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FINAL REPORT

Ascertaining the Contents of the Applicable Law in International Commercial Arbitration

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I. Introduction

At the Biennial Conference in Toronto, the Committee on International Commercial Arbitration was mandated to study the topic of the determination of the contents of the applicable law in international commercial arbitration and to report on this topic at the Biennial Conference in Rio de Janeiro in August 2008. This is the final Report prepared under this mandate.¹

A. General Description of the Topic

Both common and civil law are in agreement that facts are to be pleaded and proven by the parties and that courts in general should decide on proven facts and should not make inquiries as to issues not raised by the parties. The legal traditions, however, diverge as to causes of action and the status of law in civil litigation². In the common law, the parties are to indicate the cause of action and to assist the court in

¹ The Chairman and Rapporteurs are grateful to all those members who contributed to the Committee's work, and attended the meetings and submitted comments. The Chairman and Rapporteurs also wish to thank Prof. Giuditta Cordero Moss and Prof. Gabrielle Kaufmann-Kohler for their valuable comments on the first draft of the Report.

² J.A. Jolowicz, *Adversarial and inquisitorial models of civil procedure*, 52 ICLQ 281 ff.; European traditions in civil procedure, C.H. van Rhee (ed.), Antwerp, Intersentia, 2005; C. Reymond, *Civil law and common law procedures: which is the more inquisitorial? A civil lawyer's response*, Arb. Int. 1989, 357-368.

These differences may also relate to the different treatment of preclusive effects of judgments in common and civil law, see the Reports and Recommendations of the Committee (F. De Ly. and A. Sheppard, Res Judicata and arbitration, Interim Report of the International Arbitration Committee of the International Law Association, Berlin Conference, London, International Law Association, 2004, 826-861; F. De Ly, F. and A. Sheppard, Res Judicata and arbitration, Final Report of the International Arbitration Committee of the International Law

applying the law by giving the legal arguments that support the relief sought. On the other hand, many civil law countries have a tradition where the maxim *iura novit curia* applies under which the court is assumed to know the law and where the parties have only to prove the facts supporting their claim and identify the relief they seek. Courts may then identify the cause of action and apply the law to make a decision. In this respect, courts are authorized to recharacterize facts (since characterization is a legal process), in certain cases may modify the cause of action if the claim would fail under the cause of action identified by a party but not under a different cause of action³ and substitute its legal reasoning for that of the parties⁴.

The issues raised in the preceding paragraphs also arise in international commercial arbitration. To decide the dispute submitted to it, an international commercial arbitral tribunal will generally be required to apply, or at least to take into consideration, a wide range of legal rules or principles. Depending on the circumstances and the nature of the issue to be decided, as well as on the approach adopted by the arbitrators, these rules can be drawn from national legal systems (in particular the law of the place of arbitration, the law identified by the arbitrators as the law applicable to the specific issue under consideration and the law of the likely place of enforcement) or from non-national sources⁵, such as the *lex mercatoria*, general or transnational principles, Unidroit principles on international commercial contracts, or even in certain cases international law⁶.

Among the rules or principles which the arbitral tribunal may be required to apply are:

1. *Rules governing the jurisdiction of the arbitral tribunal*, in particular the rules relating to the existence, the validity, the scope and the effects of the arbitration agreement (including questions relating to the capacity of the parties to enter into the arbitration agreement) and rules governing arbitrability, *i.e.*, whether a particular kind of dispute can be resolved by arbitration.
2. *Rules governing the procedure*. These are the rules on the basis of which the arbitral tribunal exercises the power to issue an award which is conferred on it by the parties' arbitration agreement.
3. *Conflict of law rules*. These are the rules on the basis of which the arbitral tribunal may determine the substantive rules applicable to the different issues relevant to the solution of the dispute which, in a broad sense, also encompasses the applicability of mandatory rules.
4. *Rules governing the issues relevant to the solution of the merits of the dispute*. These rules include first of all the ones governing the contractual relationship between the parties to the arbitration. They also include all the rules relevant to the solution of the other issues which may be relevant to settle the merits of the dispute, including for instance claims in tort, matters relating to companies, the validity and effects of security

Association, Report of the seventy-second conference, Toronto, International Law Association, London, 2006, 186-204).

³ For instance, Belgian Supreme Court, April 14, 2005, Jur. Liège, Mons et Bruxelles, 2005, 856.

⁴ This authorization does, however, not amount to an obligation (French Supreme Court, December 21, 2007, No. 06-11.343.)

⁵ See the Cairo Recommendations of the Committee on Transnational Rules in International Commercial Arbitration, Report of the Sixty-Fifth Conference, London, 1992, 6.

⁶ These rules are to be distinguished from customary law, usages, course of dealing and contractual provisions. For a decision on the application of a contractual provision which allegedly had not been pleaded by a party and which was considered by virtue of the *iura novit curia* principle, see Swiss Federal Court, July 17, 1998, 20 ASA Bull 660 and September 30, 2003, 4P.100/2003. This Report does not directly address the question as to the status of custom, usages, courses of dealing and contractual provisions because their application and ascertainment will mostly be covered by the debate between the parties. However, this Report may indirectly be relevant to the extent that the status of any such rules is involved (e.g., their relationship with mandatory rules, their construction) which by and large will be determined or influenced by the applicable law.

interests, the capacity of the parties to enter into the contractual arrangement in dispute, mandatory rules which require to be applied irrespective of the law governing the merits, etc.

5. *Rules governing the enforcement of the award.* These rules may become relevant insofar as arbitrators concern themselves with the issue of the enforceability of their award⁷.

With respect to all these laws and rules arbitrators face two basic challenges. The first is identifying the national or non-national legal systems containing the applicable law to settle the different issues with which they are confronted. In doing so, arbitrators must answer the question: what law or rules apply to the dispute?⁸ This is a conflicts of law question. In most circumstances, arbitrators identify the applicable law by relying on the will of the parties, as expressed in their agreement. Most commercial contracts with arbitration clauses also specify a governing substantive law and set of procedural rules. In the rare circumstances, where the agreement is silent on those issues, arbitrators look to conflict rules drawn from a specific legal system, or, more commonly nowadays, they rely on a flexible approach considered more suitable to international arbitration. Where mandatory rules may be relevant, arbitrators may have to look to the scope rules determining their application. In many jurisdictions, arbitrators are not bound by the rules that apply in court proceedings, which implies that issues arise as to the identification and ascertainment of the conflict or scope rules that need to be applied.

The second conceptual challenge faced by arbitrators is to determine the contents of such applicable laws once they have identified the legal systems from which they are to be drawn. Having answered the question “*what law applies*”, the arbitrators now must confront the question “*what is the meaning of that applicable law, and how do we ascertain it*”? As distinct from the *conflict of laws* question, arbitrators also face a *contents of laws* question.

This second topic is one that has attracted relatively little attention, even though the determination of the contents of applicable law features in nearly every arbitration in one way or another. The existing literature on this topic provides no consensus on the theoretical framework underpinning such determinations and offers only occasional practical guidance for the issues arbitrators and parties confront in actual cases.⁹

⁷ See e.g. Article 35 of the ICC Rules.

⁸ Many arbitration laws authorize the arbitral tribunal to apply the rules of law chosen by the parties and some (France, The Netherlands) authorize the direct approach under which, absent a choice of law, the arbitral tribunal can apply the rules of law it considers appropriate. For the purposes of this Report, any reference to applicable law also includes reference to applicable rules of law under the direct approach.

⁹ For a discussion of these issues see F. Perret, *Les conclusions et leur cause juridique au regard de la règle ne eat iudes ultra petita partium*, in *Etudes Lalive*, 1993, 594 ff.; F. Perret, *Les conclusions et les chefs de demande dans l'arbitrage international*, ASA Bulletin 7 (1996), 7 ff.; J.D.M. Lew, *Proof of Applicable Law in International Commercial Arbitration*, Festschrift für Otto Sandrock, 2000, 581 ff.; M. Kurkela, ‘*Jura novit curia*’ and the burden of education in international arbitration – a Nordic perspective, ASA Bulletin, Vol. 21 No. 3 (2003), 486 ff.; D. Bensaude, *Les moyens relevés d’office par l’arbitre en arbitrage international*, Les Cahiers de l’Arbitrage, N. 2004/1 – 1st part, 27 ff.; W. Wiegand, *Iura novit curia vs. ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts*, Festschrift für Franz Kellerhals, 2005, 127 ff.; G. Kaufmann Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat’l L., 2003, 1313 ff.; G. Kaufmann Kohler, *Iura novit arbiter: Est-ce bien raisonnable?*, in *De Lege Ferenda: Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch*, Genève, Slatkine, 2004, 71 ff.; G. Kaufmann Kohler, *The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions*, 21 Arb. Int’l, 2005, 631 ff.; G. Kaufmann Kohler, ‘*The Governing Law: Fact or Law?*’ – A *Transnational Rule on Establishing its Contents*, Best Practises in International Arbitration, ASA Special Series No. 26, July 2006, 79-85; G. Cordero Moss, *Is the arbitral tribunal bound by the parties’ factual and legal pleadings?*, 3 Stockholm International Arbitration Review (2006), 1 ff.; J-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, 2nd ed., 2007, especially § 551 ff. and 803 ff.; G. Petrochilos, *Procedural law in international arbitration*, OUP, 2004, 144-149; M.E. Schneider, *Combining arbitration with conciliation*, ICCA Congress Series No. 8, 1996, 61; Practitioner’s Handbook on international arbitration, F.B. Weigand (ed.), München, 2002 (under the *iura novit curia* headings of the country reports); G. Lohmann Luca de Tena, *El aforismo iura novit curia y su posible aplicación en laudos arbitrales*, in *El arbitraje en el Perú y el mundo*, Instituto peruano de arbitraje, 2008, 99-106; I. Kalnina, *Iura novit curia: Scylla and Charybdis of International Arbitration?*, 8 Baltic Yearbook of International Law (2008), (forthcoming); P. Karrer, *The civil law and the*

