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Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality

Veit Öhlberger/Jarred Pinkston

I. Introduction

Iura novit curia is a powerful principle that can play a positive role in international arbitration regardless of the applicable law or the parties' (or their counsel's) cultural background. Much has been written about *iura novit curia* in international commercial arbitration.[1])[2]) This article seeks to cut through the academic/legal discussion to reframe the issue as simply a matter of efficiency and cultural myopia.[3]) The ultimate question is to what extent can *iura novit curia* and related concepts of a non-passive adjudicator further the goals of arbitration.

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[1]) Andrea Meier & Yolanda McGough, *Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to be Heard in International Arbitration: an Analysis in View of Recent Swiss Case Law,* 32 Asa Bulletin 490 (2014); Jeff Waincymer, *International Arbitration and the Duty to Know the Law,* 28 Journal of International Arbitration 201 (2011); Christian P. Alberti, *Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?, in* International Arbitration and International Commercial Law: Synergy, Convergence and Evolution 3 (Kröll et al. eds., 2011); Gisela Knuts, *Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case Law,* 28 Arbitr Int 669 (2012); Mohamed S. Abdel Wahab, *Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown, in* Festschrift Ahmed Sadek El-Kosheri 3 (Nassib G. Ziadé ed., 2015); Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence,* 28 Arbitr Int 173 (2012); Teresa Giovannini, *International Arbitration and Jura Novit Curia, in* Liber Amicorum Bernardo Credades (M. A. Fernandez-Ballesteros & David Arias eds., 2010); International Law Association, *International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration",* 26 Arbitr Int 193 (2010); International Law Association, *Rio De Janiero Conference (2008) International Commercial Arbitration, available at* www.ila-hq.org/en/committees/index.cfm/cid/19 (last visited October 21, 2015); Joanna Jemielniak & Stefanie Pfisterer, *Iura Novit Arbiter revisited: towards a harmonized approach?* 20 Unif. L. Rev. 56 (2015).

[2]) This article does not touch upon investment arbitration or other forms of arbitration.

[3]) International Law Association, *International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in Interna-*

The authors' proposition in this article is twofold. First, the use of the principle *iura novit curia* – or broadly defined as a non-passive arbitrator in this article – should simply be seen as a discretionary,[4]) procedural mindset available to arbitrators. Whether that procedural mindset should be embraced is a question of efficiency and pragmatism, not one of finding an explicit legal basis for it (Section III). The authors believe that many arbitrators, particularly those from a common law background (like one of the authors), are unnecessarily hesitant to play a more active role in structuring and pushing arbitration proceedings forward. The authors believe this reticence is partially based on ungrounded fears of being perceived as impartial and fears of violating due process (Section IV). The authors provide guidance (Section V) on how to proactively avoid making the use of the *iura novit curia* principle into a legal issue in the context of an arbitrator challenge or a challenge of an award or to its recognition or enforcement. The reality is that arbitrators can have a near free hand to play a more active role.

Second, arbitration practitioners should take off their cultural blinders and independently evaluate the value of a non-passive arbitrator. The authors believe that a non-passive arbitrator, drawing upon the rich tradition behind and mechanisms supporting *iura novit curia* (*e.g.*, raising issues with parties early, conducting independent legal analysis), better promotes the goals of international arbitration and the parties' ultimate satisfaction (Section VI).

II. What is *Iura Novit Curia* in the Context of International Arbitration?

The principle of *iura novit curia* has a rich history. It can be traced back to at least the 12th century[5]) and has formed a corner stone of a number of legal systems.

In the narrowest sense *iura novit curia* simply means the court knows the law and may have an obligation to apply it *ex officio*. This understanding in court litigation extends to both domestic and foreign law. However, the authors consider this distinction to be irrelevant in international arbitration because "[t]here is technically no distinction between foreign and domestic law in international arbitration; what remains is applicable law".[6]) When speaking of *iura novit curia*, this article does not maintain the domestic and foreign distinction. It also does not maintain the distinction of whether a particular legal system considers the content of the applicable law a question of law or fact.[7])

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tional Commercial Arbitration", *supra* note 2, at 17 ("The Committee has not been able to discern any uniform practice, and the opinions of scholars vary considerably […]"). This article is squarely focused on the practical realities facing practitioners.

[4]) If and to what extent arbitrators might be even obliged to apply the principle of *iura novit curia* will not be covered by this article.

[5]) Meier & McGough, *supra* note 1, at 490.

[6]) Alberti, *supra* note 1, at 13–14.

