
(a) Original agreement	222
(b) Subsequent agreement	223
(c) Possibility of <i>dépeçage</i>	223
4 No Authorization to decide <i>ex aequo et bono</i>	224
(a) <i>Klöckner v. Cameroon</i>	224
5 Application of Both Law and Equity	226
(a) <i>Benvenuti &amp; Bonfant v. Congo</i>	226
6 Equity within the Law	228
7 Limits on Decision <i>ex aequo et bono</i>	229
8 Concluding Remarks	229
CHAPTER VIII: SUMMARY OF CONCLUSIONS	231
TABLE OF CASES	239
OFFICIAL DOCUMENTS	245
BIBLIOGRAPHY	247