JURA NOVIT CURIA IN INTERNATIONAL COMMERCIAL ARBITRATION

Master’s Thesis
Procedural Law
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Supervisor: Dan Frände
Author: Marta Viegas de Freitas Monteiro
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ICC Arbitration

LCIA

UNCITRAL
http://www.uncitral.org/uncitral/index.html

\[1 \text{ [Last entry 19.8.2013].}\]
ABBREVIATIONS

CLOUT: Case Law on UNCITRAL Texts
ICC: International Chamber of Commerce
ICC Arbitration: International Court of Arbitration
ILA: International Law Association
LCIA: The London Court of International Arbitration
UNCITRAL: United Nations Commission on International Trade Law
1. INTRODUCTION

1.1 Background

International commercial arbitration can be described as a means by which international business disputes are, pursuant to the parties’ agreement, definitively resolved by independent, non-governmental, decision-makers selected by or for the parties, applying neutral judicial procedures that provide the parties an opportunity to be heard. Thus, by choosing arbitration as the means of settling a commercial dispute, the disputing parties agree to appoint a third party to conclusively decide their rights, duties and obligations in the dispute.

The distinction between domestic and international arbitration is highlighted by the fact that some countries, such as France and Switzerland, have opted for specific rules for international arbitration distinct from those governing domestic arbitration. However, the clear majority of European countries, including England and Finland, do not consider international arbitration as having a specific nature justifying different rules compared to those governing domestic arbitration. For the purposes of this thesis, by international arbitration is meant the settlement of a commercial dispute in which the parties, the arbitrators and the seat of the arbitration are not of the same nationality. The term “arbitration” can be said to generally include four fundamental features, namely that it is i) an alternative to national court proceedings, ii) a private mechanism, iii) controlled and selected by the parties and iv) a final and binding determination of parties’ rights and obligations.

Business enterprises often find themselves parties to contracts with foreign companies from around the world, which by corollary may lead to being party to litigation before courts in distant locations. Due to the importance of forum selection, parties to cross-
border commercial transactions often include dispute resolution provisions in their agreements selecting a contractual forum in which to resolve their differences, normally taking the form of either i) a forum selection clause or ii) an arbitration agreement. International arbitration agreements, which can be entered into either before or after a dispute arises, provide a contractual choice of a dispute resolution forum. In practice, most international commercial arbitrations occur pursuant to arbitration clauses contained within underlying business contracts, which typically provide for the arbitration of future disputes relating to that contract.6

The increasing popularity of arbitration as the preferred means of resolving international commercial disputes can be linked to the perception that international arbitration provides a neutral, speedy and expert dispute resolution process, which is largely subject to the parties’ control and leads to an internationally enforceable decision.7 Unlike orders of national courts, arbitral awards are portable by virtue of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter “the New York Convention”) which allows parties to transact across borders knowing that if a dispute arises, they will not have to press their substantive rights in the other party’s national courts to get a final result.8

International arbitration is a fundamentally consensual means of dispute resolution and arbitrators derive their authority from the arbitration agreement. Consensual arbitration may be classified as institutional arbitration, ad hoc arbitration or a combination of both. Ad hoc arbitration is the original form of arbitration and remains today the basic form of arbitration. In ad hoc arbitration the parties administer the proceedings themselves from the beginning and may also decide on the procedural provisions in detail within the boundaries set by legislation. In institutional arbitration the parties agree to resort to the services of an existing arbitral institution which generally has a specific set of arbitral rules regulating inter alia the conduct of the arbitral proceedings.9

Although party autonomy is the fundamental principle followed in international commercial arbitration, once a dispute has arisen it may be difficult for the disputing

8 Lutrell 2009, p. 2.
parties to come to an agreement on the conduct of the arbitration procedure which is why arbitrators are, subject to party agreement, granted rather extensive substantive case management powers in order to conduct the proceedings in an effective and prompt manner and to come to a conclusion on the outcome of the dispute.\textsuperscript{10} However, due to the fact that commercial arbitration is considered a flexible alternative mechanism of dispute resolution suited for the tailored settlement of commercial disputes in accordance with the needs and requirements of the disputing parties, defining the scope of arbitrators’ substantive case management powers may become problematic.

Substantive case management issues usually relate to trial documents, \textit{e.g.} to the relief sought by the parties, their claims, the evidence and the legal arguments used to support the claims.\textsuperscript{11} The role of an arbitral tribunal in international commercial arbitration may be described as aiming at working out the parties’ will by using the tribunal’s right of inquiry. However, in order to ensure that the dispute is settled in accordance with the correct application of the law, an arbitral tribunal may be required to conduct its own independent research in relation to the substantive applicable law of the underlying dispute \textit{e.g.} in a situation where the parties have not succeeded to provide adequate evidence on the contents of the applicable law despite the arbitral tribunal requesting them to do so.

It is universally accepted that the burden of proving the facts of a dispute lies on the parties. However, the approaches in relation to the status of law differ between common law and civil law traditions. In common law systems, the parties are required to provide the legal arguments that support the sought relief, but many civil law countries on the other hand apply the Latin maxim \textit{jura novit curia} under which parties need only to prove the facts supporting their claim and to merely identify the relief they seek.\textsuperscript{12} The effects of this fundamental divergence extend by analogy to the conduct of international arbitral proceedings.

\textsuperscript{10} Gaillard and Savage 1999, p. 633.
\textsuperscript{11} Frände, Havansi, \textit{et al.} 2012, p. 991.
\textsuperscript{12} ILA Report 2008, pp. 2–3.
1.2 Subject and Research Questions

In practice, an international arbitrator may be faced with the difficulty of determining the contents of the applicable substantive law, as the arbitrator may not necessarily be familiar with it. The question arises whether the task of presenting the contents of the applicable substantive law lies entirely upon the parties – following the common law tradition – or whether the arbitral tribunal may base its decision on points of law introduced *sua sponte* as the courts may do in many civil law countries. The raised issues are significant in practice, as challenges to international arbitral awards have been said to be on the rise. The losing party may be tempted to seek any possible ground for challenging the award in a situation where an arbitrator has ascertained and applied the law *sua sponte* and the validity of the award will be at risk in jurisdictions where the *jura novit curia* principle is not recognized as part of legal principles affecting arbitral proceedings.

This Master’s Thesis shall examine the underlying legal framework in relation to the possibility of an arbitrator to determine the contents of the applicable substantive law in international commercial disputes with the specific aim of identifying the scope of an international arbitrator’s discretion to ascertain and apply the law *sua sponte*. The focus of the examination shall be on the *jura novit curia* principle and its effect on the discretionary powers and duties of an arbitral tribunal in respect of its task of rendering a final award. The actual research questions are the following:

1. **What is the effect of the *jura novit curia* principle in international commercial arbitration?** Can an international arbitral tribunal ascertain and apply the law *sua sponte* in order to reach a decision based on the correct application of the law? Are international arbitral tribunals under a duty to do so?

2. **Moreover, what is the scope of the *jura novit curia* principle in international commercial arbitration?** What are the general duties of an international arbitral tribunal towards the disputing parties and do these duties limit the possibilities of arbitrators to ascertain and apply the law *sua sponte*?

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13 Knuts 2012, p. 669.
As it shall be established below in Chapter 3, there exists no consensus of opinion as to whether an international arbitrator should be allowed or obligated to conduct independent research or in some other manner actively participate in the assessment of the contents of the applicable substantive law. Moreover, a uniform practice has not developed even though the question of the effect of the *jura novit curia* principle in international arbitration has been the object of discussion for quite some time\(^\text{14}\).

The subject of this thesis is, in accordance with its title, limited to the assessment of international commercial arbitration leaving thus outside the scope of the examination case law and material relating to other special types of arbitration such as investment arbitration. Moreover, considering that the question relating to the applicability of the *jura novit curia* principle is relevant merely in situations where the arbitrator is under a duty to settle a dispute between the parties based on law, decision making based on equity or *ex aequo et bono* shall also be outlined from the scope of the subject of this thesis.

### 1.3 Methodology and Sources

The research method of an academic study may be described as the group of practices and operations adopted in order to present information and rules, which can be used to revise and interpret the material observed as the outcome of the conducted examination.\(^\text{15}\) Thus, the adopted methodology can be seen as constituting the ensemble of the choices a researcher makes in relation to the object of the study, the material used in it, and the method in which it shall be conducted and the results presented.\(^\text{16}\) The methodological choices in legal academic studies tend to portray mostly practical legal dogmatics aiming at identifying the contents of the legislation in force regulating a specific legal problem\(^\text{17}\). Legal dogmatics may be defined as the interpretation of legal norms in an effective legal system.\(^\text{18}\) In practice, it is rather common for legal academics to include comparative aspects in legal dogmatical studies\(^\text{19}\). Comparative assessment is useful for deepening the knowledge of a given legal system in order to assist in its development.

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\(^{14}\) Kaufmann-Kohler 2005, p. 635.  
\(^{15}\) Husa 1997, p. 21.  
\(^{16}\) Klami 1980, p. 4.  
\(^{17}\) Husa *et al.*, 2005, p. 13  
\(^{18}\) Aarnio 1989, p. 48.  
\(^{19}\) Klami 1994, p. 6.
may also be exercised with an emphasis on legal dogmatics in which case the focus is shifted to assessing how an issue relating to a given legal rule is regulated in other legal systems.  

This thesis shall use a practical legal dogmatical approach as the methodological point of view. The questions under examination relate to the active participation of an arbitral tribunal in ascertaining the contents of the applicable substantive law in settling a dispute and the effect this may have on the validity of the arbitral award. In international arbitration, the finality of the award is dependent on multiple aspects. An international arbitral award may be set aside by the court of the place of the arbitration if the arbitral proceedings have not followed the mandatory provisions set out in the national legislation of the same state. Thus, in order to provide the reader with a useful examination of the topic of this thesis, focus shall also be given to the assessment of approaches taken in various countries, albeit without using comparative law as the main methodological approach. The assessment shall be conducted with the aim of providing a useful presentation of the applicability of the *jura novit curia* principle in international arbitration, which may by its nature involve the application of various different legal sources.

In addition to examining the current situation under Finnish law, the choice of the other addressed jurisdictions has been conducted mainly on practical grounds choosing other European countries that are considered “major places of arbitration”. According to the results of a broad empirical study on the attitudes and practices of large companies in relation to international arbitration conducted by the School of International Arbitration in 2010, the most popular and used seat of arbitration is London. In addition disputes are settled in great amounts in Paris, New York and Geneva. The choice of the comparative countries has thus been conducted to include England, Finland, France and Switzerland. These countries also represent advantageous examples, as they have adopted different

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20 Husa *et al.*, 2005, p. 15.

21 It should be noted that in addition, the enforcement of an international award may be objected before the national court of the place where enforcement of the award is sought. This thesis shall however focus its assessment mainly on questions relating to the provisions relating to the validity of arbitral awards provided in both transnational and national arbitration laws.


23 The results of the study are based on an enquiry comprising of 136 questions in addition to 67 interviews conducted on representatives of companies in different fields of business in different parts of the world. Of the respondents 35 % were located in Asia, 31% in West Europe, 12% in North America, 9% in Africa and the Middle East, 6% in South and Central America and 6% in East Europe.
approaches in relation to the application of the *jura novit curia* principle in civil and arbitral proceedings, which is why a detailed assessment of the said countries proves useful especially since international arbitration has been said to be under an aim of harmonization\(^\text{24}\) and because the current aims at harmonizing international arbitral proceedings will lose their effect if the approaches in different legal systems vary considerably.

Although the subject of this thesis, *i.e.* the effect and scope of the *jura novit curia* principle in international commercial arbitration, has been much debated by academic authors as well as having been a largely discussed topic by arbitration practitioners in various seminars *inter alia* on the subject of international arbitration, the existing material on the subject is characterized by a pandemonium of arguments which are in need of a comprehensible compilation. This thesis aims to provide such a compilation of the different positions taken by academic authors and arbitration practitioners in addition to establishing a comprehensive presentation of the myriad of applicable rules and regulations, which may affect the conduct of international arbitrations everywhere in the world, albeit with a special emphasis on the so-called major places of arbitration in Europe.

Most of the materials used as a source are articles written by legal scholars and arbitration practitioners, because there exist no specific books on the application of the *jura novit curia* principle in international arbitration. The books referred to are mostly written by leading experts on international commercial arbitration and they either contain a chapter on the subject or deals with the matters accordingly in respect of the issues which the application of the principle may affect; *i.e.* in relation with chapters concerning the topic of challenging international arbitral awards and refusing the recognition and enforcement of awards *inter alia*.

Hence, this thesis shall examine the approach taken in the mentioned countries by mostly focusing on current case law on the subject. The assessment of these legal systems is advantageous because, as it shall be presented in Chapter 4 below, the finality of an international arbitral award depends on the approach taken by the national court of the place of the arbitration in relation to the grounds for setting aside an award.

\(^{24}\) See *e.g.* Kaufmann-Kohler 2003, pp. 1320–1322; Cairns 2010, p. 306.
1.4 Structure

The subject matter relating to the applicability of the *jura novit curia* principle in international commercial arbitral proceedings is quite complex and, therefore, requires an assessment of the underlying legal framework of international arbitration before embarking on a more detailed examination of the effect of the principle itself. Hence, this Master’s Thesis shall begin with a brief presentation of the main legal theories underlying the study of arbitration as an independent legal subject matter in order to proceed with a presentation of the existing legal sources which may affect the conduct of arbitral proceedings and more specifically which may have an effect on the powers and duties of an arbitral tribunal in its task of settling the matter between the disputing parties. In addition, Chapter 2 shall address the possibility of using analogy from court proceedings as a possible source in determining whether the *jura novit curia* principle is applicable also in international arbitral proceedings.

After establishing the general legal basis underlying the conduct of international commercial arbitral proceedings, the examination shall continue with an assessment of the role of an international arbitrator in ascertaining and applying the substantive law. Chapter 3 shall begin with a presentation of the current situation of diverging opinions amongst academic authors and arbitration practitioners in relation to the suitability of the *jura novit curia* principle in the field of international commercial arbitration. The chapter shall continue with an assessment of the different provisions regulating an arbitrator’s substantive case management powers in order to determine whether there exist any restrictions to the application of the principle and to conclude the examination with a proposition of consolidating the principle into international commercial arbitration.

In order to assess the actual scope of an international arbitrator’s freedom in ascertaining and applying the law *sua sponte*, Chapter 4 shall present the existing arbitration legislation and case law of the four jurisdictions chosen for a more detailed examination in order to determine whether any procedural duties of an arbitrator may restrict the application of the *jura novit curia* principle in international arbitral proceedings. The said procedural duties are i) the duty to render a valid arbitral award, ii) the duty not to exceed one’s mandate and
iii) the duty to ensure due process is followed in the conduct of the arbitral proceedings. The assessment shall be conducted by comparing the results and determining whether there can be detected any common features between the case law of the four different jurisdictions in order to conclude on the possibility to determine the exact scope of application of the *jura novit curia* principle.

The final conclusions of the examination conducted in this Master’s Thesis shall be summarized in Chapter 5. The chapter shall also include general remarks and advice for an international arbitrator as regards the possibility of ascertaining and applying the substantive law *sua sponte* in rendering an arbitral award without risking its validity and by corollary the finality of the arbitral proceedings.
2. CONDUCT OF INTERNATIONAL ARBITRAL PROCEEDINGS – GENERAL FEATURES

An international arbitral tribunal may be required to apply a wide range of legal rules and principles including rules governing the jurisdiction of the arbitral tribunal, rules governing the procedure, conflict of law rules, rules governing the issues relevant to the solution of the merits of the dispute and rules governing the enforcement and recognition of the arbitral award. The question whether the principle of *jura novit curia* may be applied in international commercial arbitration is in its nature procedural. Thus, this chapter shall begin with an introduction into the leading theories of arbitration in order to continue with a discussion of some of the rules and principles regulating the conduct of international arbitral proceedings in order to proceed, in the following chapters, with an elaborate examination of the applicability and the scope of the principle in the field of international commercial arbitration. Lastly, analogy from court proceedings shall be examined as a possible legal source for determining the width of an arbitrator’s powers and duties in determining the contents of the applicable substantive law in order to make a decision on the disputed matter.

2.1 Leading Theories of Arbitration

The use of arbitration as a means of settling commercial disputes, although having existed for centuries, has significantly increased during the past few decades. As a consequence, the study of arbitration has motivated the suggestion of several theories pursuing an examination of the juridical nature of arbitration as an independent dispute resolution mechanism. Although lacking unanimous support amidst academic authors and arbitration practitioners, four leading theories have received most attention. The said theories are i) the contractual theory, ii) the autonomous (*sui juris*) theory, iii) the jurisdictional theory, and iv) the hybrid or mixed theory.

26 A thorough overview on the history of arbitration remains unwritten. For a shorter presentation see *e.g.* Born 2009, pp. 7–64.
According to the contractual school of thought, arbitration is understood as a form of contractual relations. It is regarded as depending for its existence and continuity on the parties’ agreement. The entire arbitration process, from the arbitration agreement to the arbitral award, is considered as being based on contractual arrangements. Supporters of this theory deny the primacy or control of the state in arbitration and argue that the very essence of arbitration lies in the fact that it is created by the will and consent of the parties. However, the contractual theory has been subject to criticism. Lew et al. argue that although it is true that the consensual nature of arbitration plays an instrumental role in the initiation of arbitration proceedings, once proceedings have commenced, the parties play only a limited role while the arbitral tribunal is empowered to make important decisions.

The ideas relating to the autonomous theory originated in 1965. This theory presumes that arbitration evolves in an emancipated regime emphasizing its autonomous character. The supporters of this view consider that arbitration can be determined, in fact and in law, by looking at its use and purpose. The autonomous theory looks into arbitration per se and recognizes that the relevant laws have developed to help to facilitate the smooth working of arbitration. It has been stated, however, that it remains unclear what doctrinal or practical consequences result from this theory.

On the basis of these two theories, the application of the principle of jura novit curia could not be ordered by the state, because the state does not, according to the supporters of both of these theories, have any influence on arbitration. Nevertheless, both the contractual and autonomous theories have been criticized for the fact that the intent and agreement of the parties cannot exist in a legal vacuum. The fact that national legislation evolves in interaction with the developments in practice is not in itself sufficient to exclude its effects.

The jurisdictional theory on the other hand takes the effect of national legislation into account. This theory relies on the state’s power to control and regulate arbitrations taking

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27 Born 2009, p. 185.
29 Lew, Mistelis, et al. 2003, p. 79.
32 Isele 2010, p. 18.
place within its jurisdiction. Parties are understood to be able to submit to arbitration only to the extent expressly allowed or implicitly accepted by the law of the place of arbitration, i.e. the *lex arbitri*. The jurisdictional theory views arbitrators as exercising a public function and consequently, the role of an arbitrator is considered quasi-judicial in its nature. Primary importance is therefore given to the role of national law while contemplating greater limits on the parties’ autonomy compared to the other three theories. Under this theory the principle of *jura novit curia* could be considered as imposing a duty on the arbitral tribunal, since it could be argued that due to the fact that the tribunal derives its authority by delegation from the state, the state can demand that arbitrators execute the state’s interests. Nevertheless, the jurisdictional theory has been criticized for the fact that it fails to take into account the reality of the consensual nature of arbitration.

