



## INCAPACITY OF A PARTY IN ARBITRATION: GENERAL APPROACHES AND LIMITATIONS OF DEFENSE

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### ABSTRACT

According to Article V(1)(a) of the New York Convention, the recognition and enforcement of an arbitral award may be refused, if the parties involved, under the 'law applicable to them', were under some incapacity when entering into an arbitration agreement. However, this specific provision is considered one of the most uncertain aspects of the Convention as it has caused challenges from its structure and wording which do not explicitly set the concept of capacity nor the governing law and other essential circumstances related to this defense. Furthermore, the absence of standards in this defense makes a significantly different interpretation by courts causing legal uncertainties to all the parties involved in the proceeding. In this paper, the author examines general approaches for determining the governing law on a capacity of a party in arbitration and analyzes limitations on the defense of incapacity in arbitration-friendly jurisdictions. The approach employed is normative juridical, relying on qualitative analysis of secondary data. This paper covered the choice of law method and the substantive law method in determining the law governing capacity of a party in entering an arbitration agreement. In the end, the paper explored various laws that limit the state from invoking incapacity initially established in the Lizardi case in France.

**Keywords:** new york convention; incapacity; arbitration.

### I. INTRODUCTION

Arbitration is a private and consensual mechanism through which opposing parties choose to submit their disputes to an impartial third party for resolution.<sup>1</sup> Over several years arbitration has gained broad acceptance across various sectors, serving as a preferred mechanism for parties seeking to resolve their disputes outside of the court. Its popularity can be attributed to the benefits it offers, including neutrality and impartiality of the arbitrators, flexibility in procedure customization, the confidentiality of proceedings, efficiency in delivering faster resolutions, and access to specialized expertise.<sup>2</sup> These advantages make arbitration an attractive option for entities seeking dispute resolution outside the formal court system, promoting trust and enabling them to focus on their core activities.

One of the main principles of arbitration is the principle of party autonomy.<sup>3</sup> The principle of party autonomy grants the parties the freedom to determine the laws that will be applied to them and shape the arbitral proceeding according to their specific requirements and preferences.<sup>4</sup> It enables them to select arbitrators with the necessary expertise, decide on the procedural aspects of the arbitration, and choose the applicable law that will govern the substance of the dispute.<sup>5</sup> However, despite the autonomy

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<sup>1</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, New York: Cambridge University Press, 2008, pp. 1 – 2.

<sup>2</sup> Mathematica Policy Research, Inc., *Recent Practice/Future Possibilities: A Survey of Practitioners in International Commercial Arbitration Final Report*, 2005, p. 11.

<sup>3</sup> Julian D.M. Lew, *Contemporary Problems in International Arbitration*, London: Springer Dordrecht, 1987, p. 237.

<sup>4</sup> *Ibid.*, p. 230.

<sup>5</sup> *Ibid.*

granted to the parties, the dispute may involve parties from different jurisdictions which leads to multiple legal systems not chosen by the parties being applied.

Under Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**The New York Convention**”), the recognition and enforcement of an arbitral award where the parties were under some incapacity may be refused by the competent authority. Under the same article, the capacity of a party is to be determined by “the law applicable to them”. However, Article V(1)(a) of the New York Convention fails to provide a standard for determining the law governing the capacity of a party.<sup>6</sup> This absence of standard creates difficulty in conducting the necessary due diligence when engaging in business and uncertainty in enforcing an arbitral award.

In a case decided by the Cairo Court of Appeal on 12 September 2009, where the arbitral award was annulled with the consideration that the Egyptian General Petroleum Corporation (EGPC) did not have approval from the Egyptian Petroleum Minister which made them lack the capacity to enter into an arbitration agreement.<sup>7</sup> The Court also rejected an argument from National Gas Company (NGC) that there was an implicit approval from the Minister which should be inferred from its attendance at the contract signing ceremony.<sup>8</sup> In that case several systems of law potentially be relevant:

1. The law governing the arbitral proceedings;

The law governing the arbitral proceedings (*lex arbitri*) refers to the legal framework that governs the conduct and procedure of arbitration including the appointment and qualifications of arbitrators, the submission of evidence, the conduct of hearings, the enforcement of arbitral awards, and the grounds for challenging or setting aside awards.<sup>9</sup> This law is typically determined, in almost all cases, by the law of the arbitral situs where the parties agreed the arbitration would take place (seat of arbitration) — often legal fiction because, frequently for the convenience of the parties, the actual physical proceedings may occur in a different jurisdiction or multiple jurisdictions (venue of the arbitration).<sup>10</sup>

2. The law governing the arbitration agreement;

The law governing the arbitration agreement refers to the legal principles and rules that determine the validity, interpretation, and enforceability of the agreement.<sup>11</sup> This law governs the substantive validity and formal validity of the arbitration agreement, including the form, formation, scope, termination, interpretation, assignment and waiver of the arbitration agreement.<sup>12</sup> This law has to be expressly specified in the arbitration clause. There are several ways to determine the law governing the arbitration agreement in the absence of its express choice specified in the arbitration agreement, most notably the three-stage test used in landmark cases such as *Sulamerika v. Enesa and Enka v. Chubb*.<sup>13</sup>

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<sup>6</sup> UNCITRAL Secretariat, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 2016, p. 139.

<sup>7</sup> Ibrahim Shehata, “The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate”, *Journal of International Arbitration*, Vol. 37, No. 3, 2020, p. 391.

<sup>8</sup> *Ibid.*, p. 396.

<sup>9</sup> Margaret L. Moses, *Op. Cit.*, pp. 396 – 397.

<sup>10</sup> Llewellyn Joseph Gibbons, “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*, Vol. 32, Iss. 1, p. 39.

<sup>11</sup> *Ibid.*, pp. 65 – 66.

<sup>12</sup> Amanda Nunes Sampaio, “The law governing the arbitration agreement: Why we need it and how to deal with it”, *International Bar Association*, <<https://www.ibanet.org/article/699fd751-0bd4-4a15-bf84-e2542a8219c9>>, accessed 20 May 2023.

<sup>13</sup> Gary Born, “The Law Governing International Arbitration Agreements: An International Perspective”, *Singapore Academy of Law Journal*, 2014, p. 831.

