

## ***Iura novit arbiter* in International Disputes: How to Prevent Unforeseeable Legal Findings**

### **Abstract**

If ever there was a globalized world, we are experiencing it! In this fervently interconnected and accelerated world, the main purpose of companies and businessmen is to continue their business.

In such a context, ruled by the “business as usual”, arbitration increasingly appears to be a certainly less traumatic way of resolving a dispute and then an ideal comfort neutral room for players from different countries and with distant backgrounds.

However, its attractive nature of the private process must be combined with the jurisdictional functions that the arbitrators have to accomplish anyhow.

The balance between these two factors (namely, the substantially private nature of the arbitral process and the jurisdictional role of the arbitrators) will lead to the result, positive or negative, of this choice made by the parties.

For these reasons, they should have all the skills to build, with the precious support of their lawyers, a valuable product.

This short article aims at highlighting the role of the principle “*iura novit curia*” in the modern international arbitration, since the election of the applicable law, as well as its ascertainment, are two of the most challenging tasks for the arbitrators to deliver a satisfactory service.

### **I. Introduction**

The principle *iura novit curia* literally means "the judge knows the law".<sup>2</sup> Certainly, this concept evolves from another and more ancient rule according to which the judge must apply the law *ex officio*: “*da mihi facta dabo tibi ius*”.<sup>3</sup>

According to *Vinnio*, the expression *iura novit curia* was born accidentally in Gaul, when a judge, tired of a lawyers' long legal disquisition, exclaimed: “*venite ad factum, curia novit ius!*”.<sup>4</sup>

In the modern processual context, the adage *iura novit curia* is universally recognized concerning the *lex fori*.

According to legal scholars<sup>5</sup>, today the judge should be erudite, since his duty to know the law is inherent to the function of deciding a dispute.

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<sup>2</sup>As it will be observed infra “This formula makes a lot of sense when it concerns domestic law. It might be less obvious when the formula refers to foreign law. This is a very sensitive issue for the international arbitrator who has no *lex fori*”. *Rubino Sammartano, M.*, International Arbitration Law and Practice, third edition, 2014, 684.

<sup>3</sup>Which could be rephrased as “give me the facts and I will give you the law”, translation of this author.

<sup>4</sup>*Melendo, S. S.*, El Juez y el Derecho, Ediciones Jurídicas Europa-América, Buenos Aires, 1957. The author, however, warns about the judge who interrupts the lawyers: it could be nothing more than a fantasy, as the legal principles were not born in a moment but were expressions of slower processing.

<sup>5</sup> *Franchi, G.*, La Perizia Civile, Padova, 1959, 107.

The topic of the discussion inevitably moves to the axis *novisse-noscere*, namely wondering if the judge always must know the law or if his duty consists also in reaching this knowledge.

In the effective law-in-action practice, this question arises whenever the judge finds himself dealing with a body of rules unknown to him – not an infrequent situation.

In these cases, the legal interpreter, like a historian, should make use of all available means to ascertain the content of the law.<sup>6</sup>

Certainly, every legal system disciplines, in its way, how the judge may acquire the knowledge of the body of rules that should govern the case.

However, concerning domestic legislation, the *iura novit curia* leads to the conclusion that the judge is free to and should endeavor to ascertain the content of the law, even if he does not have the concrete cognition of the relevant rules required to resolve the dispute.

## II. Civil law and Common law: two distinct approaches concerning foreign law

The situation is more heterogeneous if a dispute includes any connecting factor with another legal system and this, due to so-called conflict of laws rules, leads to the application of foreign law.<sup>7</sup>

Indeed, the legal systems, that traditionally imply different approaches, like, for example, the distinction between civil law and common law Countries, usually arrive at different answers to the question of whether the judge could or even should ascertain the content and so apply the foreign law *ex officio*.

From the civil law perspective, the Courts have the power to determine the content of the foreign body of rules and to apply it *motu proprio*, regardless of the initiative of the parties; while within the common law tradition, the first step of the parties is required and, thus, they will have to give evidence also of the content of the alien legislation exactly as they should prove the fact.

In other words, the *civil law* tradition deems that the rules of conflict which refer to foreign regulations are able to integrate them within its own legal system; instead, on the other hand, the common law tradition considers the identification of the law of a foreign country as a mere *quaestio facti*.<sup>8</sup>

Indeed, through a short comparative analysis, it is easy to determine, for example, that in Germany both legal literature and Courts' decisions agreed upon considering the foreign law as a *quaestio iuris*. Article 293 of the German Code of civil procedure<sup>9</sup> implies the full application of the *iura novit curia* and, consequently, the duty for the Court to determine the content of the foreign law *sua sponte*.

<sup>6</sup> Calamandrei, P., Il giudice e lo storico, Studi sul processo civile, 33. According to the Author, the principle *iura novit curia* does not only mean that the judge, as public officer, has the duty to know the law even if the parties ignore or misunderstand it, but also means that he has, like any private citizen, the power to implement, even outside the proceedings, all the means of research that a scholar may use to reach the knowledge of the law in force.

<sup>7</sup> Wiśniewski, C., Zielińska, A., Who should Know the Law: The Arbitrators or the Parties? Kluwer Arbitration Blog, 3 October 2016.

<sup>8</sup> Mosconi, F., Campiglio, C., Diritto Internazionale Privato, 2006, Utet Giuridica, 173.

<sup>9</sup> Section 293 of German ZPO states that: "The laws applicable in another state, customary laws, and the statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use sources of reference as well, and to issue the required orders for such use".

Assessing the applicable foreign law as a “rule of law”<sup>10</sup>, Article 293 of the German Code shows a clear distinction between the foreign law and the simple facts of the dispute.

