

# Concerning the Principle of *jura novit curia* in Arbitration from a Swedish Perspective<sup>1</sup>

Finn Madsen

<b>1</b>	<b>Introduction</b> .....	196
1.1	Generally .....	196
1.2	Further Details Regarding the Approach to the Problem .....	196
<b>2</b>	<b>The Application of the Principle of <i>jura novit curia</i> in Conjunction with Court Proceedings</b> .....	197
2.1	Generally .....	197
2.2	Further Details Concerning the Principle of <i>jura novit curia</i> 's Meaning in Conjunction with Court Proceedings .....	198
2.3	Must Parties be Given the Opportunity to be Heard Concerning the Court's Application of the Law? .....	200
2.4	Summary .....	203
<b>3</b>	<b><i>Jura novit arbiter</i></b> .....	204
3.1	Generally .....	204
3.2	The Tribunal's Use of the Law in Contexts Other than the Determination of the Substantive Legal Issue .....	207
3.3	<i>Jura novit curia</i> in Preparatory Works, Case Law, etc. ....	209
3.4	A few Starting Points .....	211
3.5	How Should a Tribunal Deal with <i>jura novit curia</i> ? .....	213
<b>4</b>	<b>Conclusion</b> .....	218

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<sup>1</sup> This article has been developed on the basis of my previous contribution to *Juridisk Tidskrift* ("Legal Magazine") 2010-2011 No. 2, p. 985 *et seq.* It contains some consequential amendments due to changes in the law which have occurred thereafter.

## 1 Introduction

### 1.1 Generally

Within the field of litigation, the *disposition principle* and the principle of *jura novit curia* reflect the division of roles or in other words the balance of power between the parties and the court. The traditional starting point in civil proceedings is that the parties pursuant to their requests for relief and invocation of dispositive facts thereby determine the scope of the court's adjudication.<sup>2</sup> However, the court has a monopoly in respect of the law to be applied to such submissions. The division of roles which has been developed in relation hereto within the courts has exercised considerable influence on the division of roles between the parties and arbitrators in arbitral proceedings. This article is intended to provide some answers to the question concerning whether arbitration should emulate court proceedings in relation to the exclusive right to determine the applicable law or whether the division of roles between the actors in the arbitral proceedings should be formulated in another manner.<sup>3</sup>

### 1.2 Further Details Regarding the Approach to the Problem

Under Swedish litigation, the principle of *jura novit curia* includes, among other things, that a court can and shall apply legal rules to the dispositive facts invoked by the parties even if the parties have failed to advance arguments in respect of the legal rules in question.<sup>4</sup>

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2 Chapter 17, Section 3 of the Swedish Code of Judicial Procedure provides that a judgment may not be given for something else or more than that properly demanded by a party. In cases amenable to out-of-court settlement, the judgment may not be based on circumstances other than those pleaded by a party as the foundation of his action.

3 The question concerning the application of the principle of *jura novit curia* has been discussed in recent years. In an article in *Advokaten* ("The Lawyer"), Christina Ramberg (Ramberg, "Give me the law" *Advokaten*, 2006, No. 8, p. 10–11) has criticized the application of the principle whereas Jan Kleineman has defended the principle in conjunction with arbitration (the Principle of *jura novit curia* – Specifically in Arbitral Proceedings, Commemorative Volume to Bertil Södermark). It may also be mentioned that Gotthard Calissendorff addressed the issue in the article *Jura novit curia in International Arbitration in Sweden* in *Juridisk Tidskrift* ("Legal Magazine") 1995–96, p. 141 *et seq.* During 2008, the International Law Association ("ILA") adopted recommendations to arbitral tribunals which relate to the principle's application in conjunction with international commercial arbitration through *Resolution No. 6/2008 on Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*. The Recommendations were adopted at the ILA meeting held in Rio de Janeiro on 17–21 August 2008. The Recommendations and a final report are available via the organization's website "www.ila-hq.org". The principle and its application are also often subject to essays and discussions at international conferences within arbitration.

4 The principle is reflected in Swedish law through Chapter 35, Section 2 of the Code of Judicial Procedure which states that proof of a circumstance that is generally known is not required and that nor is proof required as to legal rules.

The issue concerning whether an arbitral tribunal *can, should* or even *shall* act in a corresponding manner frequently arises in arbitral proceedings. The general starting point is deemed to be<sup>5</sup> that the principle should be applied in domestic arbitral proceedings, but it is more unclear whether the principle is appropriate for international arbitral proceedings conducted in Sweden. Other considerations than those which affect the court proceedings apply, however, in conjunction with arbitration. It is also clear that the parties in an arbitration enjoy a greater right of disposition in respect of the applicable law than parties do in conjunction with civil proceedings. Moreover, with respect to international arbitrations, the arbitrators often come from different legal backgrounds and may not have any knowledge of the applicable law. In those cases the concept of *jura novit curia* is wholly artificial. The manner in which the division of roles is distinguished is unclear. In order to avoid loss of rights, it is important that parties and arbitrators agree upon the rules of the game in the arbitral proceedings and that they have the same view in respect of the division of roles which shall apply in the proceedings. An attempt to bring clarity is set forth below.<sup>6</sup>

## 2 The Application of the Principle of *jura novit curia* in Conjunction with Court Proceedings

### 2.1 Generally

From a historical perspective, it is not possible to determine when the principle became a part of Swedish law. It has been stated that its origin is based upon the medieval inquisitorial process<sup>7</sup> and it may be said to be evident from the Olaus Petri 1540 work concerning the Judges Rules,<sup>8</sup> which were promulgated into Swedish law in connection with the 1734 Act. The Judges Rules proceed

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5 Government Bill 1998/99:35 p. 145 and 146.

6 What is stated below is based upon conventional arbitral proceedings between commercial parties. It does not relate to *ex parte* proceedings which give rise to specific considerations in this context. Nor does it address civil law rules which the arbitrators, irrespective of the parties' positions, can apply in light of the rules concerning invalidity set forth in Section 33, paragraph 2 of the Swedish Arbitration Act.

An additional reservation should also be added. The account is not intended to provide anything other than a roughly hewn and schematic picture of how a court or tribunal uses legal rules. The intention is to provide practitioners with a few milestones which may be useful. A range of issues would have deserved a more thorough exposition. However, time has not permitted anything other than a fairly superficial account. I hope that this article may cause others to exhibit an interest in relation to the issues addressed herein.

7 Lindell, *the Limits of Party Autonomy in Contentious Proceedings Amenable to Out-of-court Settlement Specifically Related to the Law to be Applied*, Uppsala 1988, p. 33.

8 It is stated in Olaus Petri's Judges Rules, which were enacted in approximately 1540, item 1 that a judge shall "take pains to ensure that he knows what the law is" and item 6 that "[T]he judge shall know the law, on the basis of which he shall judge, as the law shall serve as a precept."

from the basis that the judge has a mandate from God<sup>9</sup> and that it is the judge's task to apply the law. During modern times, the principle of *jura novit curia* appears to have been motivated by, among other things, consideration been given to the legislator's normative function, the desire to promote the formation of precedent, the desirability of achieving uniformity in the application of the law and in the interests of legal certainty, i.e. a party shall not forfeit a right due to the fact that he failed to understand and thereby invoke a certain legal rule.<sup>10</sup>

## **2.2 Further Details Concerning the Principle of *jura novit curia*'s Meaning in Conjunction with Court Proceedings**

In Swedish civil litigation legislation the principle is set forth in Chapter 35, Section 2, paragraph 2, item 1 of the Swedish Code of Judicial Procedure, which states that proof is not required as to legal rules. The background hereto is that a judge, as stated above, is obliged to know Swedish law. Any evidence concerning the content thereof is thus unnecessary.<sup>11</sup> This also applies to rules pertaining to other recognized sources of the law than the law itself. The purport is also that legal rules or legal sources do not have to be pleaded by the parties in order for the court to be able to apply them. Instead, in relation to contentious cases amenable to out-of-court settlement, a court may also apply the adequate legal rule to facts invoked by the parties as the basis of their claim. This can also occur where the party has not invoked the legal rule in question.<sup>12</sup> Traditionally, the court is deemed to be both entitled and obliged to apply the legal rule which the court views as adequate. This should in principle apply even where the parties have opposed the applicable law in question.<sup>13</sup> By way of summary, the parties may thus agree on which facts will constitute the basis for the court's determination, but not concerning what legal rules shall be applied.<sup>14</sup>

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9 A judge shall "take into account that he is an agent of the Lord, and the office that he serves, does God's will," etc.

