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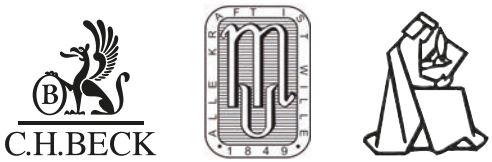

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Iura Novit Arbiter in International and Belarusian Practice of Commercial Arbitration

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I. Introduction

Iura novit arbiter is a Latin maxim standing for the *arbitrator knows the law,* and in international arbitration it determines the parties' burden of proof in relation to their legal position and arbitrators' limited power[1]) to develop legal reasoning or apply legal authorities *ex officio.* In general, the main idea of *ex officio* (on its own motion) is that the tribunal can raise legal provisions, issues and/or authorities that have not been pleaded by the parties and open a respective discussion. However, it is limited or even confronted, by the widely established requirement that an award should not come as a surprise to the parties[2]) and therefore resolve only those issues that were raised during the proceedings.

Iura novit arbiter is related to the well-known concept of *iura novit curia,* one of the most important principles of procedural law. The Latin maxim stands for the idea that the *court knows the law*[3]) and determines the division of responsibilities between the court and the parties to a dispute. Civil and common legal systems have adopted different approaches to it: the civil law tradition considers that judges have sufficient legal training so as to allow the parties to only provide them with the facts and prayer for relief. The judges know the law and will, of their own volition, find and apply the appropriate legal rule. The common law, by contrast, has never endorsed the concept of *iura novit curia* and generally expects the parties to educate judges on the law.[4])

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[1]) Giuditta Cordero-Moss, *General Report on Jura Novit Arbiter, in* Iura Novit Curia in International Arbitration 467 (Ferrari & Cordero-Moss eds., 2018).

[2]) International Law Association, Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (2008).

[3]) Friedrich Rosenfeld, *Iura Novit Curia in International Law, in* Iura Novit Curia in International Arbitration 425 (Ferrari & Cordero-Moss eds., 2018).

[4]) International Law Association, *supra* note 2; Yuko Nishitani, *General Report in* Treatment of Foreign Law: Dynamics Towards Convergence? 4–5 (Yuko Nishitani ed., 2017); Aaron D. Simowitz, *Jura Novit Arbiter in the United States,*

This clash makes the issue particularly challenging for international arbitration – a dispute resolution mechanism that was conceived as an alternative to national court litigation in response to the growing needs of an increasingly globalized world of worldwide trade and cross-border investments.[5]) It should be noted at the outset that in international arbitration the traditionally stark difference that we have seen in the approaches of civil and common law courts on the issue of *iura novit curia* is somewhat mitigated.[6]) There appears to be a common core of the principle that is applied in international arbitration generally.[7]) It is argued that in international arbitration exists a unique (neither civil nor common law) approach to the issue of *iura novit curia*.

To highlight that idea, this article uses the maxim of *iura novit arbiter* instead of the better-known *iura novit curia*. This is mainly done for two related reasons: first, to stress that the content and scope of *iura novit curia* in court and arbitration are different and secondly, to ensure "formal compliance" since in arbitration the decision maker is an arbitrator *("arbiter")* rather than a court *("curia")*.

The article aims to highlight the main concerns voiced in international arbitration practice in relation to the application of *iura novit arbiter*. The article reviews the application of *iura novit arbiter* in three dimensions: in relation to legal issues and legal provisions, in relation to legal authorities and in relation to relief sought. In addition to the arbitration practice of leading forums, the peculiarities of the *iura novit arbiter* application in the international arbitrations seated in Belarus, as well as procedural behavior patterns of Belarusian arbitrators, will be examined. Although arbitrators are bound by the mandatory rules of law of the seat and/or procedural law, they normally enjoy considerable discretion in how they run the case and, when resolving particular issues, tend to be influenced by their background and the practices of their home country. In that regard, the article, among other factors, touches upon the impact of *iura novit arbiter* on the recently released and highly debated Rules on the Efficient Conduct of Proceedings in International Arbitration **(Prague Rules)**.

