Jura novit curia and due process with particular regard to arbitration in Sweden

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Jura novit curia is here taken to have three meanings. First, it means that the parties do not have to prove the content of the applicable law. Second, it means that a court is generally not confined to the legal qualifications and arguments that the parties have made in the proceedings as applied to the pleaded facts. Third, it means that a court can construe the reliefs sought as long as the judgment does not give more (*ultra partita*) or something else (*extra partita*) than sought by the claimant.

It is submitted below that *jura novit curia* in its first meaning should not apply in international arbitrations seated in Sweden, unless the parties *and* the arbitrators agree otherwise. This does not mean that the content of the applicable law is to be treated as a factual circumstance among others and be subject to proof. The better rule is that the ascertainment of the applicable law should be a joint responsibility shared between the arbitral tribunal and the parties. This means that the tribunal does not exceed its mandate if it bases the award on a perceived applicable rule of law even if it has not been referenced by any of the parties. This will be discussed under section 1.

It will further be submitted that *jura novit curia* in its second and third meanings applies in international arbitrations seated in Sweden, again unless the parties *and* the arbitrators agree otherwise. This means that the mandate will, absent an agreement to the contrary, be limited as if Chapter 17 Section 3 sentence 2 and sentence 1 of the Swedish Code of Judicial Procedure ("SCJP") were directly applicable. This will be discussed under section 2.

The above proposition leads to a very wide mandate for the arbitral tribunal. The arbitral tribunal does not have to stretch its mandate to its outer limits. Rather, it must be within the discretion of the tribunal whether to

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apply a rule of law not referenced by the parties, whether to make a re-qualification of the pleaded facts that the parties have not considered and to construe the reliefs sought within the outer boundaries set by the prohibition against awards *ultra* or *extra partita*. If the tribunal chooses to use its wide mandate, its decision-making process must not violate the adversarial nature of the proceedings. This means that the tribunal must *normally* give the parties a reasonable opportunity to be heard. In case it fails to do so, the award may be set aside due to a procedural error. This, will be discussed under section III.

1. The Ascertainment of the Applicable Law

As regards Swedish procedural law, the *jura novit curia* principle in its first meaning has its footing in SCJP Chapter 35 Section 2. The principle of *jura novit curia* will apply in domestic arbitration when Swedish law is *lex causae*.[1] Thus, the arbitral tribunal will ascertain the law applicable to the merits[2] unless the parties have instructed otherwise[3].

When foreign law applies as *lex causae*, Swedish courts *may* require that the content of the applicable law is ascertained by the parties.[4] In NJA 2016 p. 288 the Swedish Supreme Court pronounced the following (my translation):

1 Lindskog, S., Skiljeförfarande. En kommentar, p. 639 and 712 *et seq* (2nd ed. 2011). See also *e.g.* Svea Court of Appeal case No. T-6198-12 (2013-04-29), Court of Appeal for Western Sweden case No. T-4028-13 (2015-02-27) and Svea Court of Appeal Case No. T-2610-13 (2014-12-04).

2 Lindskog, S., *supra* note 1, p. 717 and 873 *et seq*.

3 This qualification entails that the arbitrators shall respect the parties' agreement that *jura novit curia* shall not apply. Further it entails that the arbitrators shall respect the parties' agreement that a particular legal provision shall apply or not apply. It is debatable to what extent such agreements are respected by courts. NJA 1983 p. 3 and NJA 1994 p. 256 can be cited in support of the position that such agreements are in principle to be respected. See Lindell, B. Civilprocessen, p. 53 (3rd ed. 2012). See however Westberg, P., Domstols officialprövning, p. 327 and p. 507 *et seq*. (1988) and Maunsbach, L., Avtal om rätten till domstolsprövning, p. 260 *et seq. and* p. 390 *et seq.* (2015). There should be little room for this debate in an arbitration context due to the paramount importance of the party autonomy – subject to public policy limits. See generally, Born, G., International commercial arbitration, p. 2670–2776 (2nd ed. 2014). *Cf.* prop. 1998/99:35 p. 146 and SOU 1994:81 p. 177 on tacit agreement as to the application of rules of law.

4 Regarding instructions for contract interpretation, see at note 45 below.

See Jänterä-Jareborg, M., Svensk domstol och utländsk rätt (1997) and Bogdan, M., Svensk internationell privat- och processrätt, p. 45 *et seq*. (8th ed. 2014).

> 17. When a Swedish court is required to apply foreign law, the court shall in principle interpret and apply the rules in the same way as a court in the other country would have done. When doing so, the Swedish court should strive to use the legal sources and interpretation methods of the other country.
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> 18. To the contrary from what has to be observed in other situations regarding application of law, the court has no obligation to know the contents of foreign law. The court can use whatever knowledge it may have, in which case the parties should be given the opportunity to be heard about the contents of the applicable law … When the contents of the applicable law is not known to the court, the parties may be required to prove the contents of it (Chapter 35 Section 2 paragraph 2 of the Procedural Code). The contents of foreign law is however not a matter of proof in the ordinary sense. It does not regard something that has to be proven but rather it regards rules of law that are to be applied.

It can be expected that most Swedish arbitrators who have to apply another law than Swedish law as *lex causae* in a domestic arbitration will agree with the approach described in NJA 2016 p. 288 paragraphs 17–18. The approach goes back to the idea that the court – as well as the arbitral tribunal – is responsible for determining the correct legal basis for its decision and that in order to live up to this responsibility it may request assistance from the parties in its efforts to ascertain the applicable law as the circumstances permit.[5]

The point made here is that basically the same approach should be adopted (by default) irrespective of the applicable *lex causae* in international arbitrations seated in Sweden, for it would be inappropriate to maintain a dichotomy between Swedish law and other applicable rules of law in an international context as regards the ascertainment of the law.[6]

Indeed, as noted by professor Julian Lew, in international arbitration there is no domestic forum or foreign forum – there is only the applicable law for the particular case, therefore it has become the norm in international arbitration that the parties make full legal arguments in writing and orally about the applicable rules although the arbitral tribunal may request further

[5] *Cf.* ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure Principle 22.1 and 22.2.

[6] *Cf.* Hobér, K., International commercial arbitration in Sweden, p. 213 and p. 257 (2011). *Cf.* however Lindskog, S., *supra* note 1, p. 714. Lindskog leaves the door ajar for a modification of the *jura novit curia* principle in international arbitrations due to a need to prove the contents of the law. Apparently, the room modification is intended for cases in which Swedish law is not *lex causae*.

specific details about the applicable law and it will decide itself what the specific applicable rules are rather than rely on any expert.[7]

The approach, if applied to international arbitrations in Sweden, does not require that the tribunal in an artificial way must try to disregard whatever knowledge it may have about the applicable law. In that sense, the approach can been seen as expressing a middle position – a shared responsibility[8] for the correct application of the law as applied to the invoked facts. An arbitrator from another jurisdiction (or an arbitrator not trained in law at all) can normally not have an obligation to know the Swedish *lex causae* as if the *jura novit curia* principle were to apply.

A Swedish arbitrator will normally have more to bring to the table when Swedish law is *lex causae* and it appears sensible that the arbitral tribunal at large shall be able to benefit from that, particularly if that arbitrator is the chairperson.[9] This however does not mean that the other arbitrators can delegate all legal analysis to the arbitrator who happens to know the applicable law especially not if he or she is party appointed.[10] Arbitrators trained in the applicable law should be prepared for the inquisitorial curiosity of the other arbitrators.

The fact that the Arbitration Act does not set out how the tribunal is to ascertain the applicable law and that the arbitration agreement with or without supplementation by arbitration rules rarely brings clarity to the matter raises a need to deal with the issue early on in the proceedings in order to reach an explicit agreement as to whether the tribunal or the parties shall have the *primary* responsibility for ascertaining the law applicable to the

7 Lew, J., *at al*., Comparative international commercial arbitration, p. 443 *et seq*. (2003). See also e.g. Kaufmann-Kohler, G., The Governing Law: Fact or Law? – A Transnational rule on establishing its contents, Best Practices in International Arbitration, ASA Special Series No. 26 (July 2006); Wobeser, C. v., The Effective Use of Legal Sources: How much is too much and what is the role for iura novit curia, Paper for the "Conference Arbitration Advocacy in Changing Times, The Hearing, ICCA Congress, Rio de Janeiro, May 23–26, 2010.

