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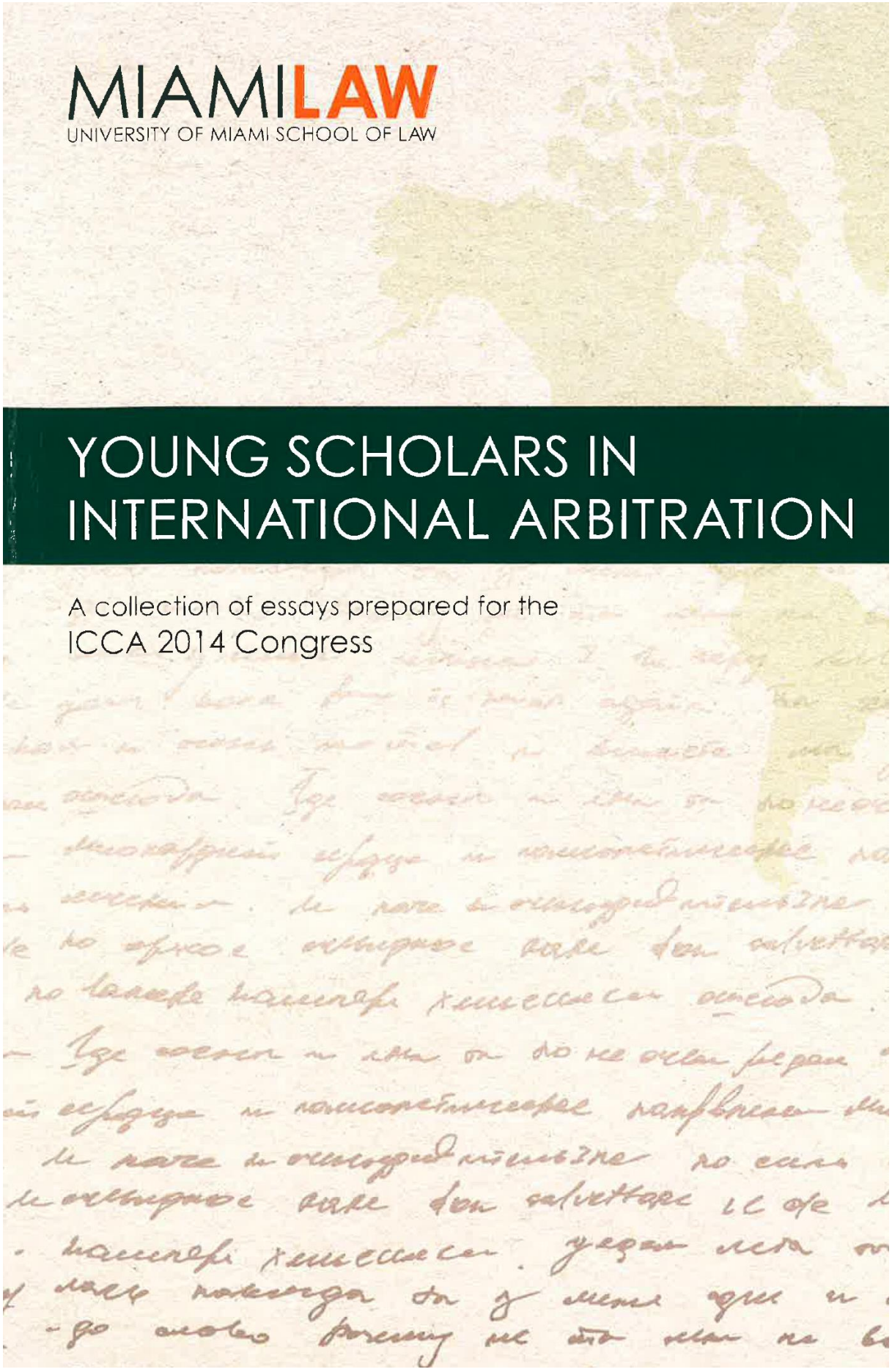

The Principle of *Iura Novit Curia*

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This essay deals with the question of what reasons would warrant the application of the principle of iura novit curia (referring to the decision-maker's duty to apply the law without any restrictions to the parties' pleadings) in international arbitration and to what extent it should be applied. This question will be answered by analyzing the reasons in favor of the application of the concept of iura novit curia in national court proceedings as well as in domestic arbitration, and finally whether these reasons also require the application of the concept in international arbitration proceedings.

1. Introduction

1.1 Meaning of the principle *iura novit curia*

The principle of *iura novit curia* is based on the distinction between facts and law. Numerous civil law jurisdictions require the parties to present the relevant facts to the court, while it is up to the judge to decide the case by applying the law to the facts presented.[1] Therefore, the common understanding is that the *iura novit curia* concept only applies to the law governing the dispute, while it is solely the parties' obligation to present the facts.

Literally, the principle of *iura novit curia* means that the judge knows the law. The actual understanding of this concept, however, varies from jurisdiction to jurisdiction.[2] Therefore, its meaning in terms of this essay has to be defined beforehand.