[7]) Knuts, *supra* note 1, at 671 (arguing "that rather than focusing on the law/fact

Iura novit curia has two facets: (1) knowing the law and (2) pro-actively applying the law (potentially independent of the parties' pleadings). The article focuses on the latter facet and uses the term *iura novit curia* in the broad sense of a non-passive arbitrator. In the authors' opinion, *iura novit curia* is also intuitively and integrally intertwined with an inquisitorial approach to resolving disputes. The principle *iura novit curia* and an inquisitorial approach fundamentally rely on the adjudicator playing an active (even leading) role in deciding a dispute. A non-passive adjudicator goes to the heart of "the civil law systems [that] are premised on the belief that justice can be better served by granting the court a wider scope of power to search for truth in co-operation with the parties or, eventually, independently from them".[8])

The term *iura novit curia* as used in this article incorporates the concept of the non-passive arbitrator: sharing his or her understanding of the applicable law; conducting independent research on the applicable law and discussing that research with the parties; probing the parties' positions by making legal and factual inquiries; and, potentially raising issues *ex officio.* In short, the authors consider *iura novit curia* to be a gateway principle that allows an arbitrator to shed any passiveness in steering the arbitration. When used judiciously, such an approach should create an ongoing dialogue between the arbitrator and the parties.

The authors wish to emphasize that they are only advocating for a more active dialogue between parties and arbitrators. "An experienced arbitral tribunal will and should use its authority to persuade the parties to agree on a procedure that the arbitrators consider appropriate for the case […]"[9]) That said, arbitration is, and should remain, a party driven process.

> In some respects an international arbitration is like a ship. An arbitration may sad to be "owned" by the parties, just as a ship is owned by shipowners. But the ship is under the day-to-day command of the captain, to whom the owner hands control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone who is in command; and, behind the captain, there will always be someone with ultimate control.[10])

Parties should have an objective interest in a more efficient proceeding (as seen before a concrete dispute arises) and a non-passive arbitrator can promote efficiency.

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dichotomy, the tribunal should never apply the principle of jura novit curia without first ascertaining that this does not jeopardize the finality of the award").

[8]) International Law Association, *Rio De Janiero Conference (2008) International Commercial Arbitration, supra* note 2, at 3.

[9]) Jason Fry, Simon Greenberg & Francesca Mazza, The Secretariat's Guide to ICC Arbitration § 3-718 (2012).

[10]) Nigel Blackaby & Constantine Partasides, Redfern and Hunter on International Arbitration 363 (5th ed., 2009).

III. Authority/Discretion to Apply *Iura Novit Curia*

Lawyers tend to crave certainty and clarity when it comes to applying legal rules and concepts. However, as is often the case, flexibility and fluidness replace clarity and certainty in international arbitration. Arbitration practitioners, pundits and academics have attempted to establish and define the role of *iura novit curia* in international arbitration[11]) but the reality is that "there is rarely an express power to apply *iura [novit curia]* in arbitration".[12]) Commentators have attempted to extrapolate from domestic legal regimes and looked to national arbitration laws, decisions of international tribunals, and institutional arbitration rules to define the basis of an arbitrator's power to apply *iura novit curia* in international arbitration. A brief summary of those potential bases follows below. It is a meager record and we posit from the limited results that an arbitrator's best basis for integrating *iura novit curia* and derivative principles into a robust arbitration proceeding remains the arbitrator's well-established discretion with regards to matters of procedure. Enmeshing an arbitrator's ability to invoke *iura novit curia* in international arbitration with an arbitrator's procedural discretion provides a sounder basis for applying the principle than looking for an explicit rule to do so.

Reconceptualizing *iura novit curia* as merely a procedural mindset or an device that an arbitrator may use at their discretion,[13]) moves the discussion beyond a purely legal, abstract discussion to issues of efficiency, pragmatism, and meeting the expectations of parties to an arbitration. An arbitrator's discretion with regard to matters of procedure is not unfettered, however. The limitations are discussed below in Section IV. With a little bit of awareness, arbitrators can mostly sidestep these limitations and this is discussed further below in Section V. The following brief summary only sketches the outline of the legal basis for applying *iura novit curia.*

A. Attempts to Extrapolate from Domestic Legal Regimes: Cultural Basis

One cannot draw a straight line from litigation practice (of whichever country) to international arbitration practice. Despite this, much of the discussion about *iura novit curia* in international arbitration begins with domestic litigation regimes. From reading through the literature, a sliding scale emerges of to what

[11]) *See supra* note 1.

[12]) Waincymer, *supra* note 1, at 217.

[13]) "A contentious question in terms of arbitrator duties is whether a tribunal must know and apply the appropriate law regardless of the contentions of the parties, under the principle iura novit curia, in some cases, even without notice to the parties." Waincymer, *supra* note 1, at 201. As already mentioned in note 4 above, the authors do not take a position in this article on the issue of whether an arbitrator has an obligation in certain situations to apply the *iura novit curia* principle.

extent a country embraces the *iura novit curia* principle with regard to foreign law (which the authors consider to be the more apt analogy for arbitration).[14])

Sit there and listen while I tell you about the applicable law, and I might have some questions for you.	I know something about the law but I am willing to listen to what you have to say (hybrid approach). Let's figure this out together.	Thank you for sharing the facts. Can you also please tell me about the applicable law?
Germany[15]), Austria[16])	France, Denmark, Finland, Spain, Sweden, Switzerland, U.S.A.	England[17])

