IS THE ARBITRAL TRIBUNAL BOUND BY THE PARTIES’ FACTUAL AND LEGAL PLEADINGS?

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Introduction

As known, the scope of the arbitral tribunal’s authority is determined by the parties. The primary source establishing the arbitral jurisdiction and the scope of the dispute is the arbitration agreement. In their statements of claim or of defence and their request for relief, the parties introduce the facts that are in dispute, the evidence that shall prove them, the legal sources and the legal arguments that shall be basis for the award. The parties’ pleadings determine, therefore, the borders of the dispute upon which the tribunal is called on to decide. The arbitral tribunal is supposed not to exceed these limits.

In certain situations, however, an arbitral tribunal may be forced to render the award without having received sufficient instructions or arguments by one or even all of the parties. If one of the parties does not participate in the proceeding, it deprives the process of the contribution of its factual and legal arguments. Even if both parties participate in the proceeding, the arguments presented by one or both of them may be not convincing or not sufficiently developed. In these cases of insufficient instructions or pleadings by the parties, how shall the tribunal decide?

Shall it assume the role of an umpire that passively listens to the presented arguments and decides which of the opposed arguments deserves to win? Shall this umpire role be taken to its utter consequences, so that, in case of failure by one party to participate in the proceedings, the other party automatically wins, even if its arguments are not convincing?

Or shall the arbitral tribunal take an active role, investigate the relevance and correctness of the produced evidence and develop arguments that were not presented by the parties? Shall this active role go so far as to deciding

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on the basis of legal sources that were not at all pleaded by the parties, shall it permit to grant relief that the parties have not requested?

We will analyse these questions below. Two levels of regulation are relevant in this context: rules on the conduct of the arbitral tribunal and rules on the validity and enforceability of the award. As we will see, the tribunal is bound in respect of the factual scope of the dispute but enjoys considerable freedom in respect of the inferences that it draws from the evidence and in respect of the legal consequences of the proven facts.

1. The Procedural Rules

The arbitral tribunal must comply with the procedural role determined by the applicable regulation. This consists mainly of: (i) the arbitration agreement, (ii) the rules of the relevant arbitral institution in case of institutional arbitration, or the arbitration rules chosen by the parties (if any) in case of ad hoc arbitration, and (iii) the rules in the applicable arbitration law in case of commercial arbitration or in the relevant convention in case of treaty based arbitration, such as investment arbitration. All of these may determine the tribunal’s role and will be examined below.

1.1 Arbitration Agreements

Arbitration agreements sometimes specify that the arbitral tribunal shall be empowered only to decide on a certain relief, for example reimbursement of damages, and not on others, for example termination of the contract. In such cases, some of the questions put in this article are readily answered: the tribunal would clearly exceed its power, if it ordered a relief that the parties have excluded in the arbitration agreement.

The question of the authority of the arbitral tribunal, however, has to be distinguished from the question of the proper interpretation by the tribunal of the contract between the parties, as well as from the question of the proper application of the law. In a contract regulating that the defaulting party shall be liable for indemnifying only direct losses and not also consequential damages, the exclusion of consequential damages is regulated as an obligation between the parties, and it is not a restriction of the tribunal’s jurisdiction (unless this restriction is reflected in the arbitration clause). If the arbitral tribunal determines that the defaulting party has to reimburse consequential damages, it may have based its decision on a wrong interpretation of the contract or on a wrong application of the law’s definition of direct and consequential losses. However, this will not mean that the tribunal has exceeded its authority.\(^1\) The award, therefore, is wrong in

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\(^1\) For similar observations see, in respect of Swedish law, HEUMAN, I., *Arbitration Law of Sweden: Practice and Procedure*, Stockholm 2003, pp. 610ff. and 737, and in respect of English
the merits, but is not rendered without jurisdiction. In terms of consequences for the effectiveness of the award, this means that the award is valid and enforceable.\(^2\) If, however, the exclusion of consequential losses had been regulated as a limit to the arbitral tribunal’s authority, the award would be invalid and unenforceable.\(^3\) Generally, arbitration agreements do not contain limitations to the tribunal’s authority,\(^4\) and they remain silent on the question of the arbitral tribunal’s power beyond the pleadings of the parties. Arbitration agreements, however, often contain instructions in respect of the applicable law. These instructions may be considered as a delimitation of the tribunal’s authority. Also here, excess of authority has to be distinguished from error in the interpretation of the contract (its choice of law clause) and error in the application of the law (the applicable choice of law rules, which rules may be applied to restrict or override the choice of law made by the parties). In the latter cases the courts will not have the jurisdiction to control the award, and the error will not have any consequences on the effectiveness of the award.\(^5\)

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\(^2\) The judicial control on the award does not extend to review of the merits; more extensively see below, section 2.

\(^3\) On the consequence of the excess of power see below, section 2.

\(^4\) As an illustration, no limitations to the arbitral tribunal’s authority are mentioned in the model *arbitration clauses* recommended by, for example, the Arbitration Institute of the Stockholm Chamber of Commerce ("Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."). The International Chamber of Commerce ("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.") or the London Court of International Arbitration ("Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."). These standard clauses are sometimes accompanied by a recommendation to regulate specifically the number of arbitrators, the venue of the tribunal, the language of the proceeding; no mention is made to regulating the scope of authority of the tribunal. Often these standard clauses are applied as a model to arbitration clauses that are individually drafted; the number of clauses that contain specific limits to the tribunal’s authority, therefore, is rather low. The ICC Rules assume that the parties shall, at the beginning of the dispute, agree on Terms of References, specifying the questions that are submitted to the tribunal. These are often drafted as a positive list of questions to be solved, rather than as a list of items that are excluded from the scope of the dispute.

\(^5\) For a more extensive discussion of the question see MOSS, G.C., "May an arbitral tribunal disregard the choice of law made by the parties?", in *Stockholm International Arbitration Review*, 2005:1, pp. 1 ff. For a criticism of a recent decision by the Swedish Court of Appeal confirming this approach in the context of investment arbitration see below, section 1.3 (a).
1.2 Arbitration Rules

Arbitration rules are issued by arbitration institutions (such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA)), they are chosen by the parties to be used in ad hoc arbitration (such as the UNCITRAL Arbitration Rules of 1976), or they are issued in connection with treaty based arbitration (such as the ICSID Rules). Generally, the extent to which the arbitral tribunal is bound by the parties’ pleadings and legal arguments is not specifically regulated in arbitration rules. There are, however, several rules that could be deemed relevant to the subject-matter:

(a) *Party’s default.* Many arbitration rules provide that the arbitral proceeding may be initiated and may continue in spite of the failure by one party to participating:6 once the arbitral jurisdiction is established,7 a party may not, by failing to contribute to it, prevent an arbitral proceeding and the award from being rendered.

This rule clarifies that it is not necessary to receive the pleadings from all parties to the dispute in order to proceed with the arbitration. However, it does not clarify what role the tribunal shall have in respect of the pleadings: shall the arbitral tribunal accept all the evidence produced and arguments and requests made by the participating party, or shall it evaluate them critically and independently?

(b) *Adverse inferences.* Some rules specify that failure by one party to appear shall not be seen as an admission of the other party’s assertions.8 Most arbitration rules, however, are silent on the

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6 SCC Rules article 28, ICC Rules articles 6(3), 18(7) and 21(1), LCIA Rules article 15(8), UNCITRAL Rules article 28(1), ICSID Rules article 42.

7 In a commercial dispute the jurisdiction is established by the arbitral agreement, see the 1958 New York Convention on Recognition and Enforcement of Foreign Arbirtral Awards, article II. In investment arbitration the arbitral agreement is, generally, based on the applicable bilateral or multilateral investment treaty, which is deemed to contain an offer to arbitrate by the host state, that is deemed accepted by the foreign investor by initiating the arbitration (see, for example, article 26(5) of the Energy Charter Treaty. More generally, see *Pawelec, J.*, *Arbitration Without Privity*, in 10 ICSID Review—Foreign Investment Law Journal 232 (1995)).

8 See the ICSID Arbitration Rules, article 42(3). This principle does not apply only to investment arbitration; the same principle may be found in modern codifications of commercial arbitration law, such as German law (Code of Civil Procedure, ZPO § 1048(2), see for example, MARTINEK, M., "Die Mitwirkungsverweigerung des Schiedsbevollmächtigten", in LÜKE, G., MIKAMI, T., PRÜTTING, H., *Festschrift für Mano Uehikawa zum 70. Geburtstag*, Berlin 2001, pp. 269ff, X) and Swedish law, see HEUMAN, L., *op.cit.*, pp. 396f. and 405. See also RUBINS, N., "Observation" in connection with Swembalt v. Republic of Latvia, in *Stockholm Arbitration Report 2004*2, pp. 123ff.
matter. This does not usually prevent the tribunal from drawing inferences adverse to the defaulting party, if this is deemed appropriate under the circumstances.