According to the *iura novit curia* principle, since the decision-maker in a dispute must apply the law to the facts introduced by the parties,[3]

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1 Switzerland: Article 57 Zivilprozessordnung ("ZPO"). Sweden: Lindskog, Skiljeförfarande: en komentar, Stockholm 2012, p. 763. Germany: Peter Schlosser, 50 Jahre Bundesgerichtshof—Festgabe aus der Wissenschaft, (Munich, 2000), pp. 399, 405.

2 Teresa Isele, "The Principle of Iura Novit Curia in International Commercial Arbitration," *International Arbitration Law Review*, Vol. 13, Issue I (2010), 14 et seq.

3 Wolfgang Wiegand, "Iura Novit Curia v. Ne Ultra Petita—Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts" in *Rechtsetzung und Rechtsdurchsetzung Zivil- und schniedersver fahrensrechtliche Aspekte—Festschrift für Franz Kellerhals zum 65. Geburstag*, ed. Monique Jametti Greiner, Bernhard Berger, et al. (Bern: Stämpfli Verlag AG, 2005), 131.

the judge is not bound by the parties' statements concerning the law and is therefore obligated to apply the law as he deems appropriate.[4]

1.2 Scope of this essay

This essay deals with two issues accompanying the application of the *iura novit curia* principle in international arbitration procedures. First, it analyzes whether and under what circumstances the concept of *iura novit curia* should be applied by arbitral tribunals in international arbitration. This question will be answered by comparing the reasons in favor of the application of the concept of *iura novit curia* in national court proceedings and domestic arbitration, and then whether these reasons also require the application of the concept in international arbitration.

Secondly, in case the first question is to be answered in the affirmative, it must be determined under what preconditions and to what extent tribunals in the field of international arbitration should apply law not mentioned by the parties.

2. Necessity of the application of the principle *iura novit curia* in court proceedings

2.1 *Iura novit curia* as prerequisite to the constitutional right of meaningful access to the courts

The right of meaningful access to courts, which is recognized in numerous constitutions of civil law countries, encompasses the parties' right to bring disputes before an impartial judge.[5] This constitutional right would be undermined if the judge did not have any legal obligation to apply the law to the facts established by the parties. Thus, as a general rule, the application of the principle *iura novit curia* is, in those jurisdictions, a prerequisite for the exercise of the constitutional right of access to the courts. This is even more important when parties are not represented by a lawyer in such court proceedings. In general, parties to legal proceedings that come before the court are not required to be represented by legal counsel. In order to appear and plead in court, it is sufficient that the parties are not incompetent or incapacitated.[6] It is

4 Ibid.

5 Andreas Kley, *Sonderdruck aus: Die Schweizerische Bundesverfassung. Kommentar* (Zurich: Dike Verlag, 2008), n. 3 Article 29a, referring to various constitutions of European countries.

6 Austria: Article 1 ZPO. Germany: Article 50 (1) ZPO. Switzerland: Art. 59 (2) lit. c ZPO and Article 11 et seq. Zivilgesetzbuch ("ZGB"). Italy: Article 75 Codice di procedura civile.

possible for unrepresented parties without any legal education or knowledge to defend their cases in court without making any statements about the law itself. To deny an individual the right to proceed *pro se* would result in a denial of justice.

2.2 *Iura novit curia* as prerequisite to equal protection and due application of the law

The main interest of each party involved in litigation is to win the case. In order to achieve this goal, each party presents the facts of the case as well as legal arguments that would allow a favorable outcome for the party presenting them. It is in turn the state's interest that its judicial institutions render decisions in compliance with the law. Furthermore, for the sake of consistency as well as coherence, it is the legal system's goal to provide uniformity to individuals faced with similar legal issues and to promote equal protection. In order to protect and uphold a state's legal system, it is the judiciary's main objective and duty to ensure the equal, uniform, and proper application of the law. Without applying the concept of *iura novit curia*, this important state objective and duty would not be achievable.

2.3 *Iura novit curia* as impediment to the abuse of law by the judiciary

In addition, the boundaries set by the rules of law limit the judiciary's power while deciding a dispute and ensure that courts do not abuse their discretion. The principle of *iura novit curia* is crucial in this regard, because it limits the trier of fact's discretion when deciding a case. From the state's perspective, it would be pointless to implement substantive rules of law without, at the same time, imposing a duty on courts to apply these rules, regardless of what the parties' pleadings include.

3. Necessity of the application of the principle *iura novit curia* in domestic arbitration proceedings

3.1 Application due to explicit or implicit provisions in national arbitration law

In some jurisdictions, national arbitration laws explicitly state that it is up to the arbitrator to apply the law to the facts presented by the

parties. The English Arbitration Act empowers the arbitral tribunal to decide "whether and to what extent the tribunal should itself take the initiative in ascertaining facts **and the law**" (emphasis added).[7] Before this provision was added to the Act, English arbitrators were not allowed to ascertain facts and law unless the parties had agreed otherwise.[8] The reason was presumably that arbitrations in which parties were represented by lawyers were modeled on the adversarial procedure of the English Court.[9] On the other hand, it has long been recognized that in complex cases involving scientific or technical issues, the inquisitorial system is sometimes more effective than the adversarial system, particularly before a tribunal qualified in those fields.[10] This provision was expressly intended to introduce inquisitorial procedures to English arbitration, subject to the parties' agreement otherwise and the mandatory requirement of fairness.[11]

Austrian arbitration law does not explicitly prescribe the applicability of the principle of *iura novit curia*; however, it can be derived *e contrario* from the wording of Art. 587(1), Austrian Code of Civil Procedure ("ZPO") which states that the arbitral tribunal "shall hear the parties and investigate **the facts** of the case before making their award" (emphasis added). The wording suggests that while the facts must be investigated by the court after having granted the right to be heard to the parties, the ascertainment and application of the underlying law is a matter for the arbitral tribunal.