10 Lappalainen, *the Principle of Jura Novit Curia and the Judge's Case Management Duties*, Juridiska Föreningens Tidskrift ("Journal of the Legal Association") 1993, p. 42 and Lindell, *Procedural Preclusion of new Facts or Evidence regarding the Matter*, 1993, p. 274.

11 This does not entail, however, that it would be impermissible to submit legal opinions concerning the content of applicable law.

12 See, for example Supreme Court's decisions in NJA 1989 p. 614, 1993 p. 13 and 1999 p. 629. However, naturally the parties can by arguing their case in a certain manner, for example by failing to invoke certain circumstances, indirectly affect which legal rules will be applied. A party's admission of a certain circumstance may also embrace its legal significance, see Supreme Courts in NJA 2010 p. 463 and Westerberg's commentary on the case in Juridisk Tidskrift (Law Journal) 2011-12 p. 168 et sec.

13 See the Supreme Court Decision in NJA 2016 p. 107 where the Supreme Court applied rules pertaining to damages to a party's claim in spite of the fact that the party declared that his action was not based on damages.

14 See Ekelöf & Boman, *Civil Proceedings I*, 7th edition, 1997, p. 54.

The court's independent application of the law does not only apply to the application of legal rules in respect of the invoked dispositive facts. For example, it may also relate to the gap-filling of an agreement in accordance with general normative provisions, normally through the use of discretionary legal rules, such as natural terms and conditions for the type of agreement in question (*naturalia negotii*) or from general legal principles. This is also viewed as a procedure of a purely legal nature.<sup>15</sup>

The independent application of the law is further deemed to include that the court is freely entitled to reclassify legal nomenclature used by the parties. If, for example, the parties have designated an agreement as a leasing agreement, the court can find that this relates to an instalment contract instead and apply the legal rules which the last-mentioned qualification may give rise to. It is unclear whether the court has an obligation or is entitled to apply the customary legal rules such as, for example, trade usage in accordance with the principle of *jura novit curia*.<sup>16</sup>

The aforementioned rough map of the application of the principle appeared, according to an earlier trend, to be on the way to being relaxed. Certain commentators have taken the view that it is apparent from case law that a court is entitled in certain circumstances to assume the parties' assessment of the legal situation. Such would be the case, for example, where the parties have clearly litigated on the basis of a common assumption, for example, that a certain statute or a certain provision is applicable.<sup>17</sup>

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15 See, for example, NJA 1999 p. 629.

16 *Civil Proceedings IV*, Ekelöf *et al.*, 7th edition p. 146, Heuman, *Burden of Proof and Evidential Requirements in Contentious Cases*, Stockholm, 2008, p. 426 and Fitger, *The Swedish Code of Judicial Procedure*, Chapter 35, Section 55. See also Westberg, *Surprising Precedent due to Trade Usage or Generally Applicable Standard Terms and Conditions*, Juridisk Tidskrift ("Legal Magazine") 2000–01, p. 348 *et seq.*

17 Lindell states in *Civil Proceedings*, 2nd edition, Uppsala 2003, (p. 62) among other things, that Supreme Court cases NJA 1978 p. 334 and 1983 p. 3 are support for the proposition that the parties enjoy a certain right of disposition in respect of the applicable law. Among other things, Lindell states that the Swedish Supreme Court in the so-called Tsisis case NJA 1983 p. 3 stated that the parties jointly assumed that the damages issue to be was assessed with the application of the Tort Liability Act and that the Swedish Supreme Court in light thereof applied the Tort Liability Act and not earlier legislation. However, it should be noted in this context that the parties' right of disposition pursuant to the legal situation only related to applying the more recent legislation than the one which was otherwise applicable. Westberg states in *The Courts Official Determination* that the Swedish Supreme Court in NJA 1978 p. 334 may be deemed to have had "at least in part" breached the principle that the parties do not have the right of disposition in respect of the applicable law. As regards this case, it should however be noted that according to the Swedish Supreme Court's judgment, it was the formulation of the request for relief which entailed that certain legislation was not applied. It may further be stated that the Swedish Supreme Court in NJA 2004 p. 149 found it determinative that the claimant had only referred to a certain legal rule. The decision has been construed in such a manner that a party can exclude the application of one of two alternative applicable rules. Heuman, in *Interpretation of Precedent based upon an Erroneous Application of the Law, Commemorative Volume to Lavin*, states however that the Swedish Supreme Court in the last mentioned case must have formulated its reasons in an erroneous manner and that it should not be concluded that they had abandoned the principle of *jura novit curia*.

It should be added that the principle of *jura novit curia* in the form outlined above is only applicable when it relates to Swedish law. It is unclear whether the court should apply the foreign law *ex officio* or whether it requires a submission by a party. According to a decision from the Swedish Supreme Court, the principle of *jura novit curia* appears not to be applicable to an issue as to whether foreign law is applicable.<sup>18</sup>

According to Chapter 35, Section 2, paragraph 2, item 2 of the Swedish Code of Judicial Procedure, in those cases where foreign law is applicable and the content thereof is not known to the court, the court is entitled to invite a party to adduce evidence thereon. However, it appears to be unclear how a judge should act if the evidence which is put before him does not clarify the legal situation in a clearly sufficient manner.<sup>19</sup> In recent case law (NJA 2016 p. 288), the Supreme Court has clarified that the court may use any knowledge it may have of the contents of the foreign law in question, but that parties should have the opportunity to be heard thereon (the Supreme Court referred to NJA II 1943 p. 446 *et seq.*) In situations where foreign law remains unknown, the court may need to presuppose that the foreign law corresponds to Swedish law. However, generally, the point of departure is that the Swedish court is obliged, to the extent possible, to apply the foreign law in the same manner that a court in the country in question would have applied it.

However, as regards what law should be applicable according to Swedish international private and procedural law, in contentious proceedings the parties always have the possibility to agree upon the applicable law.<sup>20</sup>

### **2.3 *Must Parties be Given the Opportunity to be Heard Concerning the Court's Application of the Law?***

The court sometimes has the right to apply legal rules without affording the parties the opportunity to be heard in the salient respect.<sup>21</sup> In Swedish law, the right to be heard principle has traditionally primarily been viewed to relate to what the counterparty has argued before the court and not to a legal rule which

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18 See NJA 1993 p. 341, Jänterä-Jareborg, *ibid.* P. 161, Bogdan, SvJT ("Swedish Legal Journal") 1989 p. 482 *et seq.* as well as Bogdan, Swedish International Private and Civil Law, 7th edition, chapter 3.2. See also Bogdan in SvJT ("Swedish Legal Journal") 1997 p. 485. Bogdan's view is that the principle of *jura novit curia* is applicable in the context. This opinion is also evident from Fitger *et al.*, Chapter 17, Section 12A of *the Swedish Code of Judicial Procedure*.

19 Fitger *et al.*, *the Swedish Code of Judicial Procedure*, Chapter 35, Section 55 and Jänterä-Jareborg, *Swedish Courts and Foreign Law*, p. 332-359.

