

Department of law

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# Jura novit arbiter?

How to apply and ascertain the content of the applicable law in international commercial arbitration in Sweden

David Sandberg

Supervisor: Sebastian Wejedal Beijbom

Examiner: Marie Karlsson-Tuula



**GÖTEBORGS UNIVERSITET**  
**HANDELSHÖGSKOLAN**

## SUMMARY

Despite a general harmonization of international arbitration law and arbitral procedure, there is no international consensus on how the applicable substantive law in arbitration should be ascertained and applied. In Swedish law, this issue – often discussed in terms of whether *jura novit curia* applies to international arbitration or not – is uncertain. This thesis makes a comparative analysis of English, French, Swedish and Swiss law in order to recommend a solution to this uncertainty.

In national courts, two basic approaches exist in how to ascertain and apply the substantive law. In civil law jurisdictions, the judge is generally obliged to research the law and apply the correct legal basis *ex officio* under the legal maxim *jura novit curia*. This is the case in Sweden, France and Switzerland. The freedom of the judge to apply the law *ex officio* is however limited to some extent by the parties' right of disposition and right to be heard. In common law jurisdictions, the parties are generally responsible for researching the law and presenting legal arguments. Under the adversarial principle, the judge must refrain from conducting legal research and from raising legal issues *ex officio*. Such is the case, for example, in England. When foreign law is applied in national courts, however, the differences between the common and civil law jurisdictions appear less drastic. In England as well as in France, Sweden and Switzerland, it is generally the parties who are responsible for ascertaining the content of the applicable foreign law. Yet, in Sweden and France, the court still has a secondary responsibility for ascertaining the content of foreign law.

In international arbitration, the arbitral tribunal generally enjoys considerable liberty in ascertaining and applying the applicable substantive law. Rules applied in national courts are rarely imposed in international arbitral procedure. In Sweden, however, this issue is uncertain. In England, France and Switzerland, at least two factors are common: (1) the parties are generally responsible for ascertaining the content of the applicable substantive law, and (2) the arbitral tribunal enjoys a discretionary power to research the law and raise legal issues *ex officio*, this authority is limited by the parties' right to be heard on points of law. The underlying principle is that the arbitral tribunal may not take the parties by surprise when it applies the law; the parties must be afforded an opportunity to comment if the arbitral tribunal considers application of legal rules, principles, sources or arguments, to which the parties have not referred. This deference to a discretionary power of the arbitral tribunal and the parties' right to be heard on points of law is also supported in other key sources of international arbitration law.

This thesis suggests that the principles based on commonalities in the examined jurisdictions should also be applied in international arbitral procedure in Sweden. Consequently, *jura novit curia*, as it is understood in Swedish civil litigation, should not be applied in international commercial arbitration.

## LIST OF ABBREVIATIONS

ALI	American Law Institute
Arb. Int'l	Arbitration International
ASA	Association Suisse d'Arbitrage
ATF	Arrêt du Tribunal Fédéral
BYIL	Baltic Yearbook of International Law
CJEU	Court of Justice of the European Union
CPC	Code de Procédure Civile
Disp. Resol. J.	Dispute Resolution Journal
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
ICC	International Chambers of Commerce
ICLQ	International and Comparative Law Quarterly
ICSID	International Center of Settlement of Investment disputes
ILA	International Law Association
JIDS	Journal of International Dispute Settlement
Journ. Int'l Arb	Journal of International Arbitration
JT	Juridisk Tidsskrift
JWI	Journa of World Investment
LCIA	London Court of International Arbitration
LCIARoA	London Court of International Arbitration Rules of Arbitration
LDIP	Loi fédérale sur le Droit International Privé du 18 décembre 1987
NJA	Nytt Juridiskt Arkiv
Rev. Arb.	Revue de l'Arbitrage
SAA	Swedish Arbitration Act
SCC	Stockholm Chamber of Commerce
SCPC	Code de Procédure Civile du 19 décembre 2008
SCJP	Swedish Code of Judicial Procedure
SIAR	Stockholm International Arbitration Review
SLC	Société de Législation Comparée
SOU	Statens Offentliga Utredningar
SvJT	Svensk Juristtidning
WIPO	World Intellectual Property Organization
WLR	The Weekly Law Reports
UNCITRAL	United Nations Commission of International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

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# 1. INTRODUCTION

*"I remember a deliberation many years ago. One of my coarbitrators, a Canadian, suggested dismissing a claim because – he said – "they have not proven the law". I was young and inexperienced, and surprised: "But they do not have to prove the law", I replied. And that is when I realized that we were working on very different assumptions."*<sup>1</sup>

This thesis addresses the issue of how to ascertain and apply the law in international commercial arbitration, an area where, by its very nature, different legal cultures must coexist.

## 1.1 General Background

Today, arbitration is the most common form of dispute resolution in international transactions and international commercial relationships.<sup>2</sup> The reason for its success is generally attributed to a number of advantages that arbitration has over litigation in national courts.<sup>3</sup> Arbitration is often described as cheaper and faster than national court proceedings. Furthermore, arbitration is perceived as neutral, giving neither party the advantage of proceedings in their "home" court. Arbitration is perceived as being of a more confidential nature, and the arbitral award is generally easier to enforce than a foreign court order. Finally, and perhaps most importantly, the principle of party autonomy in international arbitration makes the arbitration procedure supple and flexible, and leaves substantial liberty to the parties in the choice of arbitrators, language, seat location, applicable substantive law, etc.<sup>4</sup>

Over the last few decades, international arbitration law has been subject to two parallel – and partially contradictory – developments: internationalization and national profiling. In 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) entered into force. This may be considered the starting point in a process of internationalization of arbitration law, followed by the United Nations Commission of International Trade Law (UNCITRAL) 1985 Model Law on International Commercial Arbitration, which has been of great importance in the process of harmonization national arbitration laws.<sup>5</sup>

Despite the success of instruments like the New York Convention and the UNCITRAL Model Law, arbitration law is still far from complete harmonization. For example, the New York Convention assumes that an arbitral award is pronounced according to the national arbitration law of a particular

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<sup>1</sup> Kaufman-Kohler (ASA Special Series 2006) p. 79.

<sup>2</sup> Fouchard, Gaillard & Goldman (1999) p. 1 and Petrochilos (2004) p.1. An extensive international survey from 2006 analyzing corporate attitudes shows that 73% of the respondents prefer to use international arbitration rather than dispute resolution in national courts: Queen Mary & PWC Survey (2006).

<sup>3</sup> Other factors that have accelerated the development of arbitration as the most important form of international commercial dispute resolution over the last few decades are the underlying prosperity of international commerce and trade, the developments in communication – which in turn have led to demands of faster dispute resolution – and the more and more globalized world.

<sup>4</sup> See e.g. Born (2001) p. 7 *et seq.*, Fouchard, Gaillard & Goldman (1999) p. 1 *et seq.*, Heuman (1999) p. 27 *et seq.*, Lindskog (2005) p. 46, Madsen (2007) p. 23 *et seq.*, Tweeddale & Tweeddale (2005) p. 39 *et seq.*

<sup>5</sup> SOU 1994:81 p. 61–63.

state.<sup>6</sup> Thus, awards claiming to be a-national or denationalized, risk being refused enforcement. Arbitration must therefore be sanctioned by a national legal system in order to be binding and enforceable.<sup>7</sup>

During the decades of internationalization, arbitration also experienced a unprecedented boom in lawmaking.<sup>8</sup> Although many national arbitration laws were inspired by the UNCITRAL Model Law, the arbitration laws in some countries – particularly European countries, e.g. Sweden, France, Switzerland, England and Spain – were largely influenced by national legal culture and traditions.<sup>9</sup> Several other factors also curbed the process of internationalization of arbitration law. First, identical or similar rules were interpreted differently in different jurisdictions, the division being particularly distinct between civil law and common law jurisdictions. Second, the importance of party autonomy varied between different jurisdictions, resulting in variations as to the extent to which the parties were free to form the arbitration themselves. Third, as in all other legal areas, new concepts and ideas arose within arbitration law. Such ideas are often recognized in only a minority of the legal systems world wide, naturally leading to further variances in the law of international arbitration.<sup>10</sup>

Significantly, arbitration is also one of the areas of law that has been left outside of the European Union harmonization initiatives.<sup>11</sup> In summary, although arbitration law has been subject to an important – and in many aspects successful – process of harmonization and internationalization, differences still exist between the arbitration laws of different jurisdictions.

## **1.2 Problems concerning the ascertainment and application of the applicable law in international arbitration**

One topic that continues to divide legal scholars and arbitration practitioners – and which, at least until recently, has received a relatively small amount of attention in legal literature<sup>12</sup> – is the issue of how to ascertain and apply the law in international arbitration. The issue concerns the question whether *jura*

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<sup>6</sup> New York Convention, Art. 1. The Convention speaks of awards made in the territory of a state. See also SOU 1994:81 p. 62.

<sup>7</sup> See e.g. SOU 1994:81 p. 58–60 and Fouchard, Gaillard & Goldman (1999) p. 3.

<sup>8</sup> Berger (1993) p 1.

<sup>9</sup> SOU 1994:81 p. 64.

<sup>10</sup> Fouchard, Gaillard & Goldman (1999) p. 2.

<sup>11</sup> Pålsson (2010) p. 68 *et seq.* Arbitration and judicial proceedings in connection with arbitration are excluded from the application of the Brussels I Regulation and the Brussels and Lugano Conventions. See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 1(2)(d), Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Art. 1(2)(4), Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 1(2)(d) and *Marc Rich and Co AG v Società Italiana Impianti PA* [1991] ECR I– 3855.

<sup>12</sup> Lew (2011) p. 2 and ILA Report (2008) p. 4.

*novit curia*<sup>13</sup> applies to international arbitration, or, seen from a different perspective, if the applicable substantive law has the status of fact or law.<sup>14</sup>

From the point of view of national courts there are two basic approaches to this issue in civil litigation.<sup>15</sup> Jurisdictions from both common and the civil law legal tradition are generally in agreement that facts must be pleaded and proved by the parties, and that these facts set the limits for what the court may rule on.<sup>16</sup> However, when it comes to the status of applicable law, particularly foreign law, common and civil law legal traditions diverge. Common law countries are more prone to treat foreign law as fact to be proven by the parties, also forbidding the judges to go outside the parties' legal arguments. By contrast, civil law countries generally treat foreign law as law. Civil law judges might therefore be obliged to establish and apply the content of the applicable law *ex officio*, and they may be at greater liberty to raise new legal issues.<sup>17</sup>

As there is no *lex fori* in international arbitration, one might say that all law is foreign. And as the principle of party autonomy grants the parties the liberty – regardless of where the arbitration takes place – to decide the applicable law, a wide spectrum of different laws are applied in international arbitration proceedings.<sup>18</sup> Once again, in the words of the well-known professor and practicing arbitrator Kaufman-Kohler:

*"Reflecting back on the cases in which I have been involved as an arbitrator, and certainly forgetting some of them, I realize that I have resolved disputes under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Illinois, New York... and Swiss law."*<sup>19</sup>

Statistics from the ICC International Court of Arbitration provide that out of 817 cases handled over one year, 91 different laws or legal systems were applied.<sup>20</sup> 46 percent of the cases handled by the SCC Institute of arbitration in 2010 were international cases.<sup>21</sup> The issue of how to ascertain the content of the applicable law is therefore of great practical importance.

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<sup>13</sup> Some authors also refer to the principle as *iura novit curia*.

<sup>14</sup> See Poudret & Besson (2007) p. 475 and 803. See also e.g. Lew (2011) p. 1, Madsen (JT 2010/11) p. 486 and Kaufman-Kohler (Arb. Int'l 2005) p. 631 *et seq.*

<sup>15</sup> This is of course an over simplification. In reality both civil and common law countries are situated on a sliding scale somewhere in between the two extremes.

<sup>16</sup> ILA Report (2008) p. 2. For Swedish law, see the Swedish Code of Judicial Procedure – Rättegångsbalk (1942:740) – chapter 17 section 3 and chapter 35 section 6.

<sup>17</sup> See e.g. Lew, Mistelis & Kröll (2003) pp. 441–442 and Hartley (ICLQ 1996) pp. 291–292.

<sup>18</sup> Lew (2011) p 2.

<sup>19</sup> Kaufmann-Kohler (Arb. Int'l 2005) p. 631.

<sup>20</sup> ICC Report (2010) p. 12.

<sup>21</sup> SCC Report (2010).



In order to fulfill his or her<sup>22</sup> mandate – to resolve the dispute on the basis of the applicable law – the arbitrator undeniably needs some knowledge of the applicable law. Yet, in the process of acquiring this knowledge the arbitrator must know how to conduct himself so as to avoid the risk of challenge actions for excess of authority or procedural irregularities.<sup>23</sup> So, how should the arbitrator proceed? Should he apply the same method as the national courts, or do considerations specific to arbitration require a unique solution? May the arbitrator conduct his own legal research? How should he interact with the parties? How should he apply the law once it is ascertained? Is he free to apply a legal provision differently than argued for by the parties? May he apply a legal basis *ex officio*?

These questions touch on the underlying issue of the very role of the arbitrator: does the arbitrator only have obligations towards the parties or must other interests – such as public policy or an obligation to resolve the dispute according to law – be taken into consideration?

From the parties' point of view, it is important to know whether the applicable rules must be invoked and proved or if one might, so to speak, relax and let the tribunal do the work.

### *1.2.1 A Swedish perspective*

Sweden plays an important role in international arbitration. During the cold war, Stockholm was often chosen as the seat for arbitration between China or Soviet states and western parties. The importance of Sweden's role in arbitration survived the cold war and today Stockholm is the seat of numerous arbitrations where neither the parties, nor the object of the dispute has any connection to Sweden or Swedish law.<sup>24</sup>

In choosing the seat of the arbitral proceedings, the parties must know which procedural rules will govern the arbitration dispute.<sup>25</sup> Legal considerations, affecting the arbitral procedure, are pointed out as comprising the single most important factor in the choice of the place of the arbitration.<sup>26</sup> National peculiarities, which may have an impact on the procedure and possibly affect the outcome of the dispute, are therefore an important variable in the choice of the arbitral seat:

*”Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. /.../ Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a*

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<sup>22</sup> In the following, only *he* or *his* will be used when referring to *he* or *she* or *his* or *hers* in order to make the text easier to read.

<sup>23</sup> Lew (2011) p 2.

<sup>24</sup> See Fouchard, Gaillard & Goldman (1999) p. 79–80 and SOU 1994:81 p. 65.

<sup>25</sup> Redfern & Hunter (2004) p. 83.

<sup>26</sup> Queen Mary & PWC Survey (2006) pp. 13-14.

*party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate.*"<sup>27</sup>

The conditions for a well-functioning arbitral jurisdiction have been identified as: a high degree of respect by local courts for the autonomy of the arbitral process, the maximum efficiency of awards and law, and finally, a practice creating predictable arbitral proceedings.<sup>28</sup>

In an age where states around the world compete to be an attractive alternative for international commercial dispute resolution,<sup>29</sup> international arbitral procedure must reflect the needs and expectations of the "consumers", i.e. the parties. It is therefore important – for the sake of legal security and predictability – that the parties are aware of the procedural rules that govern the ascertainment of the applicable law. Such rules should also reflect the principle of party autonomy and the fact that international commercial arbitration is a form of dispute resolution where actors from widely different legal traditions and cultures meet.<sup>30</sup> This is a necessary end-goal for Swedish arbitration law in order to uphold, and if possible fortify, Sweden's role as an important player in international arbitration, an aim explicitly expressed by the legislator.<sup>31</sup>

### **1.3 Definition of Arbitration**

At this point, it may be suitable to provide a brief definition of arbitration, along with what types of arbitration disputes that are considered to be international.

Arbitration is a form of semi-private, semi-judicial dispute resolution where the parties to a contract agree to refer their disputes to a third party – an arbitral tribunal – instead of a national court. The arbitration is private in so far as it is based on the parties' freedom of contract: the same issues that may be subject to a contract between the parties may also be subject to arbitration. The arbitral award cannot be reviewed on its merits in a national court; it is not subject to appeal.<sup>32</sup> The award may however be invalidated or set aside in subsequent court proceedings should certain serious formal or procedural irregularities have occurred.<sup>33</sup> The binding force of the arbitral agreement between the parties, and a national court's obligation to dismiss an action that falls under an arbitration agreement, flows from the principle of *pacta sunt servanda*.<sup>34</sup> The judicial features of arbitration mainly consist in properties that arbitral awards share with court orders: enforceability,<sup>35</sup> legal force and *res judicata* effect.<sup>36</sup>

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<sup>27</sup> Explanatory note on UNCITRAL model law, para. 8-9.

<sup>28</sup> Magnusson (SAN 2/2004).

<sup>29</sup> Berger (1993) p 1–5.

<sup>30</sup> Fouchard, Gaillard & Goldman (1999) p. 3.

<sup>31</sup> Gov't Bill 1998/99:35 p. 42.

<sup>32</sup> See e.g. Heuman (1999) p. 584. The parties may agree that the award may be reviewed on its merits on appealed in court or in an arbitral tribunal, such agreements are however highly unusual, see p. 40.

<sup>33</sup> SAA section 33 and 34. See also Heuman (1999) p. 585 *et seq.*

<sup>34</sup> SOU 1994:81 p. 69 and Gov't Bill 1998:99:35 p. 42.

<sup>35</sup> SOU 1994:81 p. 67 and Gov't Bill 1998:99:35 p. 40.

<sup>36</sup> NJA 1998 p. 42.

### 1.3.1. Definition of international

There is no uniform definition of international arbitration; what defines a dispute as international varies in different jurisdictions. It is also beyond the scope of this thesis to more profoundly address this complicated issue. However, a brief note on the concept of internationality of arbitration disputes may be helpful to better understand the subject matter of this thesis.

Art. 1(3) of the UNCITRAL Model Law, which many national laws draw inspiration from, applies the following definition:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their place of business:
  - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The Swedish Arbitration Act<sup>37</sup> (SAA) applies to both domestic arbitration and, under section 46 of the SAA, to arbitration with an international connection. The international connection may consist of either party being foreign, but also of the fact that the object of the dispute relates to a foreign transaction or operation.<sup>38</sup>

## 1.4 Purpose and method

The main purpose of this thesis is to offer a recommendation on how the applicable law should be ascertained and applied in international arbitration in Sweden. The application of the maxim *jura novit curia* in international arbitration in Sweden will be discussed from the departure point of the problems and questions set out under 1.2. and in the light of a comparative analysis of principles governing the ascertainment and application of the law in the civil litigation and in the arbitration procedure in England, France Sweden and Switzerland. The methods used are legal dogmatic method combined with comparative method.

In this context it should be noted that there is a considerable difference between what an arbitrator must or must not do and what an arbitrator *should* or *should not* do. Due to the substantial liberty granted to the parties and arbitrators in international arbitration, much of what can be said on the topic concerns the latter issue.<sup>39</sup>

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<sup>37</sup> Lag (1999:116) om skiljeförfarande.

<sup>38</sup> Madsen (2007) p. 37.

<sup>39</sup> ILA Report (2008) p. 8.