3.2 Application despite lack of explicit or implicit provision in national arbitration laws

In other jurisdictions, national arbitration laws do not regulate the applicability of the principle of *iura novit curia*. Nevertheless, it is most likely in the state's interest to expand the *iura novit curia* concept to the area of domestic arbitration. First, it cannot be in the state's interest to treat parties in court proceedings differently than in domestic arbitration proceedings. Second, domestic arbitration is not detached from the state's judiciary, but rather closely related to the state's general objectives to ensure the due, uniform, and equal application of the law in order to

7 Sect. 34(2)(g) English Arbitration Act.
8 Bremer Vulkan v. South India Shipping [1981] AC 909 (England/High Court).
9 V.V. Veeder, "England," *ICCA International Handbook on Commercial Arbitration*, Suppl. 23 (Kluwer, 1997), 39.
10 Ibid.
11 Ibid.

safeguard the protection of a state's legal system at large. For example, Swedish domestic arbitration law does not provide for the application of the principle of *iura novit curia*. However, from preparatory works it can be derived that an award which is based on the application of the *iura novit curia* principle cannot successfully be challenged on this ground.[12]

Nor does Swiss domestic arbitration law explicitly rule on the applicability of the *iura novit curia* concept in domestic arbitration. Awards rendered in domestic arbitration proceedings are to some extent reviewable on the merits.[13] Thus, it is up to the Swiss Federal Supreme Court to ensure respect for the state's requirements for judicial decisions.

4. Application of the *iura novit curia* principle in international arbitration procedures

4.1 Application based on national rules of civil procedure as part of parties' choice of the applicable substantive law

It may be asked whether the parties' underlying choice of law also refers to the application of the *iura novit curia* concept as part of national rules of civil procedure. Such an approach is not logical. Even in a case where the parties agreed to the application of a specific nation's substantive law, arbitral tribunals, depending on the circumstances, still follow rules of arbitral institutions or rules agreed upon by the parties or, in the event that such an agreement is lacking, rules identified by the tribunal itself.[14] Thus, the parties' choice of substantive law does not lead to the application of the chosen forum's procedural rules.

4.2 Application based on applicable institutional rules

If the parties have agreed to the application of institutional procedural rules, the arbitral tribunal must follow these guidelines and concepts.

Article 21(1), ICC Rules of Arbitration states that "the parties shall be free to agree upon the **rules of law to be applied** by the arbitral tribunal to the merits of the dispute" (emphasis added). The wording of the provision implies that once the parties agree to the applicable law, it is the tribunal's duty to apply the law to the case to be decided.

12 Swedish Government Bill 1998/99:35, 145 et seq.

13 According to Article 393 (e), Swiss ZPO, domestic arbitral awards can be successfully challenged if that the award is based on manifest violation of law or if the outcome is arbitrary.

14 Denmark: Section 19 Danish Arbitration Act 2005. Germany: Article 1042 ZPO. Switzerland: Article 182 Swiss International Private Law ("IPRG"). Belgium: Article 1693 (1) Judicial Code.

Very similar is the provision of Article 22.3, LCIA Rules. Under the title "Additional Powers of the Arbitral Tribunal" it is stated that "the arbitral tribunal **shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties** as applicable to the merits of their dispute" (emphasis added). This provision clearly establishes the arbitral tribunal's duty to apply the law pursuant to the parties' choice of law, regardless of the parties' submissions.

Finally, the application of the principle of *iura novit curia* is also established in the UNCITRAL Arbitration Rules. Article 35(1), UNCITRAL Arbitration Rules states that "the arbitral tribunal **shall apply the rules of law designated by the parties as applicable to the substance of the dispute**" (emphasis added). Thus, the arbitral tribunal is to apply the substantive rules of law without being bound to the parties' submissions. Furthermore, it is noteworthy that according to Article 20(2)(e), UNCITRAL Arbitration Rules "the statement of claim **shall include the legal grounds or arguments supporting the claim**" (emphasis added). The parties are not required to make any statements with regard to the substantive applicable law, which clearly implies that it is the arbitral tribunal's duty to render an award based on the parties' choice of substantive law.

In sum, procedural rules established by important arbitral institutions foster the application of the principle of *iura novit curia*. This approach is logical, since the parties assign the resolution of the dispute to the arbitral tribunal, which has to base its decision on the applicable law.