All in all each of the mentioned theories fails to take into account the fact that arbitration has both contractual and jurisdictional features. The so-called hybrid or mixed theory aims at constituting a compromise in this respect. According to the hybrid theory private adjudication can exist without delegation from the state since the private adjudication process merely gains power when enforced by a state. In a nutshell, the private justice system is created by contract. The hybrid theory has become a dominant theory worldwide, as both contractual and jurisdictional elements are found in modern law and practice of international arbitration.

The divide of opinion in relation to the theoretical analysis of the legal nature of arbitration lies in the core of the academic debate on the subject of this thesis, i.e. the application of the *jura novit curia* principle in international commercial arbitration. The possibility of applying the principle in international commercial arbitration is also highlighted by a great inconsistency of opinion amidst academic authors and arbitration practitioners. The general divide of opinion observed in legal literature can roughly be divided into four subcategories, which shall be presented in more detail under Chapter 3 of this thesis; i) those who are against the application of the principle in international arbitration, ii) those who

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34 Born 2009, p. 186.
fully support its application with the view that the principle imposes a positive duty on the arbitrator, iii) those who find that the principle may be partially applied depending on the judicial nature of the applicable substantive law, and iv) those who find that the principle may be adapted with the specific characteristics of international arbitration by interpreting the principle in a more flexible manner as granting the arbitrator the authority to conduct independent research without imposing any obligations on the arbitral tribunal.

2.2 Applicable Texts and Principles

The topic of this thesis concerns the powers and duties of arbitrators in taking a proactive role in the conduct of the arbitration proceedings and applying the substantive law independently in order to resolve the disputed matter. The question of the applicability of the *jura novit curia* principle is procedural in its essence. Therefore, it is useful to begin with a brief presentation of the legal principles, rules, legislations and other materials which may affect the conduct of international arbitral proceedings.

2.2.1 Priority of Party Autonomy

Although the tendency of the evolution in international commercial arbitration has been to grant arbitrators greater procedural freedom and to favor flexibility in comparison to the strict procedural rules generally governing court proceedings\(^\text{38}\), the principle of party autonomy remains one of the cornerstones of international arbitration\(^\text{39}\). The consensual nature of commercial arbitration is highlighted by the fact that arbitrators derive their authority from the arbitration agreement between the disputing parties. Arbitration agreements may also sometimes specify what powers the arbitral tribunal shall have in fulfilling its duties.

It is universally agreed that the intent of the parties plays a leading role in determining the conduct of proceedings regardless of which law governs the arbitration. The parties may exercise their autonomy *e.g.* by including specific procedural rules in the arbitration

\(^{38}\) Mayer 1995, p. 165.

\(^{39}\) See *e.g.* Hobér 2001, p. 84; Waincymer 2011, p. 210.
agreement, by reference to institutional arbitration rules or in case ad hoc arbitration is preferred reference can be made to transnational arbitration rules.\textsuperscript{40} In the absence of express agreement between the parties on the procedure to be adopted, the general view is that the arbitration is subject to the arbitration legislation of the seat of the arbitration (“lex arbitri”)\textsuperscript{41}.

Despite the flexibility as to the variety of choice of applicable laws and rules dealing with arbitral proceedings, these do not tend to include detailed provisions on the specific procedures to be followed\textsuperscript{42}. Therefore, arbitrators are often left with a great deal of discretion in making decisions on the conduct of arbitral proceedings. Nevertheless, the principle of party autonomy must be acknowledged at all times when considering the scope of an international arbitrator’s ability to independently ascertain and apply the substantive law of a dispute. Any powers an arbitral tribunal may possess in deciding a dispute between the parties must not excessively restrict the fundamental principle of party autonomy.

2.2.2 Texts and Materials Guiding the Conduct of International Arbitral Proceedings

The selection of applicable arbitration rules and laws available for parties to choose from in relation to the conduct of international arbitral proceedings is extensive. In addition to being able to tailor the proceedings to suit their specific needs, the parties may opt to have their arbitration administered by an international arbitration institution (institutional arbitration) or arrange for the selection of arbitrators, the designation of rules, etc. themselves (ad hoc arbitration). The arbitral tribunal must then comply with the procedural rules determined by the applicable regulation. However, the arbitration laws of the seat of arbitration also play a considerable role even where the relevant lex arbitri has not been explicitly chosen to regulate the arbitral proceedings by the disputing parties or the arbitral tribunal.

\textsuperscript{40} Lew, Mistelis, et al. 2003, pp. 523–524.
\textsuperscript{41} See e.g. Redfern and Hunter 2004, p. 83; Kurkela 2003, p. 486.
\textsuperscript{42} See the following chapter.
A brief presentation of some of the applicable texts and materials shall be provided in the following chapters. These examples have been chosen due to their significance arising from their popularity of their use in international commercial arbitration or because they shall be further assessed in this thesis. The chosen examples do not represent an exhaustive list of the applicable texts within each category. A divide has also been made between rules and provisions which bind the arbitral tribunal and other materials which provide non-binding guidance to arbitrators.

### 2.2.2.1 Binding Texts

a) Institutional Arbitration Rules

Arbitration rules are issued by arbitration institutions. When the disputing parties agree on the use of the services provided by an arbitration institution, they simultaneously agree on the application of the institution’s arbitration rules. It is believed that there are currently approximately one hundred arbitration institutions having international significance.\(^{43}\)

The ICC was founded in Paris in 1919 and since 1923 it comprises an International Court of Arbitration\(^ {44}\). ICC Arbitration has been said to be the most widely used and accepted international arbitration institution\(^ {45}\), which was also confirmed in the study conducted by the School of International Arbitration in 2010\(^ {46}\). The current ICC Rules of Arbitration are in force as of 1 January 2012.\(^ {47}\) Although new innovations were introduced in the revised ICC Arbitration Rules\(^ {48}\), no significant changes were made to the content of the articles under review in this thesis.

Having been established in 1891 and formally inaugurated in 1892, the LCIA is the oldest arbitration institution and nowadays universally recognized as one of the world’s leading

\(^{43}\) Ovaska 2007, p. 281.

\(^{44}\) Poudret and Besson 2007, p. 72.

\(^{45}\) Lew, Mistelis, et al. 2003, p. 38.

\(^{46}\) 2010 International Arbitration Survey: Choices in International Arbitration, p. 3.


\(^{48}\) See e.g. Grierson and van Hooft 2012, pp. 5–22 for a more detailed presentation of the key innovations under the revised 2012 ICC Rules.
The latest version of the LCIA Arbitration Rules came into force on 1 January 1998. The LCIA Arbitration Rules are currently under review.\textsuperscript{50} The rules of arbitral institutions often remain silent on how the applicable substantive law of a dispute and its contents should be ascertained in international arbitration. The provisions are generally restricted to merely establishing that the tribunal shall apply the law or rules of law designated by the parties and where no such designation has been given, the tribunal shall apply the law it determines to be appropriate. However, under Article 22(1)(c) of the LCIA Rules the tribunal is granted with the power to \textit{sua sponte} ascertain the relevant facts and the law applicable, unless otherwise agreed by the parties. The arbitral tribunal must, nevertheless, provide the parties with “a reasonable opportunity to state their views”.

b) Transnational Arbitration Rules

The UNCITRAL Arbitration Rules were prepared under the auspices of the United Nations originally in response to an increasing need for a neutral set of arbitration rules suitable for use in \textit{ad hoc} arbitration.\textsuperscript{51} The UNCITRAL Arbitration Rules were approved on 28 April 1976 and their current revised version has been in effect since 15 August 2010.\textsuperscript{52} Although the UNICITRAL Arbitration Rules were developed in the auspices of the United Nations, they have a purely contractual status and apply only to arbitral proceedings if the disputing parties have agreed thereto in writing.\textsuperscript{53} Like institutional arbitration rules, the UNCITRAL Arbitration Rules remain equally silent as to guiding arbitrators in ascertaining and applying the law.

\textsuperscript{49} Ovaska 2007, p. 297.
\textsuperscript{50} http://www.lcia.org/Default.aspx [Last entry 19.8.2013].
\textsuperscript{53} Poudret and Besson 2007, p. 71.
c) Transnational Arbitration Laws

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 has been described as the most important international treaty relating to international commercial arbitration. Its primary objective is to deal with the recognition and enforcement of foreign arbitral awards by obliging parties to ensure that non-domestic arbitral awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. Due to the New York Convention an arbitral award is recognized and enforced in most countries of the world and has thus contributed significantly to the success of international arbitration as a means of commercial dispute resolution. The New York Convention was signed in 1958 and entered into force on 7 June 1959. As its title indicates, the New York Convention governs the recognition and enforcement of foreign arbitral awards and does not, hence, include any specific provisions regarding the conduct of the arbitral proceedings. However, the grounds for enforceability are similar to the grounds of invalidity contained in the UNCITRAL Model Law.

The UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter “the 1985 UNCITRAL Model Law” or “the Model Law”) was designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. The Model Law covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award. The latest amendments were adopted by UNCITRAL on 7 July 2006. The Model Law contains rules, which are universally recognized in the practice of international commercial arbitration and even legislatures that have decided not to adopt it as such cannot entirely ignore its guiding effect.

54 Redfern and Hunter 2004, p. 69.
56 Following UNCITRAL Secretariat’s current status information, the New York Convention has been signed and entered into force in 148 countries, including all the countries studied in this thesis. The status information can be found in http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Last entry 19.8.2013].
58 Poudret and Besson 2007, p. 67.
Arbitration necessarily takes place within the framework of a legal system. In most cases, in default of an agreement between the parties, this framework is defined, according to the generally accepted view, by the national arbitration law of the seat of the arbitration (lex arbitri). However, most national arbitration laws do not contain detailed guidance in relation to the arbitration procedure. Guidance on the matter is practically non-existent. Therefore, in absence of express party agreement, most arbitration laws grant arbitral tribunals a wide discretion in determining how to conduct the arbitral proceedings. Generally, national arbitration laws merely state general conflict of law rules, determine the law applicable to the merits and contain general rules on the conduct of proceedings.

Moreover, national arbitration laws do not generally include provisions empowering arbitrators to take initiatives in ascertaining the contents of the applicable substantive law in international arbitration. However, an exception is notably provided in section 34(1) of the 1996 English Arbitration Act, under which the tribunal shall decide all procedural and evidential matters, subject to the parties agreeing to the contrary. Under section 34(1)(2)(g) of the Act “procedural and evidential matters include […] whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law”. Thus, the English Arbitration Act expressly recognizes the possibility for the arbitral tribunal to decide whether it should take initiative in ascertaining the contents of the applicable law. Under the wording of section 34(1)(2)(g) of the Act, the disputing parties are primarily vested with the freedom to provide for the application of the principle of jura novit curia because in absence of party agreement discretion is granted to the tribunal itself.

While the rules governing the conduct of the arbitral proceedings, irrespective of whether they are institutional or transnational arbitration rules or whether they provide from the provisions of the applicable lex arbitri, are considered as the norms applicable to the procedure to be followed before the arbitrators, the lex arbitri has in fact a wider scope of application because it governs the arbitration as a whole. In other words, the importance of the lex arbitri is not limited to the fact whether or not the applicable national arbitration law applies to the actual arbitral proceedings. The lex arbitri has also bearing e.g. on the

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59 Poudret and Besson 2007, p. 37.
60 Kaufmann-Kohler 2005, p. 634.
relationship between an arbitral tribunal and the courts, specifically on the challenge proceedings available before these courts. Thus, the *lex arbitri* deals with the control by the courts of arbitrators’ activities in addition to containing rules applicable to arbitral proceedings.\(^{61}\)

Therefore, the importance of the *lex arbitri* may be considered as being twofold. Even where specific institutional, transnational or other arbitration rules have been explicitly chosen to govern the arbitral proceedings by the parties, the provisions of the *lex arbitri* govern the validity of the arbitral award, *i.e.* the decision of the arbitral tribunal may be challenged before the courts where the arbitrators have not conducted the arbitral proceedings also in accordance with the mandatory fundamental principles of the applicable *lex arbitri*. These principles shall be further discussed below in Chapter 2.2.3.

### 2.2.2.2 Non-Binding Texts

The fact that the applicable arbitration laws and rules provide no detailed guidance on how arbitrators should conduct arbitral proceedings and more specifically on the role of arbitrators in relation to the ascertaining and applying the substantive law *sua sponte*, no uniform practice has developed in the field of international arbitration\(^{62}\). The lack of a homogenous practice does not promote harmonization of international commercial arbitration and thus the lacuna in the existing arbitration laws and rules has been subject to attempts of being remedied with non-binding texts and materials. Recent attempts of providing arbitrators with non-binding guidance on the conduct of international commercial arbitral proceedings include the report of the ILA approved in 2008 and the compilation of existing case law on the 1985 UNCITRAL Model Law provided by the United Nations Commission of International Trade issued in 2012.

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\(^{61}\) Poudret and Besson 2007, p. 458.  
\(^{62}\) Kaufmann-Kohler 2005, p. 635.
a) ILA’s Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration of 2008

The ILA’s Committee on International Commercial Arbitration (hereinafter “the ILA Committee” or “Committee”) was set up to study the applicability of the principle of *jura novit curia* at the ILA’s 72nd conference in 2006 and in August 2008 the Committee’s Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (hereinafter ”the 2008 ILA Report”) was approved by the ILA at the 73rd conference held in Rio de Janeiro.

The 2008 ILA Report includes 15 recommendations on how arbitrators ought to approach the question of ascertaining the contents of the applicable law in international commercial arbitration. The recommendations are not legally binding hence arbitrators will not be sanctioned if they decide not to follow them. In other words, the recommendations merely aim to provide non-binding guidance on the question, which has not been dealt with in national arbitration laws or other rules on the conduct of international arbitral proceedings. The 2008 ILA Report is thus aimed at providing non-binding guidance to *inter alia* arbitrators and practitioners and shall thus be taken into consideration in the assessment conducted in this thesis.

b) UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration of 2012

The UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (hereinafter “the 2012 UNCITRAL Case Digest”) published in 2012 is a presentation of case law rendered in jurisdictions having enacted the UNCITRAL Model Law on International Commercial Arbitration of 1985. The UNICTRAL Case Digest contains information on cases collected in the CLOUT\(^63\) and is aimed at promoting a uniform interpretation and application of the 1985 UNCITRAL Model Law. The 2012

\(^63\) *i.e.* Case Law on UNCITRAL Texts; a system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL’s Conventions and Model Law that has been established by the UNCITRAL Secretariat. The system is aimed at promoting international awareness of the legal texts formulated by UNICTRAL and to facilitate uniform interpretation and application of those texts; available at [http://www.uncitral.org/uncitral/en/case_law.html](http://www.uncitral.org/uncitral/en/case_law.html) [Last entry 19.8.2013].
UNCITRAL Case Digest is, therefore, meant to help *inter alia* judges, arbitrators, practitioners and academics use more efficiently the case law relating to the Model Law.

### 2.2.2.3 Relevance of the *Lex Arbitri* to the Validity of the Arbitral Award

It has been argued that since an international arbitral tribunal has no nationality it needs to establish its own rules for determining the content of the applicable law. Where the parties have not agreed on the process to be followed, arbitral tribunals have the flexibility to fix the arbitration procedure as they deem appropriate. However, the practices and prejudices of national systems continue to have an important impact on arbitral proceedings. As already mentioned, in the absence of party agreement on the process to be followed, the arbitral proceedings are, in accordance with the territoriality principle, generally governed by the arbitration law of the place in which the tribunal has its seat.

Moreover, even if the parties have opted for the application of *e.g.* institutional arbitration rules, the *lex arbitri* remains relevant in the context of *inter alia* the validity of the arbitral award because the losing party may challenge the validity of the arbitral award before the national court of the state where the award has been rendered. The national courts of the seat of the arbitration have, therefore, the chance of controlling the validity of the award based on their national arbitration law. The list of grounds upon which a national court may declare an arbitral award invalid varies between states. For example in England judges have relatively wide powers and may verify the arbitral tribunal’s application of the law, but in most European jurisdictions the exhaustive lists of invalidity grounds broadly coincide with the list of grounds contained in article 34 of the 1985 UNCITRAL Model Law.

Hence, while international arbitration is primarily based on party autonomy due to its consensual nature and although it is widely affected by international sources, which aim to

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64 Lew 2010, pp. 7 and 10.
65 Some states allow the parties to derogate from the territoriality principle; see *e.g.* article 182(1) of the Swiss FPILA and article 1494 of the French Civil Procedure Code. However, it has been said that the choice of a foreign procedural law is “extremely unusual (and often ill-advised)”; see Born 2009, p. 1310.
66 It should be noted the possibility of setting aside an award for error in law has been significantly restricted by the 1996 English Arbitration Act.
67 Cordero-Moss 2013, pp. 16–17.
provide a uniform legal framework, national arbitration laws continue to have significant relevance in respect of the validity of the arbitral award.\textsuperscript{68} Thus, Chapter 4 of this thesis shall be dedicated to examining the contents of international and national sources in relation to the mentioned invalidity grounds in order to trace the bounds of the scope of the arbitral tribunal’s freedom in managing international arbitral proceedings.

\textbf{2.2.3 Principles Affecting the Conduct of International Arbitral Proceedings}

As explained above in Chapter 2.2.2.1.d), the disputing parties and the arbitrators cannot avoid the applicable \textit{lex arbitri}, \textit{i.e.} the law of governing the seat of the arbitration. They can merely select the seat of the arbitration and thus indirectly choose the applicable \textit{lex arbitri} and be granted the autonomy which the said law allows them. In other words, the mandatory provisions of the applicable \textit{lex arbitri} set the ultimate bounds to party autonomy and to the arbitral tribunal’s discretion also in relation to the conduct of the arbitral proceedings. However, although arbitrators are normally advised to seek the parties’ approval on how the arbitration proceedings should be conducted, agreement is rarely reached once a dispute has arisen\textsuperscript{69}. The arbitral tribunal will normally, therefore, be left with a wide discretion in relation to fixing the arbitration procedure in the manner it considers most appropriate.

Notwithstanding the nationality of the parties and the applicable substantive law of the dispute, arbitral proceedings are governed by specific principles that have developed along with the evolution of international arbitration. The said principles have been approved in various bilateral arbitration treaties and codified in numerous multilateral conventions, model laws and model rules both in the rules of international organizations and institutions in a way that they are nowadays considered generally applicable in international arbitration, unless the parties have expressly agreed to the contrary.\textsuperscript{70}

\textsuperscript{68} Cordero-Moss 2013, p. 39.
\textsuperscript{69} Lew, Mistelis, et al. 2003, pp. 524–525.
\textsuperscript{70} Pietrowski 2006, p. 374.
2.2.3.1 *Jura Novit Curia* Principle

The topic of this thesis refers to a principle of procedural law under which the parties are not required to prove the content of the law before national courts. It literally translates to “the judge knows the law”, but the definitions of the principle are manifold. *Jura novit curia* derives from another Latin maxim “*da mihi facto, dabo tibi ius*”, which translates to “give me the facts and I will give you the law” meaning that the court, while relying upon the parties to provide the facts, may consider and apply laws beyond the legal arguments or reasoning submitted by the parties. The principle emerged from the ideology that law is something definite and certain which does not require proof. In this sense law could be applied correctly since it constitutes an objective standard that treats like circumstances alike. By acknowledging the application of the *jura novit curia* principle, states authorize domestic judges to go beyond the legal submissions of the parties in order to come to a correct application of the law.