This Report deals primarily with the contents of laws issue set out above. It incidentally also touches upon aspects of conflicts of laws principles. It does not attempt to address the following issues which also relate to the basic relationships between the parties and the arbitrators as to party autonomy and the adversarial or inquisitorial nature of the arbitration process:

1. the power of arbitrators to make inquiries as to facts¹⁰ and to order on their own motion measures as to evidence such as appearance of fact witnesses, production of documents, site visits or expert evidence;
2. the power of arbitrators to characterize or recharacterize legal relationships¹¹; and
3. the power of arbitrators to determine or modify causes of action.

In this Report, the Committee endeavors both to develop a framework and to provide practical recommendations for addressing the contents of laws question. As will be explained, there is no single correct approach to addressing these questions. Unlike the situation in national courts, which benefit from particular rules and extensive jurisprudence specifying how a court should determine the applicable law and its contents, there is no equivalent set of rules and jurisprudence governing international arbitration. Instead, arbitrators have considerable freedom to operate within broad parameters based on fundamental principles such as fairness to the parties, due process, limits on arbitral mandates and respect for mandatory rules. So long as arbitrators assess the applicable law and its contents within these parameters their awards are unlikely to be annulled or denied enforcement on grounds relating to their ascertainment and assessment of the contents of the applicable law, regardless of the approach they take to that issue in any given dispute.

At the same time, the Committee considers that there are desirable practices for arbitrators when assessing the applicable law and its contents. Although the Committee expressly does not seek to provide a set of prescriptive rules or mandatory procedures (and recognizes that there are always exceptions), this Report attempts to describe various approaches to the conflict and contents of laws questions, and to present a list of considerations that arbitrators may take into account in ascertaining the applicable law and its contents.

This Report does not attempt to cover all types of international arbitration. Specifically, this Report deals with the ascertainment of the applicable law and its contents in international commercial arbitration and does not cover international investment arbitration where the issues and solutions may be at least in part different, although certain references are made to the practice of international investment tribunals.

B. Outline of the Report

As intimated above, the purpose of this Report is to:

1. pose the problems faced by arbitrators when they have to determine the applicable law and its contents that they may be required to apply;
2. reference the theoretical framework which applies to address the problems faced by arbitrators when they have to determine the applicable law and its contents; and

common law divide, Dis.Res.J., Feb. April 2008, 78-79; T. Giovannini, *Qui contrôle les pouvoirs des arbitres: les parties, l'arbitre ou la cour d'arbitrage?*, in *Les arbitres internationaux*, Paris, Soc.Lég.Comp., 2005, 142-144. With reference to the issue of *iura novit curia* in ICSID proceedings, see O. Spiermann, in *The Oxford Handbook of International Investment Law*, P. Muchlinski, F. Ortino and Ch. Schreuer (eds), 2008, OUP, p. 89 ff.

¹⁰ Both common and civil law acknowledge that arbitrators do not have independent fact-finding powers. An exception is Article 37 CIETAC Arbitration Rules 2005. Under the 1988 CIETAC Rules, this led to problems regarding enforcement of CIETAC awards in Hong Kong in circumstances where a party was not capable of commenting upon the exercise of a tribunal of these fact-finding powers (see *Paklito Investment Ltd. v Klockner East Asia Ltd*, January 15, 1993, Kaplan, LJ refusing enforcement on due process grounds) leading to a revision of the CIETAC Arbitration Rules (see most recently Article 37 of the CIETAC 2005 Arbitration Rules).

¹¹ See Swiss Federal Court, November 1, 1996, 20 ASA Bull 258 (bringing this element within the scope of the *iura novit curia* principle).

3. seek to address the problems faced by arbitrators and provide practical recommendations for arbitrators when determining the applicable law and its contents.

Section II of this Report provides a comprehensive and reasoned illustration of the problems faced by arbitrators when they have to determine the applicable law and its contents. Despite the differences between the situation in arbitration and domestic and international courts, an investigation into the main approaches of national and international courts, when confronted with the issue of ascertaining the applicable law and its contents, provides useful inputs for the analysis of the problems faced by arbitrators. The point will accordingly be addressed in Section III. Section IV deals with the existing theoretical framework which the arbitrators must apply or be guided by in performing their task of determining the applicable law and its contents and provides an overview of how the issue is currently dealt with in practice by arbitrators. Finally, Section V states the consensus of the committee on the issue and sets out some recommendations for how arbitrators may deal with the issue in the future, in an attempt to harmonize the process.

II. How Conflict and Contents of Law Issues Affect Arbitrators and Parties

Virtually every international arbitration presents circumstances in which arbitrators will be required to determine the applicable law and its contents. In doing so, parties and arbitrators face a number of thorny intellectual and practical questions. In a 2005 paper, Professor Kaufmann-Kohler drew on her experience to bring to life some of these questions:

*Reflecting back on the cases in which I have been involved as an arbitrator, . . . I realized 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. 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 . . . 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 the law? How did counsel teach me?*¹²

Of course, aside from exceptional cases where they act as *amiable compositeurs*, arbitrators are duty bound to apply the relevant law and rules¹³. They are not free simply to ignore them in favor of facts and equities. Instead, they must become educated in a law that they may not be expert in and may never before have even considered.

The way in which arbitrators approach the applicable law and its contents is thus a vital issue for international commercial arbitration. It is also, in some sense, a fundamental one. It alludes to the question of the very role of the arbitrator. If an arbitrator's sole function is to resolve the dispute presented by the parties, then the arbitrator presumably may – perhaps must – determine the law based solely on what the parties tell him it is. If, however, the arbitrator has supplementary obligations – derived from professionalism, a pledge to the parties or an institution to decide a dispute according to law, or public policy considerations – then the arbitrator may have to retain the ability to probe beyond what the parties say about the applicable laws and rules.

Determining the applicable law and its contents is a multifaceted challenge. It raises questions both about how arbitrators can ascertain the applicable law, and what they should do with the law once ascertained. Consider, for example, the questions surrounding how a tribunal might come to know a particular country's law. Should the parties present evidence of the relevant law? Should they do so by presenting primary source materials, like statutes or regulations, from the relevant jurisdiction? Should they

¹² G. Kaufmann-Kohler, *The Arbitrator and the Law*, supra note 9, 631.

¹³ See for instance article 42 (2) ICSID Convention providing that a Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

present judicial decisions that interpret such statutes or regulations, or other sources like scholarly articles, drafting history or evidence of practical applications of the law in the relevant jurisdiction?

In addition to the foregoing kinds of written evidence about the contents of the law, should the parties present oral information about the relevant law? Should this be through submissions of the advocates, by means of party appointed legal experts, or should the tribunal hire its own expert? If one of the arbitrators is an expert on the applicable law, in the sense of being very knowledgeable about it, should that arbitrator bring his or her knowledge to bear on the case, and if so in what way?

There are also situations in which the parties have not given the tribunal a sufficient basis on which to make legal conclusions. In that circumstance, are there limits to what the tribunal can do in directing the parties to provide more complete and helpful submissions? If the parties have not raised what the tribunal believes may be an important or even dispositive legal issue, can it raise the issue on its own initiative? Can arbitrators conduct their own legal research to see for themselves about the contents of the applicable law, and if so what if any obligations do they have to disclose that research to co-arbitrators and the parties?

Once the tribunal has received information about the law's contents, it faces a series of questions about what to do with that information. How should a tribunal interpret and understand the applicable law? Should it do so in the way in which it would most likely have been applied by the national judge (for instance taking into account binding or persuasive force of precedent applicable in the governing law) or does it have the freedom progressively to develop the law¹⁴, offer novel interpretations, employ a process free of doctrinal formalism, or interpret the law to reflect international practice and standards?¹⁵ Moreover, domestic law has become more complex to the extent that uniform law is integrated in domestic law which also complicates the task of ascertaining the contents of the applicable law¹⁶. Finally, the question arises of what a tribunal should do if the contents of the applicable rules cannot sufficiently be ascertained?