In Switzerland, Article 16 of private international Law reveals that the principle *iura novit curia* is fully applicable.<sup>11</sup>

In Italy, with respect to the foreign law, it is Article 14 of the Private International Law<sup>12</sup> that gives legal force to the *iura novit curia*: hence, the Courts are compelled to point out and to apply the applicable foreign rule exactly as it was a national one, and, therefore, it does not lose its own nature of a matter of law.<sup>13</sup>

Within the *common law* tradition the situation is reversed and the foreign law is a question of fact to be proven by the parties.<sup>14</sup> In other words, the *iura novit curia* does not encompass foreign law<sup>15</sup> and if one of the parties bases its thesis on an alien body of rules, it also has the burden of proof as any other fact-finding issue.<sup>16</sup>

Therefore, it is possible to state that in the common law tradition, the foreign law is treated as an adjudicative rather than legislative fact. In other words, it is considered as a fact, the ascertainment of which is necessary for the adjudication of only the particular dispute between the litigating parties.<sup>17</sup>

### III. From *iura novit curia* to *iura novit arbiter*

Moving now to the heart of this short essay, the questions that arise are: is the rule *iura novit curia* suitable to play its role within the scenario of international commercial arbitration? And, if yes, to what may be the extent of *iura novit arbiter*?

First, we ought to bear in mind that what the law represents for the arbitrator may be very different than what it represents for the judge<sup>18</sup>: domestic rules about the determination of the applicable law are not necessarily suitable for international arbitration and this is inferable by analysing some of the main differences between the positions of the arbitrators and those of the judges.<sup>19</sup>

<sup>10</sup> Literally: rechtsnormen.

<sup>11</sup> Article 16 of Swiss Private International Law [Code] says: “The contents of the foreign law shall be established by the authority of its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties“. See also *Bryant, A. C.*, Foreign Law as Legislative Fact in Constitutional Cases, *BYU L. Rev.* 1005 2011.

<sup>12</sup> Law No. 218 of 31 May 1995.

<sup>13</sup> *Mosconi, F., Campiglio, C.*, supra note 7, 174.

<sup>14</sup> *Waincymer, J.*, International Arbitration and the Duty to Know the Law, *Journal of International Arbitration*, 2011, vol. 28, issue 3.

<sup>15</sup> *De Ly, F., Friedman, M. W., Di Brozolo, L. G. R.*, Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", *International Law Association, Committee on International Commercial Arbitration, Report for the Biennial Conference in Rio de Janeiro, 2008*, 17. Available in *Arbitration International*, vol. 26, issue 2, 1 June 2010.

<sup>16</sup> For a historical review of this rule, see *Sommerich, O. C., Busch, B.*, The Expert Witness and the Proof of Foreign Law, 38 *Cornell L.Q.* 125, 1953, 127-128.

<sup>17</sup> *Rotem, Y.*, Foreign Law as a Distinctive Fact – To Whom Should the Burden of Proof be Assigned, *Chicago Journal of International Law*, vol. 14, No. 2, 2014, article 8, 629. See also *Born, G.*, *International Commercial Arbitration – Commentary and Materials*, New York, 2006.

<sup>18</sup> *Mayer, P.*, Reflections on the International Arbitrator's Duty to Apply the Law, *LCIA Arbitration International*, 2001, vol. 17, No. 3, 236.

<sup>19</sup> *De Ly, F., Friedman, M. W., Di Brozolo, L. G. R.*, supra note 14.

First of all, the decision-making power of the arbitrator, a real *iudex privatus*, stems from a specific consensus among the parties who choose to devolve the (future) dispute to arbitration rather than to national courts.<sup>20</sup>

Moreover, the nature of (international commercial) arbitration strongly emphasizes the autonomy of the parties; on the other hand, the arbitration clause may be pinpointed as a contract in the contract and, certainly, herein it is not necessary to refer to the discipline of the contractual autonomy of the parties.<sup>21</sup>

Due to this wide autonomy, the contractual parties are also free to choose the applicable law to the same contract.

But what happens if, not an uncommon case, the parties do not intend to make – or fail in the attempt – a choice?

The opinion of those who excluded the relevance of the *iura novit curia* in international arbitration<sup>22</sup> nowadays is less supported and both legal scholars and jurisprudence are inclined to considering this principle functioning also in the international arbitration context.

Secondly, State courts have precise rules concerning the identification of the applicable body of rules and the ascertainment of its content; the judge is bound by his own system of private international law, either in case of choice made by the parties or in case of no choice.

Conversely, in the sphere of international arbitration, in many cases arbitrators have the task of electing the applicable law within a number of different ones in competition with each other. Besides, international arbitrators are often called upon to apply laws different than the one in which they are professionally qualified and usually practice.<sup>23</sup>

It would be possible to argue that arbitrators are also bound, in case of choice made by the parties, for what concerns the identification of the applicable law.

However, even in the cases in which they face an electing applicable law clause, arbitrators always preserve a certain amount of freedom to assess the validity of that clause.<sup>24</sup>

<sup>20</sup>In the ambit of international trade, it is widely recognized that arbitration presents significant pros such as, for example: speed, flexibility, wide autonomy, confidentiality.

<sup>21</sup>About the contract and the due respect for the autonomy of the parties, see *Borroni, A.*, Neo-Contractualism and Comparative Law, published for the Essays in Honor of *Saul Litvinoff's*, (ed.), Moreteau, Romanach, Zuppi, 2008, 431. In the opinion of the Author, already the “classical contract theory was organised around the will theory of contract, which held that a contract represents an expression of the will of the contracting parties and for that reason should be respected and enforced” as well as, after the evolution of the patterns of business relationships, also with the neoclassical theory of contract, the agreement between the parties deserves the same respect.

