Revisiting the “Content-of-Laws” Enquiry in International Arbitration

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Establishing the content of the applicable law is one of the most important, albeit seldom examined, topics in the theory and practice of international arbitration. Setting as the point of departure the regulatory vacuum in nearly all national laws on international arbitration, this study examines in depth this “content-of-laws” enquiry in an attempt to foster doctrinal integrity, legal certainty, and predictability in arbitral proceedings. Specifically, this study encompasses a three level analysis of the topic. Firstly, it explores the theoretical underpinnings and the various approaches articulated in legal theory to the establishment of the content of the applicable law in international litigation and arbitration. Secondly, on the basis of an elaborate comparative review of the various legal regimes and jurisprudence in the most frequently selected venues of arbitration, namely England & Wales, France, Hong Kong, Singapore, Switzerland, the State

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of New York (USA), and Sweden, as well as in leading investment arbitration fora, it challenges conventional wisdom by showcasing the emerging trend toward the application of a “facultative” jura novit arbiter principle in international arbitral proceedings. Thirdly, it delineates a clear modus operandi for arbitral tribunals and national courts reviewing arbitral awards in annulment proceedings and offers model clauses, arbitration rules, and national law provisions on the content-of-laws enquiry. The study concludes with some final remarks and observations that amplify the importance of continuous governing law related consultations between the parties and the arbitrators throughout the arbitral proceedings and, certainly, before the tribunal has rendered its final award.

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INTRODUCTION

The method of establishing the content of the applicable law is one of the most important, albeit seldom examined, topics in the theory and practice of international arbitration. In stark contrast to the abundance of publications relating to international arbitration, only a handful of scholars have attempted to shed light on this dark corner of alternative dispute resolution and to systematize the plethora of different approaches to the ascertainment of the content of the applicable law in international arbitral proceedings.\(^1\)

\(^1\) *The Arbitration: The Epitrepontes of Menander* 40 (Gilbert Murray trans., 1945).

\(^2\) As uniquely put by Professor Park, “Many trees have been felled to make paper for articles on how to find facts, [but] . . . [l]ess attention has been paid to the arbitrator’s truth-seeking function with respect to legal norms.” William W. Park, *Arbitrators and Accuracy*, 1 J. INT’L DISPUTE SETTLEMENT 25, 42 (2010).
Notwithstanding the limited attention in legal scholarship, which has resulted, among other factors, from the fallacy that conflict-of-laws do not fit with international arbitration, the method of establishing the content of the applicable law could alter the legal basis and, as a consequence, determine the outcome of the dispute. The importance of this so-called “content-of-laws” enquiry is vividly illustrated in the following example:

Party A and Party B entered into an international agreement for the distribution of heart rate monitors in Ruritania. The distribution agreement contained an arbitration clause for the resolution of all disputes arising from or in connection with the agreement. Following the unilateral termination of the contract by B, A filed a motion to initiate arbitral proceedings for breach of the distribution agreement. Both A and B made legal submissions on contract law grounds.

This theoretical example raises a series of content-of-laws-related questions: who bears the burden of establishing the content of the applicable rules? Does it fall on the parties or the arbitral tribunal? Is the tribunal limited by the arguments of the parties? Should it look beyond the submissions of the latter? What should the tribunal do if the parties have overlooked any relevant rules? Particularly under this latter scenario, what is the effect of any overriding mandatory rules on goodwill indemnity on the law applicable to the dispute? Depending on the approach adopted to the content-of-laws enquiry, the outcome of this dispute could vary significantly.

Be that as it may, it might be argued that the importance of the content-of-laws enquiry is limited to the realm of academic curiosity, as parties usually retain legal counsel and make detailed legal submissions at the tribunal’s request. Reality, however, is different, as clearly evidenced in the seminal Soh Beng Tee & Co. v. Fairmount Development case from Singapore in which the power of the arbitral tribunal to introduce sua

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3. For an informative overview of the interplay between conflict-of-laws and international arbitration, see, for example, CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stefan Kröll eds., 2011).

4. Note the distinction between “conflict-of-laws” enquiries whereby the adjudicator explores which law is applicable, and “content-of-laws” enquiries whereby the adjudicatory strives to ascertain what the identified applicable law provides for.

5. This example is loosely based on the seminal case Werfen Austria GmbH v. Polar Electro Europe B.V., Korkein oikeus [KKO] [Supreme Court] 2008:77 (Fin.), http://www.finlex.fi/fi/oikeus/kko/kko/2008/20080077#aOT20080077_3 [https://perma.cc/KDA7-T34C].

sponte additional legal arguments constituted the central issue of annulment proceedings:

This appeal follows in the wake of a 44–day arbitration hearing that engendered 1,766 pages of transcripts and a 110–page award dated 15 March 2006 (“the Award”). In the course of the arbitration proceedings, the appellant, Soh Beng Tee & Company Pte Ltd (“SBT”) and the respondent, Fairmount Development Pte Ltd (“Fairmount”) had filed over 200 pages of pleadings, cumulatively examined 14 witnesses, and submitted at least 696 pages of written arguments.\(^7\)

Acknowledging the paramount importance of the topic for doctrinal integrity, legal certainty, and predictability, this Article navigates the approaches articulated in legal theory and followed in legal practice in an attempt to identify a transnational legal standard or best practices for arbitral proceedings. Specifically, the analysis begins with an overview of the content-of-laws enquiry in international litigation. In light of the fundamental principle of *jura novit curia*, Part I defines and demarcates the concepts of “domestic” and “foreign” laws. Part II sets out the core methods followed by national courts in the application of foreign law. Part III delves into the *sui generis* cosmos of international arbitration and, specifically, the content-of-laws enquiry in legal theory. Having set the scene with an overview of the two-tier procedural framework of arbitral proceedings—namely, party autonomy and the relevant national law on arbitration, that is, *lex arbitri*—the analysis explores the so-called “fall-back,” the inquisitorial, adversarial, and, finally, “hybrid” approaches to the issue. Part IV continues with an elaborate comparative review of the content-of-laws enquiry in the practice of the most frequently selected venues of arbitration,\(^8\) unveiling caselaw trends and patterns in various civil law and common law jurisdictions as well as investment arbitration fora. The synthesis of the findings reveals an emerging trend toward the application of a “dormant” or “potentially inquisitorial” approach, amounting to the application of a facultative *jura novit arbiter* principle in international arbitration. Part V concludes with an attempt to establish a *lex ferenda* for

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8. *Queen Mary, Univ. of London & White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 12 (2015), http://www.arbitration.qmul.ac.uk/docs/164761.pdf (listing, in this order, England and Wales, France, Hong Kong, Singapore, Switzerland, the State of New York in the United States of America, and Sweden as the most frequently selected arbitration venues) [https://perma.cc/5QPF-HEJ8].
the content-of-laws enquiry by firstly delineating the optimal rules of a hybrid approach to the ascertainment of the content of the applicable law in international arbitration and secondly offering model clauses, arbitration rules, and national law provisions on the content-of-laws enquiry.

I. MEETING THE LATINs: JURA NOVIT CURIA, Lex Fori, and Lex Aliena

It is important to begin by briefly examining two points that will set the foundations for the analysis that follows: the jura novit curia principle and the crucial distinction between domestic and foreign laws.

Pursuant to the general principle of jura novit curia, which is also referred to as “iura novit curia,” the court knows—or, at least, is presumed to know—the law. Hence, the laws of the respective forum are put on par with the laws of other legal orders in that the judge is presumed to be cognizant of their content and required to apply the law without assistance from the litigating parties. In juxtaposition with Friedrich Carl von Savigny’s idea of equality of domestic and foreign laws, however, the adage jura novit curia has not risen yet to the status of a universal principle. Accordingly, the various fora may be classified into two broad groups: (1) fora that are presumed to know equally domestic and foreign laws; and (2) fora adhering to a limited jura novit curia principle, which requires that only domestic law be ascertained and applied ex officio by the judge.

This distinction accentuates the importance of the second point examined herein, that is, the classification of rules into domestic and foreign laws. The two concepts may be demarcated only in concreto, that is, in reference to a particular state, and may be defined in a positive and negative manner respectively. Domestic law comprises the entirety of the regulations enacted by the national legislator, international treaties, and other legal documents ratified by the respective state; the primary and


11. See Masanori Kawano, Court Responsibilities for Determining Foreign Law, in International Contract Litigation, Arbitration and Judicial Responsibility in Transnational Disputes 221, 222 (Rolf Stürner & Masanori Kawano eds., 2011) (“As far as the domestic cases are concerned investigating and determining the appropriate legal rule, which applies to the particular case is commonly regarded as one of the most important responsibilities of the court. They are investigated ex officio.”).
secondary legislation of international organizations that the state is member of; as well as the application of such national or international rules by the judiciary of the state or other competent international bodies and tribunals. Conversely, foreign law consists of all national and international rules that do not form part of domestic law.\textsuperscript{12}

Having clarified the meaning of these fundamental concepts of international civil procedure and conflict-of-laws, this Article can delve into the “content-of-laws” enquiry in international commercial litigation and arbitration.

\textbf{II. INTERNATIONAL COMMERCIAL LITIGATION AND FOREIGN LAW}

The initiatives for the unification of the various national regimes on the application of foreign law have been rather anemic.\textsuperscript{13} In addition, all

\begin{itemize}
relevant projects on both regional and global levels have been discontinued—at least for the foreseeable future.14 Such a stalemate is evidenced clearly in the Report on the Meeting: Feasibility Study on the Treatment of Foreign Law of the Hague Conference on Private International Law: “[The] experts concluded that there should be no attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonisation.”15

As a consequence, the largely inconsistent national regimes on the ascertainment of the content and the application of foreign law have been

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preserved. Such inconsistencies nullify the legal certainty and predictability achieved under uniform conflict-of-laws instruments because, depending on the forum, different substantive rules might be ascertained and eventually applied to the very same dispute.\textsuperscript{16} With that in mind, it is clear that this niche topic in private international law and international civil procedure arises as a factor of paramount importance for the establishment of a level playing field in international trade.

There is a wide spectrum of approaches to the ascertainment of the content and the application of foreign law by national courts. As eloquently put in the \textit{ILA Report \& Recommendations on “Ascertaining the Contents of the Applicable Law in International Commercial Arbitration”},\textsuperscript{17} at the two extremes of the spectrum, one may find “[fora whereby] the court has considerable powers to apply foreign law and to ascertain its contents on its own motion . . . [and fora whereby] the court is required essentially to rely on the initiative of the parties to plead and prove foreign law as if it were a factual matter.”\textsuperscript{18} This distinction corresponds with the legal treatment of foreign law as “law” and foreign law as “facts,” respectively.\textsuperscript{19} In between these two positions, there are “intermediate systems . . . where pleading foreign law primarily rests with


\textsuperscript{18} \textit{Id.} at 861. Notable examples of countries following the “foreign law as legal rules” approach are Austria, Brazil, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, and Turkey. Notable examples of countries following the “foreign law as facts” approach are Argentina, Australia, Cyprus, India, Ireland, Israel, Luxemburg, Malta, South Africa, Spain, and all constituent systems of the United Kingdom.

\textsuperscript{19} Jeffrey Waincymer, \textit{Procedure and Evidence in International Arbitration} 1057–58 (2012).
the parties and where responsibility with regard to ascertaining its contents is divided between the court and the parties.**20**

Granted, national legal orders only seldom adopt one of the two extreme positions. Either they provide for special rules, which water down the “doctrinal purity” of the extreme approaches,**21** or, most frequently, legal practice—as evidenced in caselaw—blurs the picture so that the classification of the particular legal system becomes nearly impossible. Finally, for the sake of completeness, a number of jurisdictions have no relevant rules on the legal treatment of foreign law rules**22** but approach all foreign law issues on a case-by-case basis.**23**

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**20.** *ILA Report & Recommendations, supra* note 17, at 861. Notable examples of countries following this “intermediate approach” are China, Latvia, Lithuania, the Netherlands, and the United States of America.

**21.** Typical examples of such special rules are those allowing only limited appellate review of judgments for incorrect interpretation and/or application of the applicable foreign law and rules expanding the limited *jura novit curia* principle to laws of other foreign jurisdictions. For these two examples, see, for example, Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* 246–47 (1998); Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* 251–359 (2004).


III. INTERNATIONAL ARBITRATION:  
THE CONTENT-OF-LAWS ENQUIRY IN THEORY

A. Setting the Scene

Unlike court proceedings, in the context of international arbitration, no such distinction exists between domestic and foreign law.24 Other than the indirect selection of the basic procedural framework—as determined by the *lex arbitri*25—that is affected by locating the seat of the tribunal in

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a particular country—thus, *lex loci arbitri*—it cannot be sensibly argued that an arbitral tribunal has its own substantive law regime.28

26. GARY B. BORN, II INTERNATIONAL COMMERCIAL ARBITRATION 1602 (2d ed. 2014) ("While the procedural law of the arbitration will very often be the arbitration law of the arbitral seat, some national arbitration legislation [e.g., Swiss, French] allows parties to an arbitration seated locally to agree to a foreign procedural law, which will then replace or supplement most aspects of the arbitration law of the seat."); PIERRE A. KARRER, INTRODUCTION TO INTERNATIONAL ARBITRATION PRACTICE: 1001 QUESTIONS AND ANSWERS 15 (2014) (noting that, with the exception of France, this is the general practice); Kaufmann-Kohler, Globalization of Arbitral Procedure, supra note 24, at 1319; WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 327 (2d ed. 2012); JEAN-FRANÇOIS POUDRE & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 84–85, 458 (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007); WAINCZYMER, supra note 19, at 1072; see also Giuditta Cordero-Moss, Is the Arbitral Tribunal Bound by the Parties' Factual and Legal Pleadings?, 2006 STOCKH. INT'L ARB. REV. 1, 29 (2006) ("That the venue for the arbitration shall be chosen out of logistical or other practical reasons and without taking into consideration the legal framework for the proceeding, does not seem to comply with the important role that local arbitration law has in respect of the validity and enforceability of the award, of the tribunal’s power to order interim measures, or of the local court’s powers to intervene in or assist the arbitral procedure."). For a critical stance on this proposition, see PHILIPPE FOUCARD, EMANUEL GAILLARD & BERTHOLD GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION 635 (Emmanuel Gaillard & John Savage eds., 1999) ("It is widely accepted today that the seat of the arbitration, often chosen for reasons of convenience or because of the neutrality of the country in question, does not necessarily cause the procedure to be governed by the law of that jurisdiction. As the choice of a seat by the parties, the arbitral institution or the arbitrators themselves is often made on grounds entirely unrelated to the arbitral procedure, that choice will not automatically have an impact upon the conduct of the arbitral proceedings."). For a critical review of the theories identifying the law of the seat as the procedural law of the arbitral proceedings, see GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 19–46 (2003), and id. at 16–17 ("[International arbitration] seeks to distance itself from the law of any given state, in that when the parties or the arbitrators choose the place of arbitration they cannot be presumed to have intended to be bound wholesale by any rules that state sees fit to impose with regard to arbitration generally."). For a third "no-choice" view, see NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 171–72 (6th ed. 2015) ("The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum'), or *locus arbitri* of the arbitration, is well established in both the theory and practice of international arbitration."); and id. at 176 ("It is also sometimes said that the parties have selected the procedural law that will govern their arbitration by providing for arbitration in a particular country. This is too elliptical . . . . What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to
Hence, the comparison between “foreign law as facts” and “foreign law as law” is irrelevant in arbitral proceedings because there can be only

the laws of that country, including any mandatory provisions of its law on arbitration . . . . Parties may well choose a particular place of arbitration precisely because its lex arbitri is one that they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law . . . . It is not a matter of choice, any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard.”).  

27. LOOKOSKY & HERTZ, supra note 25, at 834. See UNITED NATIONS COMM’N ON INT’L TRADE LAW, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 1(2) (2008) [hereinafter UNCITRAL Model Law].  

