Part III: THE ARBITRAL TRIBUNAL

Chapter II: THE STATUS OF THE TRIBUNAL

Section I.- Arbitrators as Judges

§ 2.-Protection of the Arbitratos (1074 - 1100)

Paragraph 1088: Because many countries have no relevant laws or precedents, it is in fact a fairly hazardous task to attempt to classify the various positions taken in different jurisdictions. In any event, the distinctions between the different positions are perhaps less marked than suggested by the classifications described above. No legal system allows arbitrators to be fully liable for any error of judgment they commit, in order to avoid judicial harassment of arbitrators by losing parties. Conversely, even in the United States, where immunity is often depicted as being absolute, it is hard to imagine arbitrators being able to avoid liability for acts which clearly constitute a breach of their fundamental duties as judges.

Part IV: THE ARBITRAL PROCEDURE

Chapter II: THE ARBITRAL PROCEEDINGS

(1209 to 1301)
Section III: - Pleadings and Evidence

(1257 1301)

§1. - The Submission of Memorials and Evidence

(1261 to 1276)

A. - Evidence to be submitted

(1262 to 1266)

1266.-Where an argument as to the confidentiality of a party's documents is based on a law or regulation prohibiting the disclosure of certain documents (on the grounds of national security, for example), on what basis can that law be taken into consideration? Will it be procedural, substantive, or a mandatory rule? As this is a matter of evidence, over which arbitrators have unfettered discretion, arbitrators sitting in a country other than that which issued the regulation in question are generally under no obligation to give effect to it. At the very most, they may take such regulations into consideration as an element of fact which might constitute a legitimate reason for non-disclosure. Arbitrators sitting in the country which enacted the regulation might have a more difficult task, as their award will be generally subject to an action to set aside in that country and the rule in question may be held to be a requirement of public policy.

PART V: THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE

CHAPTER I: APPLICABLE LAW CHOSEN BY THE PARTIES

(1421 to 1536)

Section II. - The Subject Matter of the Parties' Choice

(1431 to 1508)

§2. - Transnational Rules

(1443 to 1499)
When faced with a clause which, in one form or another, provides that a dispute is to be governed by transnational rules, the arbitrators, the parties and their counsels will have to determine, once the dispute has arisen, the actual content of the rules applicable to the dispute. This is the true test of the effectiveness of *lex mercatoria* as an Instrument for resolving disputes in international trade. Again, it cannot be too strongly emphasized that applying transnational rules involves understanding and implementing a method, rather than drawing up a list of the general principles of international commercial law.

Therefore, after first discussing the transnational rules method, we shall examine a few examples of rules generally considered as being general principles of international commercial law.

### 1. Method

Two issues should be borne in mind with respect to the method to be used when identifying and applying general principles.

#### 1. Method

The first is that the starting point for any analysis of the method for determining applicable rules of law must be the choice of law clause itself. In using the generic term *lex mercatoria* to cover all of the different situations where the parties do not simply choose a particular national law, it is important not to lose sight of the diversity of the concepts liable to be included under that heading.

Amid the controversy over the legal nature of *lex mercatoria* and the various criticisms it has attracted, it is equally important to take full account of the diversity of the contractual provisions submitting certain disputes to rules other than those of a particular legal system. The task of the arbitrators—and hence that of the parties when presenting their case—is invariably to give effect to the choice initially made by the parties. The parties and the arbitrators should therefore begin by examining the choice of law clause for guidance as to the method to be used to determine the relevant rules for resolving the dispute.

Some clauses provide that principles common to several specified legal systems are to apply. In such a case, the arbitrators must use the "trunc common" method and conduct a comparative analysis limited to that of the listed legal systems, unless the clause itself allows other rules to be used on a subsidiary basis.

Thus, for example, the construction contract for the Channel Tunnel stated that it was governed by common principles of English and French law, and in the absence of such common principles by such principles of international trade law as have been applied by national and international tribunals.

On several occasions, the panel of experts appointed under Article 67 of that same contract was required to draw up such common or general principles, and succeeded in doing so.

It is fairly frequent for the application of a national law to be combined with that of principles of international origin. Thus, for example, an Iranian petroleum agreement signed in 1954 was governed by principles of law common to Iran and to the various countries to which the other parties belong and, failing that, by principles of law generally recognized by civilized nations, including such principles applied by international tribunals.

Similarly, the Libyan nationalization arbitrations were governed by principles of law of Libya common to the principles of international law and, in the absence of such common principles . . . then by and in accordance with the general principles of law as may have been applied by
international tribunals.\textsuperscript{161}

More recently, the arbitrators who made the \textit{ad hoc} award in the \textit{Banque Arabe et Internationale d'Investissements} case on November 17, 1994 in Amman were required to apply to a contract, in the absence of provisions to the contrary, "common legal principles prevailing in the member countries of the Corporation, and the recognized principles of International Law."\textsuperscript{162}

Other clauses refer exclusively to rules of international origin, with or without indicating how those rules should be determined. Such clauses are less common than combinations of rules from different legal systems, and they tend to be formulated in a variety of ways.\textsuperscript{163}

In all cases, any indications given by parties as to the method of determining the applicable rules must take precedence. Such indications would include a specified hierarchy between the various given sources or instructions to apply only principles common to certain regions of the world.\textsuperscript{164}

The second point to bear in mind is that where the parties submit their disputes to general principles of international commercial law, or behave in a manner which can reasonably be interpreted as conveying the same intention,\textsuperscript{165} the arbitrators should determine the applicable rules by examining comparative law, international instruments and international case law.\textsuperscript{166}

Comparative law is a fundamental source of transnational rules. Arbitrators often identify general principles by drawing them from various legal systems in which they are recognized, sometimes in different forms.\textsuperscript{167} However, in order to be considered as a general principle, a rule need not be found in every legal system. That would amount to giving a veto to systems which take an isolated position, whereas the goal is precisely to find a generally accepted tendency rather than to select, often somewhat randomly, a particular legal system to govern disputes.\textsuperscript{168}

International instruments and, in particular, international conventions are also a common source of inspiration for arbitrators seeking to determine the rules of \textit{lex mercatoria}. This is entirely justified, in so far as these texts reflect the agreement of a number of countries on a particular issue. Thus, for example, arbitrators deciding a dispute concerning international sales of goods on the basis of general principles are likely to refer to the Vienna Convention of April 11, 1980, on Contracts for the International Sale of Goods.\textsuperscript{169} Likewise, the resolutions of sufficiently representative international organizations can certainly lead to the creation of new general principles. For example, it is not surprising that, an the basis of the measures taken by the United Nations and the European Communities during the Gulf crisis, an arbitral tribunal identified and applied principles which effectively justify the nonperformance of certain contracts signed with Iraqi parties.\textsuperscript{170} In the same way, the work of an organization such as UNIDROIT is particularly influential in determining general principles of law.\textsuperscript{171} In May 1994, UNIDROIT published a set of Principles of International Commercial Contracts. These principles are intended to apply particularly "where the parties have agreed that their contract be governed by 'general principles of law,' the 'lex mercatoria' or the like."\textsuperscript{172} The Principles consist of 108 rules presented in the form of a restatement and accompanied by a commentary. It is a remarkable work of comparative law, which has undoubtedly made a vital contribution to the development of transnational rules.\textsuperscript{173}

