

## — Chapter 17 —

### General Report on *Jura Novit Arbitrator*

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#### I. INTRODUCTION

It is widely recognized that the will of the parties plays a determinant role in international commercial arbitration. The aim of this book is to investigate to what extent the arbitral tribunal may nevertheless develop its own legal reasoning. An independent legal reasoning will not necessarily be based on the will of the parties as manifested in the terms of the contract, in the law chosen in the contract or in the legal arguments presented by the parties in the proceedings.

As an illustration of the questions that the book aims at answering, the following can be mentioned:

- (i) Assume that an arbitral tribunal is called upon to decide whether a sales contract has been breached, and, if it ascertains that the contract was breached, to determine the amount of damages owed by the defaulting party. Assume that, during the proceeding, the claimant claims that the contract was breached because performance was late. Having heard the evidence, however, the arbitral tribunal decides that the contract was breached because the goods were not in conformity with the specifications. May the tribunal order reimbursement of damages (as requested), on a basis different from the basis that was pleaded (*i.e.*, non-conformity instead of delay)?
- (ii) Assume that the dispute regards the breach of a shares purchase agreement. The seller argues that its liability is limited to the circumstances described in the Representations and Warranties contained in the agreement. The circumstance invoked by the purchaser is not included in the Representations and Warranties. The purchaser claims that the seller has breached a duty to inform

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that, under the applicable law, is mandatory and cannot be restricted by contract terms. Therefore, the liability of the seller may not be limited to the list contained in the Representations and Warranties. May the tribunal rule that the seller is liable for having violated the mandatory information duty contained in the applicable law, even though the terms of the contract seemed to exclude that duty?

- (iii) Assume that the parties entered into a market sharing agreement with effects on the EU market. The agreement violates EU competition law. The agreement contains a governing law clause choosing the law of the Bahamas. One of the parties does not fulfil its obligations and invokes that the agreement is null according to EU-competition law. May the tribunal, in addition to the law chosen by the parties, consider the civil law consequences of EU-competition law (that was not chosen by the parties)?
- (iv) Assume the same situation as described in item (iii) above, but with the addition that the contract contains a governing law clause choosing the law of the Bahamas, and in addition says “EU law shall not apply”. May the tribunal, in addition to the law chosen by the parties, consider the civil law consequences of EU-competition law (that was expressly excluded by the parties)?
- (v) Assume that, in a dispute regarding a sales contract, the buyer proves that there has been a default and requests termination of the contract. After having heard the evidence the arbitral tribunal finds that the default is not fundamental; therefore, under the governing law, the contract may not be terminated. However, under the governing law the default entitles the buyer to reimbursement of damages. May the tribunal order the seller to pay damages – a remedy that, although not requested by the parties, follows from the legal sources that were introduced into the proceedings?

These are examples of situations in which the arbitral tribunal may desire to develop its own legal reasoning. The basis for the decision would be represented by the facts submitted by the parties, but the evaluation of the facts, the selection of the applicable legal sources and the application of these sources to the facts would be made independently of the parties’ submissions. The risk in doing so is that the arbitral tribunal be deemed to have restricted party autonomy in these cases – not only because it has not followed the parties’ legal reasoning, but also because it has deprived the parties of the possibility to present their own legal reasoning on the legal basis developed by the tribunal.

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As arbitration is known for being the realm of party autonomy, it is necessary to ascertain to which extent tribunals are entitled to restrict party autonomy in this fashion, and whether these restrictions are desirable.

As will be seen below, granting the tribunals independent powers to identify, interpret and apply the law may, under circumstances, be more advantageous to arbitration as a mechanism to settle disputes, than affirming an unrestricted supremacy of party autonomy. However, in doing so, the tribunal must respect the principle of fair hearing.

### II. THE FRAMEWORK

Among the many manifestations of the primacy of the will of the parties, is that an award may be refused recognition and enforcement if it exceeds the scope of power granted by the parties to the arbitral tribunal. This is regulated under the New York Convention.<sup>1</sup> Also national arbitration law recognizes that the parties' arbitration agreement and pleadings set the scope for the power of the arbitral tribunal – an award that exceeds this scope, may generally be set aside by the courts of the country where the award was rendered.<sup>2</sup>

This is particularly true for the circumstances of fact that constitute the basis for the award, and to a large extent also for the requested remedies. It is the parties who determine the factual scope of the dispute, and it is the parties who require the remedies. An award that decides on the basis of facts not invoked by the parties, or, to a large extent, an award that orders remedies that were not requested by the parties, is an award that exceeds the arbitral tribunal's power.