In the area of investment arbitration, the ICSID Convention provides in Article 42(1) the following: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." This provision distinguishes two scenarios. In the first, the parties have agreed on the applicable law, and in the second they have failed to agree on the applicable law. It is quite obvious that in the second scenario, the arbitral tribunal must apply the law of the Contracting State, including rules on conflict of laws, as well as applicable principles of international law. Therefore, in case the parties did not come to an agreement on the applicable law, the tribunal is not bound to the arguments made in the parties' submissions. However, the situation is not clear in the first scenario, where the parties have agreed on the applicable law. Since 1983, ICSID Annulment Committees have decided few cases addressing the

question whether the principle of *iura novit curia* should be applicable and whether it is the arbitrator's obligation to apply the applicable law. In *Klöckner v. Cameroon*, Klöckner stated that the tribunal violated Article 42(1), ICSID Convention by not applying Cameroonian law, which is based on French law.[15] The ad hoc Committee held that the real issue was whether, by articulating its own theory and argument, the Tribunal went beyond the legal framework established by Claimant and Respondent, which would, for example, be the case if an arbitral tribunal rendered its decision on the basis of tort law while the pleas of the parties were based on contract law.[16] The ad hoc Committee finally held that within the dispute's legal framework, arbitrators must be free to rely on the arguments that strike them as the best ones, even if those arguments were not developed by the parties.[17] In *Mitchell v. Congo*, the ad hoc Committee held with regard to the applicability of the principle of *iura novit curia* that it

> "could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; **this is but an option**—and the parties should have been given the opportunity to be heard in this respect—for which reason it is not possible to draw any conclusion from the fact that the Arbitral Tribunal did not exercise it."[18]

While the tribunal in *Klöckner v. Cameroon* upheld the freedom of arbitral tribunals to rely on arguments which were not brought forward by the parties, it limited its power by stating that finding a different legal basis for a claim, e.g. tort instead of contract, would be outside the arbitrator's freedom, and therefore not admissible. This approach can be qualified as a restrictive application of the concept of *iura novit curia*. It seems that after twenty three years, in *Mitchell v. Congo*, the limited perception of the *iura novit curia* principle was abandoned, by giving wide discretion to the arbitral tribunal to decide whether it shall apply the law irrespective of parties' submissions.

15 Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Ad hoc Committee Decision on Annulment, May 3, 1985, 109, accessed December 9, 2013, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom= Main&actionVal=OnlineAward.

16 Ibid., 118.

17 Ibid.

18 Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Ad hoc Committee Decision on Annulment, November 1, 2006, 21-22, accessed December 9, 2013, http://www.italaw.com/cases/709 (emphasis added).

4.3 Application based on unwritten transnational principles?

a) Preliminary remarks

As described above, arbitrators may be required to apply the *iura novit curia* principle where the parties have made an explicit agreement to this effect, or where the relevant procedural rules provide that the *iura novit curia* concept is applicable. However, it is of great importance whether the concept of *iura novit curia* is also applicable where the parties did not agree on its application and the applicable procedural rules have not imposed a duty on the arbitral tribunal to apply the law chosen by the parties. This question must be answered taking into account the various theories of the judicial nature of arbitration describing the relationship between the state's legal system and arbitration, as well as the peculiarities of international arbitration. Four theories have been suggested with respect to the judicial nature of arbitration, which are known as the jurisdictional, contractual, mixed (or hybrid), and autonomous theories.[19]

b) The jurisdictional theory

The jurisdictional theory focuses on the state power to control and regulate arbitration which takes place within its jurisdiction and is based on the assumption that dispute resolution is a sovereign function normally exercised by national courts established by the state for that purpose.[20] According to this theory, the arbitral tribunal's power to render an award derives from the law of the place of arbitration.[21] In consequence, the arbitrator is in the same position as a judge and has therefore the same public duties.[22] Thus, important basic principles of national civil procedural law must be respected by the arbitral tribunal. In many civil law jurisdictions, the principle of *iura novit curia* is of great importance and must therefore be applied in arbitration procedures taking place in those jurisdictions. For instance, the Swiss Supreme Court maintains that arbitral tribunals as well as public courts are bound by the law to apply the law to the facts duly advanced by the parties.[23]

19 Julian D. M. Lew, Loukas A. Mistelis, and Stefan Michael Kröll, eds., *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 78.
20 Ibid., 74 et seq.
21 Ibid., 75.
22 Ibid.
23 Swiss Supreme Court BGE 4P.260/2000 Reasoning E.5b and c.

Opponents of the jurisdictional theory argue that it denies the reality that arbitration is also contractual and that even if the state recognizes arbitration, it does not delegate its jurisdictional authority to the arbitral tribunal.[24] This view opposing the jurisdictional theory stresses the contractual origin of most commercial arbitration cases, but disregards that originally, any resolution of a dispute by rendering a binding decision falls under the jurisdiction of traditional courts. On the one hand, arbitration is based on the state accepting that a private court consisting of persons not appointed in a political process may render a decision, and, on the other hand, it is based on the assumption that parties have the power to dispose of their own dispute. Without these two maxims, any arbitral procedure would be impossible. Therefore, the right approach cannot be to completely detach arbitration from state jurisdiction. Furthermore, even where the parties exclude the settlement of their dispute by state courts by agreeing to arbitration, the arbitral tribunal must apply the most basic principles of civil procedure in order to render an enforceable award. Furthermore, it should be observed that arbitral awards can only be enforced by institutions of the state, which shows that state jurisdiction plays an important role even where the parties have agreed to arbitration.