In its strictest sense, the principle imposes a duty upon the judge to know the law and to dispose of the case accordingly in addition to a burden upon a judge to educate himself on the unfamiliar contents of law. However, regardless of the diversity of the principle’s definitions, the common conception is that *jura novit curia* allows the court to base its decision on legal reasons that have not necessarily been advanced by the parties. The principle, in other words, empowers the courts to qualify the issues in a manner departing from that proposed by the parties. The definition of the *jura novit curia* principle adopted in this thesis follows the reasoning of Chainais, who states that the literal translation of the principle is illusionary as it revolves around the assumption that the judge, or the arbitrator, knows the law. In fact, the definition supported by the author is subtler as it is perceived as describing that the mission of the judge is to observe that the law is followed. Consequently, since the judge has the means of ascertaining the law, the parties would not

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71 Wobeser 2011, p. 207.
72 See *e.g.* Brooker 2005 who scrutinises seven definitions of *jura novit curia* and analyses its status in French law and legal culture.
73 Jones 2012, p. 110.
74 Isele 2010, pp. 16–17.
75 Jones 2012, p. 110.
76 See *e.g.* Alberti 2011, p. 5; Knuts 2012, p. 670; Landolt 2012, p. 182.
77 Kurkela 2003, p. 489.
be required to prove it. An extension of the principle could in that case be found in the maxim "*da mihi factum, dabo tibi ius*".\(^{78}\)

The multiple nuances of the meaning of *jura novit curia* lie at the centre of the debate on the topic of its effect in international arbitration, particularly, whether the principle ought to be comprehended as imposing an obligation to ascertain the contents of the applicable substantive law on the arbitral tribunal or as merely enabling the arbitral tribunal to do so. The fact that the principle appears to have been rejected in common law jurisdictions which apply the “adversarial” trial method, as opposed to the “inquisitorial” trial method applied in civil law jurisdictions has also contributed to the divergence of opinions of legal authors and practitioners on the subject. The differences between common law and civil law jurisdictions shall be more thoroughly discussed below in Chapter 2.3.1.

### 2.2.3.2 Fundamental Principles of Arbitration

Although arbitral proceedings are not usually specifically regulated by arbitration rules or by arbitration laws, the validity and enforcement of arbitral awards are. Moreover, the mandatory fundamental principles arising from the applicable *lex arbitri* do indeed have an important effect on the conduct of the arbitral proceedings. Some of these principles are so fundamental that arbitration rules and laws may even sanction their violation.\(^{79}\)

a) *Ne Ultra Petita* - Excess of Power

Due to the legal nature of arbitration, an arbitral award is not legally valid if basic principles of law have been breached. Hence, arbitrators are bound by the principles of law applicable to the dispute, which may arise from the terms of agreement of the mandate to arbitrate, the applicable substantive law and the applicable *lex arbitri*. Arbitrators are thus generally bound by the limits of their mandate as well as the principle of due process in the use of their discretion relating to ascertaining and applying the law on their own initiative.\(^{80}\)

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\(^{78}\) Chainais 2010, pp. 11–12.

\(^{79}\) Cordero-Moss 2006, p. 11.

\(^{80}\) Kurkela and Uoti 1995, pp. 3–5.
Most arbitration rules and legislations provide for the setting aside of an arbitral award in a situation where an arbitrator has not complied with his mission. The mission of an arbitrator defines his powers and his duties, so this ground for setting an award aside has a wide scope in addition to being raised quite frequently in practice.\(^1\) The arbitrator will be considered as having exceeded his mission when he has decided *ultra* or *extra petita*, *i.e.* going beyond or exceeding the parties’ claims or prayers for relief. For example, if the award goes beyond the factual scope of the dispute as agreed upon the parties, it exceeds the power granted to the arbitral tribunal. As such, the arbitral award may be held invalid.

\(^1\) Poudret and Besson 2007, p. 741.

\(^2\) Luttrell 2009, p. 2.


\(b\) *Due Process*

Modern principles of procedural fairness derive from two maxims of law. Under the first one every man has a right to an impartial and independent adjudicator deriving from the maxim that no man may be a judge in his own cause ("*nemo judex in sua causa*")) and the second one provides that no man shall be condemned unheard ("*audi alteram partem*"). Observing the first maxim requires that only an arbitrator who has no significant interest in the cause and no preference with respect to the disputing parties may sit in determination of it. Abiding by the second one presumes that the arbitrator must recognize the parties’ right to be heard, to present evidence, to make submissions and more generally to confront one’s accusers.\(^2\) The two key elements of due process are i) the obligation to treat the parties equally and ii) to give each an adequate opportunity to present its case. In some jurisdictions such as France the notion of due process includes the right of each party to be given a reasonable opportunity of putting its case (*audi alteram partem*) in addition to dealing with that of its opponent (“principle of contradiction”).\(^3\)

An arbitral award may not be based on a question of law that the parties have not invoked or discussed during the arbitral proceedings, if this would deprive the parties of their right to be heard. Moreover, if the parties are not given an opportunity to present evidence on
questions of law which affect the outcome of the dispute, the parties may be considered as not having been granted an opportunity to present their case.  

2.2.3.3 Procedural Principles of Arbitration

The speed and practicality of arbitral proceedings are considered as a few of the main advantages of commercial arbitration as a dispute resolution mechanism. The fact that an arbitral award is final means that a dispute can be settled very promptly in comparison with court proceedings which allow appeals to the decisions of lower courts and thus resulting in the prolongation of solving commercial disputes. In addition, the fact that the disputing parties are free to choose the arbitrators enables a choice of expertise in relation to the constitution of the arbitral tribunal.

There is also a cost aspect in arbitration, which does not apply in civil litigations. An arbitral tribunal must take issues relating to the costs of proceedings into account as the parties cover the costs of the arbitral proceedings. This may become relevant in examining the applicability of the *jura novit curia* principle in international arbitration since whenever the arbitral tribunal is under a heavier duty to research and ascertain the content of unfamiliar substantive law the costs of arbitration may increase.

These procedural principles are usually also provided for in arbitration laws and rules. For example under section 33(1)(b) of the 1996 English Arbitration Act an arbitral tribunal is to “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.” A similar provision is contained for example in section 27(1) of the Finnish Arbitration Act (967/1992) under which “the arbitral tribunal shall promote an appropriate and speedy settlement of the matter”.

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84 Möller 1997, p. 52.
85 Jones 2012, p. 113.
2.3 Analogy From Court Proceedings

Some legal authors have suggested the possibility of considering analogy from court proceedings as a possible legal basis for the application of the principle of *jura novit curia* in international commercial arbitration. This would by corollary imply the appropriateness of civil proceedings having a directional effect on arbitral proceedings. On the other hand, the effect of the analogy could also be considered to be limited because of the fundamental differences between civil proceedings and arbitral proceedings. This chapter shall provide a brief examination of the principle’s effect within court proceedings in the different states chosen for comparison and present some of the main differences between civil law and common law jurisdictions in order to assess whether analogy from court proceedings can be considered as providing appropriate direction on how to conduct arbitral proceedings.

2.3.1 Divergences Between Common Law and Civil Law Systems

The common law and civil law systems are the two most widespread legal systems in the world. The common law system is in use in most English-speaking countries, whereas the civil law system is in use in Continental Europe and the countries around the world influenced by Continental Europe (*e.g.* Japan, most of Africa and all of Latin America). The two legal systems differ significantly in how a dispute is commenced, developed and presented which highlights the importance of the differences in the area of international arbitration.\(^86\)

Civil procedure in civil law countries follows the so-called inquisitorial model, according to which the court plays a proactive role remaining actively involved in the management of the case during the proceedings.\(^87\) It is generally considered in civil law jurisdictions that justice can be better served by granting the courts inquisitorial power to search the truth. This view is based on the presumption that the courts are in the best position to apply the law correctly and in its entirety while parties may present the law in a partisan manner or even deliberately not advance the full scope of the applicable law *e.g.* if it includes


\(^{87}\) Lörcher, Pendell, *et al.* 2012, p. 22.
unfavorable aspects. Civil law jurisdictions consider the *lex causae* in court proceedings a matter of law and not of fact, which means that a judge is required to educate himself on its contents (this requirement can also be referred to as “the burden of education”). In other words, the principle of *jury novit curia* is generally accepted in court litigation within civil law systems.

The law in common law countries consists of a mixture of common law and legislation. Proceedings in common law courts may be described as “adversarial” as against the “inquisitorial” system normally referred to in civil law countries. In common law proceedings the parties are fully in charge of preparing the case for trial and have also the main role at trial. Judges in common law systems have been described to traditionally take the role of a “passive umpire in a match between two opposing parties”. In common law jurisdictions the *lex causae* is considered a fact rather than law and the parties are required to prove its contents. Therefore, the principle of *jury novit curia* does not apply and the court does not conduct investigations beyond the parties’ submissions.

However, international arbitration is not easily classified as belonging to the civil law or common law system. The flexible nature of arbitration entails the possibility to adapt the procedure to the individual circumstances of the case. Thus, arbitration allows the parties and the arbitral tribunal to tailor the proceedings to the circumstances of the individual case and e.g. combining procedural aspects from both legal systems. Moreover, even if such classification were possible, as it shall be further discussed below in the following chapters, the arbitration law within Europe that mostly represents the common law systems, *i.e.* English law, does not reflect an adversarial approach in the strict sense. The 1996 English Arbitration Act does not seem to be substantially different from the approach taken in civil law countries.

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89 See *e.g.* Kurkela 2003 for additional information on the burden of education in international arbitration.
91 Knuts 2012, p. 672.
93 Cordero-Moss 2006, p.15.
2.3.2 Court Approaches to Ascertaining and Applying the Law

It has been suggested that the question whether an arbitral tribunal has the authority to apply the *jura novit curia* principle, depends on the legal culture of arbitrators and whether the arbitrators perceive the question of *lex causae* as a matter of law or of fact\(^94\). It shall be briefly presented below how judges in the four European countries ascertain and apply the law in national court proceedings. The objective is to point out the main differences in the attitudes of judges, *i.e.* the effects of the *jura novit curia* principle, within the chosen jurisdictions, in relation to the application of national and foreign law, in order to pursue with a discussion of the possible influence of the analogy from court proceedings on international arbitral proceedings in Chapter 2.3.3.

a) England

In English law it is generally the parties’ responsibility to obtain the evidence to support their contestations. The court will not undertake this task itself. Nevertheless, English judges generally undertake an assisting role with respect to the parties’ responsibility of obtaining evidence on the contents of the law *e.g.* by making orders for disclosure of documents, requests for further information, disclosure of witnesses’ statements and experts’ reports and the attendance of witnesses.\(^95\)

English courts will not normally conduct their own researches into foreign law.\(^96\) A party who wishes to rely on foreign law must generally plead the foreign rule and establish it by evidence.\(^97\) If the contents of foreign law are not established, either by evidence or by other means, the court will normally apply English law instead.\(^98\) However, the court may in some instances, where it has not had evidence of witnesses to assist it, be willing to

\(^{94}\) See *e.g.* Knuts 2012, p. 670–671.
\(^{95}\) Layton and Mercer 2004 Vol. 1, p. 164.
\(^{97}\) However, in the exceptional case where the foreign rule is admitted, the party will not be required to establish it by evidence. In these situations foreign law will be treated as a question of fact but the courts will have recognised it as “a question of fact of a peculiar kind”. For further information see Layton and Mercer 2004 Vol. 1, p. 213.
investigate foreign law, although it will normally do so only with the agreement of the parties.99

It should be noted that in some cases English courts appear to have considered foreign law without it having been proved in evidence100, although English judges are under no obligation to ascertain and apply foreign law independently and normally are hesitant to do so.101 Hence, although foreign law is considered to be a fact, thus being primarily the responsibility of the parties to obtain the evidence of it, the courts seem to reserve the possibility of researching it independently in certain exceptional circumstances. The differences between the attitudes of English and French courts with respect to this matter seem rather remote in practice.

b) Finland

In Finland, the principle of *jura novit curia* finds statutory expression in the Finnish Code of Judicial Procedure (4/1734), under which parties are not required to present evidence on the contents of the law102.

As regards foreign law, it is mainly for the parties to provide the court with evidence on its contents in cases where its application arises. Thus, if the court does not know the contents of the law of a foreign state, it “shall exhort the party to present evidence on the same”, unless it it specifically provided in a given case that the court is to obtain itself information on the contents of the foreign law applicable in the case. If in a given case foreign law should apply but no information is available on its contents, Finnish law is applied instead.103

100 *Re Cohn* [1945] Ch. 5.
102 Chapter 17:3 of the Finnish Code of Judicial Procedure as amended by statute 29.7.1948/571.
103 Chapter 17:3.3 as amended by statute 6.3.1998/165.
c) France

In France the principle of *jura novit curia* is considered as an integral part of French procedural law\(^{104}\). Under the French Code of Civil Procedure, “the judge settles the dispute in accordance with the rules of law applicable thereto”\(^{105}\). The judge “must give or restore their proper legal definitions to the disputed facts and legal acts notwithstanding the denominations given by the parties”\(^{106}\). However, the judge “may not change the denomination or legal ground where the parties, pursuant to an express agreement and in the exercise of such rights that they may freely alienate, have bound him with legal definitions and legal arguments to which they intend to restrict their debate”\(^{107}\).

The wording of the said provisions has been interpreted by the French highest civil court ("cour de cassation") in *M. Denis X. v. Carteret automobiles*\(^{108}\), as meaning that although French judges have an obligation to give the disputed facts and legal acts their exact qualification without being bound by the denominations proposed by the parties, they merely have the authority to *ex officio* change the legal basis ("moyen de droit") invoked by the parties\(^{109}\). The parties may, nevertheless, be involved in the ascertainment of the applicable law, as the judge has the power to invite the parties to furnish explanations on the legal arguments deemed necessary for the resolution of the dispute\(^{110}\).

As regards the application of foreign law, it has now been settled by the *cour de cassation* that the judge is under a duty to ascertain and apply it. Foreign law was for a long time regarded as fact\(^{111}\), which the judge had the power to apply\(^{112}\) until the *cour de cassation*

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\(^{104}\) Mayer 1995, p. 178.

\(^{105}\) Article 12 (1) of the French Code of Civil Procedure : "**Le juge tranche le litige conformément aux règles de droit qui lui sont applicables.**" [Translation from Legifrance].

\(^{106}\) Article 12 (2) of the French Code of Civil Procedure : "**Il droit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s’arrêter à la dénomination que les parties en auraient proposés.**" [Translation from Legifrance].

\(^{107}\) Article 12 (3) of the French Code of Civil Procedure ; "**Toutefois, il ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d’un accord exprès et pour les droit dont elles ont la libre disposition, l’ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat.**" [Translation from Legifrance].


\(^{109}\) "**Mais attendu que si, parmi les principes directeurs du procès, l’article 12 du nouveau code de procédure civile oblige le juge à donner ou restituer leur exacte qualification aux faits et actes litigieux invoqués par les parties au soutien de leurs prétentions, il ne lui fait pas obligation, sauf règles particulières, de changer la dénomination ou le fondement juridique de leurs demandes [...]**".

\(^{110}\) Article 13 of the French Code of Civil Procedure.

\(^{111}\) Bisbal, Cass. 1er Ch. Civ., 12 May 1959.

\(^{112}\) Compagnie algérienne de crédit et de banque v. Chemouny, Cass. 1er Ch. Civ., 2 March 1960.
reversed its approach and ruled that foreign law must be applied *ex officio*\(^{113}\). However, in 1990 the *cour de cassation* redefined its position by ruling that the judge is not under a duty to apply foreign law *ex officio* apart from two situations: i) the judge is under a duty to apply *ex officio* mandatory provisions of law (*i.e.* in matters which the parties did not have free disposition of their rights) and ii) the judge is under a duty to ascertain and apply *ex officio* provisions arising from foreign treaties and conventions\(^{114}\). The current position was established 1999 when the *cour de cassation* held that judges are under a duty to ascertain and apply *ex officio* only mandatory provisions of foreign law\(^{115}\). As regards non-mandatory provisions of foreign law, the judge has merely the authority to do so.

Therefore, it the parties do not submit evidence of foreign law, the court may only apply French law in matters where the parties have a free choice of law, or if French choice of law rules do not provide for the applicability of some other law. Where the court is under a duty to apply foreign law or when it decides to apply it on its own motion, it may require the assistance of the parties or take judicial notice of foreign law or appoint an expert\(^{116}\).

d) Switzerland

Swiss law imposes an affirmative duty on the judge to independently ascertain and apply both national and foreign law. Under the Swiss Code of Civil Procedure of 19 December 2008\(^{117}\) the courts apply the law *ex officio*\(^{118}\) within the limits of the parties’ claims\(^{119}\).

Foreign law is also considered a question of law and not of fact. In Switzerland, international private law civil procedural issues are governed by the Swiss Federal Private International Law Act of 18 December 1987\(^{120}\) (hereinafter “the Swiss FPILA”), which provides expressly that judges must also ascertain foreign law *ex officio*\(^{121}\). However, the judge may ask for the parties to collaborate in the said task of the judge. Similarly to


\(^{114}\) Coveco, Cass. Civ. 1re, 4 December 1990.


\(^{118}\) Article 57 of the Swiss Code.

\(^{119}\) Article 58 of the Swiss Code.

\(^{120}\) Loi fédérale du 18 décembre 1987 sur le droit international privé, RO 1988 1776, RS 291.

\(^{121}\) Article 16 (1) of the Federal Private International Law Act.
Finnish law, if the applicable foreign law cannot be ascertained the courts shall instead apply Swiss law.\textsuperscript{122}

\subsection*{2.3.3 Ambiguous Utility of the Analogy}

As presented above, the principle of \textit{jura novit curia} in respect of court proceedings concerns the ascertainment and application of both domestic and foreign law. When examining the principle’s application in arbitral proceedings, analogy from court proceedings proves out problematic. In order to consider the principle’s effect by analogy it must first be determined whether the approach of national procedure to domestic or to foreign law is relevant in order to successfully conduct a comparison with international arbitration.