8 *Jura novit curia* has been discussed in responsibility terms or terms of a burden of education by Kurkela, M., Jura Novit Curia and the Burden of Education in International Arbitration – A Nordic Perspective, 21 ASA Bulletin 486–500 (2003).

9 Lindskog, S., *supra* note 1, p. 715 note 26. See also Kleineman, J., Principen on jura novit curia – särskilt i skiljeförfaranden, p. 93–124 at p. 112 *et seq* in Vänbok till Bertil Södermark (2009).

10 Waincymer, J., International Arbitration and the Duty to Know the Law, 28 Journal of International Arbitration, 201–242 at p. 220 (2011).

substance of the dispute.[11] This can be seen as an outflow of the party autonomy. By default Resolution No. 6/2008 of the International Law Association (ILA)[12] Recommendation 5, 7 and 9 could be used expressing a preference for the latter distribution of the responsibility.[13]

> 5. Arbitrators should primarily receive information about the contents of the applicable law from the parties.
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> 7. Arbitrators are not confined to the parties' submissions about the contents of applicable law. [Subject to giving the parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case] arbitrators may question the parties about legal issues that the parties have raised and about their submissions and evidence on the contents of the applicable law, may review sources not invoked by the parties relating to these issues and may, in a transparent manner, rely on their own knowledge as to the applicable law as it relates to those issues.
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> 9. In ascertaining the contents of a potentially applicable law or rule, arbitrators may consider and give proper weight to any reliable source, including statutes, case law, submissions of the parties' advocates, opinions and cross-examination of experts, scholarly writing and the like.

It may occur that the applicable law cannot be ascertained, *e.g.* in expedited proceedings and emergency arbitrations. In NJA 2016 p. 288 paragraph 19 the Supreme Court (in my translation) stated that "when the contents of the applicable law remain in the unknown, the court may due to practicalities have to presume that the foreign law corresponds to Swedish law unless specific circumstances speak to the contrary." This presumption should not be relied on by arbitrators.[14] As expressed in the ILA Resolution Recommendation 4:

> 4. Arbitrators attempting to ascertain the contents of applicable law should bear in mind that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration, given the fundamen-

[11] The situation considered by Heuman, L., Arbitration law of Sweden: Practice and procedure, p. 326 (2003) seems rare amongst Swedish legal counsel.

[12] See hereto International Law Association, Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Final Report (Rio de Janeiro Conference, 2008).

[13] The preference seems to be consistent with experience; Madsen, F., Om principen jura novit curia vid skiljeförfarande, JT 2010–11 p. 485–503 at p. 497.

[14] Born, G, *supra* note 3, p. 2734.

> tal differences between international arbitration and litigation before national courts. In particular, arbitrators should not rely on unexpressed presumptions as to the contents of the applicable law, including any presumption that it is the same as the law best known to the tribunal or to any of its members, or even that it is the same as the law of the seat of the arbitration.

Instead the ILA Resolution Recommendation 15 sets out:

> 15. If after diligent efforts consistent with these Recommendations the contents of the applicable law cannot be ascertained, arbitrators may apply whatever law or rules they consider appropriate on a reasoned basis after giving the parties notice and a reasonable opportunity to be heard.

In a couple of cases I have, already at the outset of the proceedings, suggested that the UNIDROIT General Principles of International Commercial Contracts (UPICC) could be relied on, if the otherwise applicable law cannot be ascertained.

That brings over to the question how the law as ascertained may be used while still observing the limits to the arbitrator's mandate and the requirements of due process – in particular the requirement that the parties be given a reasonable opportunity to be heard.

2. Not Exceeding the Mandate

First, an arbitral tribunal must understand what facts are invoked in support of the reliefs sought. Second, it must understand what the reliefs sought are intended to encompass. Misunderstandings in these regards may lead to the setting aside of the award due to excess of the arbitrators' mandate pursuant to Section 34 paragraph 1 point 2 or point 6 of the Swedish Arbitration Act (1999:116) ("SAA").[15] Arbitral tribunals seated in Sweden can assume that Swedish courts will be influenced by domestic procedural law in assessing whether the arbitrators have exceeded their mandate. Therefore, the arbitrators should have regard to SCJP Chapter 17 Section 3 Sentence 2 and Sentence 1.

[15] See generally, Heuman, L., Vilken betydelse har prejudikat om domvilloklagan för bedömningen av klandermål rörande handläggningsfel? Del II, JT 2016–17 p. 985–1007.

2.1 Understanding the factual ground

SCJP Chapter 17 Section 3 Sentence 2 sets out that a court may not in disputes that are amenable to settlement, base its judgment on a circumstance that a party has not invoked as part of the "grounds" for the claim. It is generally believed that this provision with its logical baggage applies in domestic arbitration.[16] This means that the arbitral award will in principle be set aside, if the award has been based on circumstances that have not been invoked. This will to a large extent be decided by the court based on the terminology and standard set by domestic legal sources, although such concepts cannot be entirely decisive in international arbitration.[17]

Svea Court of Appeal case No. 2289-14 (2015-06-25) teaches that the stronger the connection to Sweden, the stronger will the domestic influence be when the court considers a challenge. In the case Swedish law applied to the merits and the chairperson was a Swedish lawyer with an American and a Russian co-arbitrator. The American and Russian parties were represented by Swedish lawyers. The court pronounced:

> In light of the strong connection to Sweden, both the parties as well as the arbitral tribunal must have been well acquainted with, and must have followed, the regulatory system applicable under Swedish procedural law on the question, inter alia, of the importance of legally relevant facts being clearly invoked.[18]

Since this setting is not uncommon at all in international arbitrations in Sweden it may be useful to recapitulate some of the central concepts in Swedish procedural law.

In legal proceedings, a multitude of factual allegations are normally made. Not all factual allegations are to be considered as invoked as part of the grounds. The Swedish legal culture is, I believe, well reflected in the proposition that a fact is normally considered as invoked when a party has tied the fact to a relief sought in such clear fashion that the other party must realize

[16] SOU 1994:81 p. 176 *et seq*, Prop. 1998/99:35 p. 145. See also Heuman, L., *supra* note 11, p. 320 *et seq*., Lindskog, S., *supra* note 1, p. 872 and Danielsson, K-E., Något om åberopanden i skiljeförfarande, p. 99–111 at p. 102 *et seq*. in Festskrift till Lars Pehrson (2016).

[17] *Cf*. Born, G., *supra* note 3, p. 3503 *et seq*. (2nd ed. 2014) and Wetter, G., Procedures for Avoiding Unexpected Legal Issues, Berg J. v. d. [ed.] ICCA Congress Series No. 7, p. 87–99 at p. 92. (1996).

[18] Judgment in translation available at <https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Court-of-Appeal/Court-of-Appeal/Court-of-Appeal/>, last accessed 2017-05-08.

that the first party means that it is considered as immediately relevant[19] to the relief sought.[20] The facts have to be concrete and detailed unless recognized by the other party. The just mentioned Svea Court of Appeal case is illustrative. Claimant's proposition that the respondent had fraudulently misled the claimant into taking certain identified actions by providing the claimant with erroneous information was found to be too abstract. The proposition had to be made concrete with regard to what actual information the respondent had provided and in which way this implied fraudulent inducement. In the case it was found that the invocation regarded the information on certain oil *flow rates* and that this was not the same as information on oil *reserves*.

The invoked facts together form the "factual ground" [Sw: *grunden*] for the relief sough. Each such fact is here referred to as an "ultimate fact" [Sw: *rättsfaktum*]. Often the tribunal cannot immediately conclude what facts the claimant intends shall serve as the factual ground and what facts that are meant to have an indirect bearing on the case. An early identification of the *legal* grounds will typically aid the arbitral tribunal to interpret and understand what ultimate facts the parties rely on and how the relief sought is to be understood.[21] It can be noted that the 2017 SCC Arbitration Rules (article 29) require that the parties identify their *legal* grounds and not just the factual grounds.