Moreover, answers to the foregoing questions may vary with circumstances. If issues of mandatory law arise, should the tribunal approach them differently than it might approach other legal matters? For example, if a tribunal suspects that it is being asked to enforce an illegal transaction, should it accept the parties' stipulation that the transaction is not illegal, or should the tribunal in some way pursue the issue? In cases that arguably have public interests at stake, or may form part of a system of informal precedent, such as some bilateral investment treaty cases, do arbitrators have some obligation to consider how their decisions on points of law may have consequences beyond the immediate dispute and to take different or additional steps to determine the law that they would not necessarily take in a traditional commercial arbitration? Can the attitude of the arbitrators be influenced by the importance of the issues or by the amounts at stake?

These many questions about how arbitrators can and should ascertain the contents of applicable law may be roughly grouped into the following four more overarching and thematic questions:

- How should arbitrators *acquire information* about the contents of the applicable law?
- How should arbitrators *interact with the parties* about the contents of the applicable law?
- How should arbitrators *make use of the information* they receive about the contents of the applicable law?

¹⁴ Similarly as with judges applying foreign law, the question arises whether arbitrators are architects or mere photographers of the law to be applied (for this metaphor, see W. Goldschmidt, *Die philosophischen Grundlagen des internationalen Privatrechts*, Festschrift für Martin Wolff, Tübingen, 1952, 217).

¹⁵ See: International Court of Arbitration of the Federal Chamber of Commerce of Vienna, award no. 4318, award no. 4366, 15 June 1994, RIW 690 (1995), *Clunet* 1055 (1995) where the UNIDROIT Principles were used for the interpretation of international uniform law and the ICC Award no. 8128, 1995, *Clunet* 1024 (1996) where the UNIDROIT Principles were used for the interpretation of CISG. More generally, on the comparative method as a tool to interpret domestic law, see B. Markesinis and J. Fedtke, *Judicial recourse to foreign law*, Routledge, 2006, 409 pp.

¹⁶ For the application and interpretation of uniform law, see R. Goode, H. Kronke and E. McKendrick, *Transnational commercial law, Text, cases and materials*, OUP, 2007, 701-727 with further references.

- How should arbitrators address situations that may call for *special treatment* regarding the contents of the applicable law?

In considering these questions, the Committee is also mindful that there are important differences between what arbitrators *can* do in the sense that they have the requisite authority, what they *ought* to do as a matter of good practice, and what they *must* do to comply with legal or professional obligations imposed on them. As this Report will elaborate, the Committee believes that arbitrators typically have wide authority to address legal matters, and in exercising that authority they are constrained only by a small number of important principles, which are reflected in international arbitration conventions such as the New York Convention as well as in arbitration laws and rules. In short, there is a great deal that they *can* do and not much that they *must* do. This implies considerable discretion for arbitrators in determining the applicable law and its contents. Consequently, much of what can constructively be said about this topic concerns how arbitrators *ought* to exercise their substantial discretion as a practical matter.

III. The Determination of Applicable Law by National and International Courts

In discussions on the approach of arbitrators to the ascertainment of the applicable law's content an analogy is sometimes drawn with the approach to this question by national and international courts. Like arbitrators, courts also regularly confront the situation where they must know the applicable law and its contents. Since courts are typically expected to know the contents of their own jurisdiction's law (although the expectations vary in different systems), the more apt analogy for arbitration is with the way in which courts determine the contents of "foreign" law.

The Committee thought it would therefore be instructive to consider the approaches of national and international courts. Those approaches are summarized in Subsection A, which is not intended to be a comprehensive treatment of a large and complex topic beyond the scope of the Committee's current project. However, for the reasons set out in Subsection B, the Committee considers that national and international court practice provides only limited guidance for how arbitrators should ascertain the contents of applicable law.

A. Court Approaches to Ascertaining Applicable Law

Court approaches to ascertaining applicable law vary considerably, at least in theory. For present purposes, it may nevertheless be useful to divide them into three theoretical categories¹⁷: (i) those in which the court has considerable powers to apply foreign law and to ascertain its contents on its own motion (this is typically the approach followed in civil law systems)¹⁸, (ii) those in which the court is required essentially to rely on the initiative of the parties to plead and prove foreign law as if it were a factual matter

¹⁷ For a comprehensive analysis of the issues relating to the application of foreign law by national courts see, among others, *Die Anwendung ausländischen Rechts im internationalen Privatrechts*, D. Müller (ed.), Berlin, de Gruyter, 1968; I. Zajtay, *The application of foreign law*, International Encyclopedia of Comparative Law, Volume III, Chapter 14, 1972; D.T., Tueller, *Reaching and Applying Foreign Law in West Germany: A Systematic Study*, 19 Stan. J. Int'l L., 1983, 99 ff; J. Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 Ariz. J. Int'l & Comp. L. 1995, 225 ff.; T.C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 Int'l & Comp. L.Q. 271, 1996, 274 ff.; W.L. De Vos, *International Aspects of Civil Procedural Law*, 7 Stellenbosch L. Rev. 163 (1996); G. Wegen, *Qualifying, Proving and Interpreting the Law of Another Country in Litigation in Germany*, 21 Int'l Legal Prac. 8, 1996, p. 10; R. Fentiman, *Foreign law in English courts*, OUP, 1998, 368 pp.; J.A. Jolowicz, *On Civil Procedure*, Cambridge Studies in International and Comparative Law, 2000, 185 ff and 253 ff.; M. Jänträ-Jareborg, *Foreign Law in National Courts: a Comparative Perspective*, in *Collected Courses of the Hague Academy of International Law*, vol. 304 (2003), 181-386; Geeroms, S., *Foreign Law in Civil Litigation: A Comparative and Functional Analysis*, OUP, 2004, 41 ff.; J. Mc Comish, *Pleading and Proving Foreign Law in Australia*, Melbourne University Law Review, 2007, 400 ff; R.Hausmann, *Pleading and proof of foreign law – a Comparative Analysis*, The European Legal Forum, Issue 1-2008, 1-61.

¹⁸ This approach was also followed by the Resolution of the Institute of International Law (Santiago di Compostela, September 4-14, 1989, 54 ReblsZ 69).

(this is typically the approach of English-based common law systems) and (iii) those intermediate systems (as in US federal litigation under Rule 44.1 of the Federal Rules of Procedure and in some US states) where pleading foreign law primarily rests with the parties and where responsibility with regard to ascertaining its contents is divided between the court and the parties¹⁹. In this respect, reference may also be made to Principle 22.1 of the joint ALI/UNIDROIT Principles of Transnational Civil Procedure which provides as follows:

The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.

These divergent approaches to ascertainment of law are simply one manifestation of more fundamental differences concerning the function of the courts and the respective roles of the parties and the judge in the different legal systems, as well as regarding the status of foreign law in international civil procedure. The common law systems are premised on the belief that the truth can be better established by way of presentation and investigation of issues in an adversarial manner primarily motivated by party self-interest, whereas the civil law systems are premised on the belief that justice can be better served by granting the court a wider scope of power to search for truth in co-operation with the parties or, eventually, independently from them.

Accordingly, many civil law systems consider that their national courts are under an affirmative obligation to investigate and apply foreign law. Once the court has determined its relevance to the proceedings, foreign law is treated as a question of law, determined by the judge in accordance with the maxim *iura novit curia* (*da mihi facta, dabo tibi ius*: “you bring me the facts and I will tell you the law”). The contents of the applicable law are determined by the judge’s own research and the court may apply foreign law irrespective of the will of the parties.

Broadly speaking, the ascertainment of foreign law in a civil law system may imply the following three activities: (i) determination of what actually constitutes the relevant foreign law; (ii) assessment of how a particular factual situation fits within the general system of applicable rules, and how foreign law treats the factual situation and what are the consequences thereof; and (iii) determination of how the particular foreign law rules are actually applied by the foreign country’s legal organs (*i.e.*, what weight is given to judicial decisions, what is the impact of a custom, etc.?).

The court may choose whichever means it finds appropriate for the determination of the contents of foreign law: it may request the parties, their experts, or even an independent expert appointed by the court, to provide information on the foreign law. Other sources of information on foreign law at the judge’s disposition are diplomatic representatives and certain channels provided for under the 1968 Council of Europe Convention on the Information on Foreign Law²⁰.

The civil law approach may also be found in Article 2 of the 1979 Montevideo Inter-American Convention on General Rules of Private International Law²¹ which provides as follows:

Article 2: Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties’

¹⁹ R. Schlesinger, *A recurrent problem in transnational litigation: the effect of failure to invoke or prove the applicable foreign law*, 59 Cornell L.Rev. 1973, 1-26; G. Bermann, *Transnational litigation*, Thomson, 2003, 256-259 (indicating that foreign law is not subject to jury trial but to be decided by the court, is capable of a motion to dismiss and that decisions on foreign law are reviewable in appellate proceedings); R. Weintraub, *Commentary on the conflict of laws*, fifth edition, Foundation Press, 2006, 112-116.