The article does not intend to be a comprehensive guideline for arbitrations seated in all jurisdictions. The authors acknowledge that there are often fundamental differences between jurisdictions that would prevent the preparation of a universally applicable guideline. The article rather relies

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in Iura Novit Curia in International Arbitration 407 (Ferrari & Cordero-Moss eds., 2018): "Although the maxima 'iura novit curia' is foreign to the common law countries, in some countries, absence of its application should not be exaggerated e.g. in USA, court may grant summary judgment 'on a ground not raised by a party' – after 'giving notice and reasonable time to respond'".

[5]) Alan Redfern & Martin Hunter, International Arbitration 1 (6th ed., 2015).

[6]) Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36 Vanderbilt Journal of Transnational Law 1313, 1331 (2003).

[7]) Cordero-Moss, *supra* note 1, at 474–5.

on the aggregated data and tries to outline the most common approaches stemming from the authors' own practical experiences in arbitrations based in Belarus or involving Belarusian parties or arbitrators.

II. Background

The importance of determining the essence of *iura novit arbiter* lies in its practical implications. As arbitration is a matter of contract, the strict application of *iura novit arbiter* raises the risk of due process violations and an excess of mandate. Both may be grounds on which an award could be set aside under the arbitration law of the country of the seat (or under the arbitration law of the country that provided the procedural law).[8]) Moreover, pursuant to the United Nations 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards **(New York Convention)** due process concerns and/or an excess of mandate entitles a court of a contracting state to refuse the recognition and enforcement of a foreign arbitral award.[9])

One reported annulment decision of the Federal Supreme Court of Switzerland may serve as a good illustrative example. An arbitral award was set aside on the ground that the arbitral tribunal went beyond the scope of what the parties had claimed. While the claimant had asked the tribunal to declare the contract null and void, whilst demanding damages in that respect, the tribunal departed from the claimant's prayer for relief. It refused to declare the contract to be null and void, but still awarded damages, albeit on a different basis — namely on the basis that the respondent had breached contractual guarantees. The Federal Supreme Court found that the arbitral tribunal acted *ultra* or *extra petita* and on that ground set aside the award.[10]) Here, the application of the law as the arbitrator knew it rather than deciding the claims as pleaded by the parties, led to the award being annulled. This is an illustration of the importance of determining the scope of *iura novit arbiter*, in particular the extent to which the tribunal can act *ex officio*.

Despite its importance, until recently *iura novit arbiter* has not received much attention from the international community of arbitration scholars and practitioners. It was only in 2008, when the issue was publicly addressed at the international level. During its 73rd Conference, held in Rio de Janeiro, Brazil, the International Law Association **(ILA)** adopted recommendations on ascertaining the contents of the applicable law in international commercial arbitration **(Recommendations)**. The ILA recognized the *"need for guidance*

[8]) Art. 34(2)(ii) and (iii) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 **(Model Law)**.

[9]) Art. V(1)(b) and (c) New York Convention.

[10]) Teresa Giovannini, *International Arbitration and Jura Novit Curia – Towards Harmonization*, *in* Liber Amicorum Bernardo Cremades 497–498 (Ballester & Arias eds., 2010).

and the development of best practices for parties, counsel and arbitrators" in this regard.[11]) Recognizing the differences between domestic courts and international arbitral tribunals, the ILA recommended a distinct approach to international arbitration in determining the content of the applicable law.[12]) This marked a breakthrough for *iura novit arbiter*. The Recommendations were welcomed by the arbitration community and have been applied in a number of cases.