A respondent may just deny the alleged ultimate facts. It may also be that the respondent invokes ultimate facts to the desired effect that the claim shall be denied notwithstanding that the ultimate facts invoked by the claimant are considered proven. Such an ultimate fact is referred to as a counter fact [Sw: *motfaktum*].[22] An example: Assume that claimant claims payment invoking a loan agreement and a transfer of money from the claimant to the respondent (ultimate facts). If the respondent invokes that the payment claim is time-barred, he has introduced a counter fact. This may animate the claimant to invoke a counter-counter fact [Sw: *motfaktum av andra graden*], *e.g.* that the limitation period has been interrupted by an *action of the claimant*. The court may then not grant the claim upon a finding that the limita-

[19] Ekelöf *et al.*, Rättegång I, p. 42 (9th ed. 2016).

[20] Lindskog, S., *supra* note 1, p. 722. *Cf* also NJA 1980 p. 352, NJA 1996 p. 52, *infra* note 28, and Svea Court of Appeal case No. T 4548-08 (2009-12-01), *infra* note 25.

[21] *Cf.* Westberg, P, *supra* note 3, p. 184 *et seq*.

[22] It should be observed that a failure to invoke a counter fact may amount to a tacit recognition of a more or less tacit assumption for the claimant's case, as is illustrated by NJA 2010 p. 643 at p. 647. Kleineman, J., *supra* note 9, p. 109 *et seq.* notes that such tacit agreements are to be treated with caution.

tion period has been interrupted by an *action of the respondent*, even if this appears from the record.

When it is unclear whether a factual allegation is intended to serve as an ultimate fact or if it is only given indirect weight as an evidentiary fact [Sw: *bevisfaktum*] in support of an ultimate fact or is introduced just as a part of a background description – *i.e.* when the question is whether the other party (or the court) should or could have understood it as invoked – the court shall be active to clarify if it is to be considered as a ground fact. This activity is referred to as substance oriented procedural guidance [Sw: *materiell processledning*].[23] The scope of the duty to provide substance oriented procedural guidance is much discussed.[24] I will confine myself to what is often considered as an outflow of the same duty namely to let the parties be heard before applying a rule of law which the parties have not referenced (of course without relying on any ultimate facts not invoked). This will be further discussed in Section 3.

In arbitral proceedings in Sweden, it is common that the tribunal sets out its understanding of the dispute in recitals. The recitals often take the form of the first parts of an award, just to be completed with the reasoning of the tribunal and the decision. If the recitals have been sent for a review and comments by the parties, it is presumed that the recitals set out the ultimate facts invoked.[25] Whether this is meant to be the case should be clarified by the arbitral tribunal. From experience, I know that the parties' legal counsel are not always very pleased to be requested to review recitals, since it may disrupt their planning and preparation for the hearings. Such a presumption

[23] The duty to provide substance oriented procedural guidance primarily regards the pleaded facts and what the court should do with them. An example of when guidance is required is when the claimant asks for damages and the respondent claims that the liability be adjusted to zero due to contributory negligence; it may require a question whether the respondent intends that the court considers the issue of contributory negligence to the full extent in relation to the claim. See NJA 1976 p. 289. Another example when a claim for damages seems to be based on the assertion that the respondent's actions amount to a criminal offence or intentional breach whereas it can also be understood such that negligence or some other ground is also to be considered. See NJA 1993 p. 13.

[24] See generally *e.g.* SOU 1982:26 p. 101–137, Westberg, P., *supra* note 3, p. 546–697 and Ekelöf *et al.*, Rättegång V, p. 45–53 (8th ed. 2011) with further references. As regards arbitration, see Lindskog, S., *supra* note 1, Wetter, G., *supra* note 17, p. 98 and Nordenson, U. K., Materiell processledning i skiljeförfaranden, JT 1993–94 p. 211–221 with further references.

[25] See Svea Court of Appeal case No. T-4548-08 (2009-12-01), T-2610-13 (2014-12-04) and T-2289-14 (2015-06-25). *Cf.* Danielsson, K-E, *supra* note 16, p. 108 *et seq*.

is therefore frequently resisted. Legal counsel on one or both sides may say that the recitals shall not exclude or replace any legal grounds, arguments or circumstances contained in the previous submissions and that any comments are for the tribunal's convenience.

If the arbitral tribunal nevertheless treats the recitals as if they give a full account for the ultimate facts invoked[26], it must be careful not to base the award on anything that can be perceived as an ultimate fact that is not included in the recitals. The above cited Svea Court of Appeal case is again illustrative.

The arbitral tribunal drew up a document ("Summary") serving essentially the function as recitals usually do. The Summary was sent out for comments by the parties. The parties made a reservation as described above. The arbitral tribunal stressed its duty to ensure that it was absolutely clear which grounds had been argued and further declared that what may have been argued in the case would not be considered as part of the grounds, unless it was covered by the wording of the Summary. The court found that the parties had ultimately accepted this. The court then found that the arbitral tribunal had based its award on the finding that the respondent had fraudulently misled the claimant into taking certain identified actions by providing the claimant with erroneous information on oil reserves *and* flow rates. The tribunal was found to have done so in one single context, although the Summary only covered misleading information on oil flow rates. The court concluded that the arbitral tribunal thereby had acted in excess of its mandate. The award was set aside pursuant to Section 34 paragraph 1 item 2 SAA.[27]

A situation that is rather common is that the claimant invokes an agreement on a certain issue (ultimate fact) as supported by a contractual provision (evidentiary fact) and submits the contract in its entirety as part of the record for the proper understanding of the provision or the context at large. The question then arises whether the claimant is entitled to the relief sought

[26] The arbitral tribunal might consider that it has made clear its understanding of what the grounds are and what the tribunal's powers encompasses and that the parties by being invited to comment and correct has been given full opportunity to present a different or modified case. A refusal to co-operate with the tribunal would therefore be at the parties' risk.

[27] The court however did so only upon finding that it was not possible to conclude that the excess of mandate did not affect the decision in the award in any respect. The necessity of such test does not follow from the wording of the Arbitration Act. *Cf.* the discussion in Heuman, L., *supra* note 11, p. 609 and Lindskog, S., *supra* note 1, p. 876 *et seq.* to which the court referred.

under another agreed issue (proven by another provisions) or only in combination with another provision. Generally it is not sufficient that a party invokes "the contract" as an ultimate fact. It is required that he identifies the agreed issue (according to a provisions) upon which he relies.[28] Normally, a contract – the law of the parties as the saying goes – is therefore not to be considered as a legal source [Sw: *rättstillämpningsfaktum*][29] to which the *jura novit* curia principle may apply.

In investor-state disputes, an applicable investments treaty can be regarded as a legal source subject to *jura novit curia*, whereas the underlying investment agreement is not. An investor may make reference to one provision in the treaty and prevail on another provision (on the facts invoked) while the arbitral tribunal still acts within its powers.

In Svea Court of Appeal case No. T 745-06 (2008-11-28), the court upheld an award in an investor-state dispute involving a Russian investor and Moldovia (the latter choosing not participate in the arbitration). The sole arbitrator (professor Giuditta Cordero-Moss) explained her perception of *jura novit curia* to the effect that arbitrators would be free to apply legal sources introduced by the parties – in this case a bilateral investment treaty ("BIT") was applied – in a different way than pleaded by any of the parties.

The dispute concerned a privatization contract according to which the investor should transfer certain assets to the host country in exchange for not specified shares owned by the host country. The host country later issued a regulation containing the list of shares eligible for exchange, the investor, who was unhappy with the list and terms for the exchange, claimed that the regulation could not be applied to pre-existing privatization agreements and asserted that the host country had breached its domestic law on non-retroactivity which applied. The claimant requested payment of a sum corresponding to the nominal value of the transferred assets plus interest. It was noted that the claimant had not invoked other legal grounds than a violation of the non-retroactivity principle laid down in the Moldavian Foreign Investment Act. The claimant did not argue that the respondent's conduct violated the BIT, although the BIT had been put forward by the claimant as one of the legal sources to be applied. Considering the *jura novit curia* principle, the

[28] *Cf.* NJA 1996 p. 52 – pointing at a contract provision amounted to an invocation of a factual circumstance whereas the mentioning of a statutory provision amounted to a legal argument that was relevant on the facts invoked. The belated invocation of the contract provision was rejected. The belated legal argument accepted.

