"THE EFFECTIVE USE OF LEGAL SOURCES: HOW MUCH IS TOO MUCH AND WHAT IS THE ROLE FOR IURA NOVIT CURIA." [1]

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SUMMARY OF CONTENTS. 1. Preliminary comments. 2. Role of arbitrators when applying the law. 3. Extent of the arbitrators mandate to establish the law. 4. Practical Solution in International Arbitration – establishing contents of the applicable law. 5. Counsel's perspective.

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I. Preliminary comments

This paper considers the best practices for both counsel and arbitrators for the questioning of witnesses and the use of legal sources, when applying the substantive law governing the dispute submitted to arbitration, especially during the arbitration hearing. The subject of this paper has further been narrowed to focus on the role of *iura novit curia*.

The status of the law governing the merits of the dispute must be addressed with reference to international arbitration rules and practice. Reference to rules or principles applicable in national courts should be avoided, as these are very different from those applicable to international arbitration.

The same applies with the Latin aphorism *iura novit curia,* which literally means "*the judge knows the law*" and refers to a principle of procedural law, according to which the parties do not have to prove the content of the law before national courts.

There are different approaches taken by national courts when applying foreign law. Some jurisdictions, such as the Swiss, German or Mexican, consider foreign law as law and apply the principle. According to this approach, national courts have the obligation to know the law and apply it to the facts, even if it is foreign.

Some jurisdictions regard foreign law as a fact which must be proven. English and French laws (unlike many civil law jurisdictions) adopt this view. In this approach, national courts are not expected to research foreign law *ex officio*, and will apply foreign law only if proven as a fact, dismissing the application of the *iura novit curia* principle.

It has been said that reference to the rules applicable to national courts and their experience in applying foreign law is of limited use when applied to international arbitration. As there is no *lex fori* in international arbitration, the very concept of foreign law is misplaced.[3] Therefore, the conclusion that the principle of *iura novit curia* is not applicable to arbitral tribunals has been the view of most legal scholars.

[3] KAUFMANN-KOHLER, Gabrielle, "*The Governing Law: Fact or Law?" – A Transnational rule on establishing its contents*", Best Practices in International Arbitration, ASA Special Series No. 26, July 2006, p. 2.

According to our colleague Yves Derains "*L´adage Jura novit curia n´a pas sa place en matière d´arbitrage.*"[4]

Gabrielle Kaufmann-Kohler also agrees that "*a hard and fast iura novit curia rule would be inappropriate in international arbitration*" and that a "*pure 'law is fact' approach would not be appropriate either.*"[5]

Also, Julian Lew also considers that "*The situation in international arbitration is different. There are no "forum" procedural requirements to follow. Rather, the composition of the Tribunal and the attitude of the arbitrators, often influenced by their own legal background, is a crucial factor. Equally there is no 'foreign law'*."[6]

According to Fouchard, Gaillard and Goldman an "*arbitral tribunal has no forum*".[7]

Therefore, when it comes to international arbitration, the starting premise should necessarily be that an arbitrator must apply the law chosen by the parties and should not avoid this obligation with an argument that the law is foreign.

In order to determine the status of the substantive law in international arbitration and the role of arbitrators and counsel during the oral phase of the arbitration, however, it is essential to address the following questions: What is the role of arbitrators when applying the law? To what extent should arbitrators establish the law? How should arbitrators establish the contents of the chosen law? What is the role of advocacy in this matter?

2. Role of arbitrators when applying the law

2.1 Law as fact approach

Going back to Gabrielle Kaufmann-Kohler´s Canadian co-arbitrator who "*suggested dismissing a claim because – he said- 'they have not proven the law.'*"[8] There are

[4] DERAINS, Yves, "*Observations - Cour d´appel de Paris (1re Ch. C) 13 novembre 1997 – Lemeur v. SARL Les Cités invisibles"*, Revue de l´Arbitrage (Comité Français de l´Arbitrage 1998 Volume 1998 Issue 4 pp. 709-711), p. 3.
[5] KAUFMANN-KOHLER, Gabrielle, "*The Governing Law: Fact or Law? – A Transnational rule on establishing its contents*", Best Practices in International Arbitration, ASA Special Series No. 26, July 2006, p. 6.
[6] LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, pp. 442-443.
[7] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p. 692.

arbitration practitioners who are of the view that foreign law should be proven as a fact, and that the burden of proof is on the parties to ascertain the contents of the law.