An international arbitrator often finds himself seated in a neutral country with the task of applying a law other than that of the legal system in which he himself is qualified.\textsuperscript{123} In other words, an international arbitral tribunal has no \textit{lex fori}, as does a national court, and hence no foreign law either.\textsuperscript{124} Therefore, the question as to whether an arbitral tribunal is free to establish and assess the contents of the law arises with respect to any law as opposed to only foreign law, which is the situation with courts. Thus, the effect of the principle of \textit{jura novit curia} would, in international arbitration, not cover merely foreign law but clearly any law.\textsuperscript{125}

Lew also supports the view under which an international arbitral tribunal has no nationality, hence no \textit{lex fori}. The author argues that notwithstanding whether the arbitration is institutional or \textit{ad hoc}, whether the rules applied in the proceedings are chosen expressly by the parties or applied by default, the manner in which the seat of the arbitration may have been fixed, \textit{i.e.} by the parties or an institution, and who the arbitrators may be (nationality, origins, experience or expertise), the arbitral tribunal will not be ascribed a specific nationality.\textsuperscript{126}

\begin{thebibliography}{99}
\bibitem{122} Article 16 (2) of the Federal Private International Law Act.
\bibitem{123} Mayer 2001, p. 238.
\bibitem{124} Mayer 2001, p. 238.
\bibitem{125} See \textit{e.g.} Kaufmann-Kohler 2003, p. 1331; Bensaude 2009, p. 450.
\bibitem{126} Giovannini 2010, p. 497.
\bibitem{127} Lew 2010, p. 7.
\end{thebibliography}
The different treatment of foreign law in national court proceedings is based on the fact that the national court has a forum law that it is deemed to know. It could thus be argued that an arbitral tribunal is always in the position of applying a foreign law, but as Isele points out this would entail that the exception in national jurisdictions would become the rule in international arbitration. On the other hand, since there are no *lex fori* and *lex causae* in international arbitration it could thus be argued, by corollary, that international arbitrators apply any law as if it were their own.\(^{127}\)

These differences do in fact strongly indicate towards a limited effect of the analogy from court proceedings in relation to the ascertainment and application of the substantive law in international arbitration. However, it should be noted that although it might be suggested that an international arbitral tribunal cannot be considered having a *lex fori*, it cannot be argued that the *lex arbitri*, *i.e.* the law of the seat of arbitration, would not have any impact on the arbitral proceedings. The significant impact of the applicable *lex arbitri* on the outcome of the arbitral proceedings shall be further examined in Chapter 4.

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\(^{127}\) Wetter 1985, p. 25.
3. ARBITRATOR’S ROLE IN ASCERTAINING AND APPLYING THE LAW

The *jura novit curia* principle has recently been a popular topic of discussion in legal literature and arbitration conferences *inter alia*. Its effect within international commercial arbitration has been much debated and the general opinion can roughly be divided between those who support its application, whether as imposing a duty or merely granting an authority, and those who do not welcome its application.

This chapter shall describe the current situation of conflicting opinions in addition to examining the legal parameters of an arbitral tribunal’s flexibility in respect of its substantive case management powers. The aim is to provide a comprehensive summary of the debate on the issue and to come to a reasoned conclusion on whether an international arbitrator may have the obligation or the authority to ascertain and apply the law on its own initiative or whether the burden of proving the contents of the law lies entirely on the disputing parties and their respective counsel.

3.1 Lack of Consensus in Legal Literature

3.1.1 Arguments Against Application of the Principle

The view shared by some legal authors that the *jura novit curia* principle has no room in international arbitration\(^{128}\) goes in line with the contractual theory of arbitration, as it does not recognize the possibility of a state mandating the application of the principle which is considered inadaptable with the consensual nature of arbitration. Objections to the application of the principle are often based on the differences between the nature of civil and arbitral proceedings. It has been argued that since the principle is a component of civil procedure and since civil procedure rules do not usually apply to international arbitration, arbitrators’ powers to take initiatives in matters of law cannot derive from the *jura novit curia* principle.\(^ {129}\)


\(^{129}\) Landolt 2012, pp. 184–186.
The ILA’s Committee reached a similar conclusion in the 2008 ILA Report. Recommendation 6 of the ILA Resolution No. 6/2008 states that arbitrators should not, in general, introduce legal issues that the parties have not raised. The 2008 ILA Report points out two main differences between international arbitral proceedings and national court proceedings that obstruct the possibility of applying the principle in international commercial arbitration. Firstly, the 2008 ILA Report highlights the differences between national legal systems themselves, as discussed above in Chapter 2.3.2, as an obstacle for the characterization of a universally applicable principle or a uniform practice that could be interpreted as guidance in relation to arbitral proceedings. Secondly, the fundamental differences between the position and the role of arbitrators compared to those of national and international judges also suggest towards limited relevancy of the analogy.\(^\text{130}\)

The mission of an arbitrator compared to that of a judge has been said to be much more ambiguous.\(^\text{131}\) The differences between the two roles relate *inter alia* to the fact that the judge has a duty of upholding the law resulting from being entrusted the task of rendering justice by the state. The judge owes a duty, as an organ of the state, to ensure that the law is applied correctly. An arbitrator, on the other hand, is appointed by the parties and is not part of a state’s legal system. The arbitrator owes a duty to the disputing parties to settle the dispute between them. Moreover, there exists no efficient mechanism, similar to the appeal procedure of national courts, to ensure the correct application of the law by an arbitral tribunal.\(^\text{132}\) Some authors argue that arbitrators have no legal duty to find the correct solution in a dispute, which is why they should settle the dispute solely based on arguments and evidence presented by the parties.\(^\text{133}\)

In addition, there are practical arguments against the application of the *jura novit curia* principle in international arbitral proceedings that relate to the fact that an arbitrator does not share the same resources as domestic judges do in conducting research on the applicable substantive law which could be argued to restrain arbitrators from independently ascertaining and applying the law. Moreover, the arbitral tribunal does not

\(^{130}\) ILA Report 2008, p. 12; see also Landolt 2012, pp. 184–186.


\(^{132}\) Ibid., pp. 236–237.

\(^{133}\) Hobêr 2011, p. 244.
have a forum law to fall back on if the contents of the applicable substantive law were unable to be ascertained as domestic courts do in practice as examined in Chapter 2.3.2.  

On the other hand, it has been pointed out that international arbitration panels are often better placed and more experienced than courts of law in dealing with disputes where different laws are applicable as, especially as regards panels constituted of three arbitrators, the members might be of the states of which the laws are applicable. Thus, the parties are free to choose the most suitable arbitrators to settle their dispute and in case they do not wish for the arbitrators to decide as amiable compositeur, they are free to choose at least one person who knows the applicable substantive law well.

Some authors also point out that independent research on the contents of the applicable law may increase costs, which in arbitral proceedings are borne by the parties and not by the state. Hence, it has been argued that arbitrators should refrain from conducting independent research and instead ought to base their decision on the law as presented by the parties during the arbitral proceedings. Landolt argues that arbitrator initiatives to obtain inter alia legal evidence will add to cost and time in the arbitration, unless it is clear from the beginning of the proceedings that arbitrators will bear the primary responsibility for the identification of evidence of the law. However, where the arbitrators have primary initiative on legal evidence, it is argued that the parties lose control of the costs of arbitration.

Moreover, allowing the application of the jura novit curia principle in international commercial arbitration has been argued to generally undermine the right of the parties to be “the masters of the arbitration” Thus, considering the importance of the principle of party autonomy in international commercial arbitration, it has been argued that any curtailment of the parties’ rights to be heard must be considered “repugnant”, which is why the better view would be to leave it to the parties to determine the scope of the dispute both as to facts and as to law. On the other hand this argument cannot be justified as there is nothing preventing the parties from expressly agreeing on the conduct of arbitral

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134 Isele 2010, p. 16.
135 Kurkela 2003, p. 494.
137 Hobér 2001, p. 141.
proceedings and thus limiting the arbitral tribunal’s authority to decide the case based entirely on the points of law raised and presented by the parties.\footnote{Chainais 2010, pp. 18–19.}

Some legal authors believe that in many specific instances arbitrators ought to demonstrate certain initiative in relation to ascertaining the contents of the applicable substantive law without, however, the need for the application of the \textit{jura novit curia} principle. It is believed that a similar outcome may be reached with proactive case management. For instance, Hobér argues that the case management duty of an arbitrator can be regarded as a remedy against, or a counterweight to, the lack of the \textit{jura novit curia} principle in international commercial arbitration.\footnote{See \textit{e.g.} Hobér 2011, p. 244.}

\section*{3.1.2 Arguments Supporting Strict Application of the Principle}

The view according to which states may demand the application of the principle of \textit{jura novit curia} by arbitrators follows the ideology of the jurisdictional theory, under which an arbitral tribunal derives its authority by delegation from the state. In addition, supporters of the hybrid theory may also lean towards advocating the strictest interpretation of the principle’s effect in international arbitration. The supporters of the view that the \textit{jura novit curia} principle imposes a strict duty on arbitrators to ascertain and apply the law interpret the principle as it is applied in civil proceedings.

Giovannini observes that courts seem to impose a real duty on arbitral tribunals to investigate independently the contents of the applicable substantive law.\footnote{Giovannini 2010, p. 500.} This is the case for example in Switzerland, where the Federal Tribunal has on various occasions held that the principle applies also in arbitration\footnote{See \textit{e.g.} DFT 4A_254/2010, 3 August 2010; DFT 4P_4/2007, 26 September 2007, consid. 4.1; and DFT 4P.100/2003, consid. 5.}.

Arguments that the application of the principle is not necessary to ensure justice which are based on the fact \textit{e.g.} in England the same result is achieved without relying on the principle in the context of ascertaining the contents of \textit{lex causae} in civil proceedings, have been argued to be unconvincing. Isele points out that in the English system the correct
application of the law is ensured by a duty on lawyers to present the entire law and not to mislead the judge\textsuperscript{143}. No such duty exists in the context of arbitral proceedings.

Moreover, it has been argued that the parties do not seem to attach great importance to the correct application of the law if they submit their dispute to arbitration disposing by corollary of a review on the merits. However, this view is arguably misconstrued since on the balance of interests, the finality of the award \textit{i.e.} a speedy resolution of the parties’ commercial relationship, might in the end be of more importance to them.\textsuperscript{144} Moreover, in the situation where the parties do not expressly provide for the arbitral tribunal to base its decision on equitable grounds or decide the matter as \textit{amiable compositeur}, and thus agree on the settlement of the dispute based on law, it is difficult to assimilate the argument that the law would not be required to be applied correctly, \textit{i.e.} in its entirety. The arbitral tribunal’s duty to base the award in law shall be further discussed below in Chapter 3.2.1.

Some authors argue that the principle should not be applicable in international arbitration because of the fact that parties often come from different legal backgrounds and do not necessarily expect arbitrators to take initiatives in the ascertainment of the applicable substantive law.\textsuperscript{145} However, Isele argues that in practice the application of the principle at the seat of arbitration would hardly come as a surprise, as parties are likely to be aware of the importance of the \textit{lex arbitri} and hence are also usually informed about it.

### 3.1.3 Arguments Supporting Partial Application of the Principle

Some authors have taken a different approach in relation to the arbitral tribunal’s duty to ascertain and apply the law. For example, following El Kosheri’s way of thinking, an approach where the application of the principle would differ where the applicable rules are i) those of international law, ii) rules pertaining to a given domestic legal system and iii) where the issues that are supposed to be governed by usages of trade, \textit{i.e.} transnational law. Following this view the principle would be considered fully applicable in relation to rules of public international law, \textit{e.g.} the New York Convention of 1958. In these situations the arbitral tribunal would be under an obligation to consider, on its own initiative, the

\textsuperscript{143} Isele 2010, p. 20.

\textsuperscript{144} Ibid., p. 22.

\textsuperscript{145} See \textit{e.g.} Hobér 2011, p. 213.
interpretation and application of the said rules in the specific circumstances of the pending case. Where the applicable rules are those of a given domestic legal system, the principle loses a great deal of its significance, as the arbitral tribunal does not necessarily know the foreign law in question. The author finds it appropriate to shift the burden of education on the parties and seems to suggest that the arbitral tribunal would have the power but no duty to take initiative in appointing its own legal experts. As for the final group of rules, transnational rules, the principle jura novit curia would play an important rule on the basis that in practice most arbitrators in charge of international commercial cases are familiar with most issues concerning trade usages. Hence, in these situations arbitrators would have to educate themselves on the said issues. \textsuperscript{146}

Wetter has similarly suggested the principle jura novit curia to be fully applicable only in what the author calls the “ex officio domain”, \textit{i.e.} in circumstances which involve a public interest or the interests of third parties that are not merely the concern of the disputing parties. Arbitrators would be required to act on their own motion and to assume total inquisitorial powers in this domain. Arbitrators would be obliged to raise questions \textit{ex officio} and to decide jurisdictional aspects of the case on grounds, which neither party may have invoked and with reference to legal arguments, which neither party may have adduced. \textsuperscript{147}

Landolt also encourages arbitrators’ initiatives in three situations: i) in the application of mandatory norms, which engage fundamental state interests in which the arbitrator would be under a duty, ii) where the outcome of the arbitration will have a sufficiently immediate and substantial impact on interests other than those of the parties, in particular the public interest such as in the case of investment arbitrations, and iii) in certain limited circumstances where there exists an interest to the arbitrators themselves to take initiatives in relation to law, \textit{e.g.} when it would be professionally embarrassing for the arbitral tribunal to be confined to choosing between the better of the parties’ submissions. \textsuperscript{148}

Sheppard takes a comparable approach finding that arbitral tribunals are not under a general duty to independently research the applicable substantive law and are entitled to

\textsuperscript{146} El Kosheri 2005, pp. 799–800.
\textsuperscript{147} Wetter 1996, pp. 92–93.
\textsuperscript{148} Landolt 2012, pp. 215–216.
rely upon counsel representing the parties. Nevertheless, where a party is unfamiliar with the applicable law or *e.g.* is badly represented, the tribunal may direct the parties in the right direction or itself research the matter and ask for the parties’ comments. However, Sheppard argues that the onus to know or identify possible mandatory rules is greater on a tribunal comprising of one or more lawyers qualified in the applicable substantive law and/or the *lex arbitri*. Although the risk would in any case remain with the parties, arbitral tribunals are expected to conduct the proceedings and apply the law to the facts and thus to apply the law in its entirety correctly in order achieve an enforceable award.\(^\text{149}\)

As mentioned above in Chapter 3.1.1, the 2008 ILA Report came to the conclusion that the strict application of the *jura novit curia* principle has no room in international commercial arbitration concluding in its Recommendation 6 that arbitrators should not, in general, introduce legal issues that the parties have not raised. However, the ILA’s Committee took a more pragmatic approach by stating in Recommendation 13 that arbitrators would be required to conduct independent research on the applicable substantive law in exceptional situations where disputes implicate rules of public policy or other rules from which the parties may not derogate. Hence, although the ILA seems to take the view that arbitrators are not under a general duty to ascertain and apply the substantive applicable law in a dispute, they would be required to do so with respect to mandatory rules of public policy. Moreover, the ILA’s Committee concluded in Recommendation 15 that arbitrators may apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard, in a situation where after diligent effort consistent with the ILA’s Recommendations the contents of the applicable law cannot be ascertained.

Bensaude has pointed out the incoherence of the Committee’s approach with respect to its Recommendation 15. The author notes that although it is acceptable that arbitrators should wait until the end of the exchange of the parties’ written claims before inviting the parties to give further information on the applicable rules on a specific question since the parties have the burden of proof of the content of the applicable law as well, a prudent arbitral tribunal would not in fact do so. Bensaude argues that a diligent arbitrator would examine carefully the parties’ written presentations in sequence with the parties’ submissions and in

\(^{149}\) Sheppard 2007, p. 144.
order to minimize cost and to be effective point out the question as soon as possible to the parties in order to vice versa refrain from reopening the debate after the conclusion of the audience in order to clarify the question in respect with the principle of contradiction.\textsuperscript{150}

However, although the arguments supporting partial application of the \textit{jura novit curia} principle seem justified, the outcome of this approach is rather complex. Even if arbitral tribunals were duty-bound to apply merely \textit{e.g.} mandatory provisions of the applicable substantive law, many of the problematic aspects affecting the application of the principle in international commercial arbitration stated in Chapter 3.1.1 above would remain unremedied. Due to the lack of unanimity in respect of the \textit{jura novit curia} principle’s effect in international commercial arbitration, this thesis shall continue with examining whether there exists any concrete restrictions in the legal provisions relating to the conduct of arbitral proceedings limiting the authority of international arbitrators to conduct independent research on the applicable substantive law and to assess whether international arbitrators could possibly have the authority to ascertain and apply the law \textit{sua sponte}.

\section*{3.2 Examination of Rules on Arbitral Tribunal’s Conduct}

Although there is no general consensus on the possibility for an international arbitral tribunal to conduct its own independent research on the applicable substantive law \textit{sua sponte}, it seems that even amongst supporters of the view under which the \textit{jura novit curia} principle has in general no room in international commercial arbitration there exists some level of approval of the fact that arbitrators are not required, or necessarily even advised, to refrain themselves in an entirely passive role.\textsuperscript{151} However, the scope of an arbitral tribunal’s authority with respect to ascertaining and applying the law in a dispute has been discussed \textit{e.g.} by Cordero-Moss in her recent publication. The provisions are scarce which is why they seem to leave the arbitral tribunal a great deal of freedom in respect of the \textit{sua sponte} ascertainment and application of the law.

\textsuperscript{150} Bensaude 2009, pp. 449–450.
\textsuperscript{151} Waincymer 2011, p. 202; Sheppard 2007, p. 145.
3.2.1 Duty to Base the Decision on Law

Since the duty of an arbitrator is to comply with the law\textsuperscript{152}, assessing the contents of the applicable substantive law can be argued as constituting an essential part of an arbitrator’s mandate. This argument in favor of the authority of an arbitrator to ascertain and apply the applicable substantive law \textit{sua sponte} is supported by the fact that the duty of the arbitral tribunal to give its ruling based on law is expressly stated in numerous arbitration rules and laws. For example, article 28 of the 1985 UNCITRAL Model Law provides that

\textit{
\begin{quote}
(1) [t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. [...] \\
(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable. \\
(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.
\end{quote}
}

Thus, under the 1985 UNCITRAL Model Law an arbitral tribunal must base its decision in law unless expressly otherwise instructed by the parties. Under the wording of the provision, the possibility of rendering an award based in equity can hence be interpreted as constituting an exception to the principal rule of basing the decision on rules of law chosen primarily by the parties, or in the lack of such choice, on rules of law, which the arbitral tribunal considers applicable. Following the example set out by the 1985 UNCITRAL Model Law, a similar approach has been taken by various states in their respective national arbitration laws as well\textsuperscript{153}. A similar premise has, in addition, been adopted in some transnational arbitration rules\textsuperscript{154} as well as in the arbitration rules of most international arbitral institutions\textsuperscript{155}.

\textsuperscript{152} Mayer 2001, p. 247.  
\textsuperscript{153} For specific provisions see \textit{e.g.} article 187 of the Swiss FPILA; article 1474 of the French Code of Civil Procedure; section 46 of the English Arbitration Act; and section 31 of the Finnish Arbitration Act.  
\textsuperscript{154} See \textit{e.g.} article 35.1 of the UNICTRAL Arbitration Rules.  
\textsuperscript{155} See \textit{e.g.} article 21 of the ICC Arbitration Rules and article 22 of the LCIA Arbitration Rules.
The early conception of arbitration associated the procedure with equity. The nature of arbitration has since developed into a new kind, based on law, as part of which the arbitrator is supposed to apply the rules of law laid down by the legislator. Consequently, it can be argued that nowadays the generally applicable approach is that an arbitral tribunal has the duty to apply the contents of the law either expressly chosen by the parties or considered as appropriate by the tribunal itself in rendering its award. By corollary, the arbitral tribunal can be considered as having an obligation to ensure that the contents of the applicable substantive law are correctly ascertained.