This does not finally clarify the role of the tribunal in respect of the pleadings: that the tribunal may not consider a failure to appear as an admission does not prevent it from accepting the pleadings as they were presented if it is convinced of their soundness. Conversely, that the tribunal may draw adverse inferences does not mean that the tribunal has to accept the presented pleadings if it is convinced that they are not sufficiently founded.

Both rules, therefore, seem to assume that the tribunal is free to independently evaluate the pleadings of the participating party. The former rule assumes a duty to independently evaluate, whereas the latter only assumes the power to proceed to an independent evaluation. That a tribunal shall not make use of this power, however, and shall blindly accept the pleadings of the participating party, does not seem to comply with the expectations of justice connected with the institute of arbitration.

The ALI/Unidroit Principles of Transnational Civil Procedure, a text issued in 2004 by the American Law Institute and the International Institute for the Unification of Private Law and aiming at providing a standard set of principles for transnational disputes as basis for future initiatives in reforming civil procedure, and aspiring at being applicable also to arbitration, contain some guidelines in respect of the eventuality that a default judgement is to be rendered. These principles are not binding rules, but they may be considered to reflect a certain international consensus on the main aspects of some procedural questions. Article 15.3 requests the

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9 For example the ICC Rules. However, a highly authoritative commentary on article 21(2) of the ICC Rules considers it to be a widely accepted principle that failure by one party to appear does not mean admission of the arguments made by the other party (DERAINS, Y., SCHWARTZ, E., A Guide to the New ICC Rules of Arbitration, 1998, p. 266).

10 See the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration of 1999, affirming in articles 9(4) and 9(5) that the tribunal may draw inferences adverse to the defaulting party in case of failure to produce a piece of evidence that was requested by the other party and ordered by the tribunal. See also the commentary on the ICB Rules by DERAINS, SCHWARZ, op. cit., article 20(5), footnote 593 and section 21(2), p. 266; negative inferences are possible, but the tribunal should be cautious in drawing them. Also in the systems expressly excluding that failure to appear is an admission, the tribunal may evaluate the attitude of the parties and draw adverse inferences, if it deems appropriate under the circumstances, see, for Swedish law, HEUMAN, op. cit., pp. 397, 405. See also RUBINS, op. cit., p. 124ff.

court that is rendering a default judgement to determine on its own initiative the following aspects: its jurisdiction, compliance with notice provisions, that the claim is reasonably supported by available facts and evidence and is legally sufficient. In connection with the latter duty of the court, it is specified that the court is not expected to carry out a full inquiry, but it has to critically analyse the evidence supporting the statement of claims. This does not prevent the tribunal from drawing adverse inferences from a party’s failure to advance the proceeding or respond as required, in accordance with article 17.3.12.

From the foregoing it seems possible to conclude that an arbitral tribunal is not bound to automatically accept any pleading made by one party in case of failure by the other party to contest it. The question that remains open is how far the tribunal can go in its independent evaluation of a party’s pleadings.

(c) *Additional information.* Many arbitration rules permit the tribunal to request that the parties present additional documentation and clarifications, to take the initiative to appoint an expert, to proceed to inspections, etc.13

This possibility to request additional clarifications is consistent with the tribunal’s independent evaluation of the participating party’s pleadings as described in item (b) above. However, the access to requesting additional clarifications is not limited to the situations where one party fails to appear and the tribunal needs further information to evaluate the other party’s pleadings. This access applies in general, even if both parties participate in the proceedings and have presented their respective cases in full.

The possibility to request additional information, therefore, may be used by the tribunal to introduce new elements that were not at all or not sufficiently pleaded by the parties. It is, however, not clear how far the tribunal may go in introducing new elements: may the tribunal ask for additional documentation and clarification in order to better convince itself of the correctness or relevance of the statements made by the parties, or also to investigate facts that were not mentioned by the parties, to apply sources that the parties had not invoked, to order remedies that the parties have not requested?

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12 See the Comment P.17B, in *Uniform Law Review*, 2004-4, p. 792
13 For example the Arbitration Rules of the SCC articles 21(3) and 27(1), ICC Rules article 20, LCIA Rules 21(1), 22(1)(c) and 22(1)(d), UNCITRAL Rules articles 15(2), 24(3) and 27(4), ICSID Rules articles 34(2) and 42(4). The same is true for the All/UNIDROIT Principles, see the comment P.15D on article 15.3.3, in *Uniform Law Review*, cit., pp. 785f
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(d) *Burden of proof.* Some rules state expressly the principle of burden of proof, a principle generally valid in most procedural systems: each party shall have the burden of proving the facts that it relies on.\(^{14}\)

This principle may appear to contradict the two rules mentioned under items (b) and (c) above: if the party having the burden of proof does not present sufficient evidence (because it fails to appear or otherwise), the facts that it invokes may not be considered proven. The tribunal shall not take over and discharge that party’s burden. This, however, does not necessarily mean that the pleadings made by the other party are sufficiently proven or substantiated: the party failing to provide sufficient evidence for its case will lose only if the other party has presented pleadings that are sufficiently substantiated. Otherwise, the arbitral tribunal has the possibility to investigate the matter on its own initiative. However, it is not completely clear how far a tribunal can go in its own investigation, before it takes over the burden of proof of the defaulting party, thus violating the corresponding principle. That the tribunal shall not on its own motion procure evidence, without involving the parties, seems to be understood;\(^{15}\) but how far may the tribunal go in requesting additional evidence in accordance with item (c) above?

(e) *Impartiality.* Many arbitration rules specify that the arbitral tribunal shall act impartially.\(^{16}\) This is a fundamental principle of due process that must be deemed to apply even if the arbitration rules do not express it.\(^{17}\)

It could be questioned whether the tribunal acts impartially when it, on its own initiative, verifies the soundness of one party’s pleadings or requests additional information as described in items (b) and (c) above. It could be argued that the tribunal, by so doing, acts on behalf of the party that did not appear or that failed to properly contest the pleadings, and that it therefore is in breach of (the rule on burden of proof, and) its duty to act impartially. However, it seems legitimate to affirm that the tribunal, by acting *ex officio* as described, does not act on behalf of the defaulting party, and rather acts in order to achieve a logical and objective result. It is, however, not completely clear to what extent the tribunal may stretch its role as investigator, before it in effect takes over the role of the defaulting party and violates the principle of impartiality.

\(^{14}\) UNCITRAL Rules article 24(1).

\(^{15}\) See for example HEUMAN, *op.cit.*, p. 397.


\(^{17}\) The principle is to be found in arbitration laws (see for example the UNCITRAL Model law article 18 and the Swedish Arbitration Act articles 8 and 21).
(i) *Fair hearing.* Many arbitration rules provide that the arbitral tribunal shall grant a fair hearing to all parties;\(^{18}\) this assumes that all parties shall have been given equal and real opportunities to present their respective cases and to respond to the arguments made by the other party. Also, this principle is a fundamental part of the due process.\(^{19}\)

If the tribunal’s own evaluation has deprived one or more parties of the possibility to respond on certain matters, so that the tribunal decides on the basis of elements on which the parties had not possibility to present their views, the adversary principle may be deemed violated. Does the parties’ right to be heard relate only to the facts that substantiate the various claims, or does it also extend to the interpretation of these facts and the factual inferences therefrom made by the tribunal?\(^{20}\) Does the right to be heard extend also to the points of law and to the tribunal’s assessment of the legal consequences of the facts in dispute? In certain systems it is uncontroversial that the tribunal enjoys the freedom to assess and apply the law on its own initiative.\(^{21}\) To what extent this *iuva nostis curias* approach may collide with the adversary principle is not clarified in the arbitration rules.

### 1.3 Arbitration Law

Arbitration law is quite heterogeneous, since it extends from the uniform regulation contained in international conventions (of which the most notable is, for commercial arbitration, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, for investment arbitration, the 1966 Washington Convention on the Settlement of Investment Disputes between States and National of other States (ICSID)), via the harmonising, but not binding 1985 UNCTRAL Model Law on International Commercial Arbitration to the arbitration law prevailing in each country.

Arbitration law does not, as a general rule, contain specific regulation of the procedure to be followed in an arbitral proceeding, beyond principles corresponding to those mentioned above in section 1.2.

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\(^{18}\) SCC Rules article 20(3), ICC Rules article 15(2) and 20(4), LCIA Rules 18(1)(a), UNCTRAL Rules 15(1) and 27(3).

\(^{19}\) See the UNCTRAL Model Law article 34(3)(a)(i) and the Swedish Arbitration Act article 24. The principle is expressly referred to also in the New York Convention article V(1)(b).

