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Editorial

Il est une composante humaine à la fois nécessaire et terrible : notre capacité et notre propension à oublier. Dans nos vies où le culte de l’immédiateté est porté par une frénésie d’accélération, il devient de plus en plus difficile d’entrer en résonnance avec notre environnement et, au-delà, le sort de nos frères et sœurs humains.

Ne nous leurrons pas. Si nous avons partagé la souffrance des victimes de la pandémie (mais déjà si loin dans nos esprits), si nous avons dénoncé l’invasion russe autant que l’agression du Hamas et les bombardements israéliens, et compati à la souffrance des peuples ukrainien, israélien et palestinien, sans oublier les autres victimes des multiples conflits qui gangrènent notre monde (et insuffisamment rapportés), il faut admettre qu’au fur et à mesure du temps qui passe, malgré la persistance des souffrances des victimes, le quotidien, nourri des multiples contingences et tracasseries qui l’aliènent, prend le pas sur le souvenir et la nécessaire compassion.

Alors, que cet éditorial soit l’occasion, pour l’AFA et pour celles et ceux qui le liront, de rappeler les souffrances des victimes de conflits, de nous y associer, de les assurer de notre soutien et de souhaiter que des solutions pacifiques soient enfin trouvées.

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[*Avocats*](#_bookmark1) *à la Cour*

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#### [*Lino*](#_bookmark1) *DIAMVUTU*

*Docteur en droit de la faculté de Lisbonne*

**[](https://www.linkedin.com/groups/8279808)[](https://twitter.com/AFArbitrage)**



Un tel message, porté par une institution d’arbitrage et son représentant, ne devra pas étonner. L’arbitrage est une forme de justice qui œuvre à la paix. Cela pourra paraître paradoxal s’agissant d’une institution dont la fonction est de régler les différends. Mais précisément, en permettant à des personnes en conflit de voir trancher leurs prétentions, l’arbitrage concourt au rétablissement de l’équilibre, perturbé par le conflit, et contribue à la paix sociale. L’arbitrage y contribue d’autant plus que d’une part, il promeut le dialogue, vecteur de paix dont ressortira la solution juste, et que d’autre part, il ne se réduit pas à une méthode de résolution des litiges mais constitue une communauté soudée par ce qu’il convient d’appeler l’*amitié arbitrale* et dont les membres sont liés par la recherche commune d’une meilleure justice. Cette *amitié arbitrale* et la communauté qu’elle contribue à créer rassemblent des praticiens du monde entier. Elle est donc un vecteur de dialogue interculturel et contribue aux relations pacifiques entre les peuples.

Et finalement, quel meilleur exemple du dialogue interculturel que les contributions qui forment ce nouveau numéro de la Lettre de l’AFA. On y trouve un article de M. Lino Diamvutu, docteur en droit de la faculté de Lisbonne et professeur à la faculté de droit de Luanda (Angola), sur la *favor arbitrandum*, concept que la communauté arbitrale ne peut que défendre, et un commentaire de M. Henri-Joseph Trémolet de Villers et Mme Léa-Belle Yammine sur la motivation d’une sentence arbitrale et le contrôle du respect de l’ordre public international, sachant que le soin mis par les arbitres à la motivation des sentences est un des attraits majeurs de l’arbitrage. A ce propos, les destinataires de la Lettre sont chaleureusement invités à nous transmettre des contributions ou à proposer à leurs collaborateurs et collaboratrices de s’investir dans la rédaction d’un article pour publication dans nos colonnes. Ces apports seront une belle manière d’entretenir le dialogue doctrinal qui nourrit l’*amitié arbitrale*.

Je finirai en disant que l’AFA peut s’enorgueillir de participer aux travaux de groupe de travail sur la réforme du droit français de l’arbitrage devant aboutir dans les premiers mois de cette nouvelle année. Une belle forme de reconnaissance de notre institution !

### Marc HENRY

*Président de l'AFA*



# Article



**La motivation d’une sentence arbitrale et le contrôle du respect de l’ordre public international.**

**La contrariété concrète du résultat de la sentence arbitrale à l’ordre public international**

Par un arrêt du 17 mai 2023 dans l’affaire Monster Energy, la Cour de cassation casse un arrêt de la Cour d’appel de Paris pour défaut de base légale[[1]](#footnote-1) retenant qu’« il résulte des articles 1520, 5°, et 1525, alinéa 4, du code de procédure civile que l’exequatur d’une sentence arbitrale rendue à l’étranger n’est refusée sur le fondement du premier de ces textes que lorsque la solution donnée au litige, et non le raisonnement suivi par les arbitres, heurte concrètement et de manière caractérisée l’ordre public international »[[2]](#footnote-2).

La Cour de cassation rappelle à l’ordre les juges du contrôle qui ont contrôlé la motivation au fond d’une sentence arbitrale pour retenir une violation de l’ordre public international et refuser l’exéquatur de la sentence arbitrale.

La Cour d’appel avait en effet considéré que le défaut de mise en œuvre de la loi dite Lurel, loi de police du for français interdisant à une entreprise de conférer contractuellement des droits exclusifs d'importation dans les collectivités d’outre-mer et dont la violation est sanctionnée par la nullité, était contraire à l’ordre public international.

La Cour de cassation casse l’arrêt pour défaut de base légale et soutient que le défaut de mise en œuvre d’une loi de police du for n’est pas ce qu’il fallait observer pour caractériser la violation de l’ordre public. Seul le résultat de la sentence, la situation créée par ladite sentence et son exécution dans l’ordre juridique interne, en l’espèce, la validation de la résiliation du contrat, aurait dû faire l’objet d’un examen de conformité à l’ordre public international.

Par cette décision, la Cour de cassation rappelle que le principe reste celui de l’interdiction de la révision de la motivation de la sentence au fond, et ce, en dépit de l’approfondissement du pouvoir de contrôle du juge, qui s’est instauré depuis l’arrêt Belokon[[3]](#footnote-3).

Ainsi, dans le cadre d’un recours en annulation ou d’un appel à l’encontre de l’ordonnance d’exequatur d’une sentence arbitrale pour contradiction avec l’ordre public international, seul le résultat, à savoir la solution consacrée par la sentence, importe. En réalité, ceci permet de circonscrire le champ d’application du contrôle du juge et par conséquent de sécuriser les décisions arbitrales rendues ou exécutées en France. Une solution partagée Outre-Manche.

**Le contrôle du juge de la contrariété de la sentence à l’ordre public international**

Il est indéniable aujourd’hui que la tendance est à l’approfondissement du contrôle de la sentence par le juge en matière de violation de l’ordre public international.

D’abord, les sources de l’ordre public international comprennent bien les lois de police du for. Dans l’affaire Monster Energy, avant d’être cassé, les juges d’appel avaient refusé l’exequatur de la sentence au motif d’une violation de l’ordre public international pour défaut de mise en œuvre par le tribunal arbitral d’une loi de police française, loi dite Lurel, applicable à l’espèce. La Cour de cassation confirme implicitement la validité de cette référence à cette nouvelle loi de police française.

Ensuite, l’approfondissement du contrôle se traduit par une extension des modalités de contrôle. Initialement, la jurisprudence adoptait une approche large du contrôle de conformité de l’ordre public international conformément à ce qui avait été posé par la jurisprudence Plateau des Pyramides[[4]](#footnote-4). Dans cet arrêt, la Cour de cassation avait retenu que « Si la mission de la cour d’appel, saisie en vertu des articles 1502 et 1504 du nouveau Code de procédure civile, est limitée à l’examen des vices énumérés par ces textes, aucune limitation n’est apportée à son pouvoir de rechercher en droit et en fait tous les éléments concernant les vices en question ».

Par la suite, les jurisprudences Thalès[[5]](#footnote-5) et Cytec[[6]](#footnote-6) ont instauré une approche restrictive du contrôle de la violation de l’ordre public international requérant que celle-ci soit « flagrante, effective et concrète » pour être sanctionnée[[7]](#footnote-7). Pour certains, cette approche restrictive était critiquable [[8]](#footnote-8).

Toutefois, depuis l’arrêt Belokon du 21 février 2017[[9]](#footnote-9), la Cour d’appel de Paris, approuvée par la Cour de cassation[[10]](#footnote-10), est revenue à une vision extensive du contrôle de la conformité à l’ordre public international[[11]](#footnote-11).

**La réaffirmation par la Cour de cassation du principe de non-contrôle de la motivation de la sentence indépendamment de la solution du litige**

Dans l’arrêt commenté, la Cour de cassation rappelle toutefois que le raisonnement du tribunal arbitral ne doit pas être l’objet du contrôle du juge mais que ce contrôle doit être limité à la solution du litige[[12]](#footnote-12), à la situation qui résulte de la sentence.