<sup>22</sup>See *Derains, Y.*, Observations, *Revue de l'arbitrage*, 1998, 711: “l'adage *iura novit curia* n'a pas de place en matière d'arbitrage et surtout en matière d'arbitrage international”.

<sup>23</sup>“Reflecting back on the cases in which I have been involved as an arbitrator, and certainly forgetting some of them, I realized that I have resolved disputes under German, French, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisia, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Illinois, New York... and Swiss law. Do I know these laws? Except for New York law, which I learned many years ago and would not pretend to know now, and Swiss law, which I practise, although not often as you see, the answer is clearly no. So how did I apply a law unknown to me? By ignoring it? By focusing on the facts and the equities? How did I become educated in law? How did counsel teach me?”: *Kaufmann-Kohler, G.*, The Arbitrator and the Law: Does he/she Know it? Apply it? How? And a Few More Questions, *Arbitration International*, 2005, vol. 21, No. 4, 631.

<sup>24</sup>The autonomy of the arbitration clause, even if it was not implemented in the New York Convention, is now almost universally recognized in international arbitration. See, for example, Article 16, par. 1, of *Uncitral Model Law*: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso iure the invalidity of the arbitration clause”.

Thirdly, arbitrators do not have a *lex fori* (at least regarding the substantive law) and this leads to alternative solutions if the content of the applicable law is not easily ascertainable.<sup>25</sup>

#### IV. The arbitration as an international jurisdiction

Within the international arbitration there is no room for recognizing a real competent forum and, indeed, it is to be considered an a-domestic instrument. This condition has an immediate consequence: it implies the impossibility of identifying a national law able to exclude all the other ones, which should be defined as foreign laws as it happens within the ordinary jurisdiction.

Furthermore, it also should be noted that, even concerning the procedural law, there is no a *lex fori* that binds the arbitrators like the judge. Hence, it should be emphasized that there is nothing to prevent the parties from deciding that the arbitration is governed partly by a certain procedural law and partly by another procedural law.<sup>26</sup>

Arbitrator Mr. Phyton, on the one hand, considered to be applicable the procedural law agreed upon by the parties, and, on the other, applied the Swiss civil procedure law because "loi du lieu du siège de l'arbitrage".<sup>27</sup>

Such a multiplicity of applicable national procedural rules should, in itself, confer internationality to arbitration, precisely from the procedural perspective. And the international nature of arbitration subsists, *a fortiori*, if the parties have not referred to any particular procedural system, but have restricted to electing as applicable an arbitral regulation.

The non-linking of the ICC Regulation to a national procedural law has been affirmed in the award in which the chairman of the arbitration panel Mr. J. De Aréchaga, responding to the plea of non-compliance of the Regulation with the national procedural law, raised with the aim of making the second one prevailing, he argued that, since there is an incompatibility between some of the rules of the Brazilian Code of civil procedure and the ICC Regulation concerning some procedural issues, the Brazilian provisions were intended exclusively for domestic arbitrations.<sup>28</sup>

Legislators have, at different times, embraced this nature of international arbitration.<sup>29</sup>

In 1985 the Supreme Court of the United States pointed out<sup>30</sup> that an arbitral tribunal, having no particular duties binding it to the application of a specific national procedural law, has no obligation to justify the application of its own regulation.

The pieces of legislation about arbitration do not specify how the arbitrators should ascertain the content of the applicable law, but there are some exceptions to this legislative silence.

<sup>25</sup> De Ly, F., Friedman, M. W., Di Brozolo, L. G. R., supra note 14.

<sup>26</sup> Sammartano, R. M., L'arbitrato Internazionale, 198/79, 70.

<sup>27</sup> Asling Trading Co. v. Gracia, 1954; mentioned also in the award B.P. Exploration Company (Libia) v. Government of the Arabic Republic of Libya, Copenhagen 10.10.1973, Revue de l'Arbitrage, 1980, 119.

<sup>28</sup> In the case ICC No. 4695/84, Yearbook Commercial Arbitration, 1986, 149, the arbitral tribunal wrote that "The specific and the explicit choice of the ICC Rules in respect of those procedural matters which concern the constitution of the arbitral tribunal and the initiation of proceedings, necessarily excludes, in respect of an international commercial contract, the application of certain procedural requirements contained in arts. 1073 and 1074 of the Brazilian Code of Civil Procedure, which are incompatible with the ICC Rules and were obviously designed to apply only to purely Brazilian or domestic arbitrations".

<sup>29</sup> Von Mehren, A. T., International Commercial Arbitration and the Conflict of Laws, The American Review of International Arbitration, 1992, vol. 3, 60. Furthermore, international commercial arbitration has become increasingly distinguished by its independence from every national legal systems. Consequently, the existence of its own discipline emerged "selon une démarche caractéristique de la représentation de l'arbitrage admettant l'existence d'un ordre arbitral autonome". See Gaillard, E., Aspects Philosophiques du Droit de l'arbitrage International, Recueil des Cours, 2008.

<sup>30</sup> In the case Mitsubishi Motors Corporation (Japan) v. Soler Chrysler-Plymouth Inc. (U.S.), U.S. Supreme Court, 2 July 1985, (Yearbook Commercial Arbitration, 1986, vol. 11, 555): "The international arbitration tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates".

One of these is represented by Article 1044 of the Dutch Code of Civil Procedure<sup>31</sup> which envisages the recourse by the arbitral tribunal to the mechanisms for ascertaining the foreign law provided for by the European Convention on Information on Foreign Law of 1968.