28. See KARRER, supra note 26, at 161 (“[L]ex arbitri is often a genitivus objectivus, so one should translate as, ‘the law concerning the arbitrator.’ This is a law at the seat dealing with the relationship between the Arbitral Tribunal and the State Courts at the seat.”). Cf. Linda Silberman & Franco Ferrari, Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 257, 298 (Franco Ferrari & Stefan Kröll eds., 2011) (disapproving Restatement (Second) of Conflict of Laws § 218, comment b, which cites two cases as examples whereby the selection of a particular state as situs of the arbitral tribunal “should be read as calling for application of that state’s local law to govern the rights of the parties under the contract . . .”).  

29. See BLACKABY & PARTASIDES, supra note 26, at 398 (“[I]t takes only a brief moment of reflection to appreciate that the convenient fiction that ‘foreign law is fact’ does not work in the context of an international arbitration. . . . Nowadays, in almost all international arbitrations, ‘law’ is treated as ‘law’.”); Gillis J. Wetter, The Conduct of the Arbitration, 2 J. INT’L ARB. 7, 25 (1985) (“[G]eneral international arbitral practice does not accept the English rule that the determination of foreign law is a question of fact. International arbitrators do apply any law as if it were their own.”). It is precisely this legal or non-factual nature of the applicable law in arbitration that places the latter outside the ambit of the INT’L BAR ASS’N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [https://perma.cc/XU42-ECTW]. Contra A. V. Dicey, John H. C. Morris & Lord Collins, On the Conflict of Laws 1, 318 (15th ed. 2012) (“[A] finding upon foreign law made by arbitrators is a finding of fact which may not form the basis of an appeal on a point of law under s. 69 of the Arbitration Act 1996.”); Fouchard, Gaillard & Goldman, supra note 26, at 692 (“As an arbitral tribunal has no forum, it should consider all laws to be foreign laws, the content of which should be established as though it were an element of fact. 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.”); Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England 73 (2d ed. 1989) (“Since an issue as to the substance and effect of a foreign law is a question of fact the decision of the arbitrator upon it is final.” (citing Prodexport State Co. for Foreign Trade v. E.D. and F. Man Ltd. [1972] 2 Lloyd’s Rep 375 at 383)).
“applicable law.”30 By the same token, the distinction between national “hard” law and “soft” law instruments also is irrelevant,31 as national laws and “rules of law” are generally put on par under the various leges arbitri.32 Nonetheless, these observations do not address the issue of who bears the burden of establishing the content of the applicable regime. Does it fall on the arbitral tribunal or on the parties? Is there any such concept as “jura novit arbiter”33 or “jura novit tribunus”? Is the arbitral tribunal empowered to resolve the dispute on unpleaded legal grounds?35

This thorny issue should be addressed in accordance with the two-tier regulatory framework of arbitral proceedings.36 Specifically, it should be approached with reference to, firstly, the procedural agreements of the parties, including any arbitration rules incorporated by reference into the arbitration agreement, and secondly, the national law governing the arbitral proceedings.

1. Party Autonomy

It is well established that party autonomy is the cornerstone of international arbitration. The parties may structure their respective arbitral

30. ILA Report & Recommendations, supra note 17, at 866 (“Unlike before national courts where there is a distinction between national and foreign law, in arbitration one can only speak of applicable law.”).
31. See LEW, MISTELIS & KRÖLL, supra note 24, at 441.
32. A typical example of a rule enshrining this proposition is UNCITRAL Model Law, supra note 27, art. 28(1).
35. Cf. PETROCHILOS, supra note 26, at 146 (“The relevant case law is less than clear-cut, no doubt because of the varying conceptions on the corresponding duty of a judge in national court proceedings.”).
36. See BLACKABY & PARTASIDES, supra note 26, at 156 (“[A]n arbitration does not exist in a legal vacuum. It is regulated, first, by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal; secondly, it is regulated by the law of the place of arbitration. It is important to recognise . . . that this dualism exists.”).
proceedings as they see fit— to the extent, of course, that the law governing the arbitral procedure allows. Because most—if not all—leges arbitri impose no limitations on the parties’ freedom to enter into special agreements on the content-of-laws enquiry, the parties are allowed to allocate the onus of establishing the content of the applicable law as they deem appropriate. Specifically, such an agreement may be concluded at any stage before or after the proceedings have been initiated but certainly before the closing of the hearings by the tribunal. It may take the form of

37. See Born, INTERNATIONAL COMMERCIAL ARBITRATION, supra note 26, at 2153 (“As a practical matter, it is relatively unusual that the arbitrators will disagree sufficiently seriously with the parties’ agreed arbitral procedures that they will overrule that agreement.”); Petrochilos, supra note 26, at 170 (“The parties’ instructions to the arbitrators are always binding on them, subject of course to common sense and decency, professional ethics, and criminal law.”).

38. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(d), Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; UNCITRAL Model Law, supra note 27, art. 19(1); see also Nigel Blackaby & Constantine Partasides, Redfern and Hunter on International Arbitration 180 (5th ed. 2009) (“The procedure of an arbitration may be, and generally is, regulated by the rules chosen by the parties; but the procedural law is that of the place of arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not. It may well be that the lex arbitri will govern with a very free rein, but it will govern nonetheless.”); Gabrielle Kaufmann-Kohler, Qui Contrôle l’ Arbitrage? Autonomie des Parties, Pouvoirs des Arbitres et Principe d’ Efficacité, in LIBER AMICORUM CLAUDE REYMOND: AUTOUR DE L’ ARBITRAGE 153, 161 (2004); Poudret & Besson, supra note 26, at 470; Waincymer, supra note 19, at 52, 109, 192. But see Petrochilos, supra note 26, at 170 (“[T]he parties may obligate the arbitrators to derogate from the law of the arbitral seat, or from any national law for that matter. . . . [N]either the arbitral institution nor the arbitrators are at liberty to [act . . .] against the parties’ agreement. At most, the arbitral institution may decline to administer the proceedings, and the controlling courts set the award aside.”). Cf. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-11, Reporters’ Notes at 137–38 (AM. LAW INST., Tentative Draft No. 1, 2010); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-15, Reporters’ Notes at 216–18 (AM. LAW INST., Tentative Draft No. 2, 2012).

39. See Seventh Session of the Working Group on International Contract Practices (New York, 6–17 Feb. 1984), Report of the Working Group on the work of its Seventh Session (A/CONF.9/246—6 March 1984), 196, [63] (“[T]he freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings . . . and should not be limited . . . to the time before the first arbitrator was appointed.”); see also Blackaby & Partasides, supra note 26, at 171 (“It is . . . often advisable, particularly where parties and their counsel are from different legal backgrounds, to agree such rules at the outset of an arbitration.
a clause in the arbitration or submission agreement,\textsuperscript{40} a special procedural agreement between the parties,\textsuperscript{41} or even an express procedural understanding of the parties and the tribunal, as documented in the Terms of Reference of the dispute.\textsuperscript{42} This practice of contractually establishing clear-cut procedural rules raises no serious problems in the theory and practice of international arbitration. The arbitrators are obliged to adhere to the directions of the parties.\textsuperscript{43} Should they deviate, the arbitral award

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This may be done by agreement of the parties, or by order of the arbitral tribunal at the first procedural meeting.”); \textsc{Gabrielle Kaufmann-Kohler \& Antonio Rigozzi}, \textsc{International Arbitration: Law and Practice in Switzerland} 376 (2015) (“In an arbitration where the actors (parties, counsel, arbitrators) come from different procedural traditions (ranging from legal systems where foreign law is a fact to be proven to systems where courts apply foreign law \textit{ex officio}, over variations between these two extremes), arbitrators are well advised to address the status of the applicable law at the outset.”).

\textsuperscript{40} See Alberti \& Bigge, \textit{supra} note 34, at 1 (noting that the content of the applicable law issue is rarely addressed in the parties’ agreements); Ieva Kalniņa, \textit{Iura Novit Curia: Scylla and Charybdis of International Arbitration?}, \textit{8 Balt. Y.B. Int’l L.} 89, 92 (2008). For a model submission agreement, including a clause on the content-of-laws issue, see \textit{infra} Part V.

\textsuperscript{41} See Poudret \& Besson, \textit{supra} note 26, at 459 (“In practice it will be rare that [the parties] develop a complete procedural code solely intended to apply to a particular case. Only certain sensitive questions (language, exchange of briefs, confidentiality or information divulged during the course of the proceedings, discovery, etc.) will generally be the object of a specific agreement.”).

\textsuperscript{42} ICC Rules of Arbitration, art. 23 (2012) (rule on the “Terms of Reference”); Tribunal federal [TF] [Federal Supreme Court] Feb. 5, 2014, 4A_446/2013 (Switz.) (where such an agreement was entered into with the Terms of Reference). For a model clause that could be included in the terms of reference, see \textit{infra} Part V. \textit{Cf. United Nations Comm’n on Int’l Trade Law, Notes on Organizing Arbitral Proceedings} (2016).

\textsuperscript{43} See Poudret \& Besson, \textit{supra} note 26, at 462–63 (“The majority opinion submits that the arbitrator or arbitrators may not veto a procedural agreement which has been properly concluded by the parties, but may only resign if they feel unable to accomplish their task. \textit{De lege lata}, we feel that this majority opinion is correct in view of the principle of party autonomy. \textit{De lege ferenda}, we are of the opinion that . . . the arbitrators should by law have the power to set aside agreements which are an obstacle to the smooth conduct of the proceedings.”); Simon Greenberg, Christopher Kee \& Romesh J. Weeramantry, \textsc{International Commercial Arbitration: An Asia-Pacific Perspective} 307–08 (2011) (“If the arbitral tribunal cannot accept the parties’ agreement on a matter of procedure, it should ordinarily offer its resignation. However, in practice an experienced arbitral tribunal may effectively require the parties to abide by certain procedural rules and decisions despite a reluctance by both parties.”); \textsc{Thomas H. Webster}, \textsc{Handbook of UNCITRAL Arbitration; Commentary, Precedents and Materials for
most likely will be set aside or pronounced unenforceable by the courts at the tribunal’s seat or in any other country where enforcement is sought. Most frequently, however, procedural agreements between the parties take the form of a clause incorporating by reference institutional or other model arbitration rules into the arbitration agreement. That said, most institutional and other model arbitration rules are silent on the content-of-laws enquiry.

**UNCITRAL BASED ARBITRATION RULES 269–70 (2010)** (“If the members of the Tribunal disagree with the procedure adopted by the parties, . . . they can and should express their preferences. If the parties persist on an important issue of procedure, then the members of the Tribunal may well have the right to resign.”).

44. See UNICTRAL Model Law, supra note 27, art. 34(1), (2)(a)(iv).

45. See New York Convention, supra note 38, art. (V)(1)(d); UNICTRAL Model Law, supra note 27, art. 36(1)(a)(iv).

46. See U.N. Secretary-General, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, at 44, U.N. Doc. A.CN.9/264 (March 25, 1985) [hereinafter Analytical Commentary]; see also GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 778 (2d ed. 2015) (“Although national law in most developed states will permit the parties to agree upon the arbitral procedures . . . parties often do not agree in advance on detailed procedural rules. At most, international commercial arbitration agreements will provide for arbitration pursuant to a set of institutional rules, which will ordinarily supply only a broad procedural framework.”). Cf. AM. LAW INST. & UNIDROIT, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, Principle 22(1) (2006) (“The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.”) (emphasis added), and id. Principle 22(2)(3) (“The court may, while affording the parties opportunity to respond: Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.”) (emphasis added). It is only logical that such soft-law instruments, which were promulgated with an eye on international civil litigation, be only mutatis mutandis applicable to international arbitration.

47. Alberi, supra note 24, at 16–17 (“One reason for the silence on [how the applicable law and its content should be ascertained] may be that institutions need to keep their rules flexible enough to allow parties from all jurisdictions to ‘feel comfortable’ with their rules without cutting too far into procedural maxims.”); Knuts, supra note 24, at 672; LEO, MISTELIS & KRÖLL, supra note 24, at 443; see also Croft, KEE & WAINCYMER, supra note 24, at 402 (“This [lack of special rules in the UNCITRAL Model Rules] is largely because different legal families have taken fundamentally different approaches to this question.”); Teresa Giovannini, Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?, in STORIES FROM THE HEARING ROOM: EXPERIENCE FROM ARBITRAL PRACTICE: ESSAYS IN HONOUR OF MICHAEL E. SCHNEIDER 59, 66 & n.38 (Bernd Ehle & Domitille Bazieau eds., 2014) (noting, as exceptions to this general observation, the LCIA Arbitration Rules of 1998, art. 22(1)(c) [LCIA Arbitration Rules of 2014, art. 22(1)(iii)], CIETAC Arbitration Rules, arts. 29(3) and 27 [sic]
2. Lex Arbitri

In the absence of a special procedural agreement between the parties, the arbitral tribunal will have to adhere to the mandates of the lex arbitri. Most national laws on international arbitration, however, lack any rules—let alone any mandatory rules—on the ascertainment of the content of the governing law.\(^{48}\) Instead, they usually provide for a procedural catch-all rule that empowers the tribunal to conduct the arbitration in an “appropriate manner,”\(^{49}\) “unimpeded by local peculiarities and traditional

\(^{48}\) See, e.g., UNCITRAL Model Law, supra note 27, at 19(2); Analytical Commentary, supra note 46, at 45 (“This enables the arbitral tribunal to meet the
standards[,] which may be found in the existing domestic law of the place [of arbitration]—albeit always within the mandatory rules of the lex arbitri and the fundamental principles of arbitration. Although this latter

needs of the particular case and to select the most suitable procedure when organizing the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence.”); see also BORN, INTERNATIONAL ARBITRATION, supra note 46, at 778 (“This authority [of the arbitrators] has enormous practical importance because it is rare case where the parties to an arbitration will find common ground on all of the procedural issues that confront them.”); POUDRET & BESSON, supra note 26, at 463 (“The power of the arbitrators to determine the arbitral procedure is more restricted than that of the parties.”). Cf. EMANUEL GAillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION 98 (2010) (noting that the practice has evolved in that the arbitrators “address concrete procedural issues as and when they arise during the course of the arbitration,” rather than by selecting a particular legal regime at the outset of the proceedings); PARK, supra note 26, at 159 (“[T]he tendency (or perhaps temptation) for arbitrators and litigants alike is often to wait to address a procedural question until it arises, for the simple reason that it may not arise at all.”); id. at 172 (“The best moment for establishment of procedural protocols lies before proceedings begin, in an initial procedural order. In practice, however, many arbitrators (and litigants) may shy away from raising matters that could cause unnecessary wrangling at the beginning of the proceedings . . . .”).

50. Analytical Commentary, supra note 46, at 44, 46 (“In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them). . . . Above all, where the parties are from different legal systems, the arbitral tribunal may use a liberal ‘mixed’ procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice . . . . Such procedural discretion . . . seems conducive to facilitating international commercial arbitration, while being forced to apply the ‘law of the land’ where the arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence.”).

51. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 583 (1989) (referring to the Analytical Commentary on the Draft Model Law, “[w]here the parties have not agreed, before or during the arbitral proceedings, on the procedure (i.e. at least not on the particular matter at issue), the arbitral tribunal is empowered to conduct the arbitration in such manner as it considers appropriate, subject only to the provisions of the model law which often set forth special features of the discretionary powers (e.g., articles 23(2), 24(1), (2) [Art. 24(1) in the final text], 25) and sometimes limit the discretion to ensure fairness (e.g. articles 19(3) [Art. 18 in the final text], 24(3), (4) [Art. 24(2), (3) in the final text], 26(2)).”); Gabrielle Kaufmann-Kohler, Identifying and Applying the Law Governing the Arbitration Procedure—The Role of the Law of the Place of Arbitration, in IMPROVING THE
rule delineates, in very broad terms, what the arbitrators can do, it gives no guidance as to what the arbitrators should do with respect to establishing the content of the applicable law. It is precisely this regulatory vacuum that allowed for the articulation of various legal theories augmenting legal uncertainty on the topic. These theories and approaches are examined in detail in the following paragraphs.