The Recommendations are aimed at developing best practices in arbitration. Their main message is premised on ensuring the right to be heard is not violated and the parties are not surprised by the content and nature of the arbitral award. The duty to consult with the parties serves this purpose and excludes surprises. The essence of the approach endorsed by the Recommendations is that the tribunal should not be allowed to raise legal issues *ex officio,* unless public policy or non-derogable provisions justify doing so. Decisions of the tribunal should not come as a surprise to parties and, in order to prevent such surprises, they need to consult with the parties.[13])

The Prague Rules were officially launched on 14 December 2018 and may become the next milestone for *iura novit arbiter*. The Rules emerged as reaction to concerns about an actual or perceived reduced level of efficiency in international arbitration, long and expensive proceedings and overall "due process paranoia".[14]) To a certain extent, increased costs and delays can be attributed to the greater use of common law features in international arbitration, such as document production and the cross-examination of witnesses. These features often result in a more passive role for the tribunal and allow the parties to run the arbitral process almost without any interference and to deploy sophisticated delaying tactics without any negative consequences. The Prague Rules were declared to be a response to the need for efficiency in international arbitration.[15])

The initial title of the Prague Rules – Inquisitorial Rules of Taking Evidence – reveals their background and initial focus.[16]) The general purpose of the Rules is to confer more power on the tribunal and promote more active

[11]) International Law Association (73rd conference) Resolution No 6/2008 on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (Rio de Janeiro August 21, 2008) Preamble; Filip De Ly, Mark Friedman & Luca Radicati Di Brozolo, *Introduction to the International Law Association International Commercial Arbitration Committee's Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration,* 26 Arbitration International 191, 191–192 (2010).

[12]) International Law Association, *supra* note 11, at Preamble.

[13]) International Law Association, *supra* note 11.

[14]) Preamble to the Prague Rules.

[15]) Alexandre Khrapoutski & Andrei Panov, *The Prague Rules – an Alternative Way of Conducting International Arbitration?* 1 Arbitration.ru 41 (2018).

[16]) The Inquisitorial Rules of Taking Evidence in International Arbitration: Draft (2018) (https://praguerules.com/publications/) accessed April 13, 2019.

participation on the part of the tribunal in the arbitral process. One of the ways in which this can be achieved is through the discretion the tribunal enjoys in the application of *iura novit arbiter* under Art. 7 of the Rules.

Art. 7 has attracted attention, although the idea is certainly not new by drawing from the traditions of civil law countries.[17]) The novelty, if any, stems from the fact that Art. 7 formulated, for the first time, a plain rule of *iura novit arbiter*. By contrast, most arbitration rules and the IBA Rules on the Taking of Evidence in International Arbitration (**IBA Rules**) are silent on this issue.

III. Iura Novit Arbiter in International and Belarusian Practice

Although the maxim *iura novit arbiter* literally stands for the idea that the arbitrator knows the law, the principle *iura novit arbiter* does not, principally, govern the knowledge of the decision-makers.[18]) Rather, it speaks of the distribution of responsibility towards legal issues, legal provisions, legal authorities and relief sought, which need to be determined either by the parties or by the tribunal.[19])

There is no uniform approach to such allocation,[20]) and it is largely influenced by legal traditions in domestic courts, therefore each jurisdiction will have its variations.[21]) However, it is largely argued that in arbitration that responsibility should be borne by the parties[22]) and it is tribunal's *discretion* rather than *duty* to consider and apply legal provisions and authorities that are not pleaded by the parties.[23]) The Prague Rules follow this pattern and allocate the burden of proof to the party that raises the respective claim or defence.[24]) There is a rational reason behind such an approach – the obvious difference

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[17]) Andrei Panov, *Why the Prague Rules May Be Needed?* 4 arbitration.ru 18 (2018).

[18]) Rosenfeld, *supra* note 3, at 428.

[19]) Rosenfeld, *supra* note 3, at 428.

[20]) Kaufmann-Kohler, *supra* note 6, at 1332.

[21]) Cordero-Moss, *supra* note 1, at 475; Khrapoutski and Panov, *supra* note 15, at 41–42; Mauro Rubino-Sammartano, International Arbitration Law and Practice 986 (3d ed., 2014).

