

THE LAW APPLICABLE TO THE SUBJECT MATTER OF THE ARBITRATION PROCESS IN INTERNATIONAL TRADE CONTRACTS



Abdelkrim Mouka^{1*}

Faculty of Law and Political Sciences, University of jijel¹

Submission date: 21/07/2025 Acceptance date: 25/09/2025 Publication date: 30/12/2025



Abstract: International trade contracts are a topic that raise many legal and practical problems, given the conflict of national laws regulating trade relations with an international dimension, especially when disputes are submitted to international commercial arbitration institutions or specialized arbitral tribunals. Arbitrators often face difficulties in determining the applicable law they must reconcile respect for the parties' autonomy with the search for the most appropriate governing law and searching for the most appropriate law on the other hand, when searching for the implicit will of the parties to the contract, and in some cases the substantive rules of national law or the rules stipulated in international agreements relevant to the subject of the dispute are applied, without recourse to national conflict-of-laws rules.

Key Words: arbitration; rules; contracts; dispute; international agreements.

القانون الواجب التطبيق على موضوع العملية التحكيمية في عقود التجارة الدولية

ملخص: تعتبر عقود التجارة الدولية من المواضيع التي تثير العديد من الإشكالات القانونية والعملية بالنظر إلى تضارب القوانين الوطنية في تنظيم العلاقات التجارية ذات البعد الدولي، وخاصة عند طرح النزاع على منصات التحكيم التجاري الدولي والهيئات التحكيمية المتخصصة، هذه الأخيرة تجد صعوبة في تحديد القانون الواجب التطبيق على النزاع، محترمة فيها إرادة أطراف العقد من جهة والبحث عن القانون الأنسب من جهة أخرى وذلك عند البحث عن الإرادة الضمنية لأطراف العقد، وفي بعض الحالات يتم تطبيق القواعد الموضوعية للقانون الوطني أو القواعد التي تنص عليها الاتفاقيات الدولية ذات الصلة بموضوع النزاع، دون الاعتماد على قواعد الإسناد الوطنية.

الكلمات المفتاحية: التحكيم؛ القواعد؛ العقود؛ النزاع؛ الاتفاقيات الدولية.



Introduction:

Various modern legal systems have focused on regulating international contracts, as they are considered one of the principal mechanisms, through which international trade transactions in particular take place. These transactions have expanded rapidly and their forms and manifestations have diversified in the contemporary world. This requires the establishment of legal rules that respond to such developments and ensure that traders are provided with the confidence and predictability required by the nature of these contracts. The problem of conflict of laws does not arise at all in the field of internal trade contracts, which are subject to internal law, which provides contractors with prior knowledge of the legal system on the basis of which they were contracted. However, the situation is different for international trade contracts that relate to more than one legal system. It is necessary to provide contractors with everything that guarantees them prior knowledge of the applicable law so that they are not surprised by laws that do not respond to their own interests.

The solutions proposed to the problem of conflict of laws in international trade contracts differ from the solutions in force for other contractual ties of an international nature, in terms of taking into account the will of the contracting parties in choosing the law of the contract. This difference appears in the rules of attribution (*a positive legal rule of a technical nature that applies to private international relations. The most appropriate and suitable laws are chosen to regulate those relations when there are multiple laws that are applicable to them*)¹ which state the applicable law in a mechanical manner that has nothing to do with the will of the parties to it. With the exception of international contracts, the will of the contracting parties is considered as a control over attribution, through which the applicable law is determined. This means applying the principle of the authority of will in choosing the applicable law in international contracts in general, and in international trade contracts in particular.

The claim that the law applicable to international trade contracts can be chosen raises several questions, primarily related to the scope of this choice. The legislator often finds himself between two contradictory interests when establishing the legal rules that regulate these contracts, especially in the aspect related to choosing the law applicable to him. The nature of these contracts requires the broad application of the principle of the power of will. However, there are some considerations that in many cases prevent the law referred to by the will from not being applied. Also, disputes

¹ - Ahmed Abdel Karim Salama, "Reflections on the Nature of the Conflict Rule," Egyptian Journal of International Law, Volume Fifty-One, 1995, p. 97.



that arise when implementing international commercial contracts, the parties have complete freedom to choose the party that will consider the dispute.