Most countries fall in the muddle in the middle of having a hybrid system, where the adjudicator works together with the parties to establish the law and facts.[18]) Much academic thought has been put into discussing the differences between these legal systems.[19]) That discussion is ultimately irrelevant for arbitration because "[b]eyond a superficial analogy court approaches to determining the contents of law do not provide strong guidance for how arbitrators should ascertain the contents of law".[20])

Despite the technical irrelevance of looking to domestic legal regimes, domestic legal regimes remain inordinately important. Lawyers are not born as logic applying legal machines. Lawyers generally gestate in one legal system before embarking on their careers in international arbitration. Once embarked no limitation exists (other than the maximum of (approx.) 190 different countries in the world) as to how many legal systems a lawyer may be confronted with. The cultural starting point for any lawyer remains quite important with regard to how that lawyer will begin to interact with new, unknown legal systems and concepts.

[14]) *See supra* note 1.

[15]) Alberti, *supra* note 1, at 6–7.

[16]) *Cf.,* Art 4 of the Austrian Act on Private International Law ("Das fremde Recht ist von Amts wegen zu ermitteln. […]" [translation: Foreign law is to be determined ex officio.]); Art 271 of the Austrian Code of Civil Procedure (ACCP) emphasizes that Austrian courts are not limited to evidence offered by the parties on foreign law ("Bei Ermittlung dieser Rechtsnormen ist das Gericht auf die von den Parteien angebotenen Beweise nicht beschränkt; es kann alle zu diesem Zwecke ihm nöthig scheinenden Erhebungen von amtswegen einleiten und insbesondere, soweit erforderlich, das Einschreiten des Justizministers in Anspruch nehmen."); *see also* OGH, October 12, 2011, docket no. 3 Ob 31/11x (Austria) (where the Supreme Court explicitly refers to the court's duty to establish a legal analysis from all perspectives in line with the principle *iura novit curia*).

[17]) International Law Association, *Rio De Janiero Conference (2008) International Commercial Arbitration, supra* note 1, at 11 (for all above mentioned jurisdictions, except Germany and Austria).

[18]) The countries following the hybrid approach may apply a different analysis but the end result is the same in that there is a give and take between the court and parties.

[19]) *See supra* note 1.

[20]) International Law Association, *Rio De Janiero Conference (2008) International Commercial Arbitration, supra* note 1, at 12.

"It is often suggested that the question of the arbitral tribunal's authority to apply the principle of *iura novit curia* when determining the *lex causae* will depend on the legal culture of arbitrators, *i.e.* whether the arbitrators perceive the *lex causae* as a law or as a fact."[21]) "Authority" should not be confused with willingness. An arbitrator's legal culture will certainly influence that arbitrator's willingness to apply the principle of *iura novit curia* but whether an arbitrator has that authority to do so is an independent matter. Putting all technical legal issues to the side, the greatest hindrance to *iura novit curia* playing a productive role in international arbitration remains the mindset of parties, their counsel and arbitrators and their willingness to apply the principle of *iura novit curia.*

B. National Arbitration Laws

The academic literature has unearthed a paucity of jurisdictions where the national arbitration law directly addresses different faces of *iura novit curia.* Under Section 34 of the English Act an arbitrator shall "decide all procedural and evidential matters, subject to the right of the parties to agree any matter". Under procedural and evidential matters is the issue of "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law".[22]) In the Netherlands under Art 1044 of the Dutch Code of Civil Procedure an arbitrator "may, through the intervention of the Provisional Relief Judge of the District Court at The Hague, ask for information as mentioned in Article 3 of the European Convention on Information on Foreign Law".[23]) Denmark has a similar provision in Art 27 (2) Danish Arbitration Act.[24])

This constitutes the extent to which national arbitration laws expressly touch upon *iura novit curia* in the context of arbitration.[25]) National arbitration laws, other than the three examples given, simply do not provide an express basis to apply the principle of *iura novit curia.*

C. International Tribunals

Various international courts have expressly applied *iura novit curia.* This includes the International Court of Justice, Permanent Court of International Justice, the World Trade Organization, Inter-American Court of Human Rights and

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[21]) Knuts, *supra* note 1, at 670–671.

[22]) *Available at* www.legislation.gov.uk/ukpga/1996/23/section/34 (last visited October 21, 2015).

[23]) *Available at* www.dutchcivillaw.com/legislation/civilprocedure044.htm (last visited October 21, 2015).

[24]) *Available at* voldgiftsinstituttet.dk/wpcontent/uploads/2015/01/danish_arbitration_act_2005.pdf (last visited October 21, 2015).

[25]) *See* generally Alberti, *supra* note 1.

the International Criminal Court.[26]) Those courts have their own unique legal basis, which makes it difficult to draw any conclusions for commercial arbitration from them. However, they are persuasive authority to the benefits of the *iura novit curia* principle.