20 Rome I Regulation, Article 3, paragraph 1.

21 It may be stated that according to the ALI/Unidroit Principles of Transnational Civil Procedure a court (22.2.3) may "while affording the parties an 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." Among other things, it is further stated in the commentary to the provision (p. 22A) that "[i]t is universally recognized that the court has a responsibility for determination of issues of facts and law necessary for the judgment and *that all parties have a right to be heard concerning applicable law and relevant evidence*" (my italics).

the court considers as part of an *ex officio* application in this context.<sup>22</sup> In this context, the Swedish Supreme Court (NJA 1999 p. 629) stated "[w]hen a court considers the application of a legal rule which is not subject of the submissions during the main hearing, it is often appropriate that the court draws the parties' attention to the legal rule (see, for example, Fitger, *Civil Proceedings* p. 42:29 *et seq.* as well as NJA 1993 p. 13 and NJA 1996 p. 52).<sup>23</sup> A disapplication of this procedural rule which is not mentioned in the Act does not, however, in itself constitute a procedural error (see NJA 1989 p. 614 with the supplement by *Supreme Court Justice Lind*<sup>24</sup>)."

Pursuant to the Supreme Court Case referred to above, NJA 1989 p. 614, it appears that it may be the judge's duty to exercise the substantive management of the proceedings which the Swedish Supreme Court had in mind in its recommendation that the parties be heard with respect to new legal rules and not the principle of the right to be heard.<sup>25</sup>

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22 See Lindell, *Judicial Knowledge and the Right to be Heard*, 2007 for an account of the European Court of Human Rights' decisions in criminal cases which give the right to be heard principle a wide scope of application in relation to the court's possibility to adjudicate according to a different statutory provision than the one invoked. According to Lindell, there is no reason to believe that the scope of the principle would be less in civil cases than in criminal cases. Heuman, *Are weak and Ambiguous Descriptions of Criminal Acts Acceptable pursuant to the European Convention?*, *Juridisk tidskrift (Legal Magazine)* 2005–06 p. 545 states that the European Court of Human Rights has stated in several cases that the indictment should include information not only in relation to the *actus reus*, but also the legal basis in order for the proceedings to fulfil the requirement of a "fair hearing".

23 Bergholtz presents in his article "*The judge's Private Knowledge on Legal issues*" in Commemorative Volume to Per Henrik Lindblom, a review of, among other things, German, English and French law which may be said to contain a prohibition against the application of the law which comes as a surprise to the parties.

24 Lind states that "it may not be assumed to be an unconditional obligation for the court to point out to the parties that a different legal rule than the one which the parties have referred to may have significance in the proceedings. In relation to this issue, the court must have the freedom to act on the basis of the individual case and the individual nature of the situation (cf. Government Bill 1986/87:89 p. 105). This would also be relevant in relation to considerations of judicial economy. Accordingly, if the court first discovers in conjunction with the deliberation of the judgment that another legal rule than the one referred to by the parties has significance in the proceedings, the court must often have the right to apply the legal rule without exposing the matter to such convoluted and prolix submissions as either a new or a continued main hearing would entail. The new rule in Chapter 43, Section 14, second sentence of the Swedish Code of Judicial Procedure concerning supplementation of the evidence following the main hearing would probably, as a general rule, hardly be used by way of analogy in relation to the aforementioned situations (cf. Government Bill 1986/87:89 p. 225)." Lind further notes that the claimant in the case in question could not have any legitimate claim to further develop its legal reasoning which he himself had not advanced previously and there is no need for the defendant to be heard, since the court did not grant the claimant's claim as a result of the legal rule in question.

25 Lindell, *the Limits of Party Autonomy*, p. 38 *et seq.* See also Lind's supplement above where he contends that it may be warranted for the court as some form of extension of its substantive case management to draw the parties' attention to the issue. See also Ekelöf & Boman, *Civil Proceedings I*, 7th edition p. 64 and footnote 139.

In a few decisions, the Swedish Supreme Court now appears to have relaxed the cautious line as specified above and moved towards a direction where one disregards how the parties have formulated their legal arguments and has also not followed the previous recommendation to give these possibilities to provide their views on legal rules which the parties have not addressed during the proceedings. A clear example is the Swedish Supreme Court's judgment in NJA 2016 p.107. The claimant company which had acquired another company's claim against guarantors which had failed to comply with their undertaking to subscribe for shares pursuant to a new issue of shares demanded performance of the guarantee agreements with the right which the issuing company had against the guarantors. The company claimed that each and all of the guarantors should subscribe for the number of shares which related to the number which he or she had agreed to subscribe for and pay the corresponding subscription price. In addition, pursuant to the district court's judgment, the claimant had expressly declared that its action was not an action for damages. The Swedish Supreme Court stated that the claimant had formulated its submissions in such a manner that the guarantors would "subscribe" for shares and pay the corresponding "subscription price". The Supreme Court took the view that despite this, and despite what was stated at the district court that the claim did not relate to an action for damages, it was of interest to determine whether the failure to comply with an undertaking to subscribe could constitute a breach of contract giving rise to liability in damages. The Swedish Supreme Court found further that the guarantors were bound by the guarantee agreements in such a manner which was required in order for a breach of the subscription undertakings to give rise to liability in damages. The parties were not afforded the opportunity to be heard on the issue of damages. In a decision dated 19 September 2016 (Ö 1810-16), the Swedish Supreme Court dismissed an appeal from the unsuccessful party that a grave procedural error had occurred in the proceedings, among other things, due to the fact that the court had not given the parties the opportunity to supplement their arguments in respect of damages.<sup>26</sup>

There are more examples of the Swedish Supreme Court's expanded application of *jura novit curia* pursuant to the above. In NJA 2014 p. 960, the issue related to the interpretation of a provision in relation to the rectification of a defect in ABT94 (Sw. *Allmänna bestämmelser för totalentreprenader avseende byggnads-, anläggnings- och installationsarbeten*; Eng. "General Conditions of Turnkey Contracts for Building, Civil Engineering and Installation Works"). The Swedish Supreme Court conducted an analysis of the purport of non-mandatory law in relation to the salient situation. In connection with this analysis, the Swedish Supreme Court noted that in this case a breach

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26 "In a decision on 19 April 2017 (Ö 5886-16) the Supreme Court found that the Supreme Court ought to have provided the parties with the opportunity to be heard. However, the Supreme Court did not find that the application of procedural law was "manifestly inconsistent with a statutory provision" as required by Chapter 58 Sections 1(4) and 10 of the Swedish Code of Judicial Procedure and thus rejected the application for relief for a substantive defect in the previous decision."



of contract had been committed which gave rise to a right to damages and that a limitation of liability provision in the provisions in question was not applicable since the breach was intentional. These issues do not appear to have been addressed at all in the case. The issue of what qualifies as an intentional breach of contract under Swedish law is extremely controversial and a number of factual circumstances may be relevant in relation to this assessment.

Another example is provided by NJA 2014 p. 760. An insurance company had been subrogated to a customer's claim after it had indemnified the customer following the theft of the customer's packages by one of the carrier's employees. The issue was whether the insurance company was entitled to submit a tortious claim against the carrier which was engaged by the customer's forwarding agent. Both the district court and the court of appeal found that the established and accepted principles in NJA 2007 p. 758 regarding construction contracts should apply, which entailed that a limitation of liability in the agreement between the customer and the forwarding agent should apply. This entailed that a tortious claim could not be pursued against the party in the earlier part of the contractual chain. However, the Swedish Supreme Court took the view that the principles stated in NJA 2007 p. 758 were not applicable in this context as assumed by the lower instances. Instead, the Swedish Supreme Court found that the evidence adduced concerning the forwarding agent's engagement did not include anything other than to enter into a shipping agreement on behalf of the customer in its own name with the carrier. In light of the aforesaid, the engagement could be viewed as a special form of commission engagement. On the basis of commission agent law grounds, the customer could thereby be viewed as having entered into an agreement at an earlier stage of the contractual chain with the carrier. As a consequence hereof, the limitation of liability clause in the freight agreement between the carrier and the forwarding agent was applicable (which corresponded to the terms and conditions between the forwarding agent and the customer). If I have construed the matter correctly, the commission agent law rules were applied without the parties having been given the opportunity to be heard in respect thereof.

