Limits to Party Autonomy in International Commercial Arbitration

Franco Ferrari
Editor

NYU
Center for Transnational Litigation, Arbitration and Commercial Law

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About the Editor

Franco Ferrari is a Professor of Law and the Director of the Center for Transnational Litigation, Arbitration and Commercial Law at New York University School of Law. Prof. Ferrari joined NYU on a full-time basis in September 2010, after serving as visiting professor for various years. Previously, he was chaired professor of comparative law at Tilburg University in the Netherlands and Bologna University as well as professor of international law at Verona University in Italy. After serving as member of the Italian Delegation to various sessions of the United Nations Commission on International Trade Law (UNCITRAL) from 1995 to 2000, he served as Legal Officer at the United Nations Office of Legal Affairs, International Trade Law Branch (2000-2002), with responsibility for numerous projects, including the preparation of the UNCITRAL Digest on Applications of the UN Sales Convention (2004 edition). Prof. Ferrari has published more than 280 law review articles in various languages and 17 books in the areas of international commercial law, conflict of laws, comparative law and international commercial arbitration. He is a member of the editorial board of various peer reviewed European law journals (Internationales Handelsrecht, European Review of Private Law, Contratto e impresa, Contratto e impresa/Europa, Revue de droit des affaires internationales). He also acts as arbitrator both in international commercial arbitrations and investment arbitrations.
About the Contributors

George A. Bermann is the Jean Monnet Professor of European Union Law and Walter Gellhorn Professor of Law at Columbia Law School, where he also directs the European Legal Studies Center. Prior to joining the Columbia faculty in 1975 he practiced as an associate at the New York law firm of Davis Polk & Wardwell. Professor Bermann is a graduate of Yale College and Yale Law School, where he was an editor of the Yale Law Journal. Professor Bermann teaches and writes extensively in the fields of European Law, Comparative Law, Transnational Litigation and Arbitration, and WTO dispute resolution. He is the author or editor of, among other books, Introduction to French Law (co-editor Picard, Kluwer Pub.), Transnational Litigation (West Pub.), Law and Governance in an enlarged European Union (co-editor Pistor, Hart Pub.), Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects (co-editor Lindseth, Oxford Univ.), and Cases and Materials on European Union Law (co-authors Goebel, Davey & Fox, West Pub.). He is a visiting member of the law faculties of the Universities of Paris I and II, the Collège d’Europe (Bruges, Belgium) and the Institut des Sciences Politiques (Sciences Po) in Paris.

Professor Bermann is currently President of the Académie internationale de droit comparé (based in Paris) and Co-editor-in-chief of the American Journal of Comparative Law. He founded and is chair of the executive editorial board of the Columbia Journal of European Law. He has served throughout his academic career as an expert on foreign law in U.S. courts and international arbitral tribunals. He is currently Chief Reporter of the American Law Institute’s new Restatement of the U.S. Law of International Commercial Arbitration.

Andrea Carlevaris is Secretary General of the ICC International Court of Arbitration and Director of the ICC Dispute Resolution Services since September 2012. Before joining the ICC, Mr Carlevaris was a partner in the Rome office of Bonelli Erede Pappalardo. His practice covered international arbitration, public international law, conflicts of law and international civil procedure. Mr Carlevaris was a member of the ICC International Court of Arbitration and of the ICC Commission on Arbitration. Prior to joining Bonelli Erede Pappalardo, Mr Carlevaris was counsel at the Secretariat of the ICC International Court of Arbitration. He is a member of the Council of the ICC Institute of World
ABOUT THE CONTRIBUTORS

Business Law, the Steering Committee of the International Arbitration Commission of the Union international des Avocats (UIA), the Board of Directors of the Italian Association for Arbitration (AIA), the Board of Directors of the International Mediation Institute (IMI) and the Advisory Board to the European Federation for Investment Law and Arbitration (EFILA). He is one of the founders of the Italian Forum on International Arbitration and ADR (ArbIt). Mr Carlevaris is the author of numerous publications on public international law, conflicts of law and international arbitration, including a monograph on interim measures in international arbitration. He is a member of the editorial boards of several law reviews, including the ICC Dispute Resolution Bulletin, Diritto del commercio internazionale, Rivista dell'arbitrato and Giustizia civile.

Giuditta Cordero-Moss Dr. juris (Oslo), PhD (Moscow), is professor at the University of Oslo. She teaches and researches primarily Norwegian and Comparative Law of Obligations, International Commercial Law, International Commercial Arbitration and Private International Law. Originally an Italian lawyer, she practiced the law of international contracts for nearly 20 years in the areas of commercial and industrial cooperation, financing, international litigation and transactions, primarily in Russia and the former Soviet Union. In 2003 she joined the Oslo University full time, where she was Director of the Department for Private Law in the period 2012-2015. She has published numerous books and articles in Norway and internationally, and is often invited to lecture at universities and organisations, including the Hague Academy of International Law, with a series of lectures on Party Autonomy in International Commercial Arbitration (2014). She acts as an advisor and as an arbitrator in her areas of expertise (since 2002). Since 2007 she is a judge at the Administrative Tribunal, European Bank for Reconstruction and Development. Since 2007 she is the delegate for Norway at the UNCITRAL Working Group on Arbitration. In 2014 she was appointed to be Vice Chairman of the Board of the Financial Supervisory Authority of Norway. In 2015 she was appointed to be member of the Norwegian Tariff Board. In 2016 she was appointed to be member of the Norwegian Academy of Science and Letters.

Kevin Davis is Vice Dean and Beller Family Professor of Business Law at New York University School of Law. He teaches courses on Contracts, Secured Transactions, Regulation of Foreign Corrupt Practices, Financing Development, and Law and Development. His
About the Contributors

current research focuses on contract law, transnational anti-corruption law, and quantitative measures of the performance of legal institutions. He holds a B.A. in Economics from McGill University, an LL.B. from the University of Toronto, and an LL.M. from Columbia University. He joined New York University in 2004. Prior to that he was a tenured member of the Faculty of Law at the University of Toronto, an associate in the Toronto office of Torys, and a Law Clerk to Justice John Sopinka of the Supreme Court of Canada. He has also held visiting positions at the University of Southern California, Cambridge University’s Clare Hall, and the University of the West Indies.

Filip De Ly is Professor of Law at Erasmus School of Law in Rotterdam and Program Director of its post-graduate LL.M. Arbitration & Business Law. He is co-author (with Marcel Fontaine) of Drafting International Contracts, An Analysis of Contract Clauses. He chairs the International Commercial Arbitration Committee of the International Law Association and is a member of the Arbitration Commission of the ICC, a board member of the Netherlands Arbitration Institute and a Council Member of the ICC Institute of World Business Law. Filip De Ly studied at Ghent Law School (Belgium) and obtained an LL.M. degree from Harvard Law School in 1983. He has worked for the US-law firm Cleary, Gottlieb, Steen & Hamilton in Brussels (1983-1986). He is frequently retained as arbitrator in international commercial arbitrations.

Domenico Di Pietro practises international arbitration with Freshfields Bruckhaus Deringer in Italy and in Japan after several years in England. His focus is on commercial and investment arbitration even though he has also acted in sports arbitrations at the Olympics. He is a founding member of Arblt, the Italian Forum for Arbitration and ADR as well as a Freeman of the Worshipful Company of Arbitrators of the City of London. He is a member of the ICC Institute of World Business Law as well as a member of the ICC Commission on Arbitration and ADR. He lectures on International Arbitration at Roma Tre University and is a past Fellow of NYU School of Law. Mr. Di Pietro has published extensively on all areas of his professional practice. He is qualified in Italy and in England and Wales.

Diego P. Fernández Arroyo is a Professor at Sciences Po Law School in Paris. He teaches subjects related to international dispute resolution, arbitration, conflict of laws, comparative law, and global governance,
ABOUT THE CONTRIBUTORS

and he is co-director of the Global Governance Studies Program. Prof. Fernández Arroyo is a member of the Curatorium of the Hague Academy of International Law, a former President of the American Association of Private International Law (ASADIP), and the current Secretary-General of the International Academy of Comparative Law. A former Professor at the Universities of Salamanca and Complutense of Madrid, he has been awarded with Honorary Professorates by the Universities of Buenos Aires and National of Cordoba. He has been invited to a number of Universities of Europe, the Americas, Asia and Australia and has been a Global Professor of NYU (2013/2015). Prof. Fernández Arroyo is also a member of the Argentinean Delegation before UNCITRAL (Working Group on Arbitration) since 2003. He has represented Argentina and ASADIP before the Hague Conference of Private International Law, the Organization of American States and the UNIDROIT, as well. Prof. Fernández Arroyo is actively involved in the practice of international arbitration as an independent arbitrator and an expert. He has developed several projects in the field of arbitration and international business law for the European Union, the Andean Community, the MERCOSUR, and the Latin-American Integration Association. He has published several books and a number of articles and notes in publications of more than 20 countries.

Inka Hanefeld is Founder and Managing Partner of Hanefeld Rechtsanwälte, a law firm specialized in dispute resolution based in Hamburg/Germany. She primarily acts as arbitrator and counsel in major domestic and international arbitration proceedings in the fields of international trade, industrial plant and machine building, energy, and post-M&A disputes. The firm’s and Ms. Hanefeld’s expertise has been recognized in various international rankings, including “GAR100 – selected firm 2016.” Ms. Hanefeld was nominated by the Federal Republic of Germany for the ICSID list of arbitrators in 2013. In June 2015, she was appointed Vice-President of the ICC International Court of Arbitration. Moreover, she is a member of the London Court of Arbitration.

Ms. Hanefeld worked for many years in the dispute resolution department of a large international law firm in Vienna, New York, Frankfurt, and Hamburg before establishing her own private practice in 2005. She holds a Master of Laws in International Legal Studies (LL.M.) from New York University School of Law and is admitted to the German and New York Bar. Her working languages are English and German. In
ABOUT THE CONTRIBUTORS

2012 and 2016, Ms. Hanefeld was a scholar-in-residence at New York University School of Law.

Helen Hershkoff joined the NYU School of Law faculty in 1995 following an acclaimed career as a public interest lawyer at the American Civil Liberties Union and the Legal Aid Society, where she litigated cutting-edge cases involving institutional reform and individual rights. At NYU, her scholarship and teaching focus on procedure and issues of economic justice. She is a co-author of the leading casebook on civil procedure, a co-editor of an admired book on comparative civil procedure, and a member of the author team of the “Wright & Miller” treatise focusing on the United States as a party. Ms. Hershkoff also writes about state constitutions and the relation between private law and public law, and has been published in Harvard, Stanford, NYU, and other leading law reviews. Ms. Hershkoff is a highly respected teacher; she was honored with the NYU 2014–2015 Distinguished Teaching Award, recognized by the Association of American Law Schools as a 2013 Teacher of the Year, and a recipient of the Law School’s 2013 Podell Distinguished Teaching Award. Hershkoff earned her BA from Harvard College, where she was elected to Phi Beta Kappa in her junior year, holds an MA in modern history from Oxford University, which she attended as a Marshall Scholar, and a JD from Harvard Law School. She graduated from Erasmus Hall High School in Brooklyn, NY.