However, where the national rules of civil procedure have not adopted the concept of *iura novit curia*, the arbitral tribunal, according to the jurisdictional theory, does not have a legal obligation to apply legal rules not mentioned in the parties' submissions. Therefore, based on the jurisdictional theory, the principle of *iura novit curia* cannot be considered a transnationally recognized principle.

c) The contractual theory

The contractual theory emphasizes that arbitration has a contractual character since it has its origins in, and depends, for its existence and continuity, on the parties' consent to arbitration.[25] This theory is based on denial of the primacy of the state in arbitration and argues that the very essence of arbitration is that it is created by the will and the consent of the parties.[26] This theory fails to take into account that the intent and agreement of the parties to arbitrate are validated by national law since without the party autonomy granted by national law, arbitration proce-

24 Isele, "The Principle," 19.
25 Lew, Mistelis, and Kröll, *Comparative*, 77.
26 Ibid.

dures would be of doubtful efficacy.[27] Therefore, the contractual theory is deficient.

d) The autonomous theory

This theory assumes that arbitration evolves in an emancipated regime and is therefore of an autonomous character, and cannot work in the context of the doctrines established in the context of private international law; it does not need to fit into internationalist or nationalist-positivist views.[28] According to this theory, arbitration, in principle, operates outside the constraints of positive law or national legal systems.[29]

This theory cannot be followed, because it completely disregards that arbitration would be nonexistent without the framework established by national laws at the seat of arbitration. Furthermore, arbitration is not disconnected from national laws, which is shown by the fact that mandatory provisions of the *lex arbitri* must be respected by the arbitrators. In addition, it is noteworthy that Articles V(1)(a), (d) and (e), New York Convention refer to the law at the seat of the arbitral tribunal, which leads to the conclusion that arbitration cannot be regarded as detached from constraints of national law.[30]

e) The mixed or hybrid theory

This theory is based on a reconciliation of the jurisdictional theory on one side, and the contractual theory on the other side, because arbitration requires and depends upon elements from both of these theories.[31] It recognizes that arbitration functions outside all public legal systems since there must be some law regulating the arbitral proceedings, but at the same time, the theory acknowledges that arbitration has its origin in a private contract which also establishes procedural rules.[32] This theory takes into account that the arbitral tribunal performs a judicial function by settling disputes without exercising any state judicial power due to the lack of an act of delegation of state power.[33]

As Isele correctly states, the suggestion that the state has no exclusive

27 Isele, "The Principle," 18.
28 Lew, Mistelis, and Kröll, *Comparative*, 81.
29 Ibid.
30 Alan Redfern, J. Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edition (London: Sweet & Maxwell, 2004), 83.
31 Lew, Mistelis, and Kröll, *Comparative*, 79.
32 Ibid., 80.
33 Ibid.

right to adjudication cannot stand since the very purpose of procedural law is to take the law out of the hands of the individual citizen and vest the state with the adjudication process.[34] This does not preclude private adjudication but it will always require subsequent recognition of the state in order to acquire state power.[35] Therefore, the arbitral tribunal must comply with the mandatory procedural rules of a state in order to render an enforceable award, and also take into account the state's interest of ensuring justice. This means that the substantive law and policies of the state should be enforced correctly in the context of arbitration, as in the context of litigation.[36]

At the same time, the arbitral tribunal must also defer to the parties' choice of law. The parties expect that the arbitrator will enforce and apply the law chosen by them.[37] The parties may put forward their views on how to apply and interpret the law in their submissions; however, in the end, it is solely up to the tribunal to decide what the specific applicable rules are.[38] The parties expect that the applicable law or rules are definite, and that they will be applied in a coherent and uniform manner. Therefore, arbitrators should "know the law" in order to be able to fulfill their mandate even in cases where the parties fail to make statements of law.[39]

In sum, the mixed or hybrid theory takes into account both the parties' as well as the state's perspective, and is therefore widely accepted. As applied to the concept of *iura novit curia*, this theory requires that arbitrators be legally bound to apply the law. This is, on the one hand, due to the state's interest in rendering decisions that will not be appealed, and on the other hand, due to the parties' interest in complying with their choice of law.

f) Do the peculiarities of international arbitration require or contradict the application of *iura novit curia*?