Another one is Section 27, par. 2, of the Danish Arbitration Act<sup>32</sup> and a third is Article 34, par. 1 and 2. lett. (g), of the 1996 English Arbitration Act.<sup>33</sup>

Like national laws, also arbitral regulations do not dwell on this issue. However, some exceptions are represented, for example, by Article 22, par. 1, (iii), of LCIA Rules<sup>34</sup>, by Article 27, par. 1, of the Arbitration Institute of the Stockholm Chamber of Commerce<sup>35</sup> and by Article 21 of ICC Rules<sup>36</sup>.

Anyway, the lack of specific indications may be replaced by the activity of the parties. If, on the one hand, it is highly infrequent that the parties include in the contract any instructions about how the arbitral tribunal will have to proceed with the determination of the content of the applicable law, on the other, it may happen that the parties come to an agreement during the arbitration proceedings, perhaps with the help and cooperation of the arbitral panel.<sup>37</sup>

However, it is much more likely that the arbitrators decide how to ascertain the content of the applicable law without any indication or legislative and/or regulatory aid.

The wide freedom granted to arbitrators highlights that a fault in the application of the law might not be deemed a sufficient reason to deny recognition or enforcement of an award according to

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<sup>31</sup>Article 1044 of the Dutch Code of Civil Procedure states that: "Request for information on foreign law: 1. The arbitral tribunal may, through the intervention of the President of the District Court at The Hague, ask for information as mentioned in article 3 of the European Convention on Information on Foreign Law, concluded in London, 7 June 1968. The President shall unless he considers the request to be without merit, send the request without delay to the agency mentioned in article 2 of said Convention and notify the arbitral tribunal thereof. 2. The arbitral tribunal may suspend the proceedings until the day on which it has received the answer to its request for information".

<sup>32</sup>Section 27, par. 2, of the Danish Arbitration Act says: "If the arbitral tribunal considers that a decision on a question of European Union law is necessary to enable it to make an award, the arbitral tribunal may request the courts to request the Court of Justice of the European Communities to give a ruling thereon".

<sup>33</sup>Article 34 of the 1996 English Arbitration Act states that: "[par. 1] It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. [par. 2] Procedural and evidential matters include [lett. (g)] whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law".

<sup>34</sup>Article 22 of LCIA Rules: "[par. 1] The arbitral tribunal shall have the power, upon the application of any party or upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views [...] the arbitral tribunal may decide [lett. (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 relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the arbitration agreement, the arbitration and the merits of the parties' dispute".

<sup>35</sup>Article 27 of the Arbitration Institute of the Stockholm Chamber of Commerce: "The arbitral tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the arbitral tribunal shall apply the law or rules of law that it considers most appropriate".

<sup>36</sup>Article 21 of ICC Rules says: "[par. 1] The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. [par. 2] The arbitral tribunal shall take into account of the provisions of the contract, if any, between the parties and of any relevant trade usages".

<sup>37</sup>*Kaufmann-Kohler, G.*, supra note 22, Author suggests: "The parties shall establish the content of the law applicable to the merits. The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the arbitral tribunal is empowered to apply to such issue any rule of law it deems appropriate". Furthermore, it may always happen that the parties, when ascertaining the content of the applicable law is difficult, decide to adjust their agreement.

the New York Convention.<sup>38</sup> Hence, an award will be hardly questionable simply because the arbitral panel erred in ascertaining the contents of the applicable law.

Therefore, trying to answer if the referee should know the law (or, "*iura novit arbiter?*"), it should be considered that the arbitrators are entrusted with the power-duty to ascertain the contents of the applicable law, as, moreover, it seems, for example, confirmed by the same provisions regarding the applicable law to contractual obligations (i.e., Rome I) albeit within the limits referred to in Article 1, paragraph 3, of Regulation (EC) no. 593/2008.

Whence, considering the logic of the procedure and the structure of the arbitration syllogism, it is excluded that the content of the law may be equated with a factual issue.<sup>39</sup>

Besides, in recent decades we have witnessed a powerful harmonizing wave in different Countries, describable as "globalization of arbitration".<sup>40</sup> It evolves with the New York Convention and went ahead with UNCITRAL Arbitration Rules, the Model Law, the regulation of many arbitration institutions and various relevant national laws.

This convergence of disciplines has proved to be a valuable tool for the appearance of a standard or, better, an international arbitration procedure.<sup>41</sup> This "globalization" should not surprise: international arbitration represents a place where actors with distant backgrounds meet and work with the common purpose of resolving a dispute.

From this perspective, highlighting a further peculiarity of international commercial arbitration is required: arbitration panels ought to bear in mind that they are dealing with international disputes and interpret the rule of law also in light of international practice and, above all, give the maximum possible effect to the intentions of the parties. Sometimes, the freedom of arbitrators – and, consequently, the flexibility of arbitration – goes even further. Indeed, if the parties have referred to the common international commercial practice, the arbitrators may or should also decide to apply the rules included in the so-called *lex mercatoria*.<sup>42</sup>

Another aspect to be underlined is that "arbitrators attempting to ascertain the contents of applicable law should bear in mind that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration [...] in particular, arbitrators should not rely on unexpressed presumption[s]".<sup>43</sup>

Among these, for example, if it was not possible to ascertain the content of the applicable law, then it will not be extended to the arbitration the presumption of identity of such content with those of the

<sup>38</sup>The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, available at <<http://www.newyorkconvention.org/>>. Last visited: 16.06.2018.