Arbitrators also often refer to international case law in determining the content of transnational rules. This is naturally true of arbitral awards, which are now accessible as a result of their publication in various periodicals. It is in the area of general principles of law that it is most clear that the previously contentious issue of whether "arbitral case law" actually exists has been overtaken by arbitral practice. In arbitral practice, of course, arbitrators very often use precedents established by other arbitral awards rendered in similar circumstances.\textsuperscript{174} The case law generated by permanent international courts, such as the International Court of Justice, will also be relevant, both when the parties expressly provide that it should apply\textsuperscript{175} and when, more generally, it reflects widely accepted rules of law.\textsuperscript{176}
2. Content

1459. - As the theory of general principles of international commercial law essentially resides in a method of determining such principles,\(^\text{177}\) to present them in the form of a list will inevitably be too simplistic an approach.

As a result, the debate among certain authors as to whether a list of some twenty principles is long or short is irrelevant. A list of principles often quoted by commentators discussing *lex mercatoria* is that compiled in an article that seeks to demonstrate the inadequacy of the method.\(^\text{178}\) The author of that article listed twenty principles of varying importance which had been considered in arbitral awards as constituting general principles. His goal was to illustrate the dearth of such principles. Ironically, his list has subsequently been used to support *lex mercatoria*.\(^\text{179}\)

Another author presented and discussed a number of principles more convincingly in an article on "the reality of international trade usages." He lists the principles under the following headings: (1) the predictability of transactions (including the "presumption of competence of parties in international trade," "the effectiveness of the arbitration agreement," "the principle of non-reliance on the lack of power of a contractual negotiator" and "the prohibition on contradicting oneself to the detriment of another;" (2) the adaptability of contracts (including "the presumption of acquiescence in an act of performance other than that which was defined in the contract" and "the obligation to renegotiate"); (3) the cooperation of the parties (including "the obligation to mitigate damages," "equal distribution of the burden of risks" and "the obligation to be candid");

(4) ethical business practices (which essentially means "the unenforceability of contracts involving corruption").\(^\text{180}\)

However valuable they may be, these lists are by no means exhaustive. The same is true of the list of principles drawn up by UNIDROIT\(^\text{181}\) and the examples discussed below.

1460. - Illustrations of general principles of international commercial law found in arbitral case law naturally include rules with an extremely broad scope. This is the case of both the principle of the binding force of contracts, often expressed in arbitral awards as *pacta sunt servanda*, and the principle of good faith.

There are now countless arbitral awards recognizing that both rules\(^\text{182}\) are general principles of international commercial law. In most cases, arbitrators simultaneously characterize the two rules as general principles.\(^\text{183}\)

1461. - In fact, some awards treat the principle of good faith as simply another expression of the principle *pacta sunt servanda*. That will be the case if bad faith is defined as the failure to honor one's contractual commitments. That is a position that contributes little to the development of *lex mercatoria*.\(^\text{184}\) Likewise, a general principle that contracts are binding is hardly revolutionary given that the same principle appears in all legal systems. Besides, awards which restrict themselves to applying that principle are most exposed to the criticism that *lex mercatoria* is merely a device enabling the hierarchy of norms to be altered

by putting the contract before the law.\(^\text{185}\) The Same applies to the principle of the protection of vested rights, found in certain arbitral awards.\(^\text{186}\)

1462. - However, the principle of good faith is particularly useful when understood as providing the basis for more specific rules, which may in turn become general principles. This is the case, for example, of the principle that a party cannot contradict itself to the detriment of another. This principle is known in German and Swiss law by the maxim *non concedit venire contra factum proprium* and, in common law countries, as estoppel by representation. It is found in French law in the form of a principle of consistency\(^\text{187}\) and has also been recognized in arbitral case law.\(^\text{188}\) It enables arbitrators to take concrete measures where the conditions for the application of the principle are satisfied, which occurs far less frequently than parties suggest.\(^\text{189}\) Even the most reticent observers of a phenomenon which they perceive as a means allowing arbitrators to create new rules of law recognize that the principle of good faith potentially constitutes one of the richest sources of *lex mercatoria*.\(^\text{190}\)

1463. - In any case, the principle *pacta sunt servanda* is subject to certain limits in all legal systems. It only applies if the contract is validly entered into, and exceptions to the
principle may be justified by the need to protect the weaker party or the general interest. The solemn formulation of principles such as pacta sunt servanda and the principle of good faith does not mean that similar prerequisites and exceptions do not exist when the transnational rules method applies. Arbitral case law shows that general principles are not confined to a few rules so broad in scope that they add nothing to the provisions of the contract, but that, on the contrary, they cover in some detail most of the major issues of international contract law.

This can be seen with respect to the validity of contracts, as well as to their interpretation and performance.

a) Principles Relating to the validity of Contracts

1464. - The issues of a contracting party's capacity and power have given rise to a number of general principles. It has been suggested that there is a principle according to which "a party cannot rely on the absence of power of the person negotiating a contract." This would prevent "one of the parties to a contract from relying on the fact that its own representative did not have the requisite powers, provided that the other party was unaware of that fact." Expressed in this way, this principle goes too far, as the fact that the other party is required to be reasonably diligent should also be taken into account. As one author has observed, there is "a tendency among arbitrators in international commerce to consider . . . that the law should only protect parties to the extent that are not under a duty to protect themselves." The real principle in this context is therefore that a reasonably diligent party can rely on its legitimate ignorance of the fact that the person who signed the contract was not empowered to do so.

1465. - Arbitral case law has also given rise to principles concerning invalid consent given by parties to a contract. In particular, it has established a principle that "in international trade parties are presumed to be competent." This principle makes it more difficult for a professional party to seek to have a contract declared void on the basis of its own mistake. In some cases, that principle has been extended to mean that "an error of fact or law cannot be recognized in international commercial relations, as it is incompatible with the presumption of competence established through usage." Once again, it would no doubt be sufficient - at least with regard to errors of fact - for the effect of this presumption of competence to be to increase the burden of proof on the party seeking to rely on its own error. It certainly cannot be excluded that in some circumstances an error of fact, even one committed by a professional, might lead to a contract being held void.

1466. - The principles of apparent authority and the presumption of competence tend to favor the validity of contracts. However, this is not to say that there is a general principle of favor validitatis. The validity of a contract, in itself, is not something deserving protection. Instead, that validity is conditioned on the compliance with the applicable rules of law, be they those of a national law or general principles. In fact, a number of general principles tend to clarify the conditions under which a contract can be held void.

1467. - As in national laws, the aim of some general principles is to protect only one of the parties. Thus, for example, arbitrators would have no difficulty in finding rules in comparative law as to vitiated consent which are accepted on a sufficiently wide scale to be considered as forming general principles of international commercial law. In the same vein, it has sometimes been argued that the unlawfulness of the abuse of a dominant economic position is also a general principle.