\(^{20}\) Case law in common law distinguishes between the fact-finding process, where the parties have a right to be heard, and the drawing of inferences from the evidence, where there is no need for the tribunal to get back to the parties and present its inferences, even if they were not anticipated during the proceeding: MEIRKIN, *op. cit.*, pp. 592f.

\(^{21}\) More extensively on this below, sections 3.3 and 3.4.
Two rules are often encountered, however, that might have a relevance to the subject-matter of this article: the rule preventing the tribunal from deciding the merits as an amiable compositeur unless it has been empowered by the parties to do so, and the rule on arbitrability of a dispute. These represent limits to the tribunal’s discretion in evaluating the pleadings by the parties.

Violation of the former rule may render the award invalid and unenforceable under, respectively, articles 34(2)(a)(iv) of the UNCITRAL Model Law and article V(1)(d) of the New York Convention, combined with a corresponding provision in the arbitration law of the country of origin of the award. Violation of the rule on arbitrability renders the award invalid and unenforceable under, respectively, article 34(2)(b)(i) of the UNCITRAL Model Law and article V(2)(a) of the New York Convention, combined with a corresponding provision in the arbitration law of the enforcement court. Also section 33(1) of the Swedish Arbitration Act contains a similar rule.

(a) Particularly on Investment Arbitration

Investment arbitration concerns disputes between a foreign investor and the host state, and is carried out in the framework of a Bilateral Investment Treaty between the host state and the investor’s state or of a multilateral treaty such as the NAFTA or the Energy Charter Treaty. Awards rendered in investment disputes are subject to the control regime determined by the relevant treaty; this may consist in a special control mechanism. To the extent that investment treaties also open the possibility for investment arbitration under rules of commercial arbitration, such as the SCC Rules, an award rendered under these rules will be subject to judicial control under the relevant arbitration law in the same way as an award rendered in commercial arbitration. Therefore, it is useful here to verify whether the law establishing investment arbitration (i.e. the relevant multilateral or bilateral investment treaty) contains any rules that may be relevant to our topic.

The treaty establishing arbitration may limit the jurisdiction of the tribunal. Thus, arbitral jurisdiction may be limited to claims relating to violations of the treaty or it may extend also to claims relating to a breach of contract. Also, the treaty establishing arbitration may contain

22 Because it would be a violation of the rule contained in applicable arbitration law and determining the powers of the tribunal. A rule limiting the tribunal’s power to decide ex novo et aux spo unless empowered to do so by the parties is generally present in arbitration laws (see the UNCITRAL Model Law article 28(3)), but not without exception: the Swedish Arbitration Act, for example, does not contain it.
23 In particular, the ad hoc Committee regulated by the ICSID Convention article 52.
24 More in general on the distinction between contract claims and treaty claims see SCHREUER, C., “Investment Treaty Arbitration and Jurisdiction over Contract Claims –
instructions in respect of the law to be applied by the tribunal to the merits of the dispute.25

In case of violation of such treaty provisions, it is not appropriate to apply the general principle that an award may not be reviewed for error in law or for error in the interpretation of the contract. This is because the error in question would be made in connection not with the decision on the merits (which is beyond the scope of control that a court may exercise on an award), but with the establishment of the tribunal's jurisdiction or of its duties in the conduct of the proceedings, as determined by the applicable arbitration law or investment treaty (which is within the scope of the judicial control). The reasoning is the same as for the rules on arbitrability and on the power to render an award *ex bono et æquo* mentioned immediately above.

A criticism to a recent decision by the Svea Court of Appeal in Sweden26 illustrates this point. The decision was rendered in connection with the challenge to a SCC award issued in an investment arbitration based on the Bilateral Investment Treaty between the Netherlands and the Czech Republic. One of the questions that the Court was called on to decide was whether the arbitral tribunal had disregarded the rule on the governing law contained in the BIT. The Court relied on the principle that error in the interpretation or application of the law cannot be judicially reviewed, and limited itself to prima facie verifying whether the tribunal seemed to have applied a law at all. The Court seemed to consider any more detailed examination of the matter to be beyond the scope of its own jurisdiction. This approach does not seem to be fully justified, and particularly not in the context of investment arbitration. Even if the award had been rendered in a commercial dispute, the Court would have had the jurisdiction to verify whether the law applied by the tribunal had been selected as a consequence of the tribunal's error in interpreting the contract or in applying rules of private international law (in which cases the Court would not have had jurisdiction to set aside the award), or if it was the result of the tribunal bluntly disregarding the choice of law made by the parties (in which case the Court would have had the jurisdiction to set aside the award for excess of power).27 In the case of investment arbitration, however, the matter is even clearer: the applicable law is determined in the Treaty that constitutes the very basis of the tribunal's jurisdiction. A violation of such a rule would

the Vivendi I Case Considered", in WEILER, T. (ed), Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, 2005, p. 299.


27 See MOSS, *op.cit.*, pp. 6ff.
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not be an error in interpreting the law, it would be a procedural irregularity, and quite a serious one, considering how important reasons of public policy lie behind a state's acceptance to regulate in a treaty its own submission to arbitration. According to article 34 (6) of the Swedish Arbitration Act, a procedural irregularity can be sanctioned with invalidity of the award if it has probably influenced the outcome of the case. In order to verify whether article 34(6) of the Swedish Arbitration Act was applicable, the Court should have examined more accurately whether the tribunal's application of the law was in accordance with the rule on choice of law contained in the BIT.28

2. The Ultimate Borders: Excess of Power, the Adversary Principle, Procedural Irregularity

While the arbitral procedure is not very specifically regulated by arbitration law, the validity and enforceability of arbitral awards are. Some of the principles that we have seen in section 1.2 above are so fundamental to arbitration, that arbitration law sanctions their violation. The sanctions will be the annulment of the award by the courts in the country of origin of the award (regulated by the respective state arbitration act)29 in the case of investment arbitration, the annulment is regulated by the relevant investment treaty),30 and the possibility to refuse recognition or enforcement


29 National arbitration laws are not harmonised, and it is therefore impossible to make statements having general validity in this respect. We will focus here on the UNCITRAL Model Law on International Commercial Arbitration, that was adopted in over 50 countries (an updated list of the countries that are considered to have adopted the Model Law, see http://www.uncital.org/uncital/en/uncital_texts/arbitration/1985Model_arbitration_status.htm), as well as Swedish law. The desirability of a uniform interpretation of the annulment standards is endorsed by the Model Law's choice to provide for the annulment of an award (article 34) the same list of grounds that it provides for the refusal to enforce an award (article 36). In turn, this list corresponds to the list of grounds to refuse enforcement that is contained in the New York Convention (article V). The New York Convention being an international instrument, it is subject to autonomous interpretation. This should be sufficient to ensure a uniform interpretation also of the annulment grounds modelled on it, at least as long as the national arbitration law has adopted the Model Law or has a wording corresponding to its article 34.

30 If the investment arbitration is subject to the annulment mechanism regulated in article 52 of the ICSID Convention, several of the annulment grounds will be similar to those that are generally to be found in national arbitration law: for example, irregularity in the constitution of the arbitral tribunal, excess of power, or procedural irregularity. In the interest of
of the award by the courts in the enforcement country (uniformly regulated by the New York Convention or by the relevant investment treaty).\textsuperscript{31}

To the extent that the applicable arbitration rules leave a certain room for the tribunal to choose its own role between the two extremes of a passive umpire and an active inquisitor, the ultimate border is given by the remedies that may affect the validity or enforceability of the award. These remedies are generally interpreted so restrictively, that they are as a rule considered not relevant to questions relating to the application of the law.\textsuperscript{32} The most significant restriction to the scope of applicability of the grounds for setting aside or refusing to enforce an award is that the court does not have the jurisdiction to review the award in the merits. This means that error in the tribunal’s interpretation of the contract, evaluation of the evidence or application of the law may not lead to invalidity\textsuperscript{33} or unenforceability of the award.\textsuperscript{34}

Taking duly into account the mentioned restricted scope of application, the following remedies seem to be relevant to our questions:

(a) \textit{Excess of power}. If the award goes beyond the factual scope of the dispute as agreed upon by the parties, it exceeds the power granted to the tribunal. An award that is rendered beyond the scope of authority of the tribunal is invalid\textsuperscript{35} and unenforceable.\textsuperscript{36}

\footnotesize{predictability and harmonisation of arbitration law, it is desirable that these standards are to the extent possible interpreted according to the same criteria irrespective of the legal framework in which they operate.

\textsuperscript{31} The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by nearly 140 countries; for an updated list of the signatories, see http://www.unctad.org/en/uncitrar/uncitrar_texts/arbitration/NYConvention_status.html.


