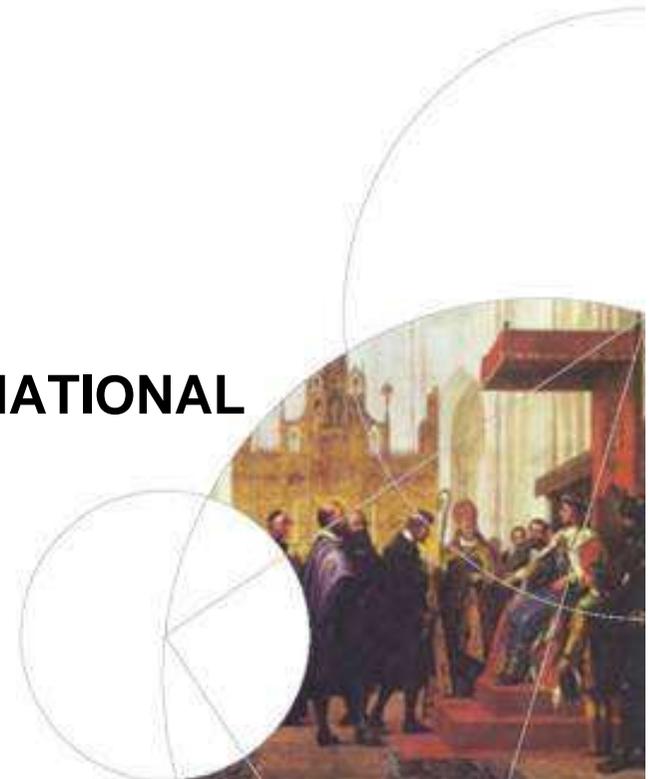




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**SHOULD ARBITRATORS KNOW THE LAW?
THE *IURA NOVIT CURIA* PRINCIPLE IN INTERNATIONAL
COMMERCIAL ARBITRATION**



IURA NOVIT ARBITER

OUTLINE

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1. Introduction

- French-language decision 4A_538/2012 of 17 January 2013 - Swiss Federal Supreme Court:
 - => the tribunal may exceptionally be under a duty to advise the parties when it considers basing its decision on a provision or a legal consideration that was not raised during the proceedings not establishment of facts
- *iura novit curia* in relation to application of foreign law in state litigation and in arbitration
- reasons and limits for the principle
- recommendations
- discussion on foreign law application only
 - arbitration: lack of *lex fori*
 - hybrid approach
 - point of reference and comparison – domestic courts' practice and judicial models of foreign law application



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- principle well-established in domestic litigation in a variety of jurisdictions
- practical importance: procedural positions of the parties, status of an arbitrator
- classical arguments in favor of the principle – do they hold in arbitration?
 - neutrality of the court
 - consistency of case law and predictability of results
 - determination of the content of applicable law by the adjudicators as particularly competent in this regard)

globalized or 'glocalized' (Fan 2013) arbitration culture?

- relatively coordinated practice of application of the principle in different jurisdictions
- common law vs. civil law divide – not decisive
- transnationalized, hybrid practice emerging – Westphalian, not a-national (Gaillard 2010)
- harmonizing different municipal approaches rather than transcending them.



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2. The Concept of *Iura Novit Curia*

A. Origins of *Iura Novit Curia*

- *iura novit curia* (“the court knows the law”): civil law tradition
- *verbatim*: commentaries of medieval glossators on Roman law (Geeroms 2004)
- *da mihi factum, dabo tibi ius*: judge as an active participant of proceedings, inquisitorial model
- empowered to conduct his or her own research as to the contents of the applicable law, instead of relying on parties’ presentations
- parties may focus on proving the facts (Waincymer 2011)
- Montesquieu: judges as “the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour” (1748/1989) => continental jurisprudence
- legal interpretation as a discovery of the pre-coded meaning of the law and its possibly full, transparent and unaltered transmission to the litigants
- hieratical origins of ancient Roman administration of justice (Jemielniak 2002)
- resolution of a dispute naturally requires an identification and application of the complete set of relevant rules.