[22]) Andrea Meier & Yolanda McGough, *Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to Be Heard in International Arbitration: An Analysis in View of Recent Swiss Case Law,* 32 ASA Bulletin 506 (2014).

[23]) Christian P. Alberti & David M. Bigge, *Ascertaining the Content of the Applicable Law and Iura Novit Tribunus: Approaches in Commercial and Investment Arbitration*, 70 Dispute Resolution Journal 1, 7 (2015).

[24]) Art. 7(1) Prague Rules; Henriques G. Duarte, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, 36 ASA Bulletin 351, 359 (2018).

between an adjudicator's knowledge of the law in a state court and in international arbitration.

Iura novit curia is applied in state courts because judges know their own law – *lex fori* – in the first place. And even if it is an international dispute and the foreign law is to be applied, they still have an opportunity to return to *lex fori*, if it appears to be impossible to establish the content of the foreign law.[25])

By contrast, arbitrators in most cases do not have *lex fori* as a simple backup option. Furthermore, it is possible that at least one (if not all) member of the arbitral panel is not qualified under the applicable law, even if that is *lex fori*. Ultimately an arbitrator may even lack any legal background.[26]) It is irrational and artificial[27] to put the burden on a tribunal in such cases. It is at least questionable whether, without legal practice in the respective jurisdiction, arbitrators will be able to meet this burden. It also does not contribute to time and cost effectiveness of the arbitral process. Therefore, imposing the burden of proof on the parties serves the purpose of efficient dispute resolution and reflects common reasonable practice in international arbitration.

Belarusian practice is in line with the above-mentioned international approach, which assigns the responsibility to the parties to provide the arbitrators with evidence and justification of applicable norms.

If the tribunal exercises its discretion and applies legal provisions and issues, legal sources and relief not raised by the parties, the question of the limits of the arbitral tribunal's discretion arises. In particular, whether such actions by the tribunal constitute an excess of power and a violation of the parties' right to be heard. These are grounds to refuse the recognition and enforcement of an arbitral award under the New York Convention and to annul the award under the Model law.

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[25]) Andrea Bonomi & David Bochatay, *Iura Novit Arbiter in Swiss Arbitration Law, in* Iura Novit Curia in International Arbitration 382 (Ferrari & Cordero-Moss eds., 2018); Vladimir Khvalei et al., *Compatibility, Novelty, Practical Corollary? A Collective Analysis of the Prague Rules* (Kluwer Arbitration Blog, 2019) (http://arbitrationblog.kluwerarbitration.com/2019/05/22/compatibility-novelty-practical-corollary-a-collective-analysis-of-the-prague-rules/) accessed May 23, 2019; *see e.g.* Art. 26 Code of Commercial Procedure of the Republic of Belarus: *"If the existence and (or) the content of the norms of foreign law and (or) customs, despite the measures taken in accordance with this article, are not established, the economic court shall apply the relevant rules of law of the Republic of Belarus*." and Art. 1095 Civil Code of the Republic of Belarus: *"If the content of the norms of foreign law, despite the measures taken in accordance with this article within a reasonable time, is not established, the law of the Republic of Belarus shall apply."*

[26]) Mohamed S. Abdel Wahab, *Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown*, *in* Festschrift Ahmed Sadek El-Kosheri 7 (Nassib Ziadé ed., 2015).

[27]) Julian D. M. Lew, *Iura Novit Curia and Due Process* (Queen Mary University of London, School of Law Legal Studies Research Paper No. 72/2010) 11.

The limited number of grounds for refusing recognition and enforcement of arbitral awards under the New York Convention are interpreted and applied somewhat differently by various national courts. Moreover, Art. VII of the New York Convention explicitly permits reliance on a more favorable national regime. Therefore, different practice is the result of deviations of the national regime in applying the New York Convention and local advice needs to be sought when enforcing an award.