\textsuperscript{33} The validity of an award is regulated by national arbitration law; it cannot, therefore, be excluded that some countries provide for review of the merits. In general, however, this possibility is excluded. In the UNCITRAL Model Law the exhaustive list of grounds for invalidity is contained in article 34 and does not include error in the merits or in the application of the law; the same is true for Swedish law (Arbitration Act, articles 33 and 34) and English law (Arbitration Act, sections 67 and 68. The possibility for an English court to review an award for errors in (English) law has been significantly limited since the Arbitration Act of 1979).

\textsuperscript{34} The exhaustive list of grounds for refusing enforcement is set forth in article V of the New York Convention, which does not contain error in fact or in law.

\textsuperscript{35} And may therefore be set aside by the courts of the country of origin, see the UNCITRAL Model Law article 34(2)(a)(iii), Swedish Arbitration Act article 34(2). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(b).

\textsuperscript{36} New York Convention article V(1)(c). Enforcement of ICSID awards is subject to the same rules of enforcement that apply to final court decisions of that state (ICSID Convention article 54(1)).}
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It is generally recognised that the rule, as contained in the New York Convention and the UNCITRAL Model Law, is to be applied restrictively. Thus the rule is deemed to apply to the factual scope of the dispute, and not also to the arguments made by the parties.37

(b) *Fair hearing.* Both parties must have been given the possibility to present their cases, otherwise the award is invalid38 and unenforceable.39

Also this rule is interpreted restrictively, so as to cover only fundamental principles of due process, such as failure to notify of the arbitral proceeding.40

In the systems that do not have a specific ground for annulment of the award relating to the inability for one party to present its case, such a serious violation of due process will be covered by the rule on ordre public or procedural irregularity.41

(c) *Procedural irregularity.* The procedure followed by the tribunal must respect the fundamental principles of due process and the mandatory rules of the applicable arbitration law (or investment treaty), otherwise the award is invalid42 and unenforceable.43

Procedural irregularities may lead to invalidity or unenforceability of an award if they seriously affect the respect of due process. This rule may cover, as seen above, disregard of the mandatory rules on the applicable law, but also situations where the tribunal has not acted impartially; however, its interpretation is very restrictive.44

37 VAN DEN BERG, A.J., "Consolidated Commentary on New York Convention", in ICCA Yearbook Commercial Arbitration XXVIII (2003), 512 c. This does not mean, however, that the tribunal may totally disregard the parties' instructions, for example, in respect of choice of law; for a development of the reasoning on the borderline between excess of power and review of the merits in this context see MOSS, *op.cit.*, pp.6ff.

38 And may therefore be set aside by the courts of the country of origin, see the UNCITRAL Model Law article 34(2)(a)(ii), Swedish Arbitration Act article 34(6). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(d).

39 New York Convention article V(1)(b).


41 For example Swedish Arbitration Act article 34(6), and the ICSID Convention article 52(1)(b), see SCHREUER, *The ICSID Convention: A Commentary*, *cit.*, pp. 970ff.

42 And may therefore be set aside by the courts of the country of origin, see the UNCITRAL Model Law article 34(2)(a)(iv), Swedish Arbitration Act article 34(6). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(d).

43 New York Convention article V(1)(d).

3. The Tribunal: An Umpire or an Inquisitor?

Within the range of the principles mentioned in section 2 above, there does not seem to be a generally acknowledged understanding of how active a role the tribunal may assume: commentators range from the encouragement of an active role for the arbitral tribunal,⁴⁵ to scepticism towards such a role⁴⁶ and nearly exclusion thereof.⁴⁷

It is not unusual that legal doctrine on international commercial arbitration focuses its attention on the consensual character of arbitration and emphasises that the arbitral procedure should be left totally to the parties. Party autonomy is, and rightly so, deemed to be the clear fundament of commercial arbitration; as a consequence, the arbitral tribunal is deemed to have a rather restricted scope for its own initiative. This neutral role of a tribunal that does not interfere with the autonomy of the parties, that listens to their arguments and decides which of the arguments deserves to win, is sometimes defined as the role of an umpire.⁴⁸ The opposed role, more judiciary and interventionist, would consist in the tribunal taking various measures on its own initiative, rather than upon the request of one of the

⁴⁵ For example WIEGAND, W., "Iura novit curia vs. Ne ultra petitum - Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts", in GREINER, BERGER, GÜNGERICH (eds), Rechtsetzung und Rechtsdurchsetzung. Festchrift für Franz Kellerhuber, Bern 2005, pp.127ff; in the context of investment arbitration, see SCHREUER, C., “Three Generations of ICSID Annulment Proceedings”, in GAILLARD, B., BANIFATEMI, Y. (eds), Annulment of ICSID Awards, 2004, pp. 30f quoting a series of decisions by the ICSID ad hoc annulment Committee applying the maxim iura novit curia, and approving of this application.

⁴⁶ For example KESSEDJIAN, C., “Principe de la contradiction et arbitrage”, in Revue de l’arbitrage 1995, pp. 381ff; RUBIN, N., “Observations” in connection with Swembalt AB v. Republic of Latvia, cit, pp. 123ff, seems to justify an active role by the tribunal only in some contexts of public interest, such as investment arbitration; SCHNEIDER, M., “Combining Arbitration with Conciliation”, in Oil, Gas & Energy Law International, vol. 1, issue 2, 2003, p.4, has serious doubts on whether an international arbitral tribunal should have the authority to identify on its own initiative the rules of law applicable to the claims made before it, but, in any case, deems it necessary for the tribunal to invite the parties to clarify their case.


⁴⁸ The use of this terminology may be misleading. In the strict sense, an umpire denotes under English law a system for deciding deadlocks between two party appointed arbitrators. In case of disagreement between the party appointed arbitrators, the two arbitrators become advocates and the decision is taken by the umpire; prior to turning into advocates, however, the arbitrators have the duty to act impartially. This system is an alternative to the arbitration, and must be considered as being rather anomalous, see MERKIN, op. cit, pp. 449ff.
parties, to develop a factual and legal argumentation, as well as to identify the applicable law.

The alternative between an umpire and an inquisitor may remind of the classical opposition between the adversary Common Law systems and the inquisitorial Civil Law systems. The usefulness of the classical division into adversary and inquisitorial systems, however, may be questioned: while either of these forms is rarely to be found in its pure terms in any system of civil procedure nowadays, it is dubious how much it would be possible to apply it to international arbitration.\(^4^9\)

An adversarial approach in the strict sense is certainly not reflected in the arbitration law that mostly represents the common law systems, English law. The English Arbitration Act does not seem, in many respects relevant here, to be substantially different from the approach in Civil Law countries.\(^5^0\) The Arbitration Act of 1996 confers on the tribunal the power to determine a series of matters on its own initiative (provided that there is no agreement to the contrary between the parties): for example, the decision of procedural and evidential matters,\(^5^1\) or the default power to determine a series of remedies, if the parties have not specified the remedies that may be awarded.\(^5^2\) Also, in drawing inferences from the evidence produced by the parties and in developing its reasoning the tribunal is not bound by the arguments made by the parties.\(^5^3\) All these powers speak for arbitrator autonomy, rather than for party autonomy. This, however, does not mean that the tribunal faces no limits in assuming an inquisitorial role.


\(^5^0\) See also the ALI/Unidroit Principles, article 22.2.3, specifying that the court may rely upon an interpretation of the facts or of the evidence that has not been advanced by a party. This article is actually more lenient to party autonomy than English arbitration law, since it assumes that the court must give the parties the possibility to respond to such independent interpretation whereas English case law does not assume the parties’ right to be heard on the tribunal’s own interpretation of the facts or of the evidence: see above, footnote 20. Traditionally English arbitration law has restricted party autonomy even more than other systems, by allowing judicial interference on questions of law (through consultative case procedures and judicial review of error in law), that in the Civil Law systems were unknown. It follows that, in English arbitral procedures, the law is not totally subject to party autonomy, at least as long the law in question is the English.

\(^5^1\) See above, footnote 20.