3. The law governing arbitrability; and

Arbitrability is the question of whether a particular dispute can be submitted to arbitration. The law governing arbitrability determines the types of disputes that are considered suitable and excluded from arbitration. This law may vary from jurisdiction to jurisdiction and can depend on factors such as public policy, the subject matter of the dispute, and the rights or interests that are at stake. For example, certain matters such as criminal offenses or family law issues may be considered non-arbitrable in some jurisdictions.<sup>14</sup>

4. The law governing the contract.

The law governing the contract refers stipulates the substantive rights and obligations of the parties to the contract. It regulates the principles and rules that determine the validity, interpretation, performance, and enforcement of the contract. The applicable law can be determined by the express choice of the parties in the contract, or in the absence of a choice, by the rules of the relevant jurisdiction. The law governing the contract may include provisions related to contract formation, contract terms, remedies for breach of contract, and other contractual rights and obligations. In arbitration, the law governing the contract is important because it helps in interpreting the contractual terms and determining the substantive rights and obligations that are relevant to the dispute being arbitrated.<sup>15</sup>

Based on the aforementioned understanding this discourse examines the systems of law that govern the capacity of parties to enter into arbitration agreements.

### 1. Problem Formulation

In the formulation problem, the author classifies the problem as follows:

- a. How to determine the law that governs the capacity of a party to arbitrate?
- b. What is the limitation of a party relying on its national law to contest its capacity to enter into arbitration?

### 2. Purpose of the study

In the context and use of this paper, the author divides into 3 things as follows:

- a. Exploring general approaches to determine the applicable law governing the capacity of a party in arbitration; and
- b. Analyzing limitations on a defense based on the incapacity of a party across jurisdictions that are regarded as being arbitration-friendly.

## II. RESEARCH METHODS

The methodology refers to the overall research strategy and methods used in a project, providing a systematic approach to address research objectives and guide data collection and analysis.<sup>16</sup> The method of approach used is normative juridical, which refers to written legal norms, both as outlined in the form of regulations and literature.<sup>17</sup> Descriptive analytical research specifications are expected to be able to give a detailed, systematic, and comprehensive picture based on the correlation of data from one another about the incapacity of a party in the arbitration. Types and sources of data used are secondary data sources as primary data sources. Data collection techniques were carried out utilizing a

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<sup>14</sup> *Ibid.*, p. 68.

<sup>15</sup> *Ibid.*, p. 69.

<sup>16</sup> Asmak Ul Hosnah, *Karakteristik Ilmu Hukum dan Metode Penelitian Hukum Normatif*, Depok: Rajawali Pers, 2021, p. 346.

<sup>17</sup> Zainudin Ali, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2011, p. 105.

literature study. The method of data analysis is qualitative, namely, research that refers to the legal norms contained in the legislation and norms that live and develop in society.<sup>18</sup>

### III. DISCUSSION AND RESULT

#### A. The Concept of Incapacity in Arbitration

The concept of capacity refers to the legal competency of an individual to take action and enter into agreements on their behalf.<sup>19</sup> The capacity of parties in arbitration is crucial for the validity of a contract, including an arbitration agreement.<sup>20</sup> In Indonesian law if a party lacks the legal capacity to enter into a contract, the contract becomes voidable, and the same principle applies to arbitration agreements.<sup>21</sup> Essentially, anyone who can enter into a valid contract can also enter into an arbitration agreement including individuals, corporations, states, and state agencies.<sup>22</sup>

##### 1. Natural person;

Incapacity of a natural person refers to restriction or prohibition preventing a certain person from lacking the capacity to enter into some specific binding legal relationship to protect the person to whom they owe duties or to preserve certain values or public interest.<sup>23</sup> For instance, in a case decided by the Supreme Court of Canada, one party objected to the recognition and enforcement of an arbitral award on the ground of incapacity as they did not have the opportunity to obtain independent legal advice during the negotiation when concluding an arbitration agreement in their contract.<sup>24</sup> There are also domestic regulations that grant the capacity of a natural person to enter into an agreement if they are aged 21 or have been married (excluding child marriage), do not have a disability, or are not under supervision.<sup>25</sup> However, there are no reported cases where recognition of arbitral award has been challenged because an arbitration agreement was entered by a minor or a disabled person under Art. V(1)(a) of the New York Convention.<sup>26</sup>

##### 2. Corporations; and

The ability of a corporate entity to engage in contractual agreements is primarily governed by its constitution and the legislation of the jurisdiction where it was incorporated.<sup>27</sup> A corporate is mandated to act through its directors and officers, adhering to its constitution and applicable laws.<sup>28</sup> If a corporate entity enters into a transaction that surpasses its authorized powers (*ultra vires*), and the outcome of the transaction proves unfavorable, the entity may argue that the agreement is not binding and that it is not obligated to resolve any disputes through arbitration.<sup>29</sup>

To prevent such situations, it is customary for jurisdictions to establish specific legal regulations that limit or invalidate the doctrine of *ultra vires*, aiming to safeguard individuals who engage in genuine

<sup>18</sup> *Ibid.*

<sup>19</sup> UNCITRAL Secretariat, *Op. Cit.*, p. 135.

<sup>20</sup> Nigel Blackaby, et.al., *Redfern and Hunter on International Arbitration (6th Edition)*, Oxford: Oxford University Press, 2015, p. 81.

<sup>21</sup> See Article 1266 Burgelijk Wetboek voor Indonesie.

<sup>22</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, *Op. Cit.*, p. 32.

<sup>23</sup> C. Ignacio Suarez Anzorena, *The Incapacity Defence Under the New York Convention* in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London: Cameron May Ltd, 2008, p. 621.

<sup>24</sup> See *Grow Biz International Inc. v. D.L.T. Holdings Inc.*, Supreme Court, Province of Prince Edward Island, Canada, 23 March 2001.

<sup>25</sup> See Article 330 Burgelijk Wetboek voor Indonesie.

<sup>26</sup> UNCITRAL Secretariat, *Op. Cit.*, p. 136.

<sup>27</sup> See Section 23 Article 1B of Singapore Companies Act 1967 or Article 1(3) of Indonesian Law No. 40 of 2007 concerning Limited Liability Company.

<sup>28</sup> Nigel Blackaby, et.al., *Op. Cit.*, p. 83.