Brian King is a Partner in the International Arbitration Group at Freshfields Bruckhaus Deringer US LLP, where his practice focuses on acting as counsel or arbitrator in major investment and commercial arbitrations. He also teaches investment arbitration as an Adjunct Professor at the N.Y.U. School of Law. Brian practiced with Freshfields in Europe for eight years before returning to New York in 2007. He has acted as counsel in some of the largest investment arbitrations to date, including the successful defense of the Republic of Turkey in a series of ICSID arbitrations involving multi-billion-dollar claims, and the prosecution of precedent-setting claims for ConocoPhillips arising out of Venezuela’s expropriation of three major oil projects owned by the company. Prior to joining Freshfields, Mr. King worked at U.S. and Dutch law firms, and served for two years as a legal advisor at the Iran-U.S. Claims Tribunal in The Hague. He received his A.B. degree from Princeton University, summa cum laude, in 1985, and his law degree from N.Y.U. in 1990. Following law school, he clerked in the District
ABOUT THE CONTRIBUTORS

Court for the Southern District of New York and in the Court of Appeals for the D.C. Circuit.

Stefan Kröll is an independent arbitrator in Cologne and an honorary Professor at Bucerius Law School in Hamburg. He is one of the Directors of the Willem C. Vis Arbitration Moot Court and Germany’s national Correspondent to UNCITRAL for arbitration. In addition, he is a Visiting Professor at the School of International Arbitration at CCLS (Queen Mary, University of London) and has acted as an advisor and consultant for the relevant organisations of the German Government (GIZ, IRZ) and USAID in various countries. He has been a Visiting Fellow at NYU School of Law (March 2012) and Cambridge University (academic year 2014/2015). He has published widely in the field of international commercial arbitration and commercial law, including the books “Comparative International Commercial Arbitration” (co-authored with Lew/Mistelis), “Arbitration in Germany – The Model Law in Practice” (co-editor with Böckstiegel/Nacimiento) and “Conflict of Law in Arbitration” (co-editor with Ferrari). In addition he has published over 50 articles in referred journals or chapters in books on the topic of arbitration.

Luca Radicati di Brozolo holds the chair of Private International Law at the Catholic University of Milan, where he also teaches Law of International Arbitration and Transnational Commercial Law. He is the author of five books and over 150 scholarly articles on different topics on arbitration, public and private international law, European Union law and antitrust law, and is a co-editor of the leading Italian commentary of the law of arbitration. He has held positions in various foreign universities, and in 2003 held a special course on international arbitration in the private international law session at the Hague Academy of International Law where he will hold the General Course in Private International Law in 2018.

Mr. Radicati di Brozolo is also a prominent attorney. After practicing in a variety of areas for many years as a partner in two of the major Italian firms, he became the Founding Partner of the arbitration and litigation boutique ArbLit – Radicati di Brozolo Sabatini Benedettelli and a Door Tenant at Fountain Court Chambers in London. His practice now focuses primarily on international arbitration as counsel, presiding, party-appointed and sole arbitrator and expert, in proceedings under the main arbitration rules and involving a broad array of issues. He has
significant experience in investor-State arbitration, and appears in court litigation in arbitration-related cases and cases raising issues of international and competition law.

He is on the ICSID Panel of Arbitrators appointed by Italy and is a member of the Court of the LCIA as well as member of the American Law Institute, Consultative Group on the Restatement (Third), International Commercial Arbitration and Co-chair of the Joint Working Group of the Competition and Arbitration Committees of the ICC Arbitration Commission on Antitrust Follow-on Actions. He is a former member of the ICC International Court of Arbitration and former Vice-Chair of the IBA Arbitration Committee, a member and former rapporteur of the Committee on International Commercial Arbitration of the International Law Association.

Francesca Ragno is Aggregate Professor of International Law (professore aggregato) at the School of Law of Verona University, where she teaches private international law and international arbitration. She graduated in Law (J.D.) with honors at the University of Bologna and obtained her PhD degree in European Private Law of Economic Relations from the University of Verona. Throughout her career she spent several research stays abroad, including at the University of Hamburg, University of Heidelberg and NYU. Her teaching and scholarship span international litigation, international commercial arbitration, conflict of laws, European contract law and international sales law. She regularly lectures and publishes in Italian, English and German. She is member of the Bologna bar.

Friedrich Jakob Rosenfeld practices arbitration and public international law with Hanefeld Rechtsanwälte in Hamburg, Germany. He is also Global Adjunct Professor at NYU Law in Paris, Visiting Professor at the International Hellenic University in Thessaloniki and Lecturer at Bucerius Law School in Hamburg. In 2014, he was appointed Global Hauser Fellow from Practice & Government at NYU School of Law. Prior to joining his current firm, Mr. Rosenfeld worked as consultant for the United Nations Assistance to the Khmer Rouge Trials in Cambodia. He studied at Bucerius Law School in Hamburg and Columbia Law School in New York and holds a PhD in public international law (summa cum laude).
ABOUT THE CONTRIBUTORS

Maxi Scherer (PhD (Sorbonne), LLM (Cologne), MA (Sorbonne)) is a full-time tenured faculty member at Queen Mary, University of London and a Special Counsel at Wilmer Cutler Pickering Hale and Dorr LLP in London. She has extensive experience with arbitral practice both in civil and common law systems. She has represented and advised clients in over 50 international arbitrations proceedings and has served as arbitrator in over 30 ad hoc and institutional arbitrations (ICC, LCIA, HKIAC, DIS etc), including as sole arbitrator, co-arbitrator, presiding arbitrator and emergency arbitrator. Ms. Scherer is admitted to the bar in Paris (France) and as solicitor (England and Wales) and has been regularly ranked by Who's Who Legal, The Legal 500 UK etc. as a leading arbitration practitioner. She publishes extensively in the field of international arbitration, and is the General Editor of the Journal of International Arbitration (Wolters Kluwer). Other academic appointments include Global Professor at New York University (NYU) Law School Paris, Visiting Professor at Sciences Po Law School Paris, Adjunct Professor at the Georgetown Centre of Transnational Legal Studies, as well as visiting positions at Bucerius Law School Hamburg, University of Melbourne, Freie Universität Berlin, Sorbonne Law School, Université de Versailles, Université de Fribourg Switzerland, Universität Würzburg, Pepperdine Law School, Universität Basel and Université de Paris X Nanterre.

Linda J. Silberman is the Martin Lipton Professor of Law at New York University and Co-Director of the Center for Transnational Litigation, Arbitration and Commercial Law. She is a leading figure in the United States in private international law and transnational litigation, and her academic and scholarly interests range from numerous areas of commercial law to personal and family matters. At NYU, Professor Silberman teaches a range of courses, including Civil Procedure, Comparative Procedure, Conflict of Laws, International Litigation/Arbitration and International Commercial Arbitration. She is co-author of an important Civil Procedure casebook (now in its 4th edition) and of a recent book on Comparative Civil Procedure. She was the co-Reporter for the American Law Institute Project—Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, and is an Adviser on three other American Law Institute projects: Restatement (Fourth) of Foreign Relations Law, Restatement (Third) of Conflict of Laws, and Restatement (Third) of U.S. Law of International Commercial Arbitration.
ABOUT THE CONTRIBUTORS

Professor Silberman is also a Member of the State Department’s Advisory Committee on Private International Law and has been a member of numerous U.S. State Department delegations to the Hague Conference. Professor Silberman combines her scholarship and academic work with other roles, such as special referee, expert witness and consultant in a number of important cases. Her work was cited by the Supreme Court of the United States on several occasions.

Nathan Yaffe is a student at New York University School of Law (JD expected, 2017). He is a Furman Scholar and member of the Institute for International Law and Justice Scholars program. He serves as chief student editor for the American Journal of International Law.
Preface

Courts and commentators have often stated that in arbitration “party autonomy is everything.” In effect, where the adjudicative power does not rest on party autonomy, there is no arbitration. But the papers published in this book, which were presented at a conference hosted by NYU’s Center for Transnational Litigation, Arbitration and Commercial Law that took place in September 2015, show that while party autonomy may trigger everything, meaning the steps necessary for one to be able to speak of arbitration, it is not itself everything. Party autonomy is limited, as the papers published here clearly show. As soon as the arbitration proceedings are initiated, the parties lose at least part of their autonomy, and the issue arises of who really owns the arbitration proceedings. The further the arbitration proceeds, the more limits party autonomy encounters.

This does not mean, however, that prior to the arbitration proceedings being initiated party autonomy does not encounter any limitations. It just means that for them to become apparent, proceedings concerning the arbitration agreement must be commenced, and for the purpose of highlighting these limitations it may well not matter whether the proceedings are state court proceedings or arbitral proceedings. All arbitration agreements contain intrinsic limitations. This is also why the best thing that can happen to an arbitration agreement as the main expression of party autonomy is the absence of a dispute between the parties, since whatever dispute may arise in connection to the agreement, it will evidence some of the limitations.

But what are the reasons for the existence of these limitations? As the papers show, these limitations are due to the number and variety of stakeholders, who range from the parties themselves, the arbitrators, the arbitral institutions, and, last but not least, the public at large.

As regards the parties themselves, one may, to give just one example referred to in the papers, think of parties to an arbitration agreement who have unequal bargaining power. Should the agreement be upheld despite this inequality? And what about an agreement to which an institutionally weaker party is party?

As for the arbitrators, limitations to party autonomy arise, inter alia, out of the fact that arbitrators agree to act as arbitrators on the basis of the arbitration agreement, and all the rules applicable to the arbitration arising therefrom, thus limiting, from a contract law point of view, the parties’ possibility to modify the arbitration agreement ex post. In effect,
once an arbitrator has accepted to act as arbitrator on the basis of the arbitration agreement, the arbitration agreement cannot be changed solely by the parties, at least not in respect of terms that do not have an impact exclusively on the parties, since the arbitrator contract implicitly incorporates the terms of the arbitration agreement.

From the papers one can also gather that arbitral institutions, too, have an interest in the arbitration process following certain rules, which may on occasion impose limitations to party autonomy. To give just one of the many examples referred to in one of the papers, parties cannot opt out of the fee schedule nor can they do away with the scrutiny of the award by the arbitral institution administering the arbitration, at least where the administering institution is the ICC.

But the public at large also has an interest in limitations to party autonomy, to the extent that the absence of any limitations can harm the arbitration process as such and lead to arbitration no longer being a viable alternative to State court litigation.

And it may well be worth reading the papers published in this book through the lens of the question of whether a certain limitation is due to the specific interests of one or the other stakeholder, to determine, among others, whether those interests can be promoted other than by limiting party autonomy, since party autonomy remains, despite the limitations highlighted in this book, the cornerstone of arbitration.

Franco Ferrari

New York, June 2016
INTRODUCTION

The relationship between the arbitration agreement and the parties’ pleadings on one hand and, on the other hand, the powers of the arbitral tribunal, reveals mutual limitations. These, in turn, reflect the tension between the centrality of the will of the parties in arbitration, and the necessity to act within the framework set by national laws and international conventions, if the enforceability of the arbitral award is to be preserved. The parties may have chosen a certain law in the contract, may have made a certain legal argument or invoked a certain fact in their pleadings, and yet the award may end up being based on another law, another legal theory, another fact. This is not only interesting from a theoretical point of view, but also has significance in practice, as the anecdotal experience mentioned below may illustrate.