D. Arbitral Rules

The only mainstream arbitration institution empowering an arbitrator to play a non-passive role with regard to the law and facts is the LCIA. LCIA Rule 22 (1) states:

> The Arbitral Tribunal shall have the power, upon the application of any party or […] upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:
>
> […]
>
> (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute […].[27])

England, as one of the countries with probably the least developed concept of *iura novit curia,* has proven counter-intuitively to be the country most committed to expressly establishing *iura novit curia* in international arbitration both in its laws and the rules of the LCIA.

E. General Discretion with Regard to Matters of Procedure

"International arbitrators are generally vested with wide discretion in most matters of procedure."[28]) This wide discretion is anchored in various arbitral rules[29]) and arbitration practice. International arbitration practice "now allows

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[26]) *Id.;* International Law Association, *Rio De Janiero Conference (2008) International Commercial Arbitration, supra* note 1, at 10.

[27]) *Available at* www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules 2014.aspx#Article 22 (last visited October 21, 2015).

[28]) Landolt, *supra* note 1, at 173.

[29]) William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion,* 19 Int'l Arb. 284 (2003) ("More often than not […] provisions [of the different arbitration institutional rules] are remarkably similar. Assuming each side gets an opportunity to be heard, conduct of the proceedings is left to the arbitrators […]"); LCIA Rule 14.2 ("[…] the Arbitral Tribunal shall have the widest discretion to dis-

arbitrators complete freedom in choosing the applicable procedure, or in simply resolving procedural issue as and when they arise".[30])

As in most jurisdictions the principle of *iura novit curia* is not explicitly provided for in the law, the arbitrators' procedural discretion is often – and in the authors' opinion rightfully – considered to be its gateway.[31])

F. Conclusion on Authority

Whereas the Authors believe that national litigation rules are not the right authority to the principle of *iura novit curia* in arbitration, explicit provisions on *iura novit curia* are scarce. However, no direct limitations exist to applying the principle *iura novit curia* and a substantial basis for its application can be found under the umbrella of the arbitrator's procedural discretion. Nevertheless, a number of indirect limitations exist to an arbitrator assuming a non-passive role and those are discussed below.

IV. Indirect Limitations to Apply *Iura Novit Curia*

Indirect limitations restricting the use of the principle *iura novit curia* can be divided into: (1) risks for the arbitrator; and (2) risks for the award.

A. Risks for the Arbitrator

The main risk for the arbitrator is that a too broad application of the principle *iura novit curia* during the course of the proceedings could result in a challenge due to lack of impartiality. The authors believe that is one of the primary hin-

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charge its duties allowed under such law"); ICC Rule 19 ("The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is made to the rules of procedure of a national law to be applied to the arbitration"); ICDR Rule 20 (1) ("[…] the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case"); VIAC Rule 28 (1) ("The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties but otherwise in the manner it deems appropriate. The arbitral tribunal shall treat the parties fairly and shall grant the parties the right to be heard at every stage of the proceedings.").

[30]) Emmanuel Gaillard & John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration § 1190 (1999).

[31]) International Law Association, *International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", supra* note 1, at 209.

drances to arbitrators not posing questions of fact that could lead to different claims or a new legal reasoning for a claim and discussing questions of law not raised by the parties in their submissions.

The fear of an arbitrator challenge based upon an arbitrator acting non-passively is not justified. For example, the Secretariat of the Vienna International Arbitral Centre (VIAC) received 26 challenges[32]) (concerning 32 arbitrators) between January 2006 and September 2015.[33]) Only in one case did a party assert as the basis of the challenge that the tribunal had raised a legal issue not mentioned by the parties. More specifically, the tribunal followed its suspicion of corruption and money laundering (and related legal consequences), despite the fact that none of the parties raised these issues. Claimant filed a challenge against all three members of the tribunal. The Board of the VIAC rejected the challenge because – in consideration of the submissions and evidence before the tribunal – it seemed reasonable to have suspicions in this regard. Also, the procedural orders concerning this issue were carefully drafted and well reasoned.

These findings are also in line with other authorities on this issue. For example, Gary Born emphasizes that "[i]n practice, however, national courts and appointing authorities have generally rejected claims that an arbitrator's conduct was evidence of improper bias. In particular, decisions have correctly cautioned against using mechanisms for challenging an arbitrator's independence to revisit a tribunal's interlocutory procedural rulings."[34])

B. Risks for the Award

Risks for the award (triggered by a too broad application of the principle *iura novit curia*) center on potential violations of the right to be heard, due process,

[32]) Art 20 of the Vienna Rules provides, *inter alia,* the following: "(2) A party's challenge of an arbitrator shall be submitted to the Secretariat within 15 days from the date the party making the challenge became aware of the ground for the challenge. The challenge shall specify the ground for the challenge and include corroborating materials to substantiate the challenge. (3) If the challenged arbitrator does not resign, the Board shall rule on the challenge. Before the Board makes a decision, the Secretary General shall request comments from the challenged arbitrator and the other party/parties. The Board may also request comments from other persons. All comments shall be communicated to the parties and the arbitrators."