The evaluation is not as easy in respect of the legal basis of the decision. When developing its legal reasoning, the arbitral tribunal is not bound to follow exclusively the parties' instructions. The arbitral tribunal is generally allowed, and even expected, to satisfy itself that the award is

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<sup>1</sup> 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V (1) (c).

<sup>2</sup> See for example the UNCITRAL Model Law on International Commercial Arbitration, article 34 (2) (a) (iii). As known, the UNCITRAL Model Law is not a binding instrument, but it has been adopted, more or less faithfully, in at least 75 countries, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html). Not all jurisdictions represented in this book have adopted the UNCITRAL Model law, but they all recognize the principle of excess of power, as the respective national reports confirm.

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based on a correct application of the relevant sources. That the arbitral tribunal is not bound by the parties' legal reasoning is evident when one of the parties (usually, the defendant) does not participate in the proceedings, thus depriving the tribunal of its pleadings: the other party's legal arguments are not necessarily automatically accepted. When a party is in default, the tribunal will independently evaluate the legal arguments presented by the party who participates in the proceedings. This means that the tribunal may develop its own legal reasoning. The power to develop its own legal reasoning, however, applies also when both parties have made their pleadings. The arbitral tribunal is not bound to simply choose between the parties' legal reasons. Also in this scenario, it is allowed, and even expected, to satisfy itself that the award is based on a correct application of the relevant sources. This may lead to applying a legal basis different from those pleaded by the parties.

The arbitral tribunal has thus on the one hand to respect the parties' instructions, but, on the other hand, it has to apply the law independently.

In addition, the arbitral tribunal has to grant both parties the opportunity to present their case and to comment on the other party's position.<sup>3</sup> This is known as the principle of fair hearing or of due process, also referred to with the maxim *audiatur et altera pars*. The principle may include a duty to inform the parties of what the legal basis for the decision will be. A party who does not expect a certain legal argument to be considered, may have deemed it not necessary to produce certain evidence or to make certain submissions. However, that piece of evidence or those submissions may turn out to be relevant, if that legal argument is made. Had that evidence been introduced or those submissions been made, the other party could have found it relevant to produce yet other evidence or make other submissions. Not inviting the parties to comment on the independently developed legal reasoning may, thus, deprive the parties of the possibility to present their case in full.

Moreover, the arbitral tribunal has to be impartial and to respect procedural rules contained in the parties' agreement, the applicable arbitration rules and the applicable arbitration law.<sup>4</sup> In addition to the

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<sup>3</sup> Article V (1) (b) of the New York Convention and article 34 (2) (a) (ii) of the UNCITRAL Model Law. Not all jurisdictions represented in this book have adopted the UNCITRAL Model law, but they all recognize the principle of fair hearing, as the respective national reports confirm.

<sup>4</sup> Article V (1) (d) of the New York Convention and article 34 (2) (a) (iv) of the UNCITRAL Model Law. Not all jurisdictions represented in this book have

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duty to act impartially, these sources establish that each party carries the burden of proving its own allegations. This may be seen as a limit to the possibility for tribunals to be very active in suggesting and pursuing new arguments.

How far the tribunal can go in developing its own legal reasoning without violating the mentioned framework is partially regulated in a series of sources that are examined in detail in the national reports. These sources, however, do not necessarily provide a comprehensive framework. In particular, they leave large room to the discretion of the arbitral tribunals and of the courts who review the awards. Given the large leeway enjoyed by arbitral tribunals, it has been suggested that the matter of application of the law by the arbitral tribunal is an area where the legal culture plays an important role.<sup>5</sup>

As awards may be subject to court proceedings ascertaining their validity (in the place where the award was rendered) or their enforceability (in the place or places of enforcement), the next question that arises is to what extent an award may be set aside or refused enforcement, on the basis that the arbitral tribunal did not properly apply its power to develop its own legal reasoning. As known, courts do not have the power to review awards in the merits. This excludes that courts may review the tribunal's application of the law. However, in developing its own legal reasoning, the tribunal may have infringed some of the above mentioned principles that do give the courts a basis to set aside an award or to refuse its enforcement.

