Articles

The Remedial Armoury of an Arbitral Tribunal: The Extent to Which Tribunals Can Look Beyond the Parties' Submissions[1]

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1. Introduction

The function of arbitral tribunals is to determine claims and disputes which parties have submitted to them. It is generally acknowledged that arbitral tribunals have broad powers in respect of determining the dispute and granting relief, often wider than those powers available to a court hearing the same dispute. The tribunal derives its power to resolve the dispute before it from the arbitration agreement between the parties, which will determine which matters are, or can be, referred to the tribunal for resolution, and from the relevant curial law. In the case of agreements to refer future disputes to arbitration, once the dispute arises, the parties will decide what specific disputes they wish the tribunal to resolve. That being so, what the parties have submitted for determination will be relevant to what the tribunal can determine.

This paper considers the powers of the tribunal in three parts. First, it will look at the powers of the arbitral tribunal with respect to granting remedies generally. Secondly, it will consider whether a tribunal is limited only to granting relief as requested by the parties, or whether it has broader remedial authority. In the context of this discussion, this section examines the civil law concept *of iura novit curia* and considers if and how it can be adapted for international arbitration. Thirdly, it considers procedural requirements as they apply in arbitral practice and how they affect the application of *iura novit curia* in international arbitration.

2. The Tribunal's Power to Grant Relief

The tribunal's power is based on two main pillars: the arbitration agreement and the applicable arbitration laws. The power to grant relief is rooted in the arbitration agreement and is activated by the parties' submission to arbitration. It is through this that the tribunal derives its authority to determine the dispute and make a final award. The applicable arbitration laws support and give effect to the arbitration agreement. They also provide the legal framework in which the arbitration takes places.

The basis of the tribunal's power

Although the arbitration agreement may contain express provisions conferring remedial powers upon the tribunal, this is rarely the case. The more common situation is that the arbitration agreement will be silent as to what relief and remedies the arbitral tribunal may

[1] Paper presented at the 14th Annual IBA Arbitration Day, *The inherent powers of arbitral tribunals: good faith, ethics and efficiency in international arbitration*, March 3–4, 2011, The Shilla Seoul, South Korea.

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Bjorn Gehle, Special Counsel, and Alice Zheng, Legal Assistant, both of Clayton Utz, Sydney.

grant. In those circumstances, the tribunal must look to the relevant arbitration rules or applicable national law on arbitration to determine the types of relief available to it.

Arbitration rules

The remedies and relief which a tribunal may grant are not usually prescribed or restricted by arbitration rules. However, institutions take different approaches on how the arbitration rules deal with relief and remedies. One approach is to neither prohibit nor mention any powers the tribunal may have with respect to relief. An example is the UNCITRAL Rules on Arbitration, which are silent on this aspect of the authority of the tribunal. This silence is commonly construed to mean that the tribunal has the power to grant relief which would be available to a court under the applicable substantive law.

Although rare, another approach that some institutions take is to specifically confer upon the tribunal certain remedial powers. For example the London Court of International Arbitration (LCIA) Arbitration Rules art.22 provides a list of "additional powers" which the tribunal may exercise, absent party agreement to the contract. Article 22.1 states:

> "Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views."

These powers are enumerated from (a) to (h). Although most of the powers conferred concern matters of procedure, art.22.1(g) provides that the tribunal has the power to

> "order the correction of any contract between the parties or the Arbitration Agreement, but only to the extent required to rectify any mistake which the Arbitral Tribunal determines to be common to the parties and then only if and to the extent to which the law(s) or rules of law applicable to the contract or Arbitration Agreement permit such correction."

The effect of this provision is that under the LCIA Arbitration Rules, the tribunal is vested with the power of rectification, unless the parties otherwise agree.

Arbitration laws

As with the arbitration rules, it is not common for the *lex arbitri* to mention specific remedies available to the tribunal. Amongst the few exceptions is the English Arbitration Act 1996. Section 48 of this Act permits the parties at first instance to agree upon the tribunal's remedial authority, including the remedies which the tribunal may grant in its award. Failing any express agreement by the parties, s.48 provides that the tribunal will have certain default powers. These powers include ordering the payment of money,[2] granting declaratory relief[3] and exercising the same powers as a court with respect to "ordering a party to do or refrain from doing anything", ordering specific performance, rectification, setting aside or cancelling a deed or document.[4]

Most national arbitration laws however are silent with regard to the remedies which a tribunal may grant. The UNCITRAL Model Law reflects this approach. Some of the states which have adopted the Model Law have amended this to include an additional provision on remedies. For instance, the adoption of the Model Law in Australia adds a provision on the availability of specific performance as a remedy.[5] This provision augments the powers the tribunal is assumed to have, rather than limiting them.[6] Gary Born suggests that such

[2] English Arbitration Act 1996 s.48(4).
[3] English Arbitration Act 1996 s.48(3).
[4] English Arbitration Act 1996 s.48(5).
[5] Commercial Arbitration Act 2010 (NSW) s.33A.
[6] Douglas S. Jones, *Commercial Arbitration in Australia* (Sydney: Lawbook Co, forthcoming), paras 9.510–9.520.

an interpretation reflects in part "judicial deference to the arbitrator's commercial expertise, which is considered peculiarly well-suited to fashioning workable and practical remedies, as well as the discretion which is accorded to a first instance court in remedial matters in many legal systems".[7]

Tribunal's power to order interim relief

While this paper is concerned primarily with the arbitrator's powers in respect of final awards, it is also relevant to consider briefly the powers of the tribunal to order interim relief. Historically, an interim injunction was sought from the courts and many national legal systems denied arbitrators the power to order interim measures, such as Austria,[8] Germany,[9] Spain[10] and Greece.[11] Article 889 of the Greek Code of Civil Procedure still provides that an "arbitrator may not order, amend or revoke interim measures of protection". This prohibition also applies in Italy,[12] China,[13] Quebec[14] and Argentina.[15]

However, it is now rare for national laws to deny the tribunal powers in this regard. The trend has shifted to recognising the authority of the tribunal to grant interim relief.

Indeed, most national arbitration legislation explicitly confers the power to grant provisional relief upon tribunals. The English Arbitration Act 1996 provides that "parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings".[16] Subsections 38(3) and (4) also provide that the tribunal can order a claimant to provide security for costs and to give directions with respect to "inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party",[17] or "ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property".[18]

A number of countries including Australia, Ireland, Georgia, Mauritius, New Zealand, Peru, Rwanda and Slovenia, and Florida in the United States, have adopted the revised 2006 UNCITRAL Model Law on Arbitration,[19] art.17 of which provides four specific types of interim measures that the tribunal may order.

Types of relief

The tribunal may grant a variety of remedies, some of which are more widely available than others, while the availability of some remedies, such as punitive damages, is more problematic. The following is a list of commonly accepted remedies.