[33]) These statistics and the following case abstract were provided to the authors by the VIAC. *See also* Manfred Heider, *Die Ablehnung von Schiedsrichtern in Verfahren vor dem Internationalen Schiedsgericht der Wirtschaftskammer Österreich – VIAC, in* Ars Aequi et Boni in Mundo – Festschrift für Rolf A. Schütze zum 80. Geburtstag 181 (Reinhold Geimer et al. eds., 2014) (the above described challenge was filed after the publication of the aforementioned article).

[34]) Gary Born, International Commercial Arbitration 1878 (2nd ed., 2014); *see also* Thomas W. Walsh & Ruth Teitelbaum, The LCIA Court Decisions on Challenges to Arbitrators: An Introduction, ARBITR INT Vol 27 283 (2011) (showing no single challenge on the grounds that the tribunal had raised a legal issue not mentioned by the parties).

and/or procedural public policy. Regularly, alleged violations of any of the aforementioned principles boil down to the question whether the tribunal based its decision on unforeseeable grounds. Another risk in this context for an award is that the tribunal may not award more than it was requested *(ne ultra petita).*

This being the Austrian Yearbook on International Arbitration – combined with the fact that *iura novit curia* is firmly established in Austria – makes Austrian jurisprudence a good starting point. The Austrian Supreme Court had to deal with both of these risks, *ne ultra petita* and whether the tribunal based its decision on unforeseeable grounds, in its decision of October 10, 2014.[35]) In this case, the Austrian Supreme Court had to decide whether to set aside an award that had been rendered between a Danish claimant and a Croatian respondent. The subject matter of the arbitration proceedings were various claims resulting from the termination of an "International Management Agreement" regarding a hotel in Zagreb owned by Respondent, which Claimant was contractually obliged to run. In the arbitral award, the Croatian hotel owner had been ordered to compensate the Danish hotel management company. The Croatian Respondent challenged the award and argued that the arbitral tribunal based its decision on the assumption of a mutual dissolution of the contract rather than the argued termination of the contract by the Croatian Respondent. The Supreme Court subsequently discussed whether the arbitral tribunal exceeded the relief sought by the claimant *(ne ultra petita)* and/or violated the parties' right to be heard. As regards *ne ultra petita* the Supreme Court emphasized that an arbitral tribunal is not bound to the legal reasoning provided in support of a prayer of relief but may base its decision, like Austrian State courts, on another legal reasoning (here: mutual dissolution of contract and not unilateral termination) if and to the extent the prayer of relief is not in its wording explicitly limited to the one legal reasoning provided by the Claimant. Pursuant to Art 182a of the Austrian Code of Civil Procedure ("ACCP") the court may only base its decision on legal grounds that one party obviously failed to consider or deemed irrelevant if it discussed these grounds with the parties and gave them the opportunity to comment (whereby subsidiary claims are excluded from this obligation). The Austrian Supreme Court held that there was indeed a breach of this obligation as the tribunal did not grant the parties an opportunity to comment on its legal approach. This constituted a procedural error that would have justified an appeal in proceedings before an Austrian State court. However, the Supreme Court also stated that, (at least) in this case, such procedural error did not reach the threshold of a sufficiently severe violation of the right to be heard to constitute a reason for setting aside the award. The Austrian Supreme Court, therefore, upheld the award by relying on the principle of *iura novit curia,* based on previous case law that an award can only be set aside when a party's right to be heard has not been granted at all.

In its decision on *Commercial Caribbean Niquel ("CCN")* v. *Overseas Mining Investments ("OMI")* the French Cour de Cassation decided a similar case in the

[35]) OGH, October 10, 2014, docket no. 18 OCg 2/14i (Austria).

opposite way. The arbitral award in question ordered CCN to compensate OMI for damages. However, the arbitral tribunal did not grant damages for lost profits, as requested by OMI, but it based its decision on the grounds of loss of opportunity, which had, at no time during the arbitral proceedings, been raised by the parties. CCN, therefore, initiated annulment proceedings before the Cour d'appel de Paris and succeeded. Subsequently, OMI appealed to the Cour de Cassation and claimed that the arbitral tribunal had not deviated from the parties' requests but it merely reduced OMI's damages, meaning that there was no change in the legal reasoning for the decision. However, the Cour de Cassation held that the arbitral tribunal had established a new legal basis for the compensation claim and that the parties should have had an adequate opportunity to address the new legal basis. It stated that granting compensation on a basis not requested by the parties, without giving them an opportunity to comment, constituted a breach of due process and, consequently upheld the decision setting aside the award.