An excess of power is a ground for refusing recognition and enforcement of an award under Art. V(1)(c) of the New York Convention. If the tribunal applies legal provisions or resolves legal issues different to the parties' instructions, the question arises whether by these actions the tribunal exceeds its mandate, since the parties did not agree to direct the tribunal's consideration toward certain legal provisions and/or issues. When invoking Art. V(1)(c) of the New York Convention one should follow a two-prong test and check whether the tribunal (i) acted within the scope of the arbitration clause and (ii) determined matters that the parties have submitted to it for resolution. The "matters" that were submitted to the tribunal's consideration can be defined in the procedural order or in the Terms of Reference, as is typical in ICC arbitration.[28]) However it may well be the case that the procedural orders are silent on the particular matters to be resolved by the tribunal and instead contains some general provision that the tribunal:

> *"shall examine those issues that are necessary to be decided upon the relief sought by the parties. In particular, the questions of fact or law to be resolved by the tribunal shall be those resulting from the parties' submissions, statements and pleadings which tribunal finds relevant and/or necessary for the adjudication of the parties' respective claims and defences."*

Courts in different jurisdictions have confirmed that the tribunal can reclassify a claim, change the legal characterization of facts reasonably connected to the arguments raised, and give legal reasoning unrelated to the parties' legal arguments.[29]) In some jurisdictions a tribunal has considerable inherent powers to determine the legal side of a case,[30]) while in others "*the tribunal risks stepping outside its mandate and the award being challenged*".[31]) In most cases, however, the actual problem lies in the incorrect or unfair application of

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[28]) Art. 23 of the ICC Rules defines that in the Terms of Reference should be, *inter alia*, summary of the parties' respective claims and relief sought and unless the arbitral tribunal considers it inappropriate a list of issues to be determined.

[29]) Alberti & Bigge, *supra* note 23, at 4–5.

[30]) *E.g. Austria, see Katharina Auernig & Paul Oberhammer, Jura Novit Arbiter in Austria, in* Iura Novit Curia in International Arbitration 30 (Ferrari & Cordero-Moss eds., 2018).

[31]) Loukas Mistelis & Metka Potocnik, *Iura Novit Arbiter in England and Wales: The Exercise of Arbitral Discretion, in* Iura Novit Curia in International Arbitration 139 (Ferrari & Cordero-Moss eds., 2018).

the tribunal's discretion (*e.g.* to consider legal provisions not pleaded by the parties), not the simple fact that such discretion was actually used in the first place.[32])

In this connection, the right to be heard under Art. V(1)(b) of the New York Convention should also be taken into account. As explained in the Guide to the Convention, the parties should have the opportunity to be heard on their claims, evidence and defences.[33]) In the US, for example, parties must have an opportunity to be heard *"at a meaningful time and in a meaningful manner"*.[34]) US courts have found no violation of the right to be heard where the arbitral tribunal refused to acknowledge contractual limitation of liability and based its refusal on a law that was not raised by the parties.[35]) In this case, the issue of the limitation of liability was raised by the tribunal during the hearing and the parties had the opportunity to submit post hearing briefs and address this issue. Thus, the court concluded that the parties had the opportunity to be heard in a meaningful time and manner.[36])

The application of *iura novit arbiter* to the relief sought and legal authorities finds more consensus in the international arbitration community, while legal issues and legal provisions raise more concerns. Their particularities are analyzed below in turn, staring with the latter.

A. Legal Issues and Legal Provisions

The situation in which the tribunal may be inclined to consider different legal provisions (either derived from the contract or the applicable law) can be illustrated by the following example. Imagine that the claimant asks the tribunal to determine that the contract was violated by the respondent, on the basis that the failure to provide documents on the proper functioning of the equipment was a violation. The tribunal is subsequently satisfied with the evidence presented by the respondent showing that the documents were actually provided. However, the tribunal finds that the documents were presented much later than the agreed contractual term, which still constitutes a contract violation, albeit on a very different ground.