B. The “Fall-Back” Approach

In an attempt to fill the aforementioned legal gap, it has been argued that, absent an agreement of the parties, the arbitrators should fall back on the rules of civil procedure in force at the tribunal’s seat. This may be described as the fall-back [on civil procedure] approach. Hence, if the

Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 336, 357 (Albert Jan Van den Berg ed., 1999) (“In the event that the parties have made no use of their freedom, the arbitrators have broad discretionary powers. Unlike the parties, however, they must apply the non-mandatory or supplementary rules of the Model Law, which are all meant to implement the overriding due process principle.”).

52. Schütze, supra note 24, at 722 (“The ascertainment of the content and the application of foreign law in arbitral proceedings follows the same rules that are applicable in litigation before national courts.”) (author’s translation from the original). Contra Joshua Karton, The Culture of International Arbitration and the Evolution of Contract Law 154 (2013) (“It is generally agreed that domestic rules on the ascertainment of the governing law should not be applied by analogy to ICA.”); Gabrielle Kaufmann-Kohler, The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions, 21 Arb. Int’l 631, 633 (2005) (“Many arbitration practitioners approach the status of the law governing the merits by reference to the rules applicable in their home courts. With due respect, such an approach makes little sense.”). But see Born, International Arbitration, supra note 46, at 777, 786 (“Historically, it was frequently said or assumed that arbitrators were required to apply the domestic procedural rules applicable in national courts in the arbitral seat . . . [on the contrary,] . . . it is well-settled in virtually all developed jurisdictions that arbitrators are not required to apply local civil procedure rules applicable in national court litigation, in an international arbitration.”); Gaillard, supra note 49, at 93 (highlighting a trend toward acknowledging the freedom of the arbitrators “to depart from the rules applicable by the courts of the country of the seat . . .”); Poudret & Besson, supra note 26, at 463 (“The former doctrine pursuant to which the law of civil procedure (and not just the law governing the arbitration) in force at the place of the seat of the arbitration was binding on the arbitrators in the absence of procedural agreements of the parties is no longer followed in [Belgium, England, France, Germany, Italy, The Netherlands, Sweden, Switzerland].”).
tribunal maintains its situs in a jurisdiction where the courts are required to establish the content of the applicable foreign law *ex officio*, the arbitrators, too, would be required to establish the content of the applicable law on their own motion. By the same token, should the tribunal be located in a jurisdiction where foreign law is established exclusively by the litigating parties, it would be the duty of the parties to educate the arbitral tribunal accordingly.\(^{53}\)

This approach, however, fails to take into account the fundamental differences between international litigation and arbitration.\(^{54}\) The rules of civil procedure have been promulgated exclusively for the regulation of litigation proceedings, reflecting features and objectives of the forum state.\(^{55}\) In addition, unique provisions of national procedural regimes, such as

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53. See Mustill & Boyd, *supra* note 29, at 19, 72–73 (implying that this practice was followed in England before the entry into force of the Arbitration Act of 1996); *see also* Parties not indicated, Final Award, ICC Case No. 8677/FMS (1997), 1 INT’L J. ARAB ARB. 333, 354–55 (2009) (seat of the tribunal in London, England) (“Neither expert on the law of D country offered any opinion on what the expression ‘in transit’ might be constructed as meaning under that law. I am entitled to look at the authorities (which are English) cited by the Defendant on this question: the place of the arbitration is London and it is a rule of English procedural law that, absent evidence, a foreign law should be assumed to be the same as the domestic law.”); Hussmann (Europe) Ltd. v. Al Ameen Dev. & Trade Co. & Ors. [2000] 2 Lloyd’s Rep. 83, [42] (Eng.) (quoting Mustill & Boyd, *supra* note 29) (“If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales.”).

54. See *ILA Report & Recommendations, supra* note 17, at 881, Recommendation No. 4. Cf. Kalniņa, *supra* note 40, at 92 (“[N]ational judges . . . are under an inherent duty to provide justice[, whereas] . . . international arbitrators . . . are often perceived as mere ‘service providers’ for settling disputes of an essentially commercial nature.”).

55. *ILA Report & Recommendations, supra* note 17, at 866; Lew, Mistelis & Kröll, *supra* note 24, at 523 (“Although the arbitration tribunal performs a judicial function, rules of national civil procedure are invariably unsuitable and irrelevant for international arbitration.”). For agreements identifying national procedural law as the regulatory framework of the arbitral proceedings, see *id.* at 524 (“Unless the chosen law contains specific provisions for international arbitration such a choice is unwise as national civil procedure rules are normally designed for domestic litigation before state courts, not for the arbitration of international cases. Arbitration requires a greater degree of flexibility.”); Poudret & Besson, *supra* note 26, at 460 (“[T]he application of such [civil procedure] law risks raising serious difficulties due to the fact that it is integrated in the judicial...
as the English “default rule” that mandates the application of English law when foreign law has been neither pleaded nor proven by the litigating parties, do not fit into international arbitration, which, as already suggested, has no lex fori. Furthermore, arbitral tribunals do not have the special mechanisms available to national courts, such as foreign law institutions, governmental, or other services responsible for the establishment of foreign laws. Equally important, this fall-back approach does not reckon with the possibility that arbitrators could be selected for their commercial awareness and expertise in a field other than law. Granted, even if the appointed arbitrators have received legal training, they organisation of a country and is not adapted to arbitration.”); WAINCYMER, supra note 19, at 192 (“The [selected civil procedure] rules may be inadequate from a policy perspective and there may be complex interpretational questions as to which parts of the rules apply when some elements might seem only applicable to court procedures. Such an approach would never seem desirable.”).

56. ILA Report & Recommendations, supra note 17, at 881, Recommendation No. 4; BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note 26, at 2734 (“These presumptions are inapplicable in international arbitration because the tribunal has no local substantive law to turn to . . . .”); id. at 2293–94 (arguing that the “default rule” approach is inconsistent with modern international arbitration theory and the application of the jura novit curia principle in international arbitration); Doug Jones, The Remedial Armoury of an Arbitral Tribunal: The Extent to Which Tribunals Can Look Beyond the Parties’ Submissions, 78 ARB. 102, 113 (2012) (“A tribunal in international arbitration has no ‘forum’ law upon which it can fall back if the content of the substantive law cannot be ascertained satisfactorily.”); PETROCHILOS, supra note 26, at 175 (“[I]t is inappropriate without more to adopt a procedural rule reflecting a particularity of municipal law, such as the English law rule that if the content of the foreign law pleaded is not proved as a fact the arbitrator is ‘compelled’ to presume that the law of the seat is the same as that foreign law.”); see also Isele, supra note 24, at 21; Kalniņa, supra note 40, at 91–92. But see Cordero-Moss, supra note 26, at 22 (“If the evidence is still not satisfactory, the tribunal will apply the presumption that foreign law is the same as English law; and English law is applied ex officio by the tribunal.”). For a dismissal of Professor Cordero-Moss’s position, see Harris Bor, Expert Evidence, in ARBITRATION IN ENGLAND: WITH CHAPTERS ON SCOTLAND AND IRELAND 503, 524 (Julian D.M. Lew et al. eds., 2013) (noting, in the context of Hussmann [Europe] Ltd v. Al Ameen Development & Trade Co & Ors [2000] 2 Lloyd’s Rep 83, that “[t]here is . . . an apparent anomaly in that the English court has also recognised the right of a tribunal with its seat in England to presume that, where parties do not raise an issue about the applicability of a foreign law rule, the law of England and Wales should apply.”).

57. See, e.g., art. 1044 Rv (Neth.); English Arbitration Act, supra note 48, §§ 35, 8291.

58. See Alberti, supra note 24, at 28; Isele, supra note 24, at 21.
would only exceptionally be familiar with the substantive law governing the merits of the dispute. Last but not least, “being forced to apply the [procedural] ‘law of the land’ where the arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence.” On account of the foregoing analysis, the fall-back approach should be rejected.

At this point, one cannot fail to observe that the fall-back approach does not address the content-of-laws enquiry de lege ferenda but offers only an easy way around the problem by referring the arbitrators to the rules of international litigation at the tribunal’s seat. Accordingly, the following paragraphs jettison this “reflexive” reference and focus instead on the “core” of the content-of-laws enquiry, that is, whether the arbitral tribunal should adopt an inquisitorial, adversarial, or, as argued herein, hybrid approach to the ascertainment of the content of the governing law in international arbitration.

C. The Inquisitorial Approach

An inquisitorial procedure translates into the application of the jura novit arbiter principle. It would be the tribunal’s duty to ascertain the content of the applicable law and to resolve the dispute on the “correct” legal grounds, even if the relevant arguments have not been advanced or the pertinent legal issues have not been raised by either of the parties.

The high costs and tardiness associated with establishing the content of the applicable law by the arbitrators have been identified as major

59. Giovannini, supra note 47, at 64; Isele, supra note 24, at 21; Kalniņa, supra note 40, at 92; LEW, MISTELIS & KRÖLL, supra note 24, at 440 (“Arbitrators may have little or no connection with or access to the applicable national law, unlike the national judges who normally apply the law they have been trained in for years.”). But see Bernard Hanotiau, The Conduct of the Hearings, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 633, 650 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014) (“In international arbitration, the arbitral tribunal will often include at least one member familiar with the ‘foreign’ applicable law.”).

60. Analytical Commentary, supra note 46, at 46.

61. Cf. ILA Report & Recommendations, supra note 17, at 866 (“[A]ny automatic transposition of national rules to arbitration would raise a conflict issue (i.e., whether arbitrators should apply the national rules of the law of the seat, of the law governing the merits or some other law).”).

62. “Correct” as defined by the parties. Cf. SAVIGNY, supra note 10, at 70 (providing the quintessential question in the Savignian conflict-of-laws theory, that is, “[t]o ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject.”).
disadvantages of the inquisitorial approach. Besides, the appointed arbitrators may not have received legal training altogether. Still, even if the arbitrators have received legal training, resolving the dispute on unpleaded grounds without allowing further submissions by the parties could be indicia of a biased tribunal. A proactive tribunal, however, safeguards the “correct” legal outcome of the dispute, especially considering that the parties—or, more accurately, the representatives of the parties—could present a distorted picture of the law to their benefit.

63. Alberti, supra note 24, at 27–28; Isele, supra note 24, at 21 (“[The increase in costs] is, of course, not necessarily so in every arbitration, but an affirmative duty [to ascertain the content of the applicable law] would certainly lead to a danger of such increase.”); Jones, supra note 56, at 113 (“[W]hen ever the tribunal is under a heavier duty to research and ascertain the content of unfamiliar substantive law, the costs of arbitration may increase.”); see also LEW, MISTELIS & KROLL, supra note 24, at 443 (“Considerations of expense may . . . deter parties from wanting tribunals to undertake such research.”).

64. Alberti, supra note 24, at 6, 28; Cordero-Moss, supra note 26, at 7; Antonias Dimolitsa, The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law, 27 ASA BULL. 426, 438 (2009); Kalniņa, supra note 40, at 91; Knuts, supra note 24, at 674. Cf. PT Prima Int’l Dev. v. Kempinski Hotels, [2012] SGCA 35, [59] (Sing.) (“Given that the Arbitrator is a Professor of Law of the National University of Singapore, it is not surprising that he thought of all the possible legal ramifications that could arise from the facts before him and then sought the views of counsel for the parties on those matters. In our view, the Arbitrator’s inquiries would not have given rise to a reasonable suspicion or apprehension on the part of a fair-minded reasonable person with knowledge of the relevant facts that he (the Arbitrator) was biased or had already made up his mind when he raised the matters.”).

65. See Cordero-Moss, supra note 26, at 7 (“[I]t seems legitimate to affirm that the tribunal, by acting ex officio[,] . . . acts in order to achieve a logical and objective result.”).

66. Alberti, supra note 24, at 27; Giovannini, supra note 48, at 6 (“Lawyers are obviously zealous in submitting only those court decisions or legal doctrine excerpts that serve the purpose of their case . . . . It is the tribunal’s duty to verify these sources independently.”). Cf. INT’L BAR ASS’N COUNCIL, IBA Guidelines on Party Representation in International Arbitration, Guideline No. 9 (2013) (“A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.”) (emphasis added); IBA Arbitration Committee Comments to Guidelines 9–11 (“With respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable.”) (emphasis added). For the usefulness of the inquisitorial approach in the event of a defaulting respondent party, see ILA REPORT & RECOMMENDATIONS, supra note 17, at 882, Recommendation No. 14; Dimolitsa, supra note 64, at 429; Giovannini, supra
This proactive approach is all the more important given the lack of appellate review of arbitral awards, the lack of grounds for the annulment of an arbitral award, or the refusal of its enforcement for erroneous application of the governing law.

Note 47, at 64; Petrochilos, supra note 26, at 149. But see Ting Kang Chung John v. Teo Hee Lai Bldng. Constructions, [2010] SGHC 20, [49] (Sing.) (“It is certainly not the duty of an arbitrator in a default hearing to assume the role of advocate for the absent party or to protect its interests . . . . All the arbitrator is required to do in such circumstances is to scrutinise the evidence of the attending party, ask such questions as he feels necessary on their evidence to satisfy himself that it proves their case and claims on a balance of probabilities. He is entitled to test and probe internal inconsistencies or contradictions appearing on the attending party’s evidence. He is not to act as an advocate for the absent party based on that absent party’s pleadings and/or documents and/or AEICs if they have been filed.”); Philip Fisher v. P.G. Wellfair Ltd. (in liq), [1981] 2 Lloyd’s Rep. 514, 522 (Eng.) (“I am afraid that the arbitrator fell into error here. He felt that it was his duty to protect the interests of the unrepresented party—in much the same way as a judge protects a litigant in person. But in a case like this I do not think it is the duty of the arbitrator to protect the interests of the unrepresented party. If the defendants do not choose to turn up to protect themselves, it is no part of the arbitrator’s duty to do it for them. In particular he must not throw his own evidence into the scale on behalf of the unrepresented party—or use his own special knowledge for the benefit of the unrepresented party—at any rate he must not do so without giving the plaintiffs’ experts a chance of dealing with it—for they may be able to persuade him that his own view is erroneous.”).

67. See Park, supra note 2, at 42; see also Andrews, supra note 24, at 365 n.317 (noting that, in light of §§ 82(1) and 69 of the English Arbitration Act refers only to errors of English law, but not to errors of “foreign,” that is, non-English, law); Blackaby & Partasides, supra note 26, at 595–96 (referring to the two extremes of the “spectrum,” that is, article 5 of the UNCITRAL Model Law and § 69 of the English Arbitration Act of 1996, precluding and allowing an appeal for mistakes of law by the arbitral tribunal respectively); Park, supra note 26 at 139, 331–32, and particularly 166 (“[A]n agreement to arbitrate usually incorporates a waiver of the right to challenge findings of fact or law.”). Cf. English Arbitration Act, supra note 48, §§ 69, 82(1); London Underground Ltd. v. Citylink Telecomm. Ltd., [2007] EWHC (TCC) 1749, [59] (Eng.) (“[T]he fact finding stage and the stage of the [sic] applying the law to the facts are separate from the stage of ascertaining the law. It is only the stage where the arbitrator ascertains the law and, by inference from the application of the law, properly understands the law that may be the proper subject of a question of law under section 69.”).