A medium approach, lying more or less in between the aforementioned Austrian and French decisions, seems to be taken by the Swiss Federal Tribunal. Albeit the principle *iura novit curia* is not unlimited, parties do not have a right to be heard on the tribunal's legal assessment unless the tribunal intends to base its decision on a rule of law or legal concept that was not raised by the parties and whose relevance the parties could not anticipate.[36]) However, the threshold for such unforeseeable legal grounds seems to be high. If a legal issue has been discussed in the proceedings, the parties must expect the tribunal to take into account all potential legal angles of this issue, whether or not they were raised by the parties.[37])

Surprisingly supportive of the use of the principle *iura novit curia* in arbitration seems to be the English courts. In a well known case, the Tribunal appointed an expert to help determine the applicable law without consulting the parties or inviting the parties to a meeting with the expert. This resulted in a challenge to the award before the English courts. Although the High Court found the Tribunal's conduct inappropriate, it held that it did not amount to an "irregularity" under the English Arbitration Act and, thus, did not constitute a basis for setting the award aside.[38])

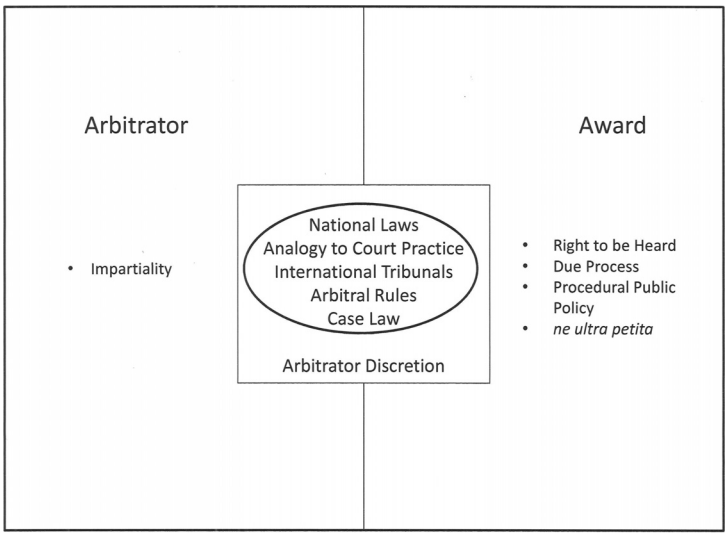
C. Conclusion on Indirect Limitations

The above shows that case law, overall, seems to be rather supportive of the use of the principle *iura novit curia*. It also shows that in arbitration the applicability of the principle of *iura novit curia* seems not so much to be linked to any perceived divide between civil law and common law,[39]) as in particular shown by the

[36]) Meier & McGough, *supra* note 1, at 501–502.
[37]) *Id.* at 502.
[38]) *Hussman (Europe) Ltd.* v. *Al Ameen Dev. & Trade Co.* [2000] EWHC 210 (Comm).
[39]) Other commentators have suggested that arbitrators should state clearly at the

aforementioned English decision. Thus, arbitrators regardless of their background should not be afraid to use the principle of *iura novit curia.* However, as the above mentioned French decision shows, even jurisdictions commonly perceived as arbitration friendly, might be rather strict in this context, so arbitrators should protect themselves and their awards when relying on the principle of *iura novit curia.* Several suggestions on how to do this are presented in the following.

The below box shows the relationship between the issues touched above. The core circle and square shows the foundations of an arbitrator's ability to use the principle of *iura novit curia,* whereas the left and right columns show its indirect limitations.



V. Suggestions of How to Mitigate Risks associated with *Iura Novit Curia*

Two stages exist for arbitrators to mitigate any risk of an arbitrator challenge for impartiality or a challenge to an award. An arbitrator can protect himself or herself and their award already before becoming non-passive or thereafter. The means of protection differ based on timing.

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beginning of the arbitration which of the three approaches to *iura novit curia* an arbitrator will apply: (1) question of fact; (2) question of law; (3) hybrid issue. The hybrid approach "leaves the tribunal considerable discretion, and it has been suggested that this approach is increasingly the norm in international arbitration." (Knuts, *supra* note 1, at 670–671; this article has embraced the hybrid approach and it underlines the authors' own recommendations).

A. Before Becoming Non-Passive

When an arbitrator wishes and intends to play a non-passive role, he or she should not simply rely on the procedural discretion granted to them and should put the parties on notice of their intend to do so. Arbitrator challenges regularly arise when a party's expectations collide with a different reality. If a party was expecting a passive arbitrator, any divergence may catch them off guard even if that divergence was objectively beneficial to the process. The problem is that once arbitration commences, parties generally no longer focus on what is objectively beneficial to the process but on what helps them win the case. The key moment in time to focus on what is objectively beneficial to the process is at the very beginning of the arbitration before concrete procedural disputes have arisen and the parties' positions still remain nascent.