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[32]) Alberti & Bigge, *supra* note 23, at 4.

[33]) UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 163 (New York, 1958).

[34]) *Id.*.

[35]) Stephan W. Schill (ed.), US No. 940, OJSC Ukrnafta v. Carpatsky Petroleum Corp. and others, United States District Court, Southern District of Texas, Houston Division, Civil Action H-09-891, 2 October 2017, 43 Yearbook Commercial Arbitration paras. 46-8 (2018).

[36]) *Id.*, at paras. 49–57.

If one were to interpret the excess of mandate ground as set out in the New York Convention narrowly,[37]) then a "mandate" is limited only to the "*matters*" or, in other words, "*issues*" brought by the parties to the tribunal for resolution. There seems to be a consensus that the tribunal has to render an award within the scope of the issues submitted to arbitration.[38]) As in the example above, the tribunal was asked to decide on the violation of the contract, it can be argued that as long as the tribunal decides within that scope it should not be considered to be exceeding its mandate under the narrow interpretation of Art. V(1)(c) of the New York Convention. That is because, despite the application of a different legal provision, the tribunal still resolves the matter (issue) submitted by the parties, it just does so using another (more appropriate) legal reasoning.

If we seek assistance in national laws and arbitration rules, we will find that the majority of arbitration-friendly laws and arbitration rules provide a tribunal with a broad discretion to conduct the arbitration "*in such manner as it considers appropriate*".[39]) It can be argued that this broad wording offers leeway to the tribunal to apply legal provisions different from the ones submitted by the parties, if it finds this appropriate.[40]) Therefore, even though arbitration laws and rules are silent on the specific application of *iura novit arbiter*, it can still fall within this broad wording and does not result in an excess of power.

According to the Commentaries to the New York Convention, case law supports the understanding that the grounds for the denial of enforcement are to be construed narrowly and only serious cases can be considered a violation.[41]) At the same time, if the tribunal raises an article of the contract or part of a legal norm, it is widely held that it is good practice to warn the parties and give them an opportunity to make submissions on these potentially new points.[42])

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[37]) Albert Jan van den Berg, *Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002)*, *in* 28 Yearbook Commercial Arbitration 668 (2003).

[38]) Cordero-Moss, *supra* note 1, at 472.

[39]) *See e.g.* Art. 22(2) ICC Arbitration Rules (2017); Art. 14.5 LCIA Arbitration Rules (2014); Art. 23(1) SCC Arbitration Rules (2017); Art. 17(1) UNCITRAL Arbitration Rules (2010) and Art. 19(2) Model law. Art. 25 of the Belarusian arbitration law also provides for wide discretion of a tribunal to conduct the proceedings in the way it deems appropriate. In respective part it reads as follows: "*in the absence of such an agreement, the international arbitral tribunal shall conduct the proceedings in the manner that it considers necessary to ensure the adoption of a lawful and reasonable decision. In this case the international arbitral tribunal is required to comply with the provisions of this Law and take into account the views of the parties, while the composition of the permanent international arbitration tribunal is also subject to the provisions of the arbitration rules*". Similar provision is incorporated in Art. 31 of the IAC Rules.

[40]) Alberti & Bigge, *supra* note 23, at 2; Cordero-Moss, *supra* note 1, at 467.

[41]) Berg, *supra* note 37, at 664.

[42]) Jeff Waincymer, *International Arbitration and the Duty to Know the Law,* 28 Journal of International Arbitration 236 (2011).

The Prague Rules follow this practice and, in Art. 7, require the arbitral tribunal to consult with the parties on the legal provisions it intends to apply.