Some authors, like Fouchard, Gaillard, and Goldman support this position and have stated that: "*…The idea that foreign laws should be treated as issues of fact is well established in both common law and civil law systems and should apply in international arbitral practice*."[9]

This approach may not be applied rigidly to arbitration. It seems that even the English are moving away from a strict view of foreign law as a fact. This is reflected in the text of the 1996 English Arbitration Act, section 34(1)(g), which indicates that the procedural powers of an arbitral tribunal include: "*whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law*."[10]

In this regard, common law jurisdictions also recognize the flexibility and powers of an arbitral tribunal to ascertain the law and recognize that the law proven by the parties should not necessarily be the limit for the arbitrator's powers to decide on the legal solution.

2.2 Balanced approach

According to Gabrielle Kaufmann-Kohler's proposition any appropriate transnational solution must be found between the two extremes, for instance along the following lines:

> "*The parties shall establish the contents of the law applicable to the merits. **The arbitral tribunal shall have the power, but not the obligation**, to conduct its own research to establish such contents. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the result of the tribunal's research.*
>
> *If the contents of the applicable law are not established with respect to a specific issue, the Arbitral Tribunal **is empowered** to apply to such issue any rule of law which it deems appropriate.*"[11]

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[8] KAUFMANN-KOHLER, Gabrielle, "*The Governing Law: Fact or Law? – A Transnational rule on establishing its contents*", Best Practices in International Arbitration, ASA Special Series No. 26, July 2006, p. 1.
[9] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p. 692.
[10] 1999, English Arbitration Act.
[11] KAUFMANN-KOHLER, Gabrielle, "*The Governing Law: Fact or Law? – A Transnational rule on establishing its contents*", Best Practices in International Arbitration, ASA Special Series No. 26, July 2006, p. 6.

According to this proposition, we may extract the following concepts:

a) Foreign law is treated as law.
b) The parties agree to establish the contents of the law applicable to the merits.
c) When the parties have established the contents of the law, the Arbitral Tribunal shall have the power, but not the obligation, to conduct its own research to establish such contents.
d) If the Arbitral Tribunal makes use of the power to establish such contents, it must give the parties an opportunity to comment on the results.
e) If the contents of the applicable law are not established by the parties on a specific issue, the arbitral tribunal is empowered (but not obliged) to apply any rule it deems appropriate.

We have two comments on this proposition.

The first comment is that this proposition assumes that the parties have agreed to establish the contents of the law. However, in my experience this does not happen in practice, where normally there is no agreement on this issue during the procedural hearing. Therefore, parties according to international arbitration rules are not obligated to establish the contents of the law, just their statement of the facts, points at issue and remedy sought.

For example, according to the UNCITRAL Arbitration Rules, article 18(2), there is no obligation to state the law, as may be read from the following text:

"*The statement of claim shall include the following particulars:*
(a) The names and addresses of the parties;
(b) A statement of the facts supporting the claim;
(c) The points at issue:
(d) *The relief or remedy sought*"

According to this rule, claimants should only state the facts supporting their claim and the relief or remedy sought and the respondent a defense thereof. However, there is no obligation to include reference to the substantive law or establish its content.

The second comment is that this proposition acknowledges that the arbitral tribunal is empowered to establish the contents of the law; however it imposes no obligation to do so. Should this "may" be a "must"? Are arbitrators obliged to make their own inquiries to establish such contents when there is no input from the parties?