This position is supported by Wobeser, who argues that the role of arbitrators in ascertaining the contents of the applicable substantive law should be examined in the light of their mandate towards the parties, i.e. the task to apply the law, which entails that arbitrators must establish the contents of the applicable law even when it has not been brought forward by the parties. Other authors supporting this position include Chainais, who is of the opinion that the arbitral tribunal’s liberty of determining the applicable substantive law in a dispute entails a duty resulting from the mission conferred upon it by the parties; the arbitral tribunal will have to decide the dispute based on law.

Some legal authors have suggested that the application of the principle of jura novit curia would follow directly from the duty to apply the law. It could be argued that since an arbitral tribunal is under the duty to base its decision either on the law chosen by the parties, or that which it itself finds most suitable, it would follow that if the parties fail to present all relevant points of the applicable substantive law and the arbitral tribunal would proceed with basing its decision merely on the incomplete points of law invoked by the parties, its role would resemble that of an amiable compositeur. In fact, the arbitral tribunal would in this case base its decision on equitable grounds and would thus be in breach of its duty to base the arbitral award on law.

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157 Wobeser 2011, pp. 211–212.
158 Chainais 2010, pp. 5–6.
159 See e.g. Kurkela 2003, p. 493 where the author discusses that the duty to apply the jura novit curia principle may arise from the applicable arbitration statute in particular in ad hoc arbitration.
3.2.2 Possibility of Independently Evaluating Parties’ Pleadings

Most arbitration laws and rules provide that once the arbitral jurisdiction is established by the arbitral agreement, a party may not prevent an arbitral proceeding and the award from being rendered by failing to contribute to the arbitral proceedings.\footnote{For institutional arbitration rules see \textit{e.g.} articles 6(3), 18(3) and 21(2) of the ICC Arbitration Rules as well as article 15(8) of the LCIA Arbitration Rules; for transnational arbitration rules see \textit{e.g.} article 30(1) of the UNCITRAL Arbitration Rules. Similar provisions are also contained \textit{e.g.} in section 30 of the Finnish Arbitration Act and section 41 of the 1996 English Arbitration Act.} Hence arbitrators are not required to receive pleadings from all parties to the dispute in order to proceed with the arbitration. Arbitrators are thus given the power to proceed with the international arbitration proceedings even in a situation of party default, which could also be interpreted as a duty of the arbitral tribunal to independently evaluate the pleadings of the participating party.\footnote{Cordero-Moss 2006, pp. 4–5.}

Although most arbitration laws and rules are silent on the arbitral tribunal’s conduct in a situation where one party fails to appear to the arbitral proceedings, it has been argued in a commentary on article 21(2) of the old ICC Arbitration Rules amended in 1998\footnote{Article 21(2) of the old ICC Arbitration Rules corresponds to article 26(2) of the revised ICC Arbitration Rules in force as of 1 January 2012. The old ICC Arbitration Rules came into force on 1 January 1998. Under article 21(2) of the old ICC Arbitration Rules, “if any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing”\footnote{Derains and Schwartz 2005, p. 289.}.}\footnote{Cordero-Moss 2006, p. 5.} that, as a widely accepted principle in international arbitration, failure by one party to appear should not normally be deemed to constitute an admission of the claims and allegations made by the other party.\footnote{Cordero-Moss 2006, pp. 4–5.} Cordero-Moss has interpreted this as assuming that an arbitral tribunal has the power to proceed to an independent evaluation where one party fails to appear to the proceedings and argues that \textit{e.g.} with respect to institutional arbitration, if the tribunal would blindly accept the pleadings of the participating party, this would not seem to comply with the expectations of justice connected with the institute of arbitration.\footnote{Cordero-Moss 2006, p. 5.}

Based on the above grounds it could thus be argued that an arbitral tribunal would seem to be allowed a rather wide leeway in the independent evaluation of the parties’ claims and allegations with respect to circumstances described above. What remains unclear is the scope of the arbitral tribunal’s power of independent evaluation.
3.2.3 Possibility of Requesting Additional Information

Many arbitration laws and rules permit arbitrators to exercise rather wide substantive case management powers. Arbitrators may e.g. request that the parties present additional documentation 165 for the purpose of clarification and to avoid uncertainties in understanding the parties’ claims. In addition, arbitrators may be allowed to appoint experts 166 or even to independently conduct inspections 167 in order to clarify matters that the parties have not managed to explain themselves. This possibility of requesting additional clarifications constitutes a part of an arbitral tribunal’s substantive case management powers. An arbitral tribunal’s task of ensuring the proper understanding of the parties’ positions is important, since the resulting arbitral award may be set aside if the arbitrators rule ultra or extra petita as we shall see below in Chapter 4.2.

It should be noted that the said possibility of requesting additional information is not limited merely to situations where one party fails to appear to the arbitral proceedings. It applies in general even if both parties participate actively in the presentation of their respective cases. Cordero-Moss finds that this possibility may be used to introduce new elements that were not at all or not sufficiently pleaded by the parties, although she points out that it remains unclear how far a tribunal may go in introducing these new elements. 168

In other words it remains unclear whether the mentioned provisions are to be interpreted as allowing an arbitral tribunal to ask for additional documentation and clarifications in order to better understand the claims and allegations made by the parties or whether they would allow a tribunal to apply sources that the parties have not invoked for example.

3.3 Consolidating the Principle Into International Arbitration

On the above-mentioned basis, it could be argued that an arbitral tribunal would at least not be prevented from independently ascertaining and applying the applicable substantive law in situations where the parties’ presentations do not suffice to clarify their claims and allegations. Moreover, some authors have suggested that the tendency of case law in

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165 See e.g. article 27(3) of the UNCITRAL Arbitration Rules and section 28 of the Finnish Arbitration Act.
166 See e.g. article 29 of the UNCITRAL Arbitration Rules and section 28 of the Finnish Arbitration Act.
167 See e.g. section 34 of the English Arbitration Act 1996 and article 22.1(c) of the LCIA Arbitration Rules.
various jurisdictions has also recently shifted towards accepting that international arbitrators may indeed ascertain and apply the applicable substantive law on their own initiative.\textsuperscript{169}

3.3.1 Proposals for Adapting the Principle with the Characteristics of Arbitration

Various legal authors have argued that the principle of \textit{jura novit curia} is capable of being adapted into international commercial arbitration.\textsuperscript{170} This position goes in line with the hybrid theory of arbitration, as it contains elements of both the contractual and the jurisdictional theory. The said authors seem to agree that the primary duty of ascertaining the contents of the applicable substantive law would be on the parties\textsuperscript{171} or at least that the burden of education ought to be shared between the parties and the arbitral tribunal\textsuperscript{172}.

Nevertheless, it has been argued that the power of arbitrators to introduce \textit{sua sponte} new issues of law constitutes “a facet of their jurisdictional mission” and should, therefore, not even be questioned.\textsuperscript{173} Hence, the proposed view is that the freedom of arbitrators to undertake an active role in the management of the arbitral proceedings, as discussed above in Chapters 3.2.2 and 3.2.3, would justify a certain level of discretion to introduce new issues of law. However, an arbitral tribunal would naturally be required to assess the appropriateness of the use of such discretion on a case-by-case basis.

The imposition of a strict duty to ascertain and apply the law does not take into account arbitration’s unique features. Isele argues that the two main arguments against a strict duty to ascertain and apply the law \textit{sua sponte} do not apply in the context of a mandatory authority. The fact that the expertise and knowledge of arbitrators varies from arbitration to arbitration would not impose great difficulty or problems where arbitrators would have merely an authority to apply the law \textit{sua sponte}. The arbitral tribunal would thus be able to decide on a case-by-case basis whether it needs to do further research or not. Also, the

\textsuperscript{169} Alberti 2011, p. 24.
\textsuperscript{170} See e.g. Jones 2012, pp. 112–113; Chainais 2010, p. 12.
\textsuperscript{171} Dimolitsa 2009, pp. 427 and 431.
\textsuperscript{172} Jones 2012, p. 114.
\textsuperscript{173} Dimolitsa 2009, pp. 427 and 431.
issue relating to the control on the merits would not cause problems either since the failure to conduct independent research would not require sanctioning.\textsuperscript{174}

Moreover, a subtler interpretation of the principle under which arbitrators would have the authority to ascertain the contents of the applicable substantive law independently would enable arbitrators to ensure equality before the law in that the parties would not be able to evade mandatory provisions and policies. The proposals for partial application of the \textit{jura novit curia} principle (see Chapter 3.1.2.2 above) would lead to the obligation of an arbitral tribunal to conduct research on the contents of the substantive law and to identify and apply mandatory provisions while ignoring any other relevant provisions that the tribunal might obtain throughout such research.\textsuperscript{175}

This view seems to be justifiable, as it appears that many jurisdictions have established that the principle of \textit{jura novit curia} applies also in arbitration. This is the position for example in Switzerland and Finland where the highest civil courts of both jurisdictions have established that the principle does indeed have an effect in arbitration and more specifically with respect to international arbitral proceedings\textsuperscript{176}.

In addition, section 34 of the English Arbitration Act 1996 would also suggest towards a more subtle effect of the principle in international arbitration, as the wording of the provision empowers an arbitral tribunal to explore legal issues without imposing any legal duties on arbitrators.\textsuperscript{177} The section also highlights the inaccuracy of arguments against application of the principle on the ground of divergences between common law and civil law systems and the fact that parties from jurisdictions that do not recognize the principle could be surprised by the outcome of the arbitration. Cordero-Moss emphasizes that the arbitration law that mostly represents the common law systems, \textit{i.e.} the English Arbitration Act, does not reflect an adversarial approach in the strict sense since \textit{e.g.} an arbitral tribunal is not bound by the arguments made by the parties when developing its reasoning\textsuperscript{178}. Moreover, Lord Justice Steyn has argued that arbitrators applying English arbitration legislation should not be bound by the technical rules of evidence or to follow

\textsuperscript{174} Isele 2010, p. 24.
\textsuperscript{175} Ibid., p. 23.
\textsuperscript{176} See the following Chapter 3.3.2.
\textsuperscript{177} For an opposite opinion see Waincymer 2011, p. 209.
\textsuperscript{178} Cordero-Moss 2006, p. 15.
the adversarial procedures of the courts.\textsuperscript{179} Hence, on this basis, it could be argued that the common law tradition of English judges adopting a passive role in court proceedings would not constitute an objection to English arbitrators adopting a more active role in arbitral proceedings.

### 3.3.2 Recent Tendencies in Case Law Suggesting Approval of the Principle in International Arbitration

In addition, recent case law seems to suggest that a consensus is forming in various jurisdictions allowing arbitrators the possibility to base their decision on matters of law not invoked by the parties.

For example, the effect of the \textit{jura novit curia} principle in arbitration has constantly been confirmed by the courts in Switzerland. The Swiss Federal Tribunal held in the so-called \textit{Westland Helicopters} case that as long as the arbitral tribunal’s conclusions are reasoned in a sufficient manner, arbitrators are not bound by the arguments invoked by the parties in virtue of the \textit{jura novit curia} principle.\textsuperscript{180} This principle has been upheld by recent case law as well\textsuperscript{181}. Under Swiss law arbitral tribunals have, in accordance with the \textit{jura novit curia} principle, the authority to base their findings in legal principles not invoked by the parties.\textsuperscript{182}

The Finnish Supreme Court has also had the opportunity of expressly acknowledging the application of the \textit{jura novit curia} principle in arbitral proceedings in the so-called \textit{Werfen} case\textsuperscript{183} where it held that an arbitral tribunal is not bound by the legal views presented by the parties. This statement has been considered as an express recognition by the Supreme Court of the principle \textit{jura novit curia} as a prevailing principle also in arbitral proceedings.\textsuperscript{184}

\textsuperscript{179} Steyn 1994, pp. 7–9.
\textsuperscript{180} \textit{Westland Helicopters Ltd. v. The Arab British Helicopter Company (ABH) and Arbitral Tribunal}, case No. DFT 120 II 172 of 19 April 1994, consid. 3.a).
\textsuperscript{181} DFT 4A_464/2009 of 15 February 2010, consid. 4.1; DFT 4A_254/2010 of 3 August 2010, consid. 3.1; and DFT 4A_108/2009 of 9 June 2009, consid. 2.1.
\textsuperscript{182} Geisinger and Mazuranic 2013, p. 247.
\textsuperscript{183} KKO 2008:77, case No. 1517 of 2 July 2008.
\textsuperscript{184} Waselius and Jussila 2011, p. 723.
Moreover, this trend has been said to be specific to certain common law countries as well\textsuperscript{185}. For example, in the context of an English rent review arbitration, Lawrence Collins J rejected in \textit{Warborough Investments Ltd. v. S Robinson & Sons (Holdings) Ltd.}\textsuperscript{186} the landlord’s argument that the arbitrator had supplied evidence or inferred it for himself and considered that the arbitrator could not be regarded as having acted in breach of his general duty under section 33 of the 1996 English Arbitration Act in "extracting an alternative case from the submissions". In addition, the said position was cited in \textit{ABB AG v. Hochtief Airport GmbH, Athens International Airport S.A.}\textsuperscript{187} in the judgment of Tomlinson J.

Even if international arbitrators would thus seem to be authorized to conduct independent research on the applicable substantive law and base their decision on those findings, what remains unclear is the scope of the said authority and freedom. As already mentioned, the choice of the place of arbitration has a significant impact on the validity of the arbitral award. In practice, the requirements for a valid arbitral award also set the bounds to the active role of an arbitrator in ascertaining and applying the substantive law \textit{sua sponte}. However, before continuing with a more detailed examination of the current legal situation in the chosen European countries, in the following Chapter 4, the proposed limits to the possibility of applying the \textit{jura novit curia} principle in international commercial arbitration shall be examined below.

### 3.3.3 Proposed Limits to the Application of the Principle

The above chapters have presented the proposal of a consolidated principle of \textit{jura novit curia} in international arbitration and provided examples from recent case law suggesting that a common approach could be detectable both in common law and civil law jurisdictions. The application of the principle requires, however, some adjustments. Firstly, as established in the above Chapter 3.3.1, an arbitral tribunal should not be regarded as being under a positive duty to ascertain the correct application of the applicable substantive law but rather that arbitrators should enjoy the authority to adopt independent legal reasoning where deemed necessary.\textsuperscript{188} Therefore, one of the suggested limits to the

\textsuperscript{185} Jones 2012, pp. 113–114.
\textsuperscript{186} [2003] 2 EGLR 149, para. 64.
\textsuperscript{187} [2006] EWHC 388 (Comm), para. 65.
\textsuperscript{188} Jones 2012, p. 114; Isele 2010, p. 24.
application of the *jura novit curia* principle in international commercial arbitration is that an arbitral tribunal cannot be sanctioned if it were to decide not to make use of its authority to ascertain and apply the applicable substantive law *sua sponte*.

Secondly, it is suggested that the educative burden should be shared between the parties and the arbitral tribunal. A shared burden is considered more appropriate, because imposing an obligation to ascertain and apply the law would impose an onerous burden upon the tribunal, it would also increase costs which may flow on to the parties and lastly, not all arbitrators are necessarily familiar with the invoked substantive law. Thus, even if an arbitral tribunal were to have the authority to ascertain and apply the law *sua sponte* in accordance with the principle of *jura novit curia*, the parties would not be entirely dismissed of having a certain role with respect to the ascertainment of the applicable substantive law. A party that relies entirely on the arbitrators to establish the law and draw the proper conclusions runs risks in practice. Hence, to avoid those risks the burden of education should be divided between the disputing parties and the arbitral tribunal.\(^\text{189}\)

Chainais notes that in accordance with good practice, it would be most appropriate that the disputing parties were the ones to invoke the applicable substantive legal provisions and that the arbitral tribunal would encourage them to act so from the beginning of the arbitral proceedings. In addition, the author highlights that the principle would naturally also be restricted by any express agreement of the disputing parties in limiting the arbitral tribunal’s powers to the arguments and claims invoked by the parties. In other words, arbitrators are limited by their mandate.\(^\text{190}\) In these circumstances the authority of an arbitral tribunal to ascertain and apply the law *sua sponte* would be restricted by the express agreement of the parties in accordance with the principle of party autonomy.

Finally, the scope of the principle in international commercial arbitration should be limited by the factual submissions of the parties.\(^\text{191}\) This is a long established rule and it is for example expressly stated in article 27(1) of the UNCITRAL Arbitration Rules under which "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense". The parties should have the sole responsibility to present the facts of their

\(^{189}\) Jones 2012, p. 114; Kurkela 2003, p. 494; see also Dimolitsa 2009 where the author suggests a primary responsibility to ascertain and apply of the parties, pp. 427 and 431.

\(^{190}\) Chainais 2010, p. 18.

\(^{191}\) Jones 2012, p. 114.
dispute, since they are in a better and more appropriate position to do so. The arbitral tribunal would, therefore, be merely authorized to ascertain and apply questions of law *sua sponte* and leave matters of fact to be established and proved by the disputing parties themselves.
4. SCOPE OF AN ARBITRATOR’S FREEDOM IN ASCERTAINING AND APPLYING THE LAW

Although opinions may differ with respect to the possibility of applying the *jura novit curia* principle in international commercial arbitration, in practice the scope of an arbitrator’s freedom in ascertaining and applying the substantive law *sua sponte* is ultimately defined by the prerequisites for an arbitral award’s validity. When ascertaining and applying the law *sua sponte* international arbitrators must, in order to render a final arbitral award, take into account certain fundamental rights of and duties owed to the disputing parties, namely i) the right to be heard in an adversarial procedure, ii) the equal treatment of the parties, and iii) the prohibition of an arbitral tribunal to exceed its mandate (*"ne ultra petita partium"*).192 The aim of this chapter is to further examine these duties of an arbitrator and to evaluate the standards of validity of an arbitral award in order to attempt to define the scope of an arbitrator’s freedom to conduct independent research on the applicable substantive law without jeopardizing the finality of the award.

4.1 Duty to Render a Valid Arbitral Award

Settling the dispute between the parties, which by corollary entails a duty to render a valid award, can be held as the main contractual duty of an arbitral tribunal. Hence, the ultimate limits of the authority of international arbitrators to ascertain and apply the law *sua sponte* may be deduced from the approach of national courts in relation to the validity of arbitral awards. The importance of national arbitration laws is highlighted in this area, since courts apply their own law when they determine whether an arbitral award is valid or not.193

4.1.1 Legal Basis of Examination

One of the main advantages of international arbitration is the fact that it leads to a final decision binding the disputing parties and that arbitral awards may be widely enforced nationally as well as internationally. The final and binding effect of the arbitral award also sets arbitration apart from other alternative dispute resolution mechanisms, such as

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193 Cordero-Moss 2013, pp. 16.
mediation which leads to the mediator giving a recommendation that the disputing parties may either accept or refuse.\textsuperscript{194} International arbitrators must, therefore, ensure that ascertaining and applying the law \textit{sua sponte} will not have a negative effect on the validity of the arbitral award, \textit{i.e.} its finality.