The aim of the legal dogmatic method is to describe and interpret the law. It should be pointed out that Swedish legal dogmatic method is less influenced by positivism and more influenced by legal realism the method in many other jurisdictions.<sup>40</sup> The aim is often described as predicting how a court would rule on a specific issue, and the perspective is therefore that of a judge.<sup>41</sup> The aim may be more precisely defined as giving an authoritative interpretation regarding the content of the law based on authoritative sources of law.<sup>42</sup> Dealing with a legal issue that is uncertain, as this thesis does, the classic conception of the legal dogmatic method therefore encounters several problems. In modern jurisprudence, the aim in this situation is rather to recommend a solution to the legal unclarity.<sup>43</sup>

The aim of modern Swedish jurisprudence has been described as explaining, not only using the authoritative frame of the doctrine of sources of law, but also using e.g. policy, functional and teleological arguments, and to leave contributions on which rational decisions may be made.<sup>44</sup> From this more modern perspective, the authoritative framework of the sources of law and the narrow task of predicting how a judge would rule on a given matter loses some of its importance.<sup>45</sup> The legal sources, however, still form the basis of the legal arguments, but may be combined with arguments based on notions of predictability, rationality, purpose and values, where the law *de lege lata* is critically analyzed.<sup>46</sup>

As to international arbitration, its transnational character is a strong reason not to heavily rely on the preparatory works and other domestic sources for interpreting the Swedish Arbitration Act (SAA).<sup>47</sup> In international commercial arbitration, the legal research has a clear international focus and the international practice is of considerable importance.<sup>48</sup> The preparatory works themselves point to the need for the Swedish arbitration legislation to adapt to international developments.<sup>49</sup> A comparative and less formalistic approach is therefore crucial.<sup>50</sup>

When applying a comparative method, choices have to be made. The comparative analysis of this thesis will therefore be focused on jurisdictions with modern arbitration laws and well-established arbitral practice. England, Switzerland, France – the top three seats of international commercial arbitration according to an extensive international survey<sup>51</sup> – and of course Sweden, will be the

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<sup>40</sup> Olsen (SvJT 2004) p. 109.

<sup>41</sup> Ross (1953) p. 47 *et seq.*

<sup>42</sup> Peczenik (1995) p. 260 *et seq.* and 314

<sup>43</sup> Olsen (SvJT 2004) p. 116-117.

<sup>44</sup> Hellner (2001) p. 33 *et seq.* and 45 *et seq.*

<sup>45</sup> Olsen (SvJT 2004) p. 113.

<sup>46</sup> Sandgren (2006) p. 534-536.

<sup>47</sup> Lindskog (2005) p. 22-23.

<sup>48</sup> SOU 1994:81 p. 71.

<sup>49</sup> Gov't Bill 1998/99:35 p. 45.

<sup>50</sup> SOU 1994:81 p. 74.

<sup>51</sup> Queen Mary and PWC survey (2006) p. 13-14.

primary targets. The jurisdictions also represent different legal cultures. England has a common law legal system while France and Switzerland both have continental civil law systems. The study of two civil law jurisdictions and only one common law jurisdiction is justified due to the fact that principles of civil procedure differ dramatically between civil law jurisdictions, whilst common law civil procedure is governed by similar principles to a higher degree.<sup>52</sup>

Institutional arbitration rules, arbitral awards and arbitration soft law will also be analyzed. Due to the confidential nature of arbitral awards, their availability might be scarce. Awards from investment arbitration – which are more likely to be made public – might therefore be useful for consideration.<sup>53</sup>

The comparison of different jurisdictions always poses a certain problem: the author, as well as the reader, trained within the compounds of a single legal system, must understand the rules of other legal systems. Simply studying the details of the legal area of comparison may often be misleading. Knowledge of the legal cultures of the jurisdictions subject to comparison might help understanding the foreign law in question by putting the compared rules in context.<sup>54</sup> Hopefully, analyzing the principles governing the ascertainment and application of law in national courts will facilitate an understanding of the corresponding principles applicable in arbitration. To this end, some general features of common and civil law civil procedure will also be described.

Regarding the use of sources in comparative studies, original and primary sources from the countries subject to the study is not a requirement. Secondary sources might even be more suitable when examining several jurisdictions within the context of a master thesis.<sup>55</sup> My linguistic knowledge has however been criterion in the selection of jurisdictions for analysis, and I will therefore employ both primary and secondary sources.

## 1.5 Delimitations

The focus of this thesis is the *ascertainment and application* of the substantive rules applicable to the contract – the *lex contractus* – that are applied to resolve the dispute before the arbitral tribunal. Thus, this thesis does not deal with the question of determining what rules apply; the choice of law and conflict of laws issues.

When ascertaining and applying the *lex contractus*, special circumstances, like the procedural default of the defendant,<sup>56</sup> public policy considerations<sup>57</sup> or the application of interim relief proceedings may

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<sup>52</sup> See e.g. Reynold (Arb. Int'l 1989) p. 357

<sup>53</sup> See e.g. Cordero Moss (SIAR 2006) p. 9 on the relevance of investment arbitration rules to international commercial arbitration.

<sup>54</sup> Bogdan (2003) p. 44-48.

<sup>55</sup> Bogdan (2003) pp. 41–43.

<sup>56</sup> See e.g. arbitral award rendered in 2005 in SCC case 93/2004, SIAR 2006:3, edited by Jarvin, p. 102 *et seq.*

<sup>57</sup> See below, subparagraph 3.1

rightfully affect the approach of the arbitral tribunal in ascertaining and applying the applicable law.<sup>58</sup> Proceedings under such special circumstances are also left outside the scope of this thesis.

Furthermore, this thesis is limited to international commercial arbitration, thereby excluding domestic arbitration, statutory arbitration, investment arbitration and interstate arbitration.

Finally, the power of the arbitrators in aspects other than ascertaining and applying rules and laws, e.g. to order production of evidence or to inquire about facts, is also left outside the scope of this thesis, as well as the question of how the arbitral tribunal should interpret the applicable law.

## **1.6 Disposition**

Section two contains a comparative study on how law is ascertained and applied in different national courts. Approaches to both *lex fori* – domestic law – and foreign law are included. The comparison will serve to highlight differences between legal cultures that have to be taken into account when shaping the international arbitral procedure. The comparison of how foreign law is treated in national courts will also serve to highlight the similarities and differences in approaches to ascertaining and applying a law that is unknown to the adjudicator.

Section three compares the arbitration laws of different jurisdictions and examines if, and to what extent, national legal traditions affect the procedural law of international commercial arbitration. In relation to the comparison of the procedure in national courts, this will serve to highlight similarities and differences in special considerations made in relation to arbitration in each jurisdiction. This comparison will, along with other sources of arbitration law, serve to examine possible uniformity of practice or common denominators in how the applicable law in international commercial arbitration is ascertained and applied.

Section four analyzes the result of the comparative outlook in the light of the principles governing arbitral procedure in Swedish law, taking into account the problems described in subparagraph 1.2, so as to, in section five, arrive at a recommendation on how the applicable law should be ascertained and applied in international arbitration in Sweden.

## **2. ASCERTAINING AND APPLYING THE LAW IN NATIONAL COURTS**

In this section, the principles governing the ascertainment and application of *lex fori* and foreign law in national courts will be compared. The comparison will highlight similarities and differences between the different legal traditions, which must be taken into account in international arbitration proceedings.

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<sup>58</sup> See ILA Report (2008) p. 21.

It will also serve to analyze whether there may be any uniform understanding of *jura novit curia*, and if not, what the different understandings of the principle includes.

Understanding how the *lex fori* is ascertained and applied in the different legal systems will also help contextualize the rules on how to ascertain and apply foreign law and the applicable substantive law in arbitration. The rules on of how foreign law is ascertained reflect the considerations made when a national judge is faced with a body of law that is unknown to him. The relevance of these rules to international commercial arbitration proceedings will in turn be evaluated.

## 2.1 General features in common and civil law civil procedure

How civil procedure, and its fundamental function, is viewed in a given legal system is reflected in the organization of the proceedings and the allocation of responsibilities and duties between the parties and the court is organized.<sup>59</sup> When studying theories regarding the respective roles of the parties and the court, and the interaction between the two, proceedings are often described in terms of being more or less *inquisitorial* or *adversarial*.<sup>60</sup>

In essence, inquisitorial proceedings refer to where the judge controls the case and its legal and factual frames. In adversarial proceedings, it is rather the parties who control the proceedings.<sup>61</sup> Applied to questions of law, the adversarial principle signifies that the judge must stick to the rules, authorities and arguments presented by the parties in resolving the dispute.<sup>62</sup> The judge may not "*propose or adopt arguments or conclusions of law differing from those which the parties put forward*".<sup>63</sup> The adversarial principle is closely connected to the principle of party control, ensuring that the court remains passive during the proceedings. Two common justifications for allowing the parties to control the legal limits of the proceedings are: ensuring that the court remains impartial, and preventing the court from falling into error.<sup>64</sup>

The adversarial principle rests on the assumption that the parties are both represented and equal, and that issues of public interest will seldom be raised in private disputes.<sup>65</sup> The focus of an adversarial procedure is dispute resolution and procedural justice, as opposed to that of inquisitorial proceedings, which is rather substantive justice in accordance with the applicable substantive law.<sup>66</sup>

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<sup>59</sup> Westberg (2010) p. 66 *et seq.*

<sup>60</sup> In Swedish legal tradition, there is no generally accepted terminology, the terms *dispositionsprincipen*, *förhandlingsprincipen* and *kontradiktionsprincipen*, are used when referring to the parties' right and power to control the proceedings, rather than the term adversarial, which is commonly used in common law legal literature. See Westberg (2010) p. 66-67 or Ekelöf (1956) p. 245 *et seq.* for the Swedish terminology and e.g. Jolowicz (ICLQ 2003) p. 281 *et seq.* and Andrews (1994) p. 33 *et seq.* for the English terminology.

<sup>61</sup> Andrews (1994) p. 33-34. See also Ekelöf (1956) p. 252.

<sup>62</sup> Andrews (1994) p. 33 *et seq.*

<sup>63</sup> Lord Staughton (Arb. Int'l 1989) p. 352.

<sup>64</sup> Andrews (1994) p. 34-35.

<sup>65</sup> Andrews (1994) p. 34-35.

<sup>66</sup> Jolowicz (ICLQ 2003) p. 281 *et seq.*, especially p. 295.

In modern western society, every legal system considers its civil litigation to be adversarial – i.e. based on the principle of contradiction. However, from a common law perspective, common law civil procedure is generally described as more adversarial in nature, as opposed to continental civil law civil procedure, which generally is described as inquisitorial. Under civil law, the more active role of the judge is not considered as giving the proceedings an inquisitorial nature.<sup>67</sup> Yet, in common law systems, this difference is often underscored as a major distinguishing element between common and civil law litigation. By contrast, Sweden belongs to the Scandinavian legal tradition, which civil procedure has been described as ”half cow - half goat”, i.e. containing both civil and common law elements.<sup>68</sup> The character of Scandinavian civil procedure, although formally classified as a civil law system, is often – also from a common law perspective – described as more adversarial in nature,<sup>69</sup> at least with respect to the collection of facts and evidence.<sup>70</sup> Whatever the terminology, it is clear that there is no system – neither common nor civil law – that is purely inquisitorial or adversarial.<sup>71</sup>

The extent to which the jurisdictions subject to comparison may be characterized as adversarial or inquisitorial falls outside the scope of this thesis. Nonetheless, an understanding of the two principles, and their underlying motivations may be useful to contextualize rules and considerations with regard to international arbitration. The most relevant aspect is the distribution of duties and powers between the judge and the parties in relation to the ascertainment and application of the law, and not in relation to selection of facts and evidence

Under civil law civil procedure,<sup>72</sup> the parties generally have no obligation to specify any legal basis for their action. The court is instead expected to know the law, i.e. the judge is obliged to research and apply the law to the facts presented by the parties. This concept is expressed through the maxim *jura novit curia*. Nevertheless, the power of the civil law judge to apply the law *ex officio* is generally limited by procedural safeguards or principles that are designed to ensure procedural fairness.<sup>73</sup> Unsurprisingly, civil law judges are generally required to have legal training.<sup>74</sup>

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<sup>67</sup> Westberg (2010) p. 80 *et seq.*

<sup>68</sup> Westberg (Bogdan 2010) p. 210 *et seq.*

<sup>69</sup> See e.g. Redfern & Hunter (2004) p. 320

<sup>70</sup> Westberg (2010) p. 66 *et seq.*

<sup>71</sup> Andrews (1994) p. 33-34.

<sup>72</sup> It should also be pointed out that civil law civil procedure may differ dramatically from jurisdiction to jurisdiction: ”(T)here is no such thing as ‘Civil Law procedure’ in civil and commercial litigation. In Common Law countries, there are undoubtedly certain common basic principles of procedure, which go back to the procedure practised in the English Courts. In continental Europe, there is no such common origin. In each country, one finds a different blend of civil procedure, largely influenced by local custom /.../. There is possibly as much difference between the outlook and practices of a French *avocat* and of a German *Rechtsanwalt* as between those of an English and of an Italian lawyer”. See Reynold (Arb. Int’l 1989) p. 357.

<sup>73</sup> Geeroms (2003) p. 34 *et seq.*

<sup>74</sup> Geeroms (2003) p. 30.



Turning again to common law, only in exceptional cases should a common law judge raise a legal issue *ex officio*. Furthermore, common law judges are not expected to know the law and need no legal training. Instead, it is the parties who have a duty to invoke, research and present the applicable law, even where the law is unfavorable to the party presenting it.<sup>75</sup>

With this general description of differences between civil and common law we turn to the specific jurisdictions subject to comparison. For each jurisdiction, the way that both *lex fori* and foreign law is ascertained is studied. Considerations made in relation to foreign law is of particular interest due to the considerations involved when the judge of a national court must depart from the safe grounds of his *lex fori* to apply a law with which he may be unfamiliar. This creates several practical problems that in many ways are common to international commercial arbitration. First, how is the foreign law introduced? Must the foreign law be invoked or should the court apply it *ex officio*. Second, how should the content of the applicable law be ascertained and applied? These are the issues that national rules generally have tried to resolve.<sup>76</sup> For the purpose of this thesis, it is the mainly the second issue – how the foreign law is dealt with once it is introduced – that is of relevance.

## 2.2 Sweden

After over 450 years of statutory existence, the principle *jura novit curia* has deep roots in Swedish legal tradition.<sup>77</sup> In modern procedural law, the principle's main *raison d'être* seems to be the will to produce precedents and a uniform application of the law, as well as considerations of protecting a party that fails to invoke a certain legal provision.<sup>78</sup>

Although the principle itself has not been enacted in statute, it finds statutory expression in Chapter 35 Section 2 of the Swedish Code of Judicial Procedure<sup>79</sup> (SCJP), which states that the parties need not prove what the law prescribes. In civil procedure, the principle obliges the judge to know the content of the law. Or rather, it obliges the judge to make use of his own knowledge of the law or to conduct his own legal research in order to ascertain its content.<sup>80</sup> The parties have no obligation whatsoever to invoke or refer to any legal provisions, but will generally do so.<sup>81</sup>

The other important consequence of the principle is that the court is obliged to apply legal provisions *ex officio*, i.e. to apply legal provisions to which neither party has made reference and subsume the facts invoked by the parties under such legal provisions.<sup>82</sup> Even if both parties have expressly opposed

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<sup>75</sup> Geeroms (2003) pp. 23-25.

<sup>76</sup> Geeroms (2003) p 41 *et seq* and p. 91 *et seq*.

<sup>77</sup> Kurkela (ASA Bulletin 2003) p. 486.

<sup>78</sup> Lappalainen (JFT 1993) p. 42.

<sup>79</sup> Rättegångsbalk (1942:740).

<sup>80</sup> Ekelöf, Edelstam & Heuman (2009) p. 303.

<sup>81</sup> Kleineman (2009) p. 93.

<sup>82</sup> Ekelöf & Boman (1996) p. 128. See also e.g. NJA 1989 p. 614, NJA 1993 p. 13, NJA 1996 p. 663 and NJA 1999 p. 629.

the application of a certain rule, the court is generally free to apply and resolve the dispute on the basis of such a rule. This concept is sometimes expressed by saying that the application of the law is excluded from the parties right of disposition over the case.<sup>83</sup> Thus, the understanding of *jura novit curia* in Swedish law is that the court is obliged to research the law in order to apply the adequate legal provision and to assure a solution that is substantially in accordance with the law.<sup>84</sup> However, as to the legal significance that the parties give the invoked facts – the legal qualification of the facts<sup>85</sup> – it seems that the parties’ right of disposition may prevail over *jura novit curia*. When the existence of a fact and its legal significance is expressly admitted by both parties, the tribunal may be bound by that legal qualification.<sup>86</sup> There are also authors who argue that the parties under special circumstances may dispose of which legal rules the court applies.<sup>87</sup>

One important question in connection the application of *jura novit curia* regards the parties’ right to be heard. This issue, related to procedural fairness, is raised when the court considers the application of a legal provision that has not been discussed during the proceedings and to which neither party has referred. From the parties’ perspective, the opportunity to comment on such a legal provision, and the opportunity to accordingly adapt their litigation strategies, may be crucial. It is therefore advisable for the court to allow the parties to comment on any legal provisions or issues that are raised *ex officio*.<sup>88</sup> It is not entirely clear which procedural principle the court would violate by not allowing the parties such opportunity, but it is more likely a violation of the duty to properly exercise case management, as opposed to a violation of the principle of contradiction.<sup>89</sup> In any event, it seems that the court is not obliged to give the parties the opportunity to comment on legal provisions or issues raised *ex officio*, as failing to do so does not in itself constitute a procedural error.<sup>90</sup>

### 2.2.1 Foreign law in Swedish courts

When a Swedish court applies foreign law, the effect of the principle *jura novit curia* is slightly modified. A Swedish judge has a responsibility for making sure that the foreign law is ascertained and

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<sup>83</sup> Ekelöf (1956) p. 255.

<sup>84</sup> Ekelöf & Boman (2002) p. 61, Ekelöf, Edelstam & Heuman (2009) p. 302. See also Kleineman (2009) p. 106-107.

<sup>85</sup> The term legal qualification is not employed in English law. For the purpose of this thesis, the term is given the same meaning as *qualification juridique* in French law or *rättslig klavificering* in Swedish law, and refers to the legal significance a certain fact or series of facts is given, e.g. the *qualification* of a certain business relationship as a partnership.

<sup>86</sup> See NJA 1992 p. 375, NJA 2010 p. 643, Westberg (JT 2011/12) p. 179 *et seq.* and Rättegång IV (7 ed) p. 70.

<sup>87</sup> See Lindell (2003) p. 62 and Madsen (JT 2010/11) p. 488. Supreme Court cases NJA 1978 p. 334 and NJA 1983 p. 3 are used as support for this view by Lindell.

<sup>88</sup> See Ekelöf, Edelstam & Heuman (2009) p. 304 and Fitger, *Rättegångsbalken*, p. 42:29 *et seq.* See also NJA 1993 p. 13 in which the Supreme court decided to resume hearings in order to let the parties comment on a legal issue that decided the outcome of the dispute in front of the Scania and Blekinge Court of Appeal, but that was not discussed by the parties in the proceedings.

<sup>89</sup> Lindell (1988) p. 38 *et seq.*

<sup>90</sup> Ekelöf, Edelstam & Heuman (2009) p. 304, Heuman (JT 1992/93) p. 919 *et seq.* and Kleineman (2009) p. 99-101. See also NJA 1989 p. 614 and Supreme Court Justice Lind’s comment on p. 622.

remains free to make use of his own knowledge and to conduct his own legal research.<sup>91</sup> It is also advisable that the the parties are given the opportunity to comment on the judge's findings.<sup>92</sup>

The important difference between application of foreign law and *lex fori* is that when foreign law applies, the judge is not obliged to establish its content himself. Under Chapter 35 Section 2 of the SCJP, the court may request that a party presents evidence on the content of foreign law. This possibility remains facultative, but should not be used when the court is in a better position to conduct the necessary research than the parties.<sup>93</sup> The request should be addressed to the party who relies on the foreign legal provision.<sup>94</sup> As to the issue of how the foreign law should be proved, the principle of free evidence applies. Translations, expert witnesses and extract from legal literature are examples of measures that might be used.<sup>95</sup>

How the court shall proceed if the content of the foreign law remains unascertained, despite efforts made by the parties and the court, is not entirely clear.<sup>96</sup> The most likely resolution would be that the court applies the *lex fori*, i.e. Swedish law. This has been the case in Swedish appeal court practice. It is however possible that the foreign law will still be taken into account, insofar that the court will not rule in favor of the claimant unless it is reasonable that the dispute is decided on the basis of Swedish law. This would allow the court to consider which party should bear the risk of the content of the foreign law remaining unascertained.<sup>97</sup>

### 2.3 England

In English law, being a common law system, civil procedure is generally described as adversarial. Although English civil procedure has become less adversarial over time,<sup>98</sup> the adversarial principle is still reflected in the way the content of the law is ascertained in English courts. English courts consider the parties' lawyers to be responsible for the legal analysis, even though no such formal obligation exists.<sup>99</sup> The parties are also free to explicitly exclude a certain legal provision from application by the court. Should the parties instead overlook the correct interpretation of the law it is not entirely clear how an English judge should proceed. Most authors and judges still argue that *jura novit curia* is not – and never has been – part of English law.<sup>100</sup> Nevertheless, there are prominent judges, e.g. Lord

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<sup>91</sup> Bogdan (2008) p. 54 *et seq* and Jänterä-Jareborg (1997) p. 236. In this context, the 1968 European Convention on information on foreign law should be mentioned. Through the convention – signed by the members of the Council of Europe – the contracting states have undertaken to, upon request, supply each other's judicial authorities with information on their domestic law on civil and commercial matters. The convention provides a practical instrument, although only available to national courts, to ascertain foreign law.