[29] Ekelöf, P. O. *et al*, Rättegång IV, p. 303 (7th ed. 2009).

sole arbitrator found that the non-retroactivity principle had not been violated.[30] The sole arbitrator invited the parties to comment on the applicability of the BIT to the claim. The claimant then drew attention to article 6 of the BIT, which regarded indirect expropriation. The sole arbitrator found that article 6 was not applicable and instead based the award on article 2 (fair and equitable treatment) – which the respondent missed to plead – and awarded part of the value claimed as damages. As a matter of due process, the sole arbitrator considered that the application of article 2 could not be surprising, since the entire arbitration was based on the BIT.

The court found that the relief sought comprised financial compensation for a certain conduct which was alleged to have caused certain damages and that the amount awarded did not exceed the amount requested. It was further found that the arbitrator had not based the award on facts not pleaded but merely had made a legal qualification of facts based on a source of law that the claimant relied on. Therefore, the principle of *jura novit curia* was not considered to have been misapplied.

2.2 The mandate for contract interpretation

Arbitral tribunals are regularly involved in contract interpretation. Swedish law is by and large in line with the UNIDROIT Principles of International Commercial Contracts ("UPICC") Chapter 4, so I will below refer to some of its provisions as a proxy for Swedish law. I am fully aware of the fact that the degree of parallelism between the provisions and Swedish law can be discussed. The purpose of the presentation is to provide a framework for an assessment of situations when an arbitral tribunal may have exceeded its mandate in the interpretation of a contract. The base line is

i. that an interpretation may not build on facts that are directly relevant for the interpretation result unless the facts have been invoked as ultimate facts,
ii. that it is for the arbitral tribunal to determine whether the ultimate facts have been duly proven and
iii. that it is within the tribunal's mandate to make legal qualifications of such facts.

[30] The award is available at <https://www.italaw.com/sites/default/files/case-documents/ita0094_0.pdf>, last accessed 2017-05-03.

A typical situation is that the claimant seeks payment of a sum. As factual grounds he invokes that an issue has been agreed; *e.g.* that a certain risk shall be borne by the respondent and that the respondent therefore is liable to pay; I refer to this asserted agreement as "X". The claimant relies on a contractual provision with a certain wording as evidence.[31] The respondent denies the alleged agreement and argues that the wording of the provision is not sufficient as proof of a common intention.[32] The tribunal will normally not state whether the agreement is "X" or something else ("Y") in its award unless one or both parties seek a declaratory award.[33] In finding for the claimant, the tribunal will probably say in the reasons that the agreement was "X"; in finding for the respondent, the tribunal will say that the agreement has not been shown to be "X". The dispute may turn on the burden of proof, the evidentiary requirements and the evaluation of evidence. This is still the case when what is agreed is decided based on other factual circumstances; *e.g.* prior course of dealing, the negotiations[34], subsequent conduct[35] or usages[36]. *Cf.* UPICC Article 4.3 and CISG Article 8. When neither the semantic meaning nor the factual circumstances in the record are deemed to be conclusive for the common intention, the interpretation however takes on a normative dimension.

[31] Heuman proposes that there is a need to distinguish between situations where the issue is whether a term can have only one or two meanings – which can and should be subject to proof – and situations where the issue is how a vague term is to be understood – which cannot be subject to proof. Legal terms under the conditions of *jura novit curia* is not subject to proof. Furthermore, the semantic meaning of a term must be distinguished from how the term was understood by a party, which is subject to proof. Heuman, L., Är avtalstolkning endast en rättslig verksamhet?, SvJT 2015, p. 793 at p. 809.

[32] In many cases the respondent who denies "X" submits that the agreement meant "Y", which is an evidentiary fact (or a proposition that is not subject to proof) meant to knock out or weaken the probability for "X". Heuman, L., *id.*, p. 805 and Ekelöf, P. O. *et al*, *supra* note 29, p. 206 *et seq*.

[33] In a declaratory award the tribunal will in finding for the claimant declare that the agreement is "X". Otherwise it will indirectly declare that the agreement was not "X" by rejecting the claimant's claim. There may be reasons to relax the standard for what a tribunal may declare in some cases so that it can be established that the agreement is "Y" and even "Z". See Westberg, P., *supra* note 3, p. 380 *et seq*.

[34] The fact finding may lead to a legal qualification that one of the parties has acted in a culpable way – Heuman, L., *supra* note 31, p. 796.

[35] Reliance on subsequent conduct may call for procedural guidance as to whether the conduct shall be used in the interpretation or whether the conduct is meant to constitute a new or modified agreement. See Heuman, L., *supra* note 31, p. 806.

[36] See further NJA 1999 p. 629 below.

The tribunal may consider Section 6 paragraph 2 of the Contracts Act (1915:218) and find that the factual circumstances at the time of the contract were such that the claimant who expressed "X" *must* have realized[37] that the respondent understood it to mean "Y" and that the claimant failed to correct this misunderstanding. The tribunal therefore denies the claim. The application of the rule requires the invocation of two ultimate facts by the respondent; realization and failure to correct.

The tribunal may consider the *contra proferentem* rule (UPICC Article 4.6), finding that the claimant supplied the term "X" and that "X" is unclear and therefore deny the claim. The application of this rule requires the invocation of one ultimate fact.[38]

The arbitral tribunal may also consider that the agreement shall be determined with regard to "good faith and fair dealing" (UPICC Article 4.8 (2) (c)), finding that the pleaded circumstances as proven shall lead to a denial of the claim. The application of this perceived rule does not require the invocation of any ultimate fact; the mere denial of "X" will in principle do. The tribunal makes a legal qualification of the pleaded facts and circumstances based on a rule of law that it deems applicable, which is within its mandate. If the respondent as his legal ground has referred to Section 6 paragraph 2 of the Contracts Act, the question arises whether the arbitral tribunal may re-qualify the issue to regard the *contra proferentem* rule (no, unless the respondent has invoked that the claimant drew up the contract) or a "good faith and fair dealing"-rule (yes, since it is based on normative considerations). See III below.

The tribunal may also consider "the nature and purpose of the contract" (UPICC Article 4.8 (2) (b)), which may or may not have been subject to proof or consider hypothetical consequences of alternative interpretations (often based on its perceived experience or common sense).[39] Thus, a general principle of law, such as the principle that a party in breach shall not benefit from its own breach, may be relied on without a party reference to it.[40] Such

[37] Heuman, L., *supra* note 31, p. 812. *Cf. id*. p. 804 *et seq*.

[38] Heuman, L., *supra* note 31, p. 798. *Cf.* NJA 1973 p. 740 (not conclusive on this point).

[39] There is a danger here that conclusions based on "experience" or "common sense" are built on assumed factual premises beyond what must be considered as judicially noticed facts [Sw: *notoriska fakta*] so that the adversarial nature of the proceedings is not respected. The use of judicially noticed facts falls beyond the scope of this paper. See generally Lindell, B., Notoritet och kontradiktion (2007).

[40] Another issue is whether this is surprising. See Court of Appeal for Western Sweden case No. T-4028-13 (2015-02-27).

considerations are of a normative nature.[41] The tribunal may also refer to "reasonableness" (UPICC Article 4.8 (2) (b)). In Swedish jurisprudence an interpretation in line with statutory law or analogues to it is often seen as preferable – or in other words as reasonable.[42] Such normative considerations are within the mandate. Another issue is how transparent these considerations should be as a matter of procedural guidance to fulfill the requirements of due process.