Compensatory damages

Compensatory damages are among the most common remedies sought. The damages may be unliquidated and calculated to compensate for losses suffered, or a liquidated sum contained in a contract. Damages are usually paid in the currency of the contract or of the

[7] Gary Born, "Form and Contents of International Arbitral Awards—G. Relief Granted in Arbitral Award" in G. Born, *International Commercial Arbitration* (New York: Kluwer Law International, 2009), p.2478.
[8] Austrian Zivilprozessordnung (ZPO) §593 (in force until the adoption of the UNCITRAL Model Law).
[9] German Zivilprozessordnung (ZPO) §1036 (in force prior to the 1998 adoption of the UNCITRAL Model Law).
[10] Spanish Arbitration Act art.23.
[11] Greek Code of Civil Procedure art.685 (in force prior to 1999).
[12] Italian Code of Civil Procedure art.818.
[13] Chinese Arbitration Law art.68.
[14] Quebec Code of Civil Procedure art.940(4).
[15] Argentinean National Code of Civil and Commercial Procedure art.573.
[16] English Arbitration Act 1996 s.38(1).
[17] English Arbitration Act 1996 s.38(4)(a).
[18] English Arbitration Act 1996 s.38(4)(b).
[19] UNCITRAL, "Status: 1985 UNCITRAL Model Law on International Commercial Arbitration", available at: *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html* [Accessed February 16, 2011].

relevant loss, although, under many national laws, arbitral tribunals have discretion to make awards in any currency deemed appropriate.[20]

Specific performance

Orders for specific performance require a party to perform a certain act, which is usually to carry out its obligations under the contract. While the arbitration agreement can still restrict the ability of tribunals to award specific performance, this remedy is rarely controversial since it is awarded in contractual disputes in both common and civil law jurisdictions. It is a remedy issued by the equity jurisdiction of common law courts and therefore only ordered where damages are inadequate.[21] It is more common in civil law jurisdictions.[22]

Declaratory relief

Declarations on the rights of parties to establish liability between parties are often coupled with awards of contractual damages for the sake of clarity. Declarations are simpler than other remedies as they are a definitive and binding statement of each party's legal position. For this reason, declaratory relief is a highly adaptable remedy, especially useful in situations where parties may not wish to antagonise each other due to continuing business prospects.

Restitution

Restitution seeks to put an aggrieved party back into the same position as it would have been in had the disputed act not occurred. It is not commonly requested or awarded in arbitrations because it is usually impracticable to undo the effects of the relevant breach and to place the claimant in its "original" position.

Restitution was granted in the controversial *Texaco* arbitration,[23] which concerned a breach by the Libyan Government of its obligations by nationalising Texaco's property and company in Libya. This decision was contentious for two reasons: (a) it is usually impracticable to require a party to "hand back" property such as oilfields; and (b) the proceedings usually indicate that the claimants were primarily seeking an authoritative legal opinion on the merits of the case, rather than an enforceable award.[24] The value of the *Texaco* arbitration as a precedent that restitution is a viable remedy in international arbitration is therefore questionable. The statistics indicate that restitution is not practicable. In the last decade of International Centre for Settlement of Investment Disputes (ICSID) decisions, restitution has rarely been considered, and has never once been awarded.[25]

Rectification and adaptation of contract

Rectification is traditionally a common law equitable remedy.[26] It is effectively unknown in civil law systems, where damages are the primary remedy. For this reason alone, rectification is problematic where non-common law parties are involved. Rectification

[20] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2009), p.526.
[21] *Beswick v Beswick* [1968] A.C. 59.
[22] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2009), p.530.
[23] *Texas Overseas Petroleum Company and California Asiatic Oil Company (Texaco) v The Government of the Libyan Arab Republic* (1978) 17 I.L.M. 1.
[24] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2009), p.532.
[25] ICSID Secretary-General, *ICSID Annual Reports*, ICSID, available at: *http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports* [Accessed February 16, 2012].
[26] Both the English Arbitration Act 1996 (at s.48(5)(c)) and the LCIA Rules (at art.22.1(g)) grant tribunals with the express power to rectify.

requires the tribunal to order a rewriting of the underlying contract in order to reflect what "ought to" have been the actual agreement. In the common law tradition, rectification is distinguished from adaptation (or "filling gaps"), which involves the general "filling in" of legal gaps to avoid the unnecessary imposition of hardship upon parties, or to allow the contract to "adapt" to any pertinent changes that would otherwise make the contract unworkable. Adaptation does not necessarily entail the complete rewriting of the contract in dispute. While the International Chamber of Commerce (ICC) has drawn up special rules for adaptation in the past, it has also expressed its unease about an international arbitral tribunal granting adaptation.[27]

Injunctive relief

Tribunals can grant injunctions as both interim and final relief. In the context of interim relief, where it is usually sought as a measure to maintain the status quo until final determination of the dispute, the tribunal may have concurrent jurisdiction to grant injunctive relief and other interim measures with the courts if that is provided for in the national arbitration law. There are limitations to the powers of the tribunal in granting injunctions, whether as interim or final relief. Unlike a national court, the tribunal cannot make an order which would bind non-parties to the arbitration agreement as the tribunal is a private body whose authority is constituted by the consent of the parties. Where the injunction is sought as an interim measure, questions may be raised as to its enforceability under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Awards which are enforceable under the New York Convention must possess a degree of "finality" which interim measures lack, as they do not resolve a point in dispute.[28] However, although the power to grant injunctive relief is limited in some regards, the remedy is well accepted as being available to the tribunal where it is appropriate and commensurate with the tribunal's authority.

Punitive damages

Punitive damages are not awarded to compensate the wronged party, but to punish the wrongdoer. Punitive damages are contentious because they are not commonly awarded by national courts and their availability varies from jurisdiction to jurisdiction. In English law, punitive damages are available for tort claims, but not for breaches of contract.[29] In the United States, punitive damages are also available for breaches of contract where statutes provide expressly for that head of damages.[30] In civil law jurisdictions such as France and Germany, punitive damages are not recoverable. When considering punitive damages, the tribunal should take into account both the *lex arbitri* and the terms of the arbitration agreement. The *lex arbitri* limitations on the availability of punitive damages will be discussed below.[31]

General availability of remedies

As demonstrated above, the availability of a particular remedy will be influenced by a range of factors, including the nature of the remedy, how it is enforced and whether it is common to the jurisdiction where enforcement is sought.

[27] ICC, *Rules for Adaptation of Contracts*, ICC Publication No.326 (Paris: ICC, 1978).
[28] Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* (New York: Kluwer Law International, 2010), p.311.
[29] *Rookes v Barnard* [1964] A.C. 1129.
[30] For example, the Racketeer Influenced and Corrupt Organisations Act (18 USCS) and antitrust laws which provide for treble damages.
[31] See the section below on Limitations on the types of relief granted.