<sup>92</sup> Gov't Bill 1973:158 p. 108 and Bogdan (2008) p.54

<sup>93</sup> Gov't Bill 1973:158 p. 107-108 and Jänterä-Jareborg (1997) p. 236.

<sup>94</sup> Jänterä-Jareborg (1997) pp. 238-240.

<sup>95</sup> Bogdan (2008) p. 55.

<sup>96</sup> Jänterä-Jareborg (1997) p. 332–359 and Bogdan (2008) p. 56-58.

<sup>97</sup> Bogdan (2008) p. 57-58 and Jänterä-Jareborg (1997) p. 359.

<sup>98</sup> Jolowicz (ICLQ 2003) p.281.

<sup>99</sup> Andrews (2003) p. 121.

<sup>100</sup> See e.g. Andrews (2003) p 93.

Denning, who argue that an English judge should apply the correct understanding of the law if he notices the parties' misperception of it.<sup>101</sup> Whatever the case might be, an English judge shall under no circumstances decide a case on a legal basis or authority raised *ex officio* without giving the parties an opportunity to comment on his findings.<sup>102</sup>

### 2.3.1 Foreign law in English courts

Under English law, foreign law is a question of fact and not of law.<sup>103</sup> Consequently, it must be pleaded and proved – and may also be admitted – by the parties.<sup>104</sup> Furthermore, an English judge will not research the content of the foreign law, because under common law “*the trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues*”.<sup>105</sup> In fact, an English judge is not permitted to conduct his own research as to the content of foreign law.<sup>106</sup> However, although considered as fact, foreign law is fact of a peculiar kind. In case of appeal, findings on foreign law are reevaluated more as points of law than as facts.<sup>107</sup>

The point of departure when applying foreign law in an English court is that its content is the same as the *lex fori*, i.e. English law.<sup>108</sup> It is for the party who has pleaded the foreign law to prove the difference: Should he fail to plead the foreign law, or to sufficiently prove its content, the court will resolve the dispute on the basis of English law.<sup>109</sup>

To prove foreign law, a party cannot simply hand over a text or translation of the foreign legal provision, nor would reference to a foreign court ruling be acceptable proof of foreign law.<sup>110</sup> The method of proving foreign law is by expert witness, normally in the form of written statement. A competent expert witness is someone in a position where he necessarily gains knowledge and experience of the applicable law in question.<sup>111</sup> Although the exact qualifications necessary for an

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<sup>101</sup> Andrews (1994) and there cited *Goldsmith v. Sperrings Ltd and others*, (1977) 1 WLR, 478, p. 508.

<sup>102</sup> Andrews (1994) pp. 48-49.

<sup>103</sup> There are important exceptions to this rule. Foreign law need probably not be proved when it is notorious, neither where statute confers judicial notice of particular laws or if it is possible to establish foreign law simply from studying foreign legal materials. (See Fentiman (1998) p. 3 *et seq.*) Similarly, where the parties agree, an English court may apply foreign law without proof, but the court is reluctant to accept such requests and is free to decline them. (See Dicey, Morris & Collins (2006) p. 258.) Lastly, it should be mentioned that under Section 4(2) of the Civil Evidence Act 1972, previous rulings in which the content of a given foreign law has been established may be invoked to create a presumption of the content of that foreign law, subject to certain conditions. (See Cheshire, North & Fawcett (2008) p. 113-117).

<sup>104</sup> *Grupo Torras v. Sheikh Fahad* [1995] EWHC 1 (Comm). See also e.g. Cheshire, North & Fawcett (2008) p. 111 and Dicey, Morris & Collins (2006) p. 255-258.

<sup>105</sup> *Neilson v Overseas Projects Corp of Victoria Ltd* [2005] HCA 54, (2005) 221 A.L.R. 213, at [118].

<sup>106</sup> See *Bumper Developmet Corporation v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA) where a judgement was reversed because the judges conducted their own legal research.

<sup>107</sup> See *Parkasho v Singh* [1968] P 233 at [250] cited in Cheshire, North and Fawcett (2008) p. 113.

<sup>108</sup> See e.g. *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] EWCA Civ 422 at [70].

<sup>109</sup> See *Global Multimedia International Ltd v ARA Media Services & Anor* [2006] EWHC 3612 (Ch) at [38]. See also, e.g. Cheshire, North and Fawcett (2008) pp. 111-112 and Dicey, Morris and Collins (2006) p. 255 *et seq.*

<sup>110</sup> Cheshire, North and Fawcett (2008) p. 113-117.

<sup>111</sup> Civil Evidence Act 1972 Section 4(1).

expert witness have nor been entirely clarified, practical, and in some cases academic, knowledge and experience is usually sufficient.<sup>112</sup>

If the parties disagree on the content of the applicable law, they will normally call one expert witness each, who in turn normally will disagree.<sup>113</sup> The court will then decide which witness it prefers. The court may also accept parts of the evidence of each party. Should an expert witness remain uncontradicted the court should however be reluctant to reject the witness, unless its statement on the content of the foreign law seems absurd.<sup>114</sup> The court is free to review the sources of law presented by an expert in its evaluation of the expert's statement – and is even bound to do so when experts disagree – but the court is not entitled to go beyond the explicit subjects of reference.<sup>115</sup>

## 2.4 France

In French civil procedure, *jura novit curia* applies. It is often said that the facts are for the parties and the law is for the judge.<sup>116</sup> The discretion of the judge in applying the law is however counterbalanced by the *principe de disposition* and the *principe de la contradiction* finding statutory expression in Art 12(3) and 16 of the French Code of civil procedure<sup>117</sup> (CPC). The former allows the parties, by explicit agreement, to limit the judge's discretion to apply only certain legal provisions, and the latter obliges the judge to let the parties comment on any legal basis raised *ex officio*.<sup>118</sup>

Regarding the exact legal basis upon which the court bases its judgement, the traditional view is that the judge may freely apply the legal provision he sees fit to the facts presented by the parties. The parties decide the litigious facts and the judge may conduct his own legal research in order to decide the applicable rule and the way it is to be applied. This is expressed through the maxim *da mihi factum, dabo tibi jus*: give me the facts, I will give you the law.<sup>119</sup> However, there are notable exceptions to this provision.

Under Art. 12 of the CPC the court has an obligation to give the correct legal qualifications of the invoked facts regardless of the denomination argued for by the parties. The court is however not obliged to examine the legal basis – *le moyen de droit* – invoked by the parties or to raise any other legal basis *ex officio*.<sup>120</sup>

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<sup>112</sup> Hartley (ICLQ 1996) p. 284, and therein cited *X, Y and Z v B* [1983] 2 Lloyd's Rep. 535. In this case, a New York attorney was the expert witness for one party and a professor at New York University who was "one of the leading authorities" gave evidence for the other party.

<sup>113</sup> Hartley (ICLQ 1996) p. 284.

<sup>114</sup> *Grupo Torras v. Sheikh Fahad* [1995] EWHC 1 (Comm).

<sup>115</sup> See e.g. *Arros Invest Ltd v Rafik Nishanov* [2004] EWHC 576 (Ch) at [22] and Dicey, Morris and Collins (2006) p. 263.

<sup>116</sup> Jolowicz (ICLQ 2003) p. 292.

<sup>117</sup> Code de procédure civile.

<sup>118</sup> Jolowicz (ICLQ 2003) p. 292 and Wijffels (van Rhee 2005) p. 269 *et seq.*

<sup>119</sup> Guinchard, Chainais & Ferrand (2010) p. 341 and 398 *et seq.*

<sup>120</sup> Guinchard, Chainais & Ferrand (2010) pp. 413-414.

A fairly recent case from the *Cour de cassation* – the highest civil court in France – examined the judge’s obligation to apply rules *ex officio*.<sup>121</sup> It is said that the obligation under Art. 12 CPC to give the correct legal qualification to facts only applies within the limits of the parties’ claims and only to the facts explicitly invoked by the parties, as opposed to facts discussed in general terms during the proceedings. Furthermore, if a party has made reference to a specific legal basis for a claim, the judge is not obliged to modify that party’s claim, nor the legal basis for the claim.<sup>122</sup>

The principle of contradiction takes a central role in French civil procedure and partially limits the judge’s power to apply legal provisions or issues raised *ex officio*. Art. 16(1) of the CPC states that the principle of contradiction must be upheld by the judge.<sup>123</sup> Under Art. 16(3), the judge may not base his decision on a legal basis – *moyen de droit* – to which neither party has referred to, unless the judge first invites the parties to comment on such legal basis.<sup>124</sup>

#### 2.4.1 Foreign law in French courts

During the second half of the 20th century, the issue of foreign law in French courts became subject to dramatic developments and extensive case law from the *Cour de Cassation*.<sup>125</sup>

The point of departure under French law has traditionally been that foreign law is treated as fact. Consequently, the *Cour de cassation* systematically refuses to control the appeal courts’ interpretations of foreign law, the parties need to prove its content and, until recently, the court was not obliged to apply the foreign law *ex officio*.<sup>126</sup> Today, when the case concerns rights of which the parties do not dispose freely, the judge must apply the foreign law *ex officio* and the parties need not invoke it. Regarding the rights of which the parties do dispose freely, the judge has the power to apply foreign

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<sup>121</sup> Cass. Ass. plén., 21 déc. 2007, *BICC*, 15 avr. 2008, rapport Loriferne et avis R. de Gouttes.

<sup>122</sup> See Cass. Ass. plén., 21 déc. 2007, *BICC*, 15 avr. 2008, rapport Loriferne et avis R. de Gouttes: “*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*”. See also Guinchard, Chainais & Ferrand (2010) p. 426 *et seq.*

<sup>123</sup> *Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction.*

<sup>124</sup> *Il ne peut fonder sa décision sur les moyens de droit qu’il a relevés d’office sans avoir au préalable invité les parties à présenter leurs observations.*

<sup>125</sup> For long, by virtue of the *Bisbal* case (Cass. 1er Ch. Civ., 12 may 1959, Ancel & Lequette (2006), No. 32-34, 1st case) a french judge was not obliged to apply foreign law *ex officio*. Nevertheless, he had the power to do so (Case *Compagnie algérienne de Credit et de Banque v. Chemouny*, Cass. 1er Ch. Civ., 2 mars 1960, Ancel & Lequette (2006) No.32-34, 2nd case). In the two cases *Rebouh* and *Schule* (Cass. Civ. 1re, 11 octobre 1988, *Rebouh* et 18 octobre 1988, *Schule*, Ancel & Lequette (2006), No. 74-78, 1st-2nd case) from 1988, the *Cour de Cassation* dramatically reversed its previous position and ruled that foreign law must be applied *ex officio*. Two years later, this case law was in turn modified by the *Coveco* ruling (Cass. Civ. 1re, 4 décembre 1990, *Coveco*, Ancel & Lequette (2006), No. 74-78, 3rd case) where the *Cour de Cassation* ruled that the judge need only apply foreign law *ex officio* when that foreign law is applicable by virtue of an international convention and where the dispute concerns a matter of which the parties do not have free disposition of their rights. Some years later, another major modification to this case law was presented when the *Cour de cassation* suspended the obligation to apply foreign law *ex officio* by virtue of international conventions in the ruling *Mutuelles du Mans* (Cass. Civ. 1re, 26 mai 1999, *RCDIP* 1999, p. 707, note Muir-Watt.).

<sup>126</sup> Loussouarn, Bourel & de Vareilles-Sommières (2007) p. 308.

law *ex officio*, but not the obligation; in such a situation *lex fori* may be applied if neither party invokes the foreign law.<sup>127</sup>

As to ascertaining the contents of foreign law, this is also an area that has been subject to numerous modifications and controversial case law.<sup>128</sup> There is no longer a distinction between matters where the parties dispose of their rights and matters where they do not. Furthermore, there is no distinction between the cases where a party has invoked the foreign law and where the judge has declared it applicable *ex officio*. Previously a responsibility of the parties, it is now the obligation of the judge to ascertain the content of the foreign law *ex officio* and to apply it correctly.<sup>129</sup>

*"il incombe au juge français qui reconnaît applicable un droit étranger d'en rechercher, soit d'office, soit à la demande d'une partie qui l'invoque, la teneur, avec le concours des parties et personnellement s'il y a lieu, et de donner à la question litigieuse une solution conforme au droit positif étranger"*<sup>130</sup>

A French judge may however demand the parties to assist him,<sup>131</sup> normally by producing a *certificat de coutume*.<sup>132</sup> Should the parties fail to establish the content of the foreign law, the judge is duty bound to establish its content himself. Only where special circumstances have prevented, or made virtually impossible the ascertainment of the content of the foreign law, may the French judge apply *lex fori* by default.<sup>133</sup> Thus, previously treated mainly as a matter of fact, foreign law is increasingly being treated as a matter of law in French courts.<sup>134</sup>

## 2.5 Switzerland

Swiss civil procedure – aside from the procedure before the *Tribunal fédéral* – has traditionally fallen within the exclusive competence of the cantons. In general, civil procedure in Switzerland has however been influenced by German and French civil procedure.<sup>135</sup> The most important role of the judge is – in accordance with the principle *jura novit curia* – to apply the law in a substantially correct manner to the facts presented by the parties.<sup>136</sup> The parties' right to be heard – the scope of which primarily falls within the competence of the courts of the different cantons – was however guaranteed by the Swiss federal constitution.<sup>137</sup> This right obliges the local courts – at the pain of having their

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<sup>127</sup> Loussouarn, Bourel & de Vareilles-Sommières (2007), p. 315.

<sup>128</sup> Ferrand (2011) p. 236 *et seq.*

<sup>129</sup> See Cass. Civ. 1re, 28 juin 2005, Bull. I. n° 289 p. 240 and Cass. Com., 28 juin 2005, Bull. IV n° 138 p. 148.

<sup>130</sup> Cas. Civ. 1re, 28 juin 2005, Bull. I. n° 289 p. 240.

<sup>131</sup> Ancel & Lequette (2006) No. 82-83, p. 723.

<sup>132</sup> This is a written expert opinion by e.g. a foreign lawyer or a French embassy official in the country in question. These *certificats de coutume* is the most common way for the parties to establish the content of foreign law in French courts. See Ferrand (2011) p. 240.

<sup>133</sup> See e.g. Cass. Civ. 1re, 16 Nov 2004, Bull. I. n° 259 p 225. See also Loussouarn, Bourel & de Vareilles-Sommières (2007) p. 322.

<sup>134</sup> Ferrand (2011) p. 231 *et seq.*

<sup>135</sup> Oberhammer & Domej (van Rhee 2005) p. 124 *et seq.*

<sup>136</sup> Oberhammer & Domej (van Rhee 2005) p. 303 *et seq.*

<sup>137</sup> Constitution fédérale de la Confédération suisse du 18 avril 1999 Art. 29(2), before that Constitution fédérale de la Confédération suisse du 29 mai 1874 Art. 4.

judgements annulled – to provide the parties with an opportunity to comment if the court considers to apply a legal provision or argument that has not been discussed by the parties, the application of which the parties could not reasonably have predicted.<sup>138</sup>

As of 2011, Switzerland's first federal code of civil procedure entered into force, the Swiss Code of Civil Procedure<sup>139</sup> (SCPC). Under Art. 57 and 58 of the SCPC, it is now explicitly stated the court applies the law *ex officio*, within the limits of the parties claims. Art. 53 of the SCPC ensures the parties right to be heard.

### 2.5.1 Foreign law in Swiss courts

Until 1989, ascertaining the content of foreign law in Swiss courts was governed by canton law and it was generally treated as a matter of fact to be proved by the party relying on the foreign law. In the absence of sufficient proof, Swiss law was generally applied.<sup>140</sup> This practice was modified in 1989 when the Swiss Act of Private International Law<sup>141</sup> (LDIP) entered into force. As a general principle, *jura novit curia* now also applies to foreign law in Swiss courts.<sup>142</sup>

Under the LDIP, foreign law is applied *ex officio*,<sup>143</sup> and under paragraph 1 Art. 16 of the LDIP, its content is established *ex officio* by the court. This may be the main rule, but the judge is still empowered to request the assistance of the parties in establishing the content of foreign law. In matters concerning pecuniary claims,<sup>144</sup> the parties may even be imposed the "burden of proof" regarding the content of the foreign law.<sup>145</sup>

Although the wording of Art. 16 reads "*la preuve peut être mise à la charge des parties*", it is not completely accurate to speak of a burden of proof; the failure to "prove" the content of the foreign law does not result in a ruling against the party relying on it.<sup>146</sup> Instead, paragraph 2 Art. 16 of LDIP provides that Swiss law is applied if the party who relies on a foreign legal rule fails to sufficiently establish its content.<sup>147</sup> The practical function of Art. 16 therefore appears to be to allow the court to redistribute some of its workload to the parties.<sup>148</sup> As to matter others than pecuniary claims, the court

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<sup>138</sup> See e.g. ATF 114 Ia 97 and ATF 107 V 246.

<sup>139</sup> *Code de procédure civile du 19 décembre 2008*.

<sup>140</sup> Hartley (ICLQ 1996) p. 277 and Dutoit (2001) p. 51.

<sup>141</sup> *Loi fédérale sur le droit international privé du 18 décembre 1987*.

<sup>142</sup> Dutoit (2001) pp. 51-53.

<sup>143</sup> Dutoit (2001) p. 51.

<sup>144</sup> In Swiss law, the term pecuniary claim – or *matière patrimoniale* in French – is given a broad interpretation and is understood best as any issue in which the parties have a financial interest. Dutoit (2001) p. 54-55.

<sup>145</sup> "*Le contenu du droit étranger est établi d'office. A cet effet, la collaboration des parties peut être requise. En matière patrimoniale, la preuve peut être mise à la charge des parties.*"

<sup>146</sup> Dutoit (2001), p. 53.

<sup>147</sup> "*Le droit suisse s'applique si le contenu du droit étranger ne peut pas être établi.*"

<sup>148</sup> Hartley (ICLQ 1996) p. 277.



may only apply Swiss law if, after reasonable efforts, the court does not succeed in ascertaining the content of the foreign law.<sup>149</sup>

Should the court have established the content of the foreign law *ex officio*, it must allow the parties to comment on statements made by experts, institutes and other third parties as well as on the content of legal sources. Should the court consider application of the law in a surprising manner, the parties must also be provided with an opportunity to comment. The parties have the right to comment on any legal arguments of which they are unaware, if such application would be considered unpredictable. Denying the parties an opportunity to comment on the court's legal research or the a surprising application of the foreign law would constitute grounds for annulling the court's judgement.<sup>150</sup>

## 2.6 Summarizing conclusions of comparative outlook

In all three civil law jurisdictions, *jura novit curia* applies, and embodies a conception of how powers and duties should be allocated between the parties and the court. The general understanding of the principle seems to be a duty for the court to ascertain the content of the law on its own motion and an obligation to apply legal provisions *ex officio* to the facts invoked by the parties. This power is limited in different ways by the parties' right of disposition and the right to be heard. There is however no common conception as to what extent the national courts' powers are limited by the rights of the parties, and thus no uniform application of *jura novit curia*.