Dans l’arrêt Belokon, il est établi qu’il convient « de rechercher si la reconnaissance ou l’exécution de la sentence était de nature à entraver l’objectif de lutte contre le blanchiment en faisant bénéficier une partie du produit d’activités de cette nature, telles que définies par la convention de Mérida »[[13]](#footnote-13).

Le test que doit suivre le juge est clair : il doit se demander si la situation créée par la sentence arbitrale est contraire à l’ordre public international.

La Cour de cassation dans l’arrêt étudié casse l’arrêt d’appel pour défaut de base légale. La Cour d’appel n’avait en effet pas établi en quoi la solution du litige, à savoir, la validation de la rupture contractuelle par la sentence constituait une violation concrète de l’ordre public international. En d’autres termes, la Cour d’appel de Paris n’avait pas démontré que la solution du litige aurait été différente si le tribunal arbitral avait fait application de la loi de police du for.

La violation de la loi dite Lurel est sanctionnée par la nullité de la convention ou des clauses contractuelles conformément aux dispositions de l’article L.420-3 du Code de commerce. La nullité contractuelle prive d’effet le contrat pour le passé et pour l’avenir. Toutefois, en l’espèce, le tribunal arbitral a prononcé la résiliation du contrat. La résiliation quant à elle prive le contrat d’effet uniquement pour l’avenir. Le tribunal arbitral n’a donc pas fait de distinction entre nullité et résiliation, distinction qui entraîne des conséquences en droit français.

Ainsi, c’est cette solution, cette distinction entre nullité et résiliation qui aurait dû faire l’objet du contrôle. La Cour d’appel aurait dû démontrer que la résiliation au lieu et place de la nullité porte atteinte à l’ordre public international.

On peut noter à l’inverse que s’agissant du respect du principe du contradictoire, le juge de l’annulation a un pouvoir beaucoup plus étendu. Il va pouvoir se fier à tout manquement à ce principe allant jusqu’à contrôler la motivation des arbitres. Il n’a pas alors à apprécier si le respect du principe du contradictoire aurait inversé la solution du litige mais doit se limiter à constater que le moyen non débattu a fondé la décision[[14]](#footnote-14). Cette solution, protégeant le droit des parties à un procès équitable n’est pourtant pas partagée outre-Manche.

**Le pragmatisme anglais : un contrôle minimaliste**

Plus précisément, la section 68 de l’Arbitration Act 1996 offre la possibilité d’un recours en annulation ou appel d’une sentence arbitrale devant les juridictions internes sur le fondement de l’irrégularité sérieuse affectant le tribunal, la procédure ou la sentence.

Cette section est axée sur les problématiques de procès équitable. Il prévoit une liste limitative de cas d’ouvertures à la contestation de la sentence, parmi lesquelles, l’obtention de la sentence par fraude ou par un quelconque procédé contraire à l’ordre public (section 68(g)) et toute irrégularité dans la conduite de la procédure reconnue par le tribunal ou par toute institution arbitrale ou autre ou personne investie par les parties de pouvoirs relatifs à la procédure ou à la sentence (section 68(i)).

Ainsi, comme en droit français, la violation de l’ordre public de fond ou procédural constitue un fondement de recours contre une sentence arbitrale.

Néanmoins, afin qu’un recours en application de la section 68 aboutisse, les irrégularités soulevées doivent avoir causé à la partie demanderesse au recours une injustice substantielle.

La partie demanderesse au recours doit alors démontrer, qu’il existait une réelle chance que le tribunal arbitral statue différemment, qu’une solution inverse était envisageable, si la violation n’avait pas eu lieu.

Les chances de succès d’un tel recours sont très limitées en pratique car il faut réussir à prouver que le tribunal arbitral a mené la procédure de façon particulièrement différente de ce que l'on pouvait raisonnablement attendre de la procédure et qu’une bonne justice exige que cela soit corrigé[[15]](#footnote-15).

Cela mène à présenter des hypothèses et au prétexte d’un pragmatisme revendiqué, à pratiquer une forme de divination.

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# Thèse

**THE PRINCIPLE OF *FAVOR ARBITRANDUM***

**IN INTERNATIONAL COMMERCIAL ARBITRATION**

Lino Diamvutu[[16]](#footnote-16)

SUMMARY

This article is based on the doctoral thesis entitled "*Favor Arbitrandum* - essay of a theorization", defended by the author at the Faculty of Law of the University of Lisbon in 2019 and published by Almedina in 2020. The study, contrary to some doctrinal positions on the subject, does not see *favor arbitrandum* as a legislative or judicial policy aimed at promoting arbitration. Rather, it seeks, from the *ratio* of its legal and jurisprudential manifestations, to identify a legal principle, determining its content, its limits and its grounds.

The principle of *favor arbitrandum* is multifaceted and does not present an identical scope in the various legal systems studied. Its content can be understood in two main senses. On the one hand, it is an interpretative-decisional criterion regarding the validity of the arbitration agreement, the jurisdiction of the arbitral tribunal and the validity or recognition of the arbitral award. On the other hand, *favor arbitrandum* is a principle which is expressed as a guideline for the legislative activity, and the interpretative and integrative work by the judge of the rules concerning arbitration. The principle of *favor arbitrandum* is subject to severe limitations. As regards its grounds, the principle of *favor arbitrandum* rests on political-economic and ethical-legal grounds.

Keywords : *Favor arbitrandum*, manifestations, content of the principle, limits, grounds

1. **General considerations**
   1. The meaning of the expression "favor arbitrandum"

*Favor arbitrandum*[[17]](#footnote-17) – also referred to by the expressions "favor arbitratus"[[18]](#footnote-18), "favor arbitrati"[[19]](#footnote-19), "favor arbitratis"[[20]](#footnote-20), "favor arbitrationis"[[21]](#footnote-21), "favor arbitralis"[[22]](#footnote-22), "favor arbitri"[[23]](#footnote-23), "favor arbitrii"[[24]](#footnote-24), "favor arbitrandi"[[25]](#footnote-25), "favor validatis"[[26]](#footnote-26), "favor validitatis"[[27]](#footnote-27), "favorem validitatis"[[28]](#footnote-28), "favor arbitral"[[29]](#footnote-29), "favor pro-arbitraje"[[30]](#footnote-30), "faveur arbitrale"[[31]](#footnote-31), "principe de faveur"[[32]](#footnote-32), "pro-arbitration presumption"[[33]](#footnote-33), "pro-arbitration bias" or "policy favoring arbitration"[[34]](#footnote-34) – has characterised, since the second half of the 20th century, the internationalisation of Arbitration Law[[35]](#footnote-35). "Idea"[[36]](#footnote-36), "attitude"[[37]](#footnote-37), "philosophy"[[38]](#footnote-38), "trend"[[39]](#footnote-39), "movement"[[40]](#footnote-40), "policy"[[41]](#footnote-41), "doctrine"[[42]](#footnote-42), "presumption"[[43]](#footnote-43), "guideline"[[44]](#footnote-44) or "legal principle"[[45]](#footnote-45), the references to *favor arbitrandum* show the diversity of perceptions on the subject.

The expression is widely accepted in arbitration doctrine. Its genesis is relatively recent, although the Latin locution gives it an appearance of antiquity[[46]](#footnote-46). The idea of the "favouring" of arbitration was earlier brilliantly referred to in the Decree of August 16 and 24, 1790, concerning the French judicial organisation, whose article 1 determined the "favouring of compromisses" of arbitration. "Arbitration being the most reasonable means of terminating disputes between citizens, the legislators may not make any provision which would tend to diminish either the favour or the effectiveness of compromisse"[[47]](#footnote-47) . In 1925, the American legislature enacted the Federal Arbitration Act which, countering the hostility of the courts, reflected a liberal federal policy favouring arbitration[[48]](#footnote-48). However, the expression "favor arbitrandum" appears *a posteriori*. It was crystallised in the arbitration doctrine at an international level through the remarkable article by Professor BERNARD HANOTIAU, of the University of Louvain (Belgium), entitled "L'arbitrabilité et la *favor arbitrandum*: un réexamen", published, in 1994, in the *Journal de Droit International*[[49]](#footnote-49).

* 1. Favour and principle of favourability

This article will analyse *favor arbitrandum* as a legal proposition. A distinction must be made between "favour" and "principle of favourability" (or legal favour). The "favour" *tout court* means what is done voluntarily to someone, without imposition and without justifiable cause, and may even be liable to clash with the principle of equality[[50]](#footnote-50). The "favour" is regarded as a phenomenon inherent in human nature[[51]](#footnote-51). According to Professor JACQUES CHEVALIER[[52]](#footnote-52), it is a general phenomenon which cuts across all areas of social life and involves an element of discretionary power, depending on who has the power to grant or refuse it[[53]](#footnote-53). The favour is as ancient as arbitration.