\(^5^3\) Section 34.
or taking over one party's interests against the other party's: the overriding principle is that the proceeding is conducted fairly and impartially,54 and this mandatory requirement is deemed sufficient to ensure a balance between the adversary and the inquisitorial proceeding.55

A peculiar treatment is reserved, in the English system, to foreign law: foreign law is considered as a fact and has therefore to be proved by the parties. This is unknown in most Civil Law systems, where not only the domestic, but also the foreign law has in principle to be applied ex officio by the tribunal, in accordance with the maxim in Re nascitur curia.56 However, even if foreign law is treated as a fact under English arbitration law, it does not mean that in questions of foreign law party autonomy totally prevails over the tribunal's independent evaluation. First of all, we have seen above that the arbitral tribunal has extensive powers in procedural evidential matters and may evaluate the evidence independently. If foreign law is treated as a fact, it will be subject to the same powers as described above. Secondly, if the foreign law is not satisfactorily proved, the tribunal may apply the presumption that foreign law is the same as English law, and will apply (on its own initiative) English law, thus avoiding to fall into the role of the umpire that would have to choose the pleadings made by the other party.57

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54 See, in respect of arbitration, KURKELA, M., “Jura Novis Curia” and the Burden of Education in International Arbitration – A Nordic Perspective”, in ASA Bulletin, 2003, pp. 485ff.; WETTER, G.J., “The Conduct of the Arbitration”, in Journal of International Arbitration, 1985, pp. 244., WIEGAND, op.cit., pp. 130ff. On Swedish arbitration law see HUBRUN, op.cit., pp. 323ff. See also the extensive comparative observations made by the Swiss Federal Court in its decision 4P.100/2003, ATF 130 III 35, pp. 577ff. (the decision confirmed the principle of in Re nascitur curia in arbitration, but set aside an award as an exception to that principle, because the award was based on elements that did not relate to the arguments presented by the parties, and the tribunal had not granted the parties the possibility to comment thereon. In doing so, the Court emphasized that this exception to the in Re nascitur curia principle has to be applied only in extraordinary situations). See also the Swiss Federal Court decision 4P.14/2004 referred to by SEGESSER, G. in ITA Monthly Report 2004, Vol. III, Issue 1, confirming an award applying the maxim in Re nascitur curia even if the tribunal had not invited the parties to comment on the legal theory upon which the decision was based. The principle is also codified in a series of private international law acts, see, for example, article 14 of the Italian, article 16 of the Swiss and § 4 of the Austrian private international laws, as well as § 293 of the German ZPO. A notable exception until recently was represented by French law, but recent court decisions seem to have acceded to the Civil Law approach also in France see CASHIN RITAINE, E., "Editorial", in ISDC's Letter, 2005 No 7, p.1. See also JANTERÄ-JAREBORG, M., “Foreign Law in National Courts – a Comparative Perspective”, in Hague Academy of International Law, Recueil des cours Vol 304 (2003), pp. 264ff., showing various internal inconsistencies in the various systems' approach to foreign law. That the tribunal has the duty to apply the law ex officio does not exclude that the law may be pleaded by the parties, see below, section 3.3(b).

55 MERKIN, op.cit., p. 901 ff.
Under English arbitration, therefore, the role of the tribunal in respect of the parties’ pleadings does not fall into the category of adversary system more than it would do in accordance with the international or national civilian arbitration rules that we saw in section 1 above. As seen, tribunals have considerable powers to act on their own initiative by requesting additional information, and they are not bound to decide in favour of the participating party in case of default by the other party (which implies that they have the power to make their own independent evaluation of the pleadings, rather than limiting themselves to choose between the available pleadings).

Having excluded that the tribunal is expected to act as an umpire in the strict sense, it remains to see more specifically what kind of ex officio initiatives are compatible with the ultimate borders of the arbitral authority described in section 2 above: the principles of excess of power, of fair hearing and of impartiality. While it is only a breach of these principles that has consequences on the validity\(^{58}\) and enforceability\(^{59}\) of the award, it might be possible to identify certain guidelines for the conduct of arbitration proceedings that might be useful as an indication of a proper procedure even if violation thereof does not lead to dramatic consequences as invalidity or unenforceability.

Below we will go through some situations that are often encountered in practice and that might present some challenges in respect of our questions.

### 3.1 Questions of Fact: May the Tribunal Request Additional Information to Undermine Uncontested Evidence?

As we have seen in section 1.2 (c) above, the tribunal may, under some arbitration rules, draw adverse inferences from the failure by one party to appear. We have also seen that the tribunal is not bound to accept the other party’s assertions blindly. If the produced evidence is not convincing because, e.g., a witness did not seem credible or a document was evidently forged, the unsatisfactory character of the evidence is apparent at a mere examination thereof. Likewise, if the produced evidence is intrinsically illogical, or if it contradicts other evidence that was produced in the same dispute, it is sufficient to examine the produced evidence to determine the weight that shall be attached to it. As long as the independent evaluation of the produced evidence consists in this examination, no difficulties seem to arise in connection with the tribunal’s role.

\(^{58}\) Assuming that the applicable arbitration law in this respect corresponds to the UNCITRAL Model law, to English or Swedish law or to the ICSID regulation.

\(^{59}\) In accordance with article V of the New York convention.
A question that might arise is to what extent the tribunal shall limit itself to an evaluation of the evidence as presented, or it is allowed to go further and, in order to verify the soundness of the evidence, to develop arguments that should have been presented by the other party. May the tribunal avail itself of its power to request additional information in order to substantiate these arguments?

We can assume that a party wishes to prove that the value of the disputed goods has decreased during a certain lapse of time. The party produces documentation showing that equivalent goods have, during that period, been purchased at a certain price and then resold at a lower price. This is evidence of the decreased value not of the specific goods in dispute, but of equivalent goods; however, the other party does not appear and therefore the extension of this evidence to the disputed goods is not contested. If the other party had appeared, it might have produced evidence that that particular purchase/resale was not indicative of the value of that type of goods, for example because the purchaser/reseller did not act diligently, or was under a conflict of interest; or it could have produced evidence that the disputed goods were not affected by the same decrease in value because of special circumstances. Assuming that there are no prima facie grounds for not applying the proven value decrease also to the disputed goods, it would be the burden of the other party to prove the special circumstances that speak against such applicability. If the other party does not appear, it does not discharge its burden of proof. In such a situation, the tribunal has two alternatives:

(a) The tribunal may consider the produced evidence as satisfactory, thus giving effect to the general rule on burden of proof:

(i) This does not create problems in the systems that permit to draw from a party's default inferences adverse to that party;\(^{40}\)

(ii) Some systems, however, expressly state that failure to appear may not be deemed as an admission.\(^{41}\) To avoid violating this rule, the tribunal should verify whether the produced evidence is capable of independently proving the point made by the party: this is the case when the evidence is relevant and sufficient even without interpreting the other party's default as an indirect admission that it is not able to rebut it by producing contrary evidence. Should, however, the tribunal determine that the produced evidence does not have an independent value, because its relevance or weight depend (also) on the

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\(^{40}\) For example, Swedish law, see above, section 1.2(b).

\(^{41}\) For example, German law and the ICSID, see above, ibid.
absence of contrary evidence, the tribunal is under a duty to raise the matter and request additional clarifications.

(b) The tribunal may consider that the produced evidence is not satisfactory, and may thus request additional evidence in order to substantiate or dismiss the arguments that can be made against its soundness.

(i) In the systems where the tribunal may draw adverse inferences from the other party’s default, the tribunal remains free not to draw such inferences. Therefore, if the produced evidence does not have independent value, and the tribunal determines that it shall not be deemed admitted by the other party, it may exercise its power to request additional information. However, if the evidence has relevance and weight irrespective of whether it is deemed admitted or not, a request by the tribunal of additional information may seem to violate the rule on the burden of proof;

(ii) In the systems where the tribunal has a duty not to deem as an admission the failure to appear, this alternative is not problematic; however, if the produced evidence has a clearly independent value, the request of additional information is not based on the duty to avoid drawing negative inferences from the other party’s default. The tribunal remains free to evaluate the evidence and to investigate further in accordance with the powers that the applicable regulation confers on it; but it runs the risk to take over the burden of proof of the other party.

What are the consequences for the award of a violation of the rule on the burden of proof? Of the three ultimate borders to the tribunal’s power that are relevant here, it seems that the rule on procedural irregularity, or due process, might be considered. As we have seen in the explanation above, a violation of the rule on burden of proof may be assessed by reviewing the tribunal’s evaluation of the pleadings and their capability of having an independent value. As known, this kind of review is generally not allowed, neither in the phase of validity challenge or in the phase of enforcement of an award. It seems, therefore, that a violation of the burden of proof would have to be quite an evident violation of impartiality and cause a substantial injustice, before it can be sanctioned with invalidity or unenforceability of the award.62 Nevertheless, a tribunal should accurately comply with its

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62 In commercial arbitration the reported decisions establishing a violation of the impartiality standard are few and deal mainly with the possibility of both parties to be heard, rather than with the rule of burden of proof (see VAN DEN BERG, “Consolidated Commentary”, at, XXVIII (2003), 521 2. and 523 4.; as an example of lack of impartiality by a tribunal, see the Dutch decision of 28 April 1998, in Yearbook Commercial Arbitration XXIII (1998), pp. 731f., refusing to enforce an award based on evidence that one party had presented after the
duties and avoid acting in a way that might raise even the slightest suspicion of impartiality, even if the threshold for invalidity and unenforceability of the award is not reached; otherwise, the parties' faith in arbitration might be undermined.