The fact that there is no uniform understanding of *jura novit curia* is even more accentuated when comparing how foreign law is treated in the jurisdictions where the principle applies. In this situation, the court's obligation to establish the content of the law is limited in all three civil law jurisdictions. Obliging the court to ascertain the content of foreign law would simply be too heavy a burden for the national court and an inefficient solution. Thus, in all four jurisdictions it is primarily the parties that are responsible for ascertaining the content of foreign law. In Swiss law – similarly to English law where foreign law is treated as fact – the parties even bear the risk of the foreign law not being ascertained.

Although a clear difference exist between England and the civil law jurisdictions as to how the law is ascertained and applied, there are also similarities that unite the jurisdictions beyond the civil-common law dichotomy. There are also considerable differences between the civil law systems. In all jurisdictions except for Sweden, the court has a duty – at least to some extent – to afford the parties an opportunity to comment on points of law that are raised *ex officio*. In this way, the powers of the tribunal is limited by the parties' right to be heard. As to the parties' right of disposition of the applicable law, France and England allow the parties to exclude certain legal provisions from being

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<sup>149</sup> Dutoit (2001) p. 56.

<sup>150</sup> ATF 124 I 49. See also Dutoit (2001) p. 53.

applied, whereas in Sweden, the application of the law falls almost entirely within the domain of the court's competence. One might say that in relation to the applicable law, the Swedish legal system is the most inquisitorial.

As evidenced, neither the adversarial-inquisitorial nor the fact-law dichotomy is decisive for indicating how the applicable law is ascertained and applied. Furthermore, the question of whether *jura novit curia* applies or not is not one single question of fundamental importance for ascertaining and applying the law. Rather, the question of how to ascertain and apply the law consists of a series of regulatory options where considerations of practicality, principle and policy are made.

### **3. ASCERTAINING AND APPLYING THE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION**

Having examined the different methods of how law is ascertained and applied in national courts, we now turn to the field of international arbitration.

#### **3.1 The arbitral tribunal's application of the law**

I begin with a short note on what exactly is meant by the applicable law that might be in place. Several different laws or legal systems may be applied in one single arbitration dispute:

- the law governing the parties' authority to enter into an arbitration agreement;
- the law governing the arbitration agreement <sup>151</sup>;
- the *lex arbitri*;
- the substantive law or laws applicable to the dispute;
- the law or laws governing the recognition and enforcement of the arbitral award.<sup>152</sup>

Depending on which aspect of the dispute or the procedure is concerned, different laws apply. As stated above, this thesis primarily focuses on the ascertainment and application of the applicable substantive law, i.e. the law applied by the arbitrators on the facts of the case to resolve the matter in dispute.

##### *3.1.1 The importance of the principle of party autonomy*

International arbitration rests on the foundation of party autonomy. It is from the contract and the parties' common intentions that the arbitrators derive their powers. The principle of party autonomy gives the parties the freedom to decide the rules governing the arbitral procedure, the applicable

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<sup>151</sup> Because of the principle of separability, the arbitration clause is seen as a separate agreement to the principle agreement and may also be governed by a different law, see e.g. Heuman (1999) p. 62 *et seq* and Poudret & Besson (2007) p. 132.

<sup>152</sup> Redfern & Hunter (2004) p. 77.

substantive law, the seat of the arbitration and so on.<sup>153</sup> International commercial arbitration in Sweden is also based on the principle of party autonomy, which provides the parties the liberty to choose the applicable law, the structure and form of the proceedings and the limits within which the arbitral tribunal may rule.<sup>154</sup>

Should the parties not exercise the aforementioned liberty, the form of the proceedings are left to the discretion of the arbitrators, limited only by fundamental procedural principles.<sup>155</sup> The arbitrators are always obliged to ensure principles of due process: to treat the parties equally, to give each party the opportunity to be heard and present his case and to study relevant material, and to ensure the transparency and the reasonable predictability of the arbitration.<sup>156</sup>

Under the principle of party autonomy, the parties are free to agree that the arbitral tribunal shall try the case with application of a certain legal provision only. The parties may also exclude certain legal provisions from application or they may explicitly decide that the arbitral tribunal may only consider the legal arguments and materials that have been presented by the parties.<sup>157</sup> Thus, party autonomy extends also to the arbitral tribunal's application of the law and the balance between the roles of tribunal and parties.<sup>158</sup> It should however be noted that in practice, agreements regarding the arbitrators' application of the law are rare, and the issue is generally not broached in discussion by the arbitrators.<sup>159</sup>

As to the choice of the arbitral seat, it may have profound legal consequences on the arbitration and may even materially alter its course.<sup>160</sup>

### 3.1.2 *The importance of the arbitral seat and the lex arbitri*

Contrary to national courts, an arbitral tribunal has no *lex fori*.<sup>161</sup> Consequently, arbitration in Sweden does not follow the procedural rules of the SCJP.<sup>162</sup> The rationale is that the parties' choice of Sweden as an arbitral seat probably has nothing or little to do with Swedish procedural law. Although many provisions from the SCJP might be suitable for application in domestic arbitration, they might be specifically unsuitable in international arbitration.<sup>163</sup>

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<sup>153</sup> See e.g. Fouchard, Gaillard & Goldman (1999) p. 31 *et seq* and 633 *et seq* and Redfern & Hunter (2004) p. 94 *et seq*.

<sup>154</sup> SOU 1994:81 p. 71 and 78 and Gov't Bill 1998/99:35 p. 43 and 49. See also Heuman (2003) pp. 249–250.

<sup>155</sup> Poudret & Besson (2007) p. 463 *et seq*. For Swedish arbitration law, see Madsen (2007) p. 36. See also Heuman (2003) pp. 264–265 and NJA 2000 p. 335.

<sup>156</sup> Poudret & Besson (2007) p. 470 *et seq* and Lindskog, Stefan (2005) p. 69.

<sup>157</sup> See e.g. Gov't Bill 1998/99 p. 146.

<sup>158</sup> Madsen (JT 2010/11) p. 491.

<sup>159</sup> Heuman (1999) p. 395. See also Calissendorff (JT 1995/96) p. 148.

<sup>160</sup> Born (2001) p 573.

<sup>161</sup> See e.g. Petrochilos (2004) p. 7 *et seq*.

<sup>162</sup> Lindskog (2005) p. 70–71 and Heuman (2003) p. 289. See also Gov't Bill 1998/99:35 that several times states that the SCJP is not applicable unless the SAA explicitly states so, and even though its principles may provide guidance in arbitration disputes between Swedish parties, this is not the case in international disputes, p. 143-144.

<sup>163</sup> SOU 1994:81 p. 74 and Gov't Bill 1998/99:35 p. 47. See also Heuman (2003) p. 289.

Two sets of rules primarily apply to the arbitral procedure: the *lex arbitri*, and the applicable procedural law or rules. Unfortunately, confusion between the two is not uncommon.<sup>164</sup>

The *lex arbitri* is generally decided by the *locus arbitri*, the seat of the arbitration.<sup>165</sup> The seat of the arbitration is, in turn, agreed upon by the parties.<sup>166</sup> Thus, the parties may only indirectly chose the *lex arbitri*. The procedural law or rules however – as explained above in 3.1.1 – fall directly within the scope of the party autonomy and might thus be decided by the parties.<sup>167</sup> The *lex arbitri* contains provisions that govern arbitration in a given country.<sup>168</sup> Even though it generally contains some mandatory or guiding rules on the arbitral procedure, these are often limited to fundamental procedural safeguards and principles.<sup>169</sup> As to the procedural rules applied, the parties will rarely have designated any.<sup>170</sup>

Under Section 47 of the SAA, the SAA is the *lex arbitri* to arbitration with its seat in Sweden.

### 3.1.3 Rules of ordre public

Since the arbitral tribunal has a general duty to render a valid and enforceable award, certain rules – from other sets of laws than the one chosen by the parties – might have to be applied *ex officio* to the dispute. These are mandatory rules – *lois de police* or *lois d'application immédiate* – that exist in every jurisdiction. In order to prevail over the parties' choice of law, these mandatory rules must be rules of international *ordre public*<sup>171</sup> or international public policy. Because of the duty of the arbitral tribunal to render an award that is enforceable and valid, these rules must be taken into consideration to some

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<sup>164</sup> Poudret & Besson (2007) p. 84.

<sup>165</sup> It should be pointed out that in contrast to this *seat theory*, there are some who argues for a de-localized conception of the *lex arbitri* where it is not dependent of a national legal order, but of international principles, much like public international law. See e.g. Fouchard, Gaillard & Goldman (1999) p. 3 and Petrochilos (2004) p. 16 *et seq.* It is however the seat theory that is the prevalent theory. See e.g. Born (2001) p. 7, Redfern & Hunter (2004) p. 83 *et seq.* and Lew, Mistelis and Kröll (2003) p. 172.

<sup>166</sup> Or in the absence of such a choice, the arbitral tribunal or the arbitration institution chosen by the parties.

<sup>167</sup> Poudret & Besson (2007) pp. 84-85 and Heuman (1999) p. 279.

<sup>168</sup> Even though the content of the *lex arbitri* may vary from one jurisdiction to another, a great degree of uniformity exist as to what issues different *leges arbitrii* govern: the scope of application of the law, the formal validity of the arbitration agreement, the appointment of the arbitral tribunal, fundamental principles governing the arbitral proceedings, the mandatory content and the effects of the arbitral award, the judicial review of the awards by national courts and recognition and enforcement of awards. Normally, only a few number of mandatory rules – the derogation of which may lead to the invalidation or the setting aside the award – exist. See Poudret & Besson (2007) p. 85.

<sup>169</sup> Poudret & Besson (2007) p. 84.

<sup>170</sup> Redfern & Hunter (2004) pp. 72-73.

<sup>171</sup> Although international commercial arbitration mainly concerns private law and legal issues of which the parties dispose within the domain of contractual freedom, national jurisdictions will set constrains also to matters which are arbitrable. The parties may not e.g. enter into contracts concerning bribery, cartels or criminal acts. When dealing with such rules, one must observe that there are different categories of mandatory rules. Each legal system contain rules that are "mandatory" when its *lex fori* is applied – *ordre public interne*. These rules are however not "mandatory" in the context of international commercial arbitration. There are also mandatory rules that are applied even when foreign law is applied in a legal system, rules that are so fundamental that they cannot be derogated from even when the *lex fori* is not applied. These are rules of *ordre public international*. One example of such rules are rules of EU competition law, see *Eco Swiss v Benetton*, case C-126/97, ECR 1999-I See e.g. Kreindler (JWI 2003). p. 239 *et seq.* See also Bogdan (2008) p. 76 *et seq.* and 85 *et seq.*

extent.<sup>172</sup> The ascertainment and application of rules of *ordre public* raises other considerations than the ones analyzed in this thesis and the issue will therefore only be mentioned briefly.

First, it may be necessary to consider mandatory rules of the arbitral seat in order to assure enforceability of the award. Some authors nevertheless propose that these rules may be disregarded. Second, mandatory rules of jurisdictions where the award might have to be enforced may be taken into account by the arbitrator in order to ensure the enforceability of the award.<sup>173</sup> Because of the difficulty in predicting where the arbitral award will be enforced, some authors recommend that the arbitrators directly enforce rules of transnational *ordre public* common to most modern jurisdictions.<sup>174</sup>

## 3.2 National arbitration laws

### 3.2.1 Sweden

The SAA does not explicitly require the parties to refer to, or invoke, legal provisions or arguments.<sup>175</sup> The SAA only stipulates, under Section 23, that the parties shall state their claims and the cause of action.<sup>176</sup> Consequently, the parties' claims and facts provided in support thereof will set the limits of what the arbitral tribunal may rule on.<sup>177</sup> As to ascertaining and applying the applicable law, the situation is however more uncertain.<sup>178</sup>

The principle of *jura novit curia* is discussed in the preparatory works of the SAA in connection with grounds for setting aside the award under Section 34(2) – excess of mandate. In this context, it is said that it "seems obvious" that an arbitrator may conduct his own legal research when e.g. interpreting a legal provision. When it comes to applying legal provisions *ex officio*, the statements are considerably more ambiguous. It is said that the *jura novit curia* applies *in dubio* in domestic arbitration – meaning that basing the award on a legal provision different from those invoked by the parties is not ground for setting aside an award. However, it is also said that in international arbitration, the parties may come from a legal tradition where *jura novit curia* does not apply. This must be reflected when defining the mission of the arbitrators and may result in a limitation of the arbitral tribunal's power to apply of the law *ex officio*. In such cases, the preparatory works seem to imply that deciding a dispute on a legal provision raised *ex officio* could be reason to set aside the award for excess of mandate. Without further guidance, the preparatory works recognize the difficulty in formulating a precise rule as to the

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<sup>172</sup> See e.g. Dimolitsa (ASA Bulletin 2009). p. 426 and ILA Report p. 21.

<sup>173</sup> See Poudret & Besson (2007), pp. 607-616 and therein cited authors.

<sup>174</sup> See e.g. Kreindler (JWI 2003) p. 239 *et seq.*

<sup>175</sup> It has been argued that – at least in domestic arbitration – neither the arbitral tribunal nor the opposite party may request that a party gives any legal arguments what so ever in support for his action. See Öhrström (2009) p. 190.

<sup>176</sup> However, in practice the parties generally present legal arguments to the arbitral tribunal. See Madsen (JT 2010/11) p. 492.

<sup>177</sup> See e.g. SOU 1994:81 pp. 175-176, Gov't Bill 1998/99:35 pp. 143-145, Lindskog (2005) pp. 931-933 and Heuman (1999) pp. 617-618. See also Svea court of appeal (Swe: Svea Hovrätt) ruling 2009-12-01 in case T-4548-08.

<sup>178</sup> The general view is however that the principle *jura novit curia* applies in domestic arbitration, see e.g. SOU 1994:81 p. 177, Gov't Bill 1998:99:35 p. 145, Lindskog (2005) p. 763 and Heuman (1999) pp. 340-341 and 394-395.

tribunal's competence on this matter, but emphasize that the arbitrators should always handle the cases in such a way as to minimize surprises in the application of the law.<sup>179</sup> Whether surprising the parties in such a way would constitute a procedural irregularity is however not discussed. On one issue however, the preparatory works provide more clear guidance: incorrect application of the law or failure to apply an applicable legal provision is not grounds for challenging an arbitral award.<sup>180</sup>

On the subject of case management, the preparatory works explain that if the arbitrators consider relevant a legal provision that has not been mentioned by the parties, the arbitrators should point this out to the parties as such. This straightforward guideline is however blurred by the following discussion on how special circumstances – the internationality of a dispute for example – must be taken into consideration, and that, in some cases such as where the arbitrators are limited to the legal provisions invoked by the parties, information on possibly relevant alternative legal provisions should not be pointed out to the parties.<sup>181</sup>

Turning to the legal doctrine, one finds significantly clearer views, albeit not at all uniform, on how the arbitral tribunal should ascertain the content of the applicable law. To better examine the debate, I will consider the different viewpoints in three main groups.<sup>182</sup>

### 3.2.1.1 *Jura novit curia applies*

Some authors – Lindskog and Kurkela – argue that the arbitrators are not only free, but even duty bound, to research the law and apply relevant legal provisions to which neither party has referred.<sup>183</sup> According to this view, the principal mission of the arbitral tribunal is to find a substantially correct solution to the dispute on the basis of the applicable law. Due to the specific character of international arbitration, some modification to this principle is however necessary. First, it should be the parties who bear the primary responsibility for establishing the content of the applicable law. But should the parties' efforts not sufficiently establish the content of the applicable law, the arbitral tribunal is itself obliged to proceed with its own research.<sup>184</sup> Lindskog does not rule out that under special circumstances, failing to apply the correct legal provision might even be reason to set aside the award.<sup>185</sup>

Second, if the arbitrators in their research deem that a legal basis or issue not discussed by the parties – but within the limits of their claims and presented facts – is relevant to the solution of the dispute, the

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<sup>179</sup> Gov't Bill 1998/99:35 pp. 144-145.

<sup>180</sup> See e.g. Gov't Bill 1998/99:35 pp. 122 and 144.

<sup>181</sup> Gov't Bill 1998/99:35 p. 119.

<sup>182</sup> It should be noted that authors within the same "group" disagree on some issues. The classification into three groups is only made in order to better overlook the debate and to show that there's no real consensus, rather a wide spectrum of different views.

<sup>183</sup> Lindskog (2005) pp. 656, 722-723, 763-765 and 933-934 and Kurkela (ASA Bulletin 2003) p. 287 *et seq.*

<sup>184</sup> Lindskog (2005) pp. 581n, 722-723 and 764-765 and Kurkela (ASA Bulletin 2003) p. 490 *et seq.*

<sup>185</sup> Lindskog (2005) pp. 947n and 952n.

arbitrators should communicate this to the parties in order to avoid surprises.<sup>186</sup> Should the arbitrators fail to point out a particular legal provision to the parties and then apply it to the dispute, there could be grounds for setting aside the award for a procedural irregularity under Section 34(6) of the SAA.<sup>187</sup> Similarly, overly active case management may cause an arbitrator to appear partial – e.g. by presenting a legal argument that may obviously help one party win the case, or by revealing where an arbitrator stands on an issue in dispute – and constitute grounds for setting aside the award pursuant to Section 8(3) of the SAA.<sup>188</sup>

### 3.2.1.2 Restricted application of *jura novit curia*

Heuman, Kleineman and Hobér seem to be of the opinion that *jura novit curia* cannot be applied in international commercial arbitration, but that the arbitral tribunal has a discretionary power to raise new legal issues.<sup>189</sup>

According to this approach, the parties themselves are responsible for ascertaining the applicable law.<sup>190</sup> However, declares Kleineman, the arbitrators cannot refrain from resolving the dispute just because both parties' legal arguments are incorrect, and neither should the arbitrators have the obligation to resolve the dispute on the basis of rules they know to be inapplicable to the situation. Thus, it must be considered as a power, but not a duty, for the arbitral tribunal to ascertain the applicable law and raise legal issues *ex officio*.<sup>191</sup>

Heuman argues that generally, since the arbitrators are often unfamiliar with the applicable law, applying *jura novit curia* in international arbitration would not be suitable. Due to the risk of mistakes in the application of the law, it is more important to strictly apply the principle of contradiction and ensure that the parties have the opportunity to comment on anything that the arbitrators have read in statutes, precedents, or legal literature, which was not invoked by the parties themselves.<sup>192</sup> Thus, it seems that Heuman assumes that the arbitral tribunal may conduct its own legal research. Arguments of a more simplistic nature may however be inserted into the award without giving the parties the opportunity to comment.<sup>193</sup> Heuman however provides us with the reservation that in international arbitration, it is not inconceivable that the arbitral tribunal may be bound by the legal arguments of the parties, depending on the parties' legal backgrounds.<sup>194</sup> It is also important that the parties are given

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<sup>186</sup> Lindskog (2005) p. 656 and Kurkela (ASA Bulletin 2003) pp. 498-499.

<sup>187</sup> Lindskog (2005) p. 968 and Kurkela (ASA Bulletin 2003), p. 499.

<sup>188</sup> Lindskog (2005) pp. 460-462 and 968.

<sup>189</sup> Heuman (1999) pp. 395-396, Kleineman (2009), p. 123 and Hobér (2011) pp. 213 and 244-245.

<sup>190</sup> Heuman (1999) p. 343 and Kleineman (2009) p. 117 *et seq.*

<sup>191</sup> Kleineman (2009) pp. 114 and 124.

<sup>192</sup> Heuman (1999) pp. 395-396. Zettermarck also shares this opinion, see Zettermarck (Heuman and Jarvin 2006) p. 112.

<sup>193</sup> Heuman (1999) pp. 395-396.