Despite the previous finding that parties may expect the arbitral tribunal to properly apply the law chosen and that the state's interests must be complied with, it cannot be denied that in international arbitration it

34 Isele, "The Principle," 19.
35 Ibid.
36 Ibid., 20.
37 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, 2nd Edition (Cambridge, 2012), 83.
38 Lew, Mistelis, and Kröll, *Comparative*, 443.
39 Claus von Wobeser, "The Effective Use of Legal Sources: How Much is Too Much and What is the Role for Iura Novit Curia," paper submitted for ICCA Congress 2010, p. 7, accessed December 7, 2013 http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ ARBITRAGEM/01_Doutrina_ScolarsTexts/awards/iuria_novit_curia__icca_2010_von-wobeser.pdf.

is frequently the case that arbitrators are faced with the need to apply substantive laws they are not familiar with. In addition, it should be emphasized that in most jurisdictions, arbitral awards are subject to very limited judicial review.[40] Courts of higher instance will mostly not review the award on the merits. Therefore, the arbitral award will, in general, not be reviewed with regard to the question of whether the arbitral tribunal applied the law correctly. Due to the arbitrators' possible unfamiliarity with the law and the very limited prospects of judicial review, it must be questioned whether the parties can expect the arbitral tribunal to apply the concept of *iura novit curia* in international arbitration cases. In fact, one could argue that the parties can only expect the arbitral tribunal to aspire to render an award in compliance with the applicable substantive law. In practice, this means most likely that the arbitral tribunal will rely on the parties' submissions and apply the law as presented by the parties, which to some extent contradicts the *iura novit curia* concept.

Furthermore, in international arbitration cases the forum is not definite. Unlike national courts, arbitral tribunals in international arbitration do not have to ensure equal protection nor due and coherent application of the rules of law to the society at large, but only to the parties involved. Therefore, the state's interest to protect the integrity of the judicial system is marginalized in international arbitration.

In the area of international arbitration, there is however a higher interest that arbitral tribunals render legally justifiable, uniform, and appropriate awards. If this were not the case, international arbitration would not be an adequate alternative to litigation before state courts. The importance of international arbitration would decline if the arbitral tribunal could only rely on the parties' submissions and was not, beyond that, per se committed to render an appropriate award in uniformity with similar cases. While one can doubt that arbitral tribunals in the international field have the duty to ensure the protection of the legal system, it cannot be denied that the acceptance of international arbitration depends on the legitimacy and recognition of the awards granted. This goal can only be achieved if arbitral tribunals ensure that appropriate and uniform awards are granted. Therefore, there is a higher interest that arbitral tribunals apply the law detached from the parties' submissions.

Moreover, tribunals in international arbitration have the contractual duty towards the parties to render an appropriate award in line with the boundaries set by the parties' choice of law. If the arbitral tribunal were

40 Switzerland: Article 190 IPRG. Germany: Article 1059 ZPO. Denmark: Section 37 Danish Arbitration Act 2005. Austria: Article 595 Austrian Code of Civil Procedure.

limited to the parties' submissions and did not base its decision on the law, it would not properly fulfill its mandate given by the parties. The choice of law made by the parties has also the role of limiting the arbitral tribunals' discretion by rendering guidelines with regard to the decision process. If the arbitrators were only bound to the parties' submissions, the boundaries would be undermined.

Thus, despite the argument that arbitral tribunals are to a large extent detached from the state's interests, it makes more sense that they are—based on their role as decision-making bodies—just as committed to rendering appropriate uniform decisions as national courts and domestic arbitration tribunals. The *iura novit curia* principle has the role to ensure the good quality of an award and to safeguard that international arbitration is, from a legal perspective, a legitimate and not a defective alternative to litigation before national courts. The fact that there is very often no opportunity for judicial review of arbitral awards does not mean that the parties waive their right that the arbitral tribunal render an appropriate and coherent decision based on the substantive law chosen by the parties.

5. Limits to the principle of *iura novit curia*

5.1 *Iura Novit Curia* and the right to be heard

a) Right to be heard with regard to substantive law under procedural rules

Article 25(2), ICC Rules states under the title "Establishing the Facts of the Case" that the arbitral tribunal, after having studied the parties' written submissions, shall hear the parties together in person. From this provision it can be derived that the ICC Rules only instruct the arbitral tribunal to grant the right to be heard with regard to facts, but not with regard to substantive law.

According to Article 17, UNCITRAL Arbitration Rules, "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that in an appropriate stage of the proceedings, **each party is given a reasonable opportunity of presenting its case**" (emphasis added). The UNCITRAL Arbitration Rules do not limit the right to be heard as to facts; they rather grant the arbitral tribunal wide discretion to decide whether the parties shall be heard with regard to issues of law.

In order to determine whether the right to be heard encompasses also the parties' right to express their views on legal issues, the text of the New York Convention may be instructive. According to Article V(1)(b), New York Convention, recognition and enforcement of the award may be refused if the party resisting enforcement furnishes proof that he was "unable to present his case." The wording is unclear and does not reveal whether the Convention gives the resisting party a right to express their views also on legal issues. Specific factors which can amount to a ground for challenge of an award include the following: a party has not been able to participate in the taking of evidence or discovery proceedings; a party has been denied the right to introduce certain evidence, or to comment on an expert's report submitted to the tribunal; or the standards of adversarial proceedings adopted by the tribunal deprived a party of its fundamental right to defense.[41] However, it is only required that the tribunal give the parties the opportunity to present their case; whether the party actually makes use of it or not, and in which way, does generally not affect the enforceability of the award.[42] Therefore, it must be assumed that if the parties have the opportunity to present the facts and the law from their point of view, this will be regarded sufficient to recognize and enforce an arbitral award under the Article V(1)(b), New York Convention.