The debate of whether this is an obligation or not has been highlighted in the Brazilian Federal Loans case:

> *"…although the Court does not consider itself bound to know the local law of the states appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties.* ***This is important for it leaves the Court free, perhaps even obligated, to resolve through its own researches any uncertainty concerning such a law, if the parties fail to produce adequate proof****."*[12]

This discussion leads us to the following analysis.

2.3 Arbitrators' mandate approach

In my opinion the role of arbitrators when applying the law should be viewed in light of their mandate towards the parties. According to their mandate arbitrators are expected to resolve a dispute applying the law chosen by the parties.

The mandate of arbitrators to "apply the law" has been stated in the arbitration Rules of mainly every arbitration institution, e.g.:

> ICC Rules Article 17: "*The parties shall be free to agree upon the* ***rules of law*** ***to be applied*** *by the Arbitral Tribunal to the merits of the dispute...*"
>
> LCIA Rules Article 22.3: "*The Arbitral Tribunal* ***shall decide*** *the parties' dispute* ***in accordance with the law(s) or rules of law chosen by the parties*** *as applicable to the merits of their dispute...*"
>
> UNCITRAL Rules Article 28: *"(1) The arbitral tribunal* ***shall decide*** *the dispute in accordance with such* ***rules of law as are chosen by the parties*** *as applicable to the substance of the dispute…"*

In the application of the law, there are different expectations as to whether arbitrators should know the law or whether it has to be proven, depending on the legal tradition of

[12] Brazilian Federal Loans Case, as quoted in KAUFMANN-KOHLER, Gabrielle, "*The Arbitrator and the Law: Does He/She Know It? Apply it? How? And a Few More Questions",* Arbitration International, Kluwer Law International, 2005, Volume 21, Issue 4 (pp. 631-638), p. 5.

counsel and parties to the dispute. According to Julian Lew, the best solution would be to make the most out of each system, along the following lines:

> *"The parties make full legal argument in writing and orally, about the applicable rules. They may support this with legal materials and independent expert reports. The Tribunal may request further specific details about the applicable law.* ***It will, however, decide itself what the specific applicable rules are rather than rely on any expert****. This approach leaves considerable discretion to the tribunal and is increasingly the norm in international arbitration… This approach reflects a neutral and international expectation that* ***the applicable law or rules must be ascertained and applied****. It recognizes that in international arbitration there is no domestic forum or foreign law. There is only the applicable law for the particular case."*[13]

My view is in line with this position, according to which the tribunal will decide itself the specific applicable rules, rather than rely solely on experts or be bound by the parties' submissions. It also, reflects the mandate that the applicable law or rules must be ascertained and applied. The bottom line is that parties have the expectation that the applicable law or rules must be ascertained and applied and that the arbitrators should know the law (or avail of enough information to know it) in order to be able to fulfill their mandate.

In sum, arbitrators "must" establish the contents of the law. If the parties fail to do so, the arbitral tribunal is not only "empowered" by the arbitral rules to establish such contents but must do so, in order to fulfill its mandate.

Therefore, arbitrators are obligated to address all claims brought forward by the parties, and provide a solution, applying the substantive law chosen by the parties (even when the content of the law has not been brought forward by them).

3. To what extent should arbitrators establish the contents of the chosen law?

Arbitrators in applying the substantive law chosen by the parties are faced with limits. Fouchard, Gaillard and Goldman, have delineated them as follows:

[13] LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, pp. 443-444.

> "*For the arbitrators, the only limits, other than those resulting from the intentions of the parties, derive from the requirements of international procedural public policy. These include, in particular, equality between the parties and compliance with the requirements of due process, a breach of which would allow the award to be set aside*."[14]

It seems that these limits lie in that: i) arbitrators must not exceed their mandate and ii) arbitrators must conduct the arbitration in such a way that it leads to a valid award.

i) They must not exceed their mandate

When arbitrators rule *infra petitia* or *ultra petitia*, they will have exceeded their mandate and their award risks being set aside or refused enforcement. This will be the case where arbitrators exceed their powers under the applicable rules or law.[15]