Alexis Mourre suggests that a remedy should be available to the tribunal unless it is expressly prohibited, either by the arbitration agreement or by any arbitration laws applicable to the proceedings or the enforcement of the award.[32] He focuses his argument on the availability of "judicial penalties". A judicial penalty is a remedy developed in French courts. The order imposes a monetary penalty upon any party that defaults in complying with a given obligation. The obligation may be procedural, such as producing a document, or a substantial obligation, such as delivery of goods under a contract.[33] The tribunal's power to make such orders has been contested on the basis that in doing so, the arbitral tribunal attempts to exercise the coercive powers of the state. The author, however, points out that the award of the tribunal is only given coercive force once it is enforced by a court.[34] Therefore, the award of such remedies by an arbitral tribunal does not suborn state power. Once it is recognised that there is no basis in principle to resist the availability of such remedies, they should be considered generally available to an arbitral tribunal.

Limitations on the types of relief granted

Not all types of relief considered above will always be available to a tribunal. Particularly in respect of more controversial or more uncommon remedies such as rectification, restitution and punitive damages, there may be constraints upon granting such remedies.

Statutory prohibitions

As mentioned above, most national laws are silent on the question of remedies and this is now increasingly interpreted as permitting the arbitral tribunal to grant a broad variety of remedies where appropriate. It is rare for national legislation to place a specific limitation on the type of relief that a tribunal can grant.

For example, a remedy which is specifically prohibited by some national statutes is the judicial penalty. The use of judicial penalties by courts is well established in France[35] and accepted in the Netherlands,[36] Belgium[37] and Switzerland.[38] Although it is not expressly permitted in these countries as a tool of the arbitration tribunal, Mourre argues that judicial penalties should be available unless the arbitration agreement expressly excludes the power.[39] However, this remedy is prohibited in Sweden.[40] The express prohibition against judicial penalties in Sweden means a tribunal whose seat of arbitration is in Sweden cannot make such an order.

Violation of public policy

While the *lex arbitri* rarely expressly limits the availability of remedies through statute, public policy can also act as a limit on the type of relief granted. For example, the availability

[32] Alexis Mourre, "Judicial penalties and specific performance in international arbitration" in Filip De Ly and Laurent Levy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, ICC Publication No.684 (Paris: ICC, 2008).
[33] Alexis Mourre, "Judicial penalties and specific performance in international arbitration", in Filip De Ly and Laurent Levy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, ICC Publication No.684 (Paris: ICC, 2008), p.53.
[34] Alexis Mourre, "Judicial penalties and specific performance in international arbitration", in Filip De Ly and Laurent Levy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, ICC Publication No.684 (Paris: ICC, 2008), p.65.
[35] Statute of July 5, 1972; however the statutory rules applicable to judicial penalties were modified by a subsequent Statute of July 9, 1991.
[36] Netherlands Civil Code of Procedure art.1056.
[37] Belgium Judicial Code art.1709.
[38] Penalties are provided for in the Swiss Law on Civil Proceedings s.76.
[39] Alexis Mourre, "Judicial penalties and specific performance in international arbitration" in Filip De Ly and Laurent Levy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, ICC Publication No.684 (Paris: ICC, 2008), p.61.
[40] Swedish Arbitration Act of 1999, 38 I.L.M. 1663 (1999) art.25-3.

of punitive damages is highly contested, as already mentioned above. Punitive damages are frequently considered to violate public policy. An arbitral tribunal sitting in Switzerland rejected a claim for exemplary damages as being contrary to Swiss public policy even though the applicable substantive law might have permitted exemplary damages.[41] In Germany, punitive damages are also contentious and one view is that an award of punitive damages is unconstitutional.[42] In a leading judgment handed down by the Federal Supreme Court of Germany (*Bundesgerichtshof*) in 1992, part of a US court decision was refused enforcement because it provided for the recovery of punitive damages.[43] Although this case does not concern the enforcement of an arbitral award directly, it demonstrates that the *lex arbitri* can take an unsympathetic view of a particular remedy and deny enforcement. The question of enforceability of awards containing punitive damages is considered below in the section on enforceability of various forms of relief.

Enforceability considerations

Enforceability of an award is critical. Aside from the question of the availability of a particular remedy, a tribunal's limitation in granting remedies may further flow from considerations regarding the enforceability of the award. For international arbitral awards, the New York Convention is indisputably the primary instrument governing the enforcement of international arbitral awards in a foreign jurisdiction. The grounds upon which an award can be challenged under the New York Convention are exhaustively set out under art.V.

"Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[41] Final Award in ICC Case No.5946, (1991) XVI *Yearbook of Commercial Arbitration* 97, 113.
[42] Nils Jansen and Lukas Rademacher, "Punitive Damages in Germany" in H. Koziol, V. Wilcox and B. Askeland (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer Wien New York, 2009), p.76.
[43] *Bundesgerichtshof* (Neue Juristiche Wochenschrift, 1992), p.3096.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

It is well established that the enforcement of an award cannot be refused on the merits of the award, subject to the public policy of the place where enforcement is sought.[44] In many jurisdictions, the remedies awarded by the tribunal are considered matters of substance rather than procedure. In that case, there would be limited scope to contest enforcement based on the remedies granted by the tribunal. A party who seeks to challenge the enforcement of an award on the basis that a particular remedy is not enforceable may attempt to raise the New York Convention art.V(2)(b), which allows enforcement to be challenged if recognition or enforcement of the award would be "contrary to the public policy of that country". The public policy ground of challenge is frequently raised in arbitration to resist enforcement and in most instances fails. Its inclusion in the New York Convention was to provide a means by which to resist awards that violated fundamental legal principles.[45] The language also directs the court to consider whether the "recognition or enforcement" of the award would violate public policy, not the contents of the award.

Further, art.V(2) is generally construed to refer to a concept of "international public policy", which is usually narrower than domestic public policy.[46]

Dissatisfied parties seeking to resist the enforcement of a particular remedy by arguing that it violates public policy enjoy limited success because of the narrow construction of art.V(2)(b). In most cases, even where the remedy in question is not commonly granted in the national jurisdiction, it would not be characterised as violating international public policy. Punitive damages, as discussed above, are contentious because some jurisdictions never or very rarely award punitive damages for a successful cause of action. Courts in some civil jurisdictions consider punitive damages to be a penalty rather than a form of compensation for loss and as such, in violation of public policy.[47] However, where the applicable substantive law permits punitive damages to be awarded, some common law courts have held that such damages are enforceable.[48]

It seems to be the case that while enforceability of the relief granted is an important consideration to take into account, enforceability is rarely refused on the basis of the type of remedy granted.