<sup>29</sup> See Section 23 Article 1A of Singapore Companies Act 1967.

dealings with corporations. Moreover, apart from corporate governance concerns, certain jurisdictions may impose restrictions on a corporation's ability to initiate arbitration under specific circumstances pertaining to the status of the corporate entity itself. For instance, several states within the United States have enacted statutes that prohibit a corporation lacking 'in good standing' under the state's laws from commencing any form of a legal proceeding, including arbitration - the failure of a corporation to maintain its good standing may serve as the grounds for an application or motion to stay or terminate an international arbitration initiated by said corporation.<sup>30</sup>

### 3. State and state entities

The issue of the capacity of states and state entities involves examining the limitations imposed on their ability to refer certain matters to domestic arbitration and the requirement of obtaining approval from relevant authorities to enter into an arbitration agreement outside their jurisdiction. These limitations have conventionally been considered to be a form of incapacity, although some have suggested that they should be categorized as issues related to the arbitrability of a case, specifically referred to as "subjective arbitrability" — in terms of state entities, these limitations appear interchangeable according to commentators.<sup>31</sup> The issues of arbitrability and capacity are closely connected as in case the state has no capacity in the dispute where it is involved the case would not be arbitrable.<sup>32</sup> However, for some scholars, the restrictions imposed by a state or state entities on its capacity to enter into an arbitration agreement should not be characterized as a matter of capacity, but instead as a matter of arbitrability. This is because restrictions are voluntarily imposed by the state not a true limitation on capacity, *e.g.*, limitation of a person under mental disability, thus it can be waived at its discretion.<sup>33</sup> Consequently, these restrictions should be regarded as issues of 'subjective arbitrability' not capacity-related issues.

In some countries, state entities, *e.g.*, state-owned entities usually have a specific legal status and are subject to regulations that stipulate the extent of their capacity to engage in arbitration. These regulations may prohibit certain matters from being referred to domestic arbitration, typically involving public policy concerns or matters involving the exercise of sovereign powers. For instance, in France, the Code of Civil restricts arbitrability in certain areas such as disputes concerning personal status, administrative acts, and matters related to public order. However commercial public or certain industrial entities are permitted to enter into an arbitration agreement with authorization by decree as the prerequisite.

*"One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned."*<sup>34</sup>

In Indonesia, the same limitation extends to the competence of Commercial Courts in adjudicating bankruptcy despite the parties having an arbitration agreement in their contract.<sup>35</sup> Additionally, some regulations require state entities to have approval from competent authorities before entering into an arbitration agreement with a foreign entity or choosing the seat of arbitration outside its jurisdiction — which serves as a mechanism to ensure compliance with domestic laws. For example, in Egypt, state-

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<sup>30</sup>See Section 10A-5A-7.07 and 10A-5A-7.08 of the Code of Alabama 1975 or Section 1-608.81 Code of the District of Columbia.

<sup>31</sup>C. Ignacio Suarez Anzorena, *Op. Cit.*, p. 625.

<sup>32</sup>Julian D.M. Lew, *Op. Cit.*, p. 123.

<sup>33</sup>Nigel Blackaby, et.al., *Op. Cit.*, p. 85.

<sup>34</sup>See Article 2060(1) French Civil Code 2016. See also Nigel Blackaby, et.al., *Op. Cit.*, p. 83.

<sup>35</sup>See Article 303 Indonesian Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

own entities (SOE) are allowed to enter into an arbitration agreement solely in administrative contracts and when the approval of the competent minister is granted.<sup>36</sup>

## **B. General Approaches in Determining Law Governing the Capacity of a Party in Arbitration**

The UNCITRAL Model Law on International Commercial Arbitration (“**The Model Law**”) departing from The New York Convention sets incapacity as a basis for setting aside an award and refusing recognition and enforcement of an arbitral award.<sup>37</sup> The *travaux préparatoires* explain that the drafting committee aimed to adhere to the Convention's wording as much as possible. However, Aron Broches, an observer representing the International Council for Commercial Arbitration, promoted the need for modification of Article V(1)(a) of The New York Convention in the Model Law as it was unclear and did not sufficiently clarify the treatment of the applicable law regarding incapacity, thus it was preferable to state that the parties lacked the capacity to enter into an agreement.<sup>38</sup> The delegates from Iraq, France, Italy, the United States, and Mexico, along with observers from Finland, Poland, Argentina, the International Chamber of Commerce, and the Cairo Regional Centre for Commercial Arbitration, reached an agreement on the proposal.<sup>39</sup> The observer from Switzerland disagreed with Broches’ proposal arguing that the sub-article does not need to deal with the question of party incapacity at all as the main reason for setting aside an arbitration award should rest in the idea of ‘manifest injustice’.<sup>40</sup>

With the advancements in regulations, the issue of which law applies to determine if a party lacks legal capacity remains a challenging aspect in the implementation of the incapacity defense.<sup>41</sup> Some authors even identify the incapacity defense as one of the most uncertain aspects of the Convention as it raises numerous questions and some of them are too significant. The issue itself is very seldom in exequatur proceedings, as demonstrated by the limited case law on such matters, thus the awareness of the intricate problems that can arise is also limited compared to, for example, the public policy defense.<sup>42</sup>

### **1. General Approaches in Determining the Law Governing the Capacity of a Party**

Article V(1)(a) of the New York Convention provides grounds for refusal of recognition or enforcement of an arbitral award where ‘the parties’ (or at least one of them)<sup>43</sup> to an arbitration agreement were, under ‘the law applicable to them’, under some incapacity. The points that are clear under Article V(1)(a) of the New York Convention are, first, that the Convention intends to ensure that

<sup>36</sup> See The Egyptian Arbitration Law No. 27 for 1994.

<sup>37</sup> See Article 34, Article 35, Article 36 The Model Law. See also *Travaux Préparatoires: United Nations Commission on International Trade Law Digest of Case Law on the Model Law on International Commercial Arbitration*, 2012, p. 173.

<sup>38</sup> United Nations Publication, *United Nations Commission on International Trade Law Yearbook*, Vol. XVI: 1985, pp. 446 – 447.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p. 447. The other delegates from Hungary, Tanzania, and China were hesitant to deviate from exact wordings under Article V(1)(a) of the New York Convention.