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Currently

- indicated as one of the significant differences between the continental and common law traditions
 - different sets of rationales for preservation of due process
- continental: justice can be administered more efficiently (Alberti 2011)
 - representations offered by the parties might be incomplete, one-sided or insufficiently professional (inferior legal representation)
 - judges on a lifelong basis - bureaucratic *besser Wissen* and sophistication => bars have become submissive (Gillis Wetter 1996)
- common law: material truth-finding in the adversarial procedural relation between the parties, without a substantive intervention of a judge
 - foreign law as a fact to be proven by the parties
 - direct involvement as a distortion of equality between the parties and risk of appearance of a bias
 - if court exercises research *ex officio*: increased level of difficulty in accurate administration of justice
- principle re: law governing the substance of the dispute, but also procedure and conflict of laws
 - court: substantive law
 - arbitration: no real *lex fori*, every law is foreign



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B. *Iura Novit Curia* in the Context of judicial Application of foreign Law in State Litigation**England**

- parties required to prove foreign law as a fact
- missing sufficient evidence, the court shall not dismiss the case, but resolve it on the basis of English law, assumed to be identical with applicable foreign law, unless proven otherwise.

France

- if the contents of proper foreign law have not been sufficiently demonstrated by the parties, the court will apply French law to the merits of the case.
- duty to apply foreign law *ex officio* (*Nouveau Code de procédure civile* – NCPC – Art. 12(1)) Cour de Cassation in the 1980s
- later decisions - duty not binding in relation to claims on issues, where the parties can freely dispose of their rights (including contractual obligations) unless matters regulated by an international convention, to which France is a party.

U.S.

Rule 44.1 (Determining Foreign Law) of the Federal Rules of Civil Procedure:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

- court not bound by the representations of foreign law offered by the parties
- foreign law as law, not as a fact



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Germany

Section 293 (Foreign law; customary law; statutes) of the German Code of Civil Procedure (ZPO):

The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.

- competence of the court presumed
- parties might be requested to produce relevant evidence, but the court is not limited by their findings
- right to be heard considered to be restricted in this regard to such circumstances as avoidance of surprise
- German Federal Court (*Bundesgerichtshof*): appeal (*Revision*) on questions of law can only refer to violations of federal law and not foreign one ('irrevisibility of foreign law')

Switzerland

the 1987 Federal Act on Private International Law, Art. 16, PIL

Establishment of foreign law

1. The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.
 2. Swiss law shall apply if the content of the foreign law cannot be established.
- Case law: the judge cannot rely on the representations of foreign law submitted by the parties. In the absence thereof, s/he has to establish the content of the applicable law himself. Only if this content cannot be established, Swiss law will apply (Art. 16(2)).



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- ⇒ common law/civil law divide not fully applicable
- ⇒ principle applied to a varied degree across the jurisdictions
- ⇒ heterogenous background of national approaches



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C. *Iura Novit Curia* in International Commercial Arbitration (Status Quo)

- the concepts of foreign law and *lex fori* not fully applicable => question relevant in any case and in regard to any law. All are equally foreign to the tribunal (Kaufmann-Kohler 2003)
- in practice a fiction - arbitrators might have high command of the applicable substantive law
- to what extent are they entitled to make use of this knowledge *ex officio*?
- *neither strict iura novit curia* (Derains 1998, Fouchard 1999) nor 'law as a fact', but a balanced solution (Kaufmann-Kohler 2006)
- Teresa Giovannini (2010): three aspects of potential application of the *iura novit curia* principle in the arbitral practice:
 - the duty of the tribunal to verify (and supplement) through independent research legal sources provided by the parties
 - new qualification of the claim (which might be exercised by the tribunal, based on the findings from the legal sources verification stage)
 - new remedies (to be potentially awarded on the basis of the requalified claims)



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- interconnected and related to other procedural rights (e.g. the right of the tribunal to grant new remedies depends on its ability to decide *ultra petita*).
- national legislation on arbitration: issue of *iura novit curia* generally unregulated.
Exception: English Arbitration Act

Section 34. Procedural and evidential matters.

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

(2) Procedural and evidential matters include —

(...)

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.