<sup>194</sup> Heuman (1999) p. 342-343.

sufficient time to research and analyze the new legal material introduced, not giving the parties this opportunity might also be ground to set aside an award.<sup>195</sup>

Hobér argues that even though it naturally is every arbitrator's ambition to find a substantially correct legal outcome to the dispute, doing so is no obligation for the arbitral tribunal. Rather, the tribunal has an obligation to decide the dispute on the basis of facts, arguments and evidence presented by the parties.<sup>196</sup> An application of legal rules or arguments that the parties have not referred to would probably be grounds for setting aside the award for excess of mandate under the SAA 34(2) as well as for being a procedural irregularity under 34(6). However, if the arbitrators become aware of a legal rule they think might be relevant, but which the parties have not discussed, they should "*resolve these issues with the parties*" in order to avoid surprises.<sup>197</sup> It is not entirely clear if Hobér considers it necessary that a party expressly relies on a legal basis or argument in order for the tribunal to apply it or if it is sufficient that the parties have been afforded an opportunity to comment on the legal basis or argument, in order for the tribunal to apply it. The bottom line seems to be that the parties must be properly informed about the legal basis that might be applied by the tribunal.<sup>198</sup>

On the issue of the parties' right to comment on legal issues, Kleineman takes a radically different approach than Heuman and Hobér. He argues that the possibilities to communicate legal provisions raised *ex officio* to the parties should be limited. Only if raised in an early stage of the proceedings, and where it can be done without the tribunal appearing biased or partial, should this be permitted. If the arbitrators do not raise a given legal provision before deliberations, they should in all cases refrain from communicating the provision to the parties, but they may still decide the dispute on its basis.<sup>199</sup> According to Kleineman, as the main obligation of the arbitrator is to resolve the dispute in a substantially correct way under the applicable law, an award cannot be set aside because of a surprising application of the law.<sup>200</sup>

### 3.2.1.3 *Jura novit curia* does not apply

Calissendorff and Madsen seem to take a third stance in the debate, arguing that *jura novit curia* should be not applied in international arbitration in Sweden.<sup>201</sup> Even though *jura novit curia* – due to its status as a general procedural principle in Swedish law – might in principle apply to international arbitration, Calissendorff and Madsen consider the principle of party autonomy to be of far greater

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<sup>195</sup> Heuman (1999), p. 341.

<sup>196</sup> Hobér (2011) p. 213 and 244.

<sup>197</sup> Hobér (2011) p. 317.

<sup>198</sup> Hobér (2011) p. 317.

<sup>199</sup> Kleineman (2009) pp. 120-121.

<sup>200</sup> Kleineman (2009) p. 108 *et seq.*

<sup>201</sup> Without giving further explanation than having "*difficulties in seeing the real problem here*" Nerdrum also argues that the arbitral tribunal should not apply legal rules that the parties have not invoked, Nerdrum (Heuman & Jarvin 2006) p. 133-134.



importance. They also point out that the parties in international commercial arbitration generally should be considered as equal, which diminishes the need to protect them from ignorance of the law.<sup>202</sup>

Madsen argues that because the application of the law in international arbitration is subject to the principle of party autonomy, the legal basis presented by the parties should normally be regarded as setting an outer parameter – similar to the parties’ claims and presented facts – upon which the arbitral tribunal may rule. Conducting further legal research to check for other rules not invoked by the parties must therefore normally be regarded as falling outside the scope of the arbitrators’ mission. Furthermore, the arbitrators, who must remain impartial, should refrain from pointing out applicable legal provisions to which the parties have not referred. Pointing out such provisions however, would not be grounds for setting aside an award.<sup>203</sup> Madsen partially bases his view on the need for a uniform international practice in procedural law of international arbitration, a practice that individuals from different legal cultures will perceive as predictable.<sup>204</sup>

As to reasons for setting aside an award, Madsen is of the opinion that even though the arbitral tribunal might not in principle be bound by the legal basis put forward by the parties,<sup>205</sup> if the parties’ conduct and legal arguments in the proceedings clearly indicate the legal basis they consider applicable to the disputes, such conduct could be deemed an implicit agreement. Basing the award on another legal basis could therefore akin to ruling *ultra petita* and would constitute grounds for setting aside the award under SAA section 34(2).<sup>206</sup> Basing the award on legal principles not invoked by the parties without giving them the opportunity to comment could also be cause for setting aside the award.<sup>207</sup> By contrast, ignoring to apply a legal provision not invoked – even if it may be applicable – is never grounds for setting aside an award.<sup>208</sup>

Calissendorff’s argument for not applying *jura novit curia* in arbitration looks slightly different. As surprises in the application of the law must be avoided, two alternatives arise: sticking to the parties legal arguments or communicating the legal issues raised *ex officio*. Since it is likely that a legal provision raised *ex officio* would benefit only one of the parties, or at least benefit one party more than the other, introducing a new legal provision would surely be considered partial, especially by foreign parties who are not accustomed to the Swedish legal system. Furthermore, such new legal provisions are often not raised until the deliberations. It would be contrary to the duty of the arbitrators to manage the procedure in an efficient and speedy manner – expressed in section 21 of the SAA – if the arbitrators reopened the case to invite the parties to comment after it has been closed for deliberations.

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<sup>202</sup> Calissendorff (JT 1995/96) pp. 147-148 and Madsen (JT 2010/11) pp. 500-501.

<sup>203</sup> Madsen (JT 2010/11) pp. 497 and 501.

<sup>204</sup> Madsen (JT 2010/11) 501. Madsen bases his views on the ILA recommendation, see section 3.2.2.4.

<sup>205</sup> Madsen (2007) pp. 282-283.

<sup>206</sup> Madsen (JT 2010/11) p. 498.

<sup>207</sup> Madsen (JT 2010/11) pp. 495-496.

<sup>208</sup> Madsen (JT 2010/11) p. 501.

For these reasons, the arbitral tribunal should refrain from conducting its own legal research and from applying legal provisions *ex officio*.<sup>209</sup>

Calissendorff however recommends that the arbitrators inquire as to whether the parties wish to apply *jura novit curia* or not. Should the parties disagree on the matter, the arbitrator may still proceed and refrain from applying *jura novit curia*, sticking rather to application of legal provisions invoked by the parties.<sup>210</sup>

Other authors also argue that *jura novit curia* does not apply in international arbitration in Sweden, but with different results. According to this view, the arbitrators may not conduct any legal research. It is instead left entirely to the parties' responsibility to prove the content of the applicable law. Nevertheless, within the limits of the sources and legal materials presented by the parties, the arbitral tribunal is free to apply the law without regard to what legal rules the parties have, or have not, invoked.<sup>211</sup>

#### 3.2.1.4 Case law

Swedish case law on the arbitral tribunal's powers to ascertain and apply the law is scarce, and such rulings will often only deal with the outer limits of the arbitral tribunal's power. However, there are rulings from challenge proceedings in the Svea court of appeal where *jura novit curia* is discussed.

In a the Svea court of appeal judgement from 27 august 2004 in case T 7866-02, the claimant alleged that the arbitral tribunal had ruled on circumstances that had not been invoked and thus exceeded its mandate. Even though both parties were Swedish, one was a resident of another country, thus giving the dispute an international connection.<sup>212</sup>

In connection with discussing fundamental procedural principles equally applicable to arbitration, the Svea court of appeal declared that a court may not rule on circumstances that have not been invoked. However, the court continued, it is not necessary that the parties invoke any legal basis. Instead, the principle of *jura novit curia* applies, i.e. the court applies the legal basis it considers relevant and draws its own legal conclusions regardless of what the parties have claimed, invoked or argued for.<sup>213</sup> Although not expressively stated, it is implied by the court that *jura novit curia* applies in the same way to arbitral proceedings. Still, *jura novit curia* was not applied in the challenge proceedings, which instead focused on interpretation and application of different contractual provisions.

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<sup>209</sup> Calissendorff (JT 1995/96) p. 148.

<sup>210</sup> Calissendorff (JT 1995/96) 149.

<sup>211</sup> Andersson and others (2011) p. 119.

<sup>212</sup> See Section 46 of the SAA.

<sup>213</sup> "[...] krävs inte heller att rättsregler (ibland benämnda rekvisit eller abstrakta rättsfakta) åberopas av någon av parterna. Här anses i stället sentensen *jura novit curia* gälla, dvs. domstolen tillämpar de rättsregler den finner relevanta och drar sina egna rättsliga slutsatser, oavsett vad parterna yrkat, åberopat eller argumenterat för."

*Jura novit curia* also came up in a challenge action case concerning investment arbitration between the Republic of Moldavia and a Russian investor.<sup>214</sup> In the arbitral award that was being challenged,<sup>215</sup> the arbitrator had awarded the Russian citizen consequential damages even though he had only argued for direct damages to a company owned by him. The arbitral tribunal asserted that it had acted appropriately, within the realm of the Russian investor's claims, and had referred only to legal sources already invoked. The Republic of Moldavia however challenged the award on several grounds, including that the arbitral tribunal had founded the award on a legal basis that was surprising to the parties, which made it impossible for Moldavia to defend itself with legal arguments.

The Svea court of appeal ruled that the Russian citizen had made a claim for damages, had provided factual circumstances to this end, and that the arbitrator had kept within the amount claimed and only ruled on the presented factual circumstances. The "surprise" legal basis upon which the arbitrator awarded the party damages was only considered another "legal qualification" of the invoked facts. Although consequential damages had never been argued for, the court considered that sources in support for consequential damages had been referred to by the parties. The court ruled that the principle of *jura novit curia* had not in fact been incorrectly applied and rejected the challenge action.<sup>216</sup> Interestingly, the fact that the case concerned international arbitration was not taken into consideration by the court, nor was the allegation of the surprising application of the law.

### 3.2.2 England

The English Arbitration Act 1996 (EAA) Art. 34(1) and (2)(g) read:

*It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*

*Procedural and evidential matters include [...] whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.*

Without offering further guidance on how the arbitrators should ascertain the content of the applicable law, the issue is left to the arbitral tribunal's discretion, subject of course to the parties' agreement. The tribunal is explicitly empowered to ascertain the content of the applicable law *ex officio*. From a common law point of view, this implies that the arbitrators have the power to act inquisitorially in

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<sup>214</sup> Svea court of appeal judgement the 28 November 2008, case no T 745-06.

<sup>215</sup> The award of 22 September 2005, under the SCC rules, rendered by the sole arbitrator Giuditta Cordero Moss, a civil law lawyer, is available on <http://italaw.com/documents/Bogdanov-Moldova-22September2005.pdf>.

<sup>216</sup> "[...] indirekt skadestånd, något som Iurii Bogdanov själv inte argumenterat för. I och med att yrkandet alltjämt kom att innefatta ekonomisk ersättning för ett visst förfarande som påstods ha orsakat viss skada, och då det utdömda beloppet inte överstiger det som begärdes av Iurii Bogdanov, anser hovrätten emellertid att skiljenämnden därigenom inte har gått utöver det framställda yrkandet. Skiljenämnden har inte heller lagt rättsfakta som inte åberopats till grund för sitt avgörande utan endast gjort en viss rättslig kvalificering av de sakomständigheter som Iurii Bogdanov angett, med stöd av en rättskälla som denne åberopat. Enligt hovrättens uppfattning har principen om *jura novit curia* inte tillämpats felaktigt i dessa avseenden. Moldavien har således inte visat att skiljenämnden överskridit sitt uppdrag i något avseende."

relation to the applicable law.<sup>217</sup> There is however no obligation for the arbitral tribunal to apply or ascertain the applicable law *ex officio*. In the case *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.*,<sup>218</sup> the commercial court held that, although section 46(1)(a) of the EAA states that the arbitral tribunal shall apply the law chosen by the parties, if the parties do not suggest that there is a specific issue under the applicable law that is different from English law, the tribunal is free to decide the case according to English law and the basis on the presumption that the two laws' content is the same. Thus, absent agreement to the contrary, the arbitral tribunal is free to let the parties prove the law also in international arbitration.<sup>219</sup> In its ruling, the court endorsed the view of one of the leading authorities in English arbitration law, Lord Mustill.<sup>220</sup> The ruling has however been subject to critique by Lew, who argues that applying English law, and not the law chosen by the parties, could be grounds to refuse enforcement of the award under the New York Convention Art. V(1)(b) and V(1)(c) for excess of power. Lew argues that even though the parties should be primarily responsible for ascertaining the applicable law, the tribunal is free to conduct its own research and should do so where the parties submissions are insufficient to resolve the dispute.<sup>221</sup>

Should the arbitral tribunal make its own research into the applicable law, it must however communicate its findings to the parties in order to let them comment before basing the award, or part of an award, on these findings.<sup>222</sup> Under section 33(1)(a) of the EAA, the arbitral tribunal has a general obligation to act fairly and impartially and give each party the opportunity to present its case and to deal with that of his opponent. Not giving a party the opportunity to address a legal issue, argument or source that is raised *ex officio* is seen a breach of section 33, and as a breach of natural justice under English law.<sup>223</sup> This is also the case where the parties have agreed that the arbitrator may himself act as an expert on the applicable law.<sup>224</sup> A breach of natural justice (or "due process" as it is called in the United States) is grounds for challenging the award, amounting to a serious irregularity under section 68(2)(a) of the EAA.<sup>225</sup> The award will however only be set aside where a substantial injustice has been caused by the irregularity.

The notion of substantial injustice is intended to be applied to support, and not to interfere with, the arbitral process.<sup>226</sup> Thus, if an arbitrator cites legal sources in the award which neither party has

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<sup>217</sup> Tweeddale & Tweeddale (2005) p. 658. See also Redfern & Hunter (2004) p. 320.

<sup>218</sup> [2000] EWHC 210 (Comm).

<sup>219</sup> Lew (2011) p 10.

<sup>220</sup> "It is a rule of civil procedure that the tribunal must assume the foreign law to be the same as English law, except so far as the contrary is alleged and proved. The arbitrator should give full weight to this presumption /.../ it is no part of his function to multiply trouble and expense by suggesting that the two laws may differ." Mustill & Boyd (1989) pp. 72-73.

<sup>221</sup> Lew (2011) pp. 11 and 15.

<sup>222</sup> Sutton, Kendall & Gill (1997) pp. 195 and 210 and Poudret & Besson (2007) p. 475.

<sup>223</sup> Natural justice, or due process as it is called in United States, requires e.g. that each party knows the case they meet, that the arbitrators do not base the award on secret knowledge and that the arbitrators informs the parties of their intentions as to the conduct of the reference so that no party is taken by surprise. See Tweeddale & Tweeddale (2005) pp. 386 and 768.

<sup>224</sup> *Sanghi Polyesters Ltd. (India) v The International Investor*, 28 January 2000, [2000] 1 Lloyd's law report 480, p. 485.

<sup>225</sup> Tweeddale & Tweeddale (2005) p. 768 *et seq* and Sutton, Kendall & Gill (1997) p. 415 *et seq*.

<sup>226</sup> See Tweeddale & Tweeddale (2005) p. 766 and Sutton, Kendall and Gill (1997) p. 422 *et seq*.

invoked or had the opportunity to comment on, the award is still only set aside if a party can show it led to a substantial injustice.<sup>227</sup>

*"The element of substantial injustice in the context of s.68 does not in such a case 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 well have reached another conclusion favourable 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 unfavourable 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."*<sup>228</sup>

The application of the element of substantial injustice ensures that awards are only set aside in cases where there is a realistic chance of reversing or changing the award,<sup>229</sup> or where the irregularity has had a real or substantial effect on the applicant.<sup>230</sup>

### 3.2.3 France

International arbitration law in France is governed by a special chapter in the CPC. Together with the remainder of French arbitration law, this chapter was subject to a reform in 2011, partially codifying previous case law and aiming at clarifying certain issues.<sup>231</sup> As to the procedural rules of international arbitration, there are few substantial modifications. The complete procedural autonomy of the parties is maintained, and even accentuated.<sup>232</sup> The code in its reformed state is fully applicable to arbitral proceedings on the basis of arbitration agreements that the parties concluded after 1 May 2011.<sup>233</sup>

Under Art. 1511 of the CPC,<sup>234</sup> the arbitrator shall decide the dispute in accordance with the rules of law designated by the parties. The arbitrator is bound by his mission to resolve the dispute and to apply the law, but in contrast to national judges, no precise rules govern the ascertainment of the content of the applicable law for the arbitrators.<sup>235</sup> Under Art. 1509, it is instead left to the parties, and by default the arbitrators, to fix the procedural rules. Regardless of which procedural rules are applied, the

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<sup>227</sup> *Sanghi Polyesters Ltd. (India) v The International Investor*, 28 January 2000, [2000] 1 Lloyd's law report 480, p. 485. The arbitrator had made reference to 18 textbooks and other works that neither party had referred to without letting the parties comment on them. The arbitrator emphasized that the sourced did not bring any new arguments but only amplified the parties' positions. Since the party who claimed the serious irregularity could not show that the new sources caused him a prejudice of any kind the award was not set aside.

<sup>228</sup> *OAO Northern shipping co v Remocladores de marin SL (Remmar)*, [2007] EWHC 1821 (Comm) (26 July 2007) (quoting *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192 at paragraph 90, per Colman J). In the case the award was set aside because a new legal basis, affecting the outcome of the dispute, was raised *ex officio* by the arbitral tribunal without letting the parties comment on it.

<sup>229</sup> *Shattari v Solicitors' Indemnity Fund* [2004] EWHC 1537 (Ch).

<sup>230</sup> *Groundshire Ltd v VHE Construction plc* [2001] EWHC 8 (TCC) (15 February 2001).

<sup>231</sup> Jarrosson & Pellerin (Rev. Arb. 2011) p. 5.

<sup>232</sup> Jarrosson & Pellerin (Rev. Arb. 2011) p. 64 *et seq.*

<sup>233</sup> See Décret n° 2011-48 du 13 janvier 2011.

<sup>234</sup> *Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées.*

<sup>235</sup> Chainais (Rev. Arb. 2010) pp. 4-5 and Jarrosson & Pellerin (Rev. Arb. 2011) p. 65.

arbitral tribunal must, under Art. 1510, guarantee the equality of the parties and the *principe de la contradiction*, both considered to be principles of international procedural *ordre public*.<sup>236</sup>

It is a debated issue in France whether or not the arbitral tribunal has an obligation to research and *ex officio* apply legal provisions and principles that do not have the status of *ordre public*.<sup>237</sup> However, ignoring the correct legal provision only amount to an error in law, which is not reason for setting aside an award or denying enforcement.<sup>238</sup> It seems to be argued by most legal authors that the parties have the primary responsibility for ascertaining the applicable law and that the arbitrator have the discretion, but not the obligation, to make legal research and raise legal issues *ex officio*, subject to the *principe de la contradiction*.<sup>239</sup>

In France, the *principe de la contradiction* plays an important role also in international arbitration.<sup>240</sup> If the principle is not respected, the award may be set aside under Art. 1520(4) of the CPC.<sup>241</sup> Before the french arbitration reform of 2011, there was an explicit reference making Art. 16(3) of the CPC – stating that the *principe de la contradiction* applies also to points of law – applicable in international arbitration. With the reform, the choice of method is different. Art. 1510 now simply states that the arbitrators must respect the *principe de la contradiction*. However, nothing indicates that a material change is intended.<sup>242</sup>

The principle of contradiction applies also to legal basis.<sup>243</sup> The result, confirmed in case law, of not giving the parties the opportunity to comment on the legal basis of the award, is that the award is set aside or refused enforcement.<sup>244</sup> The principle is often strictly applied, as in recent case law from the Paris court of appeal, where an award was set aside because the arbitral tribunal had based it on a legal principle that was not explicitly invoked, even though the principle had been discussed during the proceedings.<sup>245</sup> Poudret and Besson have however argued – before the time of this more strict application of the *principe de la contradiction* – that in general, it seems to be admitted that the arbitral tribunal may rely on a legal basis that has only been implicitly included in the debates.<sup>246</sup> This might still be the case where the legal basis is a principle so general it is considered to be implicitly included

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<sup>236</sup> Jarrosson & Pellerin (Rev. Arb. 2011) p. 60.

<sup>237</sup> Chainais (Rev. Arb. 2010) p. 20 *et seq.*

<sup>238</sup> Fouchard, Gaillard & Goldman (1999) p. 943 and Chainais (Rev. Arb. 2010) p. 22.

<sup>239</sup> See Chainais (Rev. Arb. 2010) pp. 22-23 and 43. Fouchard, Gaillard & Goldman (1999) p. 692

<sup>240</sup> Kessedjian (Rev. Arb. 1995), Bolard (Rev. Arb. 2004) p. 525 and Chainais (Rev. Arb. 2010), pp. 25-26.