It can be presented to the national judiciary, as well as to the arbitration tribunals². In both cases, the chosen law finds its scope of application in accordance with the principle of the authority of the will, which results in the exclusion of the law prepared in advance to govern the contractual association, as is the case in other transactions with a foreign element. If the disagreement is presented before national courts or arbitration courts, the application of the authority of will concept may vary in its scope. Moreover, even in the latter case, the application of the law of will may differ according to the different nature of the arbitration, whether the arbitration is free or structured arbitration. In this case (the case of free arbitration), the problem of the law applied by the arbitrator to the subject of the international trade contracts dispute arises? In the field of settling disputes in international trade contracts, the principle of authority of will is respected by subjecting the arbitrator who is the subject of the dispute to the national law chosen by the parties to the contract, or applying the rules of international trade

THE FIRST TOPIC:

The Importance of Identifying the Applicable Law Governing the Dispute in Arbitration

The choice of the seat of arbitration involves geographical, logistical, economic, financial, monetary, and infrastructural considerations. All of these factors are relevant, but the decisive one is the arbitration law of the country where the arbitration is seated. The parties expect an arbitration law that guarantees the validity of the agreement, allows proceedings to move forward, and ensures that the award is enforceable and effective.

First requirement: The Elements of the Parties' Choice of the Law Applicable to Arbitration

The parties seek a legal framework that guarantees the enforceability and legal effect of the arbitration clause or agreement, preferably in a country that is a party to the New York Convention, or that has modern arbitration legislation consistent with it, as in France, Lebanon, and Algeria³. The parties also require a law that guarantees the proper constitution of the arbitral tribunal, with limited judicial assistance where

² - The Algerian legislator defined international arbitration in Article 1039 of the law containing the Code of Civil and Administrative Procedure issued pursuant to Order No. 08/09 of April 25, 2008.

³ - Al-zajal Youssef, Journal of Jurisprudence and Law, Faculty of Law, Tangier (Morocco), p. 11, In: www.majalah.new.ma



necessary—for example, if one party fails to appoint its arbitrator or if the two appointed arbitrators cannot agree on the third.

The judiciary should only intervene to assist the progress of arbitration and not to supervise it. The law in this country must ensure that the judgment is given the form of enforcement by the judiciary without addressing the basis of the dispute and that foreign arbitration awards issued abroad are enforced without addressing the basis of the dispute.

This is the minimum required by parties when they seek a place for arbitration and scrutinize the international arbitration law in force in the country.

National legislation, international treaties and permanent arbitration regulations are hardly devoid of provisions for the application of the chosen law to the subject matter of the dispute. Within the framework of national legislation, we find that it has given the parties the freedom to choose the law applicable to the subject of the dispute within a broader framework than is the case when the dispute is brought before the national judiciary, considering that the arbitration judiciary is the original judiciary for international trade disputes, " *UNCITRAL Model Law on International Commercial Arbitration was adopted by UNCITRAL on 21 June 1985. It covers all stages of the arbitral procedure - arbitration agreement, composition and jurisdiction of the arbitral tribunal, scope of the tribunal's intervention, and recognition and enforcement of awards. It reflects the global consensus on fundamental aspects of international arbitration practice accepted by states from all regions and different legal and economic systems in the world*"⁴, The principle of the authority of the will finds its scope of application in a more liberal manner, since the arbitrator is not bound by the national considerations to which the judge may be subject.

Second requirement: Enshrining the Parties' Freedom to Choose the Law Applicable to Arbitration

In the context of enshrining the freedom to choose the law applicable to the subject of the dispute, the French legislator expanded the scope of choosing the law applicable to the subject of the dispute, which goes beyond national rules to include the substantive rules, and this is what was stipulated in Article 1496 of the French Code of Civil Procedure: *"The arbitrator shall decide the dispute in accordance with the rules of law chosen by the parties; failing such a choice, he shall do so in accordance with such rules as he considers appropriate.*

4 - Bernardo M. Cremades, International arbitration: from international commercial to investment protection arbitration, Council of the Institute of International Business Law of the International Chamber of Commerce; Member of the International Council for Commercial Arbitration.



It shall take account in all cases, he shall take account of commercial practice"⁵.