68. ILA Report & Recommendations, supra note 17, at 872; Cordero-Moss, supra note 26, at 12; Anna P. Mantakou, The Misadventures of the Principle Jura Novit Curia in International Arbitration—A Practitioner’s Approach, in IN PURSUIT OF JUSTICE: ESSAYS IN HONOUR OF SPYRIDON VL. VRELLIS 487, 492 (2014); see also Petrochilos, supra note 26, at 148 (“Although an award may
The inquisitorial approach has been adopted in numerous arbitral proceedings, and various degradations of it have been followed by the

not in principle be set aside for . . . errors in the law . . . , if a tribunal should reach ‘grossly unfair or arbitrary conclusions’ this should be taken as an indication that it either was patently biased or breached its duty to hear the parties in equality.”). But see the notorious ground for annulment of arbitral awards for “manifest disregard of the law” examined infra Part IV.B.4. In the context of ICSID arbitration, see generally INT’L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTES (“ICSID”), Updated Background Paper on Annulment for the Administrative Council of ICSID (May 2016), icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf [https://perma.cc/UR3P-CPXB]; CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 959–65 (2d ed. 2009).

69. Distributor (EU country) v. Manufacturer (EU country), Final Award, SCC Case No. 158/2011 (2013), 38 Y.B. COMM. ARB. 253, 263 (seat of the tribunal in Stockholm, Sweden) (“The Sole Arbitrator notes that the principle iura novit curia (the court knows the law) applies also in international arbitration, with the consequence that the content of the law does not have to be proven by the parties and that international arbitrators are permitted to rely on their own knowledge of the law, provided that the parties are given the opportunity to be heard and are not taken by surprise.”) (emphasis added); Seller (Turkey) v. Buyer (Turkey), Final Award, ICC Case No. 16168 (2013), 38 Y.B. COMM. ARB. 205, 214 (seat of the tribunal in Hamburg, Germany) (“The Arbitral Tribunal notes, however, that Respondent was not able to present and—to the best of the knowledge of the Arbitral Tribunal—there does not seem to exist any case law or legal authority that affirmatively states.”) (emphasis added); X (nationality not indicated) v. Y (nationality not indicated) and Y2 (nationality not indicated), Award, ICC Case No. 12073 (2003), 33 Y.B. COMM. ARB. 63, 69–71 (seat of the tribunal in Geneva, Switzerland) (embarking also on a brief comparative law review of the legal issue under examination); Union Cycliste Internationale (UCI) v. M. & Federazione Ciclistica Italiana (FCI), Award, CAS Case No. 1998/A/212 (1999), Digest of CAS Awards, Vol. II (1998-2000), Matthieu Reeb ed., Kluwer Law International (2002), 274, 277 (seat of the tribunal in Lausanne, Switzerland) (“The Panel established the content of the applicable foreign law in co-operation with the parties. . . . Moreover, the Panel undertook further research on its own motion.”) (emphasis added); Sponsor (Qatar) v. Contractor (Italy), Final Award, ICC Case No. 7639 (1994), IV, in COLLECTION OF ICC ARBITRAL AWARDS 214, 223 (Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher eds., 2003) (seat of the tribunal in Paris, France) (“[T]he Tribunal has decided to consider these principles as part of its Terms of Reference, in its genuine and serious desire to be fair to both parties, by, among other things, considering the general principles of equity, although this aspect has been disregarded by both parties all through the proceedings.”) (emphasis added); European Consortium of 4 Cos. v. Ministry of Public Works and Water Resources of an African State. Phase I: Partial Award in Jurisdiction, CRCICA Case No. 39/93 (1994), IV, in ARBITRAL
judiciary of many countries, such as Sweden, Switzerland, Belgium, Finland, Germany, the Netherlands, and Spain.

D. The Adversarial Approach

In stark contrast to the inquisitorial approach, adopting an adversarial method of establishing the content of the applicable law amplifies one of the principal underpinnings of arbitration—party initiative. It rests entirely with the parties to inform—and, thus, limit—the tribunal vis-à-vis the legal basis of the dispute. The tribunal will act as an umpire, selecting

AWARDS OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION 299, 304 (M.E.I. Alam Eldin ed., 2014) (seat of the tribunal in Cairo, Egypt) (“The Tribunal does not consider itself as exclusively limited by the legal arguments and defences of the parties. Pursuant to the principle 'iura novit curia,' the Tribunal has conducted its own further investigations in Egyptian law in order to reach a correct conclusion on the delicate issue of its jurisdiction.”) (emphasis added).

70. See infra Part IV.A.1.
71. See infra Part IV.B.2.
73. Finland follows the inquisitorial approach together with the “no-surprise” rule. See Werfen Austria GmbH v. Polar Electro Europe B.V., Korkein oikeus [KKO] [Supreme Court] 2008:77 (Fin.), http://www.finlex.fi/fi/oikeus/kko/kko/2008/20080077#atOT20080077_3 [https://perma.cc/DD47-86KF].
75. Vesna Lazić & Gerard J. Meijer, Netherlands, in PRACTITIONER’S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, supra note 72, at 617, 670 (referring, also, to article 1044 of the Dutch Code of Civil Procedure, which empowers the arbitral tribunal to request, through the President of the District Court of The Hague, information on the content of the applicable law, using the mechanism of the 1968 London Convention).
amongst the arguments of the parties. 77 Hence, under such an adversarial system, “the impartiality of the judge [“arbitrator” in the context of this study] in the eyes of the parties’ is preserved.”78 This pursuit of “preserving” the impartiality of the adjudicators, however, could be in tension with the desideratum of resolving the dispute on “correct” legal grounds.79 This last remark raises the question of what the arbitrators should do in the event of the parties’ failure to educate the arbitral tribunal with respect to the content of the governing law. Bearing in mind that this scenario has been overlooked in academic discourse,80 it is not surprising that legal practice has yielded non-uniform results, with some arbitral tribunals applying the substantive law of the tribunal’s seat81 and others

78. Staughton, supra note 77, at 353.
79. Id.
80. This neglect is not unjustifiable, considering that making legal submissions is the norm in arbitral proceedings.
81. Parties not indicated, Final Award, ICC Case No. 8677/FMS (1997), 1 INT’L ARAB ARB. 333, 354–55 (2009) (seat of the tribunal in London, England) (“Neither expert on the law of D country offered any opinion on what the expression ‘in transit’ might be constructed as meaning under that law. I am entitled to look at the authorities (which are English) cited by the Defendant on this question: the place of the arbitration is London and it is a rule of English procedural law that, absent evidence, a foreign law should be assumed to be the same as the domestic law.”); Franchisor (Austrian) v. Franchisee (South African), Final Award, ICC Case No. 5460 (1987), II, in COLLECTION OF ICC ARBITRAL AWARDS 136, 138 (Sigvard Jardin, Yves Derains & Jean-Jacques Arnaldez eds., 1994) (seat of the tribunal in London, England) (“The place of this arbitration is London, and on any question of choice of law I must therefore apply the relevant rules of the private international law of England. . . . Under the rules of English private international law, foreign law is a question of fact, to be established by expert evidence; failing evidence to the contrary, English private international law compels me to assume that any foreign law is the same with any evidence about the South African substantive law of contract. Accordingly, I am bound to assume that it does not differ from the law of England.”); see also the well-known Hussmann (Europe) Ltd. v. Al Ameen Dev. & Trade Co & Ors. [2000] 2 Lloyd’s Rep. 83, 42 (“If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales.”).
rejecting the argument advanced,\textsuperscript{82} or even the entirety of the claim made,\textsuperscript{83} on unproven legal grounds.

\textit{E. The “Hybrid” Approach}

Building on the premises of the inquisitorial and adversarial approaches already described,\textsuperscript{84} it has been maintained in legal theory that a so-called hybrid method should be preferred for the determination of what the applicable law provides for.\textsuperscript{85} Drawing upon the core elements of the aforementioned approaches, the hybrid method sets the legal arguments of the parties as the point of departure for any content-of-laws determination.\textsuperscript{86} At the same time, it provides the arbitrators with significant latitude regarding the legal analysis of the dispute.\textsuperscript{87} The major drawback of this approach, however, is the lack of clarity as to what it entails. Other than its two fundamental pillars—party initiative and flexibility of the arbitral tribunal—academic discourse has yet to guide legal practice through a series of important content-of-laws issues, such as the ascertainment and application of overriding mandatory rules, the use of corroborating sources and arguments by the arbitrators, and the different legal classification of the dispute, among others.\textsuperscript{88}

\textbf{IV. INTERNATIONAL ARBITRATION: THE CONTENT-OF-LAWS ENQUIRY IN PRACTICE}

Following this theoretical overview of the content-of-laws enquiry in international arbitration,\textsuperscript{89} Part IV focuses on the actual legal practice in

\begin{flushleft}
82. \textit{Consultant (State Y) v. State agency (State Z), State owned bank (State Z), Final Award, ICC Case No. 7047 (1994), IV, in COLLECTION OF ICC ARBITRAL AWARDS 32, 37, 41 (Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher eds., 2003) (seat of the tribunal in Geneva, Switzerland).}

83. \textit{Agent (US) v. Principal (Russian Federation), Final Award ICC Case No. 13756 (2008), 39 Y.B. COMM. ARB. 118, 136 (seat of the tribunal in Stockholm, Sweden).}

84. \textit{See supra Part III.C.–D.}

85. Nigel Blackaby & Ricardo Chirinos, \textit{Consideraciones Sobre la Aplicación del Principio iura Novit Curia en el Arbitraje Comercial Internacional}, 6 ANU. COLOMB. DERECHO INT. 77, 88 (2013); \textit{LEW, MISTELIS & KRÖLL, supra} note 24, at 443 (“This approach . . . is increasingly the norm in international arbitration.”).

86. \textit{LEW, MISTELIS & KRÖLL, supra} note 24, at 443.

87. \textit{Id.}

88. For an analysis of these issues \textit{de lege ferenda}, \textit{see infra} Part V.

89. \textit{See supra} Part III.
\end{flushleft}
the most frequently selected seats of arbitral tribunals, namely England
and Wales, France, Hong Kong, Singapore, Sweden, Switzerland, New
York in the United States of America.90 Due consideration is paid also to
key investment arbitration fora.

The analysis is divided into three parts, reflecting, on a macro level,
the distinction between commercial and investment arbitration, and, on a
micro level, the traditional grouping of legal orders into civil law and
common law jurisdictions. Whereas the former systematization is
consistent with the tenets of international arbitration, the latter appears
somewhat alien to its supra-national character, and, as a consequence, it
might be considered a disservice to the reader. This classification,
however, is not fortuitous, as the influence of the various legal traditions
on the respective leges arbitri persists. At the same time, albeit in stark
contrast to this last observation, this categorization actually amplifies the
supra-national character of international arbitration, as the discerned legal
convergence transcends legal families and traditions. Lastly, the adopted
civil law-common law grouping of the examined jurisdictions offers
clarity in the structure of Part IV.

A. The Civil Law Jurisdictions

The civil law jurisdictions examined herein are Sweden, Switzerland,
and France. The order of their presentation corresponds with a gradual
moderation in the application of the jura novit curia principle, that is, from
a rigid duty of the tribunal to ascertain and apply the law ex officio in
Sweden to a truncated jura novit curia principle in Switzerland and the
substitution of this maxim by the more familiar to the French principe de
la contradiction.

1. Sweden

As already suggested, the jura novit arbiter principle has been
consistently applied in international arbitral proceedings in Sweden.
Widely recognized as a principle applicable in domestic arbitrations,91 the

90. See 2015 INTERNATIONAL ARBITRATION SURVEY, supra note 8, at 12.
91. Svea Hovrätt [HovR] [Svea Court of Appeal] 2017-03-09 T1968-16
(Swed.) ¶ (“[P]ursuant to the principle of jura novit curia, the arbitrators are not
bound by the parties’ legal arguments, but are free to decide which provisions of
the law that apply based on the referenced legal facts. Thus, the arbitrators shall
not be considered to have exceeded their mandate if they applied a provision of
the law to the circumstances referenced by the parties in support of their respective
cases, even if neither of the parties had referenced the relevant legal provision . . .
absence of a special rule in the Swedish Arbitration Act of 1999 rendered the content-of-laws enquiry in international arbitrations seated in Sweden anything but clear.\textsuperscript{92} However, following a rather “timid” first application

\textsuperscript{92} For an overview of the theories articulated in Swedish legal theory, see Christer Danielsson, Applicable Law, in INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER’S GUIDE, supra note 91, at 137, 148–49. See also FREDRIK ANDERSSON ET AL., ARBITRATION IN SWEDEN 119 (Johnny Herre ed., 2011) (“In international arbitration proceedings in Sweden, the predominant view is that the principle [of jura novit curia] does not apply.”); Henrik Fieber & Eva Storskrubb, Arbitration in Sweden: Features of the Stockholm Rules, in INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 321, 334 (Giuditta Cordero-Moss ed., 2013) (“[I]t is still the prevalent position among commentators that the principle [of jura novit curia] is not, or should not be, applicable to international arbitrations in Sweden.”); Karl Guterstam, Jakob Ragnwaldb & Fredrik Andersson, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (In force as of 1 January 2010), in CONCISE INTERNATIONAL ARBITRATION 709, 737 (Loukas A. Mistelis ed., 2d ed. 2015) (“In international arbitrations taking place in Sweden, the principle of jura novit curia does not apply and the parties are usually expected to provide evidence on the contents and interpretation of the applicable law.”); KAJ HOBER, INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN 213 (2011) (“[I]t is very doubtful if the principle of iura novit curia is applicable in international commercial arbitrations conducted in Sweden.”); Nilsson & Rundblom Andersson, supra note 91, at 13 (“It is unsettled whether the principle of jura novit curia] applies in international disputes.”); Oldenstam & von Pachelbel, supra note 91, at 795 (“[W]ith respect to international arbitrations,
of the principle by the Svea Court of Appeal in 2008, the very same court, in 2014, emphatically ruled that “the arbitrator is generally not bound by the parties’ actions as regards legal provisions and arguments, but is rather obliged to apply these also without having been referenced by a party pursuant to the principle of *jura novit curia* . . .”

Having said that, it has been argued in Swedish jurisprudence—but not confirmed in Swedish caselaw—that the application of the *jura novit curia* where the applicable law may be more or less familiar to the parties and the arbitrators, it is unclear to what extent this principle [of *jura novit curia*] does in fact apply.”). *Cf.* Proposition [Prop.] 1998/1999:35 Ny lag om skiljeförfarande [government bill], at 144–45 (Swed.).

93. Svea Hovrätt [HovR] [Svea Court of Appeal] 2008-11-28 T745-06 (Swed.) (“[T]he arbitral tribunal . . . has merely made a legal qualification of facts, which [Iurii Bogdanov] pleaded, based on a source of law he relied on. In the Court of Appeal’s opinion the principle *iura novit curia* has not been misapplied in these aspects.”) (author’s translation from the original); see also Iurii Bogdanov v. Republic of Moldova, Arbitral Award, The Arbitration Institute of the Stockholm Chamber of Commerce, ¶ 2.2.1.8 (Sept. 22, 2005) (seat of the tribunal in Stockholm, Sweden), http://www.italaw.com/sites/default/files/case-documents/ita0094_0.pdf [https://perma.cc/QY54-Z4R5].