When I started acting as an arbitrator, back at the beginning of the millennium, I sometimes had to act in disputes where the respondent did not appear. I was well aware of the central role that party autonomy plays in arbitration: the parties’ pleadings set the foundation and the limits for the arbitral powers. The arbitrator has to follow the parties’ instructions and may not exceed the scope of power granted to it by the parties. Excess of power exposes the risk of the award being set aside by the courts of origin or refused enforcement by the courts of enforcement. However, the respondent’s failure to participate deprived the proceeding of that party’s point of view, and I did not have the benefit of counterarguments regarding the facts or the legal arguments invoked by the claimant. This raised a question: if the will of the parties is the only foundation upon which an arbitrator may act, does it mean that the
arbitrator’s role is to choose between the claimant’s and the respondent’s arguments? Does this in turn mean that, when no counterarguments are submitted, the arbitrator has to accept the claimant’s arguments? Arbitration laws or arbitration rules often specify that failure by a party to participate does not imply admission of the other party’s submissions. Therefore, the arbitral tribunal may independently evaluate the submissions of the appearing party. Also, the arbitral tribunal has the possibility to ask for clarification and additional material. But how far may the arbitrator go in his or her independent evaluation of the parties’ pleadings, without running the risk of stepping out of the scope of power that was granted by the parties or of breaching another important principle of arbitration: the adversarial principle, according to which each party must be given the possibility to be heard?

Another recurring situation was when the disputed contract contained the choice of a certain law, thus seemingly excluding application of other laws. During the pleadings, however, one of the parties invoked certain rules of laws different from the law chosen in the contract. Again, I was well aware of the role of the parties’ will in arbitration: the arbitration agreement (including a choice of law-clause) constitutes the basis for the tribunal’s jurisdiction and the arbitral tribunal cannot render a decision that exceeds that power, lest the award be deemed invalid or unenforceable. But does this principle go so far as to force an arbitral tribunal to render an award that violates fundamental principles of a closely connected law, of the law of the place of arbitration, or of the law of the place of enforcement? This would expose the award to the risk of being set aside or refused enforcement for breach of public policy. Does the legal system provide any tools to permit rendering an award that does not exceed the tribunal’s power, but does not violate fundamental principles that the contract had intended to disregard?

Further potential conflicts between the tribunal’s jurisdiction and the parties’ instructions arise when it is not always clear where to draw the line between, on one hand, full application of the applicable sources relied on by the parties and, on the other hand, introduction of new elements by the arbitral tribunal. As I have noted elsewhere, contracts are not self-sufficient, not even when they are seemingly exhaustive\(^1\) or when they, by referring to transnational rules of law, try to avoid being

\(^1\) G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, (Cambridge University Press, 2014), 80-133.
subject to a domestic law. The applicable law will have an impact on the interpretation and application of the contract: For example, the enforceability of the contract’s provisions assumes that they do not violate mandatory rules of the applicable law; the applicable law may add ancillary obligations to those arising out of the contract’s provisions; the applicable law will decide to what extent the wording of the contract may be interpreted literally. A contract (particularly if it contains a choice of law clause) will have to be interpreted and construed in light of the applicable law in all these respects. This may be difficult to reconcile with other contract clauses that may reveal the parties’ ambition to exclude any external influence on the contract (arguably, also to exclude the applicable law’s influence), such as an Entire Agreement clause.

Also, this may be difficult to reconcile with other boilerplate clauses that may be inserted into the contract without having been adapted to the governing law.

The first consideration that comes to mind is that this is a question of interpreting or construing a contract, and therefore it is up to the arbitral tribunal’s discretion to interpret and construe the contract and to apply the governing law. Any contract interpretation or application of the law will be a matter of the dispute’s merits and will have no bearing on the award’s validity or enforceability, quite irrespective of whether the interpretation or application is correct or wrong. However, when the arbitrator’s independent evaluation of the legal pleadings is based on sources or arguments that were not submitted by the parties, the risk arises of violating the adversarial principle. This requires that the parties shall be given the possibility to present their case and to comment on the elements that are used by the arbitrator as a basis for the decision. Again, the question presents itself: how far may the arbitrator go in determining the legal argumentation without running the risk of exceeding its power or violating the adversarial principle?

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2 G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, 27-79.
3 A typical wording for an Entire Agreement clause is: “This Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.”
LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

As I was acting as an arbitrator in a variety of countries and under the rules of various arbitration institutions, as well as in ad hoc arbitration and even in an investment arbitration, it became clear that further consideration was necessary to identify which sources are relevant. On the one hand, the procedural aspects of arbitration are to a large extent a matter of national law, and there may also be differences among the various applicable arbitration rules of the chosen institution or the ad hoc rules. However, arbitration is also an international phenomenon and its regulation is largely unified by international conventions, as well as harmonised by soft law and international practice. Moreover, the ultimate borders for the arbitral tribunal’s conduct are given by the rules on validity and enforceability of the awards. The latter are unified by the New York Convention, and the former are, for the most part, harmonised and aligned to the criteria of the New York Convention. Would it be possible, on this basis, to develop some guidelines that are applicable to arbitral proceedings, irrespective of the arbitration rules and arbitration law they are subject to?

Having highlighted how practically relevant these questions are, I will present below some considerations on how far the arbitral tribunal’s power goes when it comes to assessing the legal basis for the award independently of the arbitration agreement or the parties’ pleadings – a question that is often formulated with reference to the maxim *jura novit curia*: does it apply in arbitration?

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THE ARBITRAL TRIBUNAL’S POWER IN RESPECT OF THE PARTIES’ PLEADINGS AS A LIMIT TO PARTY AUTONOMY

I. LEGAL FRAMEWORK

As known, the scope of the arbitral tribunal’s authority is determined by the parties. Suffice it here to refer to the General Principle formulated by the International Law Association Committee on International Commercial Arbitration in its Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration: “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”. In other words, the parties’ instructions – understood as a combination of the arbitration agreement and the parties’ pleadings – determine the scope of the arbitral tribunal’s power, i.e. its jurisdiction. Under some circumstances, this starting point may need some specification or adjustment, as the examples made in the introduction show. In this section, I will give an overview of the rules that constitute the legal framework for understanding the relationship between parties’ instructions and tribunal’s powers.

A. Sources

Arbitration is regulated in three layers of sources that to a large extent create a circular hierarchy: at the bottom is the first layer, the arbitration agreement – which, in the case of investment arbitration, may be replaced by the applicable instrument containing the host State’s offer to arbitrate, such as a Bilateral Investment Treaty (BIT) or an Act on foreign investment. The arbitration agreement can be extended by the parties’ reference to arbitration rules, which create the second layer. If the parties have chosen institutional arbitration, the applicable arbitration rules are those issued by the chosen institution, such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA). If the parties have chosen ad hoc arbitration, they may have compiled their own arbitration rules, or they may have made reference to the UNCITRAL Arbitration Rules of 1976,

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revised in 2010. In treaty-based arbitration, if the claimant has chosen arbitration under the framework of a treaty, the relevant rules will be applicable (such as the International Centre for Settlement of Investment Disputes (ICSID) Rules). Arbitration rules may be considered an extension of the arbitration agreement: the parties’ reference to these rules has the effect of incorporating the arbitration rules into the arbitration agreement. Arbitration rules have, therefore, the same status as a contract and may not derogate from the mandatory rules of the applicable arbitration law. Arbitration law is the third layer of regulation and consists of state arbitration acts or other state sources, as well as international conventions. Arbitration law is quite heterogeneous since it extends from the uniform regulation contained in international conventions (of which the most notable for commercial arbitration is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), via the harmonising, but not binding 1985 UNCITRAL Model Law on International Commercial Arbitration (revised in 2006), to the arbitration law prevailing in each country.

In treaty-based arbitration, the arbitration law is given by the relevant treaty, such as the 1966 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States—the ICSID. Arbitration law does not, as a general rule, contain a specific regulation on the procedure to be followed in an arbitral proceeding, beyond principles corresponding to those regulated in the arbitration rules.

The circularity among these three layers of sources results from the fact that the formally highest layer, arbitration law, often provides for the primacy of the parties’ agreement (and, by extension, of the arbitration rules), thus putting at the top of the hierarchy the source that is formally at the bottom. This means that our investigation will have to primarily concentrate on arbitration agreements and arbitration rules that are more detailed than arbitration laws, on the conduct to be followed by the arbitral tribunal (section 2.2). The third layer, arbitration law and conventions, becomes relevant especially in connection with the validity and enforceability of the award, thus giving the mandatory borders for the tribunal’s conduct (section 2.3).

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7 At the time of writing, the UNCITRAL Model Law has been adopted in 69 states, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html, last accessed 10 June 2015.
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B. Conduct of the Proceedings

Generally, the extent to which the arbitral tribunal is bound by the parties’ pleadings and legal arguments is not specifically regulated in the arbitration rules. There are, however, several rules that could be deemed relevant to the subject matter:

1. Party’s Default

Often arbitration rules and arbitration laws provide that the arbitral proceeding may be initiated and may continue in spite of the failure by one party to participate: Once the arbitral jurisdiction is established, a party may not, by failing to contribute to it, prevent the arbitral proceeding from continuing 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?

2. Adverse Inferences

Some arbitration rules and some arbitration laws specify that failure by one party to appear shall not be seen as an admission of the

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8 ICC Rules articles 5(2), 23(3) and 26(2); LCIA Rules article 15(8); SCC Rules article 30(2); UNCITRAL Rules article 30; ICSID Rules article 42.
9 English Arbitration Act section 17, 41(4); Swedish Arbitration Act section 24; UNCITRAL Model Law article 25.
10 In a commercial dispute, the jurisdiction is established by the arbitral agreement; see the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral 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, which is deemed as accepted by the foreign investor by initiating the arbitration: see, for example, article 26(5) of the Energy Charter Treaty. More generally, see J. Paulsson, Arbitration without privity, in the ICSID Review, FOREIGN INVESTMENT LAW JOURNAL 10 (1995), 232.
11 UNCITRAL Rules article 30(1)(b), ICSID Rules article 42(3).
12 UNCITRAL Model Law article 25(b).
other party’s assertions. Other arbitration rules or arbitration laws are silent on the matter or permit the tribunal to draw inferences it deems appropriate. This does not usually prevent the tribunal from drawing adverse inferences regarding the defaulting party, if this is deemed appropriate under the circumstances. The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration of 2010, a widely accepted guide containing procedural suggestions to enhance efficiency in arbitral proceedings, affirm in articles 9(5) and 9(6) that the tribunal may draw inferences that are 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.

This does not completely 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 participating party’s pleadings as they were presented if it is convinced of their soundness. Conversely, that the tribunal may draw adverse inferences does not mean 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 to provide a standard set of principles for transnational disputes as a basis for future initiatives in reforming civil procedure, and aspiring to also be applicable to arbitration, contain some guidelines in respect of the eventuality that

13 SCC Rules article 30(3).
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A default judgment 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 court that is rendering a default judgment to determine on its own initiative the following aspects: its jurisdiction, compliance with notice provisions, and 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 17.3.15

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.

3. Additional Information

Often arbitration rules16 and arbitration laws17 permit the tribunal to request that the parties present additional documentation and clarification, to take the initiative to appoint an expert, and to proceed to inspections, etc.