### III. THE QUESTIONNAIRE

The purpose of this book is to provide a comparative analysis of the way in which arbitral tribunals apply in practice their power to independently develop their own legal reasoning, and of the extent to

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adopted the UNCITRAL Model law, but they all recognize the principle of procedural irregularity, as the respective national reports confirm.

<sup>5</sup> Christophe Seraglini, "L'influence de la culture juridique sur la décision de l'arbitre", *Mélanges en l'honneur du Professeur Pierre Mayer*, LGDJ, 2015, 817-831, at p. 830. For an extensive discussion and bibliographic references, see G. Cordero-Moss, "The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy On Jura Novit Curia and Related Issues", *Limits to Party Autonomy in International Commercial Arbitration* (F. Ferrari ed., 2016), 289-330. See also International Law Association, Committee on International Commercial Arbitration, *FINAL REPORT – Ascertainning the Contents of the Applicable Law in International Commercial Arbitration*, 2008.

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which this may lead to awards being set aside or refused recognition or enforcement by the courts.

All reports have been written on the basis of the questionnaire reproduced at the end of this book.

The reporters were asked to address four ways in which the arbitral tribunal's power to independently develop its own legal reasoning may take form:

- a) *The tribunal's power to make its own legal inferences from the factual basis that was proven by the parties.*

In some situations, this may lead to the tribunal applying a different legal basis from what the parties pleaded. For example, the tribunal may infer from the proven facts that the performance did not violate the applicable provisions on delivery time (as pleaded by the claimant), but that it violated the applicable provisions on quality specifications;

- b) *The tribunal's power to apply the governing law to interpret, construe, supplement or correct the contract.*

In some situations, this power may lead to results that contradict the wording of the contract. For example, the governing law may contain rules (such as the principle of good faith) that lead to construing the contract differently from what a literal interpretation would suggest (such as restricting the power of one party to exercise the contractual right of termination); or the governing law may contain ancillary obligations that extend the scope of the parties' obligations (such as a duty to give information); or the contract may contradict mandatory rules of the governing law (such as rules restricting the effects of contractual clauses on exclusion of liability);

- c) *The tribunal's power to apply the legal sources it deems applicable, even if they do not belong to the law chosen or pleaded by the parties.*

For example, the law chosen in the contract may be not applicable because the matters at issue are subject to a specific law that may not be excluded by party autonomy, such as in the areas of company law or property law; or overriding mandatory rules from a third law may be applicable, such as in the area of competition law;

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- d) *The tribunal's power to order, independently from the parties' pleadings, the remedies that follow from the sources of law the tribunal deems applicable.*

If the scope of the tribunal's power is understood as being given by the relief sought by the parties, the margin for the tribunal's power to independently order remedies that follow from the tribunal's own legal reasoning is restricted. For example, the tribunal may order payment of a sum of money that corresponds to, or is within the limits of, the sum sought by one of the parties, but the payment is ordered on a legal basis different from the basis invoked by that party – for example, the payment is defined as a reduction of the price due to defective quality of the goods, rather than as a reimbursement of damages due to a delay in performance.

If the scope of the tribunal's power is understood as being given by the facts presented by the parties, the margin for the tribunal's power to independently order remedies that follow from the tribunal's own legal reasoning is wider. For example, the tribunal may have based its reasoning on a provision of the applicable law (not invoked by the parties) that sanctions its violation with invalidity. The tribunal may therefore have declared the contract invalid – notwithstanding that the parties may have requested, respectively, payment of the provision allegedly due under the contract and reimbursement of damages caused by an allegedly negligent performance.