Express limitation by the parties

Although it is relatively uncommon for them to do so, the parties may expressly limit the remedies which a tribunal may grant in their arbitration agreement. For example, parties may agree that the tribunal will not have the power to grant punitive damages. In that case,

[44] Nicola C. Port, Scott E. Bowers et al., "Article V(1)(c)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), p.260; *Landgericht Hamburg* (1997), reported in (2000) XXV *Yearbook of Commercial Arbitration* 711.
[45] Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (London: Cameron May, 2008), p.797.
[46] Dirk Otto and Omaia Elwan, "Article V(2)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), p.365.
[47] Japan: see Takao Tateishi, "Recent Japanese Case Law in Relation to International Arbitration" (2000) 17(4) *Journal of International Arbitration* 70. Germany: see *Bundesgerichtshof* (Neue Juristische Wochenschrift, 1992), 3096, 3102. Sweden: see Kaj Hober, "Arbitration Reform in Sweden" (2001) 17 *Arbitrational International* 351.
[48] *Dandong Shuguang Axel Corp v Brilliance Machinery Co*, reported in (2002) XXVII *Yearbook of Commercial Arbitration* 624 (decided by the US District Court for the Northern District of California, USA).

the tribunal will not have the mandate to grant that remedy.[49] However, the language of the clause must be clear. A leading case from the United States indicates that where a clause purports to limit the remedies available, but fails to specifically mention "punitive damages" as being precluded, punitive damages are available to the tribunal.[50]

3. Is the Tribunal's Power to Grant Relief Restricted by the Parties' Submissions?

While in most cases the relief which a party has requested will form both the basis and the limit for the relief that the tribunal will grant, there remains the question whether a tribunal has the power to go beyond what has been requested by the parties. Are the tribunal's remedial powers limited by the parties' submissions? Drawing guidance from the civil law principle of *iura novit curia*, this section examines the extent of the tribunal's authority to adopt legal considerations outside of those raised by the parties and its power to grant "appropriate" relief.

The principle of iura novit curia

In considering the extent to which an arbitral tribunal may go beyond the parties' submissions in resolving the dispute, the principle *of iura novit curia* provides some guidance on how an arbitrator may approach this issue in practice. This principle is invoked in civil law jurisdiction as empowering the court to apply the law without being limited by the parties' submissions. It is a principle of court practice which explicitly recognises the independence and legal authority of the court. The following examination of the principle and its practical application in litigious proceedings may elucidate areas where an arbitral tribunal may also exercise a similar, if not identical, authority.

Origins and meaning

Iura novit curia is literally translated as "the court knows the law", meaning that parties to a legal dispute do not need to plead or prove the law relevant to their case. It derives from another legal maxim *da mihi facto, dabo tibi ius*, which is literally translated as "give me the facts and I will give you the law" and means that while the court relies upon the parties to provide the facts, the court may consider and apply laws beyond the legal arguments or reasoning submitted by the parties.

The maxim is a feature of the civil law system and a part of the inquisitorial model where the judge assumes a more active role in court proceedings. At its core, *iura novit curia* imposes a duty upon the judge to know the law and to dispose of the case accordingly. This means that the judge is not limited by the legal submissions of the parties. In jurisdictions where the principle applies, such as Germany, the judges' familiarity with the law is facilitated by specialisation, not only in a particular area of the law, but also regarding particular statutes. In addition, *iura novit curia* also imposes a burden upon judges to educate themselves about the law if they are unfamiliar with the legal terrain. The judge bears the responsibility for applying the law to the cases while the litigants and their lawyers are allocated the responsibility to present the facts of the case.

Even the increasing sophistication of parties' pleadings has not diminished this principle, as evidenced by recent cases from Finland and Sweden, both of which are civil law jurisdictions. In a 1990 case, the Finnish Supreme Court held that a court was acting within its powers when it adjusted unreasonable terms of a guarantee even when not requested by

[49] The enforcement of the award may also be refused under art.V(1)(c), which is discussed below in the section on the Enforceability of relief granted beyond the parties' request.

[50] *Mastrobuono v Shearson Lehman Hutton, Inc.*, 115 Supreme Court 1212 (1995).

the parties.[51] Similarly, in a 1993 case, the Swedish Supreme Court stated that the court could apply the appropriate rule of substantive law to the facts of the case even when the parties did not invoke the rule.[52] Therefore, where *iura novit curia* is accepted as part of the legal system, judges are not necessarily bound by the parties' pleadings or the manner in which a party qualifies a legal issue.

One of the key assumptions upon which the principle rests is that law is something definite and certain.[53] Presuming the law is certain and objectively determinable, then there is a "correct" decision to be made upon the facts tendered. The correct decision requires the law to be applied in its entirety. Further, assuming that parties might only submit those legal rules which further their own interests, the application of the *iura novit curia* principle furthers the interest in securing a "correct" decision by allowing the judge to go beyond the parties' submissions. The principle also assumes that the court is better suited than the parties to determine the correct application of law to the particular facts.

Other policy considerations which inform the principle are those of equality for all citizens before the law and consistency in the application of law to like cases. By permitting the court to depart from the legal submissions of the parties, the outcome in each case is, in theory, determined only by factual distinctions rather than different presentations of the law by different counsel. From a policy perspective, this also mitigates any discrepancy in the competence of legal services accessible to people with different economic resources. Moreover, the principle also enables the court to consider broader public interests which might apply to the case, though these considerations might not be contained in the submissions of the parties. Therefore, the purpose of the principle is to facilitate the aims of achieving the correct decision and to ensure equality of citizens before the law.

The practical application of *iura novit curia* in curial proceedings

The scope and operation of the principle varies across different civil law jurisdictions. In Germany and Switzerland, the principle imposes a duty upon the judge to ascertain and apply the law. The right to be heard is understood to apply in relation only to submissions on the facts, and not to points of law. The scope of *iura novit curia* is limited by the relief sought by the claimant and the facts invoked and proven by the parties. Although the court is bound by the facts submitted by the parties, the court can characterise them and assess them legally.[54] Where the court does so, the court is also under a duty to inform the parties of decisive new legal reasoning, in order to ensure that the parties have the right to be heard and to prevent a surprise decision.[55] This duty to ascertain and apply the law applies to both domestic and foreign law, although the parties may play a greater role with respect to ascertaining foreign law. In Germany, the parties have a duty to assist the court in ascertaining the applicable foreign law.[56] In Switzerland, the court may impose a duty upon the parties to prove the foreign law, where either or both of the parties rely upon the foreign law to establish a monetary claim.[57] Where the parties fail to discharge the onus of proof and the foreign law is not ascertained, Swiss law is applied to the claim.[58]

[51] Supreme Court of Finland, KKO 1990: 148, 1984-11-198.

[52] Supreme Court of Sweden, NJAI sid 1993: 13.

[53] Teresa Isele, "The Principle of Iura Novit Curia in International Commercial Arbitration" (2010) 13(1) *International Arbitration Law Review* 14, 16–17.