## **2.4**      *Summary*

As is evident from the above, there is uncertainty concerning how the principle of *jura novit curia* shall be applied by the courts. Notwithstanding that this is a vexed question in academic literature, it would appear however that earlier case law allowed for a certain degree of right of disposition for the parties in conjunction with the applicable law. If the parties in contentious proceedings amenable to out-of-court settlement litigate on the basis of a common precondition concerning the legal situation, the court may sometimes be entitled to comply therewith. The shift towards a greater right of disposition for the parties in relation to the law to be applied appears to be in line with in current developments in society. This will at least apply to commercial

parties.<sup>27</sup> Cases from foreign courts, the Court of Justice of the European Union and other sources further indicate a right for parties to know in advance which legal rules shall apply as the basis for a decision. The parties must thus be given the opportunity to argue their case also in respect of the applicable law. A court which is considering applying a legal rule which the parties have not referred to or advanced arguments in relation to should on the basis hereof give the parties the opportunity to be heard concerning the applicable law. A corresponding obligation may also exist as a result of the court's duty to exercise its substantive management of the proceedings. It would appear, however, according to the account above, that the Swedish Supreme Court in a few later decisions has changed the legal trend and has not followed the recommendation which it previously gave concerning the fact that the parties as a general rule should be given the opportunity to be heard on new legal rules which the Swedish Supreme Court intends to apply. The fact that the Swedish Supreme Court is completely unfettered by the parties' legal arguments may of course facilitate matters for the Swedish Supreme Court in its role as the highest instance court. There are however disadvantages which are significant. There may be objections which the losing party could have raised if he had been aware that other legal rules would be applied. The management of contentious proceedings will become more protracted and the costs excessive if a party must take into account all of the legal rules which the counterparty might invoke and, even, rules which a party expressly has declared are not invoked. Not allowing the parties the possibility to be heard regarding surprising applications of the law may also entail that a party is not given the opportunity to plead its case and that the main hearing does not satisfy the requirements of a fair trial.

### **3 Jura novit arbiter**

#### **3.1 Generally**

Party autonomy has played a significant role in relation to the formulation of the procedural rules contained in the Swedish Arbitration Act (the "SAA"). The background is of course that if the parties in a dispute are entitled to engage a person designated by one of the parties to resolve the dispute, then they should also be entitled to decide upon the procedural rules governing the resolution of that dispute. The parties' right to determine the proceedings is only limited by the fundamental legal requirements which the state has found necessary to impose with respect to an enforceable award.

In light hereof, Section 21, second sentence of the SAA prescribes that the arbitrators shall follow what the parties have determined, unless there is any

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<sup>27</sup> See Lindell, *Judicial Knowledge and the Right to be Heard*, p. 251 as well as Westberg, *From State to Private Administration of Justice, Commemorative Volume to Hans Ragnemalm*, p. 347 *et seq.*

impediment thereto.<sup>28</sup> An impediment is deemed to exist where the instructions are unlawful or impossible to perform. Taking into account the arbitrators' engagement to determine the dispute through a final award, an impediment would also exist where the instruction entails a significant risk that the award may be challenged or declared invalid. Insofar as the parties' right to determine the procedure is limited, it should be caused by important grounds relating to legal security.

The principle of *jura novit curia*, in the form which is applied in court proceedings, and which entails that the parties primarily lack any right of disposition in respect of the law to be applied, is not possible to reconcile with the principle of party autonomy contained in the SAA. To begin with, it is also clear that if the parties are in agreement then they can decide that the arbitrators shall adjudicate their dispute with the application of a certain legal rule to the exclusion of others.<sup>29</sup> Nor would it otherwise be considered to be any form of impediment for the arbitrators to follow the parties' instructions in relation to the applicable law. The parties' right of disposition in arbitration is thus also related to the applicable law in contrast to what applies in conjunction with court proceedings. The division of roles between the parties and the "judge" is thus different in arbitration in contrast to civil proceedings.

The essence of the right of disposition principle is that the parties as a result of their submissions and contentions may be deemed to have set the framework for the adjudication by the arbitrators. It may be noted that the SAA and the SCC Rules do not prescribe that the parties shall specify legal grounds.<sup>30</sup> Instead, it is simply stated that the parties, in conformity with provisions contained in the Swedish Code of Judicial Procedure, in addition to providing submissions, shall specify the "facts" which are invoked in support of the requests for relief.<sup>31</sup> However, the parties regularly state the legal grounds in

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28 The Arbitration Rules for the Arbitration Institute of the Stockholm Chamber of Commerce, (hereinafter the "SCC Rules"), Article 19(1) provides that subject to the Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate. The corresponding provision has been included in the new arbitration rules in effect 1 January 2017 (Article 23(1)).

29 See Government Bill 1998/99:35 p. 146 as well as the SCC Rules, Article 22(1), which states that the Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. It should be noted that the parties' rights of disposition is not limited by the fact that the agreement should relate to certain legal rules. The parties may – to begin with – agree that regulatory frameworks other than legal rules should be applicable, e.g. the UNIDROIT's contract rules, international conventions or suchlike. The parties can also agree that the dispute shall not be determined with the application of legal rules but rather in accordance fairness or *ex aequo et bono* or with the guidance of, e.g. commercial considerations (Section 1, paragraph 2 of the SAA).

30 Öhrström states in the Arbitration Institute of the Stockholm Chamber of Commerce, A Handbook and Statutory Commentary for Arbitral Proceedings, p. 190 that neither the counterparty nor the arbitrators can demand that a party develops its legal reasoning in support of its case.

31 Section 23, paragraph 1 of the SAA and Article 24 (1)(iii) of the SCC Rules. It can however be noticed that the revised arbitration rules of the SCC, as from 1 January 2017 in Article 29(I)(II) prescribe that the factual and legal basis claimant relies on shall be specified in the statement of claim.

support of their case as a matter of course.<sup>32</sup> In the event that either of the parties should exceptionally fail to do this then it may – or even should – be the case that the tribunal by virtue of its mandate should conduct the arbitral proceedings in a practical and speedy manner<sup>33</sup> and thus request that the party in question specifies the legal grounds.

The issue is whether the parties in a corresponding way in relation to submissions and invocation of facts should be deemed to have laid the foundations for the tribunal's adjudication through the legal grounds which have been invoked even when the parties have not expressly stated that the arbitrators' adjudication shall be restricted to these. Or is the starting point that the parties instructed the arbitrators to independently apply applicable law without being limited by the parties' submissions? It appears to be somewhat unclear how this division of roles shall be formulated. There does appear to be agreement however that in this context you have to distinguish between Swedish and international arbitral proceedings.<sup>34</sup>

Set forth below is an attempt to answer the question concerning whether the arbitrators shall apply the principle of *jura novit curia* and what the principle in such case should entail in detail in an arbitral proceeding.

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32 It can be difficult to distinguish between facts, which the parties must invoke, and legal rules which a court or arbitral tribunal should take into account without such having been pleaded. For example, gap-filling in relation to the interpretation of agreements through the application of legal rules is of a legal nature according to the Swedish Supreme Court in NJA 1999 p. 629. The aforementioned gap-filling exercise thus enables the court to rely upon legal rules to perform a gap-filling exercise which has not been contended or invoked by the parties. A contention that a party has entered into a disputed agreement is a dispositive fact. To interpret the agreement thus also constitutes a factual issue. The dispositive fact in conjunction with contract interpretation must be invoked by a party in order for a court or a tribunal to be able to take the fact into account. If, for example, another contract term in an agreement has significance as a dispositive fact, then this must be invoked by a party. It is insufficient that a party has invoked another contract term in the same agreement (NJA 1996 p. 52). Contract interpretation rules should thus as a general rule relate to other substantive rules. Since the dividing line between gap-filling and interpretation is unclear (see, for example, Joel Samuelsson, *Interpretation and Gap-filling*, Uppsala 2008, p. 549 *et seq.*) contract interpretation may, in a wider sense, consist of both factual issues and legal issues. The matter does not become less complicated from a procedural principle perspective regarding, e.g. where the burden of proof should be placed in relation to contract interpretation (see, for example, Heuman, *Burden of Proof and Evidential Requirements in Contentious Proceedings*, Stockholm 2008, p. 216 *et seq.*). A rule concerning burden of proof or a relaxation of an evidential requirement can sometimes relate to procedural rules and in other cases to the substantive law. Finally, in order to complete the complex picture, a tribunal pursuant to Section 1, paragraph 2 of the SAA can be given the mandate to "supplement" an agreement which pertains to something outside the scope of customary contract interpretation (including gap-filling).