The reporters were then asked to address certain provisions of the New York Convention that may lead to an award being refused recognition or enforcement, and to comment on these provisions' impact on the arbitral tribunal's power to independently develop the legal reasoning. These provisions constitute the ultimate border within which the arbitral tribunal's power may be exercised. The reporters were further asked to highlight whether the grounds for setting aside an award rendered in the respective country are equal to the grounds contained in the New York Convention, and whether they are applied equally. In particular, the reporters were asked to address three ultimate borders for the arbitral tribunal's power to independently develop the legal reasoning:

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- e) *Fair hearing* (article V(1)(b)): An example of how this ground can be relevant to the arbitral tribunal's power to independently develop the legal reasoning, is if an award is based on issues that one of the parties did not have the possibility to comment on. Does it apply only to questions of fact or also to questions of law? Does it apply only to new elements introduced by the tribunal as basis for the decision, or also to the inferences drawn by the tribunal from the proven facts and to the tribunal's legal reasoning?
- f) *Procedural irregularity* (article V(1)(d)): An example of how this ground can be relevant to the arbitral tribunal's power to independently develop the legal reasoning, is if procedural rules were violated, and this may compromise the principle of due process. Does it apply to any of the procedural rules mentioned in letters h) to k) below? Does it apply also to a scenario where the tribunal applied non-state law ("rules of law") on its own motion, but according to the applicable arbitration rules or arbitration law it only had the power to apply state law ("law")? Does it apply to other situations?
- g) *Excess of power* (article V(1)(c)): An example of how this ground can be relevant to the arbitral tribunal's power to independently develop the legal reasoning, is a scenario where the tribunal decided on matters that were not submitted to arbitration. Does it apply only to factual matters, or also to legal issues – such as where the tribunal bases its decision on a source that was not invoked by the parties? Or where the legal reasoning of the tribunal leads to ordering remedies that were not sought by the parties? Does it apply also to the situation where the tribunal decided according to a law that was different from the law chosen by the parties - based on the reasoning that, the governing law having an impact on the contract, applying a law different from what the parties chose may have an impact on the basis for deciding the dispute?

Within the above mentioned ultimate borders, the arbitral tribunal enjoys wide discretion as far as the independent development of the legal reasoning is concerned. Some procedural rules contained in national arbitration law, in arbitration rules (institutional or ad hoc, such as the UNCITRAL Arbitration Rules) or in soft law sources, may have relevance to how the arbitral tribunal exercises this discretion. Violation

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of these rules does not necessarily render the award invalid or unenforceable – but under certain circumstances it may do so, if it results in a serious violation of the principle of fair hearing or of procedural law, or even of the principle of public policy (article V(2)(b) of the New York Convention).

The reporters were asked to comment specifically on the following:

- h) The principle that each party carries the burden to prove its own allegations. To what extent does it restrict the tribunal's ability to develop its own reasoning, particularly if the tribunal requests additional information (*see* item i)) to be able to develop its own reasoning? Does it apply only to questions of facts, or also to questions of law?
- i) The tribunal's power to request additional information. To what extent does it contradict the principles of burden of proof (*see* item h)) and impartiality (*see* item j))? Does it apply only to clarification of the parties' allegations and pleadings, or does it extend to introducing new elements of fact? Does it apply also to questions of law?
- j) The principle that the tribunal shall be impartial. To what extent is it compatible with the tribunal's power to request additional information and to develop its own reasoning?
- k) The tribunal's position in case of default by one party. In this situation, the only factual and legal arguments presented to the tribunal are those of the claimant. Is the tribunal precluded from independently evaluating the claimant's pleadings? How far can the tribunal go in requesting additional information and developing its own reasoning, without compromising the principles of burden of proof and of impartiality?

The formal sources of law described above do not expressly or systematically address the matter of the arbitral tribunal's power to independently develop the legal reasoning. It is, therefore, necessary to investigate how gaps are filled. Moreover, the few express rules leave a considerable margin of discretion to the interpreter. It is, therefore, necessary to investigate where the interpreter finds the criteria for exercising its discretion. Also, it is useful to address whether the law is applied, and the gaps are filled, consistently by the various involved actors.

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Therefore, the questionnaire asked to comment on which sources are applied to fill the gaps or to guide exercise of the arbitral tribunal's discretion, as well as to comment on whether the law is applied consistently – or if there are variations in respect of domestic or international arbitration, as well as in the context of setting aside an award rendered in the court's territory or enforcing a foreign award.

#### **IV. ANALYSIS OF THE REPORTS**

The book is based on reports from 15 different jurisdictions, and in addition one report on public international law. The 15 national reports are from Argentina, Austria, Brazil, Canada, Denmark, England, France, Germany, Hong Kong, Russia, Singapore, Spain, Sweden, Switzerland and the United States.