[54] Germany: see P. Schlosser, *50 Jahre Bundesgerichtschof, Gestgabe aus der Wissenschaft* (Munich: C.H. Beck, 2000), pp.399–405; Sofie Gerooms, *Foreign Law in Civil Litigation* (Oxford: Oxford University Press, 2004). Switzerland: W. Habscheid, *Schweizerisches Zivilprozess—und Gerichtsorganisationsrecht*, 2nd edn (Basle: Helbing & Lichtenhahn, 1990), p.381.

[55] German Zivilprozessordnung (ZPO) §139(2) and §278; Basic Law for the Federal Republic of Germany (Grundgesetz fur die Bundesrepublik Deutschland) art.103(1).

[56] German Zivilprozessordnung (ZPO) §293.

[57] Teresa Isele, "The Principle of Iura Novit Curia in International Commercial Arbitration" (2010) 13(1) *International Arbitration Law Review* 14, 15.

[58] M. Keller and D. Girsberger (eds), *IPRG Kommentar: Kommentar zum Bundesgesetz über das internationale Privatrecht (IPRG) vom 1. Januar 1989* (Zurich: Schulthess, 1993), p.157.

In France, *iura novit curia* applies differently. Although the principle is an integral part of French law,[59] it does not apply as strictly as it does in Germany and Switzerland. The principle is understood as granting the judge an authority to ascertain and then apply the law, without necessarily imposing a positive duty. In practice, the judge may bear the responsibility to ensure that the facts fulfil the elements of the relief claimed. The parties also have a right to be heard on both points of facts and points of law. The principle also applies within the bounds set by the relief sought and the facts introduced. However, the judge may decide on the basis of facts which the parties introduced during proceedings, although neither party invoked them. This differs from the practice in Germany and Switzerland, where the judge is strictly limited to the facts which the parties invoke.[60] As in the other jurisdictions, *iura novit curia* applies to both domestic and foreign law, although the parties will generally have a greater role to play in ascertaining the content of the foreign law which they allege applies to the facts.

Taking into account variations in practice, applying *iura novit curia* has four consequences for civil procedure:

1. *Iura novit curia* confers an authority upon the courts to go beyond the legal submissions of the parties and pursue different legal reasoning. In some countries, that authority is paired with a positive duty to ascertain the law.
2. Where the court has a duty to ascertain and apply the law, there is a corresponding duty to educate itself regarding the content of any applicable law. Even where *iura novit curia* confers an authority, rather than a duty, the court would bear the educative burden when it exercises its authority to depart from the legal submissions of the parties.
3. The court is constrained by the factual submissions of the parties and the claim for relief. Any legal reasoning that the court may adopt must be based on the facts which the parties introduce and the burden of proof falls upon the parties.
4. Although in theory the principle applies whether the substantive law relied upon is domestic or foreign, in practice there is a difference. The principle only applies strictly with respect to domestic law. Judges will rely more on the parties to ascertain the applicable foreign law.

Application of the principle in international arbitration

The principle of *iura novit curia* developed in the context of civil litigation within national courts. For application of the principle to international arbitration proceedings, it must be adapted to the practical circumstances in which an arbitral tribunal exercises its jurisdiction over a dispute.

Overview

Broadly speaking there are two pertinent differences between arbitral and court proceedings which must be taken into account when adapting *iura novit curia*. The first is the inherent nature of arbitration as a dispute resolution mechanism, the second, the structural differences between an arbitral tribunal and a court.

Nature of arbitration Arbitration is a consent-based dispute resolution mechanism, as the jurisdiction of an arbitral tribunal to hear a dispute is given by the arbitration agreement. In contrast, domestic civil courts exercise the coercive powers of the state. This is not to

[59] French Civil Code of Procedure art.12.
[60] Teresa Isele, "The Principle of Iura Novit Curia in International Commercial Arbitration" (2010) 13(1) *International Arbitration Law Review* 14, 15 and fn.16; also see French Civil Code of Procedure art.6.

say that arbitration is purely a contractual matter. The legal effect of an agreement to arbitrate must be recognised at law so the parties may, for example, seek a stay where a party in breach of an agreement attempts to litigate the dispute and seek interim measures of protection where such measures would not be available from the courts. Further, the arbitration agreement must be recognised at law for the final award to have legal and binding force. National laws, such as the *lex arbitri* and the law of the country where the award is being enforced, support the arbitration agreement. However, the authority to determine the dispute before them is conferred upon the tribunal primarily by the arbitration agreement.

The private and consensual nature of arbitration means that the policy aims promoted through the *iura novit curia* principle, such as equality before the law and consistent outcomes for like cases, are not pressing reasons for the application of the principle to international arbitration. These aims are public policy considerations which are more applicable in the context of a national court. While justice is an important concern in arbitration, it is justice for the private parties to the dispute. Further, the concern for justice is balanced with the need to promote efficiency and efficacy in proceedings.

Structural differences The principle developed in the context of civil litigation within national courts. It presumes an educated and specialised judiciary and that, in most cases, the substantive law will be from the same legal system. International arbitration on the other hand involves tribunals that may be constituted ad hoc for the purpose of a particular dispute alone and the applicable substantive law need not be familiar to the tribunal members. A tribunal in international arbitration has no "forum" law upon which it can fall back if the content of the substantive law cannot be ascertained satisfactorily. There is also a cost aspect to arbitration that does not apply in civil litigation, as the parties rather than the state bear the tribunal's fees. Therefore, whenever the tribunal is under a heavier duty to research and ascertain the content of unfamiliar substantive law, the costs of arbitration may increase.

International arbitration is also different because arbitrators are not empowered by the state, but exercise authority which has been conferred upon them by the agreement of the parties. Therefore the tribunal cannot exercise the coercive powers of the state and does not enforce its own awards. Further, in many cases the jurisdiction in which the award may be enforced will not be the seat of the arbitration. A foreign award will require the recognition and aid of the courts in the jurisdiction in which enforcement is sought.