The following case seems particularly problematic[43]: In a dispute over a grant-back clause in a license agreement, the claimant (licensor) seeks a declaratory award establishing that he is the rightful owner of a patented improvement invention pursuant to the clause. The respondent (licensee) contests and submits that the agreement amounts to a simple license of the improvement to the claimant. The tribunal considers that the agreement should be interpreted so as to constitute a general partnership [Sw: *enkelt bolag*] for the joint exploitation of the invention entitling the claimant to a 50 percent share of it. Neither of the parties has submitted that the claimant (at least or at most) can have acquired a 50 percent share of the invention. Yet, the tribunal may find that "the nature and purpose of the contract" should lead to a re-qualification of the agreement as constituting a general partnership and that "reasonableness" motivates that the claimant is awarded a 50 percent share. The tribunal may also consider that the agreement could be construed as constituting an exclusive license rather than a transfer of ownership. Even if this could *arguably* be possible as still being based on the ultimate facts invoked – albeit combined in a way that can reasonably be expected to surprise the parties – the question remains whether the tribunal must reject the relief sought or whether the claimant can be awarded a 50 percent share. At the outset, the question turns on how the claimant's relief sought is to be understood. I will revert to this hypothetical problem below.

Svea Court of Appeal case No. T 2610-13 (2014-12-04) upheld a challenged award rendered in a dispute between a seller of a company (requesting the remainder of the purchase price) and the buyer who submitted a cross-claim for set-off and damages due to defects – invoking deviations from

41 Heuman, L., *supra* note 31, p. 809 *et seq*.

42 See *e.g.* NJA 2014 p. 960. *Cf.* NJA 1989 p. 346, NJA 1992 p. 139 and NJA 2003 p. 128.

43 This hypothetical case is inspired by the example given in Westberg, P., *supra* note 3, p. 379 *et seq*.

certain warranties and representations.[44] Cross-claimant was not successful in the arbitration and challenged the award pleading excess of mandate (and procedural error). In essence the cross-claimant submitted that the parties were in agreement on the interpretation of the term "warranties" in the sense that the claimant had not questioned cross-claimant's interpretation which meant that there *ipso jure* should be a strict liability in case of a warranty deviation. The cross-claimant further submitted that the sole arbitrator had based the award on ultimate facts not invoked and that the sole arbitrator had interpreted the contract without a mandate from the parties and without soliciting their comments on a proposed interpretation. It was argued that the sole arbitrator had based the award on the finding that cross-claimant's legal counsel had written the agreement (*contra proferentem*) which was not invoked by the claimant; that the sole arbitrator based the award on the finding that the claimant had limited understanding of the legal-technical character of the contract provisions and warranties, which was not invoked by the claimant.

The court found that the recitals neither set out that the cross-claimant explicitly had submitted that a warranty deviation should lead to strict liability nor that the claimant had accepted such a proposition. Thus, there was no "agreement" on how the term should be understood. The court further found that the cross-claimant had not shown that the arbitrator's mandate was limited so as to exclude contract interpretation and – in my opinion correctly – that the award had not been based on any circumstance that could be characterized as an ultimate fact. The court noted that evidentiary facts do not have to be invoked as if they were ultimate facts. In summary the court reasoned as follows:

> An evidentiary fact can be used by arbitrators as long as the parties have no reason to be surprised that the evidentiary fact is used. An evidentiary fact or another supporting fact in the record need not be referenced in the same manner as an ultimate fact. However, a party must have had reasonable cause to expect that it might be taken into consideration. If an evidentiary fact or supporting fact has been introduced into the proceedings, the arbitrator is free to allow that fact to influence the evaluation of evidence, provided that a party would not be justifiably surprised thereby. An arbitrator, just like public courts, is entitled to interpret agreements entered between the parties to the extent the review of the

[44] *Cf.* Skåne och Blekinge Court of Appeal case No. T-659-16 (2016-01-18) and Heuman, L., Vilken betydelse har prejudikat om domvilloklagan för bedömningen av klandermål rörande handläggningsfel*? Del I*, JT 2016–17 p. 729–743 at p. 738 regarding procedural abstention declarations [Sw: *processuella avståendeförklaringar*].

> issues in dispute so require. Also when interpreting the agreement, the arbitrator is bound by the ultimate facts invoked by the parties, but is permitted to consider evidentiary facts and supporting facts in accordance with the description above. The alleged agreement between the parties constitutes a legally relevant circumstance. However, the interpretation of the agreement could be viewed as a particular kind of evaluation of evidence, in which the written agreement document constitutes an evidentiary fact whereas the contents of the document and the subject matter governed by the agreement constitute supporting facts determining the actual application of the agreement. In his interpretation of an agreement, the arbitrator is generally not bound by the parties' actions [i.e. dispositions, my remark] as regards legal provisions and arguments, but is rather obliged to apply these also without them having been referenced by a party pursuant to the principle of jura novit curia.

The court may have missed to note – or may not have accepted – the distinction between evidence based and norm based contract interpretation in its description of the nature of contract interpretation. The take away from the case, however, is that an arbitral tribunal should stand free to accept or reject the claimant's proposition that an invoked contract clause has the meaning that the claimant wants to attribute to it. The tribunal is not confined to the arguments for a different understanding that the respondent may have presented. Caution is however called for when the interpretation of the contract is based on facts that have not been invoked. It appears for example that a construction based on the *contra proferentem* rule, as noted above, would require that a party has invoked that the other party drafted the contract. In the abovementioned award the *contra proferentem* rule does not seem to have been decisive though. Furthermore, it can be inferred that if the parties agree that an expression used in the contract shall have a certain meaning, the interpretation may not be based on the arbitrator attributing a different meaning to the same expression. Such an agreement should however be clearly demonstrated, *e.g.* by being introduced in the recitals. A mere failure to say that the expression should be understood in a different way does not amount to a tacit agreement.[45]

[45] *Cf.* however NJA 2010 p. 643. See also prop. 1998/99:35 p. 146 and SOU 1994:81 p. 177 on tacit agreement as to the application of rules of law, which seem to entail that tacit agreements on the application of contract provisions should also be respected. The correct position is probably that tacit agreements on procedural matters will be respected, but the evidentiary requirements are strict. *Cf.* SAA Section 34 paragraph 2 and SCC Rules Section 36. *Cf.* also Heuman, L. *supra* note 15, p. 740 *et seq*.

NJA 1999 p. 629 regarded the vacation of the judgment in NJA 1998 p. 448. In NJA 1998 p. 448, the claimant introduced standard conditions as evidence in support of its interpretation of the agreement under dispute – business interruption insurance. The claimant submitted that the 1998-court had used the standard conditions in a way that the claimant had not intended, to arrive at an interpretation result to the detriment of the claimant. The Supreme Court noted that a court may consider all evidence introduced even to the detriment of the party who introduced it. Evidentiary facts are not "invoked" as ultimate facts can and must be. The 1998-court referred to "generally applied insurance conditions". The claimant submitted that this amounted to the application of a trade usage. The 1999-court did not agree. The 1998-court was considered to have attempted to interpret the agreement in dispute, which led it to conclude that the agreement was incomplete. The agreement was therefore supplemented with general principles applicable to business interruption insurance contracts of the kind in dispute as these principles were perceived by the court. These principles were found to be also expressed in the standard conditions.

That is to say; a court will know and will use *any* supplementary norms (*naturalia negotii*) not just statutory provisions. The lesson is that courts, like arbitrators, may make any normative inference it pleases from the record without exceeding their powers.

Such normative inferences may sometimes need to go beyond the record. In an ICC award rendered in Zürich, the tribunal had to interpret the expression "material breach" in an international agreement subject to Swiss law. The arbitrators found that the expression was not a term of art in Swiss law, whereupon they referred to CISG Article 25 and UPICC Article 7.3.1 to support their interpretation. The award was challenged. The challenging party argued that the references meant that the arbitrators had exceeded their mandate by ignoring the parties' express choice of law and that they had deprived the parties of their right to be heard by not being invited to comment on the interpretation of the articles. The court rejected the challenge. The court held that the arbitrators had applied Swiss law; the meaning given to the expression was in accordance with the understanding of a reasonable person being a party to an international agreement of the kind in question. Given the international character of the transaction, an understanding of the expression in line with the cited articles was not considered as surprising.

Hence, the right to be heard was not violated.[46] My reflection is that it would normally cause insignificant inconvenience to solicit the parties' comments on the relevance of specified international legal instruments for the contract interpretation to make sure that the parties feel that they have been heard. See further section 3 below.