1468. - By contrast, some principles are based on the protection of the general interest. In particular, arbitral case law has established a principle that contracts obtained by corruption are void. Early awards referred to the existence of a general principle of law recognized by civilized nations that contracts which 1 seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by Courts or arbitrators.
In later cases, the arbitrators did not find such disputes to be non-arbitrable or that the *nemo auditur* principle applied, but instead held the contract in question to be void.\(^{203}\) Thus, for example, where a fictitious contract was designed to provide a party with credit to which it was not entitled, a 1982 ICC award made in Case No. 2730 found the transaction in question to be contrary not only to Yugoslavian legislation [which was held to be applicable to the contract] but also to morals and *bonos mores*. In general, any contract the object of which is contrary to mandatory laws, rules of public policy, morals and *bonos mores* will be void . . . . This principle is accepted in all countries and by all legal systems. It constitutes an international rule, an element of the ordinary law of contract in international transactions.\(^{204}\)

Authors generally favor the approach whereby an arbitrator dealing with an illegal contract should not decline jurisdiction, but should instead declare the contract to be void.\(^{205}\) The only situation in which it is unclear if this is still true is that where neither party requests the arbitral tribunal to rule on the issue of nullity. This would leave the arbitrators with no other choice than to ignore the issue of nullity or to resign if they believe that they should not become involved in a breach of international public policy.\(^{206}\)

Similarly, the general principle that contracts contravening “public morality” are void might affect contracts such as those which facilitate drug trafficking, terrorism, agreements intended to incite subversion (the hiring of mercenaries, for example) and human rights violations.\(^{207}\)

The protection of humanity’s cultural heritage, as illustrated in particular by the work of UNESCO, can also provide a basis the creation of general principles. This was discussed at length in the *Pyramids* case.\(^{208}\)

Likewise, antitrust law has also given rise to an analysis in terms of general principles.\(^{209}\)

**b) Principles Relating to the Interpretation of Contracts**

1469. - Arbitral case law recognizes the existence of number of principles concerning the interpretation of contracts.\(^{210}\) These principles are fairly similar to Articles 1156 *et seq.* of the French Civil Code,\(^{211}\) and comparable provisions in other legal systems, and even more so to the UNIDROIT Principles of International Commercial Contracts.\(^{212}\)

Despite the tendency for many parties to see bad faith in any interpretation whereby one of the parties seeks to limit its undertakings, bad faith cannot be defined by reference to the restrictive or extensive nature of the interpretation proposed. A party only interprets a contract in bad faith where the interpretation it puts forward at the time of the dispute does not coincide with what the parties genuinely intended when they signed the contract. The requirement that contracts be interpreted in good faith is merely another way of saying that a literal interpretation should not prevail over an interpretation reflecting the parties' true intentions. As observed in an early award, “the fundamental principle of good faith . . . entails searching for the common intention of . . . the parties.”\(^{214}\) Similarly, in the *Aramco* award of August 23, 1958, it was held that “the interpreter must . . . remember that the parties intended by their agreements to establish a reasonable contractual situation, in conformity with the common aim they had in view.”\(^{215}\) Likewise, the award made in 1975 in ICC Case No. 1434 stated that:

the disputed limitation of liability clause should be interpreted in the light of general principles of the interpretation of contracts, and particularly those which appear in Articles 1156 *et seq.* of the [French] Civil Code, beginning with a literal and grammatical interpretation of the words used, without failing to place them in their context and to consider the contract as a whole, so as to discover the genuine common Intention of the parties, referring in particular, if the terms are ambiguous, to the principle of good faith (cf. Article 1134 Civil Code) and resorting, if need be, to extrinsic interpretational indicators, which may be found, for example, in the historic context and in the relations between the parties.\(^{216}\)

1471. - The principle of effectiveness, whereby “it should be assumed that the authors of a clause intended it to have a real significance and impact,”\(^{217}\) is also applied in arbitral practice. As set forth in the 1975 award in ICC Case No. 1434,
there is a universally-recognized rule of interpretation whereby, if the terms of a contract are capable of two contrary interpretations or can convey two different meanings, one should favor the interpretation which gives a certain effect to the words, rather than the interpretation which renders them redundant or even absurd. This ‘principle of useful effect,’ which is also known as ‘the effectiveness principle’ (*ut res magis valeat quam pereat*) is endorsed, in particular, by Article 1157 of the [French] Civil Code.\textsuperscript{218}

1472. - The arbitrators will also take into account the conduct of the parties subsequent to their entry into the contract and until the dispute arises, as that conduct will reflect the parties' own interpretation of the disputed contract an entering into it. This rule of interpretation is sometimes described as "practical and quasi-authentic interpretation," "contemporary practical interpretation" or "proof by the subsequent conduct of the parties."\textsuperscript{219} It can be applied in situations such as that where a party has performed the contract, without reserving its rights, under conditions different to those initially provided for.\textsuperscript{220}

1473. - It has sometimes been suggested that there is a principle whereby silence should be interpreted as acquiescence.\textsuperscript{221} One author rightly criticized that proposition, noting that no such principle was accepted in English law.\textsuperscript{222} In fact, there is no such rule in continental legal systems either,\textsuperscript{223} and it cannot therefore be considered as constituting a general principle.\textsuperscript{224}

1474. - There is, however, a principle of consistency whereby within a particular document a recurring word is deemed to have the same meaning throughout.\textsuperscript{225} This rule is set forth in more general terms in Article 1161 of the French Civil Code, which states that "all clauses of a contract are interpreted one by reference to another, the meaning of each clause being determined in the light of the entire document." The need for an interpretation of the contract or of its various constituent parts as a whole has also been recognized in arbitral case law.\textsuperscript{226}

1475. - Although there have been fewer opportunities to apply it in arbitral case law, there is also a general principle whereby, if in doubt, a clause should be interpreted *contra proferentem*, or against the party that drafted it. This rule is usually, although not exclusively, applied when construing contracts of adhesion. It prevents the party that drafted the disputed provision from relying on any ambiguity in that provision in support of a position which is favorable to that party but which was not made clear when the provision was drafted. In other words, the rule requires the party drafting the provision in question to enlighten the other party as to what might be the least favorable Interpretation from the other party's point of view. As a result there should be no temptation for the party drafting the terms of the contract to leave deliberate ambiguities in the hope of exploiting them at a later stage.\textsuperscript{227}

1476. - Contractual Interpretation is not based exclusively on intrinsic factors. It has been held that the parties' intentions should be examined in context and, in particular, in the light of current usages in the relevant business sector. In the absence of any indication to the contrary, the parties will be deemed to have agreed that such usages should apply.\textsuperscript{228}

1477. - Lastly, it is a generally recognized principle that arbitrators are not bound by the characterization given by the parties to their contract. In the same way as the courts, arbitrators are entitled to recharacterize the parties' agreements as they see fit.\textsuperscript{229} Given the convergence of different legal systems on this issue, the existence of such a principle is not in doubt. However, the arbitral awards usually cited in support of its existence are irrelevant,

as one involved recharacterizing the parties' claims\textsuperscript{230} and in the other Moroccan law applied.\textsuperscript{231}

c) Principles Relating to the Performance of Contracts

1478. - Some principles help to clarify the parties' obligations in the performance of their contracts.