²⁰ See P. Mayer, *Les procédés de preuve de la loi étrangère*, Etudes offertes à Jacques Ghestin, Paris, LGDJ, 2001, 617-636.

²¹ Available at www.oas.org. The Convention was ratified by Argentina, Brazil, Colombia, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela. Mexico made a declaration that foreign law must be noticed first before Article 2 applies which is reflected in Article 14 of the Mexican Civil Code (Vargas, J., Conflict of laws in Mexico as governed by the rules of the Federal Code of Civil Procedure, available at <http://ssrn.com/abstract=977242>). Article 337 of the Brazilian Code of Civil Procedure authorizes courts to order a party invoking foreign law to prove its contents.

*being able to plead and prove the existence and content of the foreign law invoked.*²²

International courts generally follow an approach like that in the civil law tradition.²³ For example, the International Court of Justice (ICJ) has always been favorable to the application of the *iura novit curia* maxim.²⁴ The WTO Appellate Body has also relied on the *iura novit curia* maxim in its case law.²⁵ The *iura novit curia* principle has also often been invoked by the Inter-American Court of Human Rights²⁶, as well as the European Court of Human Rights²⁷. This practice may at least partially be explained by the fact that international courts enforce international norms and do not simply determine disputes between adversaries. Moreover, international courts tend to have specific jurisdictional mandates, and are not courts of general jurisdiction. Hence those courts often are the experts on matters of international law within their respective jurisdictional mandates.

Common law jurisdictions hold a different view on whether national courts should apply legal rules, especially foreign legal rules, absent proof provided by the parties. In accordance with the traditional common law view, foreign law is applied only at party request; absent evidence provided by the parties, courts are not to engage in their own research²⁸ and must apply their own legal rules rather than foreign rules. Courts apply their own law '*faute de mieux*'²⁹ because they must decide the case and they are not permitted to do their own research.

As far as the extent to which foreign law is applied once introduced, the general theory is that civil law judges generally tend to take a broader approach as to the scope of the applicable law and step into the shoes of the foreign judge, which implies also the application of the foreign statute of limitation and the foreign practice on determination of damages. Common law courts, on the other hand, are more hesitant in

²² One may add that uniform rules on conflict of law hardly have rules as to pleading and proving foreign law. Any such rule was considered but deferred in the Rome II Regulation on the law applicable to non-contractual obligations (see article 30, 1 (i) of Regulation 864/2007 of July 11, 2007, OJ L199, July 31, 2007, 40 ff.).

²³ M. Kazazi, *Burden of proof and related issues*, The Hague, Kluwer, 1996, pp. 42-50; G. Niyungeko, *La preuve devant les juridictions internationales*, 2005, 84-103.

²⁴ See the *Fisheries Jurisdiction Case* (UK v. Iceland), ICJ Reports 1974, at 9; see also the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), Merits, ICJ Reports 1986, at 24. The Permanent Court of International Justice had adopted the same view, see *The Lotus Case*, PCIJ, Series A, No. 10 (1927), p. 26.

²⁵ Appellate Body Report on EC-Hormones, § 156. For a criticism of the Appellate Body's insufficient reliance on the *iura novit curia* maxim in EC-Asbestos dispute, see Pauwelyn, J., *Cross-agreement complaints before the Appellate Body: a case study of the EC-Asbestos dispute*, 1 World Trade Review (2002), pp. 63-87, at p. 68 ff.

²⁶ The Inter-American Court of Human Rights has often invoked the principle *iura novit curia* in considering violations of the Convention "that have not been alleged in the pleadings submitted before it, in the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts", *Moiwana Village v. Suriname*, 15 June 2005, Inter-Am. Ct. H.R. (ser. C) No. 124, p. 102; see also *Juvenile Reeducation Institute v. Paraguay*, 2 September 2004, Inter-Am. Ct. H.R. (ser. C) No. 112, p. 126 and *Velasquez Rodriguez v Honduras*, 29 July 1988, Inter-Am. Ct. H.R. (ser. C) No. 4.

²⁷ *Handyside v the United Kingdom*, 7 December 1976, ECtHR Series A, No. 24, § 41.

²⁸ There are exceptions for the House of Lords if Scottish and Northern Irish law are concerned or for the Privy Council regarding the law of the countries over which it has jurisdiction (see S. Geeroms, supra note 9, 119).

²⁹ In this respect, it is to be noted that the traditional presumption that foreign law is deemed to be identical to domestic law, has gradually been replaced in Canada, Australia and England by pragmatic considerations as a basis for applying domestic law. In the United States, the Supreme Court held already in 1912 that there is no presumption of identity of similarity between domestic and foreign law if the applicable foreign law is from a civil law country (*Cuba v. Crosby*, 222 U.S. 473 (1912)).

this respect and rather choose to apply the law of the forum to such issues, which are typically considered to be procedural rather than substantive (even if they can be dispositive in a particular case).

While such differences persist, the two systems have similarities. Indeed, some might argue that rather than seeing a divergence of the two systems over time, they have actually been converging in more recent practice. For example, in Spain, the general rule provides that the party invoking foreign law must prove it, however, the judge may also play an active role in determining, substantiating and verifying the foreign law in question. In Denmark, Finland and Sweden the *iura novit curia* principle – present in the countries’ legal systems for centuries – implies that the court knows the substantive law of the forum (the “*lex fori*”) and that the parties need not submit any evidence on it. Thus, when applying the substantive law, the courts are bound neither by the parties’ pleadings nor by their classification of the legal issues.³⁰ It is not, however, clear if the same rule applies in the case where the court needs to apply substantive foreign law, the contents of which may be unknown to the national judge. According to Article 17(3) of the Finnish Code of Procedure, the judge must instruct the parties to bring sufficient ‘evidence’ determining the contents of the foreign law.³¹ Finally, countries such as France and Switzerland impose a cooperation duty on counsel to assist the court in ascertaining the contents of foreign law³².

This flexible approach that in practice anticipates shared burdens between litigants and the courts can be found in the United States and is actually close to the traditional common law approach. For example, in the United States Federal Courts, a procedural rule specifies that in determining foreign law the court may consider “*any relevant material or source,*” even if that information would not otherwise have been admissible under the evidence rules.³³ Furthermore, the explanatory notes to this rule from 1966 describe the wide ranging freedom of the court when it comes to ascertaining foreign law:

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to re-examine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

*There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely.*³⁴

Moreover, both common and civil law systems have acknowledged the somewhat unusual nature of foreign law determinations. Historically, at least some courts in each tradition treated foreign law as a

³⁰ M. Kurkela, *supra* note 9, p. 486.

³¹ *Ibid.*, at pp. 492 – 493.

³² For France, see D. Bureau and H. Muijt Watt, *supra* note 21, 433-455; F. Mélin, *La connaissance de la loi étrangère par les juges du fond*, PUAM, 2002, 379 pp.; for Switzerland see article 16 (1) of the Private International Law Statute under which the court may impose the burden of proof to a party regarding waivable rights

³³ U.S. Federal Rules of Civil Procedure, Rule 44.1.

³⁴ 1966 Advisory Committee Notes, U.S. Federal Rules of Civil Procedure, Rule 44.1.

question of fact. However, over time they came to appreciate that although it was a subject beyond the court's own knowledge and about which it accepted evidence, it was also different from other kinds of facts that might be introduced into a case. Thus English courts acknowledged that foreign law is “a question of fact of a peculiar kind”, and hence “foreign law is treated as a question for the decision of the judge alone, even when he is sitting with a jury”.³⁵

B. Limited Relevance of Court Approaches to Ascertaining Applicable Law to International Commercial Arbitration

There are several reasons why the Committee considers that beyond a superficial analogy court approaches to determining the contents of law do not provide strong guidance for how arbitrators should ascertain the contents of law.

As an initial matter, national legal systems themselves vary in how they ascertain the contents of foreign law. It is therefore difficult to discern universal principles or uniform practices that, even if they were relevant, would be capable of providing guidance to arbitrators and ensuring a consistent approach.

Moreover, there are fundamental differences between the position of arbitrators and that of national and international courts.

First, courts have prescriptive rules specifying how they are to ascertain the applicable law and its contents. National rules on application and ascertainment of foreign law are not necessarily suited for application to international commercial arbitration since they have developed within a national legal system with features, traditions and objectives that have no particular relevance to arbitration. Unlike before national courts where there is a distinction between national and foreign law, in arbitration one can only speak of applicable law. Also, any automatic transposition of national rules to arbitration would raise a conflict issue (*i.e.*, whether arbitrators should apply the national rules of the law of the seat, of the law governing the merits or of some other law). The Committee believes that the difficult characterization and practical issues raised by this conflict problem in themselves justify a transnational approach.