2.3 Understanding the relief sought

What has been said in this section so far mainly regards the understanding of the factual ground for the relief sought in relation to SCJP Chapter 17 Section 3 Sentence 2. The limits of the arbitrators' mandate must however also be considered in the light of Chapter 17 Section 3 Sentence 1: A judgment may not be given for something more (*ultra partita*) or something else (*extra partita*) than properly requested by a party.[47] The same goes for arbitrators.[48] In order to assess the scope of the mandate, the arbitrators just like the court will have to understand what the relief sought encompasses. The understanding of the relief sought is not always discussed in conjunction with the *jura novit curia* principle. The understanding of the factual ground and the relief sought is however often intertwined and a discussion of one without the other would not be adequate.

In general it is uncontroversial to say that it is within the mandate to grant a relief sought to a smaller extent than requested by the claimant (*infra partita*) when the relief sought is expressed in *quantitative* terms such a monetary amount, number of items, period of time, weight, an area[49] or space. The greater includes the lesser (*majus includit minus*). If a claimant seeks payment of 100 Euro pleading the right to damages for breach, it is, under

[46] Swiss Federal Supreme Court, 4_A240/2009 of 16 December 2009. Also reported in unilex <http:www.unilex.info/case.cfm?id=1575>, last accessed 2017-07-04. See also Rosengren, J., Contract Interpretation in International Arbitration, 30 J. Int. Arb. 1 (2013) at p. 13. The situation that the arbitrators faced in the case is of course different from a situation where both parties argue based on the idea that the national sales law of the *lex causae* is applicable and the arbitrators conclude that *lex causae* leads to the application of CISG.

[47] See the extensive discussion in Westberg, P., *supra* note 3, p. 342–509. His discussion will be used below to give illustrations of typical more or less difficult situations that an arbitral tribunal can face without any ambition to give any independent contributions to the discourse.

[48] Lindskog, S., *supra* note 1, p. 721 and 871.

[49] A debated question is whether a geographical limitation set on an unlimited claim makes the award *extra partita*, *i.e.* to something qualitatively different. See Westberg, P., *supra* note 3, p. 383 *et seq*. regarding NJA 1977 p. 485.

jura novit curia conditions, within the arbitrators' mandate to grant him 50 Euro upon a finding that the loss can reasonably be estimated to that amount or even upon a finding that the claimant is entitled to a price reduction to that amount, provided that the findings are based on the pleaded ultimate facts and provided that the claimant cannot be understood to object to that the tribunal considers the possibility to award a lesser amount than claimed (which generally can be presumed not to be the case).[50]

As an illustration, in Svea Court of Appeal case No. T 745-06 (2008-11-28) referred to above, the court accepted that the sole arbitrator turned a claim for a sum corresponding to the nominal value of certain assets became a claim for damages suffered by the investor due to a breach of an obligation of fair and equitable treatment.[51]

The same can be said for the situation that the claimant seeks a declaratory award establishing that the respondent is liable to damages although the amount is not addressed. Assuming that the respondent invokes circumstances that can be qualified as contributory negligence as counter facts, the arbitral tribunal can find that the claimant is entitled to one third of the loss.[52]

It is considerably more difficult to say what the mandate encompasses when the relief sought must be understood in *qualitative* terms. Typically, a monetary relief is of another quality than a relief *in rem*. It has been pro-

[50] Westberg, P., *supra* note 3, p. 360. A claim for 100 Euro may in reality be two claims in the sense that part of the amount is based on a separate set of ultimate facts as the case may be when *damnum emergens* is claimed as one part and *lucrum cessans* is claimed as another part. See Westberg, P., *supra* note 3, p. 403 *et seq*.

[51] The sole arbitrator in the case has later explained that *jura novit curia* should allow for the re-qualification of claims so as to enable an arbitrator to grant the relief sought although based on another remedy than in the pleaded cause. She proposes that it would be within the power of the arbitrator to base the award on a right to reduction of the price for non-conformity instead of a right to damages for delay. Cordero-Moss, G., The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy On Jura Novit Curia and Related Issues, p. 289–330 at p. 327 in Ferrari, F. [ed.], Limits to party-autonomy in international commercial arbitration (2016). The example appears rather theoretical, since the ultimate facts invoked in support of a damage claim due to delay would normally not cover a claim for reduction of the price due to a defect.

[52] *Cf*. Westberg, P., *supra* note 3, p. 370 *et seq*. See *id*., p. 368 *et seq*. regarding the more problematic situation that the claimant seeks a negative declaratory award to establish a cap of his damage liability to one third invoking contributory negligence on the respondent's side. Can the tribunal render an award finding that the liability is limited to half of the loss? Sharing liability between 0–100% can be compared to claims for shares in property. See *id*., p. 376 *et seq*.

posed that a court may qualitatively deviate from the relief sought by the claimant, if the judgment is based on a remedy serving the same purpose as the relief originally sought, the economic consequences to the respondent are less severe and the deviation appears as a simple and natural compromise solution.[53] Under this theory it seems *e.g.* that an arbitral tribunal may order a vendor to repair defective goods rather than to make a re-delivery (as far as the ultimate facts invoked allow it and repair is less severe than re-delivery), but hardly to award price reduction *in lieu* of repair[54] or damages instead of interest[55].

It is questionable whether the requirement that the deviation shall appear as a simple and natural compromise solution is distinct enough to serve as setting limits to the mandate for arbitrators. An award that appears as something else than a simple and natural compromise, rendered without an opportunity for the parties to be heard, could instead be set aside pursuant to Section 34 paragraph 1 point 6 SAA (procedural mistake that probably influenced the outcome). Furthermore, a "simple and natural" test may also serve as a delineator between what the relief sought can be taken to encompass and what it does not encompass.

Recalling the dispute about the patented invention mentioned above, assume that the arbitrators are uncertain whether the relief sought encompasses a mandate for the tribunal to consider that the claimant may have a right to something less than 100 percent of the invention or a right that cannot be characterized as ownership. Assume that this broad understanding of the relief is verified after communication with the parties.

Assume further that the arbitrators deem that the contract shall properly be understood as constituting a general partnership. It is questionable whether the partnership-compromise can qualify as natural at least as regards the distribution of property rights. How do the arbitrators arrive at the conclusion that the claimant is entitled to exactly 50 percent? The parties have not addressed the matter since they hitherto have pleaded the case in a binary fashion. A "natural compromise" would have to be based on

[53] Westberg, P., *supra* note 3, p. 487.

[54] *Cf.* Cordero-Moss, *supra* note 51, finding it questionable if a "completely different" relief can be ordered, *e.g.* termination instead of damages.

[55] *Cf.* the annulment by the Paris Court of Appeal (2016-03-15) of the award in *De Sutter P. – K., DS2 SA., et al. v. Republic of Madagascar*. The judgment is reported at <www.italaw.com/sites/default/files/case-documents/italaw7208.pdf> last accessed 2017-05-03. The sole arbitrator re-qualified a claim for interest to damages.

reasonability. The question then becomes what reasonability is. Is it based on a dull splitting-the-baby approach? Could it be based on a normative approach? According to the Swedish Partnership Act (1980:1102), the result of a general partnership is as a default rule to be divided equally between the partners. Since this is the case it is close at hand to conclude that ownership is also to be divided equally. The same ownership split also follows from the Act on Co-ownership (1904:48 s. 1). This may appear as a natural compromise to the arbitrators. It should however be for the parties to say whether the compromise is natural based on what they know about their relation, which knowledge may not be reflected at all in the record. It could be that the "natural" compromise should have been based on the parties' respective contributions in kind or money. If the parties have not had an opportunity to submit pleadings on this aspect, it can be presumed that it influenced the outcome.

A compromise can hardly be regarded as simple, if the compromise may entail new disputes or a need for significant supplementation of the disputed agreement, such as the case may be when the claimant seeks better right to some property and walks away with a co-ownership or a complex long-term contractual relationship with the respondent. It is highly questionable whether the partnership-compromise or even an exclusive license-compromise can qualify as simple. Disregarding all questions about how the solutions will affect third parties such as the patent authorities and creditors, it seems clear that the partnership agreement may need supplementation with several terms, such as duration and responsibility for patent defense and maintenance. The same could be said for an exclusive-license solution.