It is relevant to distinguish at the outset that arbitrators may not base their decisions on arguments which were not put forward by the parties. However, the limit lies in that arbitrators may not award the parties more than they sought in their claims. For example, arbitrators may not award damages or interest absent a claim in such regard by the parties. In an arbitration in which I was arbitrator, the parties did not invoke the payment of interest. The arbitral tribunal did not apply the law, as the interest payment was not invoked by the parties and doing the contrary would have been *ultra petitia.* This may also be the case where an arbitral tribunal awards consequential damages (where a contract excludes their application).[16]

On the other hand, when parties have not invoked a specific rule of law, but have asked for the remedy (e.g. interest payment), the arbitrator in order to resolve the claim is allowed to determine the content of the applicable legal provision, and this will not be *ultra petitia*. It is not indispensable (although obviously it is convenient) for the parties to refer to the specific legal provision.

The limit regarding due process lies in the expectations of the parties as to the application of the law. In this regard, Gabrielle Kaufmann-Kohler has considered that: "*Except for limits arising out of a possible agreement of the parties and the requirement that the arbitral tribunal must consult with the parties on the application of an*

[14] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p. 689.
[15] See further: LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 280.
[16] See further: LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 714.

unexpected legal rule, there appear to be no limits." [17] According to this approach, arbitrators must allow the parties to comment on the application of any unexpected legal rule, in order to ensure due process, give the parties the opportunity to present their case and respect the contradiction principle[18]. Therefore, even if the parties did not invoke the law, the tribunal must, in order not to rule *ultra petitia*, give the parties the opportunity to express their opinions on the rules of law which are to be applied when they are unexpected.

In the words of Laurent Levy:

> "*In principle, there is no violation either of due process as the parties should know that the judges and the arbitrators, know the law and will apply it…However, in extreme circumstances, due process, namely the right to put one's case in an adversarial proceeding, will bar the arbitrators from basing their award on a principle, a doctrine, a statute, a precedent etc., which the parties did not mention and of which they had no possibility to perceive the relevance and materiality…The FT has always insisted that the arbitrators should not "surprise" the parties, namely that the arbitrators should not find legal argument that the parties could never have expected in view of their submissions and the briefing of the case*."[19]

From the previous transcription we may conclude the following: i) arbitrators may apply the governing law (beyond the submissions presented by the parties) and this will not be considered *ultra petitia*; and ii) the limit regarding compliance with due process lies in that parties must be afforded the opportunity to comment on the content of the law if the award will be based on legal material which the parties did not mention and did not perceive as relevant.

However, what is "unexpected" or "perceived as relevant" in a given case, may not be clear. In a case related to these expectations, the Swiss Federal Supreme Court, on June 9, 2009, upheld an award stating that: "*…the Hungarian company, represented by experienced business lawyers should have anticipated the application of contractual terms addressing the termination of the construction contract."*[20]

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[17] KAUFMANN-KOHLER, Gabrielle, "*The Governing Law: Fact or Law? – A Transnational rule on establishing its contents*", Best Practices in International Arbitration, ASA Special Series No. 26, July 2006, p. 5.

[18] See further discussion on contradiction principle in: DERAINS, Yves, "*Observations - Cour d´appel de Paris (1RE Ch. C) 13 novembre 1997 – Lemeur v. SARL Les Cités invisibles*", Revue de l´Arbitrage (Comité Français de l´Arbitrage 1998 Volume 1998 Issue 4, pp. 709-711), p.3.

[19] LEVY, Laurent, "*Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law*", http://kluwerarbitrationblog.com/blog/1009/03/20/jura-novit-curia-the-arbitrator´s-discretion-in-the-application-of-the-governing-law/.