Recent case law At its core, *iura novit curia* empowers the neutral party hearing and deciding the dispute, whether a judge of a national court or an arbitrator, to adopt a legal characterisation of the facts as a consequence of their own legal reasoning and knowledge. Recent case law suggests that a consensus is forming in various jurisdictions that arbitral tribunals may adopt alternative legal reasoning from the legal submissions of the parties. In *Bank Saint Petersberg PLC v ATA Insaat Sanayi ve Ticaret Ltd*,[61] the Swiss Supreme Court held that the arbitral tribunal was entitled to recharacterise a claim for execution of a guarantee as a claim for damages. In *Dame Y v Z*,[62] the Swiss Supreme Court again affirmed that the arbitral tribunal was entitled to engage in legal reasoning unrelated to the legal arguments put forward by the parties. This position is also confirmed in other civil law countries, such as France[63] and Spain.[64]

However, this trend is not confined to civil law countries alone. In England, the position also seems to be that the tribunal may vary the legal characterisation of the facts. In *Société Franco-tunisienne d'Armement-Tunis v the Government of Ceylon*,[65] Morris L.J. declared that it would not be in excess of jurisdiction for an arbitrator to come to a particular

[61] Unreported March 2, 2001 Supreme Court of Switzerland.
[62] [2008] ASA Bulletin 742, 753, 754 (Supreme Court of Switzerland).
[63] *Cour d'Appel de Paris*, November 25, 1997, *Société VRV v Pharmachim*, (1998) Rev. Arb. 684ff, 687.
[64] *Tribunal Supremo*, July 21, 2003, 791/2003.
[65] [1959] 2 Lloyd's Rep. 1.

conclusion, even if it were not pleaded by the parties, so long as that conclusion was a possible view in law. This position was also reaffirmed in *ABB AG v Hochtief Airport GmbH, Athens International Airport SA*,[66] where Tomlinson J. stated that he saw no difficulty in an arbitral tribunal extracting an alternative case from the parties' submissions.

Scope of the principle in international arbitration

There is an important distinction between adopting legal reasoning which the parties did not submit and granting relief which the parties did not seek. Therefore the scope of the principle in international arbitration must be considered separately for where the tribunal adopts independent legal reasoning and where the tribunal grants relief which the parties did not request.

Adopting legal reasoning not submitted by the parties

With respect to independent legal reasoning of the tribunal, the principle of *iura novit curia* could be applicable with some adjustments which take into account the differences between arbitral and court proceedings. First, it would be more appropriate that the tribunal not be under a positive duty to ascertain the correct application of the law, independent of the parties' submissions. This is because of the onerous burden it would impose upon the tribunal, the costs which may flow on to the party and the fact that not all arbitrators will be familiar with the substantive law invoked.

On the other hand, the arbitral tribunal should enjoy the authority to adopt independent legal reasoning where the tribunal deems it necessary. An authority would allow the arbitral tribunal that is familiar with the substantive law invoked or which is faced with noticeably inadequate or incomplete party submissions to identify the correct law and the correct, or better, outcome. This position also gives due deference to the expertise of the tribunal, whether legal or commercial.

The educative burden in international arbitration should be shared between the parties and the arbitral tribunal. The reasons for a shared burden are the same as for the absence of need for a strict duty upon the tribunal: cost, burden and potential lack of familiarity with the substantial law. A party which relies entirely on the arbitral tribunal to establish the law and apply it appropriately to the facts is taking a risk. By meeting the burden of establishing the substantive law, parties can reduce the "risk of misapplication of the law or errors in its interpretation".[67] While this does not constrain the tribunal's own endeavours to know the law, it tempers the obligation in line with the practical reality of international arbitration.

The scope of the principle in international arbitration should also be limited by the factual submissions of the parties. There are two reasons why this should be the case. First, the costs might be significant if the arbitral tribunal were also to engage in seeking evidence and fact-finding, particularly in international arbitration where the location in which the relevant events took place may be geographically removed from the venue of the arbitration. Secondly, if arbitral tribunals were not bound by the parties' factual submissions, there would be increased potential that the requirements of a fair hearing and equal treatment would be breached unless the tribunal provided sufficient notice to the parties on new evidence and offered further opportunities for the parties to address the evidence.

Granting remedy not requested

Where the principle applies in curial proceedings, the authority of the court is limited by the parties' request for relief. With respect to international arbitration, it is also suggested

[66] [2006] 2 Lloyd's Rep. 1.
[67] Matti S. Kurkela, "'Jura Novit Curia' and the Burden of Education in International Arbitration—A Nordic Perspective" (2003) 21(3) *ASA Bulletin* 486, 493.

that the ambit of the tribunal's authority should be bounded by the parties' prayers for relief. That would mean that in most cases, although the tribunal would be free to exercise its authority to adopt alternative legal reasoning not submitted by the parties, it would be obliged to grant only the relief requested by the parties.

The reason for an authority to adopt legal reasoning which the parties have not submitted is to permit an experienced arbitrator familiar with the substantive law to draw upon that expertise in deciding the dispute. This reasoning does not apply with the same force to varying the relief which the parties have requested. The parties are generally in the best position to specify the desired relief. Further, where the relief granted goes beyond the parties' submissions, there may be the possibility that a dissatisfied party might seek to contest the enforceability of the award. Although the enforceability cases below demonstrate that a margin of latitude is afforded to arbitrators in granting relief broader than that sought by the parties,[68] a cautious approach should be taken.

Considerations of due process in the context of granting relief

The authority of a tribunal is exercised subject to various constraints. Chief among these are due process requirements. The *lex arbitri* often explicitly requires due process. For example, the UNCITRAL Model Law art.18 stipulates that the "parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party's case". The requirement for equal treatment of the parties and the right to present one's case is common across jurisdictions, whether directly stipulated as a procedural requirement under national arbitration legislation, or as a general requirement of public policy and legal tradition. In either case, it will generally be mandated by the *lex arbitri*, although specific standards may vary from jurisdiction to jurisdiction.

In England, the position is unequivocally that an obligation to give notice to the parties exists. In *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira)*,[69] the owners claimed against the charterers for serious damage suffered by the ship, *The Vimeira*, during the course of the charterparty and the dispute was referred to arbitration. The arbitrator found on an unpleaded point and this was not brought to the attention of either party until the award was made. The award was challenged successfully. Robert Goff L.J. stated that it was not fair to decide a case against a party on a point that was never drawn to its attention. He found that the award was liable to be set aside, as the conduct of the arbitrator amounted to technical misconduct which was a ground of appeal against an award under the then contemporary English arbitration legislation.

More recently, this obligation to inform the parties of new and adverse conclusions before rendering the award was affirmed in *OAO Northern Shipping Co v Remolcadores De Marin SL*.[70] In that case, Gloster J. stated that it was a breach of the right to be heard if an arbitrator's decision was based on specific matters which the parties never had the chance to deal with, or if the party only learnt of an adverse point in a decision against it and not earlier.

In contrast, French courts seem to admit only a limited version of this obligation. In *Société VRV v Pharmachim*,[71] the Court of Appeal held that while there was an obligation to give notice where the tribunal intended to award unpleaded remedies, there was no such obligation where the court merely recharacterised the contract as an enterprise contract, rather than a sale contract as pleaded. This position has been criticised as being untenable.[72] It draws a distinction between legal recharacterisation and granting unpleaded remedies that seems to undermine the essence of what the obligation to grant a fair hearing would

[68] See the section below on Enforceability of relief granted beyond the parties' request.
[69] [1984] 2 Lloyd's Rep. 66.
[70] [2007] 2 Lloyd's Rep. 302.
[71] Rev. Arb. 684 ff., 687 (1998), Court of Appeal, Paris, November 25, 1997.
[72] See Teresa Giovannini, "International Arbitration and Jura Novit Curia—Towards Harmonization" in M.A. Fernández-Ballesteros and D. Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley: Buenos Aires, 2010), pp.504–506.

protect. A party is just as likely to be adversely affected by different legal reasoning which leads to a contrary legal conclusion as by a different remedy.