Four ways exist to create a sound procedure, incorporating a non-passive arbitrator, before that arbitrator opens their mouth to discuss the case with the parties. First, the rules of an arbitral institution can expressly empower an arbitrator to be non-passive. LCIA Rule 22 (1) goes in this direction and should be commended. The rule could go one step further and expressly state that any inquiries made by an arbitrator cannot form the basis of a challenge to that arbitrator based on impartiality. We believe that a strong basis already exists for arbitrators to be non-passive but the lingering fear of an arbitrator challenge may limit their willingness to do so.

The second and third methods to encourage an arbitrator to be non-passive are contract based. "[A]rbitration's contractual nature invites procedural innovation aimed at reconciling truth-seeking with other litigation goals such as efficiency."[40]) Second, it is unlikely, but conceivable that parties could address a number of procedural elements in their original contract. However, as the champagne clause, the arbitration clause seldom receives due consideration.[41]) Third, for arbitrations conducted under arbitral rules envisioning terms of reference or something similar, the issue can be addressed there. For example, a clause in the terms of reference could state:

> The parties acknowledge and agree that the arbitrator may raise points of law and fact on his or her own initiative with the parties at any time and this will not constitute a basis for a party to claim that an arbitrator has acted

[40]) William W. Park, *Truth-Seeking in International Arbitration, in* ASA Special Series No. 35, The Search for Truth in Arbitration: Is finding the Truth What Dispute Resolution is About? 7 (Marcus Wirth & Christina Rouvinez & Joachim Knoll eds., 2011).

[41]) Park, *supra* note 29, at 284; *see* also Jarred Pinkston, *The Case for a Continental European Arbitral Institution to Limit Document Production, in* Austrian Yearbook on International Arbitration 2011 87–111 (Klausegger et al eds., 2011) ("When the intoxicating scent of a nearly-completed deal hangs in the air, parties generally prefer to avoid injecting the stink of negativity into negotiations by broaching the topic of what should happen when the deal goes bad and today's valued partner becomes tomorrow's respondent or claimant").

impartially. Any view expressed by an arbitrator is provisional until the issuance of a final award.

Having been signed by the parties, the terms of reference become a contract between the parties.

The fourth way for an arbitrator gain firmer footing to act non-passively is in a "Procedural Order No. 1", where the arbitrator sketches out as many procedural rules as possible before an actual disagreement between the parties arises. An extensive Procedural Order No. 1 has become routine practice in international arbitration and it is a helpful tool to promote efficiency.[42]) Although parties can and should be invited to comment on a draft Procedural Order No. 1, a Procedural Order No. 1 generally should not be signed by the parties or take on the appearance of a contract between the parties. To do so, can risk tying the arbitrator's hands and endanger an award if an arbitrator slightly deviates from such an agreement.[43])

These four methods will help the parties buy into the idea of a non-passive arbitrator. They will also further reduce the risk of an arbitrator challenge based on engaging in an open dialogue with the parties and any risk of a challenge to an award and to its recognition and enforcement. A challenge to an arbitrator may fail on the merits but succeed from a tactical perspective. A challenge costs time and money. Apprehension about an arbitrator challenge being filed can prove as much of a deterrent as the fear of a challenge actually succeeding. The four methods described can help also prevent the fear of a challenge from arising.

B. After Becoming Non-Passive

A clear legal, academic and common sense consensus exists for the situation where an arbitrator raises an issue on their own initiative.[44]) An arbitrator should, without fail, invite the parties to comment when raising issues on their own initiative. Inviting parties to comment will negate the risk of a challenge based on due process violations. However, it will not mitigate the risk of challenges based on impartiality arising from any initiative the arbitrator may take.

The primary problem with the remedy of inviting parties to comment is one of efficiency. This issue is taken up in the next section. However, it is an effective remedy that should prevent a due process challenge.

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[42]) Blackaby & Partasides, *supra* note 10, at 6.06–6.07.

[43]) The *Flex-n-Gate* v. *GEA* case in Germany clearly highlights this risk. *Available at* kluwerarbitrationblog.com/blog/2012/11/20/arbitrators-nightmare-when-procedural-orders-backfire-flex-n-gate-v-gea/ (last visited on October 21, 2015).

[44]) *See* generally *supra* note 1.

VI. Further Considerations on the Benefits of a Non-Passive Arbitrator

A. From the Overall Perspective

Parties (via their counsel) may play games. Parties may have an incentive to distract from the law. Parties may wish to talk about something other than the core issues. Parties may think it is in their best interest to overwhelm arbitrators with issues. Parties may simply try to buy time. Parties may not know the applicable law. Parties may not have the resources to dig deeply into a complex foreign legal issue. And parties may do everything objectively correct but still not touch upon an issue the arbitrator considers relevant or even decisive.

For all of these reasons, the arbitral system should have the potential of a counterbalance to a purely party driven system. A non-passive arbitrator can play that role. A party driven system only works if the parties are driving in the same direction. A non-passive arbitrator should seek to steer the proceedings in the interest of all parties. The issue should not be what an individual party currently wants in the heat of combat but what they would have objectively wanted from a fair and efficient proceeding before the dispute commenced. A non-passive arbitrator can provide a fair and efficient proceeding through a steady hand and sharing his or her accumulated wisdom through an open dialogue with the parties.

