XIII.3.9 - Waiver of right to object

A party who knows that any provision of the applicable arbitration law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived its right to object.

Commentary:
1 This Principle is a direct consequence of the prohibition of inconsistent behavior which in turn is derived from the Principle of good faith and fair dealing. A party who has knowledge that any non-mandatory provision of the applicable arbitration law or any requirement under the arbitration agreement has not been complied with must raise an objection without undue delay before it proceeds with the arbitration. Any objection which is raised at a later stage of the proceedings is regarded as inconsistent with its previous behavior because, given that party's knowledge of the non-compliance, its silence is regarded as a waiver of his right to object. A party proceeds with the arbitration if it appears at a hearing or submits a brief or any other communication to the arbitral tribunal and/or to the other party. A party would not be deemed to have waived its right to object, if, for example, a postal strike or a similar impediment prevents it for an extended period of time from sending communications.

2 Whether an objection is raised without undue delay must be considered taking into account the circumstances of the case, including the nature of the provision which the arbitral tribunal did not comply with. When a time limit is provided for, such time limit must be examined first because such time limit, whether provided for in the applicable arbitration law or in the arbitration agreement, has priority over the general formula of "undue delay".

3 If a party is deemed to have waived its right to object under this Principle, it is precluded from raising such objection later during the course of the arbitral proceedings. It also loses its right to invoke such non-compliance in subsequent setting-aside or enforcement proceedings before domestic courts. However, where an arbitral tribunal has ruled that a party was deemed to have waived his right to object, the court can come to a different conclusion in its review of the arbitral proceedings.

4 Objections against the violation of mandatory provisions of the applicable arbitration law cannot be waived. Such legal consequence would be too rigid given the significance of the rule which is reflected in its mandatory character.