1479. - Arbitrators often apply the principle found in Article 1134, paragraph 3 of the French Civil Code, as well as in
many subsequent codifications in civil law systems, according to which "contracts must be performed in good faith." Again, the principle of good faith is often simply another way of formulating the principle that the failure to perform contractual obligations renders the defaulting party liable.

1480. - The question of whether the parties' obligations should be assessed differently in economic development contracts is too controversial to generate general principles of law. On the other hand, there appears to be no doubt that contracts which require long-term cooperation between the parties can give rise to specific principles.

1481. - It is in the context of these long-term contracts that the obligation to keep one's co-contractor fully informed, which was expressed in the Klöckner award as "the duty of full disclosure," is at its strongest. However, the requirement that each party inform its co-

contractor of circumstances liable to jeopardize the performance of the contract has sometimes been presented as a rule with a more general scope. Thus, as observed in an ICC award made in 1985, "the parties' obligation to collaborate with a view to ensuring that the contract is properly performed imposes . . . on each party a duty to inform, in particular."

1482. - It is also in relation to long-term contracts that the question arises as to whether the doctrine of change in circumstances ("imprévision") is a general principle. Awards sometimes state in general terms that the parties' reciprocal obligations should be properly balanced as a matter of principle. For example, in the 1975 award in ICC Case No. 2291, the arbitral tribunal observed that:

any commercial transaction is based on a balance between the reciprocal obligations and . . . to deny that principle would amount to deprive commercial contracts of all certainty, and to have them based on speculation or chance. Lex mercatoria contains a rule whereby the obligations should remain balanced from a financial point of view.

Similarly, it was held in another award that:

in an international contract concluded without any speculative intention, the parties can be considered, in the absence of an express agreement, to have wanted a guarantee against devaluation; furthermore, it would be contrary to good faith if the government of a State, having ordered and received services, were to refuse to pay for them at their true value, thereby intending to benefit from a substantial devaluation of the payment currency.

However, arbitrators will not generally go so far as to conclude that, on the basis of general principles, they can adapt a contract to meet a change in economic circumstances, unless of course the parties have so provided by means of a hardship clause. This is an appropriate solution, given the significant divergence of views among different legal systems as to the admissibility of the change in circumstances doctrine in private law.

1483. - However, arbitral case law tends to recognize that in long-term contracts the parties have a duty to re-negotiate in good faith. Arbitral case law also tends to reject, in this context, the English doctrine according to which an "agreement to agree" has no binding effect.

1484. - Other principles serve to determine the consequences of the failure by a party to perform its contractual obligations.

1485. - Arbitral case law has established a general principle that the failure to perform a contract renders the defaulting party liable.

1486. - The fact that the co-contractor of a defaulting party can rely on that party's failure to perform to withhold performance itself has also been held to be a transnational rule. The award rendered in 1980 in ICC Case No. 3540 states that "the non adimpleti
Awards generally provide that this principle is not effective where the failure to perform relied on by the co-contractor is of far less significance than its own non-performed obligations. In other words, a party can only properly withhold performance if it complies with the principle of proportionality. As one author has observed, “it would be contrary to good faith to rely on . . . the non-performance of a relatively minor obligation . . . in an attempt to avoid performance of an essential obligation of one’s own.”

1487. - Termination of the contract for failure, to perform or lack of proper performance, which is closely related to the withholding of performance, is also considered by some arbitrators to be a general principle of law.

1488. - The release of a party from its obligations by an event satisfying the conditions of force majeure, and the fact that force majeure has a purely suspensive effect, provided that it is not long-lasting, are also recognized as general principles.

1489. - Another general principle will be that the party to which a non-performed obligation is owed cannot rely on the non-performance if it has not objected to that nonperformance within a reasonable period of time.

1490. - Another set of general principles governs the evaluation of damages resulting from a total or partial failure to perform the contract.

1491. - One of the most well-established general principles in arbitral case law is the duty of the party to which the non-performed obligation is owed to mitigate its losses.

1492. - Arbitral case law also accepts the principle of full compensation for the loss sustained, with damages covering both the loss actually suffered and loss of profit. Certain distinctions are made in some cases regarding state contracts, depending on whether the dispute concerns a lawful or an unlawful expropriation. These distinctions remain, however, controversial.

1493. - In contrast, the rule whereby punitive damages can be awarded against the defaulting party in some circumstances is not sufficiently established in comparative law to be considered a general principle.

1494. - However, in cases where the contract does stipulate that the arbitrators may make an award of damages exceeding the value of the actual loss, it is possible for them to apply a principle, based on comparative law, whereby the effects of excessive penalty clauses should be tempered. The precise remedy varies in different legal Systems, but reducing the effects of penalty clauses (rather than holding such clauses void altogether) would be more in keeping with the spirit of international commercial law, particularly in cases where the parties have submitted their disputes to general principles of law or remained silent as to the applicable law.

1495. - Some awards have held, by way of a general principle, that only direct and foreseeable losses are capable of giving rise to compensation.

1496. - In the case of partial non-performance, damages are to be assessed on the basis of what proportion of the entire set of obligations provided for in the contract has been performed. That, again, is an application of the principle of proportionality.

1497. - It is even possible that an issue as technical as the method of calculating reparable loss could give rise to general principles.

1498. - Likewise, the conditions governing the set-off of the respective sums which parties to a contract may owe one
another have been treated as general principles in some awards.269 We may also witness the development of transnational rules governing interest.270

1499. - To summarize, it is essential to recognize that the system of general principles cannot be reduced to the application of a list of rules which have already been formally codified, but that it consists instead of a method enabling the underlying principles of comparative law to be uncovered, if required.271 It is hard to deny that such a method is an appropriate tool for resolving all disputes liable to arise out of contracts which the parties intended to be governed by transnational rules or to which arbitrators choose to apply transnational rules where the parties fail to elect a governing law.272

153 See supra para. 1446.

154 On this issue, generally, see TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88; Gaillard, supra note 88, 10 ICSID REV.-FOREIGN INV. L.J. 224-28 (1995); 122 J.D.I 22-26 (1995); but see BERGER, supra note 88, at 218 et seq.

155 See supra para. 1447.

156 See supra paras. 1450 et seq.

157 See, for example, ICC Case No. 5163 where the arbitrators had to apply "the principles common to the laws of the Arab Republic of Egypt and the United States of America" (unpublished clause cited in Gaillard, supra note 88, 10 ICSID REV.-FOREIGN INV. L.J. 225 (1995); 122 J.D.I. 23 (1995)). On the terminology, see supra para. 1447.

158 Clause 68 of the contractual conditions attached to the construction contract signed an August 13, 1986 by Eurotunnel and Transmanche Link (ed. of Jan. 27, 1987).