<sup>41</sup> C. Ignacio Suarez Anzorena, *Op. Cit.*, p. 637.

<sup>42</sup> George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, Switzerland: Springer International Publishing, p. 844, p. 925.

<sup>43</sup> Supposing that the ground of incapacity in Article V(1)(a) of the New York Convention refers to the incapacity of ‘the parties’. However, in cases and teachings, the article is interpreted as meaning that the lack of capacity of one party suffices as the ground for the court to refuse recognition and enforcement of arbitral award. See also Sokofl Star Shipping Co. Inc. v. GPVO Technopromexport, District Court of Moscow, Russian Federation, 11 April 1997; Todd J. Fox, *Incapacity of the Parties*, in Reinmar Wolff, *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary, New York Convention Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary (Second Edition)*, German: Verlag C.H.Beck oHG and Hart Publishing, 2019, p. 284, para. 100.

national judges separate the treatment of incapacity of a party and the invalidity of an arbitration agreement<sup>44</sup>, and second, that the article does not provide provisions or guidance on how to determine ‘the applicable law to them’ regarding capacity, unlike its provision on the validity of the arbitration agreement.<sup>45</sup> As the Convention has no specific interpretation to determine the law governing the capacity of a party, domestic courts will be in a position where they have no limitation on construing ‘the law applicable to them’ as meaning the substantive rules they deem applicable in an international context to determine whether the parties can enter into an arbitration agreement — although it is generally considered to require the application of the choice of law method or substantive law method.<sup>46</sup>

### a. Choice of Law Method

According to this approach, the phrase ‘to them’ under Article V(1)(a) refers to the application of the ‘personal law’ of a party being alleged to have no capacity in entering an arbitration agreement.<sup>47</sup> Consequently, national courts can only seek a legal solution within the capacity-related rules of the parties' national law, excluding other rules that are unrelated to that specific law.<sup>48</sup> For a natural person, personal law is determined by factors like nationality, domicile, or residence, while for legal entities, it is determined by the place of incorporation or the seat of administration.<sup>49</sup>

This conflict rule does not establish a specific criterion to determine the applicable law. Instead, it establishes a conceptual category that restricts the types of rules a court can rely on to determine the lack of capacity. For example, a court that refuses enforcement of an arbitral award based on a party's incapacity according to the law of the place where the agreement was executed would violate the Convention, but would not if it relied on the law of the parties' nationality. The personal law approach in this method seems to be supported by the *travaux préparatoires* of the Convention. When Professor Sanders introduced a last-minute proposal that ultimately became the final text of the Convention, he explained that capacity “*would be determined only according to the law governing their (the parties) personal status and not the law applicable to the award.*”<sup>50</sup>

The decision rendered by the Sweden Court of Appeal between the State of Ukraine v. Norsk Hydro ASA provides valuable insight into Sweden's stance on the capacity of parties to enter into arbitration agreements. The key facts of the case involved two officers of the defendant who signed a Shareholders' Agreement when the required signature of its Chairman was absent.<sup>51</sup> The defendant then contested the claim that the agreement had a binding effect on them. Despite the presence of a choice of law clause designating Swedish law as the governing law, the Court ruled that Ukrainian law governed the capacity of a person to enter into a binding agreement on behalf of a Ukrainian entity.<sup>52</sup>

The Court examined the authority of the two officers and found that only one of them had proper authority under Ukrainian law to bind the defendant. Additionally, the Court considered the requirement

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<sup>44</sup> Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, The Netherlands: Kluwer Law International, p. 984, para. 1695.

<sup>45</sup> UNCITRAL Secretariat, *Op. Cit.*, p. 139.

<sup>46</sup> Emmanuel Gaillard and John Savage, *Op. Cit.*, pp. 242 and 232. See also George A. Bermann, *Op. Cit.*, p. 925.

<sup>47</sup> Eesa Allie Fredericks, “Contractual Capacity in Private International Law”, Ph.D. thesis, Institute of Private Law, Leiden University, 2016, p. 118.

<sup>48</sup> C. Ignacio Suarez Anzorena, *Op. Cit.*, p. 637.

<sup>49</sup> Emmanuel Gaillard and John Savage, *Op. Cit.*, pp. 243 – 245.

<sup>50</sup> *Travaux Préparatoires: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 24 September 1958, p. 7.

<sup>51</sup> Giuditta Cordero Moss, *Legal Capacity, Arbitration and Private International Law* in K. Boele Woelki, T. Einhorn, D. Girsberger, S. Symeonides, (red.), *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*, Zürich: Eleven International Publishing, 2010, p. 5.

<sup>52</sup> *Ibid.*

under Ukrainian law for the validity of the signatures on the agreement. It concluded that, according to Ukrainian law, the Shareholders' Agreement would have required two signatures, whereas the arbitration agreement within the clause could be binding with just one signature. The Court determined, based on evidence from witnesses, that the two signatures were not intended as binding signatures, but as an indication to the Chairman that the document was ready for execution. According to Ukrainian law and practice, such indications do not signify contract execution, and a proper signature is necessary. As the Chairman did not sign the agreement, the Court held that the arbitration agreement did not become effective for the defendant. Consequently, the Court of Appeal declared the award based on that arbitration agreement null, in accordance with the relevant section of the Swedish Arbitration Act.<sup>53</sup>

It is important to note that if the decision were made under the new Swedish Arbitration Act, the award would have been set aside based on the Act's provisions. In summary, this Court of Appeal decision established that the legal capacity to enter into an agreement and make it binding on parties is determined by the law applicable to each respective party, regardless of the agreed-upon law specified in the agreement.<sup>54</sup> Furthermore, the court expressed the view that the law and practice governing the party should prevail in determining whether a signatory can bind parties to the agreement, rather than the law agreed upon by the parties themselves. The Svea Court of Appeal decision then was appealed to the Swedish Supreme Court, but the Supreme Court declined to hear the case. Therefore, the Svea decision stands as final, indirectly confirming the Court of Appeal's position that the legal capacity of a party is determined by the law applicable to that party.<sup>55</sup>

For several decades the personal law approach has been utilized by several jurisdictions to determine the applicable law governing arbitration agreements. Under this approach, personal law, such as the *lex patriae*, *lex domicilii*, or the law of habitual residence, is considered the primary factor in determining the governing law for the capacity of a party in entering a contract.