Similarly, arbitrators are not the gatekeepers of any country's mandatory rules. Arbitrators have to determine whether and which mandatory rules to apply. In contrast, courts are bound by the local mandatory rules and, by virtue of the local conflicts system, by the mandatory rules of the applicable law. This does not imply that international commercial arbitration should function as a conduit for escaping mandatory rules, but only that arbitrators may approach mandatory rules differently than do courts.

Second, courts have a *lex fori* that they can fall back upon. Judges are expected to know this law and may research, consider and apply it regardless of the parties' will. Arbitrators have no similar *lex fori* – at least as to the merits of the dispute. This implies that the third issue discussed below (what to do if the contents of the applicable law cannot easily be ascertained?) remains unsettled and that another solution needs to be developed. Similarly, courts apply their home rule if the parties may be deemed to have waived foreign law applicable by virtue of the local conflict rule but this solution is debatable in arbitration because the seat of an international arbitration may have no bearing whatsoever on the applicable substantive law.

Third, unlike courts, arbitral tribunals are not state or public international law organs. Such entities exercise a public function and they must consider interests that transcend those of the litigants before them, including the transparency and consistency of the rules on pleading and proving foreign law. Decisions they make could become formal or informal precedents for future cases. Arbitrators are typically selected and paid to resolve the current dispute only, without concern for parties that are not before them.³⁶

These differences taken together imply that the rules which govern the determination of the applicable law before courts do not necessarily apply in international arbitration.

³⁵ W.L. De Vos, *supra* note 17, 166.

³⁶ On the differences in the way arbitrators and courts apply the law, see G. Kaufmann Kohler, *Le contrat et son droit devant l'arbitre international*, in 'Le contrat dans tous ses états', Bern, Stämpfli, 2004, 361-373.

IV. Rules and Principles on the Ascertainment of the Applicable Law by Arbitral Tribunals

Given that court rules and practice are not directly applicable to international arbitration, the analysis must focus on what – if any – rules or principles may be directly applicable in international arbitration. The Committee has concluded that, with only rare and modest exceptions, there are no express rules specifying how arbitrators should ascertain the applicable law’s contents. However, there are some general principles of international arbitration that are relevant to the parameters that arbitrators must bear in mind.

A. No General Rules

Arbitration laws and rules by and large do not specify how arbitrators should ascertain the applicable law’s contents. For the most part, such laws and rules contain general conflict of law rules³⁷ and rules governing the procedure³⁸, which offer no specific guidance on this point.

There are three notable exceptions. The first is Article 1044 of the Dutch Code of Civil Procedure which contemplates recourse by arbitral tribunals to the mechanisms for the ascertainment of foreign law under the 1968 European Convention on Information on Foreign Law. It reads as follows:

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 at London, 7 June 1968 (Dutch Treaty Series 1968, 142). 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 information³⁹.

The second exception is Section 27(2) of the Danish Arbitration Act which provides that:

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.

The final exception is Article 34(1)(2)(g) of the English Arbitration Act 1996, which mentions the topic as follows, without offering guidance on how arbitrators should perform their task of ascertaining the law:

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” (emphasis added).⁴⁰

³⁷ E.g. Article 28 of the UNCITRAL Model Law, Article 1496 of the French Code of Civil Procedure and Article 187 of the Swiss Federal Private International Law Statute.

³⁸ E.g. Article 1494 of the French Code of Civil Procedure, and Article 182 of the Swiss Federal Private International Law Statute.

³⁹ The Committee is not aware of this provision ever having been applied.

⁴⁰ The Committee is not aware of any cases addressing this aspect of the English Arbitration Act 1996.

In some countries guidance may come from the jurisprudence of the domestic courts.⁴¹ Although they may be influenced by the approach of the *lex fori* to the treatment of foreign law by the courts, for the most part the decisions do not seem to imply an obligation for the arbitrators to follow one approach rather than the other⁴².

For example, the Swiss Federal Tribunal, which accepts that the *iura novit curia* principle is applicable also in arbitration⁴³, does not consider that the failure to apply this principle is of itself a ground for setting aside an award⁴⁴.

⁴¹ This is principally the case of Switzerland, where there is abundant case law of the Federal Tribunal dealing with the topic analyzed here.

⁴² Poudret-Besson, op. cit. § 551, 558, 801, 803, 805 with references to the case law of England, France, Belgium, Switzerland and Germany. For Sweden where the issue is controversial, see S. Jarvin, La nouvelle loi suédoise sur l'arbitrage, Rev.Arb. 2000, 56; C. Zettermarck, *Determining the applicable law to an arbitration agreement*, in The Swedish Arbitration Act of 1999, Five Years On: a Critical Review of Strengths and Weaknesses, L. Heuman and S. Jarvin (ed.), JurisNet, 2006, 111-113. For Germany and Austria, see A. Reiner, *Schiedsverfahren und rechtliches Gehör*, ZfRV 2003, 67-68.

For instance, in France the prevailing line of jurisprudence confirms the arbitrator's right (and even duty) to base the award on reasons deriving from the applicable law which have been included (even if implicitly) in the debate without an explicit invitation to the parties to comment upon it. In *SGI v. Ewbank* (Rev. arb. 1993, p. 664 ff., confirmed by Cass., Rev. arb. 1995, p. 597 ff.), the Paris Court of Appeals ruled that arbitrators can apply relevant foreign law, chosen in the agreement and the terms of reference, even if the parties have refrained from discussing it in any detail during the course of the proceeding. More specifically, the Appeals Court found that :

Lorsque les arbitres font référence aux dispositions tirées d'un droit étatique pour vérifier la compatibilité des stipulations contractuelles et des usages du commerce international avec les dispositions de ce droit – dont l'application aux contrats avait été expressément rappelée dans l'acte de mission – il en résulte qu'une telle référence apparaît non seulement logique et légitime, mais impliquée par la mission même des arbitres, de sorte que ce droit faisait nécessairement partie du débat. Aucune circonstance relative à la procédure de l'instance arbitrale n'ayant par ailleurs empêché les parties de présenter leurs observations sur ce point, la prise en considération du droit étatique, dans ces conditions, ne saurait caractériser une atteinte aux droits de la défense et en particulier au principe de la contradiction.

⁴³ Swiss Federal Tribunal, April 19, 1994, ATF 120 II 172 (*Westland Helicopters case*) as the starting point of numerous decisions as to the scope of *iura novit curia* in arbitration. Poudret-Besson (op. cit. at § 551) note (critically) that in this decision the Swiss Federal Tribunal would seem to consider that when it comes to legal arguments raised by the tribunal, the right to be heard is less stringent in arbitration than before national courts. See also Swiss Federal Tribunal, 16 March 2004, (www.kluwerarbitration.com) and *OAO Northern Shipping Co. v. Re Cadore de Marin SL ("the Remmar")* [2007] EWHC 1821 (Comm), para. 22. The case law of the Swiss Federal Tribunal may best be summarized by the following citation from its decision in *N.V. Belgian CMB v. N.V. Distrigas* dated 19 December 2001 (*ASA Bulletin*, 2002, p. 493 ff):

Une partie n'a, en principe, pas le droit de se prononcer sur l'appréciation juridique des faits ni, plus généralement, sur l'argumentation juridique à retenir. Toutefois, un tel droit doit être reconnu et respecté lorsque le juge envisage de fonder sa décision sur une norme ou un motif 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 124 I 49 consid. 3c p. 52; 115 Ia 94 consid. 1b p. 96 s.; 114 Ia 97 consid. 2a p. 99 et les références). Savoir ce qui est imprévisible est une question d'appréciation. Il convient de se montrer plutôt restrictif à cet égard dans le domaine de l'arbitrage international pour tenir compte de ses particularités (volonté des parties de faire trancher le litige par des arbitres et non par des tribunaux étatiques, coopération d'arbitres de traditions juridiques différentes) et pour éviter que l'argument de la surprise ne soit utilisé en vue d'obtenir un examen matériel de la sentence par le Tribunal fédéral (arrêt non publié du 2 mars 2001, dans la cause 4P.260/2000, consid. 6a). Ainsi, sous cette réserve à interpréter strictement, l'arbitre n'a, pas davantage que le juge étatique, à soumettre à la discussion des parties les principes juridiques sur lesquels il va fonder son jugement. En vertu de la règle 'iura novit curia', il n'est en principe pas lié par les moyens de droit développés par les parties et il peut d'office appliquer une autre disposition de droit matériel pour allouer les conclusions du demandeur. En revanche, l'arbitre spécialisé, qui a accès à des sources de connaissances n'étant pas forcément à la disposition des parties, a l'obligation de porter préalablement à leur connaissance les éléments techniques fondamentaux sur lesquels va reposer

In the only reported English decision on the subject known to the Committee, the Commercial Court held that Section 46(1)(a) of the Arbitration Act 1996, pursuant to which arbitral tribunals are to apply the law chosen by the parties, does not require arbitrators sitting in London to obtain general evidence and guidance in relation to a law other than that of England and Wales, even if that law is the proper law. It went on to hold:

If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales. To hold otherwise would mean that international arbitrations held in London would be encumbered with the considerable extra expense of obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales⁴⁵.