The "principle of favourability" does not refer to a relationship of favour established between its dispenser and its beneficiary[[54]](#footnote-54). It refers to a criterion of interpretation or decision, in case of doubt, on the validity or invalidity, for example, of a legal transaction. It also translates into a rule for the solution of conflicts of norms determining that, in case of competition, the judge must apply the most favourable[[55]](#footnote-55). Therefore, the idea of favouritism is not foreign to the Law. We should refer to *favor negotii*, *favor testamenti*, *favor laboratoris*, *favor inocentiae*, *favor libertatis* or *in dubio pro reo*.

*Favor arbitrandum* is therefore one of the applications of the legal favour. The legal favour as a normative proposition presents itself fundamentally as an interpretation or decision-making criterion, in cases of doubt (e.g. *favor negotii*, *favor testamenti* or *favor rei*) or for the resolution of conflicts of rules (e.g. *favor laboratoris*). The legal favour may, for example, in labour law, refer to the conditions of elaboration or validity of its rules. As a Brazilian author[[56]](#footnote-56) also states, "The legal favour, as a principle of law, is applied in criminal, consumer and tax law. Now, also, in arbitration".

1.3. Descriptive principle or normative principle?

Principles differ from rules by the greater degree of indeterminacy of their statements, being applied in a logic of weighting[[57]](#footnote-57). A distinction is made between directive or normative principles and descriptive principles. The former constitute autonomous evaluation criteria which guide the achievement of solutions to concrete cases[[58]](#footnote-58). The latter have a fundamentally descriptive function of the guiding ideas of the system[[59]](#footnote-59). The descriptive principles are obtained through a process of abstraction and generalisation from singular rules. The revelation of directive or normative principles requires a journey back from the rules to the governing idea underlying those rules, their ratio or the value that those rules or norms aim to fulfil[[60]](#footnote-60).

*Favor arbitrandum* can be analysed as a descriptive proposition or as a normative proposition. As a descriptive proposition, "favor arbitrandum" is, in a broad sense, a proposition by which scholars translate the major trends of the set of rules that make up the positive law of arbitration, which point to the legitimacy, validity and effectiveness of the arbitration procedure [[61]](#footnote-61). Legal or jurisprudential solutions which, in case of doubt, favour arbitration can be reconduced to *favor arbitrandum*. Thus, *favor arbitrandum*, in a narrower sense, is reflected by legal or case-law solutions which determine that: (i) between the validity or invalidity of the arbitration agreement, preference should be given to its validity; (ii) between the competence or lack of competence of the arbitral tribunal, preference should be given to its competence; and, (iii) between the validity or invalidity of the arbitral award, preference should be given to its validity. It is the descriptive proposition of *favor arbitrandum*.

Some authors[[62]](#footnote-62) have analysed *favor arbitrandum* as a legislative or judicial policy for the promotion of arbitration[[63]](#footnote-63). The conclusion reached by those authors illustrates the prism through which they approached the subject. This is not the angle of my approach. A "policy" tends to be something "extra-legal".

As a normative proposition, *favor arbitrandum* is a legal principle. Normative principles are generally applied to concrete cases after doctrinal and jurisprudential work aimed at clearly defining their content, scope and limits[[64]](#footnote-64). The consecration of a principle in the legal order shall, as a rule, be done by way of doctrine and jurisprudence[[65]](#footnote-65). When the legislator expressly enshrines a legal principle in a text, this may take three forms: reference to the general category of "general principles of law"; express mention of a general principle, without specifying the requirements for its applicability; and the drafting of a specific provision containing the essence of the principle, without expressly mentioning it[[66]](#footnote-66).

1.4. The existence of the favourability principle in international arbitration and selection of legal and jurisprudential manifestations of *favor arbitrandum*

As stated in the doctrine[[67]](#footnote-67), the favourability principle exists in Arbitration Law, although jurisprudence has not yet revealed it to its full extent. Such principle penetrates Arbitration Law in all its ramifications[[68]](#footnote-68). Professors FERNÁNDEZ ARROYO and EZEQUIEL VETULLI[[69]](#footnote-69) have defined *favor arbitrandum* as "a principle emanating from the solid doctrinal, jurisprudential and normative trend in favor of arbitration. Basically, it postulates that, in cases of doubt, a solution more favorable to arbitration should be adopted, and may apply both to questions concerning the validity of the arbitration agreement and its scope and enforcement". The definition of these two authors has the merit of analyzing *favor arbitrandum* as a legal principle, and not as an idea or a policy of favoring arbitration. Such principle determines a presumption of validity of the arbitration clause, dealing with questions concerning its validity, scope or enforcement. However, the content given to the principle of *favor arbitrandum* by the referred authors does not take into account its multifaceted nature. It is precisely this legal principle that we intend to analyse here in its entirety.

The legal and jurisprudential manifestations of the principle of *favor arbitrandum* mainly revolve around the favour to the arbitration agreement, the jurisdiction of the arbitral tribunal and the arbitral award. The favour of the arbitration agreement revolves around its validity and the scope of its effects. The following may be considered as manifestations of *favor arbitrandum* concerning the validity of the arbitration agreement: the autonomy of the arbitration clause, the substantive validity of the arbitration agreement based on an alternative connection, the inopposability of exceptions based on the domestic law of the State party to the arbitration agreement, the admission of the arbitration agreement by reference, especially in French law. The manifestations of *favor arbitrandum* concerning the scope of the effects of the arbitration agreement are: the extension *ratione personae* and *ratione materiae*, notably in French, Swiss or United States law.

The legal and case-law manifestations in favour of the arbitral tribunal's competence are reflected, *inter alia*, in the recognition of the *Kompetenz*-*Kompetenz* of the arbitral tribunal and the extension of arbitrable subject-matter to increasingly important areas. The manifestations of *favor arbitrandum* may vary over time. Such manifestations, as regards the arbitrability of disputes, are of an evolving nature. However, this evolution can take the form of a sine wave. In fact, what may be considered the result of a movement towards arbitrability in a particular era may in fact reflect the reappearance of a reality already experienced in earlier times. Thus, *favor arbitrandum* should be analysed according to its manifestations in a given time interval.

The legal and jurisprudential manifestations in favour of the arbitral award are articulated around its validity and its recognition. Regarding its validity, they include: the dissociation of the voidable part of the arbitral award rendered *extra potestatem* and the exclusion of the appeal on the merits of the international arbitral award. The manifestations concerning the recognition of the arbitral award refer to the restricted nature of the public policy as a ground for refusing the recognition and enforcement of foreign international awards, the absence of review of the merits of the arbitral award to be recognised under the NYC, the *juris tantum* presumption of validity and effectiveness of the foreign arbitral award to be recognised under the NYC and the recognition of annulled arbitral awards in the country of the seat.

The subject under study requires, due to its transversality, an approach from a comparative perspective. Studies of comparative law enable a better understanding of (our) own institutes, the discovery of the spirit that inspires them and the elaboration of legislative proposals[[70]](#footnote-70). I have analysed the Laws of Angola, Portugal, Brazil, Spain, Germany, France, Belgium, Switzerland, United Kingdom, United States and the New York Convention on the recognition and enforcement of foreign arbitral awards 1958. According to Professor EMMANUEL GAILLARD[[71]](#footnote-71), "International arbitration is (...) one of the disciplines in which comparative law finds the most complete expression of all the functions that are likely to be its own. There are three of them, comparative law being sometimes a source of inspiration, sometimes a source of legitimacy, sometimes a source of positive law".

This study is limited to international [commercial] arbitration. It is accepted, however, that its conclusions may be extended to other forms of arbitration. Indeed, *favor arbitrandum* is not limited to international commercial arbitration. We have excluded from the scope of this dissertation both interstate litigation arbitration and semi-international or quasi-international public arbitration, namely ICSID arbitration. Necessary arbitration is also excluded, with only voluntary arbitration being dealt with. It is the main purpose of this article, the identification of the content of a normative principle, its limites and grounds.

1. ***Favor arbitrandum* as a normative principle**

**2.1. *Favor arbitrandum*: an interpretative and decision-making criterion**

As an interpretative and decision-making criterion, the principle of *favor arbitrandum* is revealed as (i) a principle of favourability for consent to arbitration (*favor consensus ad arbitrium*), (ii) a principle of arbitrability of disputes (*favor arbitrandum* – *stricto sensu*), (iii) a principle of validity of the award (*favor validitatis sententiae*) and (iv) a principle of recognition of the award (*favor recognitionis*).

2.1.1. Principle of favourability for consent to arbitration (*favor consensus ad arbitrium*)

Professor BERNHEIM-VAN DE CASTEELE[[72]](#footnote-72) highlighted a principle of favourability for consent to arbitration. The legal or jurisprudential manifestations concerning the arbitration agreement, common to the legal systems studied, namely: the autonomy of the arbitration clause, the substantive validity of the arbitration agreement - on the basis of an alternative connection, a substantive rule of validity or presumption of validity regarding its scope -, the unenforceability of exceptions in the domestic law of the State party to an arbitration agreement, have as a common denominator the favourable treatment of consent to arbitration[[73]](#footnote-73).