*All reports seem to converge* on some basic principles:

- (i) The tribunal has to render an award that is confined to the scope of the disputed submitted by the parties;
- (ii) Courts may not review the award in the merits, therefore the development of a legal reasoning by the tribunal is generally outside of the courts' competence;
- (iii) The tribunal must give both parties the possibility to be heard and to comment on the basis for the tribunal's decision;
- (iv) Procedural irregularities may affect the validity or enforceability of an award only in case of serious breaches;
- (v) The tribunal has wide discretion in its application of the law.

In all examined legal systems the subject-matter is not regulated expressly in arbitration law. In some countries, the principle of *jura novit curia* laid down for courts in the civil procedure of that legal system exercises influence also on the field of arbitration: Austria, Argentina, Brazil, Denmark, possibly Germany, Hong Kong, Russia (only to a certain extent), Spain, Sweden and Switzerland.

The influence exercised by foreign case law and foreign literature is quite restricted: only Canada mentioned it and, to a certain extent, Austria. The influence exercised by soft law sources is also very restricted: only Denmark mentioned it, and, to a very limited extent, Germany.

There seems to be little consistency also as to what significance it has that a dispute is international, rather than domestic. In Canada, the internationality of the dispute increases the tribunal's room for

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developing its own legal reasoning (but not in the context of setting aside an award rendered in Canada); in Sweden, it reduces it.

*Main differences* seem to be found in relation to the applicability to the subject-matter of this book of two of the above principles: the scope of the tribunal's power (item (i) above) and the duty to inform the parties (item (iii) above).

*Regarding the scope of the tribunal's power*, it is possible to divide the matter into several issues:

- (i) Would an award be in excess of power, if it draws its own legal inferences from the facts that were pleaded by the parties? Although with some uncertainty, it seems that an award based on legal inferences independently developed by the tribunal would be considered to be in excess of power in Denmark. Under certain circumstances in Switzerland and, even more restrictively in Austria, independent inferences may be deemed to be an excess of power. In all other jurisdictions, including also international adjudication, drawing inferences from the facts submitted by the parties is considered to be within the tribunal's power.
- (ii) Would an award be in excess of power if, as a consequence of its independent application of the governing law, it interprets and construes the contract differently from what appears from the contract terms or what is pleaded by the parties? The answer would be negative in Argentina, Austria, Brazil, Denmark, France, Hong Kong, Singapore, Sweden and Switzerland. The power of international adjudicators to apply the law to the facts may broadly be considered to correspond to the same approach. Also in the other reports, nothing seems to restrict the tribunal's power to apply the governing law to the facts submitted by the parties or to the contract.
- (iii) Would an award be in excess of power, if it takes into consideration the law of a country different from the law chosen by the parties? This is relevant particularly in respect of overriding mandatory rules such as competition law or rules against corruption. In most jurisdictions, the tribunal has the power to consider laws different from the law chosen by the parties. The only exception seems to be Denmark. Also in Argentina the tribunal may not apply a law different from the law chosen by the parties, but this applies only to matters of contract law. In the other jurisdictions, it is considered to be within the tribunal's power – particularly when the law is applicable according to rules of private international law (*see*, for

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example, Argentina, Germany and Russia), or when reasons of public policy require that that law is applied. Also in international adjudication, at least to the extent it fits into the polycentric paradigm, the adjudicators have the power to independently identify the applicable sources. However, if the parties expressly exclude the applicability of a certain law, under Brazilian and Swiss law the tribunal would not have the power to take that law into consideration, not even when the relevant rules are overriding mandatory rules such as rules of competition law (unless they belong to the *lex fori*).

- (iv) Would an award be in excess of power if, as a consequence of the application of its own independent legal reasoning, it orders remedies different from those requested by the parties? In most jurisdictions, the answer would be positive. In Spain, possibly Hong Kong and Switzerland, as well as in Canada provided the parties were given timely and adequate notice, the tribunal may order remedies that follow from the applied sources, even though they were not requested by the parties.

*Regarding the principle of fair hearing*, it seems that Brazil, Germany, and to a certain extent Austria, Singapore and Switzerland do not consider it applicable to the tribunal's independent legal reasoning. In these jurisdictions, the tribunal is under no obligation to inform the parties that a certain legal theory or legal rule will be applied as a basis for the decision – with the restrictions described in the respective reports. The duty to inform regards factual circumstances, but not legal arguments. In the other jurisdictions, the tribunal is under a duty to inform the parties of the basis for its decision and to invite them to comment thereon, irrespective of whether the independent reasoning regards factual or legal circumstances.