Since the determination of the contents of the applicable law is by and large a matter of procedure, in the absence of pertinent mandatory rules of the law of the seat, the arbitrators will have to deal with it as with any other procedural matter. According to the almost universally accepted principle, this means that the arbitrators must have regard to the direct or indirect will of the parties, absent which they should follow

sa décision (arrêt non publié du 17 juillet 1998, dans la cause 4P.7/1998, consid. 2a/aa et les références). En l'occurrence, le Tribunal arbitral n'a nullement méconnu ces principes. (point 5)

See also Swiss Federal Tribunal, 4P.146/2004 of 28 September 2004, ASA Bulletin 2006, p. 318; 4P.168/2006 of 19 February 2007; 27 February 2007, ASA Bulletin 2007, p 582.

⁴⁴ See Swiss Federal Tribunal, *D. d.o.o. v. Bank C.*, 27 April 2005, ASA Bulletin, 2005, p. 719 ff. Although Swiss case law considers *iura novit curia* to apply to arbitration, in that case the Federal Tribunal held that there is no prohibition against the arbitral tribunal relying entirely on the arguments advanced by the parties and asking the parties to establish the content of the applicable law. It also held that an arbitral tribunal is not under an obligation to conduct its own research on foreign law if it finds the proof submitted to it by the parties to be sufficient.

⁴⁵ *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.* [2000] EWHC 210 (Comm), § 42. The Commercial Court endorsed the following view of a leading English arbitration treatise (Mustill and Boyd at 72 (2d ed)):

First the arbitrator should recall that it is for the parties to allege that the foreign law differs from English law. If they are content to have their disputes decided according to English law, it is no part of his function to multiply trouble and expense by suggesting that the two laws differ.

and held:

The obvious good sense of this needs no elaboration. Experience has shown that in many cases, recourse to foreign law adds very considerably to the expense of an arbitration and in very many cases makes little difference; where there are genuine points of difference (as in this case in relation to the admissibility of evidence of post contractual conduct as an aid to construction), the point can generally be isolated and often be agreed. A general request to a foreign lawyer to review the entire case and opine on the principles of foreign law where the parties have not raised specific issues is a course that a prudent tribunal should not embark on without considerable hesitation (id. at § 41).

In that case the arbitral tribunal had disagreed with the submission of one of the parties that English was to be applied except if evidence was accepted by the tribunal on the Saudi governing law. It had therefore appointed its own expert with whom it then held a meeting to discuss his report without informing the parties. The Commercial Court held that the tribunal should have sought the views of the parties on the issues of Saudi law before appointing the expert and made an error in meeting with the expert without telling them. However, it did not find that this conduct amounted to an irregularity, and even less so to a serious irregularity in the sense of s. 68 of the Arbitration Act 1996.

the rules or approach of their choice⁴⁶. In practice, it is very unusual for the parties to address the issue in the arbitration agreement but an agreement may be reached during the proceedings, for instance at procedural hearings.

Like national arbitration laws, international arbitration rules are usually silent on the matter⁴⁷. The exception is Article 2.1(c) of the LCIA Rules which states:

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 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 absence of express guidance can of course be rectified by party agreement. Parties are unlikely to include in their contracts any express provision on how arbitrators are to determine the contents of applicable law. The parties could nevertheless agree at the time of the arbitration. Professor Kaufmann-Kohler suggests that arbitrators might consider proposing such an agreement to the parties, with language that says:

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.⁴⁸

While seeking party agreement along these lines seems a practical and sensible step, the Committee believes that it happens infrequently.

The result is that, save in the exceptional cases where the parties have dealt with the matter, the arbitrators will need to decide how to approach the contents of law question, without any general rules to guide them. The freedom of the arbitrators in this respect will be largely unfettered. The issue is by and large procedural and thus governed by broad discretionary powers of arbitral tribunals. Orders and awards of tribunals will not be subject to judicial review in setting aside and enforcement proceedings, save for violation of impartiality, due process, excess of mandate and public policy (see below B.). Moreover, if and to the extent that the issue is substantive (*i.e.*, the fall back when the contents of the applicable rules cannot sufficiently be ascertained or when the parties waive application of the otherwise applicable law), an error of law is not a ground to refuse to recognize or enforce under the New York Convention nor, in most modern legal systems, for setting aside. Hence an award is unlikely to be challengeable or unenforceable simply because the tribunal erred in its approach in ascertaining the contents of the law deemed applicable by it.

⁴⁶ See footnote 38 above.

⁴⁷ Like national arbitration laws (see footnotes 37 and 38 above), arbitration rules for the most part only contain very general provisions on rules applicable to the substance of the dispute (e.g. UNCITRAL Arbitration Rules, Article 33, ICC Rules, Article 17, LCIA Rules, Article 16(3)) and rules governing the procedure (e.g. UNCITRAL Arbitration Rules, Article 15, ICC Rules, Article 15, LCIA Rules, Article 14).

⁴⁸ G. Kaufmann-Kohler, *The Governing Law*, supra note 9, 84.

B. Determination of Applicable Law by Arbitral Tribunals in Practice

Given that arbitrators have broad discretion to address legal matters unconstrained by specific rules, it is not surprising that arbitral practice has varied widely, with many factors influencing how tribunals determine applicable law. The Committee has not been able to discern any uniform practice, and the opinions of scholars and practitioners vary considerably, as evidenced by the discussions within the Committee.

The Committee's research efforts have located scant reported international arbitration case law on this issue. In ICC case No. 5418, the tribunal took a pragmatic approach and combined expert evidence with own research without feeling bound to order a tribunal-appointed expert⁴⁹. In an unreported award dated February 8, 1994 in ICC case No. 7071, the Tribunal stated as follows:

However, the Tribunal does not accept that it was not entitled to refer in its Award of 23 July 1993 to literature not drawn to its attention by the parties and in respect of which no submissions had been made by the parties. The Tribunal is, of course, conscious of its obligations to conduct the proceedings in accordance with the rules of natural justice and due process. But issues 1 and 2 were the subject of lengthy and detailed evidence, submissions and argument. In these circumstances, there was no obligation upon the Tribunal to afford the parties the opportunity of making further submissions merely because the Tribunal intended to refer in its Award to some literature not referred to by the parties themselves.

Given the dearth of discussion about this topic in publicly available commercial cases, the Committee also reviewed awards from investment arbitrations. These awards are more likely to be public than are commercial arbitration awards, and many of the arbitrators who sit in those cases also sit as commercial arbitrators. Those investment awards illustrate a range of practices for determining the substance of applicable law. For instance, in a recent investment award the sole arbitrator (a civilian lawyer) held:

In respect of international arbitration taking place in Sweden, it is sometimes suggested that the principle iura novit curia applies, but the parties should be notified of new legal sources introduced by the arbitrator, so that they have the possibility to comment on them.

The sole arbitrator went on to add that:

As long as the Arbitral Tribunal limits its evaluation to the facts as presented by the parties, it remains free, within the borders of the applicable law (particularly, as long as it remains within the frame of the legal sources mentioned in the proceeding), to give the legal qualifications and determine the legal consequences that it deems appropriate, even if they were not pleaded by the parties.⁵⁰

In *Klockner v Cameroon*⁵¹, the *ad hoc* committee stated that the real question was “whether, by formulating its own theory and argument, the Tribunal goes beyond the ‘legal framework’ established by the Claimant and the Respondent” and suggested that a tribunal could not render its decision “on the basis of tort while the pleas of the parties were based on contract”, but that “within the dispute’s ‘legal framework’, the arbitrators must be free to rely on arguments which strike them as the best ones, even if

⁴⁹ XIII Yb Com Arb 102 (1988). See also ICC Case No 9029, 10 ICC Bulletin No. 2, 88.

⁵⁰ *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005 <documents/Bogdanov-Moldova-22September2005.pdf>. § 2.2.1.

⁵¹ Decision on annulment, 3 May 1985, 2 ICSID Reports 95 at para. 91, J. de droit international, 1987, 163, note E. Gaillard.

those arguments were not developed by the parties (although they could have been).” In the end, the *ad hoc* committee annulled the award for failure to apply the host country’s law and proceeding on the presumption of its identity with French law.

In *CAA and Vivendi Universal v Argentina*⁵², the *ad hoc* committee went slightly further and said that:

It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment. From the record, it is evidence that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal’s analysis of issues was clearly based on the materials presented by the parties and was in no sense ultra petita. For these reasons, the Committee found no departure at all from any fundamental rule of procedure, let alone serious departure.