Inviting comments from the parties to avoid surprises is also advised by the Recommendations, which provide that the tribunal, before making its decision, "***should give parties a reasonable opportunity to be heard*** *on legal issues that may be relevant to the disposition of the case. They* ***should not give decisions that might reasonably be expected to surprise the parties****, or any of them, or that are based on legal issues not raised by or with the parties* [emphasis added]."[43])

Belarusian law and arbitral practice, despite lacking an explicit acknowledgment of the *iura novit arbiter* principle follow similar approach. A typical arbitral tribunal established under the Arbitration Rules of the International Arbitration Court at BelCCI (**IAC** and **IAC Rules** respectively) enjoys considerable discretion and would normally not hesitate to raise legal provisions and issues it finds necessary, even when it is not argued by the parties. They only do so insofar as those parties are given an opportunity to present their views on such provisions – it should not be regarded an excess of mandate or violation of the right to be heard.

Furthermore, even before the Prague Rules, Belarusian arbitrators were proactive in determining the (foreign) applicable law and its content. On the one hand, Art. 38(2) of the IAC Rules obliges the parties to present evidence confirming the content of the foreign law norms to which they refer. Art. 37 of the Belarusian arbitration law allows the tribunal, on its own motion, to establish the content of foreign law by approaching Ministry of Justice, and other Belarusian or foreign competent authorities, with a request for assistance.

Such an approach was used, for example, when a tribunal wanted to ascertain the essence of the Dutch rules on leasing and the Swiss laws pertaining to declaring a set-off.[44]) In another recent case, the IAC tribunal suspended arbitration proceedings and authorized the claimant to resort to the Belarusian Supreme Court with a request for assistance in the collection of evidence confirming the content of Italian law, which the claimant has successfully done. Requests for legal assistance were made through the Belarusian Ministry of Foreign Affairs to the Italian Ministry of Foreign Affairs and Ministry of Justice.

B. Relief Sought

It is almost a common understanding that, if a tribunal orders remedies not sought by the parties, it exceeds its mandate.[45]) For example, when a

[43]) International Law Association, *supra* note 11, at para. 8.

[44]) Yan Funk, *Substantive law applicable to the dispute resolution, in* International Commercial Arbitration, 285–287 (Anischenko et al., 2017).

[45]) Cordero-Moss, *supra* note 1, at 476.

claimant was seeking damages for a breach of contract by a respondent, but was granted a reduction in the contract price instead; or when a claimant requested a determination that the supplied equipment was not in conformity with the contract requirements and, on this basis, to grant damages and interest, but was granted interest on the basis of the respondent's late performance instead.

At the same time there are some exceptions to this general approach. In some countries, like Spain, there is established practice permitting arbitral tribunals to apply different remedies when, on the basis of the facts presented by the parties, it would be more appropriate. It was affirmed by the Spanish courts that a tribunal can order remedies on the basis of its own reasoning regardless of the legal basis invoked by the party as long as the factual basis of the claim is not altered.[46]) It is acknowledged, though, that in order to ensure the parties' right to be heard, parties should have an opportunity to comment on all matters of fact and law which form the basis of the award.[47])

This is largely the practice in Belarusian state courts and IAC arbitrations, where, strictly speaking, the courts and tribunals are bound by the subject matter of the claim as presented by the claimant (and respondent's counterclaim as the case may be) and are not allowed to modify it on their own motion. What often happens in practice, is that judges and arbitrators start questioning the relief sought, declare their intention to apply certain legal provisions (which imply the need to amend the relief initially sought) or sometimes even directly point out that the relief sought may be different and invite the respective party to reformulate the prayer for relief in order to bring it in line with the law and adjudicator's understanding of the appropriate formulation of the subject-matter of the claim.[48])

Hence, the wording of the prayer for relief is also very important. If a claimant does not indicate a precise legal basis in its prayer for relief, it leaves greater leeway to a tribunal not to limit the subject matter of the dispute to this basis and, potentially, the tribunal might have more room to reclassify a

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[46]) Pedro A. De Miguel Asensio, *Iura Novit Curia and Commercial Arbitration In Spain, in* Iura Novit Curia in International Arbitration 332 (Ferrari & Cordero-Moss eds., 2018).

[47]) *Id.* at 354.