The principle of favourability for consent to arbitration may be identified from the legal and jurisprudential manifestations common to the legal systems analysed. Indeed, to state that the arbitration agreement is autonomous from the main contract is to recognise the existence of the parties' own consent to it. Validating the arbitration agreement on the basis of alternative connecting factors aims in fine at safeguarding the consent to arbitration. The same can be said of the rule of the unenforceability of exceptions in the domestic law of the State party to an arbitration agreement, the admission of the arbitration agreement by reference, and the extension ratione personae and materiae of the arbitration agreement[[74]](#footnote-74).

A purported principle of validity of the arbitration agreement cannot be drawn from the manifestations concerning the validity of the arbitration agreement. The validity of a legal transaction always depends on the fulfilment of certain substantive and formal requirements. The principle of validity would imply that an arbitration clause is not susceptible to annulment on grounds of incapacity, defect of consent, non-arbitrability[[75]](#footnote-75). Such a situation is inadmissible. If there is a principle of validity, its only reasonable scope is the absence of nullity of the arbitration clause itself, i.e. its equation to the arbitration commitment, so that the condemnation of the arbitration clause or the limitation of its effects cannot constitute an obstacle to the submission of disputes to arbitration[[76]](#footnote-76). What can be identified from the *ratio* of the legal and jurisprudential manifestations concerning the validity of the arbitration agreement is a principle favouring consent to arbitration.

In transmittal transactions of the arbitration agreement (e.g. assignment of claims), a favouring of consent to arbitration is also apparent[[77]](#footnote-77). In a case of assignment, the arbitration agreement will take effect between assignor and assignee and will apply between assignor and assignee[[78]](#footnote-78). As Professor JEAN-BAPTISTE RACINE[[79]](#footnote-79) states, the transfer of the arbitration agreement configures situations of multiplication of the arbitration agreement. Therefore, the principle of favourability for consent to arbitration is clearly identified in this hypothesis.

According to me, the principle of favourability for consent to arbitration compels the interpreter to a liberal interpretation of the arbitration agreement characterised by (i) the rejection of a strict or restrictive interpretation of the arbitration agreement, (ii) the application of the principle of useful effect in the interpretation of the arbitration agreement, notably in matters of pathological clauses, and (iii) the objective and subjective extension of the arbitration agreement, notably in matters of corporate groups and contracts.

The narrow interpretation of the arbitration agreement is regarded as harmful as it causes dispersion of litigation, resulting in additional costs, slowness of proceedings and the risk of contradictory rulings[[80]](#footnote-80). The principle of useful effect (also referred to as the principle of effectiveness of the arbitration agreement) serves as the basis for the principle of extensive interpretation of the arbitration agreement. Thus, the principle of useful effect underpins the broad interpretation *ratione materiae* and *ratione personae* of the arbitration agreement.

All the legal systems studied allow for the principle of useful effect or the principle of preservation of legal transactions (*favor negotii*,principle of effectiveness or *principe de l'"effet utile*") to be applied to the interpretation of contracts. A contract essentially needs interpretation in situations where there is a deficient exteriorisation of the parties' common intention, where there is a disagreement between what was intended and what was stated or between what was said and what was perceived or understood. Such disagreement may be due to the ignorance of the parties, the lack of mastery of the language or its misuse[[81]](#footnote-81).

For the majority doctrine[[82]](#footnote-82), the interpretation of the arbitration agreement should be made according to the principle of useful effect. The principle of useful effect determines that, between two possible interpretations of the same clause, one should choose the one that allows a useful sense of the clause. In other words, the principle of preservation of legal transactions determines that "transactions shall be treated more in terms of their validity than in terms of their invalidity"[[83]](#footnote-83). The actual will of the parties is taken into account when interpreting the text by which they are bound. The principle of useful effect is enshrined in Article 9(3) of the angolan Civil Code, which refers to the interpretation of the law. In its terms: "In determining the meaning and scope of the law, the interpreter shall presume that the legislator has enshrined the most appropriate solutions and has been able to express his thought in adequate terms". The apothegma "In claris non fit interpretatio" does not prevail in matters of interpretation[[84]](#footnote-84).

Contrary to the principle of *favor validitatis*, whose limits are well known as regards the extension of the arbitration agreement to non-signatories, the principle of favourability for consent to arbitration serves as a basis for the objective and subjective extension of the arbitration agreement, particularly in matters of corporate groups and groups of contracts. The extension of the arbitration agreement to non-signatory third parties constitutes an area of application of this principle.

With regard to groups of contracts, according to a minimalist position, the principle of favourability for consent to arbitration would determine respect for the parties' will to submit one of the three contracts to arbitration. According to the maximalist position, the principle of favourability for consent to arbitration would dictate that all contracts be heard by the arbitral tribunal if there were no jurisdiction clauses in the remaining contracts.

In *Dean Witter Reynolds, Inc. v. Byrd* (1985)[[85]](#footnote-85), the US Supreme Court has held that where arbitrable issues are intertwined with non-arbitrable issues, the former should be settled by arbitration, even where the outcome involves proceedings in different jurisdictions[[86]](#footnote-86). It is stated that "(a) The Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums. By its terms, the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. The Act's legislative history establishes that its principal purpose was to ensure judicial enforcement of privately made arbitration agreements, and not to promote the expeditious resolution of claims. By compelling arbitration of state law claims, a district court successfully protects the parties' contractual rights and their rights under the Arbitration Act. (b) Neither a stay of arbitration proceedings nor joined proceedings is necessary to protect the federal interest in the federal court proceeding. The formulation of collateral estoppel rules affords adequate protection to that interest"[[87]](#footnote-87).

As the doctrine stated[[88]](#footnote-88), the principle of favourability for consent to arbitration reverses the legal logic which postulates on the one hand that consent to a contract is assessed at the time of its formation and, on the other hand, that silence in contractual matters does not imply acceptance. Account must be taken of the parties' conduct in concluding, performing or terminating the contract which incorporates the arbitration clause. The principle of favourability for consent to arbitration stands out clearly with regard to the extension of arbitration clauses to non-signatories. By application of this principle, non-signatories are bound to arbitration; where they are not bound by contractual mechanisms, they are bound by active or decisive participatory behaviour in the negotiations, execution or termination of the contract[[89]](#footnote-89).

As it is well known, Law follows the evolution of society. The legal dogma itself is not static. Admitting that non-signatories to an arbitration agreement may be bound based on the theory of group of companies or contracts or by application of the principle of favourable consent to arbitration is not very different from admitting civil liability without the requirement of fault, i.e. on an objective basis, which always leaves any layman in the field astonished. In the field of civil law, the classical conception erects fault as the foundation of civil liability. In the field of Arbitration Law, consent to the arbitration agreement is the foundation of arbitration. However, with the development of international trade and, in particular, the multiplicity of joint ventures being formed around the world, the time has come to consider that other ways of ascertaining consent or *animus arbitrandi*, in the context of corporate groups or contracts, should merit the judge's attention, particularly through objective indications such as active, decisive or decisive participation in the negotiations, execution or termination of the contract containing the arbitration agreement.

In essence, what matters for binding the non-signatory to the arbitration agreement is not so much its (tacit) will but the situation created by its objective behaviour, which should be analysed in the light of the principle of the protection of confidence[[90]](#footnote-90). The principle of favourability of consent to arbitration is based precisely on the autonomy of the will and the protection of confidence.

2.1.2. Principle of arbitrability of disputes (*favor arbitrandum – stricto sensu*)

*Favor arbitrandum* (*stricto sensu*) is analysed as a criterion for deciding objective arbitrability. *Favor arbitrandum* postulates that, in case of doubt as to arbitrability or inarbitrability, the issue should be resolved in favour of arbitration[[91]](#footnote-91). The incompatibility between the arbitration clause and an allegedly applicable law that considers the dispute as not arbitrable should be resolved in favour of arbitrability because arbitrators should presume that the parties did not wish to place their contractual relations in a system not suitable for the arbitral resolution of their disputes[[92]](#footnote-92). As stated by BERNARD HANOTIAU[[93]](#footnote-93), "Indeed, we are increasingly seeing *favor arbitrandum* dominate the determination of the arbitrability of the dispute ".