## **V. COMMENTS**

The reports show that the traditional common law/civil law divide, known in the area of court procedure, is not reflected as clearly in the field of international arbitration. Thus, in the common law-systems of England, Hong Kong and Singapore the tribunal has broad powers to draw inferences – larger powers than those a tribunal has in the civil law-systems of Denmark or Argentina. Systems belonging to the adversarial tradition, therefore, are in the field of arbitration more inquisitorial than systems belonging to the inquisitorial tradition.

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A further reason why the traditional divide does not seem to play a decisive role in regard of the tribunal's power to develop its own legal reasoning, is that there are differences even within the same legal family. Within the common law family, the tribunal's investigative powers are recognized under English law, but are hindered under Canadian law, where the tribunal's own legal reasoning may be deemed to compromise the principle according to which each party carries the burden of proof for its own claims. Within the civil law family, the tribunal has the power to apply a law different from the law chosen by the parties, *i.e.*, in Germany, but not in Argentina. It seems, therefore, that the traditional common law/civil law divide is not helpful to assessing the powers of the tribunal in international arbitration.<sup>6</sup>

There is undoubtedly a common core that can be considered to apply to international arbitration in general. However, there is large room for variations. In various jurisdictions the influence of domestic legal traditions, and even of the tradition applying to domestic courts, seems to be quite strong. This confirms that even for international arbitration the legal system in which the award is rendered has a great significance – notwithstanding the very widespread opinion that arbitration does not have a forum.<sup>7</sup> Certainly in the context of annulment of an award, but also in the context of enforcement, the scope of the tribunal's power and the framework for the proceedings are ultimately determined by the *lex arbitri*.

The reports show that party autonomy solidly maintains its prominence in the field of arbitration. The powers of the arbitral tribunal derive from the parties' will, expressed in the arbitration agreement, the terms of the contract and the pleadings. If the tribunal exceeds the power conferred upon it by the parties, the award may be set aside or refused enforcement. With regard to the legal arguments, this principle does not seem to restrict the tribunal's possibility to make legal inferences from the proven facts, to apply the governing law or, to a large extent, even to consider rules not belonging to the law chosen by the parties – but in many jurisdictions it restricts the tribunal's possibility to order remedies that were not requested by the parties, even though these remedies follow from the tribunal's independent legal reasoning.

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<sup>6</sup> For a more extensive reasoning and references see G. Cordero-Moss, *International Commercial Contracts* (Cambridge University Press) (2014), 279.

<sup>7</sup> On the importance of the *lex arbitri* in arbitration see *ibid.*, 218f.

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Not only do the parties determine the scope of the tribunal's power, they also maintain a fundamental right to be heard. This means that the tribunal is obliged to inform the parties of the basis on which it will take the decision, so that the parties are given the possibility to present their respective arguments. Also violation of this principle may lead to the award being set aside or refused enforcement, although in a number of countries this applies only to factual circumstances, and not to legal arguments.

With some notable exceptions, such as England and the United States, courts do not have any power to control the tribunal's application of the law. Whether the tribunal applies the law strictly even when this may contradict the terms of the contract, or whether it acts more flexibly and deems that contract terms must prevail even when they contradict the applicable law, is a question of the sensitivity of the particular tribunal.<sup>8</sup> The courts have no say, as long as this remains a question of merits, i.e., a question of the tribunal's interpretation and construction of the contract and of its application of the law. The courts would have jurisdiction, however, if the arbitration agreement or the parties' common instructions contained restrictions as to the tribunal's power to apply the law. However, the parties usually do not attempt to restrict the tribunal's power with regard to the impact that the governing law may have on the interpretation and construction of the contract.<sup>9</sup>

The parties, however, should not overestimate the effect that their instructions may have on the tribunal's powers. There seems to be a wide

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<sup>8</sup> For a more extensive reasoning and references see G. Cordero-Moss, "EU Overriding Mandatory Provisions and the Law Applicable to the Merits", *The impact of EU law on international commercial arbitration* (Franco Ferrari ed., 2017), 336f.