[48]) This is a common situation in CISG-governed disputes involving termination of international sales contracts. Very often in the course of an oral hearing, the tribunal finds that the contract was validly avoided by notice under Art. 49 CISG, which prevails over national sales law, while a claimant keeps claiming termination of the contract under Art. 493 of the Belarusian Civil Code (BCC). In such a case the tribunal will be tempted to bring this to the attention of the parties asking to comment and possibly amend the relief sought by the claimant. In strict legal terms if such an issue is not be raised and prayer for relief is not be amended, the claim should be otherwise rejected.

claim.[49]) However, such an approach might have its downsides, since a claimant is at risk of the tribunal using this leeway and failing to consult the parties, which could put the enforceability of the award at risk.

C. Legal Authorities

Generally, a tribunal should have the power to apply legal authorities not presented by the parties. It is hard to substantiate a challenge on the ground that a tribunal has referred to legal authority not mentioned by the parties.[50]) The circumstances of such an application can be that the parties do not bring any authorities at all, or one party provides such, while the other is in default, or the legal references presented are not reliable enough, or a tribunal needs an alternative view on the question. In such situations, the tribunal may introduce legal authorities it considers relevant.

It is even argued that a tribunal **has to** conduct independent verification of the legal sources provided by the parties, since lawyers would present only extracts that serve their interests and support their position, while the tribunal has to verify the content and context of these sources independently.[51])

At the same time, two different situations must be distinguished: one where additional research merely confirms the submissions made by parties and just adds to the quality of the reasoning in the award, and another one, where the research undermines the submissions and identifies contradictory views.[52]) In the former case, it is worth checking whether the relevant authorities are in the public domain[53]) and whether the parties have had a chance to access them. In the latter case, it is important to give the parties the opportunity to comment in order to comply with the right to be heard and persuade the tribunal why the contradictory view is not to be applied in that situation.

This approach is reflected in the Prague Rules. In particular Art. 7 incorporates the tribunal's discretion to rely on legal authorities not submitted by the parties if they relate to the legal provisions pleaded by the parties. The requirement of prior consultation with the parties must also be satisfied.

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[49]) Waincymer, *supra* note 42, at 226; Marta Viegas de Freitas Monteiro, Iura Novit Curia in International Commercial Arbitration 63 (LLM thesis, University of Helsinki 2013).

[50]) Giovannini, *supra* note 10, at 501.

[51]) Giovannini, *supra* note 10, at 501.

[52]) Waincymer, *supra* note 42, at 239.

[53]) Rosenfeld, *supra* note 3, at 476.

IV. Conclusion

Although arbitrators are bound by the mandatory rules of the law of the seat and/or procedural law, they normally enjoy considerable discretion in how they run the case and when resolving particular issues tend to be influenced by their background and practices of the home country. This is particularly important when it comes to their decision making. One simple question or comment made by an arbitrator, who pretends to "know the law", even if they never practiced it, may dramatically change the flow of the arbitration proceedings and, ultimately, their outcome.

There is, undoubtedly, a growing demand from arbitration users – both clients and their counsels – for more active, time and cost-efficient adjudication. More extensive application of the *iura novit arbiter* can be considered – especially in jurisdictions with civil law tradition – as an effective solution. Hence, it is not a surprise that recent international arbitration soft-law instruments address *iura novit arbiter* and attempt to provide relevant guidance. Yet many theoretical and practical issues remain open for discussion, in particular as to the scope and limits of the application of *iura novit arbiter*. By way of example, Art. 7 of the recent Prague Rules specifically addresses the application of *iura novit arbiter* to the introduction of new legal provisions and legal authorities, but is silent regarding the tribunal's power to amend or change the relief requested by the parties and the legal issues raised.

It is now, therefore, for the international arbitrators, institutions and, ultimately, state courts to have a say and, possibly, strike a new balance between the adversarial and inquisitorial approaches to the effective resolution of international commercial disputes.

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