It should be noted that the obligation to render a valid arbitral award does not necessarily entail an obligation to render an enforceable award since the arbitrator cannot be required to know in which country the award shall be enforced and the said country’s requirements for enforcement. It will extend to an obligation to render an enforceable award only if the arbitrator has expressly contracted to do so with the parties.\textsuperscript{195} Therefore, for the purposes of this thesis, the presumption shall be that there is no such express agreement, and consequently, the examination of the limits of the \textit{jura novit curia} principle shall be restricted to the assessment of case law relating to setting aside arbitral awards on invalidity grounds.

\subsection*{4.1.2 Prerequisites for the Validity of an Arbitral Award}

The grounds for setting aside arbitral awards have been subject to efforts of harmonization \textit{inter alia} with the introduction of the 1985 UNCITRAL Model Law.\textsuperscript{196} Article 34 of the Model Law provides an exhaustive list of the grounds under which national courts may set aside an arbitral award upon the request of a disputing party. It should be noted that, as these exclusive grounds for setting aside arbitral awards are considered as exceptions to the rule that an arbitral award is final, they tend to be construed narrowly.\textsuperscript{197} Various jurisdictions have accordingly established that challenges for setting aside an award cannot be considered as appeal proceedings in which evidence would be re-evaluated and the

\textsuperscript{194} Redfern and Hunter 2004, p. 23.
\textsuperscript{196} It should be noted that, although having been defined outside the scope of this thesis, the grounds for setting aside an arbitral award under article 34 of the 1985 UNCITRAL Model Law are similar to the grounds for refusing recognition and enforcement of an arbitral award provided in article V of the 1958 New York Convention. The fact that the New York Convention has been signed and ratified by 148 countries to this day, also promotes the harmonization of the grounds for setting aside an arbitral award in order to ensure a properly working system and the success of international arbitration as a means of commercial dispute resolution.
\textsuperscript{197} UNCITRAL 2012 Case Digest p. 139, para. 23. The effect of this restrictive approach shall be further discussed in the following chapter.
correctness of the arbitral tribunal’s decision on the merits could be examined.\textsuperscript{198} This is assumed to apply in principle to issues of law in addition to issues of fact.\textsuperscript{199} For example Swiss courts have expressly stated that an award will not be set aside on the ground that it has been rendered in clear violation of rules of law, due to the fact that Swiss courts do not wish to grant the parties a possibility of having a second opportunity to re-argue the merits of a case before the court.\textsuperscript{200} The tendency to take a restrictive approach in interfering with decisions of arbitral tribunals emphasizing the exceptional character of the remedy is also common in other civil law jurisdictions.\textsuperscript{201}

Common law jurisdictions such as England\textsuperscript{202} on the other hand continue to provide for the annulment of international arbitral awards based upon such review\textsuperscript{203}. However, review on the merits is usually restricted and available only to correct egregious legal errors. The possibility of review applies only to questions of English law, excluding thus non-English law questions and questions of fact, and even then only to issues of English law that are of public significance or where the award is obviously wrong.\textsuperscript{204} Moreover, the House of Lords has highlighted in the \textit{Lesotho Highlands} case\textsuperscript{205} that the 1996 English Arbitration Act does not permit a challenge on the ground that the arbitral tribunal arrived at a wrong conclusion as a matter of law or fact. As noted by Lord Steyn, the aim of English courts is to promote “one-stop adjudication”.

Thus, arbitrators’ initiatives on legal evidence are not generally subject to an enforceable obligation to be exercised properly. Consequently, the \textit{sua sponte} ascertainment and application of the law by international arbitrators cannot be impugned on the basis of \textit{e.g.} violation of the principle of proportionality or that the arbitral tribunal has adverted to irrelevant factors \textit{inter alia}.\textsuperscript{206} Consequently, the validity of an international arbitral award cannot generally be said to depend on the manner in which an arbitral tribunal interprets

\textsuperscript{198} For case law see UNCITRAL 2012 Case Digest, p. 134, para. 3; see also Webster 2006, p. 433 and Lew, Mistelis, \textit{et al.} 2003, p. 677.
\textsuperscript{199} UNCITRAL 2012 Case Digest, p. 140, para. 25.
\textsuperscript{200} Geisinger and Mazuranic 2013, p. 224.
\textsuperscript{201} UNCITRAL 2012 Case Digest, p. 135, para. 4.
\textsuperscript{202} Other such jurisdictions include \textit{inter alia} Ireland, China, Australia, Singapore, Abu Dhabi, Libya, Saudi Arabia, Egypt and the United States; see Born 2012, p. 329 \textit{et seq}. For further information see also Pendell and Bridge 2012, pp. 322–323.
\textsuperscript{203} See section 69 of the 1996 English Arbitration Act on the possibility of an appeal on point of law.
\textsuperscript{204} Born 2012, pp. 329–330.
\textsuperscript{206} Landolt 2012, p. 190.
and applies the law, since most jurisdictions do not recognize the possibility of a review on the merits of arbitral awards.

4.1.3 Judicial Control on the Validity of an Arbitral Award

The main prerequisites for the validity of an arbitral award can thus be said to relate to the formal requirements of the conduct of arbitral proceedings. In order for arbitrators to fulfill their fundamental duty of settling the dispute between the parties, they must respect certain procedural requirements when rendering the award, including *inter alia* treating the parties equally, providing the parties with an opportunity to present their case, conducting the arbitral proceedings efficiently and expediently, completing their mandate and not exceeding it, as well as acting under a general duty of care throughout the arbitral procedure.\(^{207}\)

Taking into account the fact that courts do not generally have the jurisdiction to review arbitral awards in their merits, the remedies that appear most relevant in determining the scope of the *jura novit curia* principle in international arbitration are the remedies provided for excess of power and violation of due process.\(^{208}\) In addition, arbitrators are confined to the terms of the arbitration agreement, the factual submissions and the request for relief of the parties. If the arbitral tribunal goes beyond these boundaries, the award will be open to challenge in many jurisdictions. Procedural irregularities may also open the arbitral award to challenge, if they seriously affect the respect of due process.

The validity of an arbitral award, and ultimately the possibility of applying the *jura novit curia* principle in international commercial arbitration, is regulated by the national arbitration laws of the place of the arbitration. Domestic courts will, therefore, apply their own law when they determine whether an award is valid or not. Accordingly, the following examination of case law shall be conducted with a specific focus on the existing legislation and case law of the so-called major places of arbitration in Europe, as discussed above in the introductory Chapter 1.3.

\(^{207}\) Waincymer 2011, p. 201.
\(^{208}\) Cordero-Moss 2013, p. 12.
4.2 Duty Not to Exceed Mandate – Ne Ultra Petita

Some authors have argued that the principle of jura novit curia collides with the maxim ne ultra petita, because the possibility of an arbitrator to ascertain and apply the law sua sponte would consequently lead to the arbitrator exceeding his mandate on the basis that going beyond the parties’ submissions would necessarily imply going against the principle of party autonomy. However, the principles do coexist and both have an effect on the conduct of arbitral proceedings. They complement each other insofar as the maxim ne ultra petita merely sets the parameters of operation for the jura novit curia principle.209

Since arbitrators derive their authority from the arbitration agreement between the disputing parties, they must respect the boundaries set therein. Awarding remedies or sanctioning a party in a manner not recognized by the arbitration agreement or by law may constitute non-compliance of the arbitral tribunal’s mandate and jeopardize the finality of the arbitral award.210

4.2.1 General Features – Applicable Provisions

Under article 34(2)(a)(iii) of the 1985 UNCITRAL Model Law an arbitral award may be set aside by the court if the party making the application furnishes proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. The provision deals with two situations: i) where the arbitral tribunal has rendered a decision outside its jurisdiction or without jurisdiction ("extra petita") and ii) where the arbitral tribunal has exceeded its jurisdiction ("ultra petita"). Although most countries have based their national arbitration laws on the 1985 UNCITRAL Model Law, the wording of the invalidity ground for excess of power varies from jurisdiction to jurisdiction.

Some domestic provisions are formulated rather broadly. For example section 41(1)(1) of the Finnish Arbitration Act provides that an arbitral award may be set aside by the court

209 Alberti 2011, p. 18.
upon request of a party if “the arbitral tribunal has exceeded its authority”. In addition, article 1520(3) of the French Code of Civil Procedure has also been drafted in a general nature providing that the failure of the arbitral tribunal to comply with “the terms of the mission conferred upon it” opens the award for challenge. Were these provisions interpreted broadly, the failure of the arbitral tribunal to comply with “its authority” could enable a very broad use of the ground for challenge for parties dissatisfied with the outcome of the arbitral tribunal’s decision. Moreover, the “terms of the mission conferred upon it” could in fact include any rule governing the conduct of arbitral proceedings or even any of the rules governing the merits of the case.\(^{211}\)

On the other hand, other domestic provisions have been formulated in a more restrictive manner, such as article 190(2) of the Swiss FPILA under which an award may be set aside if “the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims submitted to it”. The circumstances of excess of power under Swiss law are thus clearly restricted to situations where the arbitral tribunal has granted relief beyond what the disputing parties have sought or where the tribunal has failed to adjudicate certain claims.\(^{212}\) Moreover, section 68 of the 1996 English Arbitration Act also provides for the challenge of awards on ground of “serious irregularity”. Under section 68(2)(b) of the Act, an arbitral award is open to challenge where a tribunal has exceeded its powers in situations where this “has caused or will cause substantial injustice to the applicant”. Hence, English arbitration law seems to have adopted a much more restrictive wording compared to the other mentioned jurisdictions in listing further qualitative prerequisites for a successful challenge of an arbitral award based on the exhaustive list of invalidity grounds provided under section 68 of the Act.

### 4.2.2 Restrictive Interpretation as Common Approach

Although the wording of the above-mentioned provisions in the presented jurisdictions may vary, national courts seem to have adopted a common approach in relation to the interpretation of the invalidity ground for excess of power. The courts in each jurisdiction seem to have adopted a narrow view in relation to the scope of the possibility to challenge

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\(^{211}\) Gaillard and Savage 1999, p. 937.

\(^{212}\) Geisinger and Mazuranic 2013, p. 243.
an award on the ground that the arbitral tribunal has exceeded its mandate. The predominant tendency in arbitration is to treat only awards which go beyond the relief sought by the parties as *ultra petita.*

a) England

English courts seem reluctant to intervene and to set aside or remit arbitral awards based on alleged procedural irregularity. Tuckey J. stated in *Egmatra AG v. Marco Trading* that section 68 of the 1996 English Arbitration Act is designated to “only be invoked in cases where something has gone so wrong that justice calls out for the matter to be corrected”. Similarly, Peter Coulson Q.C. emphasized in *Newfield Construction Ltd v. Tomlinson* that section 68 is “of limited applicability and only available in extreme cases where justice requires court action”.

The said restrictive approach was followed by the House of Lords in the *Lesotho Highlands* case. The judgment has been said to be a key case for any party considering bringing a challenge for “serious irregularity” as it goes wider than the issue in dispute, which was whether an error of law could amount to excess of power under section 68(2)(b) of the Act. The case emphasized the increasing recognition of English courts of the fact that they should interfere sparingly in arbitral proceedings. Lord Steyn noted *inter alia* that a major purpose of the amendments made to the 1996 English Arbitration Act was to reduce drastically the extent of intervention of the courts in the arbitral process. In order to decide whether section 68(2)(b) is engaged, Lord Steyn emphasized it necessary to “focus intensely on the particular power under an arbitration agreement, the terms of reference, or the Act which is involved, judged in all the circumstances of the case”.

The test for remitting or setting aside arbitral awards under English law has been described as being “two-pronged” and as having a high threshold. The conduct complained about must have been a “serious irregularity” in addition to giving rise to a “substantial

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213 Landolt 2012, p. 192.
217 Macpherson and Mainwaring-Taylor 2006, p. 120.
injustice”. Thus, English law seems to operate a rather high threshold to applications to set aside or remit an arbitral award where procedural irregularity is relied upon and the powers under section 68 of the 1996 English Arbitration Act will be invoked only in exceptional circumstances.\textsuperscript{220} In addition, if a party considers that a serious irregularity has occurred which has caused it substantial injustice, that party should take steps to resolve the issue as soon as possible, if necessary with the arbitral tribunal itself.\textsuperscript{221}

b) Finland

The position of Finnish courts on setting aside arbitral awards for excess of mandate has been clarified by the decision of the Finnish Supreme Court in Werfen Austria GmbH v. Polar Electro Europe B.V.\textsuperscript{222} Previous case law was limited to Court of Appeal cases having a general tendency of dismissing requests for setting aside arbitral awards on the basis of section 41(1)(1) of the Finnish Arbitration Act.\textsuperscript{223}

The Werfen case concerned a distribution agreement between an Austrian company and a Swiss branch of a Finnish company. The Finnish Supreme Court was faced with a challenge of an arbitral award \textit{inter alia} on the ground that the arbitrators had exceeded their authority. In the underlying arbitral proceedings the claimant, Werfen Austria, had claimed indemnity for the termination of a distribution agreement. However, the arbitral tribunal decided to adjust the distribution agreement on the basis of section 36 of the

\begin{footnotesize}
\textsuperscript{220} Shore and Carey 2005, pp. 62–63.
\textsuperscript{221} See Margulead Ltd v. Exide Technology [2004] EWHC 1019 (Comm) where Colman J. stated that continuing to participate in the hearing or waiting until after the publication of the award before objecting will be fatal to the challenge of the award under Section 68 of the Act. If the party takes part or continues to take part in the proceedings it must show that at the time the party took part in the proceedings it did not know and could not with reasonable diligence have discovered the grounds for the objection.
\textsuperscript{222} Werfen Austria GmbH v. Polar Electro Europe B.V., Supreme Court of Finland, KKO 2008:77, case No. 1517 of 2 July 2008; The case has been thoroughly discussed in an article written by two Finnish advocates who represented the claimant in the court proceedings (\textit{i.e.} respondent in the arbitral proceedings); see Waselius and Jussila 2011, pp. 712–731.
\textsuperscript{223} Actions were dismissed \textit{e.g.} in cases Helsinki Court of Appeal 13.10.1998 case No. 3068; Helsinki Court of Appeal 15.2.2007 case No. 490; and Helsinki Court of Appeal 6.6.1996 case No. 3171. However, see Helsinki Court of Appeal 26.6.2003 case No. 1942 where the arbitral award was set aside on the basis that the arbitrators had decided that the plaintiff’s claim was time-barred without giving the plaintiff an opportunity to be heard, although the defendant’s plea of limitation of action was unclear. For comments see \textit{e.g.} Hemmo 2008, pp. 1067–1069 and Peltonen 2011, pp 576–577.
\end{footnotesize}
Finnish Contracts Act (228/1929)\textsuperscript{224} which had not been invoked by the parties during the arbitral proceedings.

The Supreme Court held by a 3–2 majority vote that the arbitral tribunal had merely interpreted and adjusted the distribution agreement when it decided to award the claimant indemnity corresponding to the lost revenues that the claimant had given evidence of having suffered during the validity of the agreement. In doing so, the Supreme Court found that the arbitral tribunal had not awarded anything in excess of that claimed in the arbitration and thus had not based its award on a fact which the claimant had not invoked. The rather liberal position of the Supreme Court seems to grant arbitral tribunals with a rather wide discretion in assessing the grounds for the parties’ claims.\textsuperscript{225}

c) France

The French courts have similarly taken a narrow view in the application of the invalidity ground for excess of mandate emphasizing that the recourse is not to enable the courts “to review the substantive aspects of the award” but simply “to verify, without having to rule on whether the arbitrators’ decision was well-founded, that they complied with their mandate with regard to the contested aspects of their award”\textsuperscript{226}. French courts are thus able to set aside an arbitral award where the arbitrators have not observed the limits of the claims raised by the parties or where the arbitrators have otherwise exceeded the powers that the parties have expressly conferred upon them.\textsuperscript{227}

The fact that an arbitral tribunal may have based its decision on allegations or arguments which were not put forward by the parties will not amount to a failure to comply with its mandate. French courts have established that arbitrators exceed their mandate only where they grant one of the parties more than it actually sought in its claims. For example, the

\begin{footnotesize}
\textsuperscript{224} The adjustment of contracts on equitable grounds is a legal feature distinct for the Nordic countries. Under section 36 of the Finnish Contracts Act “(i) if a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.” [Unofficial translation from the Finlex Data Bank www.finlex.fi] [Last entry 19.8.2013].
\textsuperscript{225} Hemmo 2008, p.1073.
\textsuperscript{226} See e.g. Intrafor Color et Subutee Middle East Company v. MM. J.-C. Gagnant, S. Guilbert and others, Paris Court of Appeal (1\textsuperscript{st} Ch. Suppl.) of 12 March 1985, Rev. Arb. 1985, p. 299.
\textsuperscript{227} Gaillard and Savage 1999, p. 938.
\end{footnotesize}
Paris Court of Appeal has set aside part of an award on the basis that it ordered interest to be accrued from a date earlier than the date requested by the party. Moreover, the Paris Court of Appeal has set aside an award where the arbitral tribunal reached a decision on the property rights of a party in a situation where the party’s claims concerned only a company’s by-laws.

d) Switzerland

Under Swiss law arbitrators have an obligation to ascertain and apply the law *sua sponte*. It has been established that the parties’ prayers for relief determine the parameters within which an arbitral tribunal must adjudicate. Article 190(2) of the Swiss FPILA does not constitute a ground for setting aside an arbitral award where an arbitral tribunal grants relief for legal reasons different from those relied upon by the claimant, because an arbitral tribunal is not bound by the legal characterizations of the parties.

Thus, according to the Swiss Federal Tribunal, an arbitral tribunal does not act *ultra* or *extra petita* if it takes into consideration means of law not invoked by the parties as this would merely amount to a requalification of the facts of the case. The Federal Tribunal took a similar approach in *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.* where it held that the arbitral tribunal had not exceeded its mandate in awarding damages for breach of contract when the claimant had in fact requested indemnification for non-compliance with the guarantee agreement of the parties.

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232. See e.g. DTF 4A_464/2009, 15 February 2010, consid. 4.1; DTF 4A_440/2010, 7 January 2011, consid. 3.1 and DTF 120 II 172, 175.
233. *Westland Helicopters Ltd. v. The Arab British Helicopter Company (ABH) and Arbitral Tribunal*, case No. 120 II 172 of 19 April 1994, case No. DFT 120 II 172 p. 175, consid. 3.a) “l’arbitre] ne statue pas ultra ou extra petita s’il retient des moyens de droit qui n’ont pas été invoqués, car il ne procède, dans une telle hypothèse, qu’à une nouvelle qualification des faits de la cause”.
The Federal Tribunal gave examples of situations where an arbitrator will not have acted extra or ultra petita in *Compagnie Maritime Belge v. N.V. Distugas*. The Federal Tribunal stated that there will not be excess of power e.g. in a situation where the total amount awarded does not exceed the amount of the requested relief, even if the elements of the claims were appreciated distinctively from that presented by the parties. The Federal Tribunal held that arbitrators are not bound by the arguments invoked by the disputing parties because of the principle of *jura novit curia*, which is also applicable in arbitration. Arbitrators are thus free to apply means not invoked by the parties because this will not amount to a new or different request for relief but merely a new qualification of the applicable facts. Arbitrators are, nevertheless, bound by the object and the amount of the conclusions submitted to them, particularly where a party has determined or limited its claims in the actual conclusions.