CRAIG, PARK and PAULSSON[[94]](#footnote-94) take an identical position, stating that "If it is true that the arbitral tribunal should look to the intent of the parties in determining whether a claim is arbitrable, there must be a heavy presumption in favour of arbitrability". Other authors such as FRÉDÉRIC HENRY[[95]](#footnote-95), CHARLES JARROSSON[[96]](#footnote-96), MAURICE KRINGS[[97]](#footnote-97) analyse *favor arbitrandum* as a progressive movement in favour of arbitrability. According to MAZZUOLI and MASSA[[98]](#footnote-98), the principle of *favor arbitrandum* is the most important principle of international arbitration that serves to extend the limits of arbitration. These authors state that "The most important guiding principle of international arbitration that has developed in recent decades is the principle of 'favor arbitrandum', which is simply the extrapolation of a solid scholarly, jurisprudential, and normative trend at a transnational level in favour of extending the limits which arbitration as a method of conflict resolution par excellence may be faced with". In an identical sense, TERCIOTTI[[99]](#footnote-99) states that *favor arbitrandum* principle is a principle "according to which, when in doubt, arbitration should be preferred".

In international arbitration, there is a presumption of arbitrability only limited by the fundamentally indisposable nature of the matter, by the violation of the international public policy or by its express exclusion from arbitral jurisdiction by the legislature.

The principle of arbitrability of disputes or *favor arbitrandum* (*stricto sensu*) determines the arbitrability of all disputes of a property nature or rights that are transactable, unless expressly excluded by law. The fundamentally unavailable nature of the matter submitted to arbitration configures the recognition of the *ex arbitrandum* jurisdiction of the state judge[[100]](#footnote-100). The *ex arbitrandum* jurisdiction of the state court results from the absolute exclusion of arbitral jurisdiction for reasons of public policy[[101]](#footnote-101). The *jus imperium*, the sovereignty of the state or other major public interest determines that some matters are assigned to the state judge. A limit to objective arbitrability may relate to fundamentally unavailable matters.

The reduction of inarbitrability depends on the degree of openness to arbitration by arbitration laws and the jurisprudence of each State, in particular the application by courts of the violation of the international public policy as a limit to arbitrability[[102]](#footnote-102). A material rule is required: the principle of arbitrability of international trade disputes, subject to the requirements of international public policy[[103]](#footnote-103).

Professor LIMA PINHEIRO[[104]](#footnote-104) states that "The Transnational Arbitration Law does not contain precise rules on objective arbitrability. Nevertheless (...), it seems that the Transnational Arbitration Law enshrines at least the principle of arbitrability of disputes relating to international commercial contracts. Going further, it may perhaps be argued that the Transnational Law of Arbitration allows arbitrators to deal with all matters that are not arbitrable by virtue of transnational public policy".

This position should be defended with regard to international commercial arbitration insofar as it favours the development of arbitration and promotes an international harmonisation of the criterion of arbitrability of disputes arising from international commercial contracts.

An express legal provision excluding a certain matter from arbitral jurisdiction, in the case of disputes arising out of international contracts, submitted to international arbitration, should be analysed in the light of the principle of *favor arbitrandum*. On the one hand, the interpretation and integration of legal rules should be done in order to favour the development of international (commercial) arbitration. On the other hand, legal restrictions on arbitrability in the area of domestic contracts should not, following international jurisprudence, be extended to international contracts[[105]](#footnote-105).

On the issue of legal exclusion, Professor CHARLES JARROSSON[[106]](#footnote-106) notes that a rule determining the exclusive jurisdiction of the state court does not necessarily exclude arbitration. Such a rule may apply in the delimitation of jurisdiction between jurisdictions in the judicial order. The same rule may possibly apply only to domestic and not international arbitrations. On the other hand, a public policy rule preventing a party from resorting to arbitration may not constitute a definitive obstacle

According to the said author[[107]](#footnote-107): "Recent history has indeed shown a continuous movement in favour of arbitration, which has made it possible to strictly confine the limits of the inarbitrability of disputes to what the rules of public order actually require. Thus, it was realised that the existence of a rule assigning exclusive jurisdiction to a judge did not necessarily mean that arbitration was excluded. Indeed, the exclusive jurisdiction may have a limited field of application to relations between courts of the judicial order, for example. Similarly, it appeared that a rule of public policy preventing a party from having recourse to arbitration did not necessarily constitute a definitive obstacle to arbitration, since once acquired, the right conferred by a rule of public policy of protection may be validly waived".

It is admitted that only a special law could derogate from the law permissive of voluntary arbitration. On the other hand, the assignment of disputes to the exclusive jurisdiction of state courts must be express: (i) either the law says so directly and positively; (ii) or it prohibits for those disputes voluntary arbitration; (iii) or it acts on the requirements of arbitrability, making certain rights unavailable or unassailable[[108]](#footnote-108).

Towards "universal arbitrability"[[109]](#footnote-109)? Is transnational public policy the only limit to the arbitrability of property disputes[[110]](#footnote-110)? The concept of "universal arbitrability" referred to by KARIM YOUSSEF[[111]](#footnote-111) is progressive. The author characterises the current state of mind regarding the issue of arbitrability, particularly in the context of international trade. According to this author[[112]](#footnote-112): “(...) the trend in favour of arbitrability has recently taken a new dimension, with the inception of what can be termed ‘universal arbitrability’. Put simply, this means that arbitrability today is rarely an issue. All international disputes of an economic nature are ‘prima facie’ arbitrable in most jurisdictions, and it would be hard to find a dispute arising out of the operation of global commerce that is not”.

Professor LIMA PINHEIRO[[113]](#footnote-113) had already noted the admissibility, in international trade contracts, of the principle of arbitrability of disputes, except in cases of non-arbitrability by virtue of transnational public policy. Transnational public policy has been widely welcomed by the doctrine, although its action has been very limited. According to the above-mentioned Professor[[114]](#footnote-114), it consists of rules and principles which should be respected by arbitrators, even if they have to deviate from what was stipulated by the parties as regards the law governing the arbitration agreement, the constitution of the arbitral tribunal, the procedure or the law applicable to the merits of the case. Indeed, the application of transnational public policy may have negative effects: the departure from the law or rules normally applicable or positive and the imperative or priority application of higher or fundamental rules or principles for international commercial law[[115]](#footnote-115).

In the United States of America, the Supreme Court has held in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983)[[116]](#footnote-116) that the Federal Arbitration Act translates that “[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”[[117]](#footnote-117). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985)[[118]](#footnote-118), the Supreme Court held that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”[[119]](#footnote-119).

In France, in *Sté Ganz et autres c. Sté nationale des Chemins de fer tunisiens* (1991)[[120]](#footnote-120), the Paris Court of Appeal stated that "in international matters, the arbitrator is competent to assess his or her own competence as to the arbitrability of the dispute with regard to international public policy, and has the power to apply the principles and rules of that public policy, as well as to sanction their possible disregard, under the control of the annulment judge". In *Sté Labinal c. Sté Mors et Westland Aerospace* (1993)[[121]](#footnote-121) , the Paris Court of Appeal, in line with its previous case law, reaffirmed the teaching of the *Ganz* judgment, ruling that "arbitrability is not excluded merely because a rule of public policy is applicable to the legal relationship in dispute". And, "(...) in international matters, the arbitrator shall assess his own competence as to the arbitrability of the dispute in the light of international public policy and shall have the power to apply the principles and rules which fall within its scope and to penalise failure to do so, subject to the control of the judge responsible for setting aside the award".

In *Fincantieri-Cantieri Navali Italiani S.p.A et Oto Melara S.p.A* (1992) [[122]](#footnote-122), the swiss Federal Court's judgment dated 23 June 1992 states that "The solution adopted (...) manifests, moreover, the intention of the federal legislator to open up access to international arbitration widely".

2.1.3. Principle of validity of the award (*favor validitatis sententiae*)

The principle of validity of the award means that the grounds for its annulment must be interpreted restrictively. Thus, an arbitration award may only be annulled when: (i) the defect is a serious procedural defect likely to have a decisive influence on the resolution of the dispute, and (ii) it calls into question the entire award, i.e. there is no possibility, where appropriate, of dissociating the part of the award which may be annulled[[123]](#footnote-123). This presumption of validity seeks to achieve the legislative objective of autonomy and effectiveness of arbitration, protecting the will of the parties and the integrity of the arbitration procedure[[124]](#footnote-124).

It is in this line of thought that Professor ALBERTO CARMONA[[125]](#footnote-125) states, for example, that the absence of the date and place in the body of the arbitration award cannot generate its nullity, "merely for the sake of form". Thus, according to the same author: "If it is possible to deduce by another way the place and date when the decision was rendered (notes or certificate of the institutional arbitration body, minutes of the arbitrators' meeting, *etc*.), it will not be reasonable to annul the decision, imposing the application of the principle of *favor arbitralis*, as the specific function of the annulment lawsuit addressed by the Law is not simply to ensure the compliance with formal regulations, but to ensure certain purposes and guarantees related to the due legal process. Thus, once the objective of the Law is achieved (which, in this regard, is to identify the place where the arbitral award was made, to ascertain its nationality, and the date on which it was made, to ascertain its timeliness), no nullity can be considered (and there is no nullity without prejudice! [[126]](#footnote-126)” .