#### 1) Italy

In Italy, the contractual capacity of individuals is governed by the Italian Statute on Private International Law 1995, specifically Article 23<sup>56</sup> in Chapter 2<sup>57</sup>:

1. *“An individual’s national law determines his/her capacity to perform legal acts. However, where the law applicable to an act prescribes special capacity requirements, then the capacity to perform that act shall be determined by such law.*
2. *Concerning contracts made between persons who are in the same State, a person having legal capacity under the law of the State in which the contract is made may invoke an incapacity deriving from his/her national law only if the other contracting party, at the time of contracting, knew of such incapacity or was ignorant of it through his/her fault.*
3. *With respect to unilateral acts, a person having legal capacity under the law of the State in which the act is done may invoke an incapacity deriving from his/her national law only if this does not prejudice parties who, without fault, have relied upon his/her capacity.*

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<sup>53</sup> *Ibid.*

<sup>54</sup> Edwin N. Kimani and Peter M. Muriithi, “A Critique of the Law Governing Capacity of Parties to Enter Into an Arbitration Agreement”, *Alternative Dispute Resolution Journal*, Volume. 9, No. 1, 2021, Chartered Institute of Arbitrators-Kenya Branch (CI Arb-K), pp. 13 – 14.

<sup>55</sup> *Ibid.*, p. 14.

<sup>56</sup> Alberto Montanari and Vincent A. Narcisi, *Op. Cit.*, p. 129.

<sup>57</sup> Chapter 2 is titled “Capacities and Rights of individuals”, and Article 23 relates specifically to “Capacity of Individuals to act”.

4. *The limitations of paragraphs 2 and 3 shall not apply to acts relating to family relations or succession by reason of death nor to acts relating to rights in real property located in a State other than that in which the act is carried out.”*

Under sub-article 1 of Article 23, the capacity of an individual to enter into legal acts is determined by their national law, known as the *lex patriae*. However, sub-article 2 provides an exception to this general rule when the contract is made within the same country. In such cases, a person with capacity under the law of that country can only invoke their incapacity based on their national law if the other party to the contract was aware of their incapacity or was negligent in not knowing about it. Furthermore, sub-article 4 clarifies that the exception mentioned in sub-article 2 does not apply to contracts related to family matters, inheritance, or rights in real estate located outside the country where the contract is made. Therefore, in Italian private international law, the governing law for contractual capacity is primarily the *lex patriae*, but in certain situations, it can also be influenced by the law of the place where the contract is formed, known as the *lex loci contractus*.

## 2) Japan

Before 2007, Japan's private international law provisions were outlined in the *Hôrei* (Act on the Application of Laws of 1898) which was considered the most progressive legislation as it introduced a comprehensive framework of conflict rules governing various legal matters such as contracts, torts, family law, succession, and more.<sup>58</sup> According to Article 3(1) of that Act, an individual's capacity to enter into contracts was determined by the *lex patriae*.<sup>59</sup> While under its Article 3(2), when a foreigner lacked contractual capacity according to their own country's law but entered into a contract in Japan where they would have had such capacity, the *lex loci contractus* was to be applied.<sup>60</sup> This means that both the *lex patriae* and the *lex loci contractus* or *lex fori* were relevant in determining contractual capacity.

However, on January 1, 2007, *Hô no Tekiyô ni kansuru Tsûsokuhô* (the Act on the General Rules of Application of Laws) came into effect, introducing revisions to Japanese private international law.<sup>61</sup> The provisions related to contractual capacity are now found in Article 4 of the Act, specifically in Chapter 3<sup>62</sup>, Section 1:<sup>63</sup>

1. *“The legal capacity of a person shall be governed by his or her national law.*
2. *Notwithstanding the preceding paragraph, where a person who has performed a juristic act is of full capacity under the law of the place where the act was done (lex loci actus), that person shall be regarded as having full capacity to the extent that at the time of the juristic act, all the parties were situated in a place under the same law.*
3. *The preceding paragraph shall not apply either to a juristic act governed by family law or succession law or to a juristic act regarding immovables situated in a place where the law differs from the lex loci actus.”*

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<sup>58</sup> Yasuhiro Okuda, *Reform of Japan's Private International Law: Act on The General Rules of The Application of Laws*, in Petar Šarčević, Paul Volken, and Andrea Bonomi, *Yearbook of private international law. Volume VIII, 2006*, pp. 145 – 146.

<sup>59</sup> Koji Takahashi, “A Major Reform of Japanese Private International Law”, *Journal of Private International Law*, Vol. 2, No. 2, October 2006, p. 313.

<sup>60</sup> *Ibid.*, p. 313 – 314.

<sup>61</sup> Yasuhiro Okuda, *Op. Cit.*, p. 147. See also Government Ordinance No. 289 of 2006.

<sup>62</sup> The title of Chapter 3 is “General Rules on Applicable Law,” and the title of Section 1 is “Person”. Article 4 concerns the legal capacity of a person.

<sup>63</sup> The text is translated to English by Kent Anderson (Professor in The Australian National University, College of Law) and Yasuhiro Okuda (Professor in The Chuo University, Law School) in Petar Šarčević, Paul Volken, and Andrea Bonomi, *Yearbook of private international law. Volume VIII, 2006*, p. 428.

As a general rule, an individual's capacity to enter into contracts is governed by their national law, the *lex patriae*. However, there is an exception to this rule outlined in sub-article (2) of Article 4. If a party to the contract is in the same country as their counterpart at the time of contracting and has the capacity according to the *lex loci contractus*, even if they do not have the contractual capacity according to their *lex patriae*, then the *lex loci contractus* will apply.<sup>64</sup> The Act also specified that both parties must be physically present in the same country when entering into a contract.<sup>65</sup> Thus, it eliminates any uncertainty that may have existed under the previous law regarding the applicability of the exception in cases where a contract is concluded across borders.<sup>66</sup> Therefore, under Japanese private international law, the determination of contractual capacity is primarily governed by the *lex patriae*, with the *lex loci contractus* also being relevant in specific situations.