Other tribunals have been perhaps one step removed from a *iura novit curia* approach, allowing that tribunals may, but are not obligated to, seek out the law. In the recent ICSID case, *Mitchell v. Congo*, an *ad hoc* committee was confronted with the question of whether the arbitral tribunal had manifestly exceeded its powers by failing to examine, on its own motion, a particular provision of the pertinent bilateral investment treaty. The *ad hoc* committee stated:

It is entirely conceivable that, in view of the specific circumstances [..] the Arbitral Tribunal would have been welcome to address ex proprio motu the other provisions of the Treaty, which might potentially excuse taking such measures against the Claimant. A comparable approach would have been along the lines of the adage jura novit curia [...] but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it.” (emphasis added).⁵³

The Committee also notes that arbitrators may in practice also be influenced by a variety of other considerations depending on the specifics of the individual case, some of which may be more pragmatic than principled. For instance, they may be tempted to adopt a more interventionist approach if, based on their knowledge or experience, the solution resulting from the rules invoked or proved by the parties appears manifestly wrong. They may be induced to follow the same approach where there is an imbalance between the parties regarding the knowledge of the applicable law (e.g., because one of them is much better versed in the applicable law or can afford more competent counsel or legal experts), in default proceedings or when dealing with an *ex parte* application for interim measures. Similarly, if it is evident that the arbitrators (or some of them) have been appointed particularly in consideration of their knowledge of the applicable law, and counsel for the parties are not equally well versed in it, the arbitrators may feel that a more pro-active attitude towards the determination of the contents of the applicable law may be justified. The Committee does not criticize such practices, but also does not consider that they are susceptible of incorporation into recommendations.

⁵² Annulment Decision, 3 July 2002, 6 ICSID Reports 340 at paras 84-5.

⁵³ *Ibid.*, para. 57, footnotes omitted, emphasis added. See also: Bayerisches Oberlandesgericht, December 15, 1999, XXVI YB COM ARB 330 (2001).

V. Conclusions and Recommendations

The Committee's research and discussions indicate that the question of how arbitrators should ascertain the contents of applicable law is one which often arises in practice, yet is rarely discussed expressly in awards and is not subject to any meaningful prescriptive laws or rules.

The Committee nevertheless does not believe that arbitrators and parties need be entirely without guidance. Instead, the Committee considers that certain general principles intrinsic to international commercial arbitration are relevant to how arbitrators should ascertain the contents of law, and that these principles and their implications may be translated into specific recommendations for parties and arbitrators.

A. General Principles

Although there are no specific laws or rules that provide meaningful instruction on how arbitrators should determine the contents of law, the Committee considers that certain general principles intrinsic to arbitration bear on the issue and provide at least outer parameters for the exercise of an arbitrator's discretion.

First, the principal task of arbitrators in a commercial case is to decide the dispute within the mandate defined by the arbitration clause. Arbitration is a creature of contract. The parties can agree to its scope. That agreement is binding on the arbitrators. This principle has at least two implications for the present analysis.

One implication is that, in a dispute that is to be decided in accordance with law, arbitrators should identify, ascertain the contents of and apply the applicable law. This is one of an arbitral tribunal's duties in fulfilling its mandate, and is the basis for Recommendation 1 in the Recommendation Section of this Report. If the contents of the applicable laws cannot sufficiently be ascertained, then arbitrators may be justified in applying another law or other rules of law they consider appropriate on a reasoned basis.

Another implication is that arbitrators must take care not to stray beyond their mandate. Rendering an award beyond the submission to arbitration is one of the limited bases on which an award can be annulled⁵⁴ or can be denied recognition and enforcement under the New York Convention.⁵⁵ Arbitrators who decide a dispute on a legal rule not invoked by the parties could in some cases be accused of exceeding their mandate, even if such an approach would have been entirely acceptable in a court exercising a *iura novit curia* approach. Although many modern arbitration laws and the New York Convention give arbitrators a wide mandate that makes excess of mandate and related challenges likely to fail,⁵⁶ the principle that arbitrators act within a party conferred mandate remains relevant as this is a feature

⁵⁴ See, e.g., UNCITRAL Model Law, Article 34 (2)(iii) and (iv) Arbitration Act 1996 § 68(2)(b) and (c) (court can annul award for "serious irregularity," which includes "tribunal exceeding its powers" and tribunal failure "to conduct proceedings in accordance with the procedure agreed by the parties").

⁵⁵ N.Y. Convention Art. V(1)(c) (recognition and enforcement of award may be refused where award "contains decisions on matters beyond the scope of the submission to arbitration").

⁵⁶ See, e.g., Swiss Federal Tribunal, *N.V. Belgian CMB v. N.V. Distrigas*, 19 December 2001, ASA Bulletin, 2002, p. 493 ff.

Le juge ne viole pas non plus le principe 'ne ultra petita partium' s'il donne à une demande une autre qualification juridique que celle qui a été présentée par le demandeur. Le principe 'iura novit curia', qui est applicable à la procédure arbitrale, impose en effet aux arbitres d'appliquer le droit d'office, sans se limiter aux motifs avancés par les parties. Il leur est donc loisible de retenir des moyens qui n'ont pas été invoqués, car on n'est pas en présence d'une nouvelle demande ou d'une demande différente, mais seulement d'une nouvelle qualification des faits de la cause (ATF 120 II 172 consid. 3a p. 175 et les références). Le tribunal arbitral est toutefois lié par l'objet et le montant des conclusions qui lui sont soumises, en particulier lorsque l'intéressé qualifie ou limite ses prétentions dans les conclusions elles-mêmes. (Point 3a of the judgment, emphasis added).

See also *Laminoirs Inc. v Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980) (confirming an ICC award where the tribunal had on its own initiative applied French pre-judgment interest rates as determined by arbitrators'

distinguishing arbitration from litigation. Arbitrators sitting in jurisdictions with a wider review than strictly *ultra petitem* may thus be advised to take this into account.

Second, arbitrators must conduct the proceedings consistent with due process.

Due process is an elastic and imprecise term, with no fixed meaning. It is nevertheless fair to state that arbitration laws and rules customarily obligate arbitrators to conduct proceedings with respect for bedrock rules of procedural fairness. Among these widely accepted procedural aspects of arbitration is the right of parties to have an opportunity to be heard on important matters in dispute. For example, the LCIA rules state that one of a tribunal's "general duties" is "to act fairly and impartially between all parties giving each a reasonable opportunity of putting its case and dealing with that of its opponent."⁵⁷

This principle implies that parties should have a reasonable opportunity to address important legal points. This principle could be invoked if, in determining the contents of applicable law, the arbitrators "take the parties by surprise" by applying a rule or a principle that has not been invoked by the parties and which the latter could not foresee to be applied or as to the relevance of which they have not been given sufficient opportunity to express their position. For example, the position of the Swiss Federal Tribunal is that an award can be set aside if the parties have not been given the opportunity to comment on the legal arguments applied by the arbitral tribunal, at least if those legal arguments were not foreseeable⁵⁸. However, the Federal Tribunal has noted that this principle should be applied with caution⁵⁹. A similar position is taken by the French Supreme Court⁶⁰.

Recommendations 2 to 4 and 10 derive from due process considerations.

Third, arbitrators should approach a dispute with an open mind.

Arbitrators must of course be free from conflicts of interest. Upon accepting an institutional appointment, arbitrators typically have to certify independence from the parties.⁶¹ It is generally accepted that an emanation of these rules is that arbitrators must not only be independent, but must appear to be so. For example, the ICC Rules require arbitrators to be independent and to disclose in writing any facts or circumstances "which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties," and the IBA Guidelines on Conflicts of Interest in International Arbitration likewise require arbitrators to be impartial and independent and to decline an appointment if there are "justifiable doubts" about their impartiality or independence.

Approaching the dispute with an open mind implies that arbitrators must be prepared to consider legal positions advanced by the parties regarding the contents of applicable law, even if the applicable law is generally well known to the arbitrators. Moreover, arbitrators should take care to avoid the appearance of being a partisan of one side in the dispute. While arbitrators need not – indeed, should not – check their knowledge and experience at the hearing room door, they must be cautious about acting in ways that

own research, on the basis that the contract's choice of law provision and Terms of Reference ought to have alerted the losing party to possible application of French law).

⁵⁷ LCIA Arbitration Rules, Art. 14.1(i).

⁵⁸ Swiss Federal Tribunal, March 2, 2001, ASA Bulletin 2001, 531 (payment of an amount under a bank guarantee for failure to inform about formal defects of the demand instead of performance under the guarantee no surprise); Swiss Federal Tribunal, <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=80323> Case No. 4P.100/2003, 30 September 2003 (as the first case where an award was set aside because the tribunal had applied a contractual provision not invoked by a party and amounting to unforeseeability coming as a surprise to the parties).

⁵⁹ See 4P.4/2007 of 26 September 2007, 26 ASA Bulletin 152:

il convient d'avoir égard aux particularités de ce type de procédure en évitant que l'argument de la surprise ne soit utilisé en vue d'obtenir un examen matériel de la sentence par l'autorité de recours (arrêt 4A_42/2007 du 13 juillet 2007, consid. 7.1; arrêt 4P.114/2001 du 19 décembre 2001, consid. 5a).