<sup>241</sup> Fouchard, Gaillard & Goldman (1999) p. 947.

<sup>242</sup> Jarrosson & Pellerin (Rev. Arb. 2011) p. 41 *et seq.*

<sup>243</sup> Fouchard, Gaillard & Goldman, (1999) p. 949. See also Poudret & Besson (2007) p. 475 and Kessedjian (Rev. Arb. 1995) p. 409.

<sup>244</sup> See e.g. Revue de l'Arbitrage, 2010, p. 108, 19 June 2008, Cour d'appel de Paris (1re Ch. C) where an arbitral award in a dispute between The Arab Republic of Egypt and an English company under the Cairo regional center for international commercial arbitration was refused enforcement because the arbitral tribunal had introduced legal provisions *ex officio* without giving the parties an opportunity to comment. See also Cass. Civ. Ire, 14 Mars 2006, Revue de l'arbitrage, 2006 p. 653.

<sup>245</sup> Revue de l'arbitrage, 2010 p. 112, 3 Dec 2009, Cour d'appel de Paris (Pôle 1 - Ch. 1).

<sup>246</sup> Poudret & Besson (2007) p. 740.

and cannot reasonably take a party by surprise.<sup>247</sup> One such principle would be the French principle that a contract is interpreted in accordance with its spirit.<sup>248</sup>

One source of uncertainty regarding the application of the *principe de la contradiction* is that it is sometimes not entirely clear exactly what should be subject to contradictory debates.<sup>249</sup> A recent ruling from the Cour de cassation demonstrates the difficulties in setting a boundary between a legal source and a legal basis.<sup>250</sup> In the case, the *Cour de cassation* applied the term legal question, *question de droit*. In its ruling, the court refused to set aside an award in which the arbitral tribunal had motivated its decision by referring to Polish case law and legal doctrine, which had not been subject to the parties' discussions. The party bringing the challenge action to the court claimed that the Polish case law in question was not merely a legal source but rather an autonomous legal basis, since it contained principles not expressed in the Polish statute of limitations. Nevertheless, the Cour de cassation stated that the issue of limitation-barring had been duly invoked by one party, and that it was therefore a *legal question* that had been subject to contradictory debate. The sources used in the arbitral tribunal's motivation of the award were merely redundant affirmations of the actual motivation.<sup>251</sup> The ruling has been subject to critique by Chainais arguing that the Cour de cassation confused legal sources and legal basis.<sup>252</sup>

Finally, a line is drawn at the legal reasoning of the arbitral tribunal, which is not subject to the principle of contradiction.<sup>253</sup> However, the factual and legal basis for the arbitral tribunal's legal reasoning must be subject to contradictory debates.<sup>254</sup>

### 3.2.4 Switzerland

Swiss international arbitral procedure is governed by Chapter 12 of the LDIP. Art. 182 LDIP gives the parties, and by default the arbitrators, the power to determine the arbitral procedure. Whatever procedure chosen, the parties must, under LDIP 182(3) be treated equal and given the right to be heard in an adversarial procedure. However, the *Tribunal fédéral* has ruled that *jura novit curia* applies to international arbitration, formally obliging the arbitral tribunal to apply the law *ex officio*.<sup>255</sup> Consequently, the tribunal also has the power to subsume the facts presented by the parties under rules

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<sup>247</sup> Fouchard, Gaillard & Goldman (1999) p. 950.

<sup>248</sup> See Cour d'appel de Paris, 25 Nov 1993, 1994 Rev. Arb. p. 730.

<sup>249</sup> Chainais (Rev. Arb. 2010) p. 33 *et seq.*

<sup>250</sup> Cass. Civ. Ire, 6 May 2009, 2010 Rev. Arb. p. 90.

<sup>251</sup> "Ayant relevé que la déclaration sur la jurisprudence et la doctrine d'un droit étranger en matière de prescription, dont s'empare une partie pour dénoncer la violation du contradictoire, n'est qu'une constatation surabondante à la motivation de la décision de l'arbitre sur la question de l'interruption du délai de prescription, décision qui repose entièrement et uniquement sur des éléments dont aucun n'a échappé à la discussion des parties, lesquelles ont précisément plaidé sur l'interruption de la prescription dans le droit étranger"

<sup>252</sup> Chainais (Rev. Arb. 2010) pp. 40-41.

<sup>253</sup> Cass. Civ. Ire, 14 Mars 2006, Rev. Arb, 2006 p. 653

<sup>254</sup> Chainais (Rev. Arb. 2010) p. 42. See also the note of Racine under Cour d'appel de Paris, 18 Sept. 2003, (1re Ch. C.) 2004 Rev. Arb. p. 311.

<sup>255</sup> See e.g. ATF 120 II 172

that neither party has invoked or made reference to.<sup>256</sup> As a result, deciding the dispute by applying a rule that has not been invoked during the proceedings will not constitute grounds for setting aside the award on the basis of the tribunal having ruled *ultra petita* under Art. 190(c) LDIP.<sup>257</sup> One exception to this rule is however made when a party, in its *conclusions*<sup>258</sup> links its claims to a certain legal basis. In such case, the arbitral tribunal is bound by the legal basis referred to by the party, and may not allow the claim on another legal basis.<sup>259</sup>

Even though the *Tribunal fédéral* have stated that the arbitral tribunal is obliged to apply the law *ex officio*, erroneous application of the law, even in manifest cases, or non-application of the correct legal provision, is not cause for setting aside the award.<sup>260</sup> The arbitral tribunal also has the power to impose the parties with a burden of proof of the content of the applicable law.<sup>261</sup> Furthermore, the *Tribunal fédéral* has held that the arbitral tribunal is free to rely entirely on the arguments of the parties, and is not obliged to research the applicable law itself, where it deems the parties' presentations sufficient to decide the dispute.<sup>262</sup>

Kaufman-Kohler, Poudret and Besson argue that the arbitrators are in fact free to derogate from *jura novit curia*. Procedural matters are left to the discretion of the parties and, in default, to the arbitrators under Art. 182 LDIP. The only restriction of this discretion is the parties' right to be heard under Art. 182(3) LDIP. Since the question of how to ascertain the applicable law is a procedural matter left to the parties' discretion, it is by default left to the discretion of the arbitrators, whom are free to derogate from *jura novit curia* if they wish. The function of *jura novit curia* in Swiss arbitration law is rather to make sure that the award is not set aside if the arbitral tribunal should raise new legal issues *ex officio*, and not to actually *oblige* the tribunal to raise such issues.<sup>263</sup>

Finally, the parties' right to be heard requires the arbitral tribunal to afford the parties an opportunity to comment on the legal research of the arbitral tribunal if it includes the views of third parties, authorities, experts or institutes.<sup>264</sup> As to the application of the law, the parties have the right to

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<sup>256</sup> Perret (Études Lalive 1993) p. 595 *et seq.*

<sup>257</sup> Kaufmann-Kohler (Études Hirsch 2004) p. 73.

<sup>258</sup> The *conclusions* is, simply put, a document of Swiss procedural law in which a party states its claims. See Perret (Études Lalive 1993) p. 597.

<sup>259</sup> In the unpublished case of the *Tribunal fédéral, O. & consorts v. V* of 30 April 1992 the claimant had linked his claims for damages to the invalidity of the contract. The arbitral tribunal allowed the claim for damages, but under a different legal basis. The award was set aside by the *Tribunal fédéral* that *ultra petita*. The ruling is criticized by Perret in Perret (Études Lalive 1993) p. 597 *et seq.* but was later confirmed by the case ATF 120 II 172.

<sup>260</sup> ATF 120 II 155, at 6a p. 166. See also ATF 121 III 331, at 3a p. 333. See also Dutoit (2001) p. 597.

<sup>261</sup> Kaufmann-Kohler (ASA Special Series 2006) p. 83.

<sup>262</sup> This issue was addressed in Trib. féd., 27 April 2005, cons. 7.3, ASA Bulletin 2005, p. 719. The arbitrator had imposed on the parties to prove the difference between Croatia and Swiss law and for this the award was later challenged for being contrary to *ordre public* under Art. 190(e) LDIP. The court dismissed the challenge action, making an analogy with Art. 16(1) LDIP which allows a Swiss judge to impose the burden of proof of foreign law on the parties.

<sup>263</sup> Kaufmann-Kohler (Études Hirsch 2004) p. 74, Kaufmann-Kohler (ASA Special series 2006) p. 82 *et seq.* and Poudret and Besson (2007) p. 482.

<sup>264</sup> See Dutoit (2001) p. 596 *et seq.*, Trib. féd. 17 July 1998, ASA Bulletin 2002, p. 660 and ATF 124 I 49.



comment if the tribunal is considering to base the award on an argument that the parties have not discussed, the application of which would be unforeseeable.<sup>265</sup> Not giving the parties the opportunity to comment under such circumstances constitutes grounds for setting aside the award under Art. 190(d) LDIP, regardless of the effect on the outcome of the case.<sup>266</sup> The assessment of the character of the new legal issue or argument as unforeseeable is left to the discretion of the arbitral tribunal, but it should be interpreted narrowly due to the international character of arbitration and in order to prevent a party's right to be heard from being misused to obtain a material reexamination of the award.<sup>267</sup> Indeed, the doctrine of unforeseeability has been scarcely applied by the *Tribunal fédéral*.<sup>268</sup>

### 3.3 Institutional arbitration rules, conventions and other sources

Stepping away from national arbitration laws, this section contains analyses of arbitration soft law, institutional arbitration rules, arbitral awards and other relevant sources of international arbitration law.

#### 3.3.1 Institutional arbitration rules and practice

Generally, institutional arbitration rules are silent on the matter of ascertainment of the applicable law, leaving the arbitral tribunal with considerable flexibility.<sup>269</sup> The few provisions that do address the issue of the substantive law often provide little or no guidance on how to ascertain its content.<sup>270</sup>

There is one important exception to this silence, Art. 22.1(c) of the London court of international arbitration rules of arbitration (LCIARoA):<sup>271</sup>

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<sup>265</sup> Trib. féd., 4P.260/2000, 2 Mars 2001, cons. 6b, ASA Bulletin 2001, p. 531 ; Trib. féd., 4P.114/ 2001, 19 Dec 2001, ASA Bulletin 2002, p. 493. *L'arbitre s'apprête à fonder sa décision sur une norme ou principe juridique non évoqué dans la procédure antérieure et dont aucune des parties en présence ne s'est prévalué et ne pouvait supputer la pertinence in casu*" - ATF 130 III 35.

<sup>266</sup> See Kaufmann Kohler (Études Hirsch 2004) p. 73, Poudret & Besson (2007) p. 476 and Trib. féd. 17 July 1998, ASA Bulletin 2002, p. 660.

<sup>267</sup> See ATF 130 III 35. The position of the *Tribunal fédéral* is criticized in Poudret & Besson (2007) p. 476 and Kaufmann-Kohler (Études Hirsch 2004) p. 74. The authors argue that the international character of arbitration rather should result in a wide interpretation of the term *unforeseeable*.

<sup>268</sup> In only two cases have arbitral awards been set aside for this reason. In Trib. féd., 4P.100/2003, 30 Sept 2003, ASA Bulletin 2004, p. 574 an award was set aside because it was based on contractual provisions that had not been discussed at all during the proceedings. Thus, it was not a question of application of the applicable law or *jura novit curia*. Similarly, in Trib. féd., 4A.400/2008, 9 Feb 2009, Rev. Arb. 2010, p. 141 an award was set aside because it was unforeseeably based on legal provisions that had not been debated during the proceedings. However, the case concerned sports arbitration under the CAS rules, not commercial arbitration, and the *Tribunal fédéral* has underlined that it will not necessarily apply the same principles in international commercial arbitration as in sports arbitration. See also Lévy, *Jura Novit Curia? The arbitrator's discretion in the application of the governing law*, Kluwer arbitration blog, 20 mars 2009, <http://kluwerarbitrationblog.com/blog/2009/03/20/jura-novit-curia-the-arbitrator's-discretion-in-the-application-of-the-governing-law/>

<sup>269</sup> See e.g. Lew & Shore (Disp. Res. J. 1999) p. 37, Giovannini (SLC 2005) p. 142 and ILA Report (2008) p. 16.

<sup>270</sup> See e.g. ICC Rules of arbitration (ICC Rules), Articles 15 and 17, Singapore International Arbitration Centre Rules of Arbitration 2010, Art. 16.1, and SCC rules section 19, 22 and 24. Section 24 of the SCC rules, dealing with the parties written submissions, does not explicitly require a reference to any legal basis for the parties claims. According to Öhrström, this implies that the parties may not be required by the arbitral tribunal to give any legal basis for their claims whatsoever, at least in domestic arbitration, see Öhrström (2009) p. 189.

<sup>271</sup> ILA Report (2008) p. 16.

22.1 Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

(c) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement.

The LCIARoA explicitly empowers the arbitral tribunal to make its own enquiries into the applicable law, under the condition of first having heard the parties.<sup>272</sup> Apart from this, there is one more common denominator uniting most institutional arbitration rules: the parties' right to present their case,<sup>273</sup> and the obligation for the arbitral tribunal to render an enforceable award.<sup>274</sup>

As to the practice in arbitral tribunals, in an unreported ICC award dated 8 February 1994, case No. 7071, the tribunal held that it was free to make its own research of the applicable law and to cite new sources in the award, as long as the parties had been given the opportunity to make its submissions on the legal principles and provisions that those sources dealt with.<sup>275</sup> Similarly, there are investment arbitration awards in which the arbitral tribunal have considered itself authorized to insert new legal arguments – as opposed to legal basis basis – in the award *ex officio*.<sup>276</sup>

In an investment arbitration award<sup>277</sup> rendered under the SCC rules, the arbitral tribunal held that it was authorized to award indirect damages to a party that had only argued for direct damages. The claimant had made a claim for direct damages to a company owned by him, based on Art. 226(2) of the Moldavian civil code, and had made a general reference to the bilateral investment treaty and other relevant investment law. The arbitrator requested the parties to make legal submissions on indirect damages under Moldavian law. In the award, the claimant was accorded indirect damages with the motivation that indirect damages were generally accepted in the practice of investment arbitration. It should be noticed that the respondent was in procedural default. The sole arbitrator stated that:<sup>278</sup>

*"this correction does not introduce a new relief that was not sought by the Claimants, nor a legal source that was not mentioned as legal basis for the proceedings or a fact that was not pleaded /.../*

*In respect of international arbitration taking place in Sweden, it is sometimes suggested that the principle iura novit curia applies, but that the parties should be notified of the new legal sources introduced by the*

<sup>272</sup> Lew (2011) p. 2 and ILA Report p. 7.

<sup>273</sup> See e.g. ICC Rules, Art. 15(2), LCIA Rules, Art. 14(1)(ii) and SCC Rules, Art. 19(2).

<sup>274</sup> See e.g. ICC Rules, Art. 35, LCIA Rules, Art. 32.2, SCC Rules Art 47, Art. 62(2) WIPO Rules.

<sup>275</sup> ICC award dated 8 February 1994, case No. 7071, cited in ILA Report (2008), p. 17.

<sup>276</sup> *Klöckner Industrie-Anlagen GmbH v Cameroon* (annulment) (ARB/81/2), 2 ICSID Rep 95, para. 91 and *Compana de Aguas del Aconquija SA v Argentina* (ARB/97/3), Decesion on annulment (2002), para 84, cited in *Petrochilos* (2004) p. 147.

<sup>277</sup> The award is subject to discussion under 3.2.1.2 above in relation to the subsequent challenge action.

<sup>278</sup> *Iura Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldavia*, SCC, Arbitral award 22 September 2005: <http://italaw.com/documents/Bogdanov-Moldova-22September2005.pdf>

*arbitrator, so that they have the possibility to comment on them /.../ in the instant case, the Arbitral Tribunal does not introduce a new legal source: it applies the legal sources invoked by the Claimant in a way different from the way pleaded by the Claimant. /.../ in respect of international disputes arbitrated in Sweden it is recognized that arbitrators should be able to present legal arguments on a rationale that neither party presented”*

### 3.3.1.1 The UNCITRAL Arbitration Rules

In the latest revised version of the UNCITRAL Arbitration rules<sup>279</sup> the issue of how to ascertain the applicable law has been addressed. The parties are required, under Art. 20(2)(e) and 21(2) to include the legal grounds and arguments supporting their claims and statements of defense. This is a modification compared to the original rules where no such requirement was made.<sup>280</sup> In the *travaux préparatoire*, the modification is motivated by the fact that there is an uncertainty as to whether the parties are obliged to present legal grounds and arguments for their claims, caused by the differences in which this issue is addressed in different legal cultures. Removing this uncertainty favored predictability of the arbitral procedure.<sup>281</sup> The UNCITRAL arbitration rules do not provide any further guidance on the matter of how to ascertain and apply the *lex contractus*.

### 3.3.2 Conventions and other sources

#### 3.3.2.1 The New York Convention

One of the overriding duties of the arbitral tribunal is to render an enforceable award.<sup>282</sup> Consequently, the New York Convention, which is ratified by over 100 states and concerns the issue of international enforceability of arbitral awards, sets an indirect minimum procedural standard for the arbitral tribunal by providing the grounds on which the contracting states may deny recognition and enforcement of an award from another contracting state.<sup>283</sup>

Under Art. V(2)(b), an award may be refused enforcement where it is contrary to public policy in the state of enforcement. This ground may also refer to procedural public policy: a breach due process or natural justice. However, a serious irregularity is required in order to deem it contrary to public policy.<sup>284</sup> Under Art. V(1)(b), not giving the parties the opportunity to present their case is also grounds for refusing enforcement of an award. In a way, the two grounds for refusal connect: the opportunity to present ones case is a question of procedural *ordre public* and the most important due process rule.<sup>285</sup> The requirement of giving both parties the opportunity to present their case is often

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<sup>279</sup> UNCITRAL Rules as revised in 2010, General Assembly Resolution 65/22.

<sup>280</sup> See the original UNCITRAL Arbitration rules, General Assembly Resolution 31/98, Articles 18 and 19.

<sup>281</sup> Report of the working group on arbitration and conciliation on the work of its forty-sixth session, A/CN.9/619, New York, 5-9 Feb. 2007, p. 28.

<sup>282</sup> Lew, Mistelis & Kröll (2003) p. 279.

<sup>283</sup> Kurkela & Turunen (2010) p. 4.

<sup>284</sup> Kurkela & Turunen (2010) p. 17 *et seq.*

<sup>285</sup> Kurkela & Turunen (2010) p. 38 and 186 *et seq.*

expressed through the maxim *audi alteram partem*, the objective of which is to allow both parties to present their case from their subjective point of view.<sup>286</sup>

Under the New York Convention, an error in law is not a ground to refuse recognition or enforcement of an arbitral award.

### 3.3.2.2 UNCITRAL Model Law

The model law does not contain any explicit conditions on how to ascertain the applicable law. Art. 19 gives the arbitral tribunal a substantial liberty in determining the rules of procedure:

*(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

*(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

The Model law however contains some procedural safeguards that may be of relevance to the issue. Art. 18 of the Model law states that:

*"each party shall be given a full opportunity of presenting his case."*

Art. 23(3) also states that:

*All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.*

### 3.3.2.3 ALI/UNIDROIT Principles of transnational civil procedure

The Principles of transnational civil procedure (ALI/UNIDROIT Principles), developed by a joint study group with members from the International institute for the unification of private law and the American law institute, is a text that aims at being a set of standards for adjudication of transnational commercial disputes, applicable also to arbitration.<sup>287</sup>

Under Art. 22.1 of the ALI/UNIDROIT Principles the court is responsible for determining the correct legal basis for its decisions, also when foreign law applies. When carrying out this responsibility, the court may appoint an expert under Art. 22.4. The court may also, under Art. 22.2 and 22.3, rely on a legal theory that has not been advanced by the parties, after having afforded the parties an opportunity to be comment.

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<sup>286</sup> Kurkela & Turunen (2010) p. 38.