<sup>9</sup> An example of such attempt, that so far has not proven particularly successful, can be found in a contract between Tiffany Company and The Swatch Group. The contract excluded from the power of the tribunal any possibility to change or add to the terms of the contract. The tribunal did not find this an obstacle to construing the contract so that a non-binding attachment was deemed to be a binding term. The award was set aside by the District Court of Amsterdam: case No C/13/567933/HA ZA 14-653, decision rendered on 5. March 2015, ECLI:NL:RBAMS:2015:1181. The Court of Appeal, however, confirmed the award: case No 200.170.351/01, decision rendered on 25, April 2017, ECLI:NL:GHAMS:2017:1496. For a more extensive description of the award and a comment on the District Court decision, see G. Cordero-Moss, "The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy On *Jura Novit Curia* and Related Issues", *supra* note 5, 319.

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consensus that the tribunal maintains the power to make its own inferences and develop its own legal reasoning quite irrespective of the interpretation of the contract made by the parties and of the legal sources pleaded by the parties. This applies within the framework of the law that has been chosen by the parties in the contract, but may even extend to rules that do not belong to the law chosen by the parties. To a lesser extent, the tribunal maintains the power to apply rules not belonging to the law chosen by the parties even in spite of the fact that the applicability of these rules has been expressly excluded by the parties. The tribunal's power to consider laws not chosen by the parties (or even excluded by the parties) is relevant when the interests at stake are of particular significance for the affected society. Examples are rules against corruption or money laundering, competition law, regulations of import or export. In these areas, states usually issue overriding mandatory rules, or *lois de police*, and the underlying principles are often considered to be fundamental (public policy, *ordre public*). Other areas where party autonomy is restricted for the sake of preserving third party rights and certainty of the legal system are company law, as well as the law regulating insolvency and encumbrances.<sup>10</sup>

It is noteworthy to stress that the tribunal's power to apply a law different from the one chosen by the parties is not completely discretionary. The criteria to be followed by the tribunal when determining the applicable law are, in various jurisdictions, those laid down in the private international law.

The relevance of private international law mechanisms in arbitration is not uncontroversial. Private international law has been, in my opinion unjustly, considered an excessively rigid and old fashioned mechanism detrimental to the effectiveness of arbitration. On this basis, it has been discarded in various jurisdictions in favour of more flexible approaches meant to enhance the prominence of party autonomy – such as the *vote directe*, contained, inter alia, in article 1511 of the French Code of Civil Procedure, as well as in numerous Arbitration Rules – including also the UNCITRAL Rules. The enthusiasm for this flexible approach, however, is not unanimous – and the topic of this book shows that complete flexibility is not necessarily the best solution when it comes to selecting the applicable law.

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<sup>10</sup> For a more extensive reasoning see G. Cordero-Moss, *International Commercial Contracts*, *supra* note 6, 247f.

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A first reason why a flexible approach is not necessarily desirable is that it may lead to unpredictable results. If the arbitral tribunal is not guided by objective criteria when it determines the applicable law, the parties are not in a position to assess in advance their respective legal positions and thus to evaluate the advisability of initiating the arbitration. In some cases, determining the applicable law in advance is essential to the evaluation of whether to start an arbitral proceeding or not. For example, whether the applicable law will be Italian or Norwegian will decide whether a four years old claim is time barred or not, as the period of limitations is 10 years under Italian law and three years under Norwegian law. If the criteria for determining the applicable law are not objective, the parties are put in the paradoxical situation of having to initiate an arbitration to be able to assess whether there is at all a basis for initiating arbitration.

A second reason why a flexible approach to determining the applicable law is not necessarily desirable is that, without conflict of laws rules, the tribunal has no legal basis upon which it may restrict the choice of law made by the parties. This becomes relevant when the choice of law made by the parties leads to disregarding overriding mandatory rules or principles of public policy in the law(s) that would be applicable if the parties had not made a choice of law. The tribunal may fear that, if it has no basis to restrict the parties' choice but it nevertheless does not follow the parties' instructions, the award will be invalid or unenforceable for excess of power.<sup>11</sup>

Furthermore, if the tribunal has no legal framework to contain the parties' choice, the result may be that arbitration lends itself to practices that violate fundamental principles in the international community. This is not desirable, at least for two reasons.