The position in Switzerland is similarly ambiguous, although Swiss courts do not draw the distinction between recharacterisation and refashioning remedies. Instead, the relevant criterion is whether the legal reasoning adopted is that which the parties did make and could not *reasonably* expect.[73] Where the legal reasoning is not considered sufficiently "unpredictable" in its departure from the pleadings, the award is upheld. Where, on the other hand, the award is considered unpredictable, the award is annulled. The criterion of "unpredictability" is inherently subjective and the line between predictable and unpredictable deviations will not always be necessarily clear.

Both the French and Swiss positions seem prone to fostering ambiguity and uncertainty. In both cases, the party should be afforded the right to address the tribunal. The English position takes a more robust approach to protecting the procedural rights of the parties. In light of an expansive view of the powers of the tribunal in deciding the case and granting relief, which may be exercised independently of the parties in some cases, this approach best balances the breadth of the arbitrator's power with ensuring justice to the parties.

Enforceability of relief granted beyond the parties' request

We considered the New York Convention above in relation to the enforceability of remedies granted by a tribunal. The critical question here is whether the grounds of challenge contained in the New York Convention art.5 limit or prohibit the application of *iura novit curia* in international arbitration.

Adopting different legal reasoning

If one accepts that the principle of *iura novit curia* applies to arbitral proceedings the tribunal would have the power to grant relief on the basis of different legal reasoning to that submitted by the parties. However, it is possible that the application of the principle may be in conflict with the ground for denying enforcement set out under art.V(1)(c). This article states that an award may be unenforceable if it deals with a "difference not contemplated by or not falling within the terms of the submission to arbitration" or if it contains decisions on "matters beyond the scope of the submission to arbitration". This provision applies where the tribunal has exceeded its jurisdiction.

National courts have construed this provision to not apply where the arbitral tribunal adopts a different legal theory to that submitted by the parties, or follows its own legal reasoning from the facts as pleaded.[74] In *Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defence Systems, Inc.*,[75] it was held that art.V(1)(c) was not a bar to enforcement where the arbitrator applied law not referenced in the pleadings, as long as it did not exceed the scope of the arbitration agreement. Similarly, a German court dismissed a party's argument that the tribunal exceeded its jurisdiction when it applied the *lex mercatoria* where the contract called for "international law" on the basis that addressing the argument would amount to an indirect and impermissible review of the merits of the award.[76]

[73] See *Bank Saint Petersberg PLC v ATA Insaat Sanayi ve Ticaret Ltd* Unreported March 2, 2001 Supreme Court of Switzerland; *A v B Ltd et cons*, ATF 130 111 35 September 30, 2003 Swiss Supreme Court; *X v Y* Unreported February 9, 2009 Supreme Court of Switzerland.

[74] Nicola C. Port, Scott E. Bowers et al., "Article V(1)(c)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), p. 271; *Ministry of Defence of the Islamic Republic of Iran v Gould, Inc.*, 969 F.2d 264 (1992).

[75] 29F. Supp. 2d 1168 (1998).

[76] *Landgericht Hamburg* (1997), reported in (2000) XXV *Yearbook of Commercial Arbitration* 710, 711.

Relief granted *ultra petita* or beyond the parties' request

In some cases, the tribunal may have granted relief broader than that requested by a party (*ultra petita*), or where the relief granted was different from that requested by the parties. In those cases, a dissatisfied party may also attempt to challenge enforcement of the award under art.V(1)(c). However, the construction of this provision by national courts avoids questioning or examining the merits of an award. Thus, excess of jurisdiction under art.V(1)(c) is directed at situations where a tribunal exceeded its authority by improperly construing the scope of the arbitration agreement, not at questions of whether it improperly applied substantive law to the dispute before it.[77]

A series of cases from the United States also affirms that challenging the enforcement of an award on the basis that the relief granted was broader than or different from that requested will usually fail. In *Daniewicz v Thermo Instrument Systems*,[78] the dispute concerned a breach of contract for the sale of goods. The arbitrator not only awarded damages but also required the buyer to continue to pay royalties to the seller for the balance of the contract. The buyer appealed against the award on the ground of excess of jurisdiction. The Texas Court of Appeal rejected the contention that the remedy must be specifically requested by a party. Instead, the court held that the arbitrators had been asked to find a breach of contract and award damages commensurate with the breach. The award was therefore within the authority of the tribunal.

Similarly, in *Chandra v Bradstreet*,[79] the award combined punitive damages for embezzlement with an order that prohibited those who benefited from the embezzlement from benefiting further from the proceeds of dissolving the company that had suffered the embezzlement. The award was challenged on the basis that the arbitrator had exceeded his authority because the company never made any affirmative claims for relief. The Florida Court of Appeal upheld the award on the basis that the remedies were available from the submissions put to the arbitrator.

In *Advanced Micro Devices (AMD) v Intel Corp*,[80] the California Supreme Court considered whether an arbitrator, who had awarded one of the parties a permanent, royalty-free licence over certain software for the other party's breach of a software licensing agreement and for bad faith, exceeded his jurisdiction. In a well-considered and scholarly judgment, the California Supreme Court formulated a standard of review for arbitral remedies. The standard was whether or not the remedy bore "some rational relationship" to the cause of action pleaded. The court stated that arbitrators "enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of the arbitration, so long as the remedy may be rationally derived from the contract and the breach". In this case, the remedy was rationally derived from the arbitrator's conception of the contract's subject matter and the effect of the breach. Further, the arbitrator had not resorted to extrinsic sources in fashioning the remedy.

Although the parties' prayers for relief still form part of the boundaries of the jurisdiction of the tribunal, the tribunal is not strictly limited to the relief requested. The cases on enforcement demonstrate that there is latitude with respect to how a tribunal fashions appropriate remedies. This no doubt reflects both an emphasis on the finality of awards and due deference to the arbitrator's commercial expertise.

[77] Nicola C. Port, Scott E. Bowers et al., "Article V(1)(c)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), pp.267–272.

[78] 992 S.W.2d 713 (Texas Court of Appeal, Austin, 1999).

[79] 727 So.2d 372 (Fla. 5th. DCA 1999).

[80] (1994) 9 Cal. 4th 362.