### 3) Vietnam

The Civil Code of the Socialist Republic of Vietnam 1996 addresses the issue of contractual capacity in Article 831, consisting of Sections (1) and (2)<sup>67</sup>. Here is the English translation of the relevant content:<sup>68</sup>

1. “The legal capacity of foreigners is determined by the law of the country whose citizens foreigners are [sic] except for the cases where this Code or other laws of Vietnam provide otherwise.
2. When foreigners create and perform civil transactions in Vietnam their legal capacity shall be determined by Vietnamese law.”

According to Article 831(1) of the Vietnamese civil code, the general rule for deciding if foreigners have the legal ability to enter into contracts is based on the laws of their home country (*lex patriae*).<sup>69</sup> On the other hand, Article 831(2) explains that if a contract is made and performed within Vietnam, the laws of the place where the contract was made, the laws of the court hearing the case, or the laws of the place where the contract is performed will be applied.<sup>70</sup> However, the text of Article 831 does not clarify such a matter. For example, the law does not clearly state what should happen if a foreigner signs a contract in Vietnam but the actual activities are carried out in another country. It also does not specify what should be done if the parties enter into a contract outside Vietnam but the activities are supposed to take place in Vietnam or elsewhere. Similarly, if a contract states that the performance should occur in Vietnam but it ends up happening in another location, the law does not provide specific guidance on how to handle such situations.<sup>71</sup> Furthermore, the provision does not address the contractual capacity of Vietnamese citizens. As a result, in Vietnamese private international law, the determination of contractual capacity for foreign citizens is primarily guided by the *lex patriae*, with the *lex loci contractus*, *lex fori*, or *lex loci solutionis* coming into play in specific cases.<sup>72</sup>

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<sup>64</sup> Koji Takahashi, *Op.Cit.*, p. 314.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Article 831 is stipulated under Part 7 of the Civil Code of the Socialist Republic of Vietnam titled “Civil Relations with a Foreign Element” and Article 831 is specifically titled “Legal Capacity of Foreigners”.

<sup>68</sup> Eesa Allie Fredericks, *Op. Cit.*, p. 155.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, pp. 155 – 156.

<sup>72</sup> *Ibid.*, pp. 156 and 169.

#### 4) German

The provisions concerning contractual capacity can be found in Article 7<sup>73</sup> and Article 12 of the *Einführungsgesetz* (Introductory Act) to the German civil code<sup>74</sup>. These rules also apply to cases of limited capacity, such as minority and mental illness. However, in German law, whether the consent of a spouse is required for a valid contract depends on the applicable matrimonial property regime.<sup>75</sup> This falls under matrimonial property law and is determined by the legal system governing the consequences of marriage.<sup>76</sup>

According to the first sentence of Article 7(1), contractual capacity is generally governed by the individual's national law: "*Die Rechtsfähigkeit und die Geschäftsfähigkeit einer Person unterliegen dem Recht des Staates, dem die Person angehört*" meaning "The legal capacity and capacity to contract of a person are governed by the law of the State of which the person is a national".<sup>77</sup> The second sentence states that the same rule applies when capacity is expanded through marriage: "*Dies gilt auch, soweit die Geschäftsfähigkeit<sup>78</sup> durch Eheschließung erweitert wird*".<sup>79</sup> Paragraph 7(2) states that once capacity is acquired, it will not be affected by subsequent acquisition or loss of German citizenship: "*Eine einmal erlangte Rechtsfähigkeit oder Geschäftsfähigkeit wird durch Erwerb oder Verlust der Rechtsstellung als Deutscher nicht beeinträchtigt*." The Latin saying used in this context is "semel maior, semper maior," or "once an individual reaches adulthood, they remain an adult". Therefore, a 19-year-old German citizen who acquires the nationality of a country where the age of majority is 21 will still be considered an adult under German private international law.<sup>80</sup>

Pursuant to the first sentence of Article 12, in a contract between individuals residing in the same country, if one person has the legal capacity to enter into the contract according to the laws of that country, they can only claim incapacity based on the laws of another jurisdiction if the other party was aware or should have been aware of this incapacity at the time of the contract: "*Wird ein Vertrag zwischen Personen geschlossen, die sich in demselben Staat befinden, so kann sich eine natürliche Person, die nach den Sachvorschriften des Rechts dieses Staates rechts-, geschäfts- und handlungsfähig wäre, nur dann auf ihre aus den Sachvorschriften des Rechts eines anderen Staates abgeleitete Rechts-, Geschäfts- und Handlungsunfähigkeit berufen, wenn der andere Vertragsteil bei Vertragsabschluß diese Rechts-, Geschäfts- und Handlungsunfähigkeit kannte oder kennen mußte*".<sup>81</sup> The protection in two-party situations is regulated by the restriction of a party from using their lack of legal capacity or ability to enter into a contract based on their personal status law.<sup>82</sup> This

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<sup>73</sup> Article 7 is regulated under Chapter 2 with the title *Recht der natürlichen Personen und der Rechtsgeschäfte* or *Rights of Natural Persons and Article 7* particularly focuses on *Legal capacity and capacity to contract* or originally written as *Recht der natürlichen Personen und der Rechtsgeschäfte*.

<sup>74</sup> Originally called *Einführungsgesetz zum Bürgerlichen Gesetzbuche* or *BGBEG*.

<sup>75</sup> Eesa Allie Fredericks, *Op. Cit.*, p. 120.

<sup>76</sup> *Ibid.*, p. 121.

<sup>77</sup> Introductory Act to the Civil Code in the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 2 of the Act of 25 June 2021 (Federal Law Gazette I p. 2133); Article 240 last amended by Article 10 of the Act of 22 December 2020 (Federal Law Gazette I, p. 3328). Translation provided by Prof. Dr. Juliana Mörsdorf, LL.M. (Berkeley) and Ute Reusch in *Rechtssystem des Bundes* official site, <[https://www.gesetze-im-internet.de/englisch\\_bgbeg/englisch\\_bgbeg.html](https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html)>, accessed 5 June 2023.

<sup>78</sup> The German term for contractual legal capacity.

<sup>79</sup> Eesa Allie Fredericks, *Op. Cit.*, p. 121.

<sup>80</sup> *Ibid.*

<sup>81</sup> The original document of *Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)* is available online at <https://www.gesetze-im-internet.de/bgbeg/index.html>.