33 Section 21 of the SAA and Article 19 of the SCC Rules. In the new rules it is stated (Art 23(2)) that the tribunal shall conduct the proceeding in an "efficient and expeditious" manner.

34 Öhrström, *ibid.* p. 190 as well as the references stated therein.

### 3.2 *The Tribunal's Use of the Law in Contexts Other than the Determination of the Substantive Legal Issue*

The principle of *jura novit curia* is normally placed in relation to the determination of the substantive legal issue in a dispute. By way of introduction, the self-evident fact that the arbitrators apply legal rules in a number of different contexts deserves to be highlighted. For instance, this may occur in connection with the arbitrators adopting a position in respect of a contention that the arbitration agreement is invalid, that the arbitration clause is not applicable to the issue referred to arbitration, that impediments exist as a result of *lis pendens* or *res judicata*, that an arbitrator has a conflict of interest, etc.

All arbitrators have the ambition to render awards and decisions which can withstand judicial scrutiny. The tribunal's mandate may also be deemed to include rendering awards or decisions which cannot be successfully challenged or set aside.<sup>35</sup> In those cases where the arbitrators' application of the law may be subject to judicial scrutiny in connection with challenge/other civil proceedings, they have every reason to exhaustively investigate the legal issues.<sup>36</sup>

This also applies in cases where any law other than Swedish law is applicable. Foreign law may, for example, be applicable to issues as to whether there exists a binding arbitration agreement<sup>37</sup> or whether the signatory to an agreement possessed the authority to represent the party in question. In the event a tribunal has concluded the arbitral proceedings without having tried the issues referred to it by virtue of the fact that the arbitration agreement is invalid, then a court may, upon request by a party, find that the arbitration agreement is valid. This can of course occur against the background of other investigation concerning the legal issues other than those which were available to the tribunal.

Similarly, the arbitrators use procedural rules and principles in relation to the arbitral proceedings without these being included in, or invoked by, the parties to the proceedings in any particular manner. As regards this application of the law, as stated above the arbitrators may have an independent responsibility to ensure that the legal issues are investigated in a thorough

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35 See, for example, the general clause in article 47 of the SCC Rules which states that the Arbitral Tribunal shall make every effort to ensure that all awards are legally enforceable. The general clause has been included in Article 2(2) in the new rules taking effect on 1 January 2017.

36 One cannot exclude the fact that the tribunal may have an interest in ensuring that the award is not set aside, since this can entail that their compensation may be put in jeopardy. It should also be mentioned that the aforementioned recommendations from the ILA regarding the procurement of knowledge by the arbitrators concerning the content of the applicable law do not make the same distinction.

37 See Section 48 of the SAA which states that the parties may enter into an agreement concerning the governing law in relation to the arbitration agreement. A provision to this effect has been included in the new Article 27(1) in the new rules taking effect on 1 January 2017.

manner so that the award cannot be set aside following a challenge or invalidity action as a result of the procedural error. By way of example, it may relate to a party being permitted to amend its claim at a late stage of the proceedings, whether a party has called a witness for investigative reasons and as to whether that person should be obliged to give a testimony under oath at court or whether a scheduled main hearing should be postponed upon request by one of the parties.

The application of law in connection with the determination of a factual issue does not only relate to the application of substantive legal rules with respect to invoked dispositive facts. The application of legal rules to dispositive facts which are intended to result in a legal remedy must be kept separate from legal rules which relate to the issue concerning whether a dispositive fact can be viewed as proven. The last mentioned rules which relate to the grey area between procedural and substantive rules may for example relate to questions concerning evidential requirements, burden of proof or valuation of evidence.<sup>38</sup> Normally, it is considered that a tribunal can apply the last mentioned type of legal rules without this, formally at least, being argued or pleaded by the parties in the arbitral proceedings.<sup>39</sup>

The legal rules which have been described above and which thus shall not apply to the invocation of substantive dispositive facts but rather which regulate the proceedings are often deemed as accepted by the parties as a case management procedure for the arbitrators without being limited to the parties' legal arguments. However, the arbitrators are not entitled to deviate from the right to be heard principle in conjunction with the application of procedural rules. As will be developed below, there is reason to not surprise the parties in conjunction with the application of procedural rules.

Hereinafter, the arbitrators' application of the principle of *jura novit arbiter* will only be addressed in connection with the arbitrators application of substantive legal rules to dispositive facts. As stated previously, this application of the law is not normally subject to judicial scrutiny. The arbitrators' obligation to ensure that the award cannot be challenged or declared invalid thus does not affect this legal application. If, in such contexts, a tribunal is obliged to apply the principle of *jura novit curia*, then such must occur due to other circumstances.

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38 See, for example, Welamson, *Civil Proceedings VI*, 3rd edition, Stockholm 1994 p. 120.

39 These types of rules can also exist in substantive law in the form of presumption rules or rules concerning relaxation of evidence. It can also be the case that the parties by referring to the arbitration rules have thereby regulated these issues, see, for example, Uncitral Arbitration Rules Article 27(1) in the wording following the 2010 revision and which states that each of the parties has the burden of proof for the facts which are invoked in support of the party's case. It appears to be quite evident that the issue concerning whether a rule in a certain context is of a substantive or procedural nature may lead to difficulties. This applies not least in relation to situations where different legal systems are applicable to the procedural and the substantive issues.

### 3.3 *Jura novit curia* in Preparatory Works, Case Law, etc.

In the preparatory works to the SAA<sup>40</sup> it is stated that the arbitrators *in dubio* are assumed to follow the same principles as the courts. However, it is stated that if the dispute is related to foreign parties, then it should be considered that they may come from legal systems which do not celebrate the principle in the same manner as in Sweden.<sup>41</sup> Cases from courts of appeal in challenge cases have also taken into account that the principle is applied in conjunction with arbitration.<sup>42</sup> Both Lindskog and Heuman<sup>43</sup> take the view that there is an *obligation* and not only a right for the arbitrators to apply relevant legal rules to which the parties have not referred. Heuman takes the view that this is evident from the fact that the preparatory works state that the arbitrators are assumed to follow “the same principles as before the courts.” Heuman also states that an arbitrator who intentionally fails to apply a non-invoked legal rule may be

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40 Government Bill 1998/99:35 p. 145 and 146. The following is stated: “A related issues is whether the arbitrators in order to be deemed to have remained within the scope of their mandate are restricted to the parties’ legal arguments. In Swedish procedural law the principle of “*jura novit curia*” is deemed to apply, i.e. that court shall independently find which legal rules are applicable to the dispositive facts invoked by the parties. It appears to be given that the arbitrators, for example, in conjunction with the interpretation of a statutory provision can freely seek to find guidance in the preparatory works, doctrinal works and case law. Moreover, it may be deemed to be assumed *in dubio* that the arbitrators, in any event in domestic disputes, have followed the same principle as the courts. This thus entails that an award cannot be successfully challenged (p. 146), for example, due to the fact that the arbitrators have applied a certain legal rule in relation to the facts invoked by the parties as the basis of their claim, despite the fact that the parties have not referred to the legal rule in question. (It is irrelevant for present purposes to challenge an award on the ground that the arbitrators have failed to apply a certain, non-invoked legal rule.) On the other hand, it is clear that in arbitral proceedings the parties are entitled to limit the legal adjudication to apply the application of a certain statute to facts in the dispute or to otherwise have a right of disposition in respect of the law to be applied. This may be thought to also occur impliedly. In the event the dispute relates to foreign parties, it should be taken into account that these may be from legal systems where the doctrine of *jura novit curia* is not celebrated in the same way as in our country; this must be taken into account when one fixes the terms of the arbitrators’ mandate.”