The possibility of requesting additional clarification is consistent with the tribunal’s independent evaluation of the participating party’s pleadings as described in section 2.2.2 above. However, the power to request additional clarification is not limited to situations where one party fails to appear and the tribunal needs further information to evaluate the other party’s pleadings. This power applies in general, even if both parties participate in the proceedings and have presented their respective cases in full.

15 See Comment P-17B, UNIFORM LAW REVIEW 9 (2004-4), 792.
16 ICC Rules article 25(5); LCIA Rules 21(1), 22(1)(iii) and 22(1)(v); SCC Arbitration Rules article 24(3); UNCITRAL Rules article 27(3); and ICSID Rules articles 34(2) and 42(4). The same is true for the Ali/UNIDROIT Principles, see the Comment P-15D on article 15.3.3, UNIFORM LAW REVIEW 9 (2004-4), 785f.
17 English Arbitration Act section 37.
The possibility of requesting 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: The tribunal may ask for additional documentation and clarification in order to better convince itself of the correctness or relevance of the statements made by the parties. May the tribunal ask for additional information also to investigate facts that were not mentioned by the parties, to apply sources that the parties had not invoked, or to order remedies that the parties have not requested?

4. Burden of Proof

Some arbitration rules expressly state 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.

This principle may appear to contradict the two rules mentioned under sections 2.2.2 and 2.2.3 above. If the party with the burden of proof does not present sufficient evidence (because it fails to appear, or otherwise), the facts it invokes may not be considered as 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 of investigating 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.

5. Impartiality

Often arbitration rules and arbitration laws specify that the arbitral tribunal shall act impartially. This is a fundamental principle of

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18 For an analysis see P. Landolt, Arbitrators’ Initiatives to Obtain Factual and Legal Evidence, ARBITRATION INTERNATIONAL 2012, 173-223.
19 UNCITRAL Rules article 27(1).
20 ICC Rules article 22(4); LCIA Rules article 14(4)(i); SCC Rules article 19(2); UNCITRAL Rules article 11; and ICSID Rules article 6.
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due process that must be deemed to apply even if the rules do not specifically express it.\(^\text{22}\)

If the tribunal, on its own initiative, verifies the soundness of one party’s pleadings or requests additional information as described in sections 2.2.2 and 2.2.3 above, does it act impartially? It could be argued that the tribunal by so doing, acts on behalf of the party that did not appear or failed to properly contest the pleadings, and therefore is in breach of both the rule on burden of proof, and its duty to act impartially. However, it seems legitimate to affirm that the tribunal, by acting \textit{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 as 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.

6. Fair Hearing

Often arbitration rules\(^\text{23}\) and arbitration laws\(^\text{24}\) provide that the arbitral tribunal shall grant a fair hearing to all parties. 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. This principle, also known as the adversarial principle, is a fundamental part of the due process, as will be seen in the next section.

If the tribunal’s own evaluation has deprived one or more parties of the chance to respond on certain matters, such that the tribunal decides on the basis of elements the parties had no opportunity to challenge, the adversarial 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 made therefrom by the tribunal? Does the right to be heard

\(^{21}\) English Arbitration Act section 1(a); Swedish Arbitration Act articles 8 and 21; Swiss Private International Law Act article 182(3).


\(^{23}\) ICC Rules article 22(4); LCIA Rules 14(4)(i); SCC Rules article 19(2); and UNCITRAL Rules 17(1) and 27(3).

\(^{24}\) English Arbitration Act section 1(a); Swedish Arbitration Act article 34; Swiss Private International Law Act article 182(3); UNCITRAL Model Law article 18.
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also extend 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, so-called jura novit curia. To what extent this approach may collide with the adversarial principle is not clarified in the arbitration rules or acts.

C. Validity and Enforceability of the Award

While the arbitral procedure is not regulated in detail by arbitration law, the validity and enforceability of arbitral awards are. Some of the principles that we have seen in section 2.2 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; in the case of ICSID arbitration, the annulment is regulated by the ICSID Convention) and the possibility of refusing the recognition or enforcement of the award by the courts in the enforcement country (uniformly regulated by the New York Convention; in the case of ICSID arbitration, enforcement is regulated by the ICSID Convention).

To the extent that the applicable arbitration rules leave a certain amount of 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. The grounds for setting aside or refusing to enforce an award are usually interpreted restrictively. In particular, the courts do not have the jurisdiction to review the award in terms of the merits. This means that an error in the tribunal’s interpretation of the contract, evaluation of the evidence or application of the law may not lead to invalidity or unenforceability of the award.25

25 The validity of an award is regulated by national arbitration law; it cannot, therefore, be excluded that some countries provide for a 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 an error in the merits or in the application of the law; the same is true for English law (Arbitration Act, sections 67 and 68: The possibility of an English court reviewing an award for an error in (English) law, contained in section 69, has been significantly limited since the Arbitration Act of 1979), Swedish law (Arbitration Act, articles 33 and 34) and Swiss law (Private
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Taking duly into account the restricted scope of application, the remedies examined in the sections below seem to be relevant to the question of the arbitral tribunal’s power.

1. 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 according to numerous state arbitration laws,27 and unenforceable according to the New York Convention article V(1)(c).28

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 (the object) of the dispute, and not to the arguments made by the parties or the choice of law.29 As will be seen in section 3.1 below, however, under

International Law Act article 190). In the US Federal Arbitration Act, section 10(a) of chapter 1 is deemed to exhaustively list the grounds for vacating an award, and it does not mention error in law. Nevertheless, courts consider manifest disregard of the law as a basis for vacating awards. The Supreme Court considered this as shorthand for statutory grounds such as due process or excess of power (Hall Street Associates LLC v. Mattel Inc, 522 US 576 (2008)), but subsequent case law is divided on whether manifest disregard of the law is an independent ground or not. The Supreme Court recently declined to clarify the matter, see Dewan v. Walia, 544 F App’x 240 (4th Cir 2013), petition for certiorari declined on 7 April 2014.

26 The exhaustive list of grounds for refusing enforcement is set forth in article V of the New York Convention, which does not contain an error in fact or in law as grounds.

27 And may therefore be set aside by the courts of the country of origin. See the English Arbitration Act section 68(2)(b), the Swedish Arbitration Act article 34(2), the Swiss Private International Law Act article 190(2)(c), the UNCITRAL Model Law article 34(2)(a)(iii). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(b).

28 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)).

certain circumstances the remedy may be applied when the arbitral tribunal has not respected the parties’ choice of law.

2. *Fair Hearing (the Adversarial Principle)*

Both parties must have been given the chance to present their cases, otherwise the award is invalid according to numerous state arbitration laws, and unenforceable according to the New York Convention article V(1)(b).

The adversarial principle is fundamental in arbitration; however, this rule is also interpreted restrictively, so as to cover only fundamental principles of due process, such as failure to notify of the arbitral proceeding.

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

As will be seen in section 3.2, the adversarial principle is the most important obstacle to be taken into consideration by arbitral tribunals intending to assume an active role in choosing the applicable law or developing their own arguments.

3. *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 treaty), otherwise the award is invalid according to

(New York, 1958), http://newyorkconvention1958.org/, last visited 10 June 2015, does not seem to list decisions giving the provision a broader scope.

And may therefore be set aside by the courts of the country of origin. See the English Arbitration Act section 68(2)(a), the Swiss Private International Law Act article 190(2)(d), the UNCITRAL Model Law article 34(2)(a)(ii).

See G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, § 26.05(C)(3)(e).

For example, the Swedish Arbitration Act article 34(6). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(d). See C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, THE ICSID CONVENTION –A COMMENTARY, (Cambridge University Press, 2009), article 52, para. 280ff.
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numerous state arbitration laws\(^{33}\) and unenforceable according to the New York Convention article V(1)(d).

Procedural irregularity may lead to invalidity or unenforceability of an award if it seriously affects the respect for due process. This rule may cover the disregard of the mandatory rules on the applicable procedural law, but also situations where the tribunal has not acted impartially. However, its interpretation is very restrictive.\(^{34}\)

As will be seen in section 3.1.4, mandatory procedural rules of the \textit{lex arbitri} may, under some circumstances, restrict the arbitral tribunal’s ability to apply transnational sources if these have not been invoked by the parties.

II. THE ARBITRAL TRIBUNAL’S POWER

The overview above seems to exclude the fact that the tribunal is expected to act as passive umpire, limited to choosing between the submitted arguments. The arbitral tribunal has a certain scope for independent evaluation of the parties’ pleadings. It remains to see more specifically what kind of \textit{ex officio} initiatives are compatible with the ultimate borders of the arbitral authority described above: the principles of excess of power, of a fair hearing and procedural regularity. While it is only a breach of these principles that has consequences for the validity\(^{35}\) and enforceability\(^{36}\) 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 such as invalidity or unenforceability.

Within the range of the principles mentioned above, there does not seem to be a generally acknowledged understanding of how active a role

\(^{33}\) And may therefore be set aside by the courts of the country of origin. See English Arbitration Act section 68(2)(i); the Swedish Arbitration Act article 34(6); the UNCITRAL Model Law article 34(2)(a)(iv). The same rule applies to the annulment of ICSID awards, see the ICSID Convention article 52(1)(d).

\(^{34}\) See G. BORN, \textsc{International Commercial Arbitration}, § 26.05(C) (5)(c)(iv). For ICSID arbitration, see C. SCHREUER ET AL., \textsc{The ICSID Convention} article 52, para. 293ff.

\(^{35}\) Assuming that the applicable arbitration law in this respect corresponds to arbitration law in England, Sweden, Switzerland or of a UNCITRAL Model law country, or to the ICSID regulation.

\(^{36}\) In accordance with article V of the New York Convention.
the tribunal may assume. Commentators’ views range from the encouragement of an active role for the arbitral tribunal,\(^\text{37}\) to scepticism towards such a role,\(^\text{38}\) to a near exclusion thereof.\(^\text{39}\)


\(^{38}\) For example, A. Dimolista, *The raising ex officio of new issues of law*, in F. BORTOLOTTI, P. MAYER (eds.), *THE APPLICATION OF SUBSTANTIVE LAW BY INTERNATIONAL ARBITRATION*, ICC DOSSIERS, 2014, 22-30, 23; C. Kessedjian, *Principe de la contradiction et arbitrage*, REVUE DE L’ARBITRAGE 3 (1995), 381ff.; J. D.M. Lew, *Iura Novit Curia and Due Process*, Queen Mary University of London, School of Law, LEGAL STUDIES RESEARCH PAPER NO. 72/2010; N. Rubin, “*Observations*” in connection with *Swembalt AB v. Republic of Latvia*, (2004) 2 STOCKHOLM ARBITRATION REPORT, 119-127, 123ff., seems to justify an active role by the tribunal only in some contexts of public interest, such as investment arbitration; M. Schneider, *Combining arbitration with conciliation, Oil, Gas and Energy Law Intelligence* (2) (2003), 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.

\(^{39}\) For example, K. Hober, *Arbitration involving states*, in NEWMAN, HILL (eds.), *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* (Juris Net, 2004), 158, affirming that in a procedure as consensual as arbitration is, it must be up to the parties to determine the scope of the dispute both as to facts and law; see also Kaufmann-Kohler, *The arbitrator and the law*, and G.
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As the above overview shows, the arbitral tribunal may evaluate the parties’ arguments independently. This means that the arbitral tribunal may develop its own legal reasoning, may interpret the contract differently from how the parties have pleaded, may draw independent inferences from the facts proven by the parties. We can divide the matter into two main lines: the power of the arbitral tribunal to apply a law different from the law chosen by the parties (section 3.1), and the power of the arbitral tribunal to develop its own legal reasoning under the law invoked by the parties (section 3.2).

