

# Contents

<b>Introduction .....</b>	<b>9</b>
<b>1. Applicable substantive law and the ICSID Convention .....</b>	<b>13</b>
I)    Background .....	13
II)   ICSID jurisdiction .....	16
III)  Jurisdiction and applicable law .....	21
1)  Scope of jurisdiction .....	21
2)  Applicable law rules in treaties .....	26
3)  The correlation between the scope of jurisdiction and applicable law .....	27
IV)  General rules of applicable law in ICSID Convention .....	30
V)   The autonomy of the parties .....	33
1)  Background and definition .....	33
2)  Party autonomy and the first sentence of Article 42(1) of the ICSID Convention .....	40
VI)  Limitations of party autonomy .....	43
1)  Public policy .....	44
2)  Mandatory provisions of the host state's law .....	48
3)  Reasonable connection .....	53
VII) Choice of law varieties .....	54
1)  Direct agreement between the parties .....	54
a)  The law of the host state .....	55
b)  The law of the Investor's home country or of third state .....	56
c)  Investment agreement as a self-contained legal system .....	57
d)  International Law .....	58
aa)  International law alone as the law chosen by the parties ...	58
bb)  Compound choice of law .....	59
cc)  International minimum standards .....	59

e) Transnational Law and <i>Lex Mercatoria</i> .....	60
f) General Principles of Law .....	61
2) Applicable law chosen in treaty or legislation .....	61
a) Choice of law in domestic legislation .....	61
b) Choice of Law in treaties .....	62
VIII) Implied choice of law .....	64
1) Reference to international arbitration .....	68
2) Choice of the place of arbitration .....	68
3) Choice of law by reference to domestic legislation .....	68
4) Parties' submissions and the circumstances of the case .....	69
a) Choice of law derived from parties' submissions .....	70
b) Parties' submissions as confirmation of the chosen law .....	78
IX) Stabilization Clauses .....	78
1) Stabilization Clause and the risk of subsequent changes in law ....	79
2) Non-comprehensive stabilization clauses .....	83
3) Absence of stabilization clauses .....	83
X) Absence of agreement on the applicable law .....	84
1) Examining the absence of the agreed choice of law .....	85
2) General view of the second sentence of Article 42(1) – The residual rule .....	86
3) Application of the host state's law .....	88
a) Limits on the application of the host state's law .....	92
aa) Application of international law .....	92
bb) The state's capacity to submit to arbitration .....	93
cc) The investor's legal status .....	94
4) Rules on the conflict of laws .....	95
5) Application of international law .....	97
XI) Prohibition of a <i>non liquet</i> .....	114
XII) Decision <i>ex aequo et bono</i> .....	116
1) Definition .....	116
2) The distinction between equity within the law and <i>ex aequo et bono</i> .....	117

3) Amiable composition and <i>ex aequo et bono</i> .....	118
4) The agreement on a decision <i>ex aequo et bono</i> in ICSID arbitration .....	119
5) Absence of an authorization to decide <i>ex aequo et bono</i> .....	124
6) Limitations on decision <i>ex aequo et bono</i> .....	134
XIII) Annulment of ICSID awards .....	134
1) Necessity of a review mechanism .....	135
2) Annulment process by ICSID .....	135
3) Manifest excess of powers .....	139
a) Non-application and misapplication of the applicable law ....	139
b) Partial non-application of the applicable law .....	145
c) Substantiation of sources .....	149
d) Non-application of international law .....	150

**2. Applicable law and the Iran-United States Claims Tribunal** ..... 153

I) Background .....	153
II) Structure of the Tribunal .....	157
III) Jurisdiction of the Tribunal .....	158
1) The <i>Ratione Personae</i> jurisdiction of the Tribunal .....	159
a) Private persons before the Tribunal .....	159
b) States versus nationals .....	160
c) State versus state .....	161
d) Government-controlled entities .....	162
aa) The notion of “control” .....	164
bb) Date of control .....	165
cc) Other factors in relation to the notion of “control” ....	167
dd) No evidence of control .....	170
e) Dual nationals .....	177
aa) Doctrine of state non-responsibility .....	183
bb) Doctrine of dominant and effective nationality .....	184
cc) Tribunal’s approach on the standing of dual nationals ....	187

2) The <i>Ratione Materiae</i> jurisdiction of the Tribunal .....	196
a) Article II of the Claims Settlement Declaration and the Undertakings .....	196
b) The Iranian-forum clause decision .....	197
aa) Binding contract .....	199
bb) Specifically providing .....	201
cc) Any disputes .....	204
dd) Sole jurisdiction .....	207
ee) The competent Iranian courts .....	211
IV) The substantive applicable law of the Tribunal .....	212
1) The origin of Article V of the Claims Settlement Declaration .....	214
2) The Tribunal's fundamental obligation .....	214
3) Determination of the substantive applicable law .....	220
a) Contract .....	220
aa) Payment .....	221
bb) Performance .....	222
cc) Existence of contract .....	224
dd) Interpretation .....	227
ee) Termination .....	230
a) National law .....	232
b) General principles of law .....	235
aa) Unjust enrichment .....	240
bb) Force majeure .....	247
cc) Other principles .....	253
c) Public international law .....	254
d) Changed circumstances .....	257
<b>Conclusion .....</b>	<b>259</b>
<b>Bibliography .....</b>	<b>267</b>
<b>Lebenslauf .....</b>	<b>277</b>