<sup>287</sup> Uniform Law Review, 2004-4, p. 758 *et seq.*

### 3.3.2.4 The ILA recommendations<sup>288</sup>

In 2008, the Committee on International Commercial Arbitration addressed the issue of ascertaining the content of the applicable law in international commercial arbitration. The conference held in Rio de Janeiro 17-21 August, resulted in a recommendation on how an arbitral tribunal should ascertain the content of the applicable law.

According to the ILA recommendations, where the substantive law of the contract must be applied, the arbitrators should always discuss the issue of how to ascertain its contents with the parties.<sup>289</sup> The arbitrators should also bear in mind that national laws on the topic might not be suitable to apply in arbitration proceedings and the arbitrators should not rely on any unexpressed presumptions on similarity with another law.<sup>290</sup>

The arbitrators should primarily rely on the parties for information on the applicable law's contents.<sup>291</sup> They should not introduce any legal issues – propositions of law that may bear on the outcome of the dispute – *ex officio*, except where the legal issue concerns matters of *ordre public*.<sup>292</sup> The reason for this point of view is that, although many jurisdictions accord the power to the arbitrators raise legal issues *ex officio*, the arbitral tribunal could be accused for exceeding its mandate if it based its decision on a legal rule not invoked by the parties.<sup>293</sup> Nevertheless, special circumstances, like procedural default of a party or expedited interim relief proceedings, may justify the arbitrator to take a more active role.<sup>294</sup> Should the arbitral tribunal, due to such special circumstances, raise a legal issue *ex officio*, it should always give the parties the opportunity to comment.<sup>295</sup>

As to legal research, the arbitrators may question the parties on legal issues and sources. They may also review sources not invoked by the parties relating to legal issues already raised and may in a transparent way rely on their own knowledge.<sup>296</sup> If any sources not invoked by the parties are relied on, the parties must be given the opportunity to comment on them, at least where these sources go meaningfully beyond the ones already invoked. However, should the new sources only reinforce those already invoked, it is not necessary to invite the parties to comment. The key issue is not to take the parties by surprise.<sup>297</sup>

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<sup>288</sup> ILA resolution No. 6/2008, *International law association recommendations on ascertaining the contents of the applicable law in international commercial arbitration*.

<sup>289</sup> ILA recommendations paragraph 3.

<sup>290</sup> ILA recommendations paragraph 4.

<sup>291</sup> ILA Recommendation (2008) paragraph 5.

<sup>292</sup> *Ibid* paragraph 6.

<sup>293</sup> ILA Report (2008), p. 19.

<sup>294</sup> ILA Recommendation (2008) paragraph 14.

<sup>295</sup> *Ibid* paragraph 8.

<sup>296</sup> *Ibid* paragraph 7.

<sup>297</sup> *Ibid* paragraph 10, and ILA report (2008), p. 20.

The arbitrators should consider reopening the proceedings if, during the course of deliberations, a need for further ascertaining the applicable law is discovered.<sup>298</sup> Finally, should it not be possible to sufficiently ascertain the contents of the applicable law even after diligent efforts, the arbitrators may apply the rules they deem appropriate while affording the parties an opportunity to comment.<sup>299</sup>

### **3.4 Summarizing conclusions of comparative outlook**

After having studied the national jurisdictions of Sweden, England, France and Switzerland, as well as other sources of international arbitration law, can any general conclusions be drawn? Are there any common denominators of how an arbitral tribunal should ascertain and apply the *lex contractus* under the arbitration laws of the different jurisdictions?

#### *3.4.1 Principles governing ascertainment and application of law in national courts unsuitable in international arbitration*

On one hand, every jurisdiction's arbitration law when it comes to ascertaining the content of the *lex contractus* seems to be influenced by the rules applied in national courts to some extent. One example of this is that in England, case law shows that the applicable law may be treated as fact and presumed to have the same content as English law. The scant Swedish appeal court practice also confirm that it seems natural for the the national courts in challenge actions to presume that the same principles apply in international arbitration as in national courts.

On the other, the arbitration laws of the different jurisdictions seem to have more in common with each other than with the the rules applied in national courts. A clear example of this is EAA Art. 34(1) and (2)(g) which clearly gives the arbitral tribunal a power – shared by arbitrators under French and Swiss law – that an English national judge does not possess.

One conclusion that may be drawn from this, which also has support in legal literature, is that national rules on how to ascertain and apply the content of the law are not suitable to apply in international arbitration. One important reason is that an arbitral tribunal has no *lex fori* to fall back on.<sup>300</sup> This view seems to be the general view in Swedish legal literature as well: The international character of arbitration must affect the way the law is ascertained and applied.

#### *3.4.2 Duty or discretion to ascertain the content of the applicable law*

The power of the arbitral tribunal to research the applicable law seems almost universally accepted. The national arbitration laws of England, France and Switzerland, the LCIARoA Art. 22(1)(c), arbitration practice under the ICC and SCC rules, the ALI/UNIDROIT principles and the ILA

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<sup>298</sup> Ibid paragraph 11.

<sup>299</sup> Ibid paragraph 15.

<sup>300</sup> See e.g. ILA Report (2008) p. 7 and 11-12, Lew (2011) p. 2, Kaufmann-Kohler (Études Hirsch 2004) p. 75.

recommendations all accord this power to the arbitrators. This seems to be the case also in Sweden, although there is no consensus in the legal literature.

However, under no national arbitration law, institutional rules or other piece of soft law is the arbitral tribunal obliged to ascertain the law itself. Swiss international arbitration law, under which the arbitrators might have such a duty if the parties' submissions are insufficient, could be the exception. The power of the arbitral tribunal to burden the parties with the responsibility of ascertaining the applicable law is universally excepted. English, French and Swiss case law, as well as the ALI/UNIDROIT principles, the ILA recommendations, and the UNICTRAL arbitration rules all support this. Requesting the parties to ascertain the content of the applicable law seems to be accepted also under Swedish law, judging from the views of most legal authors.

Thus, there seems to be a broad international support for an order where the parties are primarily responsible for ascertaining the content of the applicable law and where the arbitrators are free, but not obliged, to proceed by requiring further legal submissions or in a transparent manner conduct its own legal research. Legal authors from both civil and common law jurisdictions confirm this view.<sup>301</sup>

#### 3.4.3 Duty or discretion to raise legal issues *ex officio*

Under the national arbitration laws, the duty or discretion to apply the law *ex officio* seems to correlate the principles of how the applicable law is ascertained: If the arbitral tribunal has the power to research the law, it also has some kind of power raise legal issues *ex officio*. Under French and English law, the arbitral tribunal has a discretion, but no duty, raise legal issues *ex officio*. Swiss law affords a smaller amount of freedom to the arbitral tribunal. Under Swiss arbitration law, it is more uncertain whether researching and applying the law is a discretion or a duty. Nevertheless, the failure to apply an applicable legal provision does not constitute grounds for setting aside the award under Swiss law. Interestingly enough though, when a party connects its claims to a legal basis in its *conclusions*, the arbitral tribunal is bound by the legal rules invoked.

In Swedish law, the power of the tribunal to raise legal issues *ex officio* is a much more uncertain issue. It should be kept in mind that different legal authors suggests different legal solutions. The most broadly favored interpretation however seem to be that there is no duty for the arbitral tribunal to raise legal issues *ex officio*. Sticking to the parties' arguments with the result of applying the wrong legal provision is probably only an error in law, and not cause for setting aside the award. It also seems, at least when judging from the Svea appeal court cases discussing *jura novit curia*, that the arbitral tribunal has the power to raise points of law *ex officio*. As we have seen, there are also legal authors who argue that this is the case.

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<sup>301</sup> See e.g. Kurkela and Turunen (2010) p. 178, Lew, Mistelis & Kröll (2003) pp. 443-444, Park (JIDS 2010) p. 42 *et seq*, Chainais (Rev. Arb. 2010) p. 44, Dimolitsa (ASA Bulletin 2009), p. 427.

Turning to other sources of arbitration law, the power of the arbitral tribunal to raise legal issues *ex officio* is confirmed by LCIARoA 22.1(c), under the ALI/UNIDROIT principles Art. 22.2 as well as in investment arbitration practice under the SCC rules. Interestingly enough, according to the ILA recommendation, the arbitrator should not introduce any new legal issues.

When looking for answers in international legal doctrine it however seems that there is an extensive support, from both common law<sup>302</sup> and civil law<sup>303</sup> authors, that the arbitrators should have the power to raise legal issues *ex officio*.

#### 3.4.4 *The parties' right to be heard on points of law and legal sources*

One difficulty regarding the parties' right to be heard on points of law is the question of exactly what it is that the parties have the right to comment on. For the purpose of the discussion below, a distinction is made between legal sources and legal issues. The former referring to the sources from which legal rules are derived and the latter to the legal rules themselves and how they are applied, i.e. which legal basis applies and how facts are qualified legally under this legal basis.

One difficulty when comparing the parties' right to be heard – and the arbitrators' corresponding obligation to give notice – on legal basis, is that no uniform terminology is used in the debate. Legal issues, points of law, legal basis, rules of law, legal principles or provisions, legal theories and legal arguments are terms that are all used when discussing what it is that the parties have a right to comment on. That a distinction is not always made between deciding a case on a new legal basis and on a new construction with a legal basis already referred to by a party, also causes difficulties in analyzing the parties right to be heard on points of law..<sup>304</sup>

Starting with legal sources that only deal with rules of law that already have been discussed by the parties, and that do not suggest a different application of these rules, only English law seem to oppose that such sources are cited by the arbitrators without giving the parties an opportunity to comment. However, as the citing of such a source does not cause any substantial injustice, doing so will not constitute grounds for setting aside the award under English law. The ILA position is that the content of legal sources that go meaningfully beyond the ones invoked by the parties must be communicated to the parties.

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<sup>302</sup> See e.g. Lew (2011) p. 15, Park (JIDS 2010), p. 42 *et seq* and Waincymer (Journ. Int'l Arb. 2011) p. 220. Waincymer even argues that it should not be considered as a discretion, but an obligation of the arbitrators to accurately apply the law in certain situations.

<sup>303</sup> See e.g. Kaufman-Kohler (Arb. Int'l, 2005) p. 636, Dimolitsa (ASA Bulletin 2009), p. 431 and Chainais (Rev. Arb. 2010) pp. 43-44.

<sup>304</sup> Petrochilos (2004) p.146.



In Switzerland, the *Tribunal fédéral* has declared that the parties have the right to comment on legal arguments, the application of which the parties can not reasonably foresee. In French international arbitration law, the legal reasoning, including the sources cited, are not subject to the *principe de la contradiction*, only the legal basis for the parties' claims and defenses are. However, the application of the *principe de la contradiction* seems to be strict in France, requiring that a legal basis has been explicitly invoked by a party in order for the tribunal to base its award on it without giving notice to the parties. Under English arbitration law, the adversarial principle is upheld in relation to all points of law and the parties must be afforded the opportunity to comment on both new legal basis and new legal constructions under a legal basis that has already been invoked. When comparing with Swedish law, there seem to exist a considerable difference in this respect. Although many Swedish legal authors on the subject argue that it is recommendable to afford the parties an opportunity to comment on points of law raised *ex officio*, most do not seem to consider it a duty for the arbitral tribunal the non-respect of which would be a reason for setting aside the award. In the existing appeal court case law, the question is not brought up to discussion by the court. There are however prominent authors who argue that not giving the parties an opportunity to comment on points of law raised *ex officio* may constitute grounds for setting aside the award. That the parties should not be surprised by the application of the law is also emphasized in the preparatory works to the SAA.

Common for English, French and Swiss arbitration law is that they all limit the situations where an award may be set aside due to non-respect of the parties' right to be heard on points of law. Even though raising a point of law *ex officio* without inviting the parties to comment might be considered a procedural irregularity, this irregularity must have had a real effect on the dispute's outcome in order for an award to be set aside in England. In Switzerland, an element of surprise is required and in France, different legal constructions within the legal basis already invoked are excluded from the *principe de la contradiction*.

Turning to other sources of arbitration law, a right for the parties to comment on different aspects of the applicable law when raised *ex officio* is confirmed: ICC practice speaks of a right to comment on legal provisions and principles, the ALI/UNIDROIT principles speak of a right to comment on legal theories and the ILA recommendations legal issues. In international commercial arbitration literature, there also seem to exist a widespread support for an obligation for the arbitral tribunal to afford the parties an opportunity to comment on the applicable law when researched and applied *ex officio*.<sup>305</sup> This implies that the arbitrators should not hesitate to reopen the proceedings if they consider it necessary.<sup>306</sup>

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<sup>305</sup> See e.g. Kaufmann-Kohler (*Études Hirsch* 2004) p. 78, Fouchard, Gaillard & Goldman (1999) p. 692, Lew, Mistelis & Kröll (2003) p. 533, Waincymer (*Journ. Int'l Arb.* 2011) p. 241, Petrochilos (2004) p. 146 *et seq.*, Giovannini (SLC 2005) p. 144, Dimolitsa (*ASA Bulletin* 2009), p. 439, Kalnina (*BYIL* 2008) p. 101 and Park (*JIDS* 2010), p. 44.

<sup>306</sup> Dimolitsa (*ASA Bulletin* 2009), p. 438, Waincymer (*Journ. Int'l Arb.* 2011) p. 225 and ILA Recommendations (2008) para. 11.

There are however authors who are of a different opinion, arguing that giving the parties an opportunity to comment on legal issues raised *ex officio* is not an obligation for the arbitral tribunal.<sup>307</sup>

As we can see, there is no consensus as to exactly what the parties have the right to comment on. The vast majority of the sources of international arbitration law and all three jurisdictions, except Sweden, however agree that the parties have some kind of right to comment on points of law raised *ex officio*, and that a serious enough violation of this right constitutes grounds for setting aside an award. The underlying principle seem to be that the parties must not be taken by surprise, and that the legal basis of the award should be subject to contradictory debates. A distinction seem to exist between legal basis – the actual rule of law applied, whether originating from statute, case law or general legal principles – and legal sources. Yet, as French case law shows, it is difficult to draw an exact line between the two, a court ruling might for example be both: a legal source and a legal rule originating from case law. If some common denominator may be identified it is that the parties have the right to comment on any legal issue raised *ex officio* and on legal sources that go meaningfully beyond the ones already invoked. However, the tribunal's interpretation of legal sources and its legal reasoning – including corroborations and reinforcement of legal constructions within the limits of legal basis and sources already invoked – generally seem to be excluded from the parties' right to comment.

#### 3.4.5 *Transnational principles on how to ascertain and apply the law in international arbitration?*

After having compared the arbitration laws of England, France, Sweden and Switzerland, as well as having studied international arbitration rules and soft law, it is clear that the arbitral tribunal enjoys a considerable freedom in how to ascertain the applicable law. It is also clear that there are differences in the way the law is ascertained in the four jurisdictions. The practice of national courts generally seem to affect international arbitral practice to some extent and there is therefore no universal arbitral practice. Nevertheless, beyond these differences, there seem to exist some common denominators that unite all the four jurisdictions and most arbitration soft law, as well as opinions of legal writers. Some authors even argue that these common denominators are submerging principles of transnational arbitral procedure.<sup>308</sup> The principles are:

1. The parties bear the primary responsibility for ascertaining the content of the applicable law.
2. The arbitral tribunal has a discretionary power to ascertain the content of the applicable law itself in a transparent manner.

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<sup>307</sup> See e.g. Cordero Moss (SIAR 2006) p. 29. Cordero Moss argues that only the facts invoked set the limit for the arbitral tribunal's application of the law. If the law is not treated as fact, the arbitral tribunal has an obligation to make sure that its content is sufficiently ascertained. This obligation may however be fulfilled by requesting that the parties make further legal submissions. When applying the law, the tribunal has a duty to reevaluate the parties' legal arguments and may freely subsume facts under a different legal basis – at least within the codes or acts already invoked by the parties – but if a source of law – i.e. a different code or act than the ones invoked, according to Cordero Moss' terminology – is applied *ex officio*, it might at least be advisable that the parties are heard.

<sup>308</sup> Kaufmann-Kohler (Arb. Int'l 2005) p. 636. See also Poudret & Besson (2007) p. 485.

3. The arbitral tribunal is not formally bound by the parties' legal arguments or legal basis invoked, nor is the arbitral tribunal obliged to raise legal issues *ex officio*.
4. If the arbitral tribunal makes use of its power to ascertain the applicable law or to raise new legal issues, it has an obligation to afford the parties an opportunity to comment:
  - on legal sources if they go meaningfully beyond the sources invoked by the parties;
  - on legal qualifications of facts that neither party has argued for, and;
  - on legal rules, provisions or principles applied *ex officio*.

Could these principles be applied also in international commercial arbitration in Sweden?

## 4. PRINCIPLES GOVERNING ARBITRAL PROCEDURE IN SWEDEN

Below, the conclusions of the comparative study will form the basis of a discussion from a Swedish perspective. First, policy arguments relating to *jura novit curia* will be discussed in the context of international arbitration. Second, the principles from subparagraph 3.3.5. will be examined in the light of other guiding principles of international arbitration in Sweden.

### 4.1 Policy arguments

As stated above, there are two main reasons for applying *jura novit curia* in Swedish law. The first, the will to produce precedents and a uniform application of the law, is primarily connected to a courts' social function and does not hold much weight in international commercial arbitration, which rests mainly on a contractual basis.<sup>309</sup> In addition to that, an arbitral award holds no authority over how courts apply the law, and the confidential character of arbitration results in awards rarely being made public. Being a private form of dispute settlement, arbitration is therefore scarcely intended, nor suitable, for contributing to a uniform application of the law.

The second policy reason for *jura novit curia* is to protect a party who fails to invoke the correct legal basis for its claims. In international commercial arbitration, the parties should however be considered to have an equal opportunity to engage and finance legal representation and to present legal arguments. Furthermore, the principle of party autonomy gives the parties the power to exclude *jura novit curia* from application. Consequently, protecting the parties from an erroneous application of the law has not been an important consideration in international commercial arbitration.<sup>310</sup>

In this light, it seems that the policy arguments for *jura novit curia* do not hold much weight in international commercial arbitration. It rather seems that the policy arguments for a more adversarial approach to the application of the law – focusing on dispute settlement and procedural justice – have

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<sup>309</sup> See e.g. Madsen (JT, 2010/11) p. 500n and 501.

<sup>310</sup> Madsen (JT 2010/11) p. 501.

more relevance. This indicates, at the very least, that the arbitral tribunal should not be under any obligation to research the law or to raise legal issues *ex officio*.

An outcome that is substantially in accordance with the applicable law must however be considered as predictable. The fact that an arbitral award cannot be appealed, nor reviewed on its merits is therefore sometimes given as an argument for applying *jura novit curia*, which is seen as a guarantee for a predictable resolution to the dispute in accordance with the applicable law.<sup>311</sup> There are also surveys that show that the most important thing for parties to international arbitration disputes generally is a correct and just outcome to the dispute, this is even ranked higher than receipt of a monetary award, speed of outcome, cost and expertise of the arbitrators.<sup>312</sup>

But does the application of *jura novit curia* enhance the chances of finding a solution in accordance with the applicable law? Such an argument clearly rests on the assumption that with the help of the arbitrators, it is more likely that the correct legal outcome is found. An argument of this kind is convincing in a dispute settlement model where the adjudicator is required to have legal training,<sup>313</sup> and where a weaker party might need to be protected from its own ignorance of the law. None of this is generally the case in international commercial arbitration.<sup>314</sup> Even if some members of the arbitral tribunal might be experts on the applicable law, most will probably not be. The parties' counsels however most certainly will.<sup>315</sup> Thus, the arbitrators might not be more likely to find a correct legal solution to an international commercial arbitration dispute, than the parties' legal representatives.

Undeniably though, should both parties present incorrect legal arguments, giving the arbitral tribunal the power to apply a different legal solution, rather than choosing between two incorrect ones, does increase the chances of a substantially correct legal solution. From the point of view of finding a correct legal outcome to the dispute, there are however no convincing arguments against obliging the arbitrators to give the parties an opportunity to comment on any points of law raised *ex officio*. There is always a risk that the arbitrators may misinterpret the applicable law – this risk exists even in national courts with legally trained judges, as appeals are sometimes successful. Giving the parties an opportunity to comment on points of law would only aid the arbitral tribunal's legal reasoning and increase the chance of finding a substantially correct legal outcome to the dispute.