<sup>82</sup> Lukas Rademacher, *The Protection of Third Party Interests in German Private International Law* in: Agata Koziół and Paulina Twardoch, *Ochrona osób trzecich w prawie prywatnym międzynarodowym*, Poland: Wydawnictwo C.H.Beck, p. 2. 2018.

restriction applies unless the other party was aware of or should have been aware of the lack of capacity.<sup>83</sup>

In practical terms, this approach presents notable challenges, and its implementation may be more complex than initially perceived. To begin with, distinguishing between rules governed by the parties' personal law and those that do not also rely on the laws of the jurisdiction where the court is located. This can lead to potential overlaps or differing regulations across different jurisdictions. Taking a narrower perspective, there may be situations where a jurisdiction lacks a specific personal law that governs a party's capacity to enter into a contract. In such cases, the question arises as to whether the defense of incapacity should be determined by the law applicable at the place where the powers were granted or by the law applicable at the place where the powers are being executed, depending on the circumstances.

### **b. Substantive Law Method (Limitations of Incapacity Defense in Several Pro-Arbitration Jurisdictions)**

The difficulties faced by international arbitrators when using the choice of law approach in determining the capacity of parties to enter into an arbitration agreement lead them to rely on the substantive law approach. Due to the significant differences in national laws resulting from the choice of law approach, it would be unfair and artificial to favor one legal system over others when dealing with different legal systems. When courts review an award, the main concern is to establish the conditions under which an arbitration agreement can be legally effective within its legal system. Therefore, it is appropriate to apply the important concepts of that particular law, but only those that are crucial in an international context.

To uphold fairness, arbitrators are more inclined to adopt substantive solutions that they find suitable, considering the international nature of the disputes, while still ensuring that their awards can be enforced.<sup>84</sup> In this regard, there are signs of a restrictive trend regarding the ability of a State party to claim incapacity after entering into an arbitration agreement, as seen in court cases and modern arbitration laws that occurred in several jurisdictions viewed as pro-arbitration states<sup>85</sup>.<sup>86</sup> Some suggested that there are principles like *lex mercatoria*<sup>87</sup> or contemporary *ordre public* that prevent state or government entities from relying on their incapacity.<sup>88</sup> These laws originate from various jurisdictions known for being pro-arbitration:

#### 1) Limitations of Incapacity Defense in French

In French private international law, there is a longstanding rule, also adopted in European law, that prevents a party from using its lack of capacity or the absence of authority of its presumed representative as a defense if the other party could reasonably be unaware of such incapacity or

<sup>83</sup> See the last sentence of Article 12 of EGBGB.

<sup>84</sup> Emmanuel Gaillard and John Savage, *Op. Cit.*, p. 247.

<sup>85</sup> A pro-arbitration state is measured by factors such as time and cost efficiency, consent to arbitrate, party autonomy, alignment with chosen rules, discretion in procedure, independence of arbitrators, and protection of the right to be heard. It also encompasses accuracy in justice administration, minimal court intervention, effectiveness of awards, resistance to challenges, and an expanded scope of arbitrable claims. These criteria provide a comprehensive framework to evaluate the pro-arbitration character of a policy or practice. See George A. Bermann, "What Does it Mean to be 'Pro-Arbitration'?", 34 *ARB. INT'L* 341, 2018, p. 343.

<sup>86</sup> C. Ignacio Suarez Anzorena, *Op. Cit.*, p. 627.

<sup>87</sup> The term "lex mercatoria" or "law merchant" refers to a concept that represents a set of legal rules and principles that are not tied to any specific nation. This body of rules is primarily developed by the international business community itself, drawing upon customs, industry practices, and general principles of law. These rules are commonly applied in commercial arbitrations. See Oliver Volckart and Antje Mangels, "Are the Roots of the Modern Lex Mercatoria Really Medieval?", *Southern Economic Journal*, Vol. 65, No. 3, January, 1999, p. 430.

<sup>88</sup> *Ibid.*

absence of authority.<sup>89</sup> This rule was established in an 1861 decision by the French Cour de cassation in the Lizardi case and later extended to cover cases of absence of authority. In that particular case, a minor from Mexico bought jewellery from a jeweller in Paris, France. However, according to French law, the minor was considered an adult. The Cour de cassation did not consider the minor's minority status under Mexican law. Instead, it was determined that in specific situations, French law should be applied to determine the contractual capacity of a foreign national when the contract is made with a French citizen in France.<sup>90</sup>

The *rationale* behind the Lizardi decision, which created an exception to the exclusive application of the *lex patriae*, is based on the national interest in protecting businesses located in France.<sup>91</sup> Especially for regular commercial contracts, it is not practical to investigate the details of the foreigner's personal legal system.<sup>92</sup> The decision can therefore be interpreted (and is indeed understood in French legal scholarship) as supporting the application *lex loci contractus* in these specific circumstances.<sup>93</sup> Specifically, in relation to capacity issues, this rule can be found in Article 11 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations. The main reason behind this rule is to protect the interests of third parties who rely on the apparent authority of a party, a concern that exists in various legal systems in different forms.<sup>94</sup>

## 2) Limitations of Incapacity Defense under the European Convention on International Commercial Arbitration 1961 (ECICA)

The European Convention on International Commercial Arbitration contains provisions relevant to the capacity of legal persons of public law to enter into arbitration agreements. Article II (1) and (2) of the Convention establish that individuals considered legal persons of public law under their applicable law should have the right to enter into valid arbitration agreements.<sup>95</sup> Additionally, it states that if a state intends to restrict this right, it should express such limitations upon signing, ratifying, or acceding to the Convention.<sup>96</sup> In the case of *Benteler v. Belgium*, the tribunal recognized that the provision outlined in Article II(1) represents a general principle that constitutes the 'common law of arbitration'.<sup>97</sup> As a result, even in situations where the European Convention on International Commercial Arbitration may not directly apply, Article II(1) can be invoked to support the fundamental principle embodied in this provision.<sup>98</sup>

## 3) Limitations of Incapacity Defense in Switzerland

Certain contemporary laws of different countries appear to have adopted a blended approach to address this issue and offer practical resolutions.<sup>99</sup> For instance, Article 177(2) of the Swiss Private International Law Act of 18 December 1987, titled 'Arbitrability,' states:<sup>100</sup> "*If a party to the arbitration agreement is a State or an enterprise held, or an organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability*

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<sup>89</sup> Emmanuel Gaillard and John Savage, *Op. Cit.*, p. 252.