159 On this panel, see supra para. 28.


162 Award by O. Nabulsi, Chairman. Z. Hashem and A. El Kosheri, arbitrators, supra note 68.


165 See supra para. 1448.

166 On the sources of lex mercatoria, see especially Lando, supra note 19, at 144 et seq.

167 See, for example, on estoppel by representation, known in German and Swiss law as the principle of non concedit venire contra factum proprium, infra para 1462.


Supra note 118, at 1. For an example of an award solely based an UNIDROIT Principles pursuant to the Intention of the parties, see ICC Award No. 8331 (1996), Vehicle supplier v. Purchaser, 125 J.D.I. 1041 (1998), and observations by Y. Derains.


On this issue, generally, and on the affirmative response to the question of whether arbitral case law actually exists, see supra paras. 371 et seq.

See the examples cited supra para. 1446.

On the use of the case law of the International Court of Justice as a basis for the principle of estoppel by representation in international trade law, see, for example, the September 25, 1983 Jurisdictional Decision by B. Goldman, president, I. Foighel and E.W. Rubin, arbitrators, in ICSID Case No. ARB/81/1, Amco Asia Corp. v. Republic of Indonesia, 23 I.L.M. 351, 381 (1984); X Y.B. COM. ARB. 61 (1985); 1 ICSID REP. 389 (1993); for a French translation, see supra infra para. 1549. See also Goldman, Nouvelles réflexions sur la Lex Mercatoria, supra note 88.

See supra paras. 1455 et seq.

See Mustill, supra note 116.


See Loquin, supra note 114, at 168 et seq.

See supra para. 1458.

For awards which recognize the rule pacta sunt servanda as a general principle, see, for example, ICC Award No. 3540 (1980), French contractor v. Yugoslavian sub-contractor, 108 J.D.I. 914, 917 (1981), and observations by Y. Derains; for an English translation, see VII Y.B. COM. ARB. 124 (1982); ICC Award No. 2321 (1974), Two Israeli companies v. Government of an African state, Y.Y. COM. ARB. 133 (1976); for a French translation, see 102 J.D.I. 938 (1975), and observations by Yves Derains; the November 20, 1984 Award in ICSID Case No. ARB/81/1, Amco Asia Corp. v. Republic of Indonesia, which was later annulled on different grounds, 24 I.L.M. 1022, 1034-35 (1985); I INTL ARB.
REP. 601 (1986); 1 ICSID REP. 413 (1993); for a French translation, see 114 J.D.I. 145, 154 (1987), and observations by E. Gaillard. For awards recognizing the principle of good faith to be a general principle, see, for example, the October 26, 1979 Award by Messrs. Cremades, Chairman, Ghestin and Steiner, arbitrators, in ICC Case No. 3131, Pabalk Ticaret Limited Sirketi v. Norsolor, 1983 REV. ARB. 525, 531. On this issue, generally, see Pierre Mayer, Le principe de Bonne foi devant les arbitres du commerce international, in ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 543 (1993).

183 See, for example, the April 12, 1977 LIAMCO Award, supra note 162, 20 I.L.M. 54-58; 1980 REV. ARB. 158-162; VI Y.B. COM. ARB. 89 (1981); for a French translation, see 1980 REV. ARB. 132, especially at 158-62; see also the commentaries by Patrick Rambaud, Un arbitrage pétrolier: la sentence LIAMCO, 26 AFDI 274 (1980), and by Brigitte Stern, Trois arbitrages, un même problème, trois solutions - Les nationalisations pétrolières libyennes devant l'arbitrage international, 1980 REV. ARB. 3; the January 19, 1977 Award by R.-J. Dupuy in Texaco, supra note 56; ICC Award No. 5953 (1989), supra note 64.

184 But see, on the potential implications of the notion of good faith, GÉRARD CORNU, REGARDS SUR LE TITRE III DU LIVRE III DU CODE CIVIL, DES CONTRATS ET DES OBLIGATIONS CONVENTIONNELLES EN GÉNÉRAL, LES COURS DE DROIT, 1976-77, at 200.

185 See supra paras. 1451 et seq.


188 See, for example, the September 25, 1983 Jurisdictional Decision in Amco, supra note 177, 23 I.L.M. 377-82 (1984); 113 J.D.I. 218-21 (1986), and observations by E. Gaillard at 250-52; the September 2, 1983 Award of the Iran-U.S. Claims Tribunal in Woodward-Clyde Consultants v. Iran, Award No. 73-67-3, 3 Iran-U.S Cl. Trib. Rep. 239 (1983); for a French translation, see 1985 REV. ARB. 272; the June 5, 1990 Award in ICSID Case No. ARB/81/1, Amco Asia Corp. v. Republic of Indonesia, 5 INTL ARB. REP. D4, D37 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993); for a French translation, see 118 J.D.I. 172, 177 (1991), and observations by E. Gaillard, at 183-84; see also the preliminary award in ICC Case No. 15 12 (Jan. 14, 1970), Indian cement company v. Pakistani bank, 1992 BULL. ASA 194; V Y.B. COM. ARB. 174 (1980); ICC Award No. 5926 (1989), unpublished, in which the parties, from Latin America and North America respectively, both recognized the existence of the principle but each sought to invoke it to support its case. See, for the same situation, ICC Award No. 6363 (1991), Licensee v. Licensee, XVII Y.B. COM. ARB. 186 (1992), especially 44 at 201. See also the April 8, 1999 ad hoc. Award made in Paris, Construction companies v. Middle East State, unpublished, which decides that a party which has assigned a contract without the prior consent of its cocontractor cannot rely on this circumstance in the context of the determination of the parties to the arbitration agreement (at 75).

189 On this issue, generally, see Gaillard, supra note 127; Loquin, supra note 114, at 173; SCHMITTHOFF, supra note 110, [para] 70; Kahn, supra note 180, at 323; Pinsolle, supra note 127; Paul Bowden, L'interdiction de se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88, at 125.

190 Mayer, supra note 183.

191 Comp. with Virally, supra note 110, at 381.

192 Loquin, supra note 114, at 173. See also Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in ICC CONGRESS SERIES NO. 3, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257 (P. Sanders ed., 1987), and, for a French version, 1986 REV. ARB. 329, 345.

193 See, for example, in French law, Patrice Jourdain, Le devoir de "se" renseigner (Contribution à l'étude de l'obligation de renseignement), Dalloz, Chron. 139 (1983). On this issue, see also XAVIER BOUCOBZA, L'ACQUISITION INTERNATIONALE DE SOCIÉTÉ [673 et seq. (1998).


195 On the widely accepted idea that the doctrine of apparent authority serves to correct the absence of necessary powers, see Article 11 of the June 19, 1980 Rome Convention on the Law Applicable to Contractual Obligations. See also this issue, with regard to state contracts, Audit, supra note 51, at 38 et seq. Compare, with regard to the arbitration clause, supra para. 470.

Loquin, supra note 114, at 169.

But see ICC Award No. 4145 (1984), supra note 64.

On the different question of the principle of interpretation whereby sense should be given to the provisions agreed by the parties, see infra para. 1471.