In general, neither procedural rules of arbitral institutions nor the New York Convention determine whether the parties must be given the opportunity to express their views with regard to issues of law. Therefore, arbitrators faced with this question will have to focus on doctrinal opinions and precedents.

b) Right to be heard with regard to substantive law—Doctrinal opinions

According to Wiegand, the identification and the application of the law is the tribunal's primary duty.[43] It falls within the tribunal's competence to grant a legally justified award based on the parties' motions and presentation of evidence.[44] Therefore, it is not decisive for the outcome of a case whether the parties were granted the opportunity to express their views with regard to issues of law.[45] However, Wiegand acknowl-

41 Lew, Mistelis, and Kröll, *Comparative*, 713.
42 Ibid.
43 Wiegand, "Iura Novit Curia," 138 et seq.
44 Ibid., 139.
45 Ibid.

edges that the arbitral tribunal must give the parties an opportunity to express their point of view with regard to legal issues only if the possibility exists that the legal reasoning leads to the need to introduce new facts decisive for the outcome of the case.[46]

Kurkela has a similar approach to that of Wiegand. He acknowledges, however, that the arbitral tribunal may, in order to accomplish its mission, arrange a status hearing in order to give the parties, where necessary or beneficial, an opportunity to argue and comment on the status of applicable substantive rules as well as on the issues arising out of the substantive law that have not been clarified to the panel's full satisfaction.[47]

According to Born, surprise decisions are given when the arbitral tribunal rests a decision on factual materials or (less clearly) a legal theory not advanced by the parties, without providing an opportunity to be heard, rendering the award subject to annulment.[48] This rule follows from the parties' general right to an opportunity to be heard.[49] However, Born also acknowledges that arbitrators are not obligated to give the parties specific invitations to comment on every inference that might be drawn from the interpretation that might be given to a statute or contract.[50]

Isele takes the position that due to practical considerations the parties should have the right to express their views not only to factual, but also to legal issues.[51] She argues that an extensive right to be heard supports the parties' confidence in arbitration since they have the opportunity to comment on new legal reasoning and thus they are not taken by surprise, which enhances the acceptance of the final award in an environment of different legal cultures.[52] Furthermore, granting the right to be heard regarding legal reasoning also renders two slippery distinctions unnecessary, namely the distinction between what constitutes a surprise decision as well as the distinction between fact and law.[53] Finally, Isele argues that by granting the right to be heard with regard to legal issues to the parties, it prevents the impression of partiality of the tribunal since the tribunal opens the debate for the sake of both parties and signals that

46 Ibid., 140.
47 Matti Kurkela and Hannes Snellman, *Due Process in International Commercial Arbitration* (New York: Oceana Publications, 2005), 179.
48 Gary B. Born, *International Commercial Arbitration*, Vol. 2 (Kluwer Law International, 2009), p. 2589.
49 Ibid.
50 Ibid.
51 Isele, "The Principle," 26.
52 Ibid.
53 Ibid.

it is still open to other legal and factual submissions that might change the outcome of the case.[54]

Schneider goes further and states that arbitral tribunals should only rely on facts and laws on which the parties were allowed to express their views.[55] The tribunal should therefore explicitly point out that it will apply law which was not advanced by the parties and give them the opportunity to express their views.[56] Such an approach is crucial in arbitral proceedings since in international arbitration parties often have different backgrounds and expectations.[57]

c) Right to be heard with regard to substantive laws—Case law

The Swiss Supreme Court found in a 1994 decision that the right to be heard is not limited to the parties' right to be given the opportunity to express their views as to the facts of the case.[58] But then the Court did not go on to explain further the contents of the right to be heard in arbitral procedures. In a more recent decision from 2003, the Swiss Supreme Court held that the parties' right to be heard was not sufficiently taken into account by the arbitral tribunal where the tribunal relied on a legal interpretation of a contractual provision that was not included by either party in their submissions.[59] In its most recent decision of January 17, 2013, the Court stated more precisely that the arbitral tribunal has the duty to give the parties the opportunity to comment on a legal provision which was not part of the parties' pleadings.[60] Such a duty is, according to the Swiss Supreme Court, that the arbitral tribunal has the function to avoid relying on a legal provision to the parties' surprise.[61]

In the SCC case *Bogdanov v. Moldova*, the sole arbitrator found that where the principle of *iura novit curia* is applied, the parties should be notified of new legal sources that are introduced by the arbitrator in order to provide the parties with an opportunity to comment on them.[62]

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54 Ibid.

55 *Basel Commentary to the Swiss International Private Law Act*, 2nd Edition (Basel: 2007), n. 60 to Article 182.

56 Ibid.

57 Ibid.

58 Swiss Supreme Court BGE 120 II 172 Reasoning E.3a.

59 Swiss Supreme Court BGE 130 III 35, Reasoning E.6.

60 Swiss Supreme Court 4A_538/2012 dated January 17, 2012, Reasoning E.5.1.

61 Ibid.

62 Iurii Bogdanov v. Moldova, Award, Stockholm International Arbitration Review, No. 2006:3, IIC 33 (SCC Arbitration Institute, 2005), 99 et seq.

d) Summary

Many procedural rules of arbitral institutions do not clearly define whether the right to be heard includes the parties' right to express their views on legal issues introduced by the arbitral tribunal through the *iura novit curia* principle. However, commentators as well as courts and arbitral institutions acknowledge that parties also have the right to comment on legal issues in order to avoid surprise decisions. This approach should be followed to give parties the opportunity to address the arbitral tribunal with respect to the applicability of given elements of a law.