<sup>39</sup>*Carbone, S. M., Iura novit curia e arbitrato commerciale internazionale, Rivista di Diritto Internazionale Privato e Processuale*, 2010, No. 2, 353.

<sup>40</sup>*Kaufmann-Kohler, G., Globalization of Arbitral Procedure, Vanderbilt Journal of Transnational Law*, 2003, vol. 36.2, 1331.

<sup>41</sup>On this topic, in particular, see: *Baum, A., Reconciling Anglo-Saxon and Civil Law procedure: the Path to a Procedural lex arbitrationis, Law of International Business and Dispute Settlement in the 21<sup>st</sup> Century, Liber amicorum Karl-Heinz Backstiegel, Koln, 2001, 21; Boris, C., The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process, Frommel, S. N, Rider, B. A. K., Conflicting Legal Cultures in Commercial Arbitration, The Hague, 1999, 1; Caldwell, S., Arbitration Procedures: Harmonisation of Basic Notions: Differing Approaches, Globalization and Harmonization of the Basic Notions in International Arbitration, IFCIAI Conference, Honk Kong International Arbitration Centre, 1996, 101.*

<sup>42</sup>About *lex mercatoria*, see *Gaillard, E., Thirty Years of lex mercatoria: Towards the Selective Application of Transnational rules, ICSID Review – Foreign Investment Law Journal*, October 1995, Vol. 10, issue 2, 208.

<sup>43</sup>Recommendation No. 4, Resolution No. 6/2008, Conference of the International Law Association in Rio de Janeiro, 2008, see *supra* footnote no. 14.

*lex fori*: and this is due to the crucial reason that, as already mentioned, in international commercial arbitration there is no foreign law and there is no a real and effective jurisdiction able to exclude any possible connection with a national legal system.<sup>44</sup>

In those cases, the motto *iura novit arbiter* allows the arbitrators to apply *ex officio* the principles and rules usually arisen in the ambit of the *lex mercatoria* "selon une démarche caractéristique de la représentation de l'arbitrage admettant l'existence d'un ordre arbitral autonome".<sup>45</sup>

#### V. The balance between the applicable law and legal findings raised *motu proprio* by the arbitrators

Even though great flexibility is granted to the arbitrators for the determination of the content of the applicable law, it is to be remarked that this power could be strengthened or circumscribed with a clear and precise agreement of the parties.

However, as already mentioned and as noted during the International Law Association Conference<sup>46</sup>, the parties are hardly inclined to include precise recommendations and instructions about how the arbitration panel will have to ascertain the content of the specific rules and/or the discipline concretely applicable to the dispute.<sup>47</sup>

Indeed, the attitude of businessmen is usually more focused on the strictly economic clauses, such as, for example, the price, the quantity, quality and delivery of goods, rather than on the legal elements.<sup>48</sup>

Nevertheless, even without an (accurate) *electio iuris* made by the parties, the effects of the principle *iura novit arbiter* cannot be considered to be entirely devoid of limits.

Indeed, the arbitrators' wide discretion should be balanced with the general principle of *due process*, as well as the ensuing limit of *no surprise*.

Article 9.1, lett. (b), of the Geneva Convention<sup>49</sup> guarantees the parties the opportunity to present their own cases (i.e., to support their reasons) within the arbitral proceedings: in other words, the arbitration panel should not surprise a party (or the parties) by applying *ex officio* a provision to which the parties have not referred to or, anyway, unpredictable and unforeseeable.

Therefore, if the arbitral tribunal considers that the dispute should be decided through legal findings and/or by applying rules different than those invoked by the parties, then it ought to inform the parties to avoid surprising them.<sup>50</sup>

These situations may arise, for example, when and if the arbitrators deem that the dispute should not be decided in accordance with the provisions of the contract or with the law chosen by the parties, but on the basis of a totally different body of rules: the principle of due process requires that the arbitral tribunal notify the parties and give them full chance to present their reasons. Similarly, it could happen that, due to the peculiar perspective of *iura novit curia* within the international arbitration, the arbitrators consider *lex mercatoria* as applicable law even if this is

<sup>44</sup> Carbone, S. M., supra note 38.

<sup>45</sup> *Ex pluribus*, Lew, J. D. M., Achieving the dream: Autonomous Arbitration, Arbitration International, 2006, 179.

<sup>46</sup> De Ly, F., Friedman, M. W., Di Brozolo, L. G. R., supra note 14.

<sup>47</sup> Carbone, S. M., supra note 38, 360.

<sup>48</sup> Borroni, A., supra note 20.

<sup>49</sup> Article 9.1, lett. (b), of the Geneva Convention: "[...] the party requesting the setting aside of the award [...] was otherwise unable to present his case"; similarly, Article 18 of Uncitral Model Law on International Commercial Arbitration: "The parties shall be treated with equality and each part shall be given a full opportunity of presenting his case" and Article 22, par. 4, of ICC Rules: "In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

<sup>50</sup> Tunik, D. E., Default Proceedings in International Commercial Arbitration, International Arbitration Law Review, vol. I, issue 2, 1998, 90.



not expressly mentioned, nor elected by the parties: again, the arbitral tribunal should inform the parties in order to give them a chance to present their reasons on this extremely delicate point.

## VI. Duty of information or discretion of information: a short comparative analysis

However, arbitration courts do not always abide by this "duty of information" and its consequences may be different among various jurisdictions and this seems to be due to a still far-reaching harmonization between legislation as well as between arbitration rules.