41 It may be assumed that these considerations relate to arbitral proceedings where Swedish law is applicable to the substantive legal issue. This is due to the fact that the principle does not entail that the courts have knowledge of foreign law.

42 See, for example, Svea Court of Appeal’s judgments in challenge cases dated 18 May 2000 in T 8090/99 and 27 August 2004 in T 7866-02. Moreover, Svea Court of Appeal in challenge case T 745-06 dated 28 November 2008 related to foreign parties and foreign arbitrators but with Swedish substantive law, found that no excess of mandate or error subject to challenge had been committed. The arbitrator had awarded a party indirect damages, something which the party had not requested. The Court of Appeal took the view that since the arbitrator only made a legal qualification of invoked facts by virtue of a legal source which was invoked, the principle of *jura novit curia* had not been applied erroneously. The Court of Appeal did not undertake any specific considerations in relation to the fact that the parties and the arbitrator were foreign.

43 Lindskog, *Arbitration - A Commentary*, 2012 p. 714 and Heuman, *The Law of Arbitration*, p. 340 and 342.

deemed to have committed a procedural error.<sup>44</sup> In my opinion, it should in any event not relate to a challengeable procedural error. The failure to apply a commensurate legal rule normally does not constitute a procedural error according to Swedish procedural law, but rather a substantive error.<sup>45</sup> Normally only procedural errors and not substantive errors may give rise to an award being set aside following a challenge. In this context, it should be noted that in the aforementioned statements in the preparatory works it has been categorically rejected that it constitutes a ground for challenge<sup>46</sup> that the arbitrators have failed to apply a relevant legal rule to which the parties have not referred.<sup>47</sup> An opposite rule would further entail that the court in a challenge proceeding would be required to substantively try to what extent the non-applied rule entails another outcome.<sup>48</sup> Thus far the courts have been unwilling to do this.<sup>49</sup> It may thus be assumed that it does not constitute a

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44 See Heuman, *ibid.* p. 342. This Swedish term would correspond to “manifest disregard of law” in US law. “Manifest disregard” has been discussed to exist where the arbitrator knows of the existence and application of an applicable legal rule (“controlling legal rule”) with the intention to fail to apply it. “Manifest disregard” would constitute a ground for challenge under the Federal Arbitration Act and the grounds specified therein. See, for example, Christopher R. Drahozal, in *Stockholm International Arbitration Review*, 2009:1, p. 1 *et seq.* The article contains a discussion concerning the Supreme Court’s decision in *Hall Street Associates, L.L.C v. Mattel, Inc.* (128 S.Ct.1396 (2008)) which entails a declaration of death of the term. The term has no corresponding provisions in Uncitral’s Model Law or in the New York Convention.

45 Welamson, *Civil Proceedings VI*, p. 120 and p. 230 *et seq.* It may be mentioned that the issue concerning whether a procedural error has been committed seems to be made following an objective assessment and thus what caused the court to perform the deviation is irrelevant.

46 Where the application of law which constitutes the basis for a court’s judgment is manifestly inconsistent with a statutory provision then the court’s judgment may under certain circumstances be subject to appeal pursuant to Chapter 58, Section 1, paragraph 1, item 4 of the Swedish Code of Judicial Procedure. As regards which requirements should be imposed for the deviation in respect of the statute to be applicable, see Welamson, *ibid.*, p. 232–234. A judicial review procedure is not, however, applicable to arbitration. No corresponding procedure is available in the SAA, even though this was proposed by the Arbitration Revision Committee in SOU 1994:81 (however, the proposal did not relate to erroneous application of the law to be applied).

47 It might possibly constitute a ground for challenge that the arbitrators have *completely* ignored the applicable law or the parties’ choice of law in which case the arbitrators may have exceeded their mandate pursuant to Section 34, paragraph 1, item 2 of the SAA.

48 The situation whereby a tribunal fails to apply a legal rule which the tribunal considers to be applicable is perhaps not very common. The situation which is more prevalent is that one or several arbitrators are aware of a legal rule which could possibly have significance but the application of which the tribunal fails to try since none of the parties contends that it is applicable.

49 See, for example, Svea Court of Appeal’s judgment dated 11 May 2004 in case T 11006-02 where the Court of Appeal found that an award could not be partially set aside since the request for relief thereon entailed that the court would be required to perform a substantive review of the disputed issues.



challengeable error that a tribunal refrains from applying other legal rules than those which the parties have based their arguments on.<sup>50</sup>

### 3.4 A few Starting Points

An important precondition for legal security in arbitral proceedings is as stated above that the actors are in agreement upon the rules of the game. If there is any particular reason for the arbitrators to consider that the parties have assumed that the arbitral tribunal shall apply other legal rules than those which the parties have referred to during the proceedings, the tribunal should of course take these into account. The parties may of course in conjunction with Swedish arbitrations assume that the principle will be applied as a result of the statements in the preparatory works, etc. It may also be stated that the parties have the possibility to formally agree that only certain rules in the arbitration may constitute the basis for the determination. The absence of such an agreement would perhaps mitigate in favour of the fact that the parties have not chosen to bind themselves in this manner.<sup>51</sup>

It may, however, be assumed that the parties only in exceptional cases assume that the tribunal will base its determination on something other than the legal rules to which the arguments relate. Otherwise it would have been natural for the parties to refer to such rules. It may further be stated that a party normally may be deemed to have opposed the tribunal rendering an award to the counterparty's benefit by virtue of a legal rule which has not been invoked. Does this mean that the parties in the normal case may be deemed to be in agreement that the determination on the merits should be based only on the legal rules which have been discussed?

The starting point in an arbitration between commercial parties may be deemed to be that the parties are represented by experts and are regarded as equal. The parties normally assume the primary responsibility for the legal investigation by advancing the legal arguments which, according to the parties, are sufficient for the tribunal's determination of the legal issues. If the parties have failed to refer to a decisive legal rule then this has probably been due to an omission and not by the parties assuming that the arbitrators offer a legal security net. Against the background of the requirement of impartiality, the tribunal will normally refrain from helping a party which does not formally plead its legal case in an adequate manner. Unless otherwise separately agreed,

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50 Even if it does not constitute a *challengeable* procedural error that the arbitrators have failed to apply anything other than the specified rules, there could be an obligation according to the statements in the preparatory works to do this. However, it should be taken into account, as was also indicated in the statements in the preparatory works above ("...so far follows..."), that the formulation of the principle may change. If decisive reasons currently militate in favour of another application than that which was intended, the statement in the preparatory works should not provide any impediment thereto.

51 In another context, it may be stated that the parties to an arbitration have a far-reaching positive duty to raise an explicit objection in order to avoid being bound by their procedural conduct, *see* Section 34, paragraph 2, 1st sentence of the SAA as well as Section 31 of the SCC Rules (Article 36 in the new rules taking effect on 1 January 2017).

it may normally be deemed to lie outside the scope of the tribunal's mandate to perform a separate and cost intensive legal investigation in order to determine whether or not other legal rules than those invoked by the parties may apply to the dispute. If the parties have clearly and consistently litigated on the basis of a general view concerning which legal rules shall apply in order to determine a dispute, the tribunal often views the parties' legal grounds in more or less the same way as the parties' submissions and requests for relief and dispositive facts, i.e. as a framework for the tribunal's adjudication of the dispute.<sup>52</sup> In the event that the arbitrators during the proceedings do not independently bring to the fore alternative legal grounds, the parties should normally assume that the determination will be based on what they have submitted.