So far we have assumed that the evidence produced by one party was not contested, because the other party did not appear. What if the other party appears and presents its statements, but fails to contest that particular piece of evidence? It seems that, in this situation, it would be difficult to apply the rule preventing to draw adverse inferences from failure to appear. The other party has actually presented its arguments, where it could have contested the evidence, and has decided not to contest it. This seems to be very close to an implied admission of the assertions that were meant to be proved by producing the evidence that remained uncontested. The tribunal may invite the other party to clarify whether the failure to contest the evidence is to be interpreted as an agreement on the existence of that particular circumstance or not; however, going further than that becomes dangerously close to suggesting arguments to that party.

To the extent that the parties may be deemed to agree on the existence of a certain fact, there does not seem to be any room for the tribunal to make different assumptions; however, the tribunal remains free to draw from the agreed facts the inferences that it deems appropriate, and to ask for the additional information that these inferences might render relevant.

3.2 Questions of Fact: Is the Tribunal Bound to Decide Only on Invoked Facts?

The tribunal has to base its decision on the facts introduced and proved by the parties; otherwise, it will exceed its power. The general rule is, therefore, that an award may not be based on a fact that was not invoked by a party. This does not mean that the tribunal is bound by the argumentation made by the parties in respect of the proven facts. We have seen above that a tribunal is free to evaluate the evidence and to draw from it the inferences that it deems appropriate. Does this extend to facts that are proved but not invoked by a party?

Let us assume that a buyer pays only part of the agreed price to the seller on the grounds that the delivered goods did not fully comply with the

hearing, and that the other party had not had the possibility to comment on). The ICSID ad hoc Committees have regularly rejected applications for annulment based on the allegation that the tribunal had violated the rule on burden of proof see, for references, SCHREUER, "Three Generations of ICSID Annulment", cit., pp. 32f., and ID., The ICSID Convention: a Commentary, cit., pp. 981f., referring in a. to the ad hoc Committee decision in the case Klöckner II (unpublished), that affirmed in theory the possibility to annul an award because of erroneous reversal of the burden of proof, but did not find the annulment ground applicable in the specific case.
specifications, and that the seller initiates arbitration against the buyer for breach of its payment obligations. The buyer produces evidence of the whole content of the contract, including the specifications, as well as of all the factual circumstances of the performance. From the produced evidence it appears that the seller was in breach of contract; however, the non-performance did not relate to the specifications of the goods (as invoked by the buyer), but to the delivery time. The breach of the obligations on delivery time is proved in the proceeding; however, it is not invoked as a basis for the buyer's defence. May the tribunal base its decision on a circumstance that is introduced by one party in the proceeding, but is not acted upon by that party?

In the situation described above, if we assume that also a delay in the delivery entitles the buyer to a reduction in the price, the breach of the delivery obligation is an alternative basis for the same defence presented by the buyer. The tribunal must be allowed to consider the consequences of a fact that was proved before it, even if that fact was not invoked, as long as this does not modify the scope of the dispute.63

Would the tribunal exceed its power if the tribunal's evaluation of a proven, but not invoked fact, leads it to order a remedy that was not requested? Let us assume that the arbitration is initiated by the buyer. The contract provides that, in case of non compliance with the specifications, the price shall be reduced. The buyer had paid the whole price before it had the possibility to inspect the goods; after the inspection of the goods, it requests reimbursement of part of the price because the specifications were not complied with. The contract contains also a clause that permits termination and full restitution in case of late delivery. Like in the scenario described above, the content of the whole contract as well as all the circumstances of its performance are proved in the proceeding; the buyer, however, acts only on the basis of non conform specifications, and requests reimbursement of part of the price. If the tribunal decided that the contract had to be terminated because of late delivery, and ordered restitution of the whole price and of the goods, would it exceed its powers? The question of introducing new remedies is examined below, under section 3.4(c).

3.3 Questions of Law: May the Applicable Law Be Disregarded if the Parties Do Not Sufficiently Prove It?

Sometimes tribunals do not consider the applicable law because it was not sufficiently proven by the parties; this approach has been subject to criticism, and with good reason.64

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63 Coming to the same conclusion see, under Swedish law, HEUMAN, op.cit., pp. 606f, 634, 640 and, under English law, MERKIN, op.cit., p. 592

64 For example Swembalt AB v. Republic of Latvia, in Stockholms Arbetsmätterapport 2004:2, pp.
The applicable law shall be considered, even if it has not been sufficiently proven by the parties, irrespective of whether the law is deemed to be a fact (as the English system assumes, see above, section 3) or not:

(a) If foreign law is treated as fact, it has to be proved by the parties. As we just saw in sections 3.1 and 3.2, under English law the pleadings made by the parties in respect of the facts do not bind the tribunal in its independent evaluation of the evidence and in the inferences that are based on those facts. It follows that an English tribunal is not bound by the presentation of the foreign law made by the parties, that it may request additional information and may build its own argumentation thereon. In case of insufficient evidence of foreign law, therefore, an English tribunal will be entitled to ask for additional evidence. If the evidence is still not satisfactory, the tribunal will apply the presumption that foreign law is the same as English law; and English law is applied ex officio by the tribunal.

(b) If the law is not treated as a fact, insufficient evidence does not excuse the tribunal from its duty to investigate it ex officio. This does not mean that the tribunal may not ask the parties to provide evidence of the law: it certainly is in the interest of the parties to provide as exhaustive and convincing evidence of the law as possible, so as to substantiate their respective pleadings. This approach is very common in practice, and is even codified in some private international law acts. The duty of the arbitral tribunal to investigate the law seems to consist in asking the parties to produce


64 See above, footnote 56.

66 See, however, the comment on article 20(4) of the ICC Rules, DERAINS, SCHWARZ, op.cit. footnote 582, affirming that in international arbitration the appointment of legal experts to testify on foreign law should not be necessary, because an international tribunal should not consider any law as foreign, and is assumed to know the law that it is supposed to apply. For a comparative analysis of the question of where duty to prove foreign lies, whether with the parties, the judge, or both, see JÁNTERÁ-JAREBORG, op.cit., pp. 286ff.

67 See, for example, § 293 in the German ZPO and § 6 in the Austrian Private International Law Act. KAUFMANN-KOHLEB, “Iura novit arbitre”, cit., pp. 74ff., analyses how Swiss arbitration law gives the tribunal the power, but not the obligation to investigate the law ex officio. Also the Swedish system is based on the principle that the parties have to prove the law, see HEUMAN, op.cit., p. 326, even if the Swedish arbitrator has the authority to develop its own arguments of law, see p.379.
additional evidence of the law or appointing legal experts, rather than in directly investigating the law.68

This approach is consistent with the ALI/Unidroit Principles: according to article 22.1, the court is responsible for determining the correct legal basis for its decision, including matters determined on the basis of foreign law.

To what extent can the award be set aside as invalid or deemed unenforceable because the tribunal disregarded the applicable law on the ground that it was insufficiently proved, depends on whether the failure to apply the law falls into the category of error of law (in which case it will not have consequences on the effectiveness of the award) or into one of the principles that we defined in section 2 above as the ultimate borders of the tribunal's powers. If the disregard of the applicable law is based simply on the insufficiency of the evidence thereof, and it is not corroborated by reasons that show that the tribunal has made some considerations on the choice, interpretation or application of the law, there is a basis to consider it as excess of power (because the tribunal made its decision on the basis of legal facts different from those submitted by the parties) or procedural irregularity (if the applicable law is mandatorily determined in the applicable arbitration law or investment treaty).

3.4 Questions of Law: May the Tribunal Develop Its Own Legal Arguments?

We have seen in section 3 above that the tribunal is empowered to develop its own reasoning in respect of the evidence and of the facts that the parties have introduced in the proceeding. Also, we saw in section 1 above that the tribunal has the ultimate responsibility to apply the law, whether the law is deemed to be a question of fact or a question of law. It follows that the tribunal is entitled to develop its own reasoning also in respect of the law, the more so if the law is under the sphere of the tribunal rather than that of the parties. This is recognised also in the ALI/Unidroit Principles that state, in article 22.2.3, that a court may rely upon a legal theory that has not been advanced by a party. This article requires, however, that the court must give the parties the possibility to respond to such new theory; we will come back to this requirement in section 3.5 below.