Seen from another perspective, the lack of possibility to review the award on the merits – a guarantee of substantive justice – also increases the importance of procedural safeguards and the respect for procedural fairness in order to assure procedural justice.

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<sup>311</sup> Madsen (JT 2010/11) p. 500.

<sup>312</sup> Naimark & Keer (Disp. Resol. J. 2002) p. 80.

<sup>313</sup> This is the case in Swedish national litigation, see SCJP Chapter 4, Section 1.

<sup>314</sup> Section 7 of the SAA.

<sup>315</sup> Waincymer (Journ. Int'l Arb. 2011) p. 220.

To conclude, there are no convincing policy arguments for obliging an arbitrator in international commercial arbitration to research the law and apply legal provisions *ex officio*. If however a substantially correct outcome of the dispute is sought, accepting a power of the arbitral tribunal to raise new legal issues while obliging it to afford the parties an opportunity to comment, would be appropriate.

## 4.2 Principles governing international arbitration in Sweden

Below, the results of the comparative study will be discussed in the light of principles and arbitral duties that govern the arbitral proceedings under Swedish arbitration law.

### 4.2.1 Procedural safeguards

Under Section 24 of the SAA, the parties must be accorded the possibility to present their case. This is the most important principle of the arbitral procedure and requires that the procedure is managed in such a way that the parties are not subjected to surprises of any kind.<sup>316</sup> Arbitration may only be accepted as a dispute resolution instrument if it is predictable and transparent. Both parties must therefore be given the opportunity to present their case and the chance to convince the arbitrators of the accuracy in their points of view by presenting their arguments.<sup>317</sup> In order to respect the parties' right to present their case, the parties should be informed of everything upon which the arbitrators base the award.<sup>318</sup>

The main issue related to the parties' right to present their case, in relation to ascertaining and applying the content of the applicable law, is the question whether the arbitrators are obliged to give the parties an opportunity to comment on points of law raised *ex officio*. From the viewpoint of procedural fairness, there is no reason not to let the parties comment on legal issues raised *ex officio* – including both legal basis and legal constructions within a legal basis – and legal sources, without any distinction between cases that are unexpected or surprising and cases that are not. Obliging the tribunal to give the parties an opportunity to comment would enhance predictability and transparency of the arbitral procedure. The only argument to the contrary would be that the right to present ones case is limited to factual matters. Such an argument cannot be accepted in international arbitration, as the principle of party autonomy allows the parties to dispose of the application of the law.

Not affording the parties the opportunity to present their case is seen as a procedural irregularity and constitutes grounds for setting aside the award under SAA section 34(6), if it is probable that the irregularity has affected the outcome of the case. It is the party who challenges the award that has the

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<sup>316</sup> Lindskog (2005), p. 579.

<sup>317</sup> Lindskog (2005) p. 575 and 579 *et seq.*

<sup>318</sup> Lindskog (2005) p. 580.

burden of proof for the causation between the irregularity and the outcome.<sup>319</sup> Should the irregularity be of a serious kind, causation is however presumed.<sup>320</sup> Nevertheless, it is uncertain if not letting the parties comment on legal issues raised *ex officio* is a procedural irregularity under Swedish arbitration law. On one hand, many legal authors suggest that it is, on the other, appeal court case law suggests that it is not. Whatever the case may be, from an international perspective "*it is certainly not good practice*" to decide a dispute on a legal basis that the parties have not discussed during the proceedings without first affording them an opportunity to comment.<sup>321</sup>

#### 4.2.2 Impartiality

Another important principle, expressed in the SAA under section 8 and 21, is the duty of the arbitrators to remain and appear impartial, and for the arbitral tribunal to manage the proceedings in an impartial manner. Circumstances that may diminish confidence in an arbitrator's impartiality is enough to consider an arbitrator as partial. Under section 8(3), such a circumstance is e.g. when an arbitrator takes a position to a matter in dispute during the proceedings or assists one of the parties.<sup>322</sup>

The issue of impartiality is relevant since raising a point of law *ex officio* will inevitably favor one party more than the other. If raising legal issues is considered a discretion and not a duty, it raises issues of impartiality. On one hand the arbitral tribunal's mission is to apply the law in order to resolve the dispute, and doing so *ex officio* can hardly be seen as impartial if it is done in a consistent manner throughout the proceedings without regard of which party a certain legal provision benefits. On the other hand, the communication of a legal provision to the parties might be perceived as partial by the party who is disadvantaged by it. However, if the parties are requested to comment on the application of a certain legal provision, or a legal source, without the arbitral tribunal disclosing arguments in any direction, wherein lies the perceived partiality? Can communicating a legal provision that could be relevant to the dispute – within the limits of the invoked facts and the parties' claims, prayers for relief and statements of defense – justifiably be perceived as partial? After having been brought up by the tribunal, the parties will have an equal opportunity to present arguments regarding the applicability of the legal provision, this will not be the case if the legal provision is applied without first inviting the parties to comment.<sup>323</sup> If the arbitral tribunal, when a legal issue arises, declares that it will communicate possibly relevant legal issues to the parties, and – unless the parties agree otherwise – proceeds and requests the parties to comment on the legal issue at hand, surely this cannot be perceived as partial.

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<sup>319</sup> Gov't Bill 1998/99:35 p. 146 *et seq* and Heuman (1999) p. 636 *et seq*.

<sup>320</sup> See e.g. NJA 1959 p. 384.

<sup>321</sup> Petrochilos (2004) p. 147.

<sup>322</sup> Lindskog (2005) p. 447.

<sup>323</sup> Heuman (1999) p. 395-396 Madsen (JT 2010/11) p. 501, Gov't Bill 1998/99:35 p. 119 and 145.

#### 4.2.3 Principle of party autonomy

As stated above, the SAA is based on the principle of party autonomy, giving the parties the power to exclude the application of *jura novit curia*. Since procedural issues left to the parties' discretion in default is left to the arbitrators' discretion, the natural point of departure seems to be that the arbitral tribunal's power to research the law and raise legal issues *ex officio* is a discretionary matter, unless strong enough reasons would indicate otherwise. Furthermore – and this has in Swedish legal literature been pointed out as the most important consequence of the principle of party autonomy<sup>324</sup> – the arbitral tribunal must give the parties notice before making use of these default powers. Consequently, if the arbitral tribunal conducts legal research or raises legal issues *ex officio*, it must be done in a transparent manner. The discussion on the principle of party autonomy also overlaps on many areas with the next subparagraph, the arbitral tribunal's duty to respect the mission as defined by the parties.

#### 4.2.4 Duty to complete and respect the mission

The arbitral tribunal's mission consists in resolving the dispute before it on the basis of the applicable law. It is clear that if an arbitral tribunal without valid reason disregards the parties' choice of law, and applies another body of law, it exceeds its authority.<sup>325</sup> This also constitutes grounds for setting aside the award under SAA section 34(2). This thesis is however not focused on questions of choice of law, so the question is: What are the limits of the arbitral tribunal's mission in applying the law chosen by the parties?

Starting with the ascertainment of the applicable law, the arbitrators are free to impose this burden on the parties. The practical benefits of requiring the parties to ascertain the law are considerable and there seem to be no interdiction under Swedish law against the arbitral tribunal doing so. In its mission to interpret the law, the arbitral tribunal should review the sources presented by the parties, and the tribunal is free to make its own interpretation of these sources. Should the tribunal consider that the law is not sufficiently ascertained, the tribunal should request the parties to produce more legal material. However, a burden of proof of the content of the applicable law, resulting in the arbitral tribunal rejecting claims or defenses of a party who fails to ascertain the content of the applicable law does not seem suitable to apply in international arbitration. Unexpected events, e.g. civil war, in the jurisdiction of the applicable law may render the ascertainment of the applicable law unreasonably difficult. Neither should the arbitral tribunal proceed to apply another law if the parties fails to establish the content of law they have chosen. If the parties fail to establish the content of the legal provisions they invoke, the arbitral tribunal should, in order to respect its mission, make reasonable efforts to establish the content of the law itself, whether by appointing a legal expert or by making its own legal research. Only if this proves to be unreasonably difficult or complicated should the

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<sup>324</sup> Heuman (1999) p. 267.

<sup>325</sup> Gov't Bill 1998/99:35 p. 121-122.

arbitrators proceed and apply another body of law to the dispute, the exact method of how this should be done however falls outside the scope of this thesis.

As to the issue of the tribunal's application of the law, the question is if the tribunal should stick to the arguments and legal basis presented by the parties, or, in the event that the tribunal considers that a legal basis should be applied in a different way, or that a different legal basis should be applied, if the tribunal may raise this legal issue *ex officio*. The main problem generally seem to be pointed out as the different approaches of civil law and common law to this issue. Although this is true in relation to civil litigation, we have seen that it is not entirely the case when it comes to arbitration.

Starting with Swedish law, we have seen that in failure to apply the correct legal provision or an incorrect application of a legal provision, will not constitute grounds for setting aside the award. So, if there is a duty to apply legal rules *ex officio* and to give correct legal qualifications to facts, it is unsanctioned, and not a duty in the strict sense of the word.

Could the situation be the opposite, that the arbitral tribunal is bound by the parties' legal arguments? The preparatory works point out that when defining the tribunal's authority in international arbitration, the parties' legal backgrounds must be taken into consideration. Does this mean that if two parties with common law backgrounds would chose to arbitrate their dispute in Stockholm, the arbitral tribunal would implicitly be bound to apply only the legal basis invoked by the parties? Well, even if an English court (which is the common law jurisdiction subject to study) might be bound by the parties' legal arguments, an international arbitral tribunal with its seat in England is, as we have seen, not. And for an international arbitral tribunal with its seat in Stockholm to tacitly adopt procedural rules from English civil litigation seems farfetched. The parties have chosen arbitration to settle their dispute and not litigation, so why apply litigation rules? Should the jurisdictions where the parties come from deal with this issue in two different ways, the problem undeniably gets even more complicated.

For these reasons, deciding how the applicable law is to be ascertained based on the parties' legal backgrounds seems neither predictable, nor transparent. Instead of taking the parties' legal backgrounds into account in each specific case, considering different legal cultures in abstract would allow a predictable solution. The result of the comparative outlook offers such a solution.

Leaving the parties' legal backgrounds, and turning instead to their procedural acts and measures during the arbitral proceedings, can, in the light of the principle of party autonomy, the parties' legal argumentation be considered as a part of their agreement setting limits for the tribunal's mission? Well, under Swedish procedural principles, the parties' acts and measures during the proceedings do not follow general rules on how the parties enter into an agreement. One party's failure to object to a legal qualification made or an invoked legal basis is not interpreted as a tacit acceptance that concludes an



agreement between the parties on the legal qualification or basis in question.<sup>326</sup> This should apply also to arbitral proceedings. But even if the parties' actions during the proceeding should not be interpreted as tacit agreements on how the law should be applied, the principle of party autonomy requires the arbitrators to be responsive to the legal argumentation of the parties. Where a party admits to the applicability of a certain legal basis or to a certain legal argument or qualification made by the other party, the arbitrators should not apply the law differently or apply another legal basis. Furthermore, where both parties clearly argue from a common conception of legal qualifications of facts or applicable legal basis, there are strong reasons for the arbitral tribunal not to raise other legal issues *ex officio*. These considerations are reflections of the principle of party autonomy and the parties' right to control the legal frames of the dispute.

Where there is no such common perception, the parties' unilateral procedural acts, such as invoked legal basis and the way in which a legal provision is applied, should not be interpreted as constituting the legal limits of the dispute. The tribunal should in this situation, if it considers that another legal basis is applicable or an invoked legal basis is applicable in a different way, raise these legal issues *ex officio*. The tribunal should not be obliged to simply choose between the least incorrect of two legal solutions.

In the light of the arguments presented above, it seems that, combined with the parties bearing the responsibility for ascertaining the content of the applicable law, a discretionary power of the arbitral tribunal to raise legal issues *ex officio* would be compatible with the principle of party autonomy under Swedish arbitration law, it is a solution that is acceptable in different legal cultures, as the preparatory works requires.

#### 4.2.5 Duty to render a valid and enforceable award

Flowing from the duty to handle the dispute in a practical manner under section 21 of the SAA and also inherent in the arbitral tribunal's mission, is the duty to render a valid and enforceable award.<sup>327</sup> Except for the grounds for setting the award aside under the SAA, which are mainly discussed under the other subparagraphs of this chapter, international arbitral awards may often be executed in other jurisdictions than the one of the arbitral seat. Which ones are however difficult to predict.

As stated above, in many jurisdictions, not inviting the parties to comment on points of law might be a ground for refusing enforcement or recognition of the award under the New York Convention Art. V(1) (b) and V(2)(b). National courts are often allowed to exercise strict control to make sure that due process is respected in the arbitral proceedings in other jurisdictions.<sup>328</sup>

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<sup>326</sup> Westberg (JT 2011/12) p. 173 *et seq.*

<sup>327</sup> Heuman (2003) p. 266 and Lindskog (2005) p. 402.

<sup>328</sup> Poudret & Besson (2007) p. 733 *et seq.*

The analysis of the parties' right to be heard in England, France, Switzerland and in other sources of arbitration law shows that there is a risk that an award is refused enforcement if the parties are not given the opportunity to comment on points of law raised *ex officio*. Due to the difficulty in predicting the place of enforcement of an award and the different scopes of this right in different jurisdictions, uniform principles that are acceptable in most jurisdictions would instead be a both practical and predictable approach defining the scope of the parties' right to comment on points of law. Giving the parties the right to comment on legal sources that go meaningfully beyond the ones invoked and on all legal issues raised *ex officio* seems to be a principle that would enjoy such transnational acceptance.

#### *4.2.6 Duty to handle the dispute in a speedy manner*

The arbitral tribunal's duty to handle the dispute in a speedy manner under section 21 of the SAA is an argument against the tribunal conducting its own legal research – which could be lengthy – in order to investigate if any rules that neither party has invoked could be applicable to the dispute. The cost aspect of the proceedings is also an argument against the arbitral tribunal conducting its own research. At least where it is paid on hourly basis.<sup>329</sup> This is in line with not obliging the arbitral tribunal to ascertain the applicable law itself.

As to an obligation of the tribunal to afford the parties an opportunity to comment on legal issues raised *ex officio*, the duty to handle the dispute in a speedy manner demands that the parties are only given the opportunity to comment when it is required by other superior principles. Such principles are the right to present ones case, the principle of party autonomy and the duty to render an enforceable award. Excluding legal sources that merely confirm or reinforce the ones invoked by the parties and the arbitral tribunal's own legal reasoning from what the parties should be given the right to comment on therefore seems appropriate.

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<sup>329</sup> If a flat rate is applied it would instead constitute a disincentive for the tribunal to spend time on research. See Kaufman-Kohler (Arb. Int'l, 2005) p. 84.

## 5. RECOMMENDATIONS ON HOW TO ASCERTAIN AND APPLY THE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN

The question of whether *jura novit curia* applies, or should apply, in international commercial arbitration cannot be answered with a simple yes or no. The meaning of the principle is too vague. It includes various considerations regarding the allocation of duties, responsibilities and powers between the adjudicator and the parties. The principle is also closely related to the parties' right to be heard on points of law which may limit the adjudicator's power to apply the law *ex officio*. As we have seen, *jura novit curia* applies differently – or not at all – in different jurisdictions. It may also apply differently within the same jurisdiction whether *lex fori* or foreign law is applied. To put it in other words: there is no uniform conception of *jura novit curia*. The question whether the principle should apply to international commercial arbitration in Sweden instead has to be divided into several subordinate questions.

### *The ascertainment of the applicable law*

In international commercial arbitration in Sweden, the parties should be responsible for ascertaining the content of the applicable law and the arbitral tribunal has no general obligation to conduct legal research. In order to complete its mission, the arbitral tribunal must however acquire enough knowledge of the applicable law to apply it. Thus, where the parties fail to sufficiently ascertain the content of the *lex contractus*, the arbitrators should primarily request the parties to make further submissions on the content of the applicable law. Should the applicable law's content still need further ascertainment, the arbitral tribunal may, in a transparent manner, proceed with its own research or appoint a legal expert. It should however normally be considered as falling outside the scope of the arbitral tribunal's mission to conduct its own legal research for the only purpose of clarifying if alternative legal basis may be applicable to the dispute. In its interpretation and application of the law, the arbitral tribunal should review the sources presented by the parties. The tribunal is free to make different interpretations of these sources than the parties.

### *Discretionary power to raise legal issues ex officio*

Where both parties argue from a common perception of what legal basis apply to the facts of the dispute and possibly also how the facts should be interpreted legally, there are strong reasons for the arbitral tribunal not to apply the law differently than argued for by the parties.

However, where the parties argue from different perceptions of which legal basis apply, refer to several legal basis or are not in agreement of the legal qualification of facts, the tribunal should not simply chose the least incorrect alternative if it considers another solution and other arguments to be correct. In this situation, the arbitral tribunal may, as a part of its mission, raise the legal issues it considers

necessary to resolve the dispute and make its own legal interpretation of facts, subject to the parties' right to comment on points of law.

The need to remain flexible and to adapt a suitable solution depending on the character of the legal issues and the composition of the arbitral tribunal is paramount in this situation. The tribunal may be well accustomed with the applicable law or may not know it at all. The insufficient ascertainment of the applicable law may depend on inadvertence of the parties or of difficulties related to a certain jurisdiction.

#### *The parties' right to comment on points of law*

Whenever the arbitral tribunal, as a result of its own research or knowledge of the applicable law, considers to make use of legal sources that materially differs from the ones invoked by the parties, to apply the law differently than argued for by the parties or to apply a legal basis *ex officio*, it is paramount, due to the principle of party autonomy and due process, that the parties are given an opportunity to comment. This requires the arbitrators to take a proactive approach and to communicate legal issues at the earliest point possible to the parties. Should a legal issue still not arise until the deliberations (which may often be the case), the tribunal should not hesitate to reopen the proceedings if it considers it necessary to raise the new legal issue or to cite the new legal source. Considerations of impartiality requires the arbitrators to be cautious not to present arguments in either direction or reveal where it stands on issues in dispute when inviting the parties to comment. The parties should therefore simply be asked to comment on the legal rule, alternative qualification of facts, or source, that the arbitral tribunal considers relevant, without the tribunal elaborating in either direction. Even though some commentators will protest to such case management, it is more important that the parties are not taken by surprise and that the arbitral award and its reasoning is understood by the parties. This will likely increase the acceptance of the award and make challenge actions less probable. The parties' right to comment on points of law ensures procedural fairness and cannot be disregarded in international arbitration in Sweden, doing so can, as we have seen, constitute grounds for setting aside the award.

However, all dispute resolution – including arbitration – includes compromises between fairness and efficiency. Such a compromise in favor of efficiency is that the arbitral tribunal's own legal reasoning, interpretations of legal sources invoked, and legal sources raised *ex officio* that do not go meaningfully beyond the ones invoked by the parties need not be subject to contradictory debates.

Finally, it goes without saying that if the arbitral tribunal is aware of an applicable legal basis that requires new claims to be made or new fact to be invoked, it falls outside the scope of the arbitral tribunal's mission to consider it.

## **5.1 Final remarks**

The efficiency of international arbitration in general, and the competitiveness of Sweden as an arbitral seat in particular, requires a predictable arbitral procedure, acceptable to actors from different legal traditions. The uncertainty of how the law should be ascertained and applied in international commercial arbitration in Sweden is therefore not just a source of uncertainty for the parties to a particular dispute but also a competitive disadvantage for Sweden as an arbitral seat.

The recommendation presented in this thesis fulfills the requirements of offering predictability and of being acceptable to actors from different legal cultures, it is also compatible with the principles governing Swedish arbitration law. The arbitral procedure must be predictable, but must also remain supple and flexible. It is therefore important to keep in mind, and it takes repeating, that the recommendation in this thesis only is meant as a recommendation, subordinate – of course to the will of the parties, but also – to circumstances of each particular case, which may justify deviations, made in a transparent manner.

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