### 4.2.3 Common Reluctance to Set Aside Arbitral Awards for Excess of Mandate

The courts in all of the discussed jurisdictions seem to share a common reluctance to setting arbitral awards aside solely on the ground that the arbitral tribunal has exceeded its mandate. It could be thus argued that there exists a strong presumption that, provided that the originally requested relief covers the recharacterization of the claim, the courts will not set aside an arbitral award on the basis that the arbitral tribunal would have violated the principle of *ne ultra petita*.

Some courts seem to show an inclination towards allowing arbitral tribunals rather extensive freedom in establishing the scope of the parties’ claims. For example, the Finnish Supreme Court seems to have adopted a liberal approach in relation to the scope of arbitral tribunals’ discretion to recharacterize claims. Under Finnish law the possibilities for adjusting business contracts between equally armed professionals are rare and very restricted. On this basis it has been argued that in a dispute between professional parties,

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236 See e.g. Hemmo 2003, p. 64; It has been argued, that the type of claim in the *Werfen* case was of a very special sort and that the flexible interpretation of claims under section 36 should not be construed as an indication of a generally flexible attitude of Finnish courts in relation to recharacterization of claims (Waselius and Jussila 2011, p. 726). However, Finnish courts can be generally said to have refrained from
adjustment without a claim for adjustment itself having been presented should not even be possible. It could, therefore, be argued that the Finnish Supreme Court seems to allow rather extensive freedom for arbitral tribunals to ascertain and apply the law within the limits of their mandate.

This common position is compatible with case law based on the 1985 UNCITRAL Model Law. Courts have e.g. constantly emphasized that the finality of arbitral awards was one of the main purposes of the 1985 UNCITRAL Model Law and the relevant national legislation based on it, so that awards should not be set aside easily. Consequently, the appropriate standard of review of arbitral awards under article 34 of the 1985 UNCITRAL Model Law has e.g. been considered by Canadian courts to be one that sought to preserve the autonomy of the arbitral procedure and to minimize judicial intervention. Moreover a Court of Appeal in Spain has held expressly that an arbitral tribunal will not exceed its mandate if it reclassifies claims by the parties within the scope of the jura novit curia principle. Spanish courts have held e.g. that awarding interests on sums in arrears notwithstanding the fact that no such interests were claimed would be considered as excess of mandate but that arbitral tribunals are allowed to award costs of the proceedings in their own motion without exceeding their mandate.

Therefore, it seems that the approach of national courts in different jurisdictions is rather comparable in relation to the ground for setting aside an arbitral award based on excess of power in situations where the arbitral tribunal has ascertained and applied the law sua sponte. In practice, therefore, successful challenges on setting aside arbitral awards on the sole ground that an arbitral tribunal has exceeded its mandate for the application of the jura novit curia principle are quite rare and difficult to prove. However, as it shall be presented below, where arbitral tribunals do decide to ascertain and apply the law sua sponte, they must be cautious not to violate the parties’ right to be heard and present their case, as

setting aside arbitral awards on the ground of excess of mandate, as it may be observed from Finnish case law preceding the Werfen case (see supra note 215).

237 Waselius and Jussila 2011, p. 727.
arbitral awards are in practice more easily set aside on the ground of violation of due process.

4.3 Duty to Ensure Due Process

It is generally accepted that the essential task of an arbitrator is to come to a reasoned decision from an independent perspective after following appropriate due process at all procedural stages.\textsuperscript{241} Hence, due process constitutes the necessary legal framework qualifying the proceedings as arbitration and classifying the decision as an enforceable title of execution.\textsuperscript{242} Taking an active approach in the conduct of arbitral proceedings and assessing the applicable substantive law may risk an arbitrator to seem biased in favor or to the detriment of a party. The principle of equality is closely tied to the requirement that at any stage of the proceedings each party is given an opportunity to present its case, denial of which may lead to setting aside an award\textsuperscript{243}.

4.3.1 General Features – Applicable Provisions

Article 18 of the 1985 UNCITRAL Model Law provides the fundamental requirements expected of an arbitral tribunal for procedural justice, namely that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”. In other words the fundamental requirements include i) equal treatment of the parties and ii) full opportunity to present one’s case.\textsuperscript{244} The ground for setting aside an arbitral award on the basis of violation of these fundamental requirements is provided in article 34(2)(a)(ii) of the Model Law. An arbitral award may thus be set aside by the court if the party making the application furnishes proof that he was inter alia “otherwise unable to present his case”. The wording of article 18 of the 1985 UNCITRAL Model Law “full opportunity” seems to impose a very broad duty on arbitral tribunals. However, article 34(2)(a)(ii) is considered to be interpreted in a manner as to prevent parties from abusing it.
and to resulting to “dilatory tactics”\textsuperscript{245}. In fact, the procedural guarantee in the provision has been said to rather include the right to an adequate opportunity to present one’s case.\textsuperscript{246}

Since the regularity of the arbitration procedure is, as discussed in Chapter 4.1.3, governed by national law, reference is normally made to standards of national law. The parties’ right to be heard has been said to be a universally or quasi universally recognized principle although its application may vary between different legal cultures\textsuperscript{247}. The wording of the respective provisions under national arbitration laws follow in general the contents of the 1985 UNCITRAL Model Law.

In France, arbitral tribunals are under a duty to treat the parties equally and to ensure that the principle of contradiction ("principe de la contradiction") is respected under article 1510 of the French Code of Civil Procedure. Violation of the principle of contradiction opens the award for challenge under article 1520(4) of the French Code. In Switzerland, the two fundamental requirements of procedural justice are stipulated in article 190(2) of the Swiss FPILA, under which an arbitral award may be set aside if the parties’ fundamental rights of due process or the parties’ right to equal treatment have been violated.

However, some national arbitration laws have construed their respective provisions slightly more narrowly. For example, under section 41(1)(4) of the Finnish Arbitration Act the court may set an arbitral award aside if the arbitral tribunal has not given a party a sufficient opportunity to present his case. Moreover, section 33(1)(a) of the 1996 English Arbitration Act provides that arbitral tribunals are under a general duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent. Failure to comply with section 33 of the Act shall open the award for challenge under section 68(2)(a) of the Act. The restrictive wording of the provision appears to go even further since the same qualitative requirements of “serious irregularity” and “substantial injustice”, as discussed above in

\textsuperscript{245} Brekoulakis and Shore 2010, p. 624.
\textsuperscript{246} Born 2009, p. 2578.
\textsuperscript{247} Kessedjian 1995, p. 387.
relation to the ground of excess of power in section 68(2)(b) of the Act, apply to the failure to comply with section 33 of the Act.

### 4.3.2 National Standards as the Common Approach

The same restrictive approach as is generally taken in relation to the ground for setting aside an arbitral award for excess of mandate, is also considered applicable in relation to the ground for setting aside an award for violation of due process. However, as presented below, national standards applied by the domestic courts vary.

a) England

Arbitrators in England are required under section 33(1)(a) of the 1996 English Arbitration Act to exercise their powers with care so as not to deprive a party of i) a reasonable opportunity to put its own case or ii) to respond to its opponent’s case. However, the courts have generally approached this issue in favor of arbitrators actively managing their arbitration. In *ABB AG v. Hochtief Airport* Tomlinson J found that whilst it is not necessary for an arbitral tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties “a fair opportunity to address its arguments on all of the essential building blocks in the tribunal’s conclusion”.

Gloster J quoted two judges in her ruling in *The Remmar* case before reaching the decision that the arbitral tribunal had violated section 33 of the 1996 English Arbitration Act on the ground that it had relied on a point of law which the parties had not invoked and for which they were not given an opportunity to comment. Ackner LJ discussed an arbitral tribunal’s essential functions in *The Vimeira* case and stated that “if an arbitrator considers that the parties or their experts have missed the real point in the issues the parties have raised to be resolved by the arbitrator, then the arbitrator is obliged, in common

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248 See e.g. *Margulead Ltd v. Exide Technologies* [2004] EWHC 1019 (Comm.).
fairness or as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it”. Moreover, as noted by Bingham LJ in *Zermat Holdings SA v. Nu Life Upholstery Repairs Ltd*\(^{252}\) “if an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment”. In addition, if the arbitrator is in any extent relying on his own personal experience, then he should mention about it so that it can be explored. Bingham LJ went on to note that a party should not learn of adverse points for the first time in a decision against him, as this is contrary both “to the substance of justice and to its appearance”. Gloster J emphasized that these principles apply to unargued points of law in addition to unargued questions of fact.\(^{253}\)

In accordance with the general restrictive approach taken in relation to section 68 of the 1996 English Arbitration Act, the procedural irregularity in question must also be “serious” and have caused “substantial injustice” to the claiming party in order for the claim to be able to succeed before English courts. Gloster J found the irregularity in *The Remmar* case to have been clearly serious due to the fact that the claimant had been successful on each and every other issue and would have won substantial damages were it not for the sua sponte finding of the arbitral tribunal\(^{254}\).

Colman J emphasized in *Vee Networks Ltd. v. Econet Wireless International Ltd*\(^{255}\) that the assessment of “substantial injustice” will not depend on the arbitrator having come to the “wrong” conclusion as a matter of law or fact but “whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might have reached another conclusion favorable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavorable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable”.

Although this assessment is merely of a general nature, it could be interpreted as setting the threshold quite low. In practice any losing party in the underlying arbitral proceedings

\(^{252}\) [1985] 2 EGLR 14 at p. 15.
\(^{255}\) [2005] 1 Lloyd’s Rep 192, para. 90.
could arguably have no serious difficulty in proving that the irregularity, *i.e.* the *sua sponte* ascertainment and application of the law, caused the arbitral tribunal to reach the unfavorable conclusion.

However, it is questionable whether the appropriate threshold for an invalidity ground under section 68 of the English Arbitration Act, taking particularly into account the express qualitative requirements provided in the said section, should be set so low especially since the courts favor the approach of interfering with the validity of arbitral awards merely in exceptional circumstances where “something has gone so wrong that justice calls out for the matter to be corrected” as stated by Tuckey J in *Egmatra AG v. Marco Trading*. Moreover, it has been argued that a tribunal would have to act completely unfairly before the court would set aside an award. Hence, even if the applicant in *The Remmar* case succeeded in showing that not being given a reasonable opportunity to make submissions was a “serious irregularity”, it has been argued that it is a difficult argument for a party to succeed on since English courts will support arbitral tribunals in *e.g.* enforcing timetable.

b) Finland

The Finnish Supreme Court has had the opportunity to assess the scope of “sufficient opportunity” criteria of the right to be heard in accordance with the Finnish Arbitration Act in the so-called *Werfen* case of 2008. The underlying dispute concerned an arbitral award in which the arbitral tribunal had applied on its own initiative a Finnish law provision regarding adjustment of contracts which had not been invoked by either party during the arbitral proceedings. The award was challenged *inter alia* on the ground that the party had been deprived of the right to plead its case following section 41(1)(4) of the Finnish Arbitration Act.

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257 Beeley and Stockley 2009, p. 356; It should be noted, however, that there are authors who seem to take a stricter view: see Waincymer 2011, p. 224 where the author states that there seems no good reason for an arbitral tribunal to be entitled to apply a law without warning the parties of an inclination to do so.
258 KKO 2008:77, case No. 1517 of 2 July 2008, see above Chapter 4.2.2.b) for further details on the underlying dispute.
The Supreme Court found that the respondent had been given sufficient opportunity to plead its case in the arbitral proceedings. The claimant had alleged that the contract term denying the claimant a right to termination indemnity was null and void on the basis of principles regarding commercial agents. The claimant had claimed indemnity on the basis of facts which typically may lead to the adjustment of an agreement and, consequently, the respondent had had the opportunity to plead its case relating to all these facts and had also referred to views on reasonableness when contesting the claim for indemnity. Hence, the Supreme Court concluded that the arbitral tribunal had not breached the principle of contradiction.\(^{259}\)

The Supreme Court seems to have considered foreseeability as a determining factor in the assessment of the alleged violation of due process. The Supreme Court found that since, during the arbitral proceedings, the parties had referred to reasonableness when contesting the claim for indemnity, although in a somewhat different context, the application of the adjustment provision to a contractual term that was claimed to be null and void could not have come as a surprise to the parties.

Moreover, the fundamental nature of the applied legal provision may also have had an effect on the judgment of the Supreme Court. The provision that the arbitral tribunal applied \textit{sua sponte} is a fundamental element in Finnish contract law. Knuts has suggested that this may indeed have influenced the view of the Supreme Court in finding that the application of the provision on adjustment of contracts was foreseeable.\(^{260}\)

c) France

The French interpretation of the principle of due process ("\textit{principe de la contradiction}") goes beyond the mere opportunity of a party to present its case. Arbitrators are under a duty to ensure that each party will be heard on any point of law or on facts in addition to having the obligation to ensure that the parties have had the opportunity to consider and comment on each legal and factual issue considered in the arbitral award. Therefore, the parties must be heard and be given an opportunity to comment on any new arguments and

\(^{259}\) Waselius and Jussila 2011, p. 723.

\(^{260}\) Knuts 2012, pp. 682–683; see also Wobeser 2011, p. 215.
evidence introduced in the award that were not invoked during the arbitral proceedings or in the parties’ submissions.  

The position of the French courts was described in *Thyssen Stahlunion v. Meeaden* where the Paris Court of Appeal set aside part of an arbitral award on the basis that the arbitral tribunal had decided on its own initiative that interest would accrue on the principal award of damages at the “one-year LIBOR rate” without having heard the parties on the issue. The Court of Appeal found that “the principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it.”

The position was confirmed in *VRV v. Pharmachim* where the Paris Court of Appeal, however, assessed also the possibility of an arbitral tribunal merely requalifying a legal instrument within the limit of the factual evidence as presented by the parties without violating the principle of contradiction. The Court of Appeal held that “by holding without the possibility of an appeal, on the basis of all elements of fact and law that had been argued by the parties, that the contract characterized as a sales contract by its drafters was in reality a business contract, the arbitrators who only reinstated the legal instrument to its exact characterization, as was their duty, in order to apply it to the rules of law deriving from the characterization, did not violate the principle of contraction or the rights of the claimant by abstaining from inviting it to explain itself regarding a question of which all the facets had been discussed”. However, the Court of Appeal partially annulled the award on the basis that the arbitrators had, on the other hand, violated the principle of contradiction by having modified the legal ground of the claim of damages from contractual to tortious liability without having invited the parties to take a position on the said issue.

French courts will not set aside an arbitral award on the ground of violation of due process only where the rule relied upon by the arbitral tribunal is so general in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. Gaillard and Savage have provided

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262 Paris Court of Appeal (1st Ch. C.), 6 April 1995.
some examples of these types of situations by stating that this will be the case e.g. of the principle of good faith in the performance of contracts which will necessarily be among the elements taken into account by arbitrators who have been instructed to apply French law. In addition, the principle that contracts should be interpreted in accordance with their spirit is a fundamental rule of interpretation of contracts under French law which will always be applied by arbitrators, either implicitly or expressly.\(^{265}\)

Insofar as the rule relied upon by the arbitral tribunal does not fall within the scope of the above-mentioned exception, French courts seem to have adopted a consistent position of enforcing the principle of contradiction. This rather strict approach has been upheld in recent case law as well\(^{266}\). In *Engel Austria GmbH v. Don Trade and Others* of 3 December 2009, the Paris Court of Appeal annulled the arbitral award on the basis that the arbitral tribunal had violated the principle of contradiction in rendering its decision based on a point of law introduced *ex officio* without inviting the parties to present their observations prior to rendering its award.\(^{267}\)

In the quite recent case of *Overseas Mining Investments Ltd v. Commercial Carribean Niquel S.A.*\(^{268}\) the French *cour de cassation* upheld the annulment\(^{269}\) of an UNCITRAL award, finding that the arbitral tribunal had in fact modified the legal basis of the indemnification by substituting the claim based on loss of profit by an indemnification based on loss of chance and, therefore, had violated the principle of contradiction in failing to invite the parties to comment on the said modification.

All in all, French courts seem to have undertaken a consistent approach in setting aside arbitral awards in which the decision has been based on a point of law not invoked by the parties during the arbitral proceedings and not submitted for the parties to comment before making the decision. They seem to have adopted the view that any matter of law which has not been discussed during the arbitral proceedings will generally be considered


\(^{266}\) See e.g. *Gouvernement de la République Arabe d’Égypte v. Malicorp Ltd.*., Court of Appeal of Paris, 19 June 2008, case no. 06/17901.


\(^{268}\) Case No. 785 of 29 June 2011 (10-23.321), Cour de cassation, 1st Civil Chamber

\(^{269}\) Paris Court of Appeal, 25 March 2010.
unforeseeable no matter what the surrounding circumstances of the specific case may have been.

d) Switzerland

The term “parties’ right to be heard” under article 190(2) of the Swiss FPILA refers to fundamental due process rights. The purpose of article 190(2) of the Swiss FPILA is to avoid adjudication of claims on which a party had no opportunity to present its case and to guarantee each party’s right to have its claims addressed by the arbitral tribunal. The Swiss Federal Tribunal has established that the parties’ right to be heard corresponds broadly with the right guaranteed under article 29(2) of the Swiss Federal Constitution. It has been interpreted as including i) the right to examine the files that will constitute the basis of the arbitral award, ii) to present legal arguments, iii) to express their opinion on any facts that are essential for the decision, iv) to participate in the hearings personally or via representation, v) to offer relevant evidence, and vi) to comment on the results of the taking of evidence.

However, the Federal Tribunal has adopted a very restrictive approach in interpreting this ground for setting aside an award. For example, the parties’ right to be heard does not entail a right to a reasoned award. The arbitral tribunal is not compelled to discuss all arguments invoked by the parties and may thus e.g. implicitly reject arguments that are objectively irrelevant. Moreover, the Federal Tribunal has also held that a party must object immediately if it considers that its right to be heard has been breached in order to give the arbitral tribunal an opportunity to correct the situation, otherwise the right to complain at a later stage will be considered as having been waived.

The Federal Tribunal has held that arbitrators are under an obligation to apply the law sua sponte. Consequently, an arbitral tribunal may base its award on legal grounds not invoked by the parties during the arbitration procedure. However, the arbitral tribunal may not take

270 Geisinger and Mazuranic 2013, p. 244.
272 Segesser and Schramm 2010, p. 933.
273 See DFT 4P.235/2001, consid. 3e ; DTF 127 III 576, consid. 2c.
276 See DFT 4A_682/2011, 31 May 2012, consid. 3.1; DFT 4A_16/2012, 2 May 2012, consid. 3.3.
the parties by surprise by applying legal provisions or principles that neither party could reasonably have anticipated. If the arbitral tribunal considers that the parties have entirely overlooked legal issues that are determining for the outcome of the case, it must point this out to the parties and provide them with an opportunity to present their case on the issues. 277

Nevertheless, the Federal Tribunal applies this exception restrictively. The Federal Tribunal has held that case law reserves an exception to the *jura novit curia* rule if the arbitral tribunal intends to base its decision on a legal provision or argument not raised previously in the proceedings and on which none of the parties has relied and could possibly conceive its relevance in the case at hand 278. Hence, the arbitral tribunal is duty-bound to inform the parties and grant them the right to be heard only in situations where it intends to rely on a fact or a legal argument that the parties have discussed merely marginally, or not at all, and none of them can reasonably expect that the arbitrators would consider the argument to be decisive for the outcome of the case. 279

The question of whether something is foreseeable or not is subject to a case-by-case appreciation. The notion of what is considered as “reasonable to anticipate” was discussed in *Urquijo Goitia v. da Silva Muñiz* 280 in which the Federal Tribunal annulled an award on the ground that the arbitral tribunal had based its decision on a legislative provision which the court found to be “manifestly non-applicable” to the circumstances of the arbitration and, therefore, could not have been anticipated by the parties. In doing so, the arbitral tribunal had deprived the claimant of its right to be heard. Knuts has also noted that the legislative provision in question was not fundamental in its nature, which may also have had an effect on the foreseeability of its *sua sponte* application 281.