[20] VON SEGESSER, George, "*Iura novit curia-the right to be heard (decision of the Swiss Federal Supreme Court as of 9 June 2009- 4a_108/2009) ", Kluwer arbitration blog:*

In this matter Fouchard, Gaillard and Goldman give a practical solution. According to this view, as a general rule the arbitrators must afford the parties the opportunity to discuss a rule of law to be applied. The exception would be that: "*the rule relied on by the arbitrators is so general in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. This will be the case, for example, of the principle of good faith in the performance of contracts…"* [21]

In order to further analyze the extent to which the arbitrator may ascertain the content of the law and identify legal issues which the parties have not raised, the following cases serve as useful illustrations. In a case between the companies *Comesa Gmbh* and *Polar Electro Europe BV* [22] regarding a distribution agreement with a clause indicating that in the event of termination, the distributor was not entitled to compensation, the Arbitral Tribunal held that if the provision was not adjusted, the contract clause whereby the Distributor gave up any rights to compensation would lead to an unreasonable result due to changed circumstances. The Tribunal found legislative support for the position that whereas a court (or tribunal) cannot adjust unreasonable provisions *ex officio*, a party should be considered to have invoked the unreasonableness of a clause if it contested the other party's claim and presented views on unreasonableness.

The award was challenged on the ground that arbitrators had based their ruling on general contract law although neither party had specifically invoked it. The Supreme Court had to decide if the Tribunal had exceeded its authority or deprived a party of sufficient opportunity to present its case.

The Supreme Court decided not to set aside the award. In its reasoning it stating that the "burden of pleading" had been complied with, as the award was based on facts invoked by claimant and which respondent was able to comment on. Moreover, the

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http://kluwerarbitrationblog.com/blog/2009/08/27/iura-novit-curia-the-right-to-be-heard-decision-of-the-swiss-federa-supreme-court-as-of-9-june-2009-4a_1082009/.,

[21] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p. 950.

[22] RUNELAND, Per, "*Iura Novit Curia in Finnish and Swiss Arbitration"*, Sansfrontieres, bi-annual Newsletter of SJ Berwin´s International Arbitration Group, Issue September 8, 2009, pp. 5-7.

Supreme Court applied the principle of iura novit curia and clearly stated that "*the Tribunal was not bound by the legal reasoning presented by the parties*."[23]

In another case, *José Ignacio Urquijo Goitia v. Liedson da Silva Muñiz*, involved an agent which entered into an agreement with a Brazilian football player according to which the agent was accorded the exclusive right of representation in Europe. However, the player contracted with a Portuguese football club, without the Agent's involvement. The Court of Arbitration of Sport ruled based on a mandatory provision in the Swiss Federal Law on the Employment Exchange and the Hiring-out of Personnel, which had not been invoked by the parties. This provision provided that a person seeking employment, even if contractually bound to one broker, might use the services of other brokers.

The Swiss Federal Supreme Court ruled that: i) the Panel should have allowed the parties to comment on the legal provision that decided the outcome of the case; ii) the Agent's right to be heard had been violated; and iii) the award was annulled due to the violation of the right to be heard.[24]

Both the Comesa and Silva Muñiz cases relate to situations where the parties did not rely on a statute that was used by the tribunal or panel to decide the case. Per Runeland has amply analyzed this situation, highlighting the differences between both cases, indicating that *"there is a material difference between the two cases"*[25] which may be outlined as follows:

a) In the Finnish case a basic principle of civil law was applied (which was in fact undoubtedly applicable to the dispute). In the Swiss case, a law was applied (which was not applicable) therefore the parties could not foresee that it would be applied.

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[23] RUNELAND, Per, "*Iura Novit Curia in Finnish and Swiss Arbitration"*, Sansfrontieres, bi-annual Newsletter of SJ Berwin´s International Arbitration Group, Issue September 8, 2009, pp. 5-7.
[24] Commenting on this case LEVY, Laurent*, "Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law",* http://kluwerarbitrationblog.com/blog/1009/03/20/jura-novit-curia-the-arbitrator´s-discretion-in-the-application-of-the-governing-law/, has indicated that the Swiss Federal Supreme Court up until this decision, had: "*always used "jura novit curia" to reject setting aside proceedings, namely to save awards which arbitrators had, arguably, based on legal reasons beyond the arguments of the parties….Thus, it is not really a matter of substantive law but that the law is being applied without the parties´ being able to make their submissions on that substantive law. As far as I am aware, the FT Decision of 9 February 2009 represents the first time the FT annulled an award in spite of "jura novit curia*."
[25] RUNELAND, Per, "*Iura Novit Curia in Finnish and Swiss Arbitration"*, Sansfrontieres, bi-annual Newsletter of SJ Berwin´s International Arbitration Group, Issue September 8, 2009, pp. 5-7.