The principle of *favor validitatis sententiae* may be extracted from the legal provisions limiting the control of the arbitral award by the state judge, from those dictating the removal of remedies against the arbitral award and the restrictive interpretation of the grounds for annulment of arbitral awards[[127]](#footnote-127). Thus, the validity of the arbitral award should be preferred to its invalidity or annulment. According to VAN LEYNSEELE[[128]](#footnote-128), the principle of *favor arbitrandum* is a principle by which "(...) courts must view awards with flexibility and adopt a 'bias' in favour of their enforcement". An abundant jurisprudence illustrates the application of *favor validitatis sententiae*.

Professor LIMA PINHEIRO[[129]](#footnote-129) speaks clearly in this respect. In his words[[130]](#footnote-130): "As regards the challenge of the arbitral award, the state courts have a special responsibility. On them depends, to a high degree, the success of arbitration as an alternative means of resolving disputes. The grounds for annulment should be interpreted restrictively, the specificity and autonomy of arbitration should be respected and the teachings of doctrine (domestic, foreign and international) should be taken into account. In short, rather than an arbitrary exclusion of certain grounds for annulment, what is needed is an arbitration-friendly jurisprudence".

2.1.4. Principle of recognition of the award (*favor recognitionis*)

*Favor recognitionis* is understood as a principle aimed at making foreign judgments more easily recognised and enforceable[[131]](#footnote-131). The favourability of recognition essentially derives from the favourable pronouncements on the recognition and enforcement of arbitral awards provided for in the NYC, which are reflected in most of the legal systems analysed[[132]](#footnote-132). These include the prohibition of review of the merits of the arbitral award to be recognised (Article III), the restrictive interpretation of the concept of "public policy" (Article V) and the application of the most favourable national law, namely as regards the relocation of arbitral awards and the consequent recognition, in a given legal system, of awards which have been annulled in the countries where they were made, as favoured by Article VII.

*Favor recognitionis* aims to facilitate the recognition of the arbitral award in a legal order other than that in which it was rendered. However, as the Portuguese Supreme Court stated in its judgment of 14 March 2017[[133]](#footnote-133): "The circumstance that the aforementioned Convention [NYC] aims at facilitating the recognition and enforcement of foreign arbitral awards does not mean an unconditional or unlimited recognition of such awards, its Article V, paragraph 2, al. b) that recognition may be refused if the competent authority of the country in which recognition is sought finds that it is contrary to public policy in that country. It is generally accepted that the public policy in question here, as it raises a question of Private International Law, is only international - which was expressly provided for in Article 56(1)(b)(ii) of the LVA, in the light of which, in our legal system, this ground for refusal of recognition must be interpreted". Let us now review some aspects of the application of the principle of recognition of foreign arbitral awards.

The principle of *favor recognitionis* finds a field of application with regard to compliance with the legal requirements for recognition of foreign arbitral awards and recognition of annulled arbitral awards in the country of the seat.

The recognition of a foreign award without the requirement to submit a certified translation of the award is a realization of the application of Article VII of the NYC. The German Federal Court of Justice (BGH) in a judgment of 25 September 2003[[134]](#footnote-134) upheld the decision of a lower court which had granted exequatur to a foreign arbitral award pursuant to Article 1064 paragraphs 1 and 3 of the German Code of Civil Procedure. Pursuant to its Article 1064(1), the original of the award or a certified copy must be submitted in order to obtain an enforceable declaration of the arbitral award. Contrary to Article IV of the NYC, the German Code of Civil Procedure does not require the submission of a certified translation of the award or of the arbitration agreement. Consequently, the BGH admitted the application of Article VII of the NYC for the grant of exequatur to that award.

The recognition of awards set aside in the country of origin: a step to far[[135]](#footnote-135)? Article VII(1) of the NYC, the conventional basis of *favor recognitionis*, has been applied in some famous case law cases by French, American and Belgian courts to support the recognition of arbitral awards declared void in the country of seat. A Court of Appeal of the Grand Duchy of Luxembourg has admitted its applicability in matters of recognition of judgments set aside in their country of origin.

American case law on the issue of recognition of annulled awards is less expansive than that of France. It bases the recognition of annulled awards in the country of the seat on the text of Article V of the NYC, more precisely on the use of the word "may" which determines a faculty and not an obligation of non-recognition. French case law is based on Article VII of the NYC[[136]](#footnote-136).

The American judge, in order to recognize an arbitral award set aside in the country of the seat, has his attention focused on the decisions eventually rendered by foreign jurisdictions, including those of the seat, in relation to the arbitral award[[137]](#footnote-137). The French judge focuses on the award itself, irrespective of decisions on it in other states[[138]](#footnote-138). The arbitral award is assessed in the light of article 1520 of the French Code of Civil Procedure, pursuant to which an appeal (action) for annulment is only admissible for lack of jurisdiction of the court, its irregular constitution, non-compliance with its mission, violation of the adversarial principle and the contravention of international public policy of the award to be recognised or enforced.

Although American jurisdictions attach importance to the jurisdiction of the seat, they will recognise judgments set aside in the country of origin when: (i) the annulling decisions proceeded to a review of the merits of the arbitral award, in particular when such decisions expressly or tacitly ignored the waiver of remedies against the merits of the award under the contractual terms (*Chromalloy*) [[139]](#footnote-139); (ii) the annulling decisions are based on domestic considerations in matters of public policy or non-arbitrability (reasoning in *TermoRio*)[[140]](#footnote-140); (iii) annulling decisions that violate the basic rules of morality and justice (*TermoRio*, *Pemex* and *Thai-Lao Lignite*) [[141]](#footnote-141).

American courts have curtailed the recognition of foreign arbitral awards by applying the doctrine of *forum non conveniens*[[142]](#footnote-142). The term "forum non conveniens" refers to a technique in private international law which allows the courts of a particular state to decline jurisdiction if they conclude that the chosen forum is inappropriate or that a foreign forum would be more appropriate to resolve the dispute between the parties[[143]](#footnote-143).

On the one hand, it is a procedural exception, i.e. a means of defence available to the defendant[[144]](#footnote-144). On the other hand, it is an exception clause of private international law which allows the judge to exercise a power of moderation, enabling him to correct or adapt the abstract rule of connection when the situation has an insufficient connection with the chosen *forum* or is more closely connected with another country[[145]](#footnote-145).

The doctrine of *forum non conveniens* was affirmed by the US Supreme Court in *Gulf Oil Co. v. Gilbert*[[146]](#footnote-146) in 1947 in a domestic dispute between a Virginia corporation and a Pennsylvania corporation. The criteria for the applicability of the doctrine set out in that case were extended to transnational litigation in *Piper Aircraft Co. v. Reyno*[[147]](#footnote-147) in 1981.

In Roman-Germanic Laws, this exception is not allowed. European Union regulations on the recognition and enforcement of judgments given by courts of other Member States, e.g. Regulation No. 2201/2003 and Regulation No. 1215/2012, as well as the Lugano Convention do not allow the invocation of this ground for non-recognition. Moreover, the Court of Justice of the European Union has also consecutively denied it[[148]](#footnote-148).

**2.2. *Favor arbitrandum*: a guideline for the formulation of pro-arbitration rules and their interpretation or integration towards the development of arbitration**

2.2.1. Guideline for the legislator to formulate pro-arbitration rules

In its first meaning, the principle of *favor arbitrandum* is a guideline that influences the legislator to draft rules favouring the validity of the arbitration agreement, the competence of the arbitral tribunal and the validity and recognition of the arbitral award. This has been very explicitly formulated by Professor JARA VÁSQUEZ[[149]](#footnote-149), who refers to the principle of *favor arbitri* or *favor arbitralis* as "a guideline which guides the formulation and application of rules which ultimately safeguard the right to effective protection of citizens by preserving the validity of the arbitration agreement or arbitral award in the face of intervention by the state justice system".

*Favor arbitrandum* influences the favorability of the rules on arbitration. Thus, when a given arbitration law provides, for example, for provisions favourable to the autonomy of the arbitration agreement, to the arbitrability of disputes, or restricts the situations for challenging arbitral awards, *etc*., it is said to be legislation characterised by *favor arbitrandum*. The principle does not refer to the validity of the Arbitration Law rules drafted by the State, nor can it be analysed as a supra-legal principle that imposes on the legislator the formulation of pro-arbitration rules. As a guideline, the principle simply guides the legislature towards the elaboration of a legal framework favourable to the conduct of domestic and international arbitrations.