First, it may lead to rendering an award that is invalid or unenforceable because it violates the court's public policy.

Second, it undermines the credibility of arbitration as a method for settling disputes – because it makes arbitration a means to evade applicable mandatory regulation of fundamental character. In a long term perspective, this may lead to a less arbitration-friendly regime: if choosing arbitration permits the parties to circumvent important applicable regulations, this will inevitably lead to restricting the number

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<sup>11</sup> For an extensive discussion and further references, see Cordero-Moss, "The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy - On *Jura Novit Curia* and Related Issues", *supra* note 5.

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of disputes which may be submitted to arbitration. It may be reminded here that the scope of arbitrability is defined on the national level and is therefore more easily prone to changes than the areas of arbitration law that are regulated by convention. The scope of what may be arbitrated started to expand with the famous second look-doctrine in the Mitsubishi case.<sup>12</sup> This expansion was based on the reliance that courts, while exercising judicial control in connection with enforcement of the award, would have the possibility to ensure that fundamental principles were not violated by the award. If arbitration consistently is used to circumvent applicable regulations based on fundamental principles, the risk is that this arbitration-friendly trend is reversed. The risk of backfiring is present especially in combination with the so-called minimalist doctrine, according to which courts should not have the power to independently evaluate whether an award violated fundamental principles, but should limit their control to verifying that the tribunal considered the matter.<sup>13</sup> If the arbitral tribunal has no legal basis to consider overriding mandatory rules or fundamental principles other than those belonging to the law chosen by the parties, and if the courts have to pay deference to the arbitral tribunal's evaluation, arbitration runs the risk of being abused to evade the application of law or to disregard fundamental principles. Some national courts in Europe have already restricted arbitrability of disputes in certain areas precisely with the aim of ensuring that important regulation in those areas is accurately implemented, and the Advocate General of the European Court of Justice has repeatedly argued for the same approach.<sup>14</sup>

The intention, when restricting the arbitral tribunal's interference with party autonomy (and the courts' interference with the award), is to enhance arbitration and increase its effectiveness. The risk is that exactly the opposite result is obtained, i.e. that arbitration loses its credibility and, instead of being promoted, is restricted.

Therefore, recognizing that an arbitral tribunal has powers to develop its own legal reasoning and to apply sources different from those pleaded by the parties may have the appearance of being a restriction to the

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<sup>12</sup> *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>13</sup> For references, see G. Cordero-Moss, "EU Overriding Mandatory Provisions and the Law Applicable to the Merits", *supra* note 8, 328f.

<sup>14</sup> For references, *ibid.*, 332f., quoting Belgian, English and German decisions, as well as opinions by the Advocate General of the EUCJ. See also, for a more recent decision in the same direction, the Austrian report, section III.C.

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central role that party autonomy plays in arbitration – but in reality it is a means to ensure that arbitration continues enjoying a friendly legal regime. Ultimately, it is more favourable to party autonomy than a tribunal that has no such powers.

### **VI. CONCLUSION**

*Jura novit arbiter*, the maxim that justifies the arbitral tribunal's development of its own legal reasoning, may *prima facie* be deemed to contradict the fundament of arbitration, that is, the supremacy of party autonomy. A deeper examination, however, shows that the vast majority of the examined legal systems give the tribunal the power to make its own legal inferences from the submitted facts, and to independently interpret and apply the law. To a large extent, the tribunal also has the power to consider rules that do not belong to the law chosen by the parties – particularly when fundamental principles are at stake. In many legal systems, however, the arbitral tribunal is expected to inform the parties of its independent legal reasoning, so as to give them the possibility to comment. These powers of independent legal reasoning only in few systems go so far as to permit the tribunal to order remedies different from those that were requested by the parties. Also, these powers have to be exercised cautiously and in the respect of the legal framework (particularly, of the principle of fair hearing). Moreover, they should ensure predictability – and this may be achieved if the tribunal reasons according to the guidelines laid down in the private international law.

Recognising the tribunal's power to develop its own legal reasoning is not detrimental to arbitration, but quite to the contrary: it supports the role of arbitration as a credible method to settle disputes, and it thus contributes to counteracting emerging trends to restrict the scope of arbitrability in the name of ensuring more accurate application of the law.