95. *But see* Distributor (EU Country) v. Manufacturer (EU Country), Final Award, SCC Case No. 158/2011 (2013), 38 Y.B. COMM. ARB. 253, 262 (seat of the tribunal in Stockholm, Sweden) (“The Sole Arbitrator notes that the principle *iura novit curia* . . . applies also in international arbitration . . . provided that the parties are given the opportunity to be heard and are not taken by surprise.”); Iurii Bogdanov v. Republic of Moldova, Arbitral Award, The Arbitration Institute of the Stockholm Chamber of Commerce, ¶ 2.2.1.8, 4.2.2.2 (Sept. 22, 2005) (seat of the tribunal in Stockholm, Sweden), http://www.italaw.com/sites/default/files/case-documents/ita0094_0.pdf [https://perma.cc/V6JY-27T9]. For domestic arbitrations, see Svea Hovrätt [HovR] [Svea Court of Appeal] 2017-03-09 T1968-16 (Swed.) (“If the arbitrators consider applying a legal provision that has not been referenced by either party, reasons may exist for the arbitrator to bring this to the parties’ attention within the framework of procedural guidance, so as to avoid surprises.”).
arbiter principle should always be followed by an invitation to the parties to amend their legal submissions.96

2. Switzerland

The jura novit arbiter principle is applicable also in international arbitrations seated in Switzerland,97 albeit with the proviso of “no-surprise” to the parties.98 Despite the lack of any relevant provisions

96. Danielsson, supra note 92, at 150; Finn Madsen, Commercial Arbitration in Sweden: A Commentary on the Arbitration Act (1990:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 193 (3d ed. 2007); Nilsson & Rundblom Andersson, supra note 91, at 13; see also Madsen, supra, at 283 n.51 (noting that this requirement is applicable to court proceedings as well).


in Chapter 12 of the Swiss Private International Law Act,99 this principle is so deeply embedded in the Swiss legal order that one can find blocks of Swiss Federal Supreme Court judgments with identical wording on this topic. Notably,

[a]s a general rule, pursuant to the adage jura novit curia, state courts or arbitral tribunals may freely assess the legal bearing of the facts, and may decide on the basis of rules of law other than those invoked by the parties . . . . As an exception, [the parties] need to be asked for their views, when the judge or the arbitral

ASA BULL. 490, 491 (2014). On the element of surprise, see Tribunal fédéral [TF] [Federal Supreme Court] May 26, 2014, 4A_544/2013 (Switz.) (noting that the internationality of the dispute is not sufficient to sustain a “surprise of the parties” argument); Tribunal fédéral [TF] [Federal Supreme Court] May 24, 2013, 4A_476/2012 (Switz.), and Tribunal fédéral [TF] [Federal Supreme Court] Nov. 9, 2010, 4A_428/2010 (Switz.) (noting that the agreement of the parties to arbitrate their dispute, as well as the diverse legal background of the arbitrators, should be taken into consideration for the determination of the “surprising” nature of the legal basis of the award); Schweizerisches Bundesgericht [BGer] [Federal Supreme Court] Mar. 16, 2004, 4P.14/2004 (Switz.), and Tribunal fédéral [TF] [Federal Supreme Court] Sept. 30, 2003, 4P.100/2003 (Switz.) (noting that the parties might be “surprised” if the legal analysis of the tribunal was unrelated to the elements discussed in the arbitral proceedings); Karrer & Straub, supra, at 854 (“The parties must be given an opportunity to comment on the theory [applied by the arbitral tribunal ‘out of the blue’]. It is, however, unclear when this opportunity was sufficiently granted, which makes for a tricky decision towards the close of an arbitration.”); Knuts, supra note 24, at 683, 685 (arguing that the fundamental nature of the legal concept under examination and the latter’s similarity to the legal basis invoked by the parties limit significantly the possibility of taking the parties by surprise); Meier & McGough, supra, at 502 (“[T]he threshold for unforeseeable legal grounds is high: The Federal Tribunal has adopted a restrictive approach . . . . If a legal issue—even a broad one . . . .—has been discussed in the proceedings, the parties must expect the tribunal to take into account all potential legal aspects of this issue, whether or not they were raised by the parties.”). Without reference to the caveat of “no-surprise,” see Tribunal fédéral [TF] [Federal Supreme Court] Oct. 18, 2011, 4A_214/2011 (Switz.); Schweizerisches Bundesgericht [BGer] [Federal Supreme Court] Mar. 1, 2002, 4P.200/2001 (Switz.); Mar. 2, 2000, 4P.260/2000.

99. Cf. Swiss PILA, art. 16(1) (“The contents of the foreign law shall be established by the authority on its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties.”) (author’s translation from the original). For a direct application of this provision in international arbitration, see Schweizerisches Bundesgericht [BGer] [Federal Supreme Court] Apr 27, 2005, 4P.242/2004 (Switz.).
troubel considers rendering a decision on a norm or a legal consideration, which was not invoked in the proceedings, and the pertinence of which could not be anticipated by the parties.\textsuperscript{100}

and

[the principle] \textit{jura novit curia}, which is applicable in arbitral proceedings, requires the arbitrators to apply the law \textit{ex officio}, without limiting themselves to the legal arguments advanced by the parties. Therefore, they may uphold arguments not advanced by the parties, as these would constitute neither a new nor a different claim, but merely a new qualification of the facts of the case.\textsuperscript{101}

Because the seat of the Court of Arbitration for Sport (“CAS”) is located in Lausanne, Switzerland,\textsuperscript{102} this “truncated” \textit{jura novit arbiter} principle is applicable also in all CAS sports arbitrations.\textsuperscript{103}

3. France

Following the example of Sweden and Switzerland, the absence of a relevant content-of-laws rule in Book IV, Title II (“International Arbitration”) of the French Code of Civil Procedure has been mitigated with clear instructions from French caselaw.\textsuperscript{104} However, different from

\begin{itemize}
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the Swedish and Swiss legal orders whereby the jura novit curia principle is applicable, both the Cour de Cassation and the Paris Court of Appeals have ruled that the principle of due process—or, in French, “principe de la contradiction”—requires the arbitral tribunal to consult with the parties with respect to any legal grounds that have not been argued by the latter but have been introduced into the arbitral proceedings ex officio by the arbitrators. Such consultations may be dispensed with only if the

1506(3) a contrario), the French Code of Civil Procedure extends the content-of-laws rule applicable to litigation proceedings to domestic arbitration (C.P.C. arts. 16 and 1464(2)). Cf. C.P.C. art. 16 (“In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle. In his decision, the judge may take into consideration grounds, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. He shall not base his decision on legal arguments that he has raised sua sponte without having first invited the parties to comment thereon.”) (author’s translation from the original).

105. See supra Part IV.A.1.–2.

106. C.P.C. art. 1510 (“Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.”) (author’s translation from the original); C.P.C. art. 1520(4) (“An award may only be set aside where: due process was violated.”) (author’s translation from the original). See Catherine Kessedjian, Principe de la Contradiction et Arbitrage, 1995 REV. ARBITR. 381 (1995).

unargued grounds are sufficiently general so as to be covered by the pleadings of the parties. All in all, French caselaw has acknowledged the latitude of the tribunal to look beyond the legal submissions of the parties, although the submissions should always be paired with an invitation to the parties to address the grounds raised proprio motu.

B. The Common Law Jurisdictions

The common law jurisdictions examined herein are England and Wales, Hong Kong Special Administrative Region (“SAR”), Singapore, and the State of New York in the United States of America. The order of their presentation corresponds with the influence of the common law tradition and the English Arbitration Act of 1996 on the respective legal regimes, that is, from setting the legal standard in England and Wales, to


108. Cour d’appel [CA] [regional court of appeal] Paris, May 30, 1996, 1996 REV. ARB. 645, 648 (Fr.) (“The arbitrators did not add anything to the factual or legal basis of the dispute by considering [ex officio] the dispute under the rules of equity, given that the legal basis applied by the arbitrators has implicitly, albeit necessarily, formed part of the proceedings.”) (author’s translation from the original); Nov. 25, 1993, 1994 REV. ARB. 730, 731 (Fr.) (“The [ex officio] reference of the arbitral tribunal to the principle of good faith fulfilment [sic] of obligations, which, necessarily, forms part of the pleadings, does not violate the principle of due process.”) (author’s translation from the original); May 28, 1993, 1995 REV. ARB. 466, 466 (Fr.) (“[B]y referring [ex officio] to the spirit of the contract, the referees have only searched for the common intention of the parties . . . . [T]his is a fundamental rule of contract interpretation in French law . . . and . . . it, necessarily, forms part of the pleadings . . . . [T]herefore, the motion [to set aside the arbitral award] on the grounds of violation of the principle of due process must be rejected.”) (author’s translation from the original); Gaillard, supra note 107, at 457; Fouchard, Gaillard & Goldman, supra note 26, at 950.

109. Because this caselaw rule is identical with the content-of-laws rule applicable to domestic arbitrations under C.P.C. articles 16 and 1464(2), one cannot help but wonder why the French legislator did not extend the application of article 16 to international arbitration (C.P.C. 1506(3) a contrario).
the legal transplantation of the English content-of-laws rule to Hong Kong and Singapore, and, finally, the enigmatic regulatory vacuum in the State of New York.

1. England and Wales

Interestingly, in England, the “Queen” of all common law jurisdictions that treat foreign law as “facts”—even if considered “facts of a peculiar kind.”—the Arbitration Act of 1996 allows the tribunal to decide whether to adopt an inquisitorial or an adversarial stance in the proceedings unless an agreement exists between the parties. Equally interesting is the lack of reported caselaw on the application of § 34(2)(g) on the ascertainment of the governing law. Granted, this discretion of the tribunal under the “chameleon” regime of § 34(2)(g) is not limitless, as the proceedings should always conform to the general principles of arbitration enshrined in the Act. Against this background, English caselaw requires,

111. English Arbitration Act, supra note 48, c. 23.
112. Id. § 34(2)(g) (“Procedural and evidential matters include—whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law”). See B.R. Cantrell, E.P. Cantrell v. Wright & Fuller Ltd. [2003] EWHC (TCC) 1545, [181] (Eng.). For the adoption of the inquisitorial approach, at least, by the minority, see B v. A, [2010] EWHC (Comm) 1626, [21] (Eng.). Cf. ED & F Man Sugar Ltd. v. Belmont Shipping Ltd. [2011] EWHC (Comm) 2992, [21] (Eng) (“[The] arbitrators are not barred from asking a party whether it has considered raising a different case from that which it has advanced but section 33 of the Arbitration Act 1996 does not oblige them to do so . . . . Such questions may be asked by a tribunal anxious to understand the basis upon which a case is being advanced.”); F Ltd. v. M Ltd. [2009] EWHC (TCC) 275, [44] (Eng.) (“Whilst the emphasis in arbitration and litigation will always be on those particular matters on which the defendant has raised a positive case, a claimant always has the burden of ensuring that the A to Z of its pleaded case . . . is both workable and properly explained to the Tribunal. That responsibility cannot be shrugged off to the defendant or the Tribunal itself.”).
113. English Arbitration Act, supra note 48, §§ 4(1), (2), 34(2)(g), sch. 1. See Fraser Davidson, Arbitration 375 (2d ed. 2012) (“The parties might of course remove or curtail the tribunal’s freedom in this regard, e.g. by insisting that the procedure must be entirely inquisitorial or entirely adversarial or by imposing a specific procedure or indeed a specific procedural law on the parties.”).
114. See, e.g., English Arbitration Act, supra note 48, § 1 (“The provisions of this Part are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to
under the head of “serious irregularity,” that the parties be given the opportunity to present their case and be heard. Therefore, when the such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part.”); id. § 33 (“(1) The tribunal shall—(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”); see also DAVID ST. JOHN SUTTON, JUDITH GILL & MATTHEW GEARING, RUSSELL ON ARBITRATION 243–44 (24th ed. 2015).

115. English Arbitration Act, supra note 48, § 68 (“(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3). (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—(a) failure by the tribunal to comply with section 33 (general duty of tribunal); (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the award; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award. (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—(a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration. (4) The leave of the court is required for any appeal from a decision of the court under this section.”); see also id. §§ 33–34.

116. Lorand Shipping Ltd. v. Davof Trading (Africa) BV (Ocean Glory) [2014] EWCH (Comm) 3521, [25] (Eng.) (“[W]here a Tribunal wishes to adopt a course not advocated by either party, it is generally incumbent upon the Tribunal
tribunal decides to follow the jura novit arbiter principle, it should solicit further submissions from the arbitrating parties on the legal grounds that were not invoked by the latter but which were introduced ex officio by the arbitrators. Be that as it may, considering that § 68, firstly, sets a

to give the parties an opportunity to address it on that possible course before it is finally adopted. Depending on the circumstances, failure to do so will—or at least may—amount to a serious irregularity.”); London Underground Ltd. v. Citylink Telecomm. Ltd. [2007] EWHC (TCC) 1749, [37] (Eng.) (“It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity.”); F Ltd., [2009] EWHC (TCC) at [56] (“It appears that there has been an error by the majority, which arose because the Arbitral Tribunal did not raise this entirely new analysis with the parties, and did not ask for submissions on the novel line of reasoning . . . . Whilst I at once accept that the majority may well have been led into this error by the muddled and prolix nature of both sides’ pleadings, that cannot mean—in circumstances where a point has been decided against a party without it ever having been heard on that point—that a serious irregularity has not occurred.”); Pacol Ltd. v. Joint Stock Co. Rossakhar [1999] 2 All E.R. (Comm) 778, [787] (Eng.) (“[W]hat has happened in this case is that an award has been made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence . . . . In those circumstances, I have no hesitation in concluding that there has in the present case been a serious irregularity within the meaning of s. 68(1) of the Arbitration Act 1996.”); see also ABB AG v. Hochtief Airport GmbH [2006] EWHC (Comm) 388, [80] (Eng.) (noting that erroneous conclusions as to the content of the applicable law do not amount to “serious irregularity”); Cameroon Airlines v. Transnet Ltd. [2004] EWHC (Comm) 1829, [111] (Eng.) (“[T]he Tribunal went its own way to a conclusion which neither Camair nor Transnet had contended for and did so unheralded. That, in my judgment, was fundamentally unfair.”).

117. See SUTTON, GILL & GEARING, supra note 114, at 243–44 (“Arbitrations seated in England are rarely conducted under the inquisitorial approach in its true sense, save to an extent in the context of ‘quality’ arbitrations relating to commodity sales.”).

118. See Terna Bahrain Holding Co. WLL v. Al Shamsi [2012] EWHC (Comm) 3283, [106] (Eng.) (“Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses. If he chooses to invite the tribunal to reject it without addressing it in detail, that may well be a sensible tactic, in order to avoid the risk of giving it more weight and prominence that the party advancing it has done. But that is not the same as having been deprived of an opportunity of addressing it, still less of an unfair procedure having been adopted.”).

119. See Manuel Arroyo, Which is The Better Approach to Jura Novit Arbiter—The English or the Swiss?, in NEW DEVELOPMENTS IN INTERNATIONAL
“high threshold” for “serious irregularity” and, secondly, requires that the applicant has suffered “substantial injustice” as a result of the “serious procedural irregularity,” the annulment of the arbitral award for failure to invite further legal submissions by the parties would be exceptional.

COMMERCIAL ARBITRATION 2010, at 27, 38–40 (Christopher Müller & Antonio Rigozzi eds., 2010) (citing relevant caselaw); DAVIDSON, supra note 113, at 375 (“[I]t should be noted that operating inquisitorially does not allow the tribunal to exclude the parties from the process, and that it will amount to a serious irregularity if, e.g. the tribunal questions a witness in the absence of the parties or seeks to rely on the views of its own expert without giving the parties an opportunity to comment on those views.”); see also SUTTON, GILL & GEARING, supra note 114, at 156–57, 162, 509–10.