For Professor BERNHEIM-VAN DE CASTEELE[[150]](#footnote-150), the principle of favourability is a general principle which occupies a central and high place in the architecture of the principles of Arbitration Law. According to that author, the favourability principle has an "ultra-normative" value, insofar as it precedes the principles it generates[[151]](#footnote-151). And it has an extraordinary normative force with a *modus operandi* that fulfils two functions: to set aside the normally applicable substantive rules when their result is incompatible with the needs of international trade; and to protect the legal security of economic operators, setting aside the rule of conflict of laws that undermine their confidence[[152]](#footnote-152).

ABOUBAKRY NIANG[[153]](#footnote-153) argues that *favor arbitrandum* has become a constant in legislative and judicial policies on arbitration, and runs through all its subject matter. According to the author: "Whether it stems from a deep-seated political conviction or whether it is a figure imposed by the competition between States to attract arbitral litigation, *favor arbitrandum* has become a constant in legislative and judicial policies on arbitration, so much so that no study of this private mode of dispute resolution can do without it. Whether it is officially asserted or only expressed in the background of legislative provisions and case law solutions, the favour of arbitration runs through the whole subject and almost inevitably imposes itself on the observer's appreciation.

Indeed, modern States have well understood the important role played by international commercial arbitration in resolving international trade disputes. PIERRE LALIVE[[154]](#footnote-154) states that “(...) The liberal attitude of modern States as regards both contratual autonomy and arbitration may be said to be motivated by a general recognition of the advantages or necessity of globalization and of international economic commerce. (...) This favourable attitude of States is shown for instance by the national legislations limiting or excluding the jurisdiction of national Courts in case of valid arbitration agreement restricting the possibilities of ‘appeals’ against awards, or lending assistance for the enforcement of Awards”.

It is this perception that leads several authors to refer to their respective national legislations as being characterized by *favor arbitrandum*. Professor MOURA VICENTE[[155]](#footnote-155), making an assessment of the five years of application of the Portuguese LVA, highlights the "favor arbitrandum (...) which inspires the [Law on Voluntary Arbitration] itself", on the one hand. On the other hand, he notes that the "favor arbitrandum (...) inspires almost universally the international arbitration regime" .

Professor OLIVIER CAPRASSE[[156]](#footnote-156), when presenting the new Belgian Arbitration Law resulting from the 2013 reform of the Code of Judicial Procedure, highlights the fact that *favor arbitrandum* inspired the legislator and presided over the formulation of solutions more favourable to the arbitrability of disputes, as well as the regime for the challenge of arbitral awards and their recognition. Thus, the interpreter must necessarily take this fact into consideration when applying the legal rules. In the words of the said author[[157]](#footnote-157): "The spirit behind the reform is therefore that of favouring arbitration, with the legislator unambiguously stating his desire to 'encourage the location of international arbitrations in Belgium and to prevent national arbitrations from being relocated'. This true declaration of support must always be borne in mind by those who have to interpret and apply the new texts (...)".

There are numerous examples of legislative texts on arbitration which currently reflect a very favourable treatment of arbitration. In this respect, the role of the legislator is fundamental. There is great competition between States for the largest number of international arbitrations in their respective territories. The designation of "arbitration-friendly country", "arbitration-friendly jurisdiction" or "arbitration-friendly approach" by State courts has had a major impact on the parties' choice of the seat of arbitration. The rules in favour of the validity of the arbitration agreement (including objective arbitrability), the competence of the arbitral tribunal, the validity and recognition of the arbitral award, limiting the intervention of the State courts to what is strictly necessary, promote international arbitration.

Finally, it should be noted that a legislative text inspired by *favor arbitrandum* should be interpreted taking into account this very principle. The question cannot be approached in any other way.

2.2.2. Guideline guiding the interpretation and integration of norms towards the development of arbitration

Another meaning of the principle consists in its role as a guideline for the interpretation and integration of legal rules towards the development of arbitration. This is understood here as a presumption that the legislature could not have intended to enshrine a rule that disfavours the conduct of international arbitrations in a context of a globalised economy.

The legal manifestations in favour of the agreement (autonomy of the arbitration agreement, the alternative connection rule for the validation of the arbitration agreement, the rule that exceptions under the domestic law of the State party to the arbitration may not be invoked against the counterparty, the validity of the arbitration clause by reference) of the jurisdiction of the arbitral tribunal (the principle of jurisdiction, the broadening of the legal criterion of arbitrability) and of the arbitral award (the validity of the award rendered extra potestatem, the exclusion of the appeal on the merits of the arbitral award, the refusal of recognition of the arbitral award for breach of international public policy) allow us to identify the direction in which the legislature tends to develop the rules on the settlement of disputes by arbitration.

The legislature enshrines the solutions found by doctrine or case-law for the development of arbitration, in particular international arbitration. Therefore, when interpreting legislation, between a solution which discourages arbitration and one which points the way to the evolution of Arbitration Law, the latter should be preferred. The interpreter must then encourage the settlement of disputes by arbitration and favour its development.

For Professor FRÉDÉRIC BACHAND[[158]](#footnote-158), the interpreter called upon to determine the meaning of the rules on arbitration must avoid any distrust of private justice and must take into account the fact that he must encourage and foster the development of arbitration[[159]](#footnote-159) . This is an unequivocal position which is in line with the current favourable climate for arbitration at international level.

It is interesting to reproduce here the pronouncement of the illustrious Professor: "(...) Not only is recourse to private justice permitted, but the legislator also wanted to encourage its development. This is a second fundamental idea - that of favouring the development of arbitration, which is added to that of the legitimacy of arbitration - from which the Court implicitly derives an interpretative guideline of great importance: not only must the interpreter called upon to clarify the meaning of the rules of arbitration avoid showing any distrust of private justice, he must also take into account the fact that it must be encouraged, that its development must be favoured” [[160]](#footnote-160).

The reduced number of liability claims against arbitrators and the voluntary enforcement of arbitrators' awards show, to a certain extent, the confidence that economic operators worldwide now have in arbitration as an alternative means of dispute resolution. Its legitimacy is therefore no longer in doubt. On the contrary, we must encourage the settlement of disputes by arbitration, which is bound to contribute to social peace. The development of arbitration should be encouraged in the context of a globalised economy, with a view to achieving transparency in international trade[[161]](#footnote-161).

Professor MOURA VICENTE[[162]](#footnote-162) notes that significant developments have occurred in the interpretation and jurisprudential application of the 2011 Portuguese Law on voluntary arbitration (LVA), characterised by *favor arbitrandum*. In the same vein, OLIVEIRA *et al.*[[163]](#footnote-163) state that "in the 'international' interpretation of the LVA rules, the principles of pro arbitratis, pro actum, the favour of arbitration and the validity of procedural legal acts, have a reinforced value here, as they also have - in this respect Article 53(3) of the LVA even inculcates it - that of the interpretative or integrative prevalence of the expressions and stipulations of the parties and of the relevant commercial usages"[[164]](#footnote-164). As regards the criteria for interpretation and integration of the parties' contractual will or of the regime applicable to international arbitration, the same authors reply that "a relevant role in the interpretation and integration of the parties' contractual will or of the regime to be applied to international arbitration is played by (? ) the recourse to comparative law, not only to the Model Law but also to the laws of the countries where we have been inspired to adopt the parallel rules of the LVA and to the stabilised arbitral jurisprudence of the most experienced and reputed Commissions, Cours and Centres in the arbitration universe, always bearing in mind, however, the requirement of a balanced adaptation to the different legal, linguistic and commercial cultures of the commentators"[[165]](#footnote-165).

An example of this interpretation of the principle of *favor arbitrandum* may be given about the scope of the suppletivity and inoperability of the rule contained in Article 10(4) of the PLVA. In its terms: "Unless otherwise stipulated, if within 30 days from the receipt of the request made to it by the other party, a party fails to appoint the arbitrator or arbitrators it is incumbent upon it to choose, or if the arbitrators appointed by the parties do not agree on the choice of the presiding arbitrator within 30 days from the appointment of the last of them, the appointment of the missing arbitrator or arbitrators shall be made, at the request of either party, by the competent state court." In the event of failure also to use the means of redress agreed upon by the parties (for failure to designate an arbitrator by the challenged party or for failure of the designated arbitrators to agree on the appointment of the chairman), either party must be given the possibility to have recourse in the last resort to the state court under the adapted terms (in particular as to when the 30-day time limit begins to run) contained in this paragraph 4[[166]](#footnote-166).

For OLIVEIRA *et al.*[[167]](#footnote-167), "it does not (...) seem necessary to reject this possibility outright, although it is true that the legislator did not expressly foresee it - but neither did he refuse it. On the other hand, to admit it is still a manifestation of the *favor arbitratis* which dominates the entire LVA and we would therefore answer that question in the affirmative - provided, of course, that there is no trace of a hypothetical will on the part of the parties to the contrary - with the understanding that, in the event of frustration of the means provided for by the parties to make up for the lack of designation provided for in Article 10(4) of the LVA, the possibility of making up for the lack of designation must be rejected outright. In the event of frustration of the way foreseen by the parties to overcome the lack of designation provided for in Article 10(4), any party may request the (president of the) competent state court, within 30 days, to proceed, in the second or last instance, so to speak, to the appointment of the missing arbitrator(s)". In the same sense defends JOSÉ MIGUEL JÚDICE[[168]](#footnote-168) that "(...) the appointing entity may not release itself in time (and, we may add here, even refuse the mission), in which case the principle of *favor arbitratis* imposes that one may appeal to the state court (...)".