A. The Arbitral Tribunal’s Power to Independently Choose the Applicable Law

An arbitral tribunal is obliged to apply the law chosen by the parties. If the disputed contract contained a choice of law, this choice is an instruction by the parties to the tribunal, and both arbitration rules and arbitration acts direct the tribunal to apply the law chosen by the parties. This seemingly uncontroversial duty to apply the chosen law raises at least two questions: whether disregard by the arbitral tribunal of the parties’ choice constitutes an excess of power, and whether the arbitral tribunal has, under certain circumstances, the possibility to take into consideration laws different from the law chosen by the parties.

1. Excess of Tribunal’s Power or Discretion?

An excess of power is relatively easy to ascertain, as long as it relates to the object of the dispute. What is more difficult is the question regarding the applicable law. In other words, if the award relates to an object within the borders of the tribunal’s power, but the tribunal applies a law that is different from the law requested by the parties. As seen above, neither the challenge – nor the enforcement of – an arbitral award


40 ICC Rules article 21(1); LCIA Rules article 22(3); SCC Rules article 22(1); UNCITRAL Rules article 35(1); English Arbitration Act section 46(1); Swiss Private International Law Act article 187(1); UNCITRAL Model Law article 28(1); ICSID Convention article 42.
may be used as a basis for the courts to review the merits of the arbitral tribunal’s decision, including its application of the law – which in turn includes the legal reasoning made by the arbitral tribunal to choose the applicable law. It may not always be easy to determine the borderline between the review of the tribunal’s application of the law and the decision as to whether the tribunal had the authority to apply that law. The former is not within the scope of the jurisdiction of the court. The latter may be evaluated by the courts when determining whether the arbitral tribunal exceeded the power that it was granted by the parties.

An analysis of the reported cases concerning the UNCITRAL Model Law and the New York Convention shows that the defence of excess of power is seldom given effect to for the purpose of sanctioning the arbitral tribunals’ application of the law.41 To the extent that the question has been given attention, it seems that it has mainly been answered negatively, both in theory and in practice.42 However, even if it does not happen very often, it is, in principle, possible to request the annulment of an award or to resist its enforcement on the basis of the allegation that the arbitral tribunal has gone beyond its powers in connection with the choice of the applicable law. The governing law has a significant impact

42 In theory see, for example, Gaillard and Savage (eds.), Fouchard, Gaillard and Goldman on International Commercial Arbitration, available at http://www.kluwerarbitration.com/arbitration/arb/commentary/full
   text/FouchardGaillardGoldmanonInternationalCommercialArbitration/, 1700. In practice, see the Swedish Svea Court of Appeal decision CME v. Czech
   Republic, T 8735-01, RH 2003:55 (published in English in the Stockholm
   Arbitration Report [2003-2], 167ff.). The decision was rendered in connection
   with the challenge to an SCC award issued in an investment arbitration based
   on the BIT 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 an 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 an examination of the matter to be
   beyond the scope of its own jurisdiction. For a criticism of this decision, with
   further bibliographic references, see G. Cordero-Moss, International
   Commercial Contracts, 274ff.
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on the interpretation and the effects of a contract. The same contract may have dramatically different effects, depending on the governing law. The matters submitted to arbitration very much depend on the criteria that they have to be measured against. The dispute is to be solved on the basis of certain rules that have been agreed upon by the parties in the contract (or, failing such agreement, that are designated by the applicable private international law). If the tribunal applies a different law, and assuming that the two laws regulate the question in different ways, it could be considered as if the tribunal had applied a different contract. The assumptions for resolving the dispute would not be the same as those agreed upon by the parties. Therefore, the decision would be on matters different from those submitted by the parties.

Some awards administered under the ICSID Convention have been annulled under article 52 of the Convention because they have been rendered on the basis of a law different from the applicable law.

For example, in Klöckner v Cameroon, the ad hoc annulment committee determined that while the tribunal had properly identified the applicable law to the dispute, it did not apply that law and instead based its decision on a “broad equitable principle without establishing its existence in positive law.” A similar analysis was presented by the ad hoc annulment committee in Amco v Indonesia, where the issue was not the incorrect determination of the law governing the dispute, but

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43 For an extensive analysis see G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, 81-133.

44 For a similar reasoning see REDFERN, HUNTER, BLACKABY, PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, (Oxford University Press, 2009), para. 3.91 as well as the International Law Association Committee on International Commercial Arbitration, ‘International Law Association Report Ascertaining the contents of the applicable law in international commercial arbitration’, 2008, 19.


46 Klöckner v Cameroon (Klöckner) (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985, para. 79.


48 Amco v Indonesia (Amco) (ICSID Case No. ARB/81/1), Decision on Annulment, 16 May 1986.
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rather the tribunal’s failure to apply an essential provision of that law.\textsuperscript{49}

Even though these particular annulment decisions have been criticized, and some later annulments committees have created a higher threshold for annulling an award based on the application of a law that is not the applicable law,\textsuperscript{50} there is no doubt that application of the wrong law could still lead to annulment of the award on the ground that the tribunal manifestly exceeded its powers.\textsuperscript{51}

This judicial control, however, has to be based on a careful analysis of the reasons for the award to verify that the proper criteria for the exercise of the defence are met. As we will see in the following section, under certain circumstances, the arbitral tribunal’s application of a law different from the law that was chosen in the contract cannot be seen as a disregard of the parties’ choice.

2. Private International Law as a Means to Determine the Scope of the Parties’ Choice of Law

Under some circumstances the arbitral tribunal may be entitled to take into consideration a law different from the law chosen in the contract. As examined below, this may be due to the fact that the choice made in the contract does not cover the relevant area of law, or it may be because the law chosen by the parties gives effect to rules of other laws (for example, through its \textit{force majeure} principle, or through its rules on immorality or on illegality, which may extend to the violation of foreign laws). Under other circumstances, the disregard by the arbitral tribunal of

\textsuperscript{49} Ibid. at para. 23

\textsuperscript{50} See e.g. MINE v Guinea (MINE) (ICSID Case No. ARB/84/4), Decision on Annulment, 22 December 1989, para. 5.04; Amco (Resubmitted), Decision on Annulment, 17 December 1992, paras. 7.18-7.29; Wena Hotels v Egypt (Wena Hotels) (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, paras. 21-55; CDC v Seychelles (\textit{CDC}) (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005, paras. 44-47; Repsol v Petroecuador (Repsol) (ICSID Case No. ARB/01/10), Decision on Annulment, 8 January 2007, para. 38; MTD v Chile (MTD) (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007, paras. 44-48, 59-77; Soufraki v UAE (Soufraki) (ICSID Case No. ARB/02/7), Decision on Annulment, 5 June 2007, paras. 35-37, 79-114; \textit{Lucchetti v Peru} (\textit{Lucchetti}) (ICSID Case No. ARB/03/4), Decision on Annulment, 5 September 2007, para. 98.

\textsuperscript{51} C. SCHREUER ET AL., THE ICSID CONVENTION, art. 42, para. 19.
the parties’ choice may qualify as a disregard of the parties’ instructions (section 3.1.3).

Imagine a contract entered into by two competing manufacturers active in Europe for the licensing of certain technology. The transfer of technology is accompanied by a system for sharing the market between the two competitors, which violates European competition law. The contract contains a choice-of-law clause, according to which the governing law is Russian law, and an arbitration clause. We can assume that a dispute arises between the two parties, and that one of the two parties alleges that the contract is invalid because it violates European competition law. The other party replies that EU competition law is not applicable to the contract, which chose the Russian governing law specifically to avoid the applicability of EU law. Hence, it is outside of the tribunal’s power to take into consideration EU competition law.

What can the arbitral tribunal do? If it follows the contract and applies the chosen Russian law, it runs the risk of rendering an award that violates the EU public policy (EU competition law having been qualified by the CJEU as public policy in a case similar to the one illustrated here). An award that violates the public policy of the court may be set aside as invalid and is unenforceable. If the arbitral tribunal has its seat within the EU, therefore, the award runs the risk of being annulled; and if the award has to be enforced in an EU country, it runs the risk of not being enforced.

Consequently, the tribunal might be inclined to take into consideration EU competition law, thus avoiding rendering an invalid or unenforceable award. Does the arbitral tribunal run the risk of exceeding its power or incurring a procedural irregularity if it takes into consideration EU competition law, which the contract had excluded? In other words, is the arbitral tribunal forced to choose between two

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52 Case C-126/97 (Eco Swiss).
53 English Arbitration Act section 68(2)(g); Swedish Arbitration Act section 33(2); Swiss Private International Law Act article 190(2)(e); UNCITRAL Model Law article 34.2(b)(ii).
54 New York Convention article V.2(b). For a similar reasoning under US law, see the seminal decision Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985): the Supreme Court allowed arbitration of a dispute concerning (i.a.) competition law matters, pointing out that the courts would maintain their power to review application of competition law at the stage of enforcement of the award.
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grounds for invalidity or unenforceability of the award: conflict with the public policy on one hand, and excess of power or procedural irregularity on the other hand?

In my opinion, there is room for arguing that an arbitral tribunal is, under certain circumstances, not affected by the contract’s choice of law. The fact that the parties have chosen a certain governing law does not exclude the relevance of all rules of any other laws, as will be seen below.

a) Full application of the chosen law

One first situation is when the chosen law itself assumes that rules of other laws are taken into consideration. The law chosen in the contract may have a rule on illegality, allowing for the disregard of an agreement (or a choice of law) made by the parties if the agreement or choice of law leads to violation of the mandatory rules of foreign law. In this way, a tribunal taking into consideration EU competition law would not have exceeded its power. On the contrary, it would have given full application to the law chosen by the parties: the instruments to restrict the effects of the parties’ choice of law would be given precisely by the chosen law. Similarly, the chosen law may have a rule on force majeure, leading a tribunal to consider, for example, the effects of foreign rules restricting exports or imports. In our example, therefore, the arbitral tribunal may apply the chosen law and, through this law’s rule on illegality, it may take into consideration EU competition law.