In 2016 the Court of Appeal of Paris, in the case *Republic of Madagascar v. De Sutter P. et al.* quashed an ICC award (of 29 August 2014) because the arbitral tribunal had based its decision on legal findings which were not invoked by the parties and without giving them the opportunity of exposing their views.<sup>51</sup>

This decision did not distance from other prior judgments of the French courts which, actually, had gone even further in limiting the rule *iura novit arbiter* and in recognizing a more intense defense of the due process: the Court of Appeal of Paris, in the case *Gouvernement de la République Arabe d'Égypte et al. v. Malicorp Ltd.*<sup>52</sup>, and the French Supreme Court, in the case *Overseas Mining Investment Ltd. v. Commercial Carribean Niquel*, ruled by giving maximum extent to the adversarial principle even when the legal issues raised *motu proprio* by the arbitral tribunal were not really unpredictable because even "si les arbitres n'ont effectivement pas l'obligation de soumettre au préalable leur motivation à une discussion contradictoire, ils doivent cependant respecter le principe de la contradiction".<sup>53</sup>

In Switzerland, however, the Swiss Federal Court, on several occasions, has rejected challenges against awards rendered in the absence of a full discussion on the legal issues as, among others, in the well-known *Tvornica* case: "In Switzerland, the right to be heard concerns particularly, factual findings. The parties' right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, accordingly to the principle *iura novit curia*, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties".<sup>54</sup>

This position has been shared by the Italian legislator: according to articles 112 and 113 of the Italian Code of civil procedure, "nel pronunciare sulla causa, il giudice deve seguire le norme del diritto". This provision generically refers to all "the law" and not only to those rules invoked by the parties.

Therefore, the Court (either national or arbitral) may apply the most suitable "piece of law" as well as adjust the *nomen iuris* independently of parties' initiatives.<sup>55</sup>

With the new second paragraph of article 101 of the Italian Code of civil procedure<sup>56</sup>, which certainly has to be combined with the fourth paragraph of article 183<sup>57</sup>, to avoid the so-called "sentenze della

<sup>51</sup>Cour d'Appel de Paris, Pôle 1 – Chambre 1, Arrêt du 15 mars 2016, R.G. No. 14/19164. Available at <<https://www.italaw.com/sites/default/files/case-documents/italaw7208.pdf>>. Last visited 16.06.2018.

<sup>52</sup>Cour d'Appel de Paris, Arrêt du 19 juin 2008, R.G. No. 06/17901. Available at <<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000019225667>>. Last visited 16.06.2018.

<sup>53</sup>Cour de Cassation, I chambre civile, Arrêt No. 785 du 29 juin 2011, R.G. No. 10/23321. Available at <[https://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/785\\_29\\_20477.html](https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/785_29_20477.html)>. Last visited 16.06.2018.

<sup>54</sup> Quoted in *Geradin, D., Villano, E. P.*, "Iura Novit Curia Stealing the Limelight (Again)", *Kluwer Arbitration Blog*, 22 april 2016. Available at <<http://arbitrationblog.kluwerarbitration.com/2016/04/22/iura-novit-curia-stealing-the-limelight-again/>>. Last visited 16.06.2018.

<sup>55</sup> See, Cassazione Civile, Sez. II, judgment no. 17075 of 24.08.2015. Available at <<http://www.eclegal.it/iura-novit-curia-non-contestazione-in-appello-contraddittorio/>>. Last visited 16.06.2018.

<sup>56</sup>Article 101, paragraph 2, of the Italian Code of civil procedure: "Se ritiene di porre a fondamento della decisione una questione rilevata d'ufficio, il giudice riserva la decisione, assegnando alle parti, a pena di nullità, un termine, non inferiore a venti e non superiore a quaranta giorni dalla comunicazione, per il deposito in cancelleria di memorie contenenti osservazioni sulla medesima questione", paragraph added with the Law No. 69 of 18 June 2009.

terza via", if a crucial question has been raised *ex officio*, the Court is now forced to invite the parties to present their observations.

By only partially innovating concerning the traditional approach, the Italian Supreme Court is rather constant in considering that the judge ought to incite the adversarial discussion between the parties only if the issue (raised *ex officio*) concerns factual findings or mixed factual and legal findings.<sup>58</sup>

This approach is certainly applicable also to arbitration: in Italy, *ex* article 822 of the Code of civil procedure, also the arbitrator "decides according to the rules of law", unless the parties have opted for an arbitrator acting as amiable compositeur.

Consequently, it could be assumed that, in international arbitration practice, if an arbitrator applies, as he must, the governing law, beyond the submissions of the parties, there will be no case for an annulment of the award.<sup>59</sup>

However, it should be mentioned a *dictum* of the Swiss Federal Tribunal which, for the first time, quashed an award despite the adage *iura novit curia*.<sup>60</sup>

In this case, the Federal Tribunal, indeed, found fault with the arbitrators, as they relied on a contractual clause which the parties had not discussed. Thus, it is not a matter of substantive law but that the law is being applied without the parties' being able to make their submission on that substantive law.<sup>61</sup>

Summing up, therefore, it is possible to argue that in the field of international commercial arbitration, there is not a shared one-size-fits-all solution concerning the principle *iura novit arbiter* and arbitral tribunals still need to carefully balance the pros and cons of dealing with it in order to ensure due process and to render an enforceable award.

To achieve these goals, the international arbitration practice seems to suggest to the arbitrators not to base their awards on legal issues completely unpredictable and unforeseeable for the parties.

Again, ILA Recommendations could be useful since they support a proactive attitude of the arbitration panel that should encourage the discussion between the parties also about legal issues raised *ex officio* by giving them a reasonable opportunity to present their submissions.<sup>62</sup>

The recent Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (i.e., PCC Rules), contains, probably the most courageous and ambitious provision on this point: "An

<sup>57</sup> Article 183, paragraph 4, of the Italian Code of Civil Procedure: "Nell'udienza di trattazione ovvero in quella eventualmente fissata ai sensi del terzo comma, il giudice richiede alle parti, sulla base dei fatti allegati, i chiarimenti necessari e indica le questioni rilevabili d'ufficio delle quali ritiene opportuna la trattazione".