⁶⁰ Cour de Cassation, March 14, 2006, Rev. arb, 2006, p. 653.

⁶¹ See, e.g., ICC Rules of Arbitration, Art. 7.

reasonable litigants could perceive as evincing allegiance or favoritism to one party⁶². Such considerations animate Recommendations 4 and 10.

Fourth, public policy considerations may legitimately influence the approach of arbitrators to determining the contents of applicable law.

Although commercial arbitration is a means of privately resolving disputes, it operates within a public legal system defined by international conventions and national laws. These conventions and laws acknowledge that public policy constrains contractual and arbitral freedom, and may impose limitations or restrictions that the parties cannot agree to disregard⁶³. For example, parties cannot by agreement between themselves legitimately seek through international arbitration to enforce contracts to pay bribes, to commit criminal acts, or to engage in prohibited cartel or similar anti-competitive business practices.

Mandatory laws expressing public policy norms may warrant special consideration by arbitrators. When such laws may be implicated in a dispute, arbitrators should with respect to such issues generally have more freedom to probe, to set the agenda, and to drive the development of the legal analysis than is typically the case when no such issues are present. Arbitrators should seek to understand and apply such mandatory laws not because they have, like a court, some public duty to participate in enforcing those laws, but primarily because doing so may be necessary to rendering a valid and enforceable award. Consequently, application of mandatory rules in arbitration will be inspired by considerations related to the efficiency of the arbitral process to ensure a valid and enforceable award and, thus, be indirectly influenced by the grounds for setting aside at the seat and the grounds for refusal of recognition and enforcement at the likely place(s) of enforcement.

In applying these principles, a distinction should be made between the different categories of mandatory rules. In each system of law some rules are “mandatory” when that law is applicable, but not when a different law is applicable by virtue of a conflict rule (*ordre public interne* in the classic French terminology). They include, for example, rules on form, nullity and limitations. These rules may not be mandatory in arbitration because parties may opt out of them by stipulating the applicability of a different law. Such rules typically present fewer risks for arbitrators and may be treated like any other legal issue. Mandatory rules that parties cannot contract away (*lois d’application immédiate*) present different risks. Because of their nature, an arbitral tribunal determining a dispute that implicates such rules should be prepared to go further and initiate inquiries about the potentially applicable mandatory law, even if the parties have not done so. Recommendation 13 attempts to accommodate the special circumstances that issues of mandatory law present.

Other special circumstances regarding the ascertainment of the contents of law may also from time to time arise in arbitration. It is not possible to anticipate all of them. Among those that the Committee has discussed are situations where there is some unusual aspect to the proceedings (such as only one party appears in the case and presents legal submissions, or certain interim relief proceedings), or the rare occasions where even after diligent effort the tribunal concludes that the applicable law contains no guidance relevant to the dispute or that the applicable law cannot be determined (as may be the case where the applicable law is of a country undergoing rapid, radical and comprehensive legal transformation). The Committee believes that in certain interim relief proceedings, or where only one party appears, arbitrators may take a more active position in questioning legal submissions than it might do if the other party had appeared. While arbitrators do not step into the shoes of the absent party and become its advocate, they are nevertheless justified in taking steps necessary to ensure that they decide the dispute according to the applicable law and not only according to the untested submissions of just one party. Where the applicable

⁶² Compare Dutch Supreme Court, June 29, 2007 (LJN: AV7405, R06/005HR) upholding the setting aside of an arbitral award where the arbitrators were medical doctors in a dispute relating to a life insurance policy and, with the permission of the parties, had investigated the insured. The Supreme Court held that this mixture of expert mission and arbitral adjudication created an appearance of bias justifying the setting aside of the award. Although the case is clearly distinguishable as it relates to facts and not the contents of the applicable law, the decision is instructive as to the delicate position of arbitrators in raising issues which may be interpreted as favoring the position of one of the parties.

⁶³ *E.g.*, R. H. Kreindler, *Approaches to the Application of Transnational Public Policy by Arbitrators*, 4 *Journal of World Investment and Trade* 2, 2003, p. 239 ff.

law simply cannot be determined, the Committee believes that arbitrators may decide the dispute according to whatever rules they consider appropriate on a reasoned basis. Arbitrators cannot avoid their fundamental obligation to decide the dispute, even if the law chosen by the parties does not provide the answer. The Committee nevertheless considers that this will be a rare circumstance, for in virtually all commercial cases the applicable law provides the rules, principles or other guidance necessary to resolve the dispute, even if does not include an express statute or court decision directly on point. Recommendations 14 and 15 address these circumstances.

B. Recommendations for Arbitrators

In light of these general principles, the Committee believes a balanced approach is the most acceptable general approach to the determination of the contents of the applicable law in international commercial arbitration. Arbitrators should primarily rely on the parties to articulate legal issues and to present the law, and disputed legal issues. They should give parties appropriate directions in relation thereto and should give appropriate weight to information so obtained.⁶⁴ Arbitrators must through the proceeding develop a sufficient understanding of the applicable law that they can fulfill their mandate to decide the dispute according to law. Arbitrators who attempt to develop legal issues in a strict application of *iura novit curia* approach risk taking the arbitration from the parties and appearing partial. Yet arbitrators who completely fail to seek clarification of legal issues in a strict *laissez faire* approach risk not having sufficient guidance when they go to render an award, or risk making an award that is incorrect on the legal issue in question. Accordingly, arbitrators should inquire about the applicable law within the general parameters of the arbitration defined by the parties and, considering costs, time and relevance of issues, may conduct their own research, provided the parties are given an opportunity to be heard on material that goes meaningfully beyond the parties' submissions.

Beyond these general propositions, the Committee considers it may be helpful to set out more specific recommended practices for arbitrators on how to determine the applicable law's contents. The Committee considers that by identifying such practices fewer issues will need to be tackled by the arbitrators on a case-by-case basis. In turn, this will reduce the risks of uncertainty for parties and the risk of tribunals adopting approaches to the determination of the contents of the law that diverge unnecessarily from generally accepted norms.

These recommendations are offered for arbitrators to consider, much like the UNCITRAL Notes on Organizing Arbitration Proceedings, the IBA Guidelines on Conflicts of Interest in International Arbitration, and other similar efforts to offer suggestions regarding frequently arising topics that are not specifically addressed in rules. Failure to consider or follow these recommendations should not in itself be treated as a departure from acceptable practice or a failure to comply with an arbitrator's duty. In this spirit, the Committee recommends:

General considerations

1. At any time in the proceedings that a question requiring the application of a rule of law (including a question of jurisdiction, procedure, merits or conflicts of laws) arises, arbitrators should identify the potentially applicable laws and rules and ascertain their contents insofar as it is necessary to do so to decide the dispute.
2. In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or appearance of bias.

Acquiring information

3. When it appears to the arbitrators that the contents of applicable law might significantly affect the outcome of the case, arbitrators should promptly raise that topic with the parties and establish appropriate procedures as to how the contents of the law will be ascertained (in submissions with materials attached, through experts, witnesses or otherwise).

⁶⁴ However, arbitrators are not bound by evidence so procured (*e.g.*, expert evidence). For an example of this principle, see *Shandong Textiles Import and Export Corp. v Da Hua Non-ferrous Metals Company*, March 6, 2002 (HK Court of First Instance) available at www.hklii.org.

4. 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, given the fundamental differences between international arbitration and litigation before national courts. In particular, arbitrators should not rely on unexpressed presumptions as to the contents of the applicable law, including any presumption that it is the same as the law best known to the tribunal or to any of its members, or even that is the same as the law of the seat of the arbitration.

Interaction with parties

5. Arbitrators should primarily receive information about the contents of the applicable law from the parties.
6. In general, and subject to Recommendation 13, 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 contents of applicable law. Subject to Recommendation 8, 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.

Making use of information about law’s content

9. In ascertaining the contents of a potentially applicable law or rule, arbitrators may consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties’ advocates, opinions and cross-examination of experts, scholarly writings and the like.
10. If arbitrators intend to rely on sources not invoked by the parties, they should bring those sources to the attention of the parties and invite their comments, at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case. Arbitrators may rely on such additional sources without further notice to the parties if those sources merely corroborate or reinforce other sources already addressed by the parties.
11. If in the course of deliberations arbitrators consider that further information about the contents of applicable law is necessary to the disposition of the case, they should consider reopening the proceedings to enable the parties to make further submissions on the open legal issues, but only to the extent necessary to address the open legal issues and taking into account considerations of relevance, time and cost.
12. In applying the rules of the applicable law, arbitrators should give due regard to available information about the application of the rules in the jurisdiction from which the rules emanate.

Special circumstances

13. In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award.
14. In applying the foregoing Recommendations, arbitrators may take account of the nature of the proceedings, in particular regarding default and expedited interim relief proceedings, and may take a more active role than might otherwise be the case in questioning legal submissions.

15. If after diligent effort consistent with these Recommendations the contents of the applicable law cannot be ascertained, arbitrators may apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard.

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