b) In the Finnish case the arbitrators knew the law, whereas in the Swiss case they did not and applied a provision in error without allowing the parties to comment.

As a practical solution, in a case where the parties have failed to raise such rules, the arbitral tribunal is encouraged to invite the parties to express their opinion on this issue, in order to guarantee due process.

ii) Compliance with mandatory rules and public policy

An award may also be set aside when it violates public policy, as may be the case when it contains provisions against mandatory rules, or fundamental principles of law:

a) In addition to the rules of law chosen by the parties the arbitrator is also bound to apply "*… a number of mandatory rules that are essential prerequisites of any dispute settlement system, private or public, which have a bearing on the duties of the arbitrator."*[26]

b) Moreover, arbitrators may also decide not to apply the governing law when this is contrary to public policy: "*There is no doubt that arbitrators are entitled to disregard the provisions of the governing law chosen by the parties where they consider those provisions to be contrary to international public policy."*[27]

Nonetheless, the fact remains that in practice it is rare for arbitrators to decide not to apply the rules of the governing law chosen by the parties

According to Fouchard, Gaillard and Goldman *"The crux of the problem is that determination of the reasoning arbitrators should adopt when faced with an allegation that a contract is illegal in the light of rules other than those of the law governing the contract."*[28]

[26] LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 276.
[27] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, pp.860-861.
[28] FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p.851.

In an English case, Soleimany v. Soleimany[29], there is a useful illustration of public policy and illegalities of the law. The case related to an agreement concerning Persian carpets exported from Iran to England. The exporting of carpets was in contravention of the Iranian revenue laws. The award was ruled under Jewish law and the arbitral award decided that even if smuggling carpets was illegal this had no bearing on the contractual rights of the parties.

The Court of appeal held that "*Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it.*"[30] Therefore the Court held that the agreement was illegal and it was contrary to public policy to enforce it in England.

Another case, Westacre Investments, Inc.[31], involved the purchase of military equipment in Kuwait. The contract was governed by Swiss law. The arbitral tribunal dismissed allegations by respondents that the contract involved bribery and as such should be declared void.

The award was in favor of Westacre and respondents challenged it on public policy grounds. The Court of Appeal ruled that the award should be enforced because although it would be contrary to the public policy of Kuwait, its enforcement was not contrary to the public policy of Switzerland.

4. Practical solution in International Arbitration in establishing the contents of the chosen law.

Most arbitration laws empower the tribunal to determine proceedings with regard to ascertaining the facts and the law. Therefore, arbitrators are allowed considerable flexibility to decide how to establish the content of the law.

As a starting premise, arbitrators have broad discretion and flexibility to establish the contents of the substantive law. The arbitral tribunal must therefore have access to the

[29] Soleimany v. Soleimany [1998] 3 WLR 811, [1999] QB 785 (CA), [1999] 3 All ER 847, 859.
[30] LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 724.
[31] Westacre Investments Inc. v Jugoimport –SDPR Holding Co Ltd and Others [1999] 3 All ER 864, 876.

content of the applicable foreign law. In reaching this goal there appears to be a liberal approach taken in the forum. [32]

Generally in practice, arbitral tribunals are able to resolve the dispute analyzing the evidence submitted by the parties, the facts in dispute and contractual terms. In such a case, arbitrators are not faced with the issue of establishing the content of the substantive applicable law, and may validly resolve the dispute by interpreting the contract terms and applying principles of law, as allowed, for example, under article 33(3), of the UNCITRAL Rules which provides that:

> "(3) *In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*"[33]

Therefore, arbitral tribunals normally analyze the documents and other evidence submitted by the parties, as well as their subsequent conduct, in order to determine the parties' intention and understanding at the time of executing the contract.