In light of the aforementioned, it may be assumed that situations often arise where a party subsequently contends that he did not have any reason to assume that the arbitrators would determine the case on the basis of other legal rules than those which were relevant in the proceedings.<sup>53</sup>

As stated in the preparatory works, the parties can often enter into an implied agreement concerning the applicable law. It may be assumed to be the arbitrators who are primarily required to determine whether the parties may be deemed to have agreed that the case should be decided by virtue of the legal rules which are pleaded in the case. If the tribunal has construed the parties in such a way, then this will probably be determinative subsequently.<sup>54</sup> In the event the arbitrators are deemed to have failed to follow such an agreement, this may constitute an excess of mandate pursuant to Section 34, paragraph 2 of the SAA which will result in the award being set aside following a challenge.

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52 It may be stated that Öhrström, by reference to Lindskog, takes the view that the parties' instructions to the arbitrators should be express and unambiguous for the arbitrators to be obliged to follow them, *see* Öhrström *ibid.* p. 173 and references therein to Lindskog.

53 It may be considered to constitute a challengeable error that the parties have not been permitted to be heard in respect of a surprising application of the law. The Supreme Courts in Switzerland and Finland have adopted a position in relation to this issue with different outcomes. The principle that the parties are given the opportunity to be heard in respect of the tribunal's application of the law has been approved by the Swiss Tribunal Fédéral i *Urquijo Goitia v. Da Silva Muñiz* (No. 4A 400/2008, Ire Cour de droit civil, 9 February 2009). In the judgment, the court approved earlier case law which provides that a tribunal may not surprise the parties by applying legal rules or legal principles that none of the parties have referred to and which the parties cannot reasonably have anticipated would apply. The failure to allow the parties to be heard includes a restriction of the parties' rights to plead their case. The case has been described and commented upon by Christoph Brunner in *News LCIA*, Vol. 14, Issue 1, November 2009, p. 38–39. The Supreme Court in Finland has, however, in a judgment dated 2 July 2008 in case No. 1517 dismissed a challenge action based on the fact that the tribunal based its decision on a legal rule which had not been referred to by the parties during the proceedings. The decision has been commented upon by Petra Kiurunen and Sophie Nappert in *Stockholm International Arbitration Review* 2008:3, p. 259 *et seq.* *See also* Knuts, *Jura Novit Curia* and the Right to Be Heard, *Arbitration International* Vol. 28, Issue 4 2012, p. 669 *et seq.*

54 Cf. NJA 1974 p. 740.

### 3.5 *How Should a Tribunal Deal with jura novit curia?*

As regards *international arbitration* in Sweden, there is since 2008 a certain degree of support as to how the arbitrators should act. As stated above, the International Law Association adopted new rules concerning ascertaining the content of the applicable law in international commercial arbitration in 2008.<sup>55</sup> A common approach has occurred in relation to the view in "civil law" countries which, as in Sweden, apply the principle of *jura novit curia* and the view held in "common law" countries which traditionally do not have quite such a steadfast view in relation to the principle.<sup>56</sup> In the "final report" which contains the recommendations it is stated that as regards the substantive application of the law, an international tribunal does not have a home country's law, *lex fori*, and the contents of which it can be expected to know. Nor has a tribunal a function in society which corresponds to a court's, rather the tribunal's responsibility is primarily directed solely to the parties. For these reasons, the principles which steer a court's application of the law are not applicable to a tribunal.

Against this background, the recommendations include that arbitrators following submissions by the parties shall determine how the tribunal shall acquire knowledge of the applicable law.

The recommendations result ultimately in the conclusion that the arbitrators should primarily procure knowledge concerning the applicable law from the parties. In addition, the arbitrators shall not draw attention to the legal issues of significance for the outcome which the parties have not provided submissions on (unless the rules are of a public policy nature). The arbitrators are entitled to call into question the parties' submissions and their evidence and of the legal issues submitted by the parties. In this context, they are entitled to take into account their own knowledge and other legal sources submitted by the parties.

If the arbitrators intend to make use of legal sources which have not been invoked by the parties, then the parties' submissions in relation hereto should be obtained in any event where these go meaningfully beyond the parties' submissions and might significantly affect the outcome. However, the arbitrators may rely upon such additional sources without obtaining the parties' comments concerning the sources, but only to confirm or substantiate other sources which the parties have already referred to.

In the recommendations, the arbitrators are given the possibility to recommence the proceedings if they find during their deliberations that further information concerning applicable law of significance for the outcome needs to

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55 International Law Association Rio De Janeiro Conference (2008) International Commercial Arbitration, Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration available at the company's website "[www.ila-hq.org/](http://www.ila-hq.org/)".

56 It is evident from the report in Comparative Law of International Arbitration, 2007, Poudret and Besson that in "civil law" countries, such as France, Belgium, Switzerland and Germany, the principle of *jura novit curia* is applied in relation to the law of arbitration in a manner which is similar to the courts, although primarily subject to the limitations of the application of a legal rule which has not been discussed and is surprising should not take place (p. 741).

be procured. In this context, the significance of the information which needs to be procured as well as time and costs aspects should be taken into account.

The issue is then whether this restrictive approach in relation to the arbitrators' free application of the law should become applicable to international arbitration in Sweden.<sup>57</sup>

To begin with, it can be noted that in the "Final Report" which was presented in connection with the adoption of the recommendations it is stated that there is no uniform precedent in this context in conjunction with international arbitration. To what extent the recommendations will affect case law in conjunction with international arbitration are difficult to determine at this time even if the recommendations may be deemed to have significance. Against this background, there is no international case law which could be used as the basis for how Swedish law should be formulated in this context.<sup>58</sup>

As has been stated above, the arbitrators normally have the mandate to conduct the proceedings in the manner which they consider appropriate as long as the arbitrators take into account the parties' agreements and applicable rules.<sup>59</sup> Normally, there should not be any impediment for a tribunal to follow the recommendations in connection with international arbitration in Sweden.<sup>60</sup>

The recommendations entail that the arbitrators in a normal case will determine the dispute with the application of the legal rules which the parties have based their case on and that the parties' legal submissions shall primarily constitute the basis for the assessment of the invoked legal grounds. The recommendations thus entail that the arbitrators' application of *jura novit curia* as it is applied in conjunction with civil proceedings in Sweden is significantly limited.

The issue is whether the grounds on which the principle of *jura novit curia* are based are so sound that the traditional Swedish view concerning the

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57 One difficulty which is disregarded in this context is what is referred to as international arbitration and that such is not defined in the SAA, cf. Section 48.

58 In case NJA 2000 p. 538 (the "*Bulbank case*") the Swedish Supreme Court posed the question whether there existed "any uniform standpoint in other countries which could contribute to illuminating the content under Swedish law."

59 Article 22 (1) of the SCC Rules provides that the arbitrators, where an agreement has not been entered into between the parties, may "apply the law or the rules of law which the arbitrators consider most appropriate". It may be assumed that the rule is primarily aimed at the parties' choice of law and is not intended to authorize the arbitrators to apply legal rules which the parties have not referred to or provided submissions in respect of. (See the corresponding provision in Article 27(1) in the new rules taking effect on 1 January 2017.) It may also be stated that Article 19 (1) of the SCC Rules provides that the tribunal is entitled to conduct the arbitration in "such manner as it considers appropriate". One cannot exclude the fact that these provisions may be invoked in conjunction with a challenge proceeding which applies where the arbitrators have committed a challengeable procedural error in this context. No decisive significance between the institutional procedure and a procedure according to the SAA appears to exist in this context and thus there is no distinction between these categories in the reasoning above. (See the corresponding provision in Article 23(1) in the new rules taking effect on 1 January 2017.)

60 Of course it will often be a desirable alternative that the arbitrators and the parties expressly agree that these principles shall apply.

principle's applications should be decisive. The grounds which are usually specified in this context and which have been referred to above, usually relate to the legal security aspect and that such is one which has the most weight in conjunction with arbitration.<sup>61</sup> Other reasons such as supporting the legislator's normative function, formulation of precedent or uniformity in the application of the law should normally not be something which the parties are prepared to pay for and for the arbitrators to take into account. As regards the legal security aspect, it may be stated that arbitration is a "one instance proceeding" and that rectification of an "erroneous" application of the law is not something which can be subject to appeal.<sup>62</sup> One can pose the question why a party should lose a right purely due to the fact that he has failed to take into account a special legal rule that he should have acted in respect of. Or, put in another way, why should the factual issue be determined in another legal way as a consequence of the fact that this is determined by a tribunal instead of a judge?