<sup>90</sup> Eesa Allie Fredericks, "Contractual Capacity in Private International Law: The Lizardi Rule in the Far East", *The Comparative and International Law Journal of Southern Africa*, Volume 51, Issue 1, p. 118.

<sup>91</sup> *Ibid.*, p. 119.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, p. 120.

<sup>94</sup> Emmanuel Gaillard and John Savage, *Op. Cit.*, pp. 252 – 253.

<sup>95</sup> Edwin N. Kimani and Peter M. Muriithi, *Op. Cit.*, p. 8.

<sup>96</sup> *Ibid.*

<sup>97</sup> Stefan Kröll, 'The European Convention on International Commercial Arbitration — The Tale of a Sleeping Beauty' in *Austrian Yearbook on International Law*, 2013, p. 6.

<sup>98</sup> *Ibid.*

<sup>99</sup> C. Ignacio Suarez Anzorena, *Op. Cit.*, p. 625.

<sup>100</sup> Bernard Hanotiau, "The Law Applicable to Arbitrability", *Singapore Academy of Law Journal*, 2014, Vol. 26, p. 877.

*of a dispute covered by the arbitration agreement.*” By incorporating such measures, these laws aim to provide substantive solutions and guidance in restricting the ability of a State party to claim incapacity after entering into an arbitration agreement.

#### 4) Limitations of Incapacity Defense in Spanish

In Spanish law, specifically under the Spanish Arbitration Act No. 60/2003, Article 2(2) addresses the limitations of the incapacity defense. The provision falls under the section titled ‘subject matter of arbitration’ and states the following:<sup>101</sup>

*“Where the arbitration is international and one of the parties is a State or a company, organisation or enterprise controlled by a State, that party shall not be able to invoke the prerogatives of its own law in order to avoid the obligations arising from the arbitration agreement”.*

In conclusion, according to the Spanish Arbitration Act No. 60/2003, Article 2(2)<sup>102</sup>, which addresses the limitations of the incapacity defense, it is worth noting that in an international arbitration involving a State or a company, organization, or enterprise controlled by a State, such entities are not permitted to use the privileges granted by their own laws as a means to evade the obligations arising from the arbitration agreement.

In most cases, the party against whom the arbitral award is invoked is both the defendant in the arbitration proceedings and the party alleged to have been lack the capacity when entering into the arbitration agreement.<sup>103</sup> However, based on the wording of the Convention, it seems possible for a party to argue that not only were they incapable, but the other party was as well. This can be inferred from Article V(1)(a) which permits the accused party to raise this defense if ‘the parties to the agreement’ were affected by incapacity, rather than just one party being lack of capacity.<sup>104</sup>

This can be seen in the Italian case of *Société Arabe des Engrais Phosphates et Azotes v. Gemananco*, where there was a dispute between two state-owned companies from Tunisia and an Italian company. The Tunisian companies sought to enforce an award in their favor, which was granted in arbitration against the Italian company.<sup>105</sup> However, the Italian company argued that it was not capable of entering into an arbitration agreement when the Tunisian companies tried to enforce the award in the courts of Bari. During the arbitration proceedings, the Italian company had previously claimed that the Tunisian companies were not incapacitated, while the Tunisian companies argued the opposite. Both the Court of Appeal of Bari and the Supreme Court of Italy did not consider this contradictory behavior as a violation of the principle of *"venire contra factum proprium."* It is important to note that this specific aspect of the Convention is highly debated as it potentially allows a party whose consent was not affected to renounce the arbitration agreement to the disadvantage of the other party, who relied on certain capacity restrictions. In some countries, such behavior is explicitly prohibited.<sup>106</sup>

<sup>101</sup>C. Ignacio Suarez Anzorena, *Op.Cit., Op. Cit.*, p. 626.

<sup>102</sup>It is important to note that the absence of legal capacity in such cases can be considered under the second option of Article V(1)(a) and also falls within the scope of Article V(2)(b) of the New York Convention if it relates to public policy matters.

<sup>103</sup>C. Ignacio Suarez Anzorena, p. 635.

<sup>104</sup>*UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 2016, p. 135. See also supra note 43.

<sup>105</sup>*Société Arabe des Engrais Phosphates et Azotes – SAEPA and Société Industrielle d’Acide Phosphorique et d’Engrais – SIAPE v. Gemanco srl*, Court of Appeal of Bari, Italy, 2 November 1993, XXII Y.B. COM. ARB. 737 (1997). The Italian Court of Cassation has subsequently reversed the decision of the Court of Appeal of Bari on grounds unrelated to the New York Convention.

<sup>106</sup>See Article 1164 of The Argentine Civil Code.

#### IV. CONCLUSIONS

According to Article V(1)(a) of the New York Convention, the recognition and enforcement of an arbitral award can be refused if one or both parties did not have the legal capacity to enter into the agreement. However, the Convention does not provide a clear guideline for determining which law should be applied to assess a party's capacity. This lack of clarity creates challenges in conducting proper research and introduces uncertainty when enforcing arbitral awards. Consequently, domestic courts have the authority to interpret "the law applicable to them" as the substantive rules they consider appropriate in an international context while evaluating the parties' capacity to enter into an arbitration agreement. Although the choice of law or substantive law methods is generally employed, the absence of a standard allows for a wide range of interpretations.

Under the Choice of Law Method, the phrase 'to them' in Article V(1)(a) refers to applying the personal law of a party alleged to lack the capacity in entering an arbitration agreement. This means that national courts can only consider the capacity-related rules of the party's national law, excluding unrelated rules. However, the choice of law approach presents challenges for international arbitrators when determining party capacity, leading them to rely on the substantive law approach by applying relevant particular laws restricting the defense of incapacity in arbitration. Given the recent advancements in regulations, the issue of determining the applicable law to assess a party's incapacity remains a challenge when it comes to the functioning of the incapacity defense. If there is an amendment to the Convention, it would be crucial to redefine the incapacity defense. The modified regulation shall include a precise definition of capacity, which law should be used to govern this matter to prevent legal uncertainty and protect against the exploitation of one party's lack of capacity.

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