The example shows how a broad qualitative understanding of a relief sought may force the arbitral tribunal and the parties to engage in extensive communication about several compromises and their details. As a rule of thumb, arbitrators should be entitled to presume that the relief sought does not encompass solutions that do not appear as simple and natural. This can also be expressed: A relief sought should normally be understood in the context of the legal issues raised by the parties.

3. Due Process

Almost invariably, the question whether an arbitral tribunal has acted in excess of its mandate comes with the question whether the tribunal at least did a procedural mistake by rendering an award with a surprising outcome

due to a surprising reasoning. The significance of the surprise is that the parties by an objective assessment had no reason to address the possibility of the reasoning in their pleadings and submissions. In this way due process has been violated in the sense that the parties have not been given a reasonable opportunity to be heard. This may *in principle* lead to the setting aside of the award pursuant to Section 34 paragraph 1 point of the SAA provided that the mistake with probability affected the outcome.[56] A "surprise criterion"[57] for due process may not be very helpful, since what is deemed surprising by judges considering a set-aside action may vary from jurisdiction to jurisdiction. The decisive question should be whether it may have mattered to the outcome that the parties have in fact not been heard.[58]

Whereas the monitoring of excess of mandate to a large extent will be guided by domestic procedural standards, the case for monitoring due process in international arbitrations should be considered without such influences, since the notion of due process is differently understood across the globe.[59]

In Swedish legal literature it has been suggested that courts shall *preferably* draw the attention to applicable rules of law that the parties have not referred to in order to avoid unnecessary and costly appeals.[60]

The attitude of Swedish courts is well captioned in NJA 1989 p. 614, NJA 1993 p. 13 and NJA 1999 p. 629.

From NJA 1993 p. 13 it can be concluded that it would be correct to hear the parties regarding their respective positions on damage liability in the absence of negligence and solicit what the grounds for strict liability might be. On the other hand, strict liability can be considered without communication, if the respondent would prevail anyway. See the separate opinion by Justice Lind in NJA 1989 p. 614. In NJA 1999 p. 626 the Supreme Court found that it is often appropriate for a court to draw the attention of the parties to a norm that the court perceives as applicable, but that a mere omission to do so does not as such amount to a procedural error. In the case at

[56] Heuman, L., *supra* note 11, p. 324 *et seq*. and Hobér, K., *supra* note 6, p. 317 *et seq*. See also Born, G., *supra* note 3, p. 3517 *et seq*. See however, Kleineman, J., *supra* note 9, p. 109.

[57] What I refer to as "the surprise criterion" is analyzed and discussed by Knuts, G., *Jura Novit* Curia and the Right to be Heard – An Analysis of Recent Case Law, 28 Arbitration International 669–686 (2012).

[58] Waincymer, J., *supra* note 10, p. 224.

[59] Born, *supra* note 3, p. 3504 *et seq*. Wetter, G., *supra* note 17, p. 87.

[60] SOU 1992:26 p. 126.

hand it was noted however that the respondent had referred to "fundamental principles of insurance law" and that the claimant had commented on that issue. The request for vacatur was dismissed. NJA 1999 p. 629 may be understood to mean that it is not a procedural error if the court does not draw the attention of the parties to a supplementary norm, if the norm – or rather an unspecified set of norms – has been referred to by a party and commented upon by the other party.[61]

The motive to avoid costly appeals cannot have any bearing to arbitrators unless the award is open to a review on the merits.[62] Nevertheless, arbitrators have a certain duty to draw the attention to rules that are not referenced.[63] On the other hand it has been suggested that the procedural guidance in general should be exercised with caution so as to avoid that the court may be

[61] A discussion about *jura novit curia* in Swedish courts has recently followed in the wake on the Swedish Supreme Court's judgment in NJA 2016 p. 107 (regarding the liability of guarantors towards the successor of the rights held by the creditor in respect of full coverage of an issue of new shares). Claimant sought payment against the transfer of shares (acquired as a result of the fulfillment of the guarantee). Claimant stated that the claim was *not* based on the assertion that the respondent was liable to damages. The Supreme Court nevertheless based its reasoning on the proposition that claimant was entitled to damages (see *e.g.* items 51–52 and 67–68 of the judgment). Claimant was finally found to be entitled to payment against delivery of the shares. Respondents filed for vacation of the judgment due to procedural errors. The respondents submitted (i) that claimant had not invoked the right to damages as a basis for its claim and that a judgment based on such an invocation would be contrary to the provisions of Chapter 17 Section 3 of the Code of Judicial Procedure and (ii) that if rules on damage liability could be applied, the Supreme Court had failed to conduct procedural guidance as regards the substantive aspects of the dispute. In Ö 1810-16, The Supreme Court (in another composition) found that the dispute had not been resolved based on other circumstances than those invoked by the parties and that the fact that the court had not invited the parties to ponder on the application of other legal rules than those referred to by the parties did not amount to a procedural irregularity such that the judgment should be revoked. The reasons for the decision are rather barren. Ö 1810-16 refers to NJA 1999 p. 629. The saga continued with an unsuccessful attempt to vacate the decision in Ö 1810-16; Ö 5886-16. The case has been analyzed and debated by Unnersjö, A., JT 2015–16 p. 409, Håstad, T., JT 2016–17 p. 605 and 2017–18 p. 137, Heuman, L., *supra* note 15, p. 738 *et seq*, Schöldström, P., SvJT 2017 p. 142 and Lambertz, G., SvJT 2017 p. 334. It appears that the Supreme Court pursued an agenda as a developer of the law, which does not illustrate best practice to be followed by arbitrators.

[62] The fact that an arbitral award cannot be reviewed on the merits should not lead to the conclusion that arbitrators should guide more actively than courts. *Cf.* Nordenson, U. K., *supra* note 24, p. 215.

[63] SOU 1994:81 p. 150; seemingly limited to domestic arbitrations. *Id.*, p. 151. See however *id.*, p. 177.

perceived as partisan or lacking objectivity.[64] This proposition has been questioned. A lack-of-objectivity criterion would be too vague to have any meaning and a judge should furthermore be able to give the guidance in a way that does not cause such concerns.[65] The same could be said for arbitrators.[66]

Of more substantial weight is the proposition that procedural guidance regarding applicable rules can cause a party to invoke new ultimate facts, evidentiary facts or to introduce new evidence and thereby cause additional costs and loss of time.[67] This could be reconciled with a perceived duty of the arbitrators to produce an award striving to achieve justice under law[68], since the degree of correctness shall be assessed on the basis of the pleaded ultimate facts as proven.[69]

It goes without saying that an arbitral tribunal can base the award on the legal reasoning of a party (as long as plausible) and then yield to the urge to offer their "better" reasoning *obiter dicta*.

The hard questions then become (i) if and when should an arbitral tribunal apply a rule of law not referenced by the parties where this may lead to an outcome different from that which would follow if the legal propositions made by the parties were to be followed and (ii) when, if ever, can the rule be applied without first being discussed with the parties with regard to the adversarial nature of the proceedings.

The ILA Resolution should in most cases serve as a starting point for a discussion.[70]

The ILA Resolution expresses the sensible position that arbitrators should *generally* not introduce "*legal issues*" that the parties have not raised (Recommendation 6 and 8), unless the dispute implicates public policy or the application of other rules that the parties may not derogate from when settling

64 SOU 1992:26 p. 121.

65 Lindell, B., Partsautonomins gränser, p. 23 (1988). See however Calissendorff, G., Jura novit curia i internationella skiljeförfaranden i Sverige, JT 1995–96 p. 141 at p. 142.

66 Nordenson, U. K., supra note 24, p. 214.

67 SOU 1992:81 p. 126. *Cf. id*., p. 120 with a less strict standard for guidance regarding the factual circumstances.

68 *Cf.* Born, G., *supra* note 3, p. 1997 *et seq*., Wetter, G., *supra* note 17, p. 97 and Nordenson, U. K., *supra* note 24, p. 213.

69 The discussion about correctness in the sense "predictable" *versus* correctness in the sense "just" is not addressed here. Which approach leads to the most correct outcome will probably always be a matter of personality. See *e.g.* Ramberg, J., Skiljedom eller dom? Om effektivitet och rättssäkerhet i dömande verksamhet, JT 1997–98 p. 627 at p. 635 *et seq*.