A further opportunity to take into consideration laws different from the chosen law is given by the conflict rules of the private international law applicable by the tribunal; in particular by the rules regulating the

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55 For example, article 169 of the Russian Civil Code. See also article 20 of the Swiss Obligation Code and § 138 of the German BGB.
56 For a more extensive discussion on the matter, as well as further references, see F. A. Mann, Sonderanknüpfung und zwingendes Recht im internationalem Privatrecht, in FESTSSCHRIFT FÜR GÜNTER BEITZKE ZUM 70. GEBURTSTAG (Berlin, 1979), 608; L. Pålsson, Romkonventionen.Tillämping lag för avtalsförplichtelser (Stockholm: Norstedts Juridik, 1998), 123, and K. Siehr, Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht, (1988) RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, 41-102, 78ff.
57 Private international law, also known as choice of law or conflict of laws, is that branch of every state law that determines which law applies in cross-
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scope of party autonomy, by the rules permitting the direct application of
overriding mandatory rules and by the exception of public policy.

b) *Regard to the scope of party autonomy*

The parties’ power to choose the applicable law is based on a
conflict rule, so-called party autonomy, which applies to the area of
contract law. Competition law falls outside of the scope of party
autonomy. This means that the parties’ choice of law does not extend to
this area. Other areas falling outside the scope of party autonomy are, for
example, legal capacity, company law, property law and, as a general
rule, tort law. In these areas, the applicable law is determined on the
basis of connecting factors. Contracts often have implications that go
beyond the mere scope of contract law. For example, in a shareholders
agreement, the provisions that regulate the parties’ rights and obligations
towards each other have a contractual nature, but the provisions that
regulate the competence and functioning of the company’s bodies, are of
company law. These latter provisions are not subject to the law chosen
by the parties to govern the contract, but to the law applicable to
to company law matters. Even the simplest contract of sale has
implications regarding property law: whether title to the goods has
passed to the buyer or not is not a question that is subject to the law
chosen in the contract – it shall be decided under the law applicable to
property matters. If the contract has implications for competition law,
as in our example, the law chosen in the contract will apply to contract
matters. For matters of competition law, the connecting factor will be,
primarily, the place where the anti-competitive effects take place. In our
example, therefore, the arbitral tribunal will apply the chosen law on the
matters where the parties’ choice is applicable. On matters of
competition law, it may apply European competition law.

\[\text{border relationships. On the question of which private international law applies}
\text{to arbitration, see G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS,}
\text{203-209.}\]

\[58 \text{More extensively, G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL}
\text{CONTRACTS, 177-180.}\]

\[59 \text{Id., 181-184.}\]

\[60 \text{Id., 187-189.}\]
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c) Overriding mandatory rules

Another limitation to the application of the law chosen by the parties is provided by the so-called overriding mandatory rules. These are mandatory rules of substantive law that may be applied directly, quite irrespective of which law is otherwise applicable (hence the name “overriding” mandatory rules). If there is no specific conflict rule to render these rules applicable, they will be applied directly in spite of a different applicable law if they protect interests that are particularly important to a certain society and have a sufficient connection with the disputed matter – for example, rules protecting the employee or the consumer may have direct application, as do rules regulating financial markets, export-import, etc. Competition law is often considered an area with overriding mandatory rules. In our example, therefore, the parties’ choice of law will not be able to affect the applicability of EU competition law.

d) Public policy

Finally, any applicable foreign law may be refused application, and any decision may be refused enforcement, if they violate public policy in a way that is intolerable in that system. Competition law has been deemed by the CJEU to have the character of public policy. In our example, therefore, the parties’ choice of law may be restricted in respect of competition law.

Competition law is capable of triggering all restrictions to party autonomy available in private international law. More often, however, these restrictions apply individually. While the arbitral tribunal’s ability to restrict the parties’ choice of law may be seen as disturbing in a context where the parties’ will is deemed to be fundamental, applying the criteria contained in private international law ensures a degree of predictability, thus reducing the element of surprise that otherwise might accompany unexpected limitations to party autonomy.

61 Id., 191-198.
62 Id., 202-203.
63 Case C-126/97 (Eco-Swiss).
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Admittedly, questions have been raised about the relevance of private international law to arbitration. The main argument is usually that private international law is too formal and complicated, and that it may lead to results that are not expected by the parties. The ICC Rules of Arbitration were described as a landmark when, in 1998, they deleted any reference to private international law. Under article 21 of the ICC Rules of Arbitration, if the parties have not made a choice, the arbitral tribunal may freely choose the applicable rules of law directly and without applying any conflict rules. When they choose to submit a dispute to arbitration under the ICC Rules, the parties agree that the arbitral tribunal is not bound to apply any private international law. Other arbitration rules have now followed and apply the so-called voie directe: direct access to the governing law, without having to be concerned with the criteria for choice of law contained in private international law. While apparently enhancing the centrality of the parties’ will, this eagerness to do away with private international law has the undesired effect of increasing the risk of arbitrary limitations to party autonomy. As we have seen above, the arbitral tribunal may have to apply a law that was not chosen by the parties in order to avoid rendering an award that is invalid or may be refused enforcement. In the absence of private international law criteria, the arbitral tribunal’s discretion is unlimited. Private international law becomes useful when it is necessary

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64 See the International International Law Association Committee on International Commercial Arbitration, INTERNATIONAL LAW ASSOCIATION REPORT ASCERTAINING THE CONTENTS OF THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION, 2008, 4, 12. That arbitrators are not bound to apply the principles of private international law that are applicable to courts is considered to be an uncontested point by E. GAillard and J. Savage (eds.), FOuChARD, GAillard and GOLDman ON INTERNATIONAL COMMERCIAL ARBITRATION, (Kluwer Law International, 2004), 849. At the same time, arbitrators are said to be under no public duty to enforce state laws: see International Commercial Arbitration Committee, p. 20. See also L. Radicati Di BRozolo, Arbitration and Competition Law: The Position of the Courts and of Arbitrators, ARBITRATION INTERNATIONAL, 2011, 1–25, 16f.


66 The LCIA Rules article 22(3), the SCC Rules article 22(1) and the UNCITRAL Rules article 35(1) give the arbitral tribunal the authority to directly apply the substantive law that it deems appropriate, without going through the mediation of a choice of law rule.
to ascertain the scope of the choice of law made by the parties, as explained above. Excluding its applicability to arbitration for the sake of preserving predictability may turn out to be a cure worse than the disease. Today the applicability of private international law to arbitration is not uniform, and varies from the mentioned *voie directe*, via the inclusion of specific conflict rules,67 to the discretion for the arbitral tribunal to choose the private international law it deems applicable,68 and the designation of the private international law of the place of arbitration.69

3. Disregard for the Parties’ Choice Not Based on Private International Law

The private international law does not often provide a means for restricting the scope of party autonomy. As a matter of fact, the restrictions that we saw above are more the exception than the rule, and in the majority of cases, the choice of law made by the parties is not restricted by other choice-of-law rules, by overriding mandatory rules or by principles of the public policy.

As an illustration, we can assume that the parties, after having entered into a contract, renegotiate the price and enter into a new contract with the sole purpose of increasing the price. If the amendment agreement is governed by English law, the party that agreed to pay a higher price might claim, under certain circumstances, that the amendment contract is not binding because it did not contemplate any consideration in exchange for the promise to pay a higher price (the expectation of obtaining performance that the other party was already obliged to carry out according to the first contract does not normally qualify as a consideration).70 The arbitral tribunal may find this result

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67 Such as the rules on the law applicable to legal capacity or to the arbitration agreement contained in article V(1)(a) of the New York Convention, article 34(2)(a)(i) and 36(2)(a)(i) of the UNCITRAL Model Law, or the rule on the law applicable to the merits contained in article 187 of the Swiss Private International Law Act.
68 Such as the rule on the law applicable to the merits contained in article 28(2) of the UNCITRAL Model Law and section 46(3) of the English Arbitration Act.
69 See article 31 of the Norwegian Arbitration Act.
70 More extensively, see G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, 120-122.
unsatisfactory, since the expectation of the parties at the moment of entering into the second contract was clearly that the higher price should be binding. In order to avoid an unsatisfactory result, the tribunal may decide not to apply English law, but rather the law of the country where the contract is to be performed, because under such law, the increase in price would be deemed as binding.

In such a scenario, the private international law does not provide any tool with which to override the choice of law made by the parties: the subject matter is clearly within the scope of party autonomy, there are no overriding mandatory rules and there is no violation of public policy. Therefore, it is not possible to argue that the arbitral tribunal has not disregarded the contract’s choice and has simply filled in its gaps in accordance with the applicable private international law. Moreover, in our example, the law applied by the arbitral tribunal is not the law that would be applicable if the contract had not contained a choice (this law being, at least in European private international law, not the law of the place of performance, but the law of the country where the party making the characteristic performance has its place of business). The tribunal has, in other words, not used the applicable private international law to integrate or correct the contract’s choice. It has simply decided that it was more appropriate to choose a different law.

If the arbitral tribunal has applied private international law wrongly, for instance if it wrongly assumed that the English rule on consideration would be contrary to the public policy, it has incurred an error in law. As already mentioned, errors in law are not subject to judicial control under many state laws or under the New York Convention. Therefore, an award that disregards the contract’s choice of law on the basis of a wrong application of private international law may not be considered invalid or unenforceable.

If, however, the award does not make any considerations on private international law and there is no basis for assuming that disregard for the contract’s choice is due to an error in the application of choice-of-law rules or in the interpretation of the contract, then it is possible to argue that the arbitral tribunal has ignored the parties’ instructions. This may qualify as an excess of power.

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4. Application of Transnational Rules as Procedural Irregularity?

What if the arbitral tribunal decides that the English doctrine of consideration is peculiar to English law, and that in an international setting, it is not appropriate to apply a rule of a municipal law, particularly when it conflicts with the expectations of parties in international trade? The tribunal may resolve to apply a principle that is often referred to as a generally acknowledged principle within international trade — pacta sunt servanda — according to which an agreement has to be complied with irrespective of the presence of consideration. Alternatively, the tribunal could decide to apply transnational instruments of soft law such as the UNIDROIT Principles of International Commercial Contracts (UPICC), which in article 2.1.1, say that an agreement is formed by an exchange of an offer and acceptance or conclusive conduct — without the requirement of consideration. The tribunal, in this case, would have disregarded the contract’s choice of law not by applying the law of another country, but by applying generally acknowledged principles or non-authoritative transnational sources.

One of the grounds for setting aside or refusing enforcement of an arbitral award is, as seen in section 2, the violation of mandatory procedural rules of the lex arbitri. As seen above, the tribunal’s interpretation of the contract and application of law (also including the private international law) may not be reviewed by the court, irrespective of how evidently wrong they are. There is, however, one context in which it is possible to differentiate: when the arbitral tribunal disregards

72 For a discussion of two awards which did not apply a mandatory rule of the governing Swiss law see F. Perret, Resolving Conflicts between Contractual Clauses and Specific Rules of the Governing Law, in F. Bortolotti, P. Mayer (eds.), THE APPLICATION OF SUBSTANTIVE LAW BY INTERNATIONAL ARBITRATION, ICC Dossiers, 2014, 109-115, 110 f. The first award “considered that it was at liberty to purely and simply disregard the specific rule” (ibid. at 111), while the second classified the disputed matter in such a way that the mandatory rule was not applicable. In both awards the result was in line with the parties’ expectations. On the advisability to apply a legal reasoning compatible with the governing law in order to exclude application of specific mandatory rules of the same law see also K.P. Berger, To What Extent Should Arbitrators Respect Domestic Case Law?, in F. Bortolotti, P. Mayer (eds.), THE APPLICATION OF SUBSTANTIVE LAW BY INTERNATIONAL ARBITRATION, ICC Dossiers, 2014, 80-96.
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the choice of the parties and applies transnational sources. In this case, in addition to the risk of exceeding the instructions of the parties, the arbitral tribunal may have exercised powers that it might not have according to the applicable arbitration law.