It is in this sense of interpretative guideline of the rules that the same author, addressing the question of whether the arbitrators have the power and competence to determine - without the explicit will of the parties - that a phase of mediation falls within the time of arbitration proceedings, or if the time to be taken for mediation should be deducted from the time limit for arbitration, or if the arbitrators may appoint a mediator or if the arbitrators may have access to the mediation report, states that "in interpreting the powers of the Arbitrators, one should apply the principle of *favor arbitratis* (. ..)" .

However, the aforementioned author concludes that "(...) when the parties choose arbitration as a means of conflict resolution, they assert a potentiality granted to them by the legal system, which is to submit themselves to a private form of Justice, genetically felt as an exponent of individualism and the primacy of private will. But this cannot be confused with an endorsement that from this private power can lead to situations of the exercise of rights without limits and without measure, so that they can act on evolutions of the concrete will, destroying the certainty and security which are essential values of the legal system (...)"[[169]](#footnote-169).

Thus, in our view, the limit of the principle lies in an interpretation of the law towards the evolution of Arbitration Law, without, however, violating the fundamental principle of arbitration which is the principle of autonomy of the will.

**3. Limits of the principle of *favor arbitrandum***

The principle of *favor arbitrandum* is limited by all mandatory legal rules, and also by supplementary legal rules when they are not excluded by an agreement of the parties in a different sense. The principle may also be limited by other principles at stake in the matter since principles limit each other.

I distinguish three categories of limitations on the principle of *favor arbitrandum*. The first category concerns limits of a general nature, e.g. mandatory or supplementary rules which are not excluded by an agreement of the parties in a different sense, the public policy, the violation of good customs, fraud or other grounds for annulment of the award provided for in state laws on arbitration. The second category concerns the limits of the arbitration procedure itself. These are: the lack of *jus imperium* by the arbitrator, anti-arbitration injunctions and the arbitrator's liability for his errors *in iudicando*. The third category concerns the limits depending on the quality of the parties. These include the impecuniosity of a party and the immunity from enforcement of States.

Let's just look at public policy. In general terms, public order constitutes a limit to the autonomy of the parties[[170]](#footnote-170). As Professor CARNEIRO DA FRADA[[171]](#footnote-171) correctly formulates, public policy refers to a set of binding principles which, as such, are unavailable, fulfilling a negative delimitation function of the private autonomy space. *Favor arbitrandum* finds a limit in public policy. However, it can act in different ways. Sometimes it is internal public policy that operates, limiting the *favor arbitrandum*; other times it will be international public policy. As one author[[172]](#footnote-172) states, "public policy is intended to interfere throughout the various phases of the arbitration".

Regarding the arbitration agreement, public policy intervenes to delimit the space of contractual freedom by determining the fundamentally indisposable matters. Such matters concern, for example, criminal law (except in legal systems in which the Public Prosecutor's Office is allowed to settle certain offences[[173]](#footnote-173)), personal status, family law (matters concerning marriage, divorce and separation, except for property matters), collective proceedings, taking into account the personal scope of the arbitration agreement, *etc*. In the light of the progress made in the field of international arbitration, it should be noted that it is only when the rights in dispute are fundamentally inalienable or conflict with international public policy that *favor arbitrandum* has a limit on the arbitrability of disputes in international arbitration[[174]](#footnote-174).

*Favor arbitrandum* cannot prosper against the rules relating to the capacity of persons. The rules on capacity to enter into arbitration agreements are of public policy, absolutely limiting private autonomy. In fact, Article V(1)(a) of the NYC makes express reference to the incapacity of the parties to the arbitration agreement as grounds for refusing recognition and enforcement of foreign arbitral awards. This refers to the legal capacity of the parties, their ability to freely dispose of their rights and assume obligations. More specifically, it refers to the ability to act in one's own name in defence of one's interests, i.e. the ability to stand in court. This capacity is assessed on the basis of the personal law of each of the parties[[175]](#footnote-175). As a rule, minors, interdicted and incapacitated persons may not enter into arbitration agreements. In the case of minors, it shall not be possible to conclude an arbitration agreement, even through a representative. In the case of the incapacitated, if the court does not make the conclusion of arbitration agreements in the judgment of incapacity subject to the assistance of the curator or that the incapacitated person concludes an arbitration agreement with the authorisation of the assistant, it seems that the validity of such arbitration agreements should be accepted. The prohibition cannot extend to situations where the incapacitated person is merely assisted and not represented.

Contradiction of public policy appears as a ground for annulment of the award in many national legislations (e.g. Angolan law) and in international conventions on arbitration. In other laws, such as the Portuguese and French, the *favor validitatis sententiae* is limited, in international arbitration, by international public policy. An award which leads to a result which is manifestly incompatible with the principles of international public policy is void (article 54 of the PLVA).

Public policy constitutes a limit on the enforcement of judgments that violate the fundamental principles of procedural law. It essentially concerns the principle of adversarial proceedings, the equality of the parties and the prior (written or oral) hearing of the parties before delivery of the judgment. The principle of adversarial proceedings, which is expressed in the old saying Nemo condemnat sine auditur, stipulates that either party must be in a position to discuss the claims, arguments and evidence of his adversary. LIONEL ASCENSI[[176]](#footnote-176) considers the adversarial principle to be a fundamental principle of human rights in dispute resolution procedures, although there are situations in which contradiction must give way to certain individual or collective demands or interests. The violation of these procedural principles certainly constitutes a limit to the validity of arbitral awards or the recognition and enforcement of foreign arbitral awards.

In most countries that have adopted the NYC, public policy is interpreted in a narrow sense, i.e. as international public policy. With regard to international arbitral awards, the contravention of international public policy constitutes a limit to their recognition and enforcement. International public policy offers the broadest virtualities of allowing recognition of foreign arbitral awards.

**4. Grounds of the principle of *favor arbitrandum***

Ground is, in a common sense, the basis, the reason, the motive, what legitimates or justifies something. In a more technical sense, it may also refer to a set of knowledge that supports a theory or to a principle or set of principles on which a conceptual system is based. According to the specificity of the theme studied, the search for the grounds from a philosophical, ethical, linguistic, socio-political or legal point of view may be relevant.

The ground of *favor arbitrandum* cannot be analysed without taking into consideration the socio-political and economic context in which its manifestations are revealed. In addition, it is of course important to analyse the ethical-legal grounds of the principle. The grounds of *favor arbitrandum* refer to economic, political and ethical-legal values. In our view, the principle of *favor arbitrandum* rests on two orders of grounds: the political-economic grounds and the ethical-legal grounds.

The political and economic grounds of the principle of *favor arbitrandum* are based on the search for an efficient dispute settlement system for the development of international trade, as well as on the need for a reduction of court proceedings and greater legal certainty to improve the climate for international trade and investment. *Favor arbitrandum* is in itself an instrument of competition between States, at the service of prestige and national economies. The *favor accordandum* is increasingly reflected in State legal systems.

As for the ethical-legal grounds of *favor arbitrandum*, the following values must be considered: the autonomy of the will, the protection of confidence (principle of reliance), legal security and social peace. Autonomy of the will, aimed at valuing the individual, is the foundation of voluntary arbitration. For this very reason, it constitutes the primary foundation of the principle of *favor arbitrandum*. The legal and jurisprudential manifestations referred to in this article satisfactorily find an ethical-legal foundation in the autonomy of the will.

There is a strong connection between the protection of the will and the protection of confidence. The different realisations of *favor arbitrandum* may also plausibly find a basis in the protection of confidence. As an interpretative-decisional criterion or guideline for normative formulation and interpretation towards the development of arbitration, the protection of confidence serves as a basis for *favor arbitrandum*. Alongside the autonomy of the will, the protection of confidence (principle of reliance) constitutes the supporting foundation of the principle of *favor arbitrandum*. There are several legal and arbitral decisions that refer directly to the protection of the parties' expectations to determine bold solutions in order to make international commercial arbitration feasible.

Finally, the values of legal security and social peace should be taken into consideration in the reasoning of *favor arbitrandum*. Such values play an important heuristic, interpretative and gap-filling role in resolving the many legal questions posed by international commercial arbitration. The imperative of legal security, a corollary of the rule of law, and the search for social peace may dictate original solutions in favour of arbitration. To that extent, *favor arbitrandum* is also based on these two values.



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