Such a possibility in choosing the law applicable to the subject matter of the dispute was taken into account by the Egyptian legislator in Article 39 of the Commercial Arbitration Law, which stipulates that: « The arbitration panel shall apply to the subject of the dispute the rules agreed upon by the two parties. If they agree to apply the law of a particular country, the substantive rules therein shall be followed without the rules relating to conflicts of laws unless the parties agree otherwise ».

This is what the Algerian legislator has adopted, which has kept pace with modern legislation in terms of giving the parties complete freedom to choose the law applicable to the subject of the dispute. This is according to Article 1050 of the Code of Civil and Administrative Procedure, which states the following: « The arbitration court shall decide the dispute in accordance with the rules of the law chosen by the parties. In the absence of this, the arbitration court shall decide in accordance with the rules of law and customs that it deems appropriate. »

Through this text, it becomes clear to us that the Algerian legislator firmly established the principle of freedom of choice in line with the doctrine of party autonomy⁶.

Such a choice is stipulated in Article 13/3 of the Regulations of the Arbitration Court of the International Chamber of Commerce, which stipulates the following: « The parties are free to choose the law that the court must apply to the subject of the dispute ». Article 33/1 of the Rules of the International Trade Law Commission "Unistral" also stipulates that: « The arbitration tribunal shall apply the law chosen by the parties to the subject of the dispute, and if this law is not specified, the court shall apply the law to which the applicable attribution rules refer »⁷.

Within the framework of international agreements, this is what was indicated by the European Convention on International Commercial Arbitration of 1961, which stipulated in Article Seven that the parties have the freedom to determine the law that

⁵ - MOREAU Bertrand & BERNARD Thierry, National law and international arbitration law, J.DELMAS, Paris, 1985, P 134

⁶ - Aliouch Qarbou Kamal, International Commercial Arbitration in Algeria, opu, Algeria, 2001, pp. 53-54

⁷ - Maashou Ammar, Guarantees in International Economic Contracts in the Algerian Experience: In Key Contracts and Production in the Hand, a thesis for a state doctorate in international law and international relations, University of Algiers, 1998, p. 337.



arbitrators must apply to the subject of the dispute⁸. The law applicable to the subject matter of the dispute may be the domestic national law of one of the countries, The primary function of the national judge or arbitrator, like that of the international judge or arbitrator, is to decide disputes. It rarely does so *ex aequo et bono* and most often rules on the basis of the applicable law. In doing so, he interprets the rule of law that he holds. But the judge and the arbitrator are mere automatons dispensing judgments. They enjoy a certain freedom in the exercise of their mission⁹, and the arbitrator may decide the dispute in accordance with international trade rules.

THE SECOND TOPIC:

Choosing National law

The law chosen by the parties may be a national law, whether it is the law of one of the parties or a foreign law¹⁰. This choice may be made at the time of concluding the contract or later after a dispute has arisen its parties. Whenever a specific national law is designated, it is understood that the reference is made directly to its substantive rules, excluding its conflict-of-law rules. In other words, the referral system created by conflict-of-law rules is set aside.

First requirement: The Different Approaches of Jurisprudence and Legislation to the Application of National Law

Many scholars emphasize the possibility of applying the substantive rules of national law directly, without resorting to conflict-of-laws rules. This view is reinforced by case law and international practice, since most international instruments, such as the 1958 Model Law on International Commercial Arbitration, have adopted the direct application of substantive rules, where it indicated that, The arbitral tribunal shall decide the dispute in accordance with the rules of domestic law chosen by the parties, even when the chosen law is that of a particular state, the reference is made directly to its substantive rules, excluding its conflict-of-laws provisions.

Such a trend, this approach, which excludes conflict-of-laws rules when national law is chosen, was not expressly adopted by the Algerian legislator in Article 1050. However, what can be concluded indirectly from the context of the text is that he wants to apply the substantive rules directly as long as there is no exception that limits this principle.

8 - Tharwat Habib, A Study in International Trade Law: With Interest in International Sales, Arab Union Printing House, Cairo, 1975, p. 169.

9 - Gilbert Guillaume, The precedent in international justice and arbitration. - Journal of international law (Clunet) n° 3, July 2010, p 02.

10 - Redfern Allan and Hunter Martin, The Law and Practice of International Commercial Arbitration (translated from English: Robin Eric), 2nd edition, LGDJ, Paris, 1994, p. 84.