Furthermore, it should be recalled that the success of international arbitration is heavily based on the parties' approval, and it is self-evident that the parties will more likely accept a decision if they are allowed to express their views regarding all aspects that were decisive for the outcome of the dispute.

In sum, arbitral tribunals should allow parties to comment on issues of law introduced by the arbitral tribunal *sua sponte* that are decisive for the outcome of the case even though the parties did not address them in their previous submissions.

5.2 Iura novit curia v. Ne ultra petita

a) Definition of the *ne ultra petita* principle and its application in international arbitration

The principle of *ne ultra petita* means that a judicial body shall not award more to a winning party than it has requested.[63] If the judicial body exceeds the party's request and grants to it more or something different than requested, the principle of *ne ultra petita* is violated.[64] The same applies when the judicial body decides on legal consequences that were not part of the party's request.[65]

According to Article 34(2)(a)(iii), UNCITRAL Model Law on International Commercial Arbitration, an arbitral award will be set aside if

> "the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration, or contains decisions on matters beyond the scope of the submission to

63 Wiegand, "Iura Novit Curia," 133.
64 Ibid.
65 Ibid.

> arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside."

If the arbitrators ruled on issues not presented by the parties, they acted "*ultra petita.*"

Awards addressing matters outside the scope of the parties' submissions have been annulled by U.S., English, French, Swiss, and other courts.[66]

b) Contradiction between the principles of *iura novit curia* and *ne ultra petita*?

According to Born, the arbitral tribunal does not exceed its authority if it relies on arguments or authorities not raised by the parties to support their claims.[67]

The Swiss Supreme Court has held that a violation of the principle *ne ultra petita* does not occur in a case where a tribunal's judgment deviated from the parties' arguments.[68] The Claimant had requested payment based on her being entitled to contract performance. The arbitral tribunal, however, awarded the Claimant payment based on compensation for Respondent's failure to meet his contractual obligations.[69] The Court reasoned that the arbitral tribunal did not award more than it had requested, but that it only based its award on a different legal basis that was not mentioned by either party.[70] Finally, the Court held that the principle of *iura novit curia* forced the tribunal to examine all bases for claims, and that therefore the tribunal did not decide *ultra petita* by awarding a payment based on the Respondent's failure to fulfill its contractual obligations.[71]

Based on the aforesaid, the principles of *ne ultra petita* and *iura novit curia* do not contradict each other as long as the arbitral tribunal does not award to the prevailing party more or something other than requested.

66 Born, *International Commercial Arbitration*, 2607.
67 Ibid., 2608.
68 Swiss Supreme Court BGE 4P.260/2000, Reasoning E.5.
69 Ibid.
70 Ibid.
71 Ibid.

6. Conclusions

Where procedural rules explicitly prescribe that the tribunal apply the substantive rules of law, arbitral tribunals do not have any discretion to this effect and must apply the law without being limited to the parties' pleadings.

Where the duty to apply the law is not explicit, it is disputable whether arbitral tribunals must apply the law based on the *iura novit curia* concept. One could argue, on the one hand, that the principle of *iura novit curia* does not apply in the area of international arbitration, but rather in national court proceedings and domestic arbitration proceedings because these proceedings are tied to a certain forum, and because the state has a duty to ensure due, coherent, and equal application of the law in order to protect the integrity of its own legal system. On the other hand, one can argue that, according to the hybrid theory, international arbitration relies on both the parties' agreement to arbitrate and also on the state's approval of this alternative of dispute resolution. Even if one views international arbitration as totally detached from any state, there is still strong interest in international arbitration that awards rendered by arbitral tribunals are approved by the parties and by society as a whole, to further the general acceptance of the process as a legitimate alternative to proceedings in national courts.

Furthermore, arbitral tribunals in international arbitration should base their decisions on the law that has been stipulated by the parties as applicable, even if arguments based upon it are not mentioned in the parties' pleadings. Arbitral tribunals should not be restricted to the parties' pleadings. There should be no discretion when it comes to applying the law, because the parties' choice of law leaves no discretion and implies a duty to render a proper and coherent decision. The lack of judicial review on the merits should not be an excuse for not applying the law in a proper and coherent way. It rather has to be accepted as a feature of international arbitration. Due to all the reasons stated above, the principle of *iura novit curia* should be recognized as applicable in the area of international arbitration.

While applying the *iura novit curia* concept, arbitrators should not render surprise decisions. The parties should be given the possibility to comment on issues of substantive law. This would enhance the general acceptance of an award, and avoid impressions of partiality as well as possible annulments by national courts. Thus, the principle of *iura novit curia* finds its limits in the parties' right to be heard.

Finally, the intervention of *iura novit curia* does not mean that the arbitral tribunal exceeds its powers as long as the prevailing party is not awarded more than it has requested. The principles of *iura novit curia* and *ne ultra petita* do not contradict each other.