Under the power to develop an independent legal reasoning it is possible to distinguish at least three categories:

(a) *New qualifications under the same sources.* Suppose that a buyer has proved the content of the whole contract with the seller, as well as the circumstances of the non-performance of that contract by the seller. We can further assume that the buyer is claiming reimburse-

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68 See also the ALI/UNIDROIT Principles, article 22.4.
ment of damages on the basis of article 45 of the Vienna Convention of 1980 on Contracts for the International Sale of Goods (CISG). The request of damages is based on the alleged breach by the seller of the quality specifications for the goods; according to article 45 of the CISG (combined with article 35), breach of specifications entitles the buyer to claiming damages. As in the scenario presented in section 3.2 above, we assume that the evidence produced in the arbitral proceeding shows that the seller was in breach of the contractual obligation on the time of delivery; however, the buyer does not act upon this breach. The tribunal does not accept the buyer's arguments in respect of breach of specifications. However, the tribunal deems the delay in performance as a breach of contract. The seller, therefore, is ordered to reimburse damages to the buyer on the basis of article 45 of the CISG, as requested; however, the basis for applying article 45 of the CISG is not article 35 on non-compliance with specifications but article 33 on time for delivery. As seen in section 3.2 above, the tribunal is not exceeding its power because the fact of the delay had been proved in the proceeding, even if it had not been invoked by the buyer. The tribunal is not exceeding its power in respect of the legal argumentation either. The tribunal is free to qualify the proven facts in accordance with the legal sources that it deems applicable, especially if these legal sources have been pleaded by the parties (we will see immediately below to what extent the tribunal may apply new sources that have not been pleaded by the parties). In our example, the tribunal is subsuming the proven facts under an article of the CISG that it deems more appropriate than the article that was invoked by the buyer. The qualification and subsumption of a fact belong to the evaluation of the legal consequences of that fact, and are part of the legal reasoning that the tribunal has the power and the duty to carry out independently.69

(b) New source. To take another kind of independent legal reasoning, let us assume that a buyer alleges that the contract is terminated, in accordance with article 49 of the CISG, because of fundamental breach by the seller. The arbitral tribunal determines that the contract may be terminated, as requested by the buyer. However, the basis for terminating is not the fundamental breach and the

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IS THE ARBITRAL TRIBUNAL BOUND BY THE PARTIES’ PLEADINGS?

CISG, but the governing national law that sanctions unfair contract terms with invalidity of the contract. During the proceeding, the buyer had produced evidence of the contract that contained a clause excluding the seller’s liability, and the tribunal deemed this clause to be sufficient to trigger invalidity under the national governing law. Assuming that the consequences of the invalidity are the same as the consequences of the termination that had been requested by the buyer (we will see immediately below to what extent the tribunal may apply remedies that were not requested), and assuming that the tribunal is acting on the basis of facts that have been proved (even if not invoked) by the parties, it is within the scope of the tribunal’s power to interpret the applicable law and apply it as it deems appropriate, even if the parties have failed to make the relevant argument.70 A possible problem might arise in respect of the possibility for the parties to respond to the new legal sources introduced by the tribunal. We will revert in section 3.5 below to the possible implications relating to the adversary principle.

(c) New remedies. We can assume that the buyer is requesting reimbursement of damages for breach of contract by the seller; the tribunal, however, determines that the contract is to be declared invalid because it contained unfair terms. Whether this determination is based on the same facts invoked by the buyer, or on facts proved but not invoked, the evaluation does not change. There does not seem to be a unitary treatment of this situation in the various countries. In common law systems the request of remedies made by the parties is deemed to constitute the borders for the tribunal’s jurisdiction.71 In many civil law systems the borders of the tribunal’s jurisdiction seem to be set by the parties’ presentation of the facts, whereas the legal consequences of those facts are left to the tribunal to determine according to its own identification of the applicable law, subsumption and interpretation.72 This latter

70 In the same sense see the decisions by the ICSID ad hoc Committees referred to by SCHREUER, “Three Generations of ICSID Arbitrations”, cit., pp. 30 f. The decision of the ICSID ad hoc Committee in Klöckner v. Cameroon, in Yearbook Commercial Arbitration XI (1986) (Klöckner I), pp.173 ff., clearly affirms the tribunal’s freedom to develop its own legal theory and arguments; such freedom, however, is restricted by the “legal framework” established by the parties. As an example of a hypothetical violation of the limits set by such legal framework, the ad hoc Committee mentions a decision rendered on a tort ground, whereas the parties’ submissions were based on contract (ibid.).

71 See, for England, MERKIN, op.cit., p. 714 (a).

72 See, for Sweden, HEUMAN, op.cit., pp. 611, 736 ff.; for Switzerland see the court decisions referred to in footnote 56 above, and WIEGAND, op.cit., pp. 135 ff., 140 ff. Extensively arguing how the legal consequences are within the sphere of the tribunal and should be determined ex officio (in accordance with the maxim de nullis factis, dabo tibi ius). That an
approach seems to be more consistent with the powers of the tribunal, shown in the foregoing, to develop its own legal argumentation and to apply the law *ex officio*. In other words, the tribunal would not exceed its power if it grants remedies that were not requested by the parties, provided that these remedies are based on the facts proved in the proceeding and that they have not expressly been excluded from the authority of the tribunal by agreement of the parties (in the arbitration agreement, under the proceeding or in other manner expressly meant to regulate the jurisdiction of the tribunal). As we saw above, the tribunal is not expected to simply act as an umpire and choose between the parties' arguments; if it is entitled to develop its own legal argumentation, it must also be entitled to draw the legal consequences of this argumentation, and these at times might entail remedies that were not requested by the parties. This is, however, a dangerous area for the tribunal since, as we just saw, the power of the tribunal to grant remedies beyond the requests of the parties is not completely uncontrovertial in all legal systems. The systems that the tribunal should be concerned with are the law of the arbitral venue and the law or laws of the enforcement court or courts. While the law of the place of arbitration is known to the tribunal, the law of the place or places of enforcement is not. Since an award may be enforced in any country where the losing party has assets (assuming that enforcement is permitted by prevailing legislation or conventions, of which the New York Convention is the most significant), and this may include any country where that party has assets in transit, it is unpredictable for the tribunal which interpretation of the excess of power clause the enforcement court will apply. Therefore, it is in the interest of the effectiveness of the award to avoid rendering a decision that, even if valid under the law of the place of arbitration, might be deemed to be in excess of power in other systems. It seems advisable that the tribunal informs the parties of its evaluation of the legal consequences of the produced evidence, and gives them the possibility to comment thereon. Should the parties agree that the remedies suggested by the tribunal shall not be applied, this would clarify that the tribunal does not have the authority to grant them. Should the parties not reach an agreement thereon, they would still have the opportunity to make their cases on the points introduced by the tribunal. In this way, the adversary principle would not be violated. We will revert

independent assumption by the tribunal does not lead to excess of power is indirectly confirmed by the lack of reported court decisions refusing enforcement under the New York Convention; see VAN DEN BERG, *op. cit.*, 512c.
immediately below in section 3.5 to the necessity or opportunity that the tribunal invites the parties to comment on new elements upon which the decision is going to be based. This should not be considered as if the tribunal was acting partially, suggesting to one party what legal arguments it should make and what legal remedies it should request. The invitation by the tribunal to comment is only a consequence of the tribunal’s power to develop its own independent legal argumentation, and is meant to preserve the adversary principle.

3.5 Inviting the Parties to Comment

The invitation to the parties to comment on the tribunal’s own legal reasoning is required in some systems, recommended in others, not considered necessary yet in others. Also legal literature seems to be divided between these positions.

This invitation seems necessary if the tribunal’s legal reasoning leads to new facts or evidence becoming relevant. If one or both of the parties may develop their cases by presenting new evidence that was not relevant in the context of the original pleadings, but becomes relevant in the context of the tribunal’s reasoning, it is reasonable to expect the tribunal to give the parties the opportunity to do so, even in the systems that do not as a general rule require an invitation to comment.

73 For example in France, see KESSEDjian, op.cit., p. 399. A recent Norwegian Supreme Court decision defined the adversarial principle as fundamental principle of due process in Norwegian law, and set aside an award that had radically reduced the amount of damages requested by the claimant without the tribunal having advised the parties that it was contemplating to do so: Rv 2003 s. 1590. See also the Swiss decision 4P 100/2003, at, which, however, underlines that this requirement applies only to extraordinary cases. See also the ALI/UNIDROIT Principles, article 22.2.3

74 See, for Sweden: Hjëman, op.cit., pp. 634, 683, 734, who considers it open whether this rule is mandatory. See the Svea Court of Appeal decision No 8090-99, at, pp. 256ff. rejecting the existence of such a rule, commented upon by WALLIN, op.cit., pp. 266ff (considering it recommendable to invite the parties’ comments, but deeming it not a serious procedural irregularity if it is not done, at least in respect of domestic arbitration).