After the previous analysis of the positions of jurisprudence and legislation, especially Algerian jurisprudence, it now remains to ask: In the absence of an explicit choice of the law applicable to the subject of the dispute, should the arbitrator apply the law reflecting the parties implicit will, or should he rely on the legal system he considers most appropriate ?.

Second requirement: The approach of international agreements to the application of national law

The solutions provided by modern legislation have differed in the event of a failure to explicitly choose the law of the contract. There is some legislation that gives attribution rules a reserve role in determining the applicable law, However, such a trend may be accompanied by some difficulties in determining the legal system to which the dispute rules belong, whether the arbitrator will apply the dispute system existing in the country of which he holds nationality, or the country in which he resides or resides, or in the country to which the parties to the dispute belong by nationality, or will he follow the dispute system in force in the country of the seat of arbitration, or in the country whose courts were supposed to have jurisdiction to consider the dispute Or in the country where his ruling is likely to be implemented after it is issued, without the arbitrator searching for the law implicitly intended by the will of the parties, as is the case in Article 13/1 of the UNCETRAL Rules, as well as Article 7/1 of the European Convention on International Commercial Arbitration.

Such a precautionary solution, which is applied in the event of an explicit choice, means excluding the role of implicit will since the attribution rule undertakes the task of determining the applicable law. This is in contrast to other legislation that allows the arbitral tribunal to choose the applicable law. This allows the arbitrator to search for the implicit will of the contracting parties, and thus uses various evidence through which the implicit will can be demonstrated.

But on the other hand, the arbitrator can apply the applicable law as he deems appropriate to rule the dispute at hand, according to his personal discretion, The arbitrator's discretion in determining the applicable law is strengthened by the lack of subsequent judicial review over the appropriateness of the choice of the applicable law made by the arbitrator. The check established, in an application for exequatur or an appeal for annulment of the arbitral award, only concerns the existence of possible conflicts between the substance of the chosen law and the requirements of international public order. In practice, arbitrators often prefer to apply the laws of developed jurisdictions, which are perceived as more reliable, or to apply international trade rules directly.

THE THIRD TOPIC: Agreement on Applying International Trade Rule



With the diversity of types of international trade contracts, it has become clear that the traditional conflict approach, is ineffective in taking appropriate solutions that are compatible with the nature of these contracts, as it leads in many cases to the application of one of the laws that was established as a basis for governing internal relations.

First requirement: The Choice of Substantive Rules Derived from Commercial Practice

To avoid the disadvantages that arise from applying national law, traders in the context of international commerce often prefer to choose the rules established by commercial transactions – substantive rules - to govern the subject matter of the dispute, Substantive rules are defined as: « a set of substantive or material rules with international or global content that already exist or are specifically prepared to provide a direct solution that ends or avoids the conflict in a special relationship of an international nature"¹¹, which provide traders with prior knowledge of their content as global rules that traders are accustomed to following and developing their content as dictated by the circumstances surrounding the contract, so they transcend national boundaries and exclude restrictions imposed by domestic legislation.

What demonstrates the suitability of these rules for governing disputes related to international trade appears primarily in terms of the diversity of their sources. In addition to the legislative sources represented by national laws, there are other sources of greater importance in terms of expressing the collective will and the merchants, which are those represented by the commercial customs and traditions that the dealers used to follow spontaneously, gradually evolved into autonomous rules, independent of national legal systems, and are now directly applicable in dispute resolution¹².

Second requirement: The Position of Algerian Legislation on the Agreement to Apply Substantive Rules

The Algerian law relating to international commercial arbitration, as recently amended, is among the legislations that allowed the application of these rules according to Article 1050, which provides that: "The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties; in the absence of such choice, it shall apply the rules of law and customs it deems appropriate" , and This wording confirms that substantive rules may be invoked by the parties, and, in the absence of choice, applied *ex officio* by the arbitrator. This shows us that the Algerian legislator has established a balance between party autonomy and the arbitrator's discretion in applying these rules.

¹¹ - Hisham Khaled, International Contracts and Their Subjection to Objective Rules, Dar Al Fikr Al Jami'i, Alexandria, 2001, p. 09.