70 As discussed by Madsen, F., *supra* note 13, p. 498 *et seq*.

the dispute (Recommendation 13).[71] The concept "legal issues" is clarified to regard "propositions of law that may bear on the outcome of the dispute" (Recommendation 6).

It is clearly inappropriate to introduce legal issues that can be expected to be followed by the introduction of new ultimate facts or new reliefs sought; *e.g.* a limitation defense or a claim for interest.[72]

Other situations may be less clear. By way of example, it could arguably be an introduction of a new legal issue if the arbitral tribunal were to ask whether a claim for damages due to breach of contract in part could be regarded as a claim for damages due to *culpa in contrahendo*[73] or if asking whether the facts invoked by the respondent in contesting causality are to be understood as a failure by the injured party to mitigate the loss.[74] Likewise, drawing the parties' attention to form requirements may arguably amount to the introduction of a new legal issue.[75]

The Recommendations seem to generally confine the arbitrators to the legal issues as defined by the parties. At the same time, the arbitrators are not confined to the parties' submissions about the contents of the applicable law, so they may rely on their own knowledge (in a transparent manner) and may review sources that the parties have not referred to as regards the legal issues raised by the parties (Recommendation 7). If the arbitrators want to rely on legal sources that the parties have not referenced, such as statutes, case law or scholarly writing, they should bring the sources to the parties attention and invite their comments (Recommendation 8) – at least when the sources go meaningfully beyond the sources invoked and they may significantly affect the outcome. To clarify, the arbitrators may rely on additional sources with-

71 *Cf.* NJA 1997 p. 825. The opening to raise new legal – and indeed also factual issues – depends on the idea that the arbitrators (and the parties) shall protect against challenges of the award. See also in this regard the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017) article 2 (2). *Cf.* Wetter, G. *supra* note 17, p. 91 *et seq*. This may also call for consideration of over-riding mandatory rules of a third state subject to article 9 (3) of the Rome I Regulation. See generally Babić, D., Rome I Regulation: binding authority for arbitral tribunals in the European Union, 13 Journal of Private International Law, 71–90 (2017).

72 *Cf.* Wetter, G., *supra* note 17, p. 90.

73 Lindell, B., Processuell preklusion, p. 296 (1993) and Heuman, L., JT 1993–94 p. 612 at p. 616 discussing NJA 1988 p. 161.

74 Waincymer, J., *supra* note 10, p. 224.

75 *Cf.* Kleineman, J., *supra* note 9, p. 101 *et seq* and Danielsson, K-E., *supra* note 16, p. 106.

out further notice to corroborate or reinforce other sources that have already been addressed by the parties (Recommendation 10).[76]

Recommendation 6 and 7 read together must mean that it is conceptually possible to introduce a rule of law not referenced by the parties without introducing a new legal issue. The distinction between the permissibility of introducing new legal sources and the "prohibition" against introducing new legal issues can be explained by saying that the former may lead to the introduction of new evidence on law and legal arguments but probably not to more than that, whereas the latter will with probability lead to all that plus the introduction of new ultimate facts, factual evidence and even new or amended claims.

Primarily, the sources of law that could conceivably be introduced should be such that they still fit within the mandate as set by SCJP Chapter 17 Section 3. New sources of law should not be introduced unless the arbitrators reach a *prima facie* conclusion that it may with significant probability affect the outcome.[77]

Given this, in a case where the parties have confined their interpretation arguments to the wording, it seems for example appropriate to draw the parties' attention to the possibility that the tribunal may interpret the contract not only with regard to its wording, but also with regard to the contract as a whole, its perceived nature and purpose and with regard to reasonability *inter alia* based on statutory law. Similarly, it seems appropriate that the arbitrators draw the parties' attention to Section 36 of the Contracts Act, if they consider that a limitation of liability clause which the claimant proposed is null and void, may be valid but subject to adjustment.[78]

The ultimate stakeholders – *i.e.* the parties – generally go to arbitration in order to seek a just and final settlement of their affairs. They usually do not go to arbitration to make a point of law unless they seek an award for need

[76] Rules of law that serve as tacit premises for a referenced rule under discussion may need to be brought to the parties' attention unless they can be corroborated as uncontroversial. It is *e.g.* a tacit premise that offers are binding, if the dispute concerns whether an agreement is not formed due to late acceptance. *Cf.* Kleineman, J., *supra* note 9, p. 116 *et seq*. Such tacit premises may however also comprise tacit legal issues, which in some circumstances may call for an arbitrator activity to clarify what issues the arbitrators are asked to resolve.

[77] Heuman, L., JT 1992–93, p. 919 at p. 922.

[78] See however the much discussed *Werfen* case, in which the Supreme Court of Finland – although in a split decision – upheld an award in which the arbitrators adjusted such a clause under Section 36 of the Finish Contracts Act without giving the parties an opportunity to be heard. KKO 2008:77. See further, Knuts, G., *supra* note 57.

of a precedent. For such parties, the arbitrators' choice to introduce a new legal source may be perceived as unfortunate. It leads to further costs, loss of time, legal arguments and may be new expert opinions. On the other hand, a choice *not* to introduce a new legal source may be perceived as even more unfortunate. It may open up for a party to initiate new proceedings based on that very source provided that the matter has not become *res judicata*[79].

New legal sources *may* be introduced, but the arbitrators are not under a duty to do so in the sense that an omission to introduce should lead to the setting aside of the award under Swedish law.[80] The reason for introducing new legal sources must normally be due to a desire to reach an outcome that is deemed to be legally correct (just) when confinement to the parties' propositions on the applicable law lead to an incorrect outcome (unjust).[81] A final resolution will follow either way. It is a question regarding best practice. The case against introducing a new legal source is weak or non-existent as long as an introduction can avoid injustice, be applied on the factual basis as presented and without any significant increase in costs or loss of time. The case for introducing new sources of law is particularly strong when this can prevent new proceedings.

It can be assumed that the parties, if asked *ex ante* – before knowing who will benefit from it – whether they prefer a correct or an incorrect outcome, they will prefer an outcome that is just rather than unjust, even if the price is marginally higher and it takes marginally longer.[82] If this is so, there should be an *in dubio* preference among arbitrators for the introduction of new legal sources.

If it becomes clear during the deliberations that further information on the applicable law is needed, the arbitrators should not be afraid of re-opening the proceedings to enable the parties to make further submissions, but only to the extent necessary. While considering to re-open the proceedings, the arbitrators should have regard to the relevance, time and cost (Recommendation 11).

[79] See generally the discussion in Heuman. L., *supra* note 11, p. 357 *et seq*.

[80] SOU 1984:81 p. 177, Prop. 1998/99:35 p. 146, Heuman, L., *supra* note 11, p. 325, Madsen, F., *supra* note 13, p. 495. See however Lindskog, S., *supra* note 1, p. 763 and Heuman, L. *id.*, p. 323 *et seq* assuming such a duty in, as it seems, domestic arbitration.

[81] Kleineman, J., *supra* note 9, p. 115 regards this as a duty of loyalty emanating from the mandate. See however Hobér, K., *supra* note 6, p. 244.

[82] Cf. Rawls, A Theory of Justice, p. 17 *et seq* (1971) on the "veil of ignorance".

In choosing between introducing new legal sources during deliberations in order to reach a correct award with or without a re-opening of the proceedings, the arbitrators may consider that the parties will not be able to sway the arbitrators by being given an opportunity to be heard. The costs and loss of time associated with a re-opening therefore seem senseless. Although situations like that may exist, the arbitrators would regularly have to consider whether it is better to give the parties the opportunity to give their view on legal arguments and qualifications as this may reduce the risk for annulment attempts and to some extent increase the chances for the award to reach finality which ultimately may set-off the time and cost drawback of re-opening the proceedings over the new source of law.[83]

[83] Geradin, D. & Paolo Villano, E., *Iura Novit Curia Stealing the Limelight (Again)*, Kluwer Arbitration Blog, April 22, 2016 <http://kluwerarbitrationblog.com/2016/04/22/iura-novit-curia-stealing-the-limelight-again/>, last accessed 2017-05-03. *Cf.* however Justice Lind in NJA 1989 p. 614, reflecting the attitude of a state court when the judgment cannot be appealed or vacated.