When it is not possible to resolve the dispute solely according to contractual terms, arbitrators must apply a law which is often unknown or difficult to access. There is little doctrine on this point, regarding the methodology to be used and no clear guidance is given by most arbitration rules.

In this typical scenario, the practice of arbitration on the American continent has evolved in that in cases where arbitrators are not familiar with the law, the parties will normally submit expert opinions on the applicable law. During the hearing arbitrators will examine legal experts and narrow the key issues of the dispute. Thereafter, if arbitrators require any submission on a specific point of law, they will request briefing from the parties.

In my experience, arbitrators must use all available methods which allow them to establish the contents of the law chosen by the parties to resolve the dispute. Among the methods which I have used in practice the following are worth mentioning:

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[32] See further: FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, p. 689. LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p. 282.

[33] United Nations Commission on International Trade Law, Arbitration Rules, General Assembly Resolution 31/98.

a) Seeking support from co-arbitrators, when they have specific knowledge on the applicable law.

b) Studying thoroughly memorials and submissions by the Parties in preparation for the oral phase of the proceeding, in order to have sufficient opportunity to spotlight and interrogate on key issues.

c) Determine in a procedural order whether the proceedings will be conducted in an inquisitorial or adversarial style. [34]

c) Where possible, combine the continental tradition and the common law approach, ensuring a flexible procedure. This methodology is effective, as it allows for combining independent study with expert reports and pleadings on the content of the foreign law submitted by the parties. This approach lightens the burden of the arbitral tribunal to establish the content of the law and is a practical solution which might lower costs in the arbitration.

d) The examination of legal expert witnesses at the hearing is an important point (if not a crucial point) for the arbitrator to ascertain the law. In this phase the common law procedures, in which the parties plead and prove the applicable law, are most valuable.

e) Arbitrators when addressing questions directly to expert witness may ascertain the contents of the applicable law or clarify any issue which comes from their independent research of the law. Therefore, arbitrators should use the hearing to interrogate witnesses regarding legal points. This is the perfect moment for arbitrators to question and confront legal experts with delicate and relevant points of law, both in the file or not mentioned therein.

f) Also, in my experience calling the experts from both parties together for confrontation of legal points and to discuss and interpret their positions, has rendered excellent results. This method has allowed me to narrow the discussion and be able to

[34] LEW, MISTELIS, KRÖLL, Comparative International Commercial Arbitration, Kluwer Law International, 2003, pp. 725-726: *"It is a continental European tradition that a court takes the initiative in directing the ascertainment of the facts and the law. For that purpose it may conduct its own examination of witnesses. Litigation in common law countries is, on the other hand, traditionally adversarial. In adversarial proceedings the principle is that the parties arrive at the truth by each leading evidence and then testing that evidence through cross-examination of the relevant witnesses."*

deliberate on specific and controversial issues of law. This is in line with a harmonizing approach, in which the tribunal will allow the parties to conduct their examinations, and after this the tribunal will use its broad discretion to interrogate both on the matters at issue, as well as on other points of law that might be central to the dispute.

g) Another valuable method of establishing the contents of the law is posing additional questions to be answered by both parties, in closing briefs.

h) Furthermore, the arbitral tribunal should also conduct an independent study of the law where relevant.

i) Arbitrators should make available for examination and critical analysis by the parties any specific legal points which have not been addressed by the parties and which will be part of the basis of the award.

In the application of a national law, the arbitral tribunal should: i) be aware of the hierarchy of sources in such legal system; ii) and as a general rule, apply the law in force.