On the affirmation that "contractual principles such as the invalidity of contracts where the parties' consent is defective are general principles of law which are applicable here," See ICC Award No. 3327 (1981), French company v. African state, 109 J.D.I. 971 (1982), and observations by Y. Derains. On the affirmation of the general principle that misrepresentation constitutes a cause of nullity of contracts, See the award cited by FOCHARD, supra note 112, at 433. Compare the more conservative position taken by Paulsson, supra note 88, at 96, which, in our view, overestimates the differences in national laws on these issues although, admittedly, the terminology used differs significantly from one jurisdiction to the next.

Kahn, supra note 180, at 317. But see the reservations expressed by DE BOISSÉSON, supra note 41, at 636. Compare, for the idea that the lifting of the corporate veil can be based on lex mercatoria, with ICC Award No. 8385 (1995), U.S. company v. Belgian company, 124 J.D.I. 1061 (1997), and observations by Y. Derains.


Supra note 204, at 917-18. On the issue of the nullity of contracts for corruption, see EXTORTION AND BRIBERY IN BUSINESS TRANSACTIONS (ICC Publication No. 315, 1977); Ahmed S. EI Kosheri and Philippe Leboulanger, L'arbitrage face à la corruption et aux trafics d'influence, 1984 REV. ARB. 3; Francois Knoepfler, Corruption et Arbitrage international, in LES CONTRATS DE DISTRIBUTION - CONTRIBUTIONS OFFERTES AU PROFESSEUR FRANÇOIS DESSEMONTET À L'OCCASION DE SES 50 ANS 357 (1998); Loquin, supra note 114, at 180; Lalive, supra note 193, at 345; Kahn, supra note 180, at 314. For a more reserved position on the ground that the nullity of contracts for corruption is less frequently pronounced than is sometimes alleged to be the case, see Bruno Oppelit, Le paradoxe de la corruption à l'épreuve du droit du commerce international, 114 J.D.I. 5 (1987). The broad ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1997, should put an end to this minority view. See also ICC Award No. 5622 (Geneva, Aug. 19, 1988), Hilmarton v. OTV (1993 REV. ARB. 327, and the commentary by Vincent Heuzé, La morale, l'arbitre et le juge, id. at 179; 1992 RIV. DELL' ARB. 773, and A. Giardina's note; for an English translation, see XIX Y.B. COM. ARB. 105 (1994)) and, on the subsequent proceedings to which this award gave rise, infra para 1595; for a case where the arbitrators considered that corruption could lead to the nullity of the contract but where there was insufficient evidence of such corruption, see the March 21, 1992 ICC Award upheld by CA Paris, Sept. 30, 1993, European Gas Turbines v. Westman International Ltd., 1994 REV. ARB. 359, and D. Bureaus note; 1994 REV. CRIT. DIP 349, and V. Heuzé's note; 1994 RTD Coat. 703, and observations by J.-C. Dubarry and E. Loquin; 1994 BULL. ASA 105, and the commentary by Adel Nassar, Ordre public international et arbitrage? Y a-t-il eu une évolution?, id at 110; XX Y.B. COM. ARB. 198 (1995); ICC Award No. 7047 (Feb. 28, 1994), by H. Raeschke-Kessler, Chairman, J. Patry and D. Mitrovic, arbitrators, Corporation W. v. State Agency F., 1995 BULL. ASA 301, upheld by Swiss Fed. Trib., Dec. 30, 1994, 1995 BULL. ASA 217; 1996 REV. SUISSE DR. INT. ET DR. EUR. 545, and observations by P. Schweizer. See also the awards cited supra para. 586.


See Pierre Mayer, La règle morale dans l'arbitrage international, in ETUDES OFFERTEES A PIERRE BELLET 379, [para] 34 (1991). On the fact that these principles are part of international public policy, see infra para. 1535.

See Lalive, supra note 193, at 341.

See supra para. 508 and especially Kahn, supra note 180, at 317-18; DE BOISSÉSON, supra note 41, at 639.


On this issue, generally, see Philippe Kahn, L'interprétation des contrats internationaux, 108 J.D.I. 5 (1981); Horsmans, supra note 197; FOCHARD, supra note 112, at 434 et seq. On the principles of construction of arbitration agreements, see supra paras. 476 et seq.

See, e.g., ICC Award No. 1434 (1975), supra note 14. On these rules, see especially Jacques Dupichot, Pour un retour aux textes: défense et illustration du "petit guide-âne" des articles 1156 à 1164 du Code civil, in ETUDES OFFERTEES À JACQUES FLOUR 179 (1979); CORNU, supra note 185, [para] 44 et seq. See also J. LOPEZ SANTA MARIA, LES SYSTÈMES D'INTERPRÉTATION DES CONTRATS (Thesis, University of Paris (France), 1968), with a
Supra note 118, especially Arts. 4.1 to 4.8, at 90-100.

See, e.g., ICC Award No. 2921 (1975), French transporter v. English company, 103 J.D.I. 989 (1976), and observations by Y. Derains; the September 25, 1983 Jurisdictional Decision in Amco, supra note 177.


Supra note 47, 27 INT'L L. REP., 173 (1963); for a French translation, see 1963 REV. CRIT. DIP 272, 319. See also the reasons given for an award made by a Dutch arbitrator on December 23, 1932, according to which the examination of the contract "cannot be limited to its literal terms as contracts must be performed in good faith" (European company v. European company cited by FOUGARD, supra note 112, [para] 619 at 439).

Supra note 14. With respect to the arbitration agreement, see supra para. 477.

See the June 10, 1955 Award by President Cassin, supra note 215.


Compare, on the "presumption of acquiescence to an act of performance different from that defined by the contract," Loquin, supra note 114, at 175. With respect to the arbitration agreement, see supra para. 477.


Mustill, supra note 116, at 177, n. 106. Comp. with Loquin, supra para. 1459 and note 114.


But see Paulsson, supra note 88, at 89.

See, e.g., ICC Award No. 1434 (1975), supra note 14, and Kahn, supra note 211, at 18.

See, e.g., ICC Award No. 1434 (1975), supra note 14, and the September 25, 1983 Jurisdictional Decision in Amco, supra note 177, 23 I.L.M. 377 et seq. (1984); 113 J.D.I. 218 et seq. (1986), and the observations by E. Gaillard at 231. With respect to the arbitration agreement, See supra para. 477.


See, e.g., ICC Award No. 2583 (1976), Spanish contractor v. Libyan owner, 104 J.D.I. 950 (1977), and observations by Y. Derains.

Goldman, La lex mercatoria dans les contrats et l’arbitrage internationaux: réalité et perspectives, supra note 88, at 489; Paulsson, supra note 88, at 92.

ICC Award No. 3540 (1980), supra note 183.

ICC Award No. 3243 (1981), U.S. company v. Moroccan company, 109 J.D.I. 968 (1982), and observations by Y. Derains. See also, an the basis of Portuguese law, ICC Award No. 7518 (1994), Italian party v. Portuguese party, 125 J.D.I. 1034 (1998), and observations by Y. Derains.