121. F Ltd., [2009] EWHC (TCC) at [34] (“It is impossible to say that there has been a substantial injustice in circumstances where an unpleaded alternative basis of claim . . . has been expressly considered and rejected by the majority.”); OAO N. Shipping Co. v Remolcadores de Marin SL (The Remmar) [2007] EWHC (Comm) 1821, [26] (Eng.) (“The Court’s task on this type of application is not to second-guess the tribunal’s views on any additional submissions which [the party seeking annulment] might have made if called upon to do so. It is sufficient if [the party seeking annulment has] been deprived of the opportunity to advance submissions which were ‘at least reasonably arguable,’ or even simply something better than ‘hopeless.’”); Vee Networks Ltd. v. Econet Wireless Int’l Ltd. [2004] EWHC (Comm) 2909, [90] (Eng.) (“The element of serious injustice in the context of section 68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that the arbitrator reached a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.”); Cameroon Airlines, [2004] EWHC (Comm) at [102] (“[W]hat is required to satisfy the [substantial injustice] test is indeed an extreme case ‘where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.’ On the other hand . . . I do not think it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had not occurred might realistically have led to a significantly different outcome.”).
2. Hong Kong SAR

The Special Administrative Region of Hong Kong is an interesting case study for the content-of-laws enquiry because the UNCITRAL Model Law for the regulation of international arbitral proceedings is applied alongside the English “chameleon” regime. Specifically, the Hong Kong Arbitration Ordinance incorporates the Model Law into Hong Kong law. With respect to the content-of-laws enquiry, whereas the Model Law merely empowers the tribunal to conduct the arbitral proceedings in an “appropriate” manner, § 56(7) of the Ordinance enshrines a special content-of-laws rule, which is nearly identical to § 34(2)(g) of the English Arbitration Act. However, differently from English law, Hong Kong courts in annulment proceedings will not examine the application of § 56(7) against the concepts of “serious irregularity” and “substantial injustice” but against article 34 of the UNCITRAL Model Law, which

122. For the confusing and nebulous regime on the ascertainment of foreign law in People’s Republic of China arbitration, see Yijin Wang, Ascertain Foreign Law in PRC Arbitration, 10 ASIAN INT’L ARB. J. 93 (2014).
124. UNCITRAL Model Law, supra note 27, art. 19(2); H.K. Arbitration Ordinance, supra note 123, § 47(2).
125. H.K. Arbitration Ordinance, supra note 123, § 56(7) (“Unless otherwise agreed by the parties, an arbitral tribunal may, when conducting arbitral proceedings, decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those arbitral proceedings.”). See John Choong & Michael J. Moser, Hong Kong SAR, in ASIA ARBITRATION HANDBOOK 189, 198 (Michael J. Moser & John Choong eds., 2011) (“In Hong Kong, experienced international tribunals are unlikely to adopt the strict technical rule that the foreign law is assumed to be identical to Hong Kong law unless it is proven as a question of fact by expert evidence. Instead, they will adopt a variety of approaches to avoid this technical rule, where appropriate, and usually with the agreement of all parties... Conversely, most Hong Kong tribunals would hesitate to apply the maxim iura novit curia [the court knows the law] in its most wide-reaching form. This is in part because of due process concerns, bearing in mind the adversarial approach that many counsel in Hong Kong are familiar with. That said, many arbitrations in Hong Kong involve difficult but recurring issues of PRC law and experienced arbitrators have, in addition to relying on the evidence before them, been known to draw on their own knowledge of such issues.”).
enshrines the rule for the setting aside of arbitral awards. In that context, the Court of First Instance has ruled that, in case the arbitral tribunal exercises its power to ascertain the content of the applicable law on its own motion, it needs to consult the parties and give them the opportunity to make further submissions, particularly when the grounds raised ex officio would come as a surprise to the parties. Notably,

the respondents had no reason to expect the Tribunal to adopt a view on PRC law which had not been canvassed in the course of the arbitration.

In such circumstances, the Tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and given them an opportunity to respond before making a decision on the same. The failure of the Tribunal in this regard furnished the respondents with a valid ground of complaint under Article 34(2)(a)(ii).

This requirement to afford the parties the opportunity to make further legal submissions was affirmed in Pacific China Holdings (in liq) v. Grand Pacific Holdings. In that case, the Court of First Instance found that

[i]n its award . . . the Tribunal cited other New York authorities, to which neither party had been referred, and about which neither party had made any submissions. I have always understood that the practice was that, when a judge, in the course of preparing his judgment, came upon authorities not cited by the parties which the judge considered that might be relevant, he should refer them to the parties and seek either written or oral submission on those authorities. That said, I can find no direct authority to support the proposition. That may be because it is self-evident.

Notwithstanding the failure of the tribunal to consult with the parties, the court dismissed the claims of violation of the right to be heard under article 34(2) on the grounds that the expertise and stellar background of the

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128. Id. § 81.
129. Brunswick Bowling, [2011] 1 H.K.L.R.D. at 718 [27–28] (emphasis added); id. at 724 [67] (“I do not think the Tribunal can apply its secret view on PRC law without giving an opportunity to the parties to address it on the same.”) (emphasis added).
131. Id. at 228 [142].
arbitrators rendered the latter “perfectly capable of dealing with the New York law issue, without further submissions.”

In short, the arbitration regime of Hong Kong Special Administrative Region allows the arbitrators to introduce ex officio new legal grounds. An invitation for further submissions by the parties would be required in exceptional cases only, such as when those unpleaded grounds would come as a surprise to the parties.

3. Singapore

Following the model of Hong Kong closely, the Singapore International Arbitration Act\(^\text{133}\) adopts the UNCITRAL Model Law,\(^\text{134}\) together with a special content-of-laws rule, which provides that “[a]n arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.”\(^\text{135}\)

Although this special rule of § 12(3) does not add much to article 19(2) of the Model Law,\(^\text{136}\) Singaporean courts have ruled that arbitral tribunals are not confined to the arguments advanced by the parties.\(^\text{137}\) Put in the affirmative, tribunals in Singapore are allowed to examine sua sponte all relevant legal grounds and arguments.\(^\text{138}\) Insofar as any unpleaded

\(^{132}\) Id. at 228–29 [144–145].

\(^{133}\) International Arbitration Act, 2002, c. 143(A) (Sing.) [hereinafter Singapore International Arbitration Act].

\(^{134}\) Id. § 3.

\(^{135}\) Id. § 12(3) (emphasis added). See MARK MANGAN, LUCY REED & JOHN CHOONG, A GUIDE TO THE SIAC ARBITRATION RULES 163 (2014) (arguing that § 12(3) witnesses the convergence between the inquisitorial civil law approach and the common law).

\(^{136}\) UNCITRAL Model Law, supra note 27, art. 19(2) (“Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.”).

\(^{137}\) Soh Beng Tee & Co. v. Fairmount Dev., [2007] SCCA 28, [65] (Sing.) (“(e) The arbitrator . . . is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him.”).

\(^{138}\) See PT Prima Int’l Dev. v. Kempinski Hotels, [2012] SGCA 35, [59] (Sing.) (“Given that the Arbitrator is a Professor of Law of the National University of Singapore, it is not surprising that he thought of all the possible legal ramifications that could arise from the facts before him.”); Lim Wei Lee & Alvin Yeo, Singapore, in ASIA ARBITRATION HANDBOOK, supra note 125, at 671, 678 (“Most Singapore arbitral tribunals are less likely to adopt the technical rule that
argument stems from the submissions of the parties, the tribunal need not consult further with them. Such consultations would be required only if the resolution of the dispute on the particular grounds would come as a surprise to the parties. The “surprising” nature of the grounds will be determined on a case-by-case basis, the yardstick being the “dramatic departure from the submissions [of the parties].” As elucidated by the High Court of Singapore in TMM Division Maritima v. Pacific Richfield Marine, “The more surprising the decision and its reasoning — i.e., the more inexplicable it is in the light of the evidence and submissions — the more likely it is that the arbitral tribunal has crossed from permissible discretionary decision-making into the forbidden territory of impermissible breach of natural justice.” In juxtaposition with this latitude of the arbitrators under § 12(3), tribunals seated in Singapore are required to take notice of public policy and any relevant overriding mandatory rules.

foreign law is assumed to be the same as Singapore law unless proven as a question of fact by expert evidence. Parties are, however, free to agree to the application of this rule if considered appropriate.

139. See AQU v. AQV, [2015] SGHC 26, [18] (Sing.) (“It is clear that the principles of natural justice are not breached just because an arbitrator comes to a conclusion that is not argued by either party as long as that conclusion reasonably flows from the parties’ arguments.”).

140. TMM Div. Maritima v. Pac. Richfield Marine, [2013] SGHC 186, [65] (Sing.) (“Commercial parties appoint arbitrators for their expertise and experience, technical, legal, commercial or otherwise. These arbitrators cannot be so straightjacketed as to be permitted to only adopt in their conclusions the premises put forward by the parties. If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it.”).

141. Soh Beng Tee & Co. v. Fairmount Dev., [2007] SCCA 28, [44] (Sing.) (“There is now an established line of English cases that vividly illustrates the principle that arbitrators or judges should not surprise the parties with their own ideas.”); id. at [65] (“(e) . . . [the arbitrator is not] expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.”).

142. Id. at [65] (“(d) . . . Only in instances such as where the impugned decision reveals a dramatic departure from the submissions . . . or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene . . . the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award.”).

143. TMM Div. Maritima, [2013] SGHC at [60].

144. PT Prima Int’l Dev. v. Kempinski Hotels, [2012] SGCA 35, [72] (Sing.) (“Public policy is a question of law which an arbitrator must take cognisance of if
Similarly to Hong Kong law, the Singapore IAA deviates from the English law requirement of “substantial injustice” to the party seeking the annulment of the arbitral award. Specifically, § 24(b) of the IAA requires that the application of a surprising legal basis had actually “prejudiced” the complaining party.\textsuperscript{145} Although this requirement “lower[s] the bar to establish a remediable ‘prejudice,’”\textsuperscript{146} the setting aside of an award for the use of unpleaded legal grounds remains exceptional.

Concisely, Singaporean law empowers the arbitrators to explore \textit{sua sponte} the content of the legal regime governing the dispute. The failure of the tribunal to invite further submissions by the parties on the arguments raised \textit{ex officio} would lead, only exceptionally, to the annulment of the arbitral award.

\section*{4. New York}

New York is the most enigmatic venue with respect to the content-of-laws enquiry. In stark contrast to the common law jurisdictions examined above,

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\item 145. \textit{Singapore International Arbitration Act, supra} note 133, § 24(b) (“Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if—a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.”).
\item 146. \textit{Soh Beng Tee & Co.}, [2007] SCCA at [91] (“In our view, this difference, while noteworthy, is not crucial. The fact that Parliament may have chosen different language does not invariably mean that it has intended a wholly different meaning . . . . Section 48(1)(a)(vii) of the Act plainly requires the ‘rights’ of ‘any party’ to have been ‘prejudiced’ . . . . It does, however, appear that Parliament, in steering away from the ‘substantial injustice’ formula adopted in the UK [sic] Arbitration Act 1996, had intended to set a lower bar to establish a remediable ‘prejudice’ . . . . It appears to us that in Singapore, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness. . . . What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.”).
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the arbitration laws of New York—the United States Federal Arbitration Act ("FAA") of 1925, as codified and amended, and article 75 of the New York Civil Practice Law and Rules ("NY CPLR")—do not provide for any rules on the method of establishing the content of the applicable substantive law. This lack of special provisions is aggravated by the laconic provisions of both the FAA and the NY CPLR on the conduct of arbitral proceedings. It is well established, of course, that arbitrators enjoy discretion in the conduct of the proceeding. However, this regulatory vacuum, together with the lack of relevant New York caselaw, has allowed for the articulation of both adversarial and inquisitorial approaches to the content-of-laws enquiry in arbitrations seated in New York.

On the one hand, in accordance with the typically adversarial approach of the common law, it has been argued that the parties bear the onus of educating the arbitral tribunal vis-à-vis the content of the applicable law. This adversarial approach would be consistent also with strong caselaw of...

149. See Tilman Niedermaier, International Arbitration in the U.S., in INTERNATIONAL COMMERCIAL ARBITRATION: INTERNATIONAL CONVENTIONS, COUNTRY REPORTS AND COMPARATIVE ANALYSIS, supra note 107, at 660, 662 ("[S]tate arbitration law has a narrow application. As it is subject to the federal preemption doctrine, state law applies only to the extent that it is consistent with federal arbitration law or where inter-state commerce is not concerned. Notwithstanding the broad scope of default application of federal law, the parties, as a matter of freedom of contract, can agree that the arbitration is governed by state law.").
150. Cf. John V.H. Pierce, Janet R. Carter & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 447, 500 (James H. Carter & John Fellas eds., 2d ed. 2016) ("Unlike the FAA and the Conventions, the CPLR contains provisions regarding procedures to be followed during the arbitration."); Peter Bowman Rutledge, Rachael Kent & Christian Henel, United States, in PRACTITIONER’S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, supra note 72, at 877, 901 ("There is relatively little US legal authority regarding the procedures to be followed in an arbitration. Most issues are left to the agreement of the parties (including their agreement as to any particular procedural rules) and to the discretion of the arbitral tribunal.").
151. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 57 (5th ed. 2014); Rutledge, Kent & Henel, supra note 150, at 901.
152. Rutledge, Kent & Henel, supra note 150, at 920 ("Consistent with its common law tradition, the general expectation and practice in US arbitration is for the parties to provide the tribunal with the applicable legal authorities and written argument applying those authorities to the specific facts of the case.").
the United States Court of Appeals for the Second Circuit on the common law ground for the annulment of arbitral awards, namely the “manifest disregard of the law.” Although the “manifest disregard of the law” presupposes the ascertainment of the applicable law—thus risking “putting the cart before the horse”—further examination of this ground could contribute to the holistic approach of the content-of-laws enquiry in New York-seated arbitrations. Specifically, setting aside the question of whether the “manifest disregard of the law” has survived Hall Street Associates, L.L.C. v. Mattel, Inc., the Second Circuit has ruled that the application of this ground has three requirements: (1) “the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators”; (2) “the law was in fact improperly applied, leading to an erroneous outcome”; and (3) “the arbitrator must have known of [the law’s] existence and its applicability to the problem before him.” For the needs of this analysis, emphasis should be put on this subjective third requirement—knowledge of the arbitrator. The Second Circuit has held also that, with respect to this subjective element, only the legal knowledge

154. The “manifest disregard of the law” as a ground for the setting aside of arbitral awards was first articulated in Wilko v. Swan, 346 U.S. 427, 436–37 (1953), which was overruled on different grounds by Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (“[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”).
155. Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 590 (2008) (“In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.”); see also Stolt-Nielsen v. Animalfeeds Int’l Corp., 559 U.S. 662, 672 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in Hall Street Associates v. Mattel, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”). For the proposal that this ground is still applicable in New York courts, see Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 121–22 (2d Cir. 2011) (“In addition to the section 10(a) grounds for vacatur, we have recognized a judicially-created ground, namely that ‘an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law.’”); Porzig v. Dresdner, Kleinwort, Benson, N. America, L.L.C., 497 F.3d 133, 139 (2d Cir. 2007).
“introduced” by the parties may be imputed on the tribunal.\textsuperscript{157} Therefore, it appears that, at least for the application of this ground of annulment, the arbitrators have no obligation to ascertain the content of the applicable substantive law.