<sup>58</sup> See, *ex multis* Cassazione civile No. 2984/2016, conf. No. 8936/2013, quoted in Codice di Procedura Civile Studium, a cura di Luigi Tramontano, La Tribuna, 2018.

<sup>59</sup> Lévy, L., *Iura novit curia?* The Arbitrator's Discretion in the application of the Governing Law, Kluwer Arbitration Blog, 20 March 2009.

<sup>60</sup> Swiss Federal Tribunal, Judgment of 9 February 2009, Case reference No. 4A\_400/2008, available at <www.bger.ch>, last visited 16.06.2018.

<sup>61</sup> Lévy, L., *supra* note 59.

<sup>62</sup> ILA Recommendations No. 6-7-8: "6. In general, [...] arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised; 7. Arbitrators are not confined to the parties' submissions about the content of applicable law. [...] arbitrators may question the parties about legal issues the parties have raised and about their submissions and evidence on the contents of the applicable law, may review sources not invoked by the parties relating to those legal issues and may, in a transparent manner rely, on their own knowledge as to the applicable law as it relates to those legal issues; 8. Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties".

award may not be based on legal grounds different from those relied on by either of the parties, unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds".<sup>63</sup>

Less ambitious, also the regulation of the Milan Chamber of Commerce considers this issue, even if limited to the law applicable to the proceedings: "In any case, the principles of due process and equal treatment of the parties shall apply".<sup>64</sup>

In spite of the poor legislative and regulatory production on this specific profile of the *iura novit arbiter* and, consequently, the unlikelihood of identifying a procedural harmonization, on the one hand, there is again no reason to fail to give appropriate warning to the parties and give them a full opportunity to make their own submissions and, on the other hand, it is advisable for a tribunal to grant itself the power to decide on the applicable law through any terms of reference agreed to with the parties.<sup>65</sup>

From an extremely practical point of view, the parties should reach an agreement as early as possible, maybe already at the first hearing. A model of wording could be the following: "The arbitral tribunal is to resolve all issues of fact and law that shall arise from the claims and counterclaims and pleadings as duly submitted by the parties, including, but not limited to, the following issues, as well as any additional issues of fact or law which the arbitral tribunal, in its own discretion, may deem necessary to decide upon rendering an arbitral award in the present arbitration".<sup>66</sup>

## VII. *Iura novit arbiter* in investment treaty arbitration

A short analysis of the relevant features of the principle *iura novit arbiter* also within the ambit of the investment treaty arbitrations might be useful.

First of all, since an investment treaty arbitration is always an arbitral process, it should be stressed that there are no substantial differences concerning the autonomy of the parties, namely the cornerstone of the discipline of the law applicable to the arbitration. This choice, indeed, even in the investment treaty arbitration, is referred to as the parties.<sup>67</sup>

Concerning the identification of the applicable law, it is necessary to spend a few more words and to give some clarification because there might be practical consequences that should be considered.

In the investment treaty arbitration, the parties to the treaty are to be distinguished from the parties of the arbitral process. Indeed, the first are the contracting States, while the latter is one of the contracting state and an investor from the other contracting State.

Therefore, the arbitration agreement contained in an investment treaty, as well as the relevant choice-of-law clause, are deemed to be stipulated by the contracting States for the benefit of their investors.<sup>68</sup>

<sup>63</sup> Chapter II "General provisions", § 6, No. 2. Available at <www.sakig.pl>. Last visited 16.06.2018.

<sup>64</sup> Article 2, par. 3, available at <www.camera-arbitrale.it>. Last visited 16.06.2018.

<sup>65</sup> *Waincymer, J.*, supra note 14.

<sup>66</sup> *Carter, J. H.*, Right and Obligations of the Arbitrator, *Dispute Resolution Journal*, 1997, Vol. 52, No. 1.

<sup>67</sup> For example, the first part of Article 42, par. 1, of ICSID Convention states that: "The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties".

<sup>68</sup> This situations was supposed during the negotiations of the Washington Convention of 1965: "The Chairman remarked that [...] it was likewise open to the parties to prescribe the law applicable to the dispute. Either stipulation could be included in an agreement with an investor, in a bilateral agreement with another State, or even in a unilateral offer to all investors, such as might be made through investment legislation". See Summary record of proceedings, Addis

Hence, any agreed mechanism in the arbitration agreement, including the law applicable to the dispute, is deemed to be chosen directly by the parties to the arbitration. This assumption is nothing more than the implementation of the dissociated nature of consent to arbitration in investment treaty arbitration: although the consent to arbitration is dissociated in time, the parties to the arbitration are still presumed to have given their common consent to arbitration at the time the investor accepts the host State's general consent by filing the request for arbitration.<sup>69</sup>

This peculiar mechanism of the investment treaty arbitration is today well established. Ex multis, in the case *Goetz v. Burundi*, the arbitral tribunal remarked that: “[u]ndoubtedly, has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties, the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty”.<sup>70</sup>

However, if, on the one hand, the parties often fail in determining the applicable law, on the other hand, in the vast majority of cases, even in investment treaties there is not a clear choice of law.<sup>71</sup>

Therefore, the spotlight is to be turned on possible scenarios related to the ascertainment of the applicable law in the absence of the parties' agreement also within an investment treaty arbitration. In other words, as before, the question is whether (and to what extent) the principle *iura novit arbiter* is suitable for investment treaty arbitrations.