See, for example, Article 148 of the Egyptian Civil Code, which was used as a model in many other Arab countries.


See supra para. 1461.

See, for example, the Norsolor award, supra note 183.

In favor of a specific assessment of such contracts, see, for example, Patrick Rambaud, L'annulation des sentences Klöckner et Amco, 32 AFDI 259 (1986); the January 19, 1977 Texaco Award by R.-J. Dupuy, supra note 56; but see the October 21, 1983 Award in Klöckner, subsequently annulled on different grounds, supra note 140, 111 J.D.I. 426 (1984), and observations by E. Gaillard, 114 J.D.I. 141 (1987). See also Prosper Weil, Droit international et contrats d'Etat,
in MÉLANGES OFFERTS À PAUL REUTER - LE DROIT INTERNATIONAL: UNITÉ ET DIVERISTÉ 549 (1981);
Kahn, supra note 51.


238 Supra note 140. See also Loquin, supra note 114, at 179 et seq., according to which it is a general principle of law, and Audit, supra note 51, at 111.

239 Award cited by Sigvard Jarvin, L'obligation de coopérer de bonne foi; Exemples d'application au plan de l'arbitrage international, in L'APPORT DE LA JURISPRUDENCE ARBITRALE, supra note 113, at 157, 167-68. See also ICC Award No. 3093 (1979), supra note 60. On this issue, see also Piero Bernardini, Is the Duty to Cooperate in Long-Term Contracts a Substantive Transnational Rule in International Commercial Arbitration?, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88, at 137. On the corresponding obligation of reasonable diligence in seeking out information, see supra para. 1464.

240 On this issue, see especially Denis Philippe, "Pacta sunt servanda " et "Rebus sic stantibus ", in L'APPORT DE LA JURISPRUDENCE ARBITRALE, supra note 113 at 181; ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES DU COMMERCE [paras] 548 et seq. (1984); Paulsson, supra note 88, at 95. 

241 Supra note 214. See also SCHMITTOFF, supra note 110, [para] 70.


243 See, for example, the reservations expressed in ICC Award No. 1512 (1971), Indian cement company v. Pakistani bank, I.Y.B. COM. ARB. 128 (1976); for a French translation, see 101 J.D.I. 904 (1974), and observations by Y. Derains; ICC Award No. 2404 (1975), Belgian seller v. Romanian purchaser, 103 J.D.I. 995 (1976), and observations by Y. Derains. See also Goldman, La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives, supra note 88, at 495. On this issue, generally, see Hans van Houtte, Changed Circumstances and Pacta Sunt Servanda, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88, at 105.

244 On this issue, see supra paras. 35 et seq.

245 For a comparative law analysis, see René David, L'imprévision dans les droits européens, in ETUDES OFFERTES À ALFRED JAUFFRET 211 (1974). For the position of the UNIDROIT principles with respect to hardship, see Articles 6.1.2 to 6.2.3; see also P. Kahn, review of the Principles in 121 J.D.I. 1115 (1994). For an application of the doctrine of change in circumstances under Algerian law, which expressly accepts the rule, see, for example, the ad hoc Award rendered in Paris on December 29, 1993 by D.G. Wright, chairman, P. Mayer and C. Molineaux, arbitrators (C. Molineaux dissenting, Icori Estero S.p.A. v. Kuwait Foreign Trading Contracting & Investment Co., 9 INT'L ARB. REP. A1 (Dec. 1994). For an example of the refusal to apply the doctrine of change in circumstances recognized, within certain limits, by Dutch law, see ICC Award No. 8486 (1996), Dutch party v. Turkish party, 125 J.D.I. 1047 (1998), and observations by Y. Derains.

246 On the duty to renegotiate in good faith, see, for example, ICC Award No. 2291 (1975): "reasonable renegotiation [is] customary in international contracts" (supra note 214); ICC Award No. 8365 (1996), supra note 109. See also Loquin, supra note 114, at 175 and, on the similar concept of the "equal sharing of the burden of risks," at 178; Goldman, La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives, supra note 88, at 492. On the fact that the invalidity of an "agreement to agree" is not a transnational rule, see ICC Award No. 8540 (Sept. 4, 1996), unpublished.

247 See, e.g., ICC Award No. 3131 (Oct. 26, 1979), Norsolor, supra note 183, and Kahn, supra note 180, at 321.

248 See, e.g., ICC Award No. 2583 (1996), supra note 229.

249 Supra note 183. See also ICC Award No. 7539 (1995), French company v. Greek company, 123 J.D.I. 1030 (1996), and observations by Y. Derains; the October 21, 1983 Award in Klöckner, supra note 140, and observations by E. Gaillard, 114 J.D.I. 142 (1987); ICC Award No. 8365 (1996), supra note 109; Paulsson, supra note 88, at 93. On this issue, see Philip D. O'Neill, Jr. and Nawaf Salam, Is the Exceptio Non Adimpleti Contractus Part of the New Lex Mercatoria?, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88, at 147.

250 For another application of this principle, see infra para. 1496.

251 JEAN CARHONNIER, DROIT CIVIL - Vol. 4 - LES OBLIGATIONS [para] 84, considered to reflect a rule of lex mercatoria by Y. Derains, observations following ICC Award No. 2583 (1976), Spanish contractor v. Libyan owner, 104 J.D.I. 950, 951 (1977). See also the October 21, 1983 Klöckner Award, supra note 140, and the observations by E. Gaillard, 114 J.D.I. 143 (1987). On whether there is a general principle under which the right to withhold performance is subject to the prior formal notification by the party inviting it to its co-contractor, see Gaillard, id. at 143-44 (1987).

252 Compare, on the effect of express termination clauses, ICC Award No. 2520 (1975), Two Czechoslovak companies v. Italian company, 103 J.D.I. 992 (1976), and observations by Y. Derains.

253 Compare, on the definition of force majeure, ICC Award No. 2478 (1974), which was subject to Swiss law, but was expressed in general terms (French company v. Romanian company, 102 J.D.I. 925 (1975), and observations by Y.
Derains); ICC Award No. 2142 (1974), 101 J.D.I. 892 (1974), and observations by R.T.


255 On the consequences of the long-lasting embargo against Iraq; held to be a cause of termination of a construction contract, see ICC Award No. 8095 (Sept. 25, 1997), unpublished.

256 On this issue, see David W. Rivkin, Lex Mercatoria and Force Majeure, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION, supra note 88, at 161; Henry Lesguillons, Pratique arbitrale concernant la "force majeure" et la "frustration", in INADEMPIMENTO, ADATTAMENTO, ARBITRATO - PATOLOGIE DEI CONTRATTI E RIMEDI 457 (1992).

257 See, for example, ICC Award No. 2520 (1975), in which the arbitrators took into account, in their assessment of damages, the absence of any adverse reaction by one party to the failure by the other party to perform its obligations (supra note 253); ICC Award No. 8365 (1996), supra note 109. Compare, in a case governed by Moroccan law, ICC Award No. 3243 (1981), supra note 232.