On the other hand, given the paucity of pertinent New York caselaw and the great similarities among the various state legislations and the Federal Arbitration Act, one could look for guidance in the jurisprudence and legal practice in other states. Thus, a domestic arbitration case from New Jersey could be of assistance in such an endeavor. Specifically, in the context of appellate proceedings for the setting aside of an arbitral award rendered on legal grounds raised by neither party, the Superior Court of New Jersey ruled in \textit{Township of Montclair v. Montclair PBA Local} (\textit{Montclair}) that

\begin{quote}
the problem here [is] one of fundamental fairness to a party in arbitration . . . the arbitrator utterly disregarded the arguments of both sides and decided the case on the basis of a provision that neither party cited, relied upon or even had notice was at issue. Such action constitutes a type of procedural misbehavior prejudicial to the rights of a party and is sufficient to warrant
\end{quote}

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157. Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002) (“Manifest disregard can be established only where a governing legal principle is ‘well defined, explicit, and clearly applicable to the case,’ and where the arbitrator ignored it after it was brought to the arbitrator’s attention in a way that assures that the arbitrator knew its controlling nature.”); Duferco, 333 F.3d at 390 (“In determining an arbitrator’s awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration.”); DiRussa v. Dean Witter Reynolds, 121 F.3d 818, 823 (2d Cir. 1997) (“Moreover, ‘knowing’ all of the provisions of a particular statutory scheme without assistance from the parties is a daunting task, even for a skilled lawyer or judge. DiRussa argues that ‘[a] competent and conscientious panel, knowing it was being called upon to enforce federal and state anti-discrimination statutes, would be sure to review these statutes in order to ensure its compliance therewith and would request briefing from the parties on any issue on which it was unclear.’ While this would be a prudent course of action for arbitrators dealing with statutory claims, we agree with the district court that their failure to do so did not constitute manifest disregard of the law.”); Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) (“In sum, a court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney. Indeed, this is so far from being the case that an arbitrator ‘under the test of manifest disregard is ordinarily assumed to be a blank slate unless educated in the law by the parties.’ Goldman, 306 F.3d at 1216.”). See Pierce, Carter & Cinotti, \textit{supra} note 150, at 494 (“It is not enough that a reasonable arbitrator would have known of, and applied, the relevant law; instead, the court looks only to the law that was expressly cited to the arbitrator by the parties.”).
\end{footnotes}
vacating the award under N.J.S.A. 2A:24-8(c) . . . . By predicating his ruling upon an issue that neither party raised nor had notice of, the arbitrator effectively denied the parties the right to marshal evidence and be heard on the pivotal issue identified by the arbitrator. Fundamental fairness requires, at the very least, notice of claim and the right to be heard.\textsuperscript{158}

Considering N.J.S.A. § 2A:24-8(c)\textsuperscript{159} is nearly identical to FAA § 10(a)(3)\textsuperscript{160}—the “catch-all provision [ensuring] basic procedural due process”\textsuperscript{161}—it would be apposite to transpose the holding of the New Jersey appellate court into international arbitrations conducted under the FAA rules. Hence, arbitral tribunals would be allowed—not required—to resolve disputes on unargued legal bases with the proviso that the parties have been advised accordingly and given the opportunity to address the new legal grounds. That being said, it is noteworthy that this approach has been enshrined in the draft of the Third Restatement of the Law on the United States Law of International Commercial Arbitration, which provides that “[a]n arbitral tribunal is not precluded from raising factual or legal issues sua sponte during the proceedings. However, the tribunal must then afford the parties an opportunity to address and respond to those issues.”\textsuperscript{162}

159. N.J. STAT. ANN. § 2A:24-8 (West 2017) (“The court shall vacate the award in any of the following cases: . . . (c). Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party.”).
160. 9 U.S.C. § 10(a)(3) (2012) (“In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”).
161. Pierce, Carter & Cinotti, supra note 150, at 493.
162. RESTATMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-13, Reporters’ Notes, at 186 (AM. LAW INST., Tentative Draft No. 2, 2012); id. § 5-9, Reporters’ Notes, at 111 (AM. LAW INST., Tentative Draft No. 1, 2010); see also id. at 192, 113, respectively (“The absence of substantive appellate review of arbitral awards requires that parties be afforded an opportunity to address all material arguments in the first instance and denial of such an opportunity may be regarded as a significant procedural defect.”).
It should be expected that the prestige of the American Law Institute ("ALI") and the elevated status of Restatements as authoritative expressions of United States law will serve as driving forces for the application of the Montclair approach in New York and the United States in general.¹⁶³

C. The Investment Arbitration Experience

Transposing the content-of-laws enquiry into investment arbitration, it is only logical that the public international law nature of investment disputes would introduce a new dimension to the topic—the distinction between national and international law. Generally speaking, in international dispute settlement, the jura novit curia principle covers only international law¹⁶⁴ whereas the contents of any relevant national laws will need to be proven as plain facts by the parties.¹⁶⁵ In investor-state disputes, however, the closely intertwined application of public international law and national law mandates the expansion of the jura novit curia principle to national law as well.¹⁶⁶ This “deviating” position has become the norm

¹⁶³ See Rutledge, Kent & Henel, supra note 150, at 880 (“[O]nce [the Restatement of the Law on International Commercial Arbitration] is completed, it should have an important impact on future legal developments in this area.”).
¹⁶⁴ See, e.g., Fisheries Jurisdiction Case (U.K. of Gr. Brit. and N. Ir. v. Ice.), Judgment, 1974 I.C.J. 3, ¶ 17 (July 25) (“The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. . . . [T]he burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”) (emphasis added) (a contrario).
¹⁶⁵ Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. ser. A No. 7, at 19 (May 25) (“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”).
¹⁶⁶ ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 95 (2009); see also Giuditta Cordero-Moss, Tribunal’s Powers Versus Party Autonomy, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1207, 1210 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (“Within the framework of ICSID, it seems to be undisputed that a tribunal is not bound to base its award on the legal arguments that were presented to it by the parties.”); Carlos Ignacio Suarez Anzorena, Vivendi v. Argentina: On the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers, in ANNULMENT OF ICSID AWARDS 123, 143 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) (arguing that the jura novit curia principle does not cover non-pleaded grounds of
in investment arbitration, as evidenced in numerous cases resolved under the ICSID Convention,\(^{167}\) as well as in other investment arbitration fora.\(^ {168}\) Most recently, the ICSID tribunal in *Burlington Resources Inc. v. Republic of Ecuador* ruled that

> [w]hen applying the law (whether national or international), . . . the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia*—or better in this instance, *iura novit arbitrere*—allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not rely on a legal theory that was not subject to debate or that the Parties could not anticipate or address.\(^ {169}\)


\(^{169}\) ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 45 (Feb. 7, 2017) (emphasis added), http://www.italaw.com/sites/default/files/case-documents/italaw8208_0.pdf [https://perma.cc/5EKN-XME6]. With nearly identical wording, see *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, ¶ 118 (Apr. 15, 2016), http://www.italaw.com...
Hence, it is clear that even in investment arbitration a moderate *jura novit arbiter* principle is applicable with the proviso of the “no-surprise” rule.\textsuperscript{170}

\textsuperscript{170} See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, ¶¶ 68-70 (Feb. 5, 2002), http://www.italaw.com/sites/default/files/case-documents/ita0903.pdf (holding that the parties could have anticipated the legal arguments advanced by the Tribunal) [https://perma.cc/T2LN-9AAJ], *Contra Compañía de Aguas del Aconquija SA* and *Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 84 (July 3, 2002), http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf (“It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention.”) (emphasis added) [https://perma.cc/5NHC-Z75J]. See, e.g., Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in *ANNULMENT OF ICSID AWARDS* 17, 31 (Emmanuel Gaillard & Yas Banifatemi...
Nonetheless, such surprise of the parties alone, which needs to be invoked and proved by the party seeking the annulment of the ICSID award, will not result in the annulment of the award. Rather, as first articulated in the seminal *Klöckner I* case, and most recently affirmed in *TECO Guatemala Holdings L.L.C. v. Republic of Guatemala*, the requirements for the application of either grounds of annulment—manifest excess of powers or serious departure from a fundamental rule of procedure—will have to be met as well.175

**D. Convergence of Laws?**

This succinct analysis of the theory and practice of the content-of-laws enquiry allows for a series of interesting remarks. To begin with, it is clear that the distinction between civil law and common law jurisdictions has been preserved. This distinction is manifested in the special rules—or the lack thereof—on the content-of-laws enquiry and the explicit reference to—or the omission of—the *jura novit arbiter* principle by arbitral tribunals and national courts.

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172. *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner against the Arbitral Award Rendered on October 21, 1983, ¶ 91 (May 3, 1985), http://icsid.worldbank.org/en/Documents/cases/Decision%20of%20the%20Ad%20Hoc%20Committee_Translated_ARB.81.2.pdf#search=klockner ("Within the dispute’s ‘legal framework,’ arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties, although they could have been. Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a ‘serious departure from a fundamental rule of procedure.’ Any other solution would expose arbitrators to having to do the work of the parties’ counsel for them and would risk slowing down or even paralyzing the arbitral solution to disputes."). [https://perma.cc/WR6E-X8HT].


174. *ICSID Convention, supra* note 167, arts. 52(1)(b), (d), respectively.

175. For an analysis of the ICSID art. 52 application requirements, see *Schreuer et al., supra* note 68, at 890–1095.
Specifically, whereas all three civil law jurisdictions examined herein—Sweden, Switzerland, and France—do not provide for special rules on the ascertainment of the content of the applicable law, the common law jurisdictions—England, Hong Kong, and Singapore—have enacted such special regimes, with the sole exception to the common law “group” being New York. This divergence in the points of departure may be explained by the great deference to open-ended rules and general principles in the civilian legal tradition, the great influence of English law on Hong Kong and Singapore, and, lastly, the general structure of United States federal and state laws that contain only a handful of provisions on the conduct of arbitral proceedings.

Furthermore, in juxtaposition with the common law jurisdictions and the sui generis regime of France, both Swedish and Swiss courts have extended the application of the jura novit curia principle to arbitral proceedings. This practice is linked, indisputably, to their familiarity with the principle and the readiness of both the Swedish and the Swiss legal industries to accept the application of the principle in international arbitration.

Against this background of different legal traditions and points of departure, one cannot fail to observe the legal convergence on the content-of-laws enquiry. Contrary to conventional wisdom, a trend is emerging towards the rejection of both “pure” inquisitorial and adversarial approaches and the adoption of a more facultative-discretionary approach to the issue in international arbitration. This trend may be described as a “dormant” or “potentially inquisitorial” approach. Whereas the principle jura novit curia signals both a right and duty of the court to establish the legal basis of the dispute, pursuant to this emerging approach, the arbitrators are merely allowed to look beyond the arguments advanced by the parties. This approach amounts to the application of a facultative jura novit arbiter principle. That said, this prerogative of the tribunal needs to be paired, to a greater or lesser extent, with the opportunity of the parties to express their opinions on the legal issues raised by the tribunal proprio motu.

This convergence of national laws toward a “dormant” or “potentially inquisitorial” approach is neither coincidental nor a compromise between the “extreme” inquisitorial and adversarial approaches. On the contrary,

176. ILA Report & Recommendations, supra note 17, at 872 (“The Committee has not been able to discern any uniform practice [as to how arbitral tribunals determine the content of the lex causae].”).
177. See supra Part I.
178. Cf. Alberti, supra note 24, at 26 (“In absence of any specific rules or trends to the contrary one may argue that the iura novit curia principle should then be treated as a tribunal’s right—and not as a duty—to ascertain the contents of the law.”).
because national courts reviewing arbitral awards in annulment proceedings had no regulatory guidance or “safety net” to fall back on, they had to resort to the general principles and the theoretical underpinnings of international arbitration. Thus, this prevailing approach in legal practice reflects the dispute resolution function of arbitral tribunals and the effect of fundamental principles, such as party autonomy and due process, on the conduct of arbitral proceedings. Accordingly, the latitude enjoyed by the tribunal allows the arbitrators to ensure that the pertinent legal issues have been duly considered. At the same time, the right of the parties to make further submissions on any unpleaded legal grounds allows the parties to be in control of the proceedings and the arbitrators to render awards that comply with the right of the parties to be heard. This coveted balance between the judicial function of the tribunals and the contractual basis of arbitration is achieved by the “potentially inquisitorial” approach to the content-of-laws enquiry. Lastly, one should not overlook that the emergence of this uniform approach clearly depicts the “practical harmonization” of arbitration regimes and the cross-fertilization achieved by the truly global practice of arbitration and the formation of multi-cultural arbitral tribunals.

What remains unsettled in practice, however, are the circumstances under which the tribunal would be required to afford the parties the opportunity to make further legal submissions as well as the effects of international public policy and overriding mandatory rules on the discretion of the arbitral tribunal. Should the tribunal revert to the parties every time the arbitrators use their inquisitorial powers or only if the new legal grounds could possibly come as a surprise to the parties? How should the tribunal exercise its discretion? Should the arbitrators consider *sua sponte* issues of international public policy and the application of overriding mandatory rules, or should the latter have no effect on the facultative *jura novit arbiter* principle? These issues are examined in Part V under a *de lege ferenda* analysis of the content-of-laws enquiry in international arbitration.

V. DE LEGE FERENDA

Considering, firstly, the drawbacks of the fall-back, inquisitorial, and adversarial approaches, and, secondly, the emerging trend towards a “potentially inquisitorial” approach, clear regulatory preference seems to exist, in both legal theory and practice, for the adoption of a hybrid approach to the ascertainment of the content of the applicable law by arbitral tribunals.

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179. Compare with the largely unsuccessful legal harmonization and unification attempts under international uniform law instruments.
It is not clear, however, what this approach entails.\textsuperscript{180} Given the gap in national legal regimes, soft-law projects could be of assistance in delineating a method of identifying the content of the governing law. Accordingly, the \textit{ILA International Commercial Arbitration Committee’s Report and Recommendations on “Ascertaining the Contents of the Applicable Law in International Commercial Arbitration,”}\textsuperscript{181} which adopts such a hybrid approach, is used as the point of reference for the analysis that follows.

The ILA Report and Recommendations stipulates that the parties bear the onus of educating the arbitral tribunal with respect to the content of the applicable law.\textsuperscript{182} The arbitrators, however, are not limited by the parties’ submissions, as they may research the disputed legal issues on their own motion.\textsuperscript{183} Should the arbitrators intend to render an award relying on sources not invoked by the parties, the tribunal should afford the latter the opportunity to amend their submissions.\textsuperscript{184} The opportunity to amend the submissions is appropriate “at least if those sources go meaningfully beyond [those] . . . already invoked[,] and [if they] might significantly affect the outcome of the case.”\textsuperscript{185} Thus, the introduction of legal arguments merely corroborating the arguments of the parties should not mandate, prima facie, further hearing of the parties on the new sources.\textsuperscript{186}

It is important to distinguish independent legal research by the tribunal from the consideration of legal issues that have not been raised in the parties’ submissions. Whereas the first act pertains to the argumentation on a legal issue falling clearly within the mandate of the tribunal, unargued issues bear on the scope of the arbitration agreement. The arbitrators should not contemplate legal issues that have not been raised by the parties because such practices could bring the tribunal outside its mandate.\textsuperscript{187} Put differently, the legal characterization of the dispute by the parties and the

\textsuperscript{180} See supra Part III.E.

\textsuperscript{181} \textit{ILA Report & Recommendations, supra note 17.}

\textsuperscript{182} \textit{Id.} at 881, Recommendation No. 5.

\textsuperscript{183} \textit{Id.} at 881, Recommendation No. 7.

\textsuperscript{184} \textit{Id.} at 882, Recommendation No. 10. See Mantakou, supra note 68, at 497 (noting that this requirement for consultations with the parties leads, essentially, to a gradual reshaping of the classic \textit{jura novit curia} principle into “\textit{jura non novit curia}”).

\textsuperscript{185} See Mantakou, \textit{supra} note 68; see also, \textit{e.g.}, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 6, 2009, 2010 REV. ARB. 90, 92 (holding that overabundant additional grounds raised \textit{ex officio} by the arbitral tribunal cannot justify the annulment of the award).

\textsuperscript{186} See Sanghi Polysteres (India) Ltd. v. Int’l Investor (KCFC) (Kuwait) [2000] 1 Lloyd’s Rep. 480 [26], [28] (Eng.); see also Giovannini, \textit{supra} note 48, at 6 (“To the best of our knowledge, the insertion in the award of legal references not mentioned by the parties has never given rise to any challenge whatsoever.”).