To begin with, it should be taken into account that the principle, if it is to be applied in conjunction with arbitration, must as specified above be modified in a satisfactory manner in relation to what applies before the courts. This is due to the fact that the parties do not only have an unrestricted right of disposition in respect of which facts constitute the basis for the determination but also over the law to be applied. This difference entails *per se* that the principle cannot offer the same protection for the erroneous application of the law as it does before the courts.

Nor can one disregard the fact that a party may forfeit its rights as a consequence of several other factors which might appear to be equally disruptive, e.g. by failing to invoke a special dispositive fact, failing to invoke certain evidence, by formulating its request for relief in an erroneous manner, etc.<sup>63</sup>

In light of the aforesaid, one may view the fact that the grounds relating to legal security which may be advanced are not particularly weighty. It appears to be more important that uniform and foreseeable international arbitration case law can be developed and which also is construed as legally certain by actors from various different legal cultures. The ILA's recommendations may be deemed to fulfil such a task.

It is also unclear whether and under what circumstances the arbitrators commit a challengeable error by determining the dispute on the basis of legal rules which the parties have not referred to. It would normally be viewed as acceptable, or in any event not challengeable, also in an international

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61 Other reasons appear to be connected to a court's and the law's function in society, something which should not affect the formulation of arbitration.

62 Taking into account that the reform – a more modern trial – renders permission to appeal necessary in order to achieve an adjudication in a higher instance, the distinction may be said to have diminished between procedures at the courts and before arbitral tribunals.

63 It may be stated that Swedish procedural law, more strictly than, e.g. English law which also maintains the accusatory principle, applies the principle that the court may not go beyond the scope of the requests for relief and facts invoked whereas Swedish procedural law in relation to the law to be applied accords more closely with the continental rather than the English tradition.

arbitration in Sweden that a tribunal by virtue of its mandate to conduct the substantive management of the proceedings asks the parties for their standpoint to the application of a certain legal rule, which is relevant to apply but which has not been referred to.<sup>64</sup>

One may assume that any challengeable errors in connection with the application of the principle must relate to the fact that a tribunal determines the matter by virtue of a legal rule on which the parties have not provided any submissions. In a similar manner to what was deemed to apply in the aforementioned Supreme Court decision in NJA 1999 p. 629 et seq., there should be a main rule that the parties to an arbitration should be given the opportunity to be heard concerning the legal rules which are determinative for the outcome of the case and that a breach of this main rule may entail a procedural error.<sup>65</sup> The international legal developments referred to above also appear to be moving in this direction.

For the aforementioned reasons, there should be no question of applying legal rules which the parties have not had any grounds to construe would be used for the determination of the case. The legal developments which have occurred above through the Supreme Court's judgments in NJA 2014 p. 760, NJA 2014 p. 960 and NJA 2016 cannot be deemed to be applicable to the conduct of arbitral proceedings.

Against this background and since there is reason to believe that arbitrators in the future in conjunction with international arbitration will seek support for their actions in the recommendations and the final report which was prepared, there are grounds to believe that the *jura novit curia* principle will be limited in the future in a manner which is set forth in the recommendations. This means, among other things, that the arbitrators must be proactive in relation to the law to be applied and not delay in their deliberations of the legal aspects relating to the dispute until after the case management phase of the proceedings has been concluded.

The final issue concerns the application of *jura novit curia* in *Swedish arbitration*, i.e. arbitration without an international element.

The issue, as has been formulated above, is whether the parties by specifying legal grounds for their case, in a similar manner as regarding the requests for relief and invoked circumstances may be deemed to have excluded the possibility for the arbitrators to consider and apply other rules as the basis

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64 Perhaps it would not be acceptable if the parties through the agreement had already specified what legal rules should be applied to the factual issue.

65 In the event the parties may be deemed to have agreed to limit the mandate of the arbitrators to adopting a position to the legal rules which have been submitted, then there is a breach of mandate pursuant to Section 34, paragraph 1, item 2. In the event it should be considered to be a breach of the right to be heard principle, then it would appear that there exists a procedural error pursuant to item 6 in the aforementioned provision, cf. NJA 2009 p. 128. In the last-mentioned situation, the error must have affected the outcome. If the losing party can show that it was likely that a fact in rebuttal of relevance for the new legal rule could have been submitted, it appears that the causative requirement would be fulfilled.

for the determination of the outcome than those which have been invoked in the proceedings.

A difference in relation to international arbitration in this context is that the parties in light of the legislative statements made in the preparatory works and case law may have an expectation that the arbitrators in these contexts should be less limited in relation to the application of the law and give more consideration to Swedish legal traditions. In light of the tradition, the parties normally assume that the arbitrators will independently seek to find guidance in recognized legal sources as to how the invoked legal rules or legal principles should be applied.<sup>66</sup>

For the reasons stated above, the parties probably however normally assume that the outcome of the dispute is determined on the basis of the legal grounds which are advanced by the parties and in the event a relevant legal ground has not been specified, then this is due to a mistake or due to the fact that the parties have intentionally refrained from invoking it.

In a similar manner as specified above in relation to the recommendations issued by the ILA, it may be desirable for the arbitrators in a Swedish arbitration to ask the parties how the arbitrators shall conduct themselves regarding the law to be applied. If this does not occur, the question may be raised whether the arbitrators often have to assume that the mandate includes determining the dispute primarily on the legal grounds which the parties have stated or which have otherwise been discussed in the arbitration. This should apply in particular where the parties in the relevant context have pleaded their case in a clear and consistent manner. In such case, the tribunal has no reason to investigate whether other legal grounds may have significance for the outcome. The tribunal's independent application of other legal grounds or initiatives in relation to such application would then be restricted to certain deviating situations, e.g. where there are particular grounds to believe that the parties assumed that the arbitrators would apply the principle as it is used before the courts. Perhaps the arbitrators should also act if they consider that either of the parties is suffering unfair prejudice by virtue of the fact that a legal rule which the arbitrators are aware of but which has not been addressed will not be applied unless they intervene.

In the event the arbitrators consider that the non-addressed legal rules may be of significance for the outcome of the case and that they should take the initiative in respect of the application of the rules, then it would as stated above be necessary that the parties are given the opportunity to be heard before the case is decided.

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<sup>66</sup> See the statement in the preparatory works referred to above in Government Bill 1998/99:35 p. 145 and 146.

## 4 Conclusion

The arbitrators apply the legal rules in various different contexts without being limited by the parties' submissions from a legal perspective. This is necessary in order for arbitration to act as an effective instrument of dispute resolution. The issue is whether the limitation should be imposed in relation to how the principle is applied before the courts and how these limitations in such event should be formulated. The assessment which is made in this article is that limitations should exist in relation to the tribunal's determination of the substantive legal issue. This is in light of the fact that the division of roles between parties and tribunals significantly deviates from the equivalent division of roles in conjunction with court proceedings. In arbitration, the parties are in fact also given a right of disposition in respect of the law to be applied. This right is absent for the parties to a significant extent in conjunction with court proceedings. Normally, the parties may be deemed to prepare a framework for the tribunal's application of the law through the legal grounds which are specified in their case. This should entail that the principle of *jura novit curia* should be applied restrictively, primarily in conjunction with international arbitration. As regards international arbitration, the application of the law may occur in accordance with the recommendations adopted by the ILA. In addition, in Swedish arbitrations, the starting point should normally be that the tribunal may decide the case on the basis of the parties' legal grounds where the parties have pleaded their case in a clear and consistent manner. In the event the tribunal considers that it might base the outcome of the award on other legal grounds than those which have been specified in the proceedings, the tribunal should allow the parties to be heard in respect of these legal rules. In any event, the arbitrators should not impose any surprising application of the law as the basis for the outcome.