¹² - POMMIER Jean – Christophe, Principle of autonomy and the law of contract in conventional private international law, Economica, Paris, 1992 , P300



Some Algerian jurisprudence has commented on the aforementioned article, stating that commercial customs do not merely play a supplementary role within Algerian law, but instead operate on an equal footing with other legal rules. In this way, the new Algerian legislation related to arbitration is an example of legislation that supports the theory of trans-international rules, and even an example of legislation that is more liberal to the arbitrator than his definition of the rules that must be applied to the subject of the dispute¹³.

These rules also find their scope of application in the case of arbitration stipulated in Article 1050 of Order N°. 08/09, which includes the Algerian Code of Civil and Administrative Procedure, as the repealed Article 458 bis 15 stipulates that: « The arbitration court shall act as *amiable compositeur* if the parties' agreement confers such authority», according to which the arbitrator shall be free to search for the solution that appears to him appropriate and legitimate for the parties, He may resolve the dispute in accordance with law, or, where expressly authorized by the parties, on the basis of fairness. But this is on the condition that there is an explicit agreement between the parties to resort to this type of arbitration.

13 - Nader Mohamed Ibrahim, Center for Transinternational Rules before International Economic Arbitration, Dar Al Fikr Al Jami'i, Alexandria, 2002, pp. 588-589.



Conclusion

After we have addressed the role of will in choosing the law applicable to the subject of the dispute in international trade contracts it has become clear that the basis of these transactions is the application of the principle of the authority of will and the resulting consideration of the law referred to by the will.

However, such submission may require some kind of clarification, as saying that the law of will does not mean that this law will be applied in the manner desired by the parties. However, there are some limitations that limit the ability of this choice. In some cases, this may lead to the exclusion of the law of will, and the reasons for this may vary, especially when it comes to the issue of the law chosen by the contracting parties violating public order or proving fraud towards Algerian law.

However, in view of the legal texts addressed by the legislator in the provisions relating to international commercial arbitration in the Code of Civil and Administrative Procedure, we find Algerian law among the legislations that allowed the application of these rules according to Article 1050, which stipulates that: « The arbitration panel shall decide the dispute in accordance with the rules of law...», and the latter means - according to the text of the article - the substantive rules that the parties may refer to. The arbitrator may also apply it on his own initiative in the absence of a choice. This shows us that the Algerian legislator has settled between the parties and the arbitrator in applying these rules.

The customs of international trade enjoy a complementary role with regard to Algerian legislation, and even stand on a parallel level with other legal rules.

With this role, the new Algerian legislation related to arbitration is an example of legislation that supports the theory of trans-international rules, and even an example of the most liberal legislation for the arbitrator when determining the rules that must be applied to the subject of the dispute.

Bibliography List

Books

1. Aliouch Qarbou Kamal, International Commercial Arbitration in Algeria, Algeria, 2001.
2. Hisham Khaled, International Contracts and Their Subjection to Objective Rules, Dar Al Fikr Al Jami, Alexandria, 2001.
3. MOREAU Bertrand & BERNARD Thierry, National law and international arbitration law, J.DELMAS, Paris, 1985.
4. Nader Mohamed Ibrahim, Center for Transinternational Rules before International Economic Arbitration, Dar Al Fikr Al Jami'i, Alexandria, 2002.
5. POMMIER Jean – Christophe, Principle of autonomy and the law of contract in conventional private international law, Economica, Paris, 1992 .



6. Redfern Allan and Hunter Martin, The Law and Practice of International Commercial Arbitration (translated from English: Robin Eric), 2nd edition, LGDJ, Paris, 1994.
7. Tharwat Habib, A Study in International Trade Law: With Interest in International Sales, Arab Union Printing House, Cairo, 1975.

- Thesis:

* Maashou Ammar, Guarantees in International Economic Contracts in the Algerian Experience: In Key Contracts and Production in the Hand, a thesis for a state doctorate in international law and international relations, University of Algiers, 1998.

Articles:

1. Ahmed Abdel Karim Salama, "Reflections on the Nature of the Conflict Rule," Egyptian Journal of International Law, Volume Fifty-One, 1995, pp 86-107.
2. Al-zajal Youssef, Journal of Jurisprudence and Law, Faculty of Law, Tangier (Morocco), In: www.majalah.new.ma
3. Gilbert Guillaume, The precedent in international justice and arbitration. - Journal of international law (Clunet) n° 3, July 2010, pp 02- 10.