\textsuperscript{187} \textit{ILA Report & Recommendations, supra note 17, at 881, Recommendation No. 6.}
relevant arguments advanced delimit the legal arsenal of the arbitral tribunal. Should the arbitrators qualify the legal dispute in a different way or resolve the dispute on a different legal basis from that envisaged by the parties—let alone grant relief not requested by the latter—they would act extra or ultra petita, that is, in violation of their mandate under the arbitration agreement. By acting extra or ultra petita, the tribunal risks the setting aside or the limited enforceability of the award—if it is enforceable at all. If, however, the parties have focused on the relief sought without legally qualifying the dispute, the tribunal would be allowed to render an award on any legal grounds, albeit within the limits of the remedy requested.

Nevertheless, new issues raised sua sponte by the arbitrators should not be prohibited altogether. In exceptional circumstances—when overriding

188. For example, adjudicating a claim on the basis of unjust enrichment rather than breach of contract.

189. For example, ruling for the termination of the contract rather than the award of damages, awarding non-requested damages or interest, etc. See, e.g., Louis Dreyfus S.A.S. v. Holding Tusculum B.V., 2008 QCCS 5903 (Can. QC).


191. See UNCITRAL, Notes on Organizing Arbitral Proceedings, nn.11(a), 11(c). But see Dimolitsa, supra note 64, at 438 (“[T]he principle of ‘ne ultra petita partium’ does not enter into play as much when arbitrators introduce ex officio new issues of law. Indeed, introducing new issues of law does not equate with granting non-requested remedies. It is not excluded, however, that a party challenges an award for violation of this very principle in situations where arbitrators have raised new issues or have recharacterized legal relationships; but such challenge should normally fail as long as the arbitrators have ultimately adjudicated not more or other than what was claimed.”).

192. See, e.g., UNCITRAL Model Law, supra note 27, art. 34(1), (2)(a)(iii).

193. See, e.g., New York Convention, supra note 38, art. V(1)(c); UNCITRAL Model Law, supra note 27, art. 36(1)(a)(iii).

194. For a brief analysis of the ultra petita concept, see MATTI S. KURKELA, SANTTU TURUNEN & CONFLICT MANAGEMENT INSTITUTE (“COMI”), DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 28 (2d ed. 2010); Cordero-Moss, supra note 26, at 2 (“[T]he tribunal would clearly exceed its power, if it ordered a relief that the parties have excluded in the arbitration agreement.”). See also Jones, supra note 56, at 121 (“A challenge to the award or its enforcement will probably be refuted where the party alleging that the tribunal exceeded its jurisdiction was given sufficient notice and failed to make any objections to the tribunal taking that course of action . . . .”).

195. Such as damages sought on contract law, rather than tort law, grounds.

196. Alberti & Bigge, supra note 34, at 14.
mandatory rules\textsuperscript{197} or substantive international public policy touch upon the legal framework of the dispute—the tribunal “may be justified” in acting on its own motion.\textsuperscript{198} Such initiative by the tribunal is vital to minimizing the likelihood of a successful challenge to the award\textsuperscript{199} and safeguarding its enforceability.\textsuperscript{200} Granted, even under such scenarios, the arbitrators would


\textsuperscript{198} ILA Report & Recommendations, supra note 17, at 882, Recommendation No. 13; Michael Capper, “Proving” the Contents of the Applicable Substantive Law(s), 11, in THE APPLICATION OF SUBSTANTIVE LAW BY INTERNATIONAL ARBITRATORS 31, 34 (Fabio Bortolotti & Pierre Mayer eds., 2014). For an overview of the application of overriding mandatory rules and public policy in international arbitration, see FOUCHARD, GAILLARD & GOLDMAN, supra note 26, at 847–59 and particularly 852–53 (stressing that the application of international mandatory rules jeopardizes predictability, which is an “important consideration” for the parties) and 856 (noting that “it . . . appears that arbitrators have so far remained particularly reluctant to apply mandatory rules other than those of the lex contractus.”).

\textsuperscript{199} ILA Report & Recommendations, supra note 17, at 882, Recommendation No. 13.

\textsuperscript{200} Capper, supra note 198, at 35 (“In order to fulfil [sic] their duty to render a final and enforceable award, the arbitrators may have to consider such mandatory rules even in the event that none of the parties refer to them.”). For the duty of the arbitral tribunal to render an enforceable award, see Martin Hunter & Allan Philip, The Duties of an Arbitrator, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 477, 485 (Lawrence W. Newman & Richard D. Hill eds., 3d ed. 2014); Sigvard Jarvin, The Sources and Limits of the Arbitrator’s Powers, 2 ARB. INT’L 140, 158 (1986); KURKELA, TURUNEN & CONFLICT MANAGEMENT INSTITUTE (“COMI”), supra note 194, at 1; PARK, supra note 26, at 547, 550 (“Of all the arbitrator’s duties, the most persistently problematic may well be the obligation to seek an enforceable award. This obligation implicates not only tensions among the various duties themselves, but also conflicts between norms at the arbitral seat and the law of the enforcement forum.”); Silberman & Ferrari, supra note 28, at 313. See also, e.g., LCIA Arbitration Rules, art. 32(2) (2014) (“For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties . . . shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.”) (emphasis added); ICC Rules of Arbitration, art. 42 (2012) (“In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to
be required to raise this possibility with the parties and “give [the latter] a reasonable opportunity to be heard on [those] legal issues that may be relevant to the disposition of the case” before rendering the award.\(^\text{201}\)

Failure of the tribunal to request relevant additional submissions by the parties could result, again, in the annulment\(^\text{202}\) or the limited enforceability\(^\text{203}\) of the arbitral award.

This procedural requirement of affording the parties the opportunity to address all legal points raised \textit{ex officio} by the tribunal, however, should be applied with caution so as to foster expediency and efficiency in the arbitral proceedings. Thus, the tribunal should draw a line to ensure that the final award be rendered in the most efficient manner. As eloquently put by the ad hoc Committee in the annulment proceedings of \textit{Mr. Tza Yap Shum v. Republic of Peru}:

> The Republic of Peru’s argument provides us with an example of the reduction \textit{ad infinitum} which is illustrated by Zeno’s paradox of motion: assuming that time is composed of a series of moments, the arrow which travels no distance during that moment, is not moving and will never reach the target. In similar fashion, an arbitrator will never be able to make an award because of the obligation to continuously submit the reasons for the award to the parties for their observations.\(^\text{204}\)

Hence, by allowing the parties to be essentially in control of the legal basis of the dispute, the arbitrators ensure that the threshold set by the

\[^\text{201}\] (emphasis added); \textit{Seller (Turkey) v. Buyer (Turkey), Final Award, ICC Case No. 16168 (2013), 38 Y.B. COMM. ARB. 205, 214 (seat of the tribunal in Hamburg, Germany); Salini Construttori SPA v. The Fed. Democratic Republic of Ethiopia, Award, ICC Case No. 10623 (2001), 21 ASA BULL. 2003, 82, 85 (seat of the tribunal in Addis Ababa, Ethiopia).

\[^\text{202}\] See, e.g., \textit{UNCITRAL Model Law, supra} note 27, art. 34(1), (2)(a)(ii).

\[^\text{203}\] See, e.g., \textit{New York Convention, supra} note 38, art. V(1)(b); \textit{UNCITRAL Model Law, supra} note 27, art. 36(1)(a)(ii).

fundamental principles of international arbitration has been met, due process and public policy have been duly considered, the arbitral proceedings have been conducted in a fair and unbiased manner, and the award has been rendered within the mandate of the tribunal. This observation testifies to the quiet, yet powerful, effect that the fundamental principles of arbitration have on the structure of international arbitral proceedings and explains the gradual convergence of national laws on international arbitration.

Finally, the advantages of such an elaborate hybrid approach are manifest, even if examined exclusively through the lens of pragmatism. Specifically, by adopting such an elaborate hybrid method, the arbitral tribunal establishes an “internationally-neutral” procedural regime that would be acceptable by both parties. Furthermore, by following a method that reflects—to a greater or lesser extent—guidelines promulgated under the auspices of major arbitration centers and other renowned academic or professional organizations, such as the International Law Association, the tribunal would be presumed to have exercised its powers in an “appropriate manner,” thus ensuring the wide enforceability of the arbitral award.

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205. Dimolitsa, supra note 64, at 432–33.

206. See ILA Report & Recommendations, supra note 17, at 881, Recommendation No. 2; see also, e.g., UNCITRAL Model Law, supra note 27, art. 18; UNCITRAL Arbitration Rules, art. 17(1). Cf. New York Convention, supra note 17, at 881, Recommendation No. 2; see also, e.g., UNCITRAL Model Law, supra note 27, arts. 34(1), (2)(b)(ii), 36(1)(b)(ii).

207. See supra Part IV.D.

208. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note 26, at 2208 (“[E]xperienced arbitrators in cases with parties of diverse nationalities will usually seek to arrive at procedural decisions that are ‘international,’ rather than reflecting parochial procedural rules in local national courts of either party [or the arbitral seat] . . . . In these circumstances, tribunals will fashion arbitral procedures that . . . provide an internationally-neutral procedural framework, consistent with the parties’ objectives in agreeing to arbitrate their disputes.”).

209. See, e.g., UNCITRAL Model Law, supra note 27, at 19(2); UNCITRAL Arbitration Rules, art. 17(1); see also KURKELA, TURUNEN & CONFLICT MANAGEMENT INSTITUTE (“COMI”), supra note 194, at 7 (“The soft law norms . . . at least to some extent bind the margin of discretion given to arbitrators in national laws.”); PARK, supra note 26, at 159 (“[A] more nuanced view might see procedural soft law as enhancing arbitration’s integrity.”), and 172 (“[P]rofessional guidelines have evolved to mitigate some of the hazards of arbitral discretion.”); Irene Welser & Giovanni De Berti, The Arbitrator and The Arbitration Procedure—Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices, AUSTRIAN Y.B. INT’L ARB. 79, 79 (2010) (“Best practices—if accepted by the arbitral community—. . . might increase the
Essentially, pursuant to this optimal hybrid approach, which may also be described as a “moderately inquisitorial” approach,\textsuperscript{210} the arbitrators should begin their legal analysis from the submissions of the parties. When the applicability of particular rules—or even a legal regime in its entirety—has not been raised in the pleadings, the tribunal would be allowed, but not required, to explore that possibility with the parties. Should the parties revert without any comments on the applicability of those rules, this latter attitude should be understood as an \textit{ex post} choice-of-law agreement—more accurately, an \textit{ex post negative} choice-of-law agreement—to exclude the application of the unpleaded rules. Furthermore, should the arbitrators find the parties’ submissions unpersuasive compared to the legal basis identified \textit{proprio motu}, they would have to advise the parties accordingly and solicit further submissions before rendering the arbitral award, unless the independent research by the tribunal has yielded only corroborating legal arguments and sources. Lastly, in light of the arbitrators’ duty to render an enforceable award, the tribunal would be required to explore, on its own motion, the applicability of any relevant overriding mandatory rules, and to consider any legal issues pertaining to the international public policy, of either the situs or any other country of potential enforcement of the award. Nonetheless, even under this overriding mandatory rules/public policy scenario, the tribunal should revert to the parties and solicit further legal submissions on the pertinent overriding mandatory rules or international public policy considerations.

\textsuperscript{210}. Cf. supra Part IV.D., and, more specifically, the established in legal practice “potentially inquisitorial” approach, which, in contrast to this normative analysis, does not provide clear-cut rules on the extent of the governing law-related consultations with the parties or the effects of overriding mandatory rules and public policy considerations on the content-of-laws enquiry.

\textsuperscript{210}. For a critical stance towards the expansive trend of promulgating—and, conveniently, resorting to—“soft-law” in international arbitration, see Michael E. Schneider, \textit{The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into “Best Practices”}, in \textsc{Liber Amicorum En L’Honneur de Serge Lazareff} 563 (Laurent Lévy & Yves Derains eds., 2011). \textit{Cf.} Capper, \textit{supra} note 198, at 32 (“[I]nternational arbitration should not be considered as governed by any specific legal system or tradition. Rather, the prevalent opinion is that international arbitration should be governed by what is known as ‘international best practice’. The tricky part, however, is to identify what the international best practice is with respect to establishing the contents of the applicable law.”).
Against this background, it is recommended that all content-of-laws issues be addressed clearly in both the agreement of the parties and the national law governing arbitral proceedings. The advantages of these gap-filling recommendations are by no means negligible because their adoption would set clear regulatory standards that foster the much-valued legal certainty and predictability, and their use would diminish any dilatory tactics and/or procedural objections raised ex post by the losing party.

Given the difficulties associated with amending national laws, it would be comparatively easy for the parties to agree on the method of establishing the content of the applicable law. Such a clause in either the arbitration/submission agreements or the terms of reference could read as follows:

The Parties shall establish the content of the applicable substantive law. The Arbitral Tribunal shall have the power to establish the content of the applicable substantive law on its own motion. Should the Arbitral Tribunal exercise this power, the parties must be afforded the opportunity to make further legal submissions.211

A similar rule could be introduced into institutional or other model arbitration rules that are incorporated by reference into the arbitration/submission agreement. Such a rule could read as follows:

Rule X—Content of the Rules Applicable to the Merits of the Dispute
1. The Parties shall establish the content of the rules applicable to the merits of the dispute.
2. The Arbitral Tribunal shall have the power to establish the content of the applicable rules on its own motion.
3. The Arbitral Tribunal shall be required to establish the content of the applicable rules when the (non-)application of certain rules could jeopardize the enforceability of the arbitral award.
4. If the Arbitral Tribunal exercises its power under paras. 2 or 3, the parties shall be afforded the opportunity to make further legal submissions.

Conversely, because dispute resolution agreements tend to be “midnight clauses” entered into haphazardly right before the conclusion of the commercial transaction, the niche content-of-laws enquiry is usually overlooked by the counsels of the parties. Hence, it is recommended that

211. See also Burckhardt, supra note 98, at 174; GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 239–40 (5th ed. 2016).
a relevant provision be added to the default regime of the various *leges arbitri*. Such a provision could read as follows:

Rule X—Content of the Rules Applicable to the Merits of the Dispute

1. The parties shall establish the content of the rules applicable to the merits of the dispute.
2. The arbitral tribunal shall have the power to establish the content of the applicable rules on its own motion.
3. The arbitral tribunal shall be required to establish the content of the applicable rules, when the (non-)application of certain rules could jeopardize the enforceability of the arbitral award.
4. If the arbitral tribunal exercises its power under paras. 2 or 3, the parties shall be afforded the opportunity to make further legal submissions.212

CONCLUSION

The foregoing analysis strived to achieve the three research goals set out in the Introduction: (1) address the theoretical underpinnings of establishing the content of foreign law in arbitration; (2) identify the actual practice in the most popular arbitration venues; and (3) delineate clear legal standards for tribunals and courts reviewing arbitral awards in annulment proceedings. First, this Article established that arbitrators should escape the confines of the binary distinction between inquisitorial and adversarial methods of establishing the applicable law and adopt, instead, a hybrid approach to the content-of-laws enquiry. Second, it showcased that, contrary to conventional wisdom, a trend is emerging in the practice of international arbitration towards the application of a facultative *jura novit arbiter* principle, which amounts to the adoption of a uniform “dormant” or “potentially inquisitorial” approach to the ascertainment of the content of the applicable legal regime. Third, the analysis looked to the future by examining the content-of-laws enquiry *de lege ferenda*. In that context, the parties should have both the first and the last word in reference to their dispute. The arbitrators should be allowed to select among the arguments advanced and, if they deem it appropriate, to introduce new legal arguments for the resolution of the dispute. This

power, however, should be paired with the opportunity of the parties to make further legal submissions on the issues examined *ex officio*. In light of the above, the focal point of any content-of-laws enquiry should shift from determining whether any such principle as *jura novit arbiter* or *jura non novit arbiter* exists—a conundrum greatly resembling the “glass half-full or half-empty” debate—and refocus on the importance of the continuous governing law-related consultation between the arbitrators and the parties throughout the arbitral proceedings, and certainly before the tribunal has rendered its final award.