Already in 1979 in the case *BP Exploration Co. (Lybia) v. The Government of the Libyan Arab Republic*, the tribunal, fully recognizing the rule *iura novit arbiter*, stated that “an arbitrator is both entitled and compelled to undertake an independent examination of the legal issue deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the claimant”.<sup>72</sup>

Conversely, in the case *MINE v. Republic of Guinea*<sup>73</sup>, the *ad hoc* annulment committee identified a manifest excess of the power of the tribunal and, consequently, a limitation to the *iura novit arbiter* in the ambit of investment treaty arbitration, when the arbitration panel applies legal issues outside the law applicable to the dispute.<sup>74</sup>

In 2006 another *ad hoc* annulment committee again re-extended the potential application of the principle *iura novit arbiter* in investment treaty arbitration: “[the arbitral tribunal], strictly

Ababa Consultative meetings of legal experts, December 16-20, 1963, II Convention on the Settlement of Investment Disputes between States and Nationals of other States, Documents concerning the origin and the formulation of the Convention, ICSID Publication 1968, Vol. II, part. 1, 267. Available at <<https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf>>. Last visited 16.06.2018.

<sup>69</sup> *Baniġatemi, Y.*, *The Law Applicable in Investment Treaty Arbitration*, Arbitration under International Investment Agreements: a Guide to the Key Issues, chapter 9, *Yannaca-Small, K.* (ed.), Oxford University Press, 2010.

<sup>70</sup> ICSID Case No ARB/95/3, *Antoine Goetz and others v. Republic of Burundi*, award of 10 February 1999, available at [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C151/DC537\\_Fr.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C151/DC537_Fr.pdf), last visited 16.06.2018.

<sup>71</sup> For an interesting statistics, see Parra, A., *Applicable Law in Investor-State Arbitration*, Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2007, 2008.

<sup>72</sup> Sole arbitrator Mr. *Lagergren*, 53 ILR 297.

<sup>73</sup> ICSID Case no. ARB/84/4, ICSID Review – Foreign Investment Law Journal, available at <[http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C136/DC674\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C136/DC674_En.pdf)>. Last visited 16.06.2018.

<sup>74</sup> The committee found: “Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to functio. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*”.

speaking, is not subject to any obligation to apply a rule of law that has not been adduced, this is but an option [...]”.<sup>75</sup>

Hence, unfortunately, it appears that the investment treaty arbitral decisions expressly or implicitly addressing *iura novit curia* deal with the issue cursorily, providing little analysis and scant support.<sup>76</sup>

Anyhow, the rule that aims at preventing unforeseeable decision (i.e., no surprise) emerges like an everstronger requirement also in the ambit of the investment treaty arbitration. For example, in the case *Bogdanov v. Moldova*, the sole arbitrator states that arbitral tribunals should avoid that parties be “surprised by the consideration of legal issues that were not taken into consideration in the proceedings”.<sup>77</sup>

### VIII. Conclusions: the importance of harmonized best practices to prevent surprising decisions

Both in the field of international commercial arbitration and in that of investment treaty arbitration, undeniable reasons of opportunity, in any case, suggest to the parties to agree on an arbitral clause.

As it has already shown in the previous pages, the protection of the parties (above all the weaker ones) implies the safeguard from the risk of unpredictable decisions. Therefore, since the not yet balanced functioning of the principle *iura novit arbiter*, it is advisable to take care of this issue from the negotiations of the arbitration clause.

A lawyer, better if a comparative one<sup>78</sup>, indeed, may play the role of a sort of architect able to help the parties in designing an appropriate and safe contractual path, namely a business project complete with all those legal elements rarely considered by the businessmen.

Then, it would be useful to provide, within the arbitration clause, the opportunity for the parties to present their submissions within a defined period; or the opportunity (but also the burden) to present their submissions orally within the first subsequent hearing.

To conclude, in the opinion of this author, it is endorsable the consideration that arbitration is a service industry the further development of which is dependent on the trust and consent of its users. They are more likely to accept an arbitral tribunal's decision if they can follow the rationale and are not surprised by a justification on legal grounds that they have not raised.<sup>79</sup>

<sup>75</sup> ICSID Case no. ARB/99/7, *Mr. Patrick Mitchell v. The Democratic Republic of Congo*. Available at <<https://www.italaw.com/sites/default/files/case-documents/ita0537.pdf>>. Similarly, in the case *CME Czech Republic B.V. v. Czech Republic*: “this does not mean that a tribunal is bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties and the Tribunal to be essential to the Tribunal's decision“, issued in Stockholm, Swede, in the *Uncitral Arbitration Proceedings*. Available at <<https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf>>. Last visited 16.06.2018.

<sup>76</sup> *Bigge, D. M.*, *Iura novit curia in Investment Treaty Arbitration: May? Must?*“, *Kluwer Arbitration Blog*, 29 December 2011.

<sup>77</sup> *Bogdanov v. Moldova*, *Stockholm Chamber of Commerce, SCC Case No. 93/2004*, quoted in *Bigge, D.M.*, *supra* note 75.

<sup>78</sup> As noted by *Borroni, A.*, “Neo-Contractualism and Comparative Law“, *supra* footnote 20, in the growing high specialization of law firms, “academic comparative lawyers emerged as specialists [...] for [their] attitude to understand a legal system and to be able to make the international or transnational collaboration possible“.

<sup>79</sup> *Wiśniewski C., Zielińska, A.*, *Who Should Know the Law: The Arbitrators or the Parties?* *Kluwer Arbitration Blog*, 3 October 2016.

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