Moreover, the Federal Tribunal has noted that one has to be rather strict in the field of international arbitration in order to do justice to its particularities (i.e. intention of the parties to let arbitrators, instead of courts of law, to decide on their disputes and

277 Geisinger and Mazunaric 2013, p. 247.
278 DFT 4P.100/2003, 30 September 2003 at consid. 5 : "La jurisprudence aménage cependant une exception au principe "*jura novit curia" lorsque le juge s'apprête à fonder sa décision sur une norme ou un principe juridique non évoqué dans la procédure antérieure et dont aucune des parties en présence ne s'est prévalu et ne pouvait supputer la pertinence in casu. " [English translation from Scherer 2005, p. 101].
279 Scherer 2005, p. 100.
281 Knuts 2012, p. 683.
cooperation of arbitrators of different legal cultures). The Federal Tribunal noted in the case *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.* 282, that a restrictive approach is necessary in order to avoid that the purported unforeseeability of the arbitral tribunal’s legal reasoning is capable of being used to force on the state court a review of the merits of the arbitral award. 283

In addition, the Federal Tribunal seems, in deciding on the applicable threshold on a case-by-case basis, to take into account the actual circumstances of the parties’ representation and the level of expertise of counsel and any experts heard during the arbitral proceedings as it did in the case of *Y v. Z* 284 where the Federal Tribunal discussed the view that it was not convinced that the *sua sponte* application of the legal principle in the case came as a surprise to the claimant, *inter alia* because both parties’ representation was comprised of expert counsels who had in addition acquired expert evidence on matters of law from professors of law 285.

### 4.3.3 Lack of Common Approaches

Although the approaches taken by the courts in the presented jurisdictions vary considerably, some general remarks are capable of being made. Indeed, the question as to how due process is to be applied in practice when new facts and new arguments keep emerging in the hearings and submissions, seems to be a difficult task to master 286.

a) Varying Approaches of National Courts

The strictest approach appears to have been taken by the French courts. In France, the situation seems to be that arbitrators in practice are better off submitting all matters of law

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283 DFT 4P.100/2003, 30 September 2003, consid. 5: "D’après le Tribunal fédéral [...] savoir ce qui est imprévisible est une question d’appréciation et il convient de se montrer plutôt restrictif dans le domaine de l’arbitrage international, pour tenir compte de ses particularités (volonté des parties de faire trancher le litige par des arbitres, et non par les tribunaux étatiques; coopération d’arbitres de traditions juridiques différentes); il s’agit également d éviter que l’argument tiré de l’imprévisibilité du raisonnement adopté par le tribunal arbitral ne soit détourné pour imposer à l’autorité de recours une révision au fond des sentences arbitrales." English translation from Scherer 2005, p. 101.
used as a legal basis in the arbitral award and that were not invoked by the parties to the
discussion of the disputing parties, or else the arbitral tribunal will quite easily be
considered having violated the principle of contradiction and the award will be set aside.
The wording used by the French courts in describing the matters of law which must be
rendered for the parties to comment and argue are quite vague, which can be seen as
constituting, by corollary, a rather extended application of due process in France. For
example, in Thyssen Stahlunion v. Meeaden\textsuperscript{287} the Paris Court of Appeal stated that
anything used as basis for the decision must be rendered to the discussion of the disputing
parties.

The English courts seem to have originally adopted a similar approach with the use of
rather vague words describing the matters which the parties must be granted opportunity to
comment and present their case, such as “the real point”\textsuperscript{288} and “point that has never been
raised”\textsuperscript{289}. However, recent case law seems to have adopted a slightly higher standard. In
ABB AG v. Hochtief Airport\textsuperscript{290} Tomlinson J introduced a more restrictive standard in obiter
dicta by finding that in the case, the claimant had been granted a “fair opportunity” to
address its arguments on all of the “essential building blocks” in the arbitral tribunal’s
conclusions and that because he saw no further argument which the claimant could have
deployed which would have been in substance different from the arguments already
deployed, no “substantial injustice” had been caused to the claimant\textsuperscript{291}. A higher threshold
was also applied in The Remmar case\textsuperscript{292}.

It should be noted, however, that Colman J stated in Pacol v. Rossakhar\textsuperscript{293} that particularly
in arbitrations which are conducted on documents alone arbitrators should not introduce
inter alia “matters which have never been matters in issue between the parties” in their
awards. Hence, in so-called paper arbitrations arbitrators should avoid arriving at a
conclusion which may not have been envisaged by either party. It seems possible to argue
that the ground for setting aside an award could, therefore, have a lower threshold in so-
called paper arbitrations.

\textsuperscript{287} Paris Court of Appeal (1Ch.C.) of 6 April 1995.
\textsuperscript{288} Ackner LJ in Interbulk Ltd. v. Aiden Shipping Co (The Vimeira) (No.1) [1984] 2 Lloyd’s Rep 66 at p. 76.
\textsuperscript{289} Bingham LJ in Zermat Holdings SA v. Nu Life Upholstery Repairs Ltd [1985] 2 EGLR 14 at p. 15.
\textsuperscript{290} [2006] EWHC 388 (Comm).
\textsuperscript{291} Ibid. para 72.
\textsuperscript{292} See above Chapter 4.3.2.a) for further details.
\textsuperscript{293} [2000] 1 Lloyd’s Rep 109, p. 115.
The most lenient approaches towards the respect of the parties’ right to be heard and present their case seem to have been adopted by the remaining jurisdictions, Switzerland and Finland. There are similarities between the case law of the two mentioned states. The Swiss Federal Tribunal applies generally a high threshold to any allegation that the arbitrators took the parties by surprise since arbitrators are, like judges, in principle free to apply the law. A similar starting point was taken by the Finnish Supreme Court in the Werfen case where it found that the principle of due process was not violated since the parties were given the opportunity to plead their case as regards all of the facts that were applied in relation to the new legal basis introduced sua sponte by the arbitral tribunal.

b) Detectable Common Features

On a more detailed examination of the presented cases it appears, as pointed out by Knuts, that most jurisdictions seem to give importance to the fundamental nature of the legal concept or principle applied by the arbitral tribunal of its own initiative. For example, the only exception to the strict application of the principle of contradiction by French courts relates to situations where the rule relied upon by the arbitral tribunal of its own initiative is so general and fundamental in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. Similarly, e.g. the provision applied sua sponte by the arbitrators in the Werfen case concerned a fundamental element in Finnish contract law, as discussed in the previous chapter.

Moreover, it has been noted that some courts have shown a certain tendency of interpreting the possibility of the disputing parties having expressly chosen the applicable substantive law as entailing, by corollary, an acceptance of the fundamental concepts inherent to that specific law. Consequently, in these circumstances the applicable fundamental concepts may not, in practice, come as a surprise to the parties. This observation is supported by

296 It should be noted, however, that on the basis of an assessment of existing French case law on the ground of violation of the principle of contradiction, French courts appear to apply this exception only in exceptional circumstances.
297 Knuts 2012, p. 684.
e.g. the Finnish Werfen case and the Swiss case X. SA v. Y. SA\(^{298}\) where the parties had expressly chosen the applicable substantive law. By contrast in the Swiss case Urquijo Goitia v. da Silva Muñiz\(^{299}\), where the Federal Tribunal set the award aside for violation of due process, the parties had not expressly chosen any applicable substantive law\(^{300}\).

In addition, courts seem to be generally ready to give some importance to the level of expertise of both counsel of the disputing parties and possible expert witnesses that have been heard on the applicable substantive law during the arbitral proceedings, as in the Swiss case of Y v. Z\(^{301}\). Moreover, the circumstances relating to the level of the parties’ expertise of the applicable substantive law were also discussed in the The Remmar case where the sellers’ legal team did not include English lawyers and so the buyers’ legal team was likely to have been more familiar with English legal concepts than the sellers’ legal team\(^{302}\). By contrast for example in the Werfen case both parties’ counsel were familiar with the applicable substantive law, i.e. Finnish law.

Another feature being capable of having an influence on the outcome of the courts’ assessment is the concept of fairness. For example, if the provision applied by the arbitral tribunal has in fact been “manifestly inapplicable”, as it was the case in Urquijo Goitia v. da Silva Muñiz, then the courts may also find more easily that had the parties been given an opportunity to present their arguments on the said provision, the provision would not have been most likely relied upon by the arbitral tribunal in its award\(^{303}\).

All in all, the assessment of what elements affect the foreseeability of the disputing parties is significantly dependent on the circumstances of the dispute and the circumstances surrounding the arbitral proceedings inter alia. Arbitrators have been described as being faced with a “Scylla and Charybdis dilemma” because of the fact that their involvement in

\(^{298}\) DFT 4A_254/2010 of 3 August 2010.

\(^{299}\) DFT 4A_400/2008 of 9 February 2009.

\(^{300}\) In that case Swiss law was applicable due to a provision relating to sports arbitration and the FIFA rules.

\(^{301}\) DFT 4A_220/2007 of 21 September 2007, consid. 11.2.


\(^{303}\) It should be noted that this could possibly be interpreted as an exception to the general rule that under Swiss law courts are not able to review arbitral awards on the merits. It seems that although Swiss courts will not enable parties the opportunity of re-arguing their case before national courts, in circumstances where the arbitral tribunal has on its own initiative and without hearing the parties on the point of law applied a “manifestly inapplicable” provision, the courts will be less reluctant to set aside the award for violation of due process.
the arbitral proceedings and the parties’ presentation of their case must not to be too active nor too passive\textsuperscript{304}. Striking the perfect balance is an issue to be determined on a case-by-case basis taking into account all circumstances relating to the parties, the dispute and the arbitral proceedings. Some authors suggest that drawing a clear line between what is to be considered as acceptable and unacceptable involvement in the introduction of evidence of law on the part of the arbitral tribunal does not even seem possible\textsuperscript{305}.

Hence, the actual limits of the \textit{jura novit curia} principle seem to be established in practice by the attitudes of national courts in relation to the enforcement of the fundamental principle of due process. These attitudes do, however, vary considerably between the courts of the examined jurisdictions and the conducted assessment must be concluded as being highly dependent on the circumstances of each particular case.

\textsuperscript{304} Wetter 1996, p. 92.
\textsuperscript{305} Kurkela and Uoti 1995, p. 66.
This Master’s Thesis has contributed to the assessment of the applicability of the jura novit curia principle within international commercial arbitration by defining the legal basis of the principle and by gathering diverging arguments of legal authors and arbitration practitioners, in addition to examining the case law in some of the so-called major arbitration places in Europe, in order to detect existing common features setting the bounds for the jura novit curia principle in international commercial arbitration. The topic of this thesis involves a very complex combination of different legal principles and concepts relating to the specific characteristics of international commercial arbitration as well as a lack of a uniform approach mainly due to the diverging attitudes and backgrounds of legal authors and arbitration practitioners. As presented in Chapter 2, the legal background of the jura novit curia principle involves a rather delicate balance between inter alia the principle of party autonomy, inherent to the consensual nature of commercial arbitration, and the procedural freedom of an arbitral tribunal arising from its substantial case management powers. Although the number of applicable arbitration laws and rules affecting international commercial arbitration is immense, actual guidance on how an arbitral tribunal ought to conduct arbitral proceedings is very limited.

The scarcity of detailed guidance has encouraged some authors to consider analogy from court proceedings as an appropriate legal basis for the application of the jura novit curia principle in international commercial arbitration. This approach highlights the differences between the common law and civil law systems which, however, in reality are not necessarily essential in the context of arbitration. Moreover, the fundamental differences between civil and arbitral proceedings, as examined in Chapter 2.3, strongly indicate towards a limited effect of the analogy in the assessment of international arbitrators’ powers and duties as regards the conduct of commercial arbitral proceedings and more specifically ascertaining and applying the substantive law sua sponte.

Thus, the reality of the lack of guidance has strongly contributed to the ambiguity of the current situation. The existing legal literature dealing with the effect of the jura novit curia principle in international commercial arbitration is, as examined in Chapter 3, characterized by a consistent lack of consensus. Moreover, no uniform approach has been
developed in practice either. The opinions of legal authors and arbitration practitioners may be roughly divided into four groups including those who argue against the application of the principle and are of the view that arbitral tribunals should adopt a passive approach and base its decision merely on the legal and factual arguments invoked by the disputing parties during the arbitral proceedings.

Others find that the arbitral tribunal is under a duty to ascertain and apply the applicable substantive law in order to conclude a valid arbitral award, which can be considered as the main contractual duty of an arbitral tribunal once it has been established and given the task of settling the conflict between the disputing parties. However, the third group of opinions supports a type of partial duty to ascertain and apply the law mostly regarding merely mandatory provisions of the applicable substantive law and consider that as regards non-mandatory provisions, arbitrators have either merely the authority or no power at all to conduct independent research on the applicable substantive law.

However, the detailed examination of the existing rules on the conduct of arbitral tribunals in the management of arbitral proceedings conducted in Chapter 3.2 indicates that there exists no legally binding restrictions or limits to the authority of arbitrators ascertaining and applying the law *sua sponte* in accordance with the principle of *jura novit curia*. Therefore, it has been concluded that the fourth group of opinions, *i.e.* those who support the authority of arbitral tribunals to ascertain and apply the law *sua sponte* without imposing any positive duty on them to do so, would be the most appropriate view to be taken especially with reference to current case law which seems to be characterized by a tendency of accepting that in specific circumstances arbitrators are able to apply the proved facts of a case to legal matters not invoked by the parties, as presented in Chapter 3.3.

As presented in Chapter 4, national courts have the power to control, on the basis of their own national arbitration laws, the validity of arbitral awards rendered within their jurisdiction which, by corollary, entails that, assuming that the disputing parties have not expressly agreed to restrict the arbitrators’ powers in this respect, national courts set the ultimate bounds to the applicability of the *jura novit curia* principle. Hence, in order to define the actual scope of the *jura novit curia* principle in international commercial arbitration, one must necessarily examine the position taken by national courts in existing case law. Taking into account the fact that most jurisdictions do not allow the courts to
review arbitral awards in the merits, the actual limits to the *jura novit curia* principle are in practice set by the grounds for setting aside arbitral awards on the basis that the arbitral tribunal has either exceeded its mandate or violated the fundamental principle of due process.

However, as it has been established in Chapter 4.2, the examined decisions of the national courts in England, Finland, France and Switzerland are characterized by a common reluctance of the national courts to setting aside arbitral awards for excess of mandate. Courts seem to allow freedom to arbitrators in recharacterizing the parties’ claims to a rather large extent. The common position seems to be that insofar as the originally requested relief covers the recharacterization of the claim, the courts will not set aside arbitral awards on the basis that the arbitral tribunal has allegedly exceeded its mandate. In practice, therefore, successful challenges on this ground are rare and difficult to attain.

The examination of case law relating to setting aside arbitral awards on the ground of violation of the parties’ fundamental rights of due process conducted in Chapter 4.3 reveals that the standards applied in the different jurisdiction seem to vary considerably. However, certain common features can be detected in the national courts’ approaches.

For instance English courts apply the qualitative requirements of “serious irregularity” and “substantial injustice” in the assessment of alleged procedural irregularities in determining whether a party has been deprived of its right to a reasonable opportunity to putting its case and dealing with that of its opponent. However, no general conclusions can easily be made from the existing English case law in order to determine how this assessment is conducted in practice. An arbitral award was for example set aside in a situation where the claimant had lost its case solely on the legal basis applied *sua sponte* by the arbitral tribunal without having submitted the matter to the parties for their comments. In the said case certain value was also given to the fact that the losing party’s legal team did not include any experts of the applicable substantive law, as did on the other hand the legal team of the opposing party.

The level of expertise of the disputing parties’ legal representation and expert witnesses heard during the arbitral proceedings has also been given importance in Swiss case law. Moreover, Swiss courts have set aside an arbitral award in a situation where the *sua sponte*
applied legal provision was “manifestly inapplicable” to the circumstances of the case and the parties had not been granted an opportunity to be heard before the arbitral tribunal rendered its decision. The fact that the arbitral tribunal had applied the legal provision was considered unforeseeable and the parties should have been given an opportunity to present their arguments before rendering the decision.

Moreover, the fundamental nature of the legal concept or principle applied by the arbitral tribunal of its own initiative seems to be taken into account in most of the assessed jurisdictions. For example, French courts have adopted a rather strict approach of enforcing the principle of contradiction apart from the exceptional situations where the rule relied upon by the arbitral tribunal of its own initiative is so general in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. In addition, the fact whether the applicable substantive law has been expressly stated by the disputing parties or not may affect the assessment of the national courts. Parties who have expressly agreed upon the applicable substantive law may be interpreted as having accepted, by corollary, the fundamental concepts inherent to that specific law.

Thus, the approaches taken by the national courts in the examined jurisdictions do not generally indicate any common standards of assessment, apart from the fact that the courts assess each matter on a case-by-case basis and that the key element in determining whether the principle of due process has been violated or not in a situation where the arbitral tribunal applies a legal concept or principle of its own initiative, relates to whether the *sua sponte* application can be considered as being reasonably foreseeable in the particular circumstances of that specific case. Therefore, the most important question for arbitral tribunals to consider when contemplating to base an arbitral award on a point of law not invoked by the parties during the arbitral proceedings without inviting the parties to comment on it is whether the application of the legal concept, principle or provision in the specific circumstances of the case could be considered reasonably foreseeable.

Hence, there does not seem to exist valid real objections against allowing international arbitrators to ascertain and apply the law on their own initiative. Moreover, enabling an arbitral tribunal to conduct independent research on the contents of the applicable substantive law can be considered necessary from a point of view that this is the most
appropriate means of ensuring the parties have an opportunity for their dispute to be settled in the correct manner as the decision cannot easily, or necessarily at all, be appealed against at a later stage.

However, arbitral tribunals must be cautious when exercising such powers and arbitrators are highly recommended to taking into account the fact that anything applied *sua sponte* must not come as a surprise to either disputing party or the arbitral award may risk being set aside by the national courts of the place of the arbitration or possibly at a later stage where the arbitral award is sought to be enforced in another jurisdiction. Moreover, any party relying on the arbitral tribunal to ascertain the contents of the applicable substantive law on its own initiative must acknowledge the risk this necessarily entails, as arbitral awards are not generally set aside on the grounds that arbitrators have failed to apply the law correctly or at all since a review of merits of arbitral awards are in practice extremely rare due to the common reluctance shared by national courts in most jurisdictions of interfering with the validity of international arbitral awards.