Arbitration laws and arbitration rules generally permit the parties to instruct the tribunal as to what ‘rules of law’ shall be applied to the merits of the dispute. The terminology ‘rules of law’ is deemed to refer not only to a state law, but to any system of rules, including transnational rules. The terminology ‘law’, on the contrary, is deemed to refer to state laws. While the parties are at liberty to choose ‘rules of law’, the arbitral tribunal’s power to apply ‘rules of law’ is more limited. Failing a choice made by the parties, the arbitral tribunal must look at the applicable arbitration rules or arbitration law to ascertain its power.

Thus, the tribunal is empowered to apply transnational sources on its own initiative by the French Code of Civil Procedure (article 1511), by the Swiss Private International Law Act (article 187, in the French version, but not in the German or the Italian versions), as well as by the ICC Rules (article 21(1)), the LCIA Rules (article 22(3)) and SCC Rules (article 22(1)), which all make reference to ‘rules of law’. Other laws and rules, on the contrary, exclude this possibility, and assume that the tribunal applies a state law unless the parties have made reference to non-national sources: for example, the English Arbitration Act (section 46(3)), the UNCITRAL Model Law (article 28(2)) and the UNCITRAL Rules (article 35(1)).

Following this logic, arbitration rules and legislation give an arbitral tribunal the power to render three kinds of decisions: decisions in equity, which are admissible only with direction from the parties; decisions based on rules of law, including transnational sources, which only in some systems may be applied on the tribunal’s own initiative even

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73 More extensively, see G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, 299ff.
74 Generally, both arbitration rules and arbitration laws make a clear distinction between a decision made at law and a decision made ex bono et aequo. A tribunal is empowered to take the latter decision (acting therefore as an amiable compositeur) only if the parties have expressly instructed it to do so. This is expressly stated, for example, in the English Arbitration Act section 46.1(b); in the Swiss Private International Law Act article 187(2); the UNCITRAL Model Law article 28(3); as well as in the ICC Rules article 21(3); the LCIA Rules article 22(4); the SCC Rules article 22(3); the UNCITRAL Rules article 35(2).
though the parties have not chosen these sources; and decisions based on state laws, which in all systems may be applied on the tribunal’s own initiative.

What happens if the arbitral tribunal decides to disregard the peculiarity of one national system of law, and applies instead the generally recognised transnational principle of *pacta sunt servanda*, or the rule of article 2.1.1 of the UPICC, which provide for the binding effect of a contract even in the absence of consideration? Is the award effective, or does it run the risk of being annulled or not being enforced?

We have seen that the courts have no jurisdiction to review the application of the law made by the arbitral tribunal. Therefore, a wrongful application of English law would not be subject to judicial control; neither would a wrongful interpretation of the choice-of-law clause in the contract or a wrongful application of private international law. However, an unsolicited application of transnational sources goes beyond an error in law, at least under the arbitration laws or arbitration rules that do not give the arbitral tribunal the power to apply ‘rules of law’ without having been instructed to do so by the parties. Application of transnational sources without having being empowered by the parties is forbidden by these arbitration laws, and may therefore result in a procedural irregularity.

Whether the disregard of the English doctrine of consideration is the consequence of a (perhaps wrong) application of the law (and therefore not subject to judicial control) or of the application of transnational principles (and therefore subject to judicial control if the arbitral tribunal is empowered only to apply a ‘law’) has to be established on the basis of a careful analysis of the reasons for the award.

**B. The Arbitral Tribunal’s Power to Develop Its Own Legal Reasoning**

As the overview made in section 2 shows, the arbitral tribunal’s discretion in interpreting the contract and the proven facts, as well as applying the governing law, is not subject to any court control. The decision on the merits is final, and an award will be valid and enforceable even if it is based on an incorrect interpretation of the contract or of the facts, or on a wrongful application of the law. An award may be set aside as invalid or refused enforcement only (for our purposes) if the tribunal exceeded its power, or if the principle of fair hearing was violated.
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Generally, arbitration agreements are quite broad and confer on the arbitral tribunal the power to decide any disputes arising out of a certain legal relationship, and all aspects of these disputes. Arbitration agreements that limit the arbitral tribunal’s jurisdiction in respect of certain matters, for example, the interpretation of the contract, may turn out to create difficulties. In a decision by the Amsterdam District Court, an award was set aside for having exceeded the power granted to the tribunal by the arbitration agreement. A contract between Tiffany and Swatch for the production and distribution of watches contained a provision that seems to be a procedural version of the Entire Agreement clause: “The arbitral tribunal may not change, modify or alter any express condition, term or provision of this Agreement and to that extent the scope of its authority is expressly limited. The arbitral tribunal shall make its award in accordance with the rules of law and not as amiable compositeur.” The arbitral tribunal, a very eminent tribunal consisting of Filip de Ly, Georg von Segesser and Bernard Hanotiau, considered the contractual provisions, among other provisions containing good faith obligations to develop and promote the products in order to accomplish the Business Plan. The Business Plan in itself did not contain binding obligations, but the arbitral tribunal interpreted the contract’s good faith obligations in light of the governing law, and came to the conclusion that they gave sufficient basis to imply an obligation to take into consideration the Business Plan. The arbitral tribunal had carefully

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75 As an illustration, no limitations to the arbitral tribunal’s authority are mentioned in the Model Arbitration clauses recommended by, for example, the ICC, the LCIA, the SCC or the UNCITRAL. These standard clauses are sometimes accompanied by a recommendation to specifically regulate the number of arbitrators, the venue of the tribunal and the language of the proceeding; no mention is made of 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.


77 Quoted in Tiffany v. Swatch, Amsterdam District Court Decision at para 2.4.
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considered the wording of the arbitration agreement, and concluded that interpreting the contract and the governing law so as to read implied obligations into the contract, was not the same as changing, modifying or altering any express condition, term or provision of the agreement. The Amsterdam District Court disagreed without explaining its view in detail. Interpreting an implied obligation into the contract was considered a question of merit by the arbitral tribunal, but a question of scope of power by the court. The Amsterdam District Court decision was appealed, therefore more may come of this case. The wording of the arbitration agreement may have been based on the desire to enhance predictability, and to avoid the contract text being affected by purposive interpretations or by application of a governing law belonging to the civil law system and therefore prone to reading ancillary obligations into contracts. 78 Leaving aside the observation that this desire of predictability seems difficult to reconcile with the expressed good faith obligations contained in the contract (as good faith obligations are open to purposive interpretation of contract terms, implied obligations etc.), it is questionable how effective the restrictions contained in the arbitration agreement are. The first obstacle lies in the interpretation of the restrictions: changing, modifying or altering any express condition, term or provision of the agreement is not the same as interpreting the agreement, but where does the demarcation line go? The eminent arbitral tribunal and the Amsterdam District Court had different opinions on this. Moreover, these restrictions cast doubt on the relationship between the choice of law clause and the arbitration clause: if the chosen law contains rules and principles that create ancillary obligations or alter some provisions of the contract, which clause prevails? The clause that chose the law altering the contract, or the clause that restricts the possibility to alter the contract? In a similar context, it has been suggested that the latter must be considered as lex specialis, and therefore it must prevail.79 The parties may then be deemed to have chosen the law, less the rules that would alter the contract. But what if the rule altering the contract is mandatory? For example, an agency agreement may provide

78 For a discussion of the impact that the legal tradition may have on interpretation and application of contracts see G. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, 81-122.
that the agent shall not be entitled to any compensation upon termination of the contract. The contract may have chosen the law of a EU member state, and the arbitration clause may contain the mentioned restrictions. As known, EU law has mandatory rules on compensation upon termination, rules that have even been deemed by the CJEU to be essential for the achievement of the internal market\(^80\) – a formulation that the CJEU uses in connection with public policy.\(^81\) In this situation, it is not feasible to apply the chosen law less its mandatory rules on compensation.\(^82\) It is not necessarily helpful when the arbitration agreement contains restrictions to the arbitral tribunal’s power to interpret the contract.

When the arbitration agreement does not contain restrictions to the arbitral tribunal’s jurisdiction, which occurs in the vast majority of the cases, the arbitral tribunal is given the power to render a decision on the merits of the dispute. The scope of the dispute is set by the parties’ agreement and by the factual situation proven by the parties in the proceeding. Any reasoning developed by the arbitral tribunal within this scope, is arguably made in the exercise of its discretion. The arbitral tribunal, therefore, does not exceed its power if it interprets the contract under the governing law in a way that contradicts the language of the contract or the parties’ pleadings (section 3.2.1 below), or if it draws from the facts inferences different from those pleaded by the parties (section 3.2.2 below). More uncertain is the situation where the arbitral tribunal orders remedies different from those requested by the parties (section 3.2.3 below).

Even though the arbitral tribunal does not exceed its power when it develops its own legal reasoning independently of the parties’ agreement and pleadings, it must ensure that all parties have had the opportunity to express their view on the reasoning for the award. Otherwise, the adversarial principle may be violated and the award may be set aside or refused enforcement.

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\(^{80}\) Case C-381/98 (Ingmar).
\(^{81}\) Case C-126/97 (Eco-Swiss).
\(^{82}\) Along the same line of reasoning W. Park, *The Predictability Paradox*, note 19.
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1. Interpreting and Construing the Contract under the Governing Law

It is within the scope of the tribunal’s power to investigate the applicable law and apply it as it deems appropriate, even if the parties have failed to make the relevant argument.

This may sometimes lead to an award that disregards contractual terms because they are deemed to violate the applicable law. In a recent decision the Swiss Supreme Court considered an award that had *motu proprio* applied Swiss law on sham transactions. On this basis, the arbitral tribunal disregarded a contract between the parties that allegedly had replaced an older contract between the same parties, and awarded payment according to the original contract. That particular Swiss rule had not been pleaded by the parties, and the losing party challenged the validity of the award. The Swiss Supreme Court came to the conclusion that the arbitral tribunal had not exceeded its power: as the principle of *jura novit curia* applies, the tribunal is entitled to develop its own legal reasoning. In this case, the applicable law was Swiss, and the legal counsel to the losing party was Swiss. Therefore, the application of the Swiss rule could not have come as a surprise. On this basis, the Supreme Court found that the adversarial principle had not been violated. In contrast, the Swiss Supreme Court earlier set aside an award in which the arbitral tribunal had *motu proprio* applied a mandatory rule of Swiss law prohibiting exclusive intermediation in labour issues, and had rejected the agent’s request for payment of the fee under an agency agreement for a football player. The agency agreement had been entered into between a Brazilian football player resident in Portugal and an agent resident in Spain. When the football player accepted an offer from a Portuguese football club, the agent claimed its fee in accordance with the contract. The arbitrator applied Swiss law, which was the applicable law according to FIFA statutes, and considered the exclusivity clause in the

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83 F. Perret, *Resolving Conflicts between Contractual Clauses and Specific Rules of the Governing Law*, affirms that the governing law must be applied and this includes any constraints the law may create to the contract (at 110), but encourages to apply the law in a way that is compatible with the parties’ expectations.


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agency agreement unenforceable. The award was set aside not because the arbitral tribunal had developed a legal reasoning that had not been pleaded by the parties – as a matter of fact, the Swiss Supreme Court confirmed that the principle of *jura novit curia* applies; the award was set aside because the parties could not have been expected to anticipate that Swiss law would have applied. According to the Swiss Supreme Court, the arbitral tribunal is entitled to develop its own legal theory and apply the sources it deems applicable even though they have not been pleaded by the parties – when the specific circumstances suggest that those sources may come as a surprise to the parties, the arbitral tribunal has to draw the parties’ attention to them. The obstacle that the arbitral tribunal has to overcome when it seeks to introduce new sources, is not the scope of its power – it is the adversarial principle.