B. From the Parties' Perspective

An arbitrator is appointed for their perceived wisdom and expertise. The parties and process should take full advantage of that wisdom and not wait to see it exposed only in the final award. Parties are paying for the arbitrator's time: why should they not get the most for their money at all stages of the arbitration.

Counsel may fear a non-passive arbitrator because they fear losing control of the process. That feeling of control is, at least to a certain extent, an illusion. Counsel may dictate how many hours are focused on task A (*e.g.,* the length and subject matter of submissions) or task B (*e.g.,* the issues forming the topic of cross-examination) but that control evaporates the moment an arbitrator or tribunal adjourns for deliberation. The arbitrator will bring his or her intellect and wisdom to bear on the matter. An arbitrator will often not be able to simply decide between position A and position B as presented by the parties. The facts and law will often push the issue in another direction or to some kind of middle ground: An unsurprising reality considering that parties have incentives to take diametrically opposing positions. This is where an arbitrator's wisdom most comes into play and where the parties have already lost an opportunity to influence the arbitrator.

By fully engaging with a non-passive arbitrator, parties will have much more opportunity to influence an arbitrator where it counts most. A better way of looking at the issue is to consider the non-passive arbitrator as placing a flag down on

an issue (after initially hearing the parties) and inviting the parties to move him or her to the left or right of the flag toward their position. A party may only have to move the arbitrator a millimeter or two in their direction on that issue to win the issue. In contrast, a passive arbitrator that allows the parties to place their own flags down, potentially kilometers apart, must then determine where his or her conclusion should fall (somewhere along that large spectrum created by the parties). All the while the parties' arguments may fall well away from the arbitrator's conclusion. The parties wasted time arguing unnecessary issues and the arbitrator wasted time crafting a middle ground solution.

The authors believe it better to lose the veneer of control earlier and fully engage with an arbitrator than lose control later when the arbitrator retires behind closed doors. By engaging an arbitrator early, parties will gain greater control over their ability to influence the arbitrator on the issues the arbitrator considers most important or contentious, and not waste time and resources fully litigating every issue.

C. From an Arbitrator's Perspective

The key consideration in determining how active a non-passive arbitrator should be is the stage of the arbitration. A non-passive arbitrator is most valuable early as they can provide some guidance to the parties and focus the dispute. This is, however, the stage most likely to implicate the fears of arbitrator impartiality. The four methods for mitigating impartiality before an arbitrator becomes non-passive take on great importance in this regard. As the arbitration proceeds, a non-passive arbitrator raising issues with the parties at a late stage should invite comments from the parties to avoid due process concerns. Comments, more comments and then more comments undermine efficiency. An even worse outcome is for an arbitrator to deliberate at the end of proceedings and only then discover crucial gaps in the case of one party. The difficulties around the decision whether to go back to the parties asking for comments and the delays in case of doing so could have been avoided at an earlier stage by a non-passive arbitrator. All this further heightens the importance of a non-passive arbitrator playing a more active role early rather than waiting to later. By becoming active early, an arbitrator will likely not prolong the proceedings as their comments can be addressed within the existing structure of the proceedings, *e.g.*, scheduled submissions and hearing.

Another issue with *iura novit curia* in international arbitration is the dynamic between members of a tribunal. The three members of a tribunal will likely come from different legal systems and have come to their appointment by different means (*e.g.*, party appointed, institutions appointed, appointed by co-arbitrators). In this context, one arbitrator well versed in the applicable law has the ability to take on inordinate importance in internal deliberations, especially late in the arbitration.

In this regard, one concrete recommendation is for a tribunal to have a brief

internal deliberation after the contours of the case have become clear. Arbitrators should openly discuss their preliminary views. Any red flagged issues can become a part of the dialogue between the tribunal and the parties. This provides parties with the ability to address the legal thinking of a tribunal that might greatly be influenced by one member of the tribunal with specialized knowledge of the applicable law.

The barriers to arbitrators conducting legal research in legal systems they are unfamiliar with and possibly in a language they do not know are an additional practical consideration. By engaging in active and early dialogue, the parties can better educate the arbitrator to the extent necessary.

VII. Conclusion

"Efficiency-promoting tools must always be harnessed with an arbitral process that aims to ascertain what happened and to provide a reasonable understanding of relevant legal norms."[45]) The principle of *iura novit curia* and the notion of a non-passive arbitrator underlying the principle are wonderful "efficiency-promoting tools" that also promote the goals of arbitration and strengthen the process. Arbitrators – whether from the fog of cultural myopia, fear of an arbitrator challenge or fear of challenge to the award – often remain passive in arbitral proceedings. The article has attempted to slightly dissipate that fog and reframe the issue of the non-passive arbitrator as a question of efficiency.

[45]) Park, *supra* note 40, at 4.