Also, arbitrators should be allowed flexibility in the process of interpretation of the applicable law. In this exercise tribunals may consider international practice or international standards to help them interpret national rules. Moroever, arbitrators may decide to apply international or transnational legal rules.

Even when parties select one law to apply, it might well be that the remedy they have requested is not contemplated in such law. In this scenario arbitrators are entitled to apply other laws different from the chosen law. Where the parties are silent as to the governing law, the arbitrators have complete freedom to determine and ascertain the law. [35]

In conclusion, in practice, arbitrators have flexibility, and as such they must use all available methods in order to arrive at the hearing with sufficient knowledge, which allows them to present relevant questions to the parties and focus on relevant and core issues. If and when the arbitral tribunal is able to spot these issues and question both

[35] See further: FOUCHARD, GAILLARD, GOLDMAN, On International Commercial Arbitration, Kluwer Law International, 1999, pp. 881-882.

the parties and experts during the hearing, this discussion will bring them a step closer to knowing the law and applying it.

5. The advocate's perspective

The role of counsel in presenting the case before the arbitral tribunal is relevant in that adequate briefing of the case allows arbitrators to spot key legal substantive issues and to guarantee that the expectations of the parties are met by the arbitral tribunal when resolving the dispute.

It is advisable that counsel take into consideration the following issues:

a) The choice of arbitrators will impact the application of the law.

A common question in this matter would be: should arbitrators know the applicable law? To which there is no correct answer. It appears to be advisable that they know the applicable law, however, it is not indispensable. There may be other characteristics, such as the experience in case management which might be more relevant when choosing an arbitrator. Or the dispute may be more of a contractual nature or involve certain technicalities which do not revolve around the application of the governing law.

On the contrary, where the understanding and application of the law is key to the resolution of the dispute, there is no doubt arbitrators who know the law should be preferred. Especially when the dispute involves complex legal points, it is advisable that counsel ensure that there is a co-counsel who will guide the process of the applicable law or a chairman who is knowledgeable of the applicable law.

Moreover, the legal tradition of arbitrators will impact the resolution of the dispute. A civil law tradition arbitrator will generally consider that he or she should investigate the applicable law; whereas a common law counsel might expect the law to be proven by the parties. In this regard, counsel must have sufficient background regarding the dispute and its legal implications in order to take this into consideration when choosing an arbitrator. However, this is not the full story where the parties seek relief on a matter that is not covered by the law chosen or produced. In such a case the arbitrator's legal background might not cover any and every issue involved.

b) Whenever there is doubt regarding the application by the arbitral tribunal of the substantive law, counsel should address this issue, especially at the procedural hearing.

c) Counsel even if not obliged, are expected to file sufficient legal evidence and make available legal materials (as well as good translations) given that arbitral practice has developed to expect that "*the parties bring forth their legal arguments in their written submissions and prove the content of the chosen law by various evidentiary means, such as documents (be it authorities, whether statutes, court decisions, arbitral awards or legal writings), or legal experts*."[36]

d) Counsel are responsible for defining a strategy, taking into consideration whether the arbitrators have knowledge of the applicable law and the legal cultures of the arbitrators and for defining whether and if, in the particular case, it is convenient to provide the arbitral tribunal with information on the applicable law. From the above analysis it will be determined whether or not to submit expert legal opinions or whether to trust the authority of arbitrators which have knowledge as to the applicable law.

e) During the hearing counsel should examine expert legal witnesses efficiently allowing arbitrators to spot and understand any issue which is relevant to their claim.

In conclusion, the hearing is the perfect moment for arbitrators to confront any legal issues and: i) determine how to apply the law chosen by the parties; ii) establish the contents of the law or address any error of law or clarify any issues relating to the remedy sought, iii) give the parties sufficient opportunity to comment on provisions of the applicable law and iv) thereby ensure the validity and enforcement of the award.

[36] LEVY, Laurent, "*Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law*", http://kluwerarbitrationblog.com/blog/1009/03/20/jura-novit-curia-the-arbitrator´s-discretion-in-the-application-of-the-governing-law/.