Another example of arbitral tribunal developing its own legal theory is an investment award based on the BIT between Moldova and Russia, where I acted as the sole arbitrator. The claim regarded a privatization contract that provided for the investor to transfer some assets to the host country in exchange for not specified shares owned by the host country. When the host country issued a regulation containing the list of shares eligible for exchange in the context of privatization, the investor claimed that the regulation could not be applied to pre-existing privatization agreements and pleaded that the host country had breached its own legislation on retroactivity. The arbitral tribunal found that the regulation was a necessary specification of the general obligation contained in the privatization contract, and that the rule on retroactivity was therefore not applicable. However, the content of the regulation was such as to deprive the exchange of any value, and this would be in breach of the provision on fair and equitable treatment of the applicable BIT. The BIT had not been pleaded by the investor, but it was part of the proceeding, as it had been used by the claimant as grounds for the arbitral jurisdiction. The arbitral tribunal observed that it was within its power to develop the legal reasoning it deemed appropriate. However, to ensure respect of the adversarial principle, it invited the parties to present their arguments on the applicability of the BIT. The award ended up applying a provision of

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the BIT different from that pleaded by the claimant in response to the tribunal’s request. This was within the power of the tribunal to develop its own legal reasoning. The losing party challenged the award before the Swedish Courts, claiming, i.a., that the arbitral tribunal had exceeded its power, and resisted enforcement of the award before the Moldovan courts, but the award was confirmed by the Svea Court of Appeal Stockholm\textsuperscript{88} and enforced by the Supreme Court of Moldova.\textsuperscript{89} The Svea Court of Appeal, in particular, found that the arbitral tribunal had applied the principle of \textit{jura novit curia} correctly: even though the claimant had not pleaded the legal theory that the award was based on, the decision was based on the facts proved in the proceeding and the ordered remedy was within the scope of the relief sought by the claimant. Therefore the arbitral tribunal was not deemed to have exceeded its power.

In summary, the arbitral tribunal may develop its own legal reasoning on the basis of the applicable sources. If the tribunal’s legal reasoning leads to new facts or evidence becoming relevant, the tribunal is well advised to invite the parties to comment. 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.\textsuperscript{90}

2. \textit{Inferences from the Proven Facts}

The tribunal is free to qualify the proven facts in accordance with the applicable legal sources. 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. Therefore, the arbitral tribunal is not bound by the qualification of the fact pleaded by the parties. Moreover, the tribunal is allowed to consider the consequences of a fact that was proved, even if that fact was not invoked, as long as this does not modify the scope of the dispute.

\textsuperscript{88} Svea Court of Appeal, case No T 745-06 dated 28 November 2008.
\textsuperscript{89} Supreme Court of Moldova, decision No 2re-46.2006 of 16 February 2006, Buletinul Curtii Supremee de Justitiie a Republicii Moldova, 2006, No 3, 18.
\textsuperscript{90} In this sense, see also Wiegand, \textit{Jura novit curia} v. \textit{Ne ultra petita}, 140ff.
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A recent decision by the Svea Stockholm Court of Appeal confirmed the validity of an award that had interpreted the contract in light of facts that were known to the parties, but had not been invoked. The disputed contract regarded the acquisition of a business entity and contained several “Warranties” on the activity and financials of the acquired entity. The dispute regarded, i.a., to what extent the respondent was entitled to reimbursement of damages as a consequence of breach of these warranties. The arbitral tribunal interpreted the invoked warranties not in the technical legal sense of the term, i.e., as guarantees that create a strict liability for the promisor, but as terms of contract that require negligence by the promisor, if a breach is to create liability. To come to this interpretation, which contradicted the effects proper of the terminology used in the contract, the arbitral tribunal relied on circumstances such as the contract being drafted by the respondent, and that the claimant was not a sophisticated party capable of understanding the legal implication of the words used. The award was sought to be set aside on the grounds that, i.a., these circumstances had not been pleaded by any of the parties. The Svea Court of Appeal observed that the parties could not be deemed to have given the arbitral tribunal joint instructions regarding the interpretation of the agreement. If the parties had instructed the tribunal to interpret the term “warranty” as creating a strict liability, the award would have been outside the scope of the tribunal’s powers. Since the parties did not give any express instructions on this issue, the arbitral tribunal was not precluded from interpreting the contract in light of the circumstances that it deemed appropriate, as long as these were introduced into the proceeding in such a way that it could be expected they would be taken into consideration. Interpreting the words of the agreement in light of surrounding circumstances, such as who drafted the contract and the other party’s degree of legal insight, even though these circumstances had not been invoked, was considered by the court not as a matter of scope of power, but as a question of merits.

A similar approach was taken by the Swiss Supreme Court when it confirmed the validity of an award rendered in a dispute regarding an agency agreement. The losing party (who had been the respondent in the arbitration) alleged, i.e., that the persons who appeared in the arbitral

91 MHH AS v. Axel’s Konsult och Förvaltning AB, Svea Court of Appeal, case No T 2610-13, decision rendered on 4 December 2014.
92 Quoted in MHH AS v. Axel’s Konsult, at 4.
93 X. v Y., Federal Supreme Court of Switzerland, case 4A_538/2012.
proceeding did not have the power to represent it, and therefore the award was invalid. The arbitral tribunal had concluded that the respondent was duly represented and had based its finding, among other things, on some documents that had been produced by the respondent. These documents had been introduced to prove a completely different matter. The respondent challenged the award’s validity, claiming that it had been taken by surprise by the inferences that the tribunal drew from these documents. The Supreme Court recalled the tribunal’s duty to inform the parties when it considers a source or a legal theory that was not pleaded by the parties and that could come as a surprise to the parties, and specified that this duty has a restricted scope. The Court found, moreover, that this principle does not concern questions of facts. The adversarial principle provides that each party expresses its views and submits evidence on the relevant facts, but it does not require the arbitrators to ask for the parties’ view on the bearing of each piece of evidence, nor does it empower the parties to limit the autonomy of the arbitral tribunal in assessing the evidence.

In summary, the necessity of an invitation to comment is not evident if the tribunal’s reasoning, based on facts or sources that are part of the proceeding, 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.

3. Decision on Remedies

Sometimes the arbitral tribunal may find that the requests for remedy presented by the parties do not reflect the tribunal’s understanding of the legal relationship between the parties, and may render an award ordering a remedy different from any of those sought by the parties. There does not seem to be a unitary treatment of this situation in the various systems.

The starting point seems to be that the arbitral tribunal is bound by the parties’ request for relief. The Superior Court of Quebec found that the arbitral tribunal had exceeded its power when it ordered that a joint venture should be terminated because of frustration and developed a

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94 T. Giovannini, International arbitration and jura novit curia, 2ff.
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system for valuation and buy out. Neither of the parties had pleaded that the legal relationship should be terminated, based on frustration or otherwise, nor had they requested a buy out. The Superior Court found that the arbitral tribunal did not have the mandate to decide on those matters. In addition, the Court found that the adversarial principle had been violated. The Court quoted Lord Mustill, who had appeared as expert witness for one of the parties, as saying that the tribunal “had gone on a frolic of its own...” Assuming that tribunals are more sober in their decisions for new remedies, in some 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. This is particularly so when the award is within the limits of the relief sought by one of the parties – for example, an award ordering payment of a sum up to the requested amount, but for a cause different from the pleaded cause (damages for delay instead of reduction of price for non-conformity or, as in the mentioned Svea Court of Appeals decision, reimbursement of damages for breach of the obligation to grant foreign investment fair and equitable treatment, instead of reimbursement for breach of the rule on retroactivity). It is more questionable if the award orders a completely different relief, for example termination instead of reimbursement of damages.

The power to decide independently on the remedies seems to be consistent with the powers of the tribunal 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 have not expressly been excluded

96 Id., at para 102.
97 See G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, § 25.04(F) (3)(h); T. Giovannini, International arbitration and jura novit curia, 8f; for Sweden, Heuman, ARBITRATION LAW OF SWEDEN, 611, 736f.; for Switzerland, Wiegand, *Jura novit curia v. Ne ultra petita*, 135f., 140ff., extensively arguing how the legal consequences are within the sphere of the tribunal and should be determined *ex officio* (in accordance with the maxim *da mihi factum, dabo tibi jus*).
from the authority of the tribunal by agreement of the parties (in the arbitration agreement, under the proceeding or in another 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 uncontroversial in all legal systems.

Whether an award was rendered in excess of the tribunal’s power, has to be established by reference to the scope of the tribunal’s power; in turn, the scope of the tribunal’s power derives from the arbitration agreement. It is, therefore, the law governing the arbitration agreement, that decides whether an award exceeds the tribunal’s power. As known, the arbitration agreement is subject to the *lex arbitri*\(^99\) (the law of the arbitral venue), unless the parties have chosen a different law, which they very rarely do.\(^100\) In theory, therefore, the outcome of the evaluation should be the same, irrespective of which court has evaluated the matter, as it is made according to the same law in all courts. In practice, however, it cannot be excluded that a court’s application of the *lex arbitri* is tainted by that court’s understanding of the powers of a tribunal. The courts that the tribunal should be concerned with are the court of the arbitral venue (where the award may be set aside) and the court(s) of enforcement. While the court of the place of arbitration is known to the tribunal, the court 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 as to 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

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\(^99\) According to, for example, article V (1)(a) of the New York Convention.

\(^100\) A glance at the standard arbitration clauses recommended by the various arbitral institutions, as well as at the UNCITRAL Arbitration Rules, shows that the only recommendation to the parties is to choose the law governing the merits of the dispute – not also the law governing the arbitration agreement.
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avoid rendering a decision that, even if valid under the law of the place of arbitration, might be deemed to be an 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 chance 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 adversarial principle would not be violated. 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 adversarial principle.

CONCLUSION

We have seen that the tribunal enjoys ample room for independently evaluating the parties’ pleadings. The tribunal is not bound by the arguments made by the parties, and even the choice of law contained in the arbitration agreement may be subject to restrictions. An important border that the tribunal encounters 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 ordering remedies that were not requested by the parties. Most importantly, it is 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 adversarial principle is not violated.

The sanctions against misuse of such powers are few and their scope of application is rather restricted. While the rule on excess of power mainly sanctions decisions made outside the factual subject matter of the dispute, the rule on fair hearing is not meant to permit a review of the

101 Under the Arbitration Rules of the ICC, LCIA, SCC and UNCITRAL, the arbitration law of England, Sweden, Switzerland and the UNCITRAL Model Law countries, as well as under the ICSID Rules and the ALI/UNIDROIT Principles.
tribunal’s evaluation of the evidence or of the law. Therefore, only gross violations of the tribunal’s duties may lead to the application of these sanctions.

This does not mean, however, that a tribunal should feel free from any constraint in administering the proceeding: loyalty to the parties’ pleadings, respect of the principles of impartiality and due process, accuracy in the interpretation of the contract and the application of the law, and not the least efficiency, 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’ a wrong decision on the merits, and, as such, not leading to invalidity and unenforceability of the award.

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