258 On this issue, see Marcel Fontaine, Il danno risarcibile nella giurisprudenza arbitrale della Camera di Commercio Internazionale, in INADEMPIMENTO, ADATTAMENTO, ARBITRATO - PATOLOGIE DEI CONTRATTI E RIMEDI 541 (1992); JÉRÔME ORTSCHEIDT, LA RÉPARATION DU DOMMAGE DANS L'ARBITRAGE COMMERCIAL INTERNATIONAL (Thesis, University of Paris XII (France), 1999).

259 See, e.g., ICC Award No. 2478 (1974), supra note 254; ICC Award No. 3344 (1981), supra note 222; ICC Award No. 4761 (1987), Italian consortium v. Libyan company, 114 J.D.I. 1012 (1987), and observations by S. Jarvin; ICC Award No. 5910 (1988), Belgian purchaser v. Belgian seller, 115 J.D.I. 1216 (1988), and observations by Y. Derains; ICC Award No. 5514 (1990), French company v. Government committed to the provision of financing, 119 J.D.I. 1022,1024-25 (1992), and observations by Y. Derains; ICC Award No. 6840 (1991), Egyptian seller v. Senegalese buyer, 119 J.D.I. 1030, 1034 (1992), and observations by Y. Derains; the June 5, 1990 Award by R. Higgins, president, M. Lalone and P. Magid, arbitrators, in Amco, supra note 189, 5 INT'L ARB. REP. D41 et seq. (Nov. 1990); 118 J.D.I. 178 (1991), and observations by E. Gaillard, especially at 187; on this issue, generally, see Yves Derains, L’obligation de minimiser le dommage dans la jurisprudence arbitrale, 1987 INT'L BUS. L.J. 375; Kahn, supra note 180; at 321-22; Loquin, supra note 114, at 177-78; Goldman, La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives, supra note 88, at 495. On the application of this rule in awards where different national laws apply, see the references cited by Y. Derains, observations following ICC Award No. 5910 (1988), supra, at 1222; in French law, see ICC Award No. 2404 (1975), supra note 244; see also CA Paris, 1e Ch., Sec. C, Dec. 8, 1998, Peter Van Vugt Agrow Products B.V. v. Hydro Agri France Nouvelle Denomination Hydro Azote, No. 1997/04763, unpublished; in English law, see ICC Award No. 5885 (1989), Seller v. Buyer, XVI Y.B. COM. ARB. 91 (1991); in Algerian law, see ICC Award No. 5865 (1989), supra note 15. For a convincing demonstration that, in spite of the fact that it is not formulated in the same way, this principle is recognized under French law, see ORTSCHEIDT, supra note 259, [paras] 200 et seq.

260 See, e.g., ICC Award No. 1526 (1968), Belgian parties v. African state, 101 J.D.I. 915 (1974), and observations by Y. Derains; the November 20, 1984 Award, set aside on other grounds, in Amco, supra note 183, 24 I.L.M. 1036 (1985); 114, at 177-78; Goldman, supra, at 1222; in French law, see ICC Award No. 2404 (1975), supra note 244; see also CA Paris, 1e Ch., Sec. C, Dec. 8, 1998, Peter Van Vugt Agrow Products B.V. v. Hydro Agri France Nouvelle Denomination Hydro Azote, No. 1997/04763, unpublished; in English law, see ICC Award No. 5885 (1989), Seller v. Buyer, XVI Y.B. COM. ARB. 91 (1991); in Algerian law, see ICC Award No. 5865 (1989), supra note 15. For a convincing demonstration that, in spite of the fact that it is not formulated in the same way, this principle is recognized under French law, see ORTSCHEIDT, supra note 259, [paras] 200 et seq.

261 On the recovery of compensation in cases of lawful expropriation, see the discussion in the June 5, 1990 Award in Amco, supra note 189, 5 INT'L ARB. REP. D41 et seq. (Nov. 1990); 118 J.D.I. 179 (1991), and observations by E. Gaillard, especially at 187. See also the May 20, 1992 Award by E. Jimenez de Arechaga, president, R. Pietrowski, Jr. and M. El Mahdi, arbitrators (M. El Mahdi dissenting), in ICSID Case No. ARB/84/3, Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, 8 ICSID REV. - FOREIGN INV. L.J. 328 (1993); 32 I.L.M. 933 (1993), with correction at 32 I.L.M. 1470 (1993); XIX Y.B. COM. ARB. 51 (1994); 8 INT'L ARB. REP. A1 (Aug. 1993); 3 ICSID REP. 189 (1995); for a French translation, See 121 J.D.I. 229 (1994), and observations by E. Gaillard. On the issue, see ORTSCHEIDT, supra note 259, [paras] 426 et seq.

262 On the recovery of compensation in cases of unlawful expropriation, see, for example, the June 5, 1990 Award in Amco, supra note 189, S INT'L ARB. REP. D41 et seq. (Nov. 1990); 118 J.D.I. 187 (1991).

263 On this issue, See E. Allah Farnsworth, Punitive Damages in Arbitration, 7 ARB. INT'L 3 (1991); ORTSCHEIDT, supra note 259, [paras] 604 et seq. But See, on the arbitrability of the question, supra para. 579.

264 See UNIDROIT Principles, supra note 118, Art. 7.4.13, para. 2; See infra para. 1556.

265 ICC Award No. 1526 (1968), in which the arbitral tribunal reasoned in terms of general principles although it had declared a specific law to be applicable (supra note 261); ICC Award No. 2404 (1975), supra note 244; the November 20, 1984 Award in Amco, supra note 183, 24 I.L.M. 1037 (1985); 114 J.D.I. 155 (1987); the June 5, 1990 Award in Amco, supra note 189, 5 INT'L ARB. REP. D41 et seq. (Nov. 1990); 118 J.D.I. 179 (1991), and observations by E. Gaillard, especially at 187.

See supra para. 1486.


See supra paras. 1458 and 1459.

See infra para. 1556.

Referring Principles:

I.1.1 - Good faith and fair dealing in international trade

I.1.2 - Prohibition of inconsistent behavior

I.2.3 - Presumption of professional competence and equality of parties

II.4 - Agency by estoppel / apparent authority

III.1 - Set-off

IV.1.2 - Sanctity of contracts

IV.5.1 - Intentions of the parties

IV.5.3 - Interpretation in favor of effectiveness of contract

IV.5.4 - Interpretation against the party that supplied the term

IV.5.2 - Context-oriented interpretation

IV.6.9 - Duty to notify / to cooperate

IV.7.1 - Invalidity of contract that violates good morals (“<em>boni mores”</em>)

IV.7.2 - Invalidity of contract due to bribery

V.1.4 - Principle of simultaneous performance; right to withhold performance

VI.1 - Termination of contract in case of fundamental non-performance

VI.2 - Deadline for notice of defects

VI.3 - Force majeure

VI.4 - Promise to pay in case of non-performance
VII.1 - Damages in case of non-performance
VII.2 - Principle of foreseeability of loss
VII.4 - Duty to mitigate
VII.6 - Duty to pay interest
XII.6 - Attorney-client privilege
XIII.2.7 - Immunity of arbitrator