75 On Swiss law see the judicial practice referred to in footnote 56 above and, more explicitly on this matter, the Federal Court decision No 4P 115/1994, in ASA Bulletin (1995 No 2), pp. 217ff., par [5]. On English law see MERKIN, op.cit., p. 592. In respect of German law see MARTINEK, op.cit., XI. In respect of ICSID arbitration see SCHREUER, The ICSID Convention: A Commentary, at, pp. 97ff., showing that ICSID awards consistently are not deemed invalid even if the reasons upon which they are based come as a surprise to the parties.

76 Considering the invitation necessary, for example, KESSEDjian, op.cit., pp. 39ff., and SCHNEIDER, op.cit., p.4. Considering it not necessary: WIEGAND, op.cit., pp.147ff., and MERKIN, op.cit., p. 592.

77 In this sense also WIEGAND, op.cit., pp. 140ff.
The necessity of this invitation to comment is less evident if the tribunal's reasoning remains on a purely legal level: as long as the parties' comments are limited to the legal qualification of some factual circumstances or the subsumption under a certain rule, they are a contribution to the tribunal's reasoning, but they are not binding on the tribunal and do not add anything to the sphere of authority of the tribunal.

If the tribunal introduces new sources of law, however, it might be advisable to request the parties to comment on the new sources, so that the parties are given the possibility to evaluate the new legal dimension of the dispute. The tribunal might not be in a position to evaluate whether the parties can produce new evidence in light of the new sources, and therefore it seems advisable to leave this evaluation to the parties themselves, by advising them of the tribunal's intention to apply a certain source.

Another question is how specific the invitation to comment on the new sources should be. Should the tribunal limit itself to indicating the source in a generic way, in our example by making reference to the national law on unfair terms of contracts, or should it be more specific and indicate the article of the law that it deems relevant? This latter alternative seems to come close to a suggestion of the legal arguments to one party, and should, probably, be avoided. What if the parties do not properly respond to the generic invitation and do not address the specific aspects of the sources that the tribunal intends to apply? In our scenario, this would happen if the tribunal invites the parties to comment on the applicable national law on unfair terms of contracts, and the parties comment on parts of the regulation that are not relevant to the dispute, whereas they fail to comment on the article on invalidity, that the tribunal deems relevant. The adversary principle has been taken care of in that the tribunal drew the parties' attention to the source on unfair contract terms. By so doing, the source has been introduced in the proceeding and the parties have had the possibility to comment on it. Failure by the parties to recognise the relevant article may not affect the tribunal's ability to develop its own legal argumentation, as seen above. Therefore, it should not be a problem to decide on the basis of the rules the tribunal deems applicable, even if the parties have not pleaded them after they have been invited to comment on them.

3.6 Distinction between Domestic and International Arbitration?

In respect of the tribunal's ability to develop its own legal argumentation and to apply the law ex officio, a distinction is sometimes drawn between domestic arbitration and international arbitration, and it is suggested that

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78 But see HEUMAN, op.cit., p. 324, who prefers that the invitation to comment is made with reference to a specific legal rule.
the principle *iura novit curia* should apply to a more restricted extent when
the dispute is international.79

One of the reasons for this suggestion is based on the international
character of arbitration: it is assumed that foreign parties might be used
from their respective systems to a different procedure and might not expect
that the tribunal takes an active role. The overview of the arbitration rules
made in section 1.2 above, however, seems to show that the tribunal's
powers are not regulated in dramatically different ways in the main
institutional rules, as well as the UNCITRAL rules. It might, of course, not
be excluded that other arbitration rules provide for much more passive
tribunals; however, the rules analysed here are quite representative of the
modern standard, at least within European arbitration rules.80

Furthermore, it might be difficult to assume total ignorance by the
parties of the local arbitration law, let alone of the arbitration rules of the
institution that the parties have chosen. That the venue for the arbitration
shall be chosen out of logistical or other practical reasons and without
taking into consideration the legal framework for the proceeding, does not
seem to comply with the important role that local arbitration law has in
respect of the validity and enforceability of the award, of the tribunal's
power to order interim measures, or of the local court's powers to intervene
in or assist the arbitral procedure. Such an undervaluation of the local
arbitration law's significance might have been encountered more often
some decades ago, when arbitration was a relatively new phenomenon.
Nowadays arbitration has become a settled branch within international
dispute resolution and seems even to have passed the definition as
"alternative" method for dispute resolution over to newer forms, such as
mediation and conciliation. In this context, not knowing the tribunal's
powers under the chosen arbitration law seems to be rather unjustified;
therefore, the suggestion that the role of the tribunal in international
disputes should be restricted because of the possibility that the parties
might be unprepared to an active role under the applicable arbitration rules,
seems to be an excessive measures meant to accommodate the interests of
negligent parties. Should, however, the venue of the tribunal have not been
chosen by or known to the parties prior to the initiation of the proceeding,
this reasoning might be more flexible.

79 See, for example, HURMAN, op.cit., pp. 323, 379, 682f., KAUFMANN-KOHLER, " *Iura
novit arbitrer*," ib., pp. 75f., KISSEDJIAN, op.cit., pp. 403f., and MAYER, P., "Le pouvoir
des arbitres de régler la procédure: une analyse comparative des systèmes de civil law et de
80 KAUFMANN-KOHLER, "The Arbitrator and the Law", ib., p. 632, with further
bibliographic references in footnote 4) even speaks of a transnational arbitral procedure that
is developing on an international level, possibly with the exception of US arbitration.
Another reason for distinguishing between domestic and international disputes in respect of the principle *iura novi curia* is based on the observation that, in an international dispute, the tribunal might tend to apply to the merits transnational sources of the *lex mercatoria*, that are more difficult to determine than state law. An invitation to comment on these sources, therefore, might preserve predictability of the result. It is certainly a commendable aim to preserve predictability, and I agree that the application of transnational sources might create problems in terms of predictability. From the point of view of the validity and enforceability of the award, however, the distinction between application of the *lex mercatoria* and of a state law becomes relevant only if the sources applied by the tribunal do not qualify as sources of law. As seen in section 1.3 above, an award that is not rendered at law is invalid, if the parties have not requested the tribunal to act as an *amicus comatus*. The lack of power to render an award *ex bono et aequo* would not be remedied by an invitation to comment (unless the parties in their comments agree thereon). If application of the *lex mercatoria* does not prevent the award from being considered at law, invitation to comment is not required for the effectiveness of the award (although it might be highly recommendable because of the mentioned question of the predictability).

4. Conclusion

We have seen that the tribunal enjoys ample room for independently evaluating the presented evidence, legal arguments and sources, and for requesting additional information and thus introducing new elements in the proceeding. The tribunal, therefore, is not bound by the arguments made by the parties. The only border that the tribunal seems to meet is the factual scope of the dispute, as well as any restrictions to the tribunal’s jurisdiction that might be contained in the arbitration agreement or other appropriate instrument, such as an investment treaty in the case of investment arbitration. There are also some uncertainties in respect of introducing remedies that were not requested by the parties. It is, therefore, advisable to invite the parties to comment on the tribunal’s inferences of law or new sources that the tribunal intends to apply, so as to ensure that the adversary principle is not violated.

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81 KESSELI, op.cit., pp. 403f.
82 According to a widespread opinion in legal literature, the tribunal has the authority to apply the *lex mercatoria* on its own motion if the arbitration rules or the applicable arbitration law provide that the tribunal may apply "rules of law", as opposed to "law". The SCC Rules, for example, use the formula "rules of law", whereas the UNCITRAL Rules use "law". For a more extensive analysis of this question see MOSS, op.cit., pp. 17ff.
83 Under the arbitration rules of the SCC, ICC, LCIA and UNCITRAL, as well as under the ICSID Rules and the ALI/Unidroit principles.
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not violated. Invitation to comment is, as seen above, requested in some
systems on all the elements upon which the award is going to be based,
whether they are elements of fact or of law.

The sanctions against a misuse of such powers are few and their scope of
application is rather restricted: while the rule on excess of power mainly
only sanctions decisions made outside the factual subject-matter of the
dispute, the rules on fair hearing and impartiality are not meant to permit a
review of the tribunal’s evaluation of the evidence or of the law. Therefore,
only gross violations of the tribunal’s duties may lead to application of these
sanctions.

This does not mean, however, that a tribunal should feel free from any
constraint in administering the proceeding: impartiality and due process, as
well as accuracy in the interpretation of the contract and the application of
the law, are important principles and should always be the inspiration for
any act by the tribunal, irrespective of whether a violation thereof might be
considered “only” as a wrong decision on the merits, and as such not
leading to invalidity and unenforceability of the award.