- expressly left to the discretion of the tribunal, unless the parties agree otherwise
- Waincymer: practical application extremely limited (Section 33(1)(a): obligation of the tribunal to give “each party a reasonable opportunity of putting his case and dealing with that of his opponent”, *ius cogens* status)
- Rules of procedure of arbitral institutions and the UNCITRAL Rules – tacit, discretionary
- arbitration as administration of justice? (Gaillard 2010)



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3. Choice-of-law Issues

- role of the law of the place of arbitration - system offering the general basis for the scope of powers of a arbitral tribunal (authorization of *legis loci arbitri*)
- should the tribunals, acting in accordance with the general obligation of issuing an enforceable award, also take into account the rules of the legal system(s) of the place(s) of anticipated enforcement on its scope of powers?
- generally unnecessary in the light of the New York Convention
- such *sua sponte* exercise of the application of proper substantive law, which would constitute a violation of the public policy of the state of enforcement, and thus serve as a ground for its refusal on the basis of Art. V(2)(b)
- classification of a procedural rule on the scope of *iura novit arbiter*, as part of a country's public order highly unlikely
- doctrine of exceptional character of public order arguments, and their international and transnational orientation in enforcement cases (Hascher, after Lalive 2000, Jemielniak 2014)



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4. Legal Framework for *Iura Novit Curia*

- Usually not expressly stipulated.
- **International Law**
 - Resolution No. 6/2008 on „Ascertaining the Contents of the Applicable Law in International Commercial Arbitration”
- **Civil Law Countries**
 - **France:** *Engel Austria GmbH v. Don Trade*
 - **Germany:** A judge who wants to rely on a legal argument not raised by the parties must inform them about this argument (Section 139(2) of the ZPO).
 - **Switzerland:** The arbitral tribunal may base its findings on legal principles not raised by the parties, but may not take the parties by surprise.



- **Common Law Countries**
 - **England:** 1996 English Arbitration Act; *OAO Northern Shipping Company v. Remolcaderos de Marin SL*
 - **United States:** intermediate approach



5. Policy Considerations for Iura Novit Curia

- Courts are in the best position to apply the law correctly and in its entirety as their only interest is to decide the dispute in a fair manner.



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6. Interdependence of Iura Novit Curia with other Fundamental Principles

- The power of arbitrators to introduce new issues of law touches upon the core of the hybrid nature of arbitration as private jurisdiction and the clash between the contractual and jurisdictional mission of an arbitrator.
- **Party Autonomy**
 - If parties to an arbitration proceeding do not present a particular legal issue to the arbitral tribunal, why should the latter be able to raise it?
 - The tribunal should establish rules of procedure and standards of conduct.
- **Ne Ultra Petita**
 - *Ne ultra petita* does not enter into play when arbitrators introduce new issues of law.
 - Limitation: the arbitration agreement confines the tribunal's jurisdiction to only decide damages based on contract law.

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- **Right to be heard**

- CAS Award, *José Urquijo Goitia v. Liedson da Silva Muñiz*, 2007, Case no. A/1371
- Tribunals should provide the parties with an opportunity to be heard if they intend to base their decision on a legal reasoning that has not been advanced by the parties and that could otherwise lead to an unforeseeable decision.

- **Equal Treatment**

- When new issues of law are introduced *ex officio* by the arbitrators, it may prompt a party to amend its claim or defence in order to improve its chances.



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- **Uniformity in the Application of the Law**
 - What if neither party introduces a legal theory that is required for a convention's or a law's uniform application?
- **Practical Considerations of *Iura Novit Curia***
 - The arbitrators may not necessarily be qualified in the applicable law.
 - The parties may have a different background and thus have different expectations regarding the determination of the relevant legal principles.



7. *Iura Novit Curia* as the Tribunal's Right

- Is *iura novit curia* a right or duty?
- Status quo
 - *Leges arbitri* and arbitration rules remain mostly silent on this issue (exception: Section 34(2)(g) of the 1996 English Arbitration Act).
- Should states make the *iura novit curia* a mandatory rule?



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8. Recommendations

- *Iura novit curia* principle has a place in international arbitration. However, its application needs to take into account the interaction of the principle with other fundamental procedural principles.
- **Guidelines**
 - As soon as possible, the tribunal should remind the parties that it is primarily their task to advance all facts and legal reasoning.
 - Tribunals should take the circumstances of a case into consideration when determining to what extent they may wish to play an active role in ascertaining the contents of the applicable law.
 - Where a tribunal believes that the parties have missed a legal issue, it should put the point to the parties so that they have an opportunity of dealing with it.



- **Additional considerations parties should keep in mind**
 - The process of education on the law should be addressed early on with the tribunal to understand the tribunal's expectations.
 - The parties shall try to find out which legal conclusions will be deemed by the tribunal to derive from the facts established on the basis of the applicable law.



Thank you for your attention.