Violation of due process

Where the tribunal grants relief on legal reasoning not submitted by the parties or grants relief which the parties have not specifically requested, a dissatisfied party may also seek to resist enforcement by arguing a violation of due process. Violation of due process is dealt with in the New York Convention under both arts V(1)(b) and V(2)(b). Article V(2) is generally governed by the doctrine of *lex specialis*, which holds that a law governing a general subject matter does not override a law which governs specific matters. Some courts have stressed that art.V(2)(b) cannot be invoked if a certain issue is governed by any of the grounds in art.V(1).[81] However, not all courts follow this approach and therefore even though art.V(1)(b) specifically deals with due process, a defect in procedure may still be raised successfully under art.V(2)(b).

Article V(1)(b) Article V(1)(b) provides that a ground for refusing the recognition and enforcement of an award is if

> "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

Procedurally, this provision requires the alleged defect to be raised by the party against whom the award is invoked, unlike art.V(2)(b), which may allow a court to examine the defect ex officio.[82]

The cases decided under this provision establish that there are two key components to due process as considered under the New York Convention. First, the parties must be given proper notice of the arbitration. Secondly, the parties must be given an opportunity to present their case.

The requirement that the notice of arbitration provide sufficient content in order to facilitate party participation is intimately linked to the due process requirement that parties be given an opportunity to present their case. This ground is connected to the positive requirement under the UNCITRAL Model Law art.24 of due process in arbitration proceedings. Article 24 is not prescriptive regarding procedural requirements. However, the equal treatment of the parties and the right to be heard, where the two values reinforce each other, are considered core values protected by the due process requirement.[83]

Case law indicates that the opportunity to be heard requires an opportunity for a party to address evidence and facts which are adverse to it and upon which the tribunal intends to base its decision.[84] It does not require that the tribunal consider all the evidence that a party wishes to present in its award, but it must consider the major arguments advanced and where an argument is contested, the tribunal should make note of the contrary argument.[85] The defect alleged must also not be due to the complainant's own failure to participate or act

[81] See Federal Supreme Court of Switzerland case, 102 *Semaine Judiciaire* 1980, 67 (decided in 1978) reported in (1986) XI *Yearbook of Commercial Arbitration* 538, 540.

[82] Andres Jana, Angie Armer et al., "Article V(1)(b)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International 2010), p.234.

[83] Andres Jana, Angie Armer et al., "Article V(1)(b)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), pp.233–234; also see UNCITRAL Model Law art.18.

[84] Supreme Court of Austria (decided March 31, 2005), reported in (2006) XXXI *Yearbook of Commercial Arbitration* 583; *GWL Kersten & Co BV v Société Commerciale Raoul-Duval et Cie* (1992, Amsterdam Court of Appeal, Netherlands), reported in (1994) XIX *Yearbook of Commercial Arbitration* 708; *Rice Trading (Guyana) Ltd v Nidera Handelscompagnie BV* (1991, The Hague Court of Appeal, Netherlands), reported in (1998) XXIII *Yearbook of Commercial Arbitration* 731.

[85] *Oberlandesgericht Stuttgart* (decided March 15, 2001), reported in IHR 2001, 212; *Oberlandesgericht Celle* (June 30, 2007), reported in (2008) XXXIII *Yearbook of Commercial Arbitration* 524.

during the proceedings.[86] Such conduct is considered either to waive the due process objection, or to lead to a finding that there was no defect. In many jurisdictions, a pure procedural defect is not sufficient to warrant refusing enforcement. Instead, the parties must be prejudiced by the lack of opportunity to be heard. In Germany, there must be a causal nexus between the defect alleged and the outcome in proceedings detrimental to the party raising the allegation.[87] In the United States, there must be substantial prejudice.[88] In Spain, the requirement for the defect to be relevant is that it must be real and material.[89] However, in some cases where the proof of actual prejudice is inconclusive, but cannot be excluded, the award may nevertheless be refused enforcement.[90]

Article V(2)(b): public policy A disappointed party may also contest the enforceability of the award under art.V(2)(b), alleging that the procedural defect amounted to a violation of public policy. We have considered the construction of art.(V)(2)(b) above.[91] Since due process is a well-recognised public policy concern across all jurisdictions, challenges under art.V(2)(b) are often successful. In a Dutch case, a foreign award was refused enforcement on the basis that the arrangement of the hearing had prevented a party from responding to new evidence.[92] A single hearing was held before documents were submitted and the arbitrators then based their decision on previously unknown evidence submitted by one party but did not take into account rebuttal evidence offered by the other party. In this case, public policy was violated as one party was denied the rights to equal treatment and to a fair hearing.

Public policy may also be violated where the decision of the tribunal is based on adverse points not raised during the arbitration and no notice was given to the parties before the award was rendered. A French court refused to enforce a foreign award where damages were awarded on the basis of a contract being annulled for "error".[93] The alleged error, however, was never raised during the arbitration, and the arbitral tribunal never brought it to the attention of the parties.

Successful challenges to enforcement of the award under arts V(1)(b) and V(2)(b) establish that equality to the parties and the right to be heard are fundamental values the breach of which results in an unenforceable award. These due process concerns mirror those considerations enunciated in case law from both common law and civil law jurisdictions. The concern with due process is universal. In exercising its powers, a tribunal must take these concerns into consideration and act accordingly.

[86] Andres Jana, Angie Armer et al., "Article V(1)(b)" in H. Kronke, P. Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (New York: Kluwer Law International, 2010), p.252; *Grain Partners S.pA v Coopergrao* (October 18, 2006, Superior Court of Justice, Brazil); *Geotech Lizenz AG v Evergreen Systems Inc.*, 697 F.Supp 1248 (1988).

[87] *Oberlandesgericht Schleswig* (decided 1999), reported in (2004) XXIX *Yearbook of Commercial Arbitration* 687.

[88] *Treasuransi Unum Indonesia v Evanston Insurance Co*, 92 Civ. 4623 (1992, US District Court for the Southern District of New York, USA), reported in (1994) XIX *Yearbook of Commercial Arbitration* 788; *Compagnie des Bauxites de Guinée v Hammermills Inc.* (1992, US District Court for the District of Columbia, USA), reported in (1993) XVIII *Yearbook of Commercial Arbitration* 566.

[89] *Russo e Nero Gaststattenbetriebs GmbH v Almendrera Industralia Catalana SA (ALICSA)* (2004, Tribunal Supremo, Spain), reported in (2007) XXXII *Yearbook of Commercial Arbitration* 597; *Scandlines, AB and Scandlines Denmark A/S v Ferrys del Mediterraneo, S.L* (2002, Tribunal Supremo, Spain), reported in (2007) XXXII *Yearbook of Commercial Arbitration* 555.

[90] *Oberlandesgericht Hamburg* (1975), reported in (1977) II *Yearbook of Commercial Arbitration* 241; *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 H.K.L.R. 155.

[91] See section: Limitations on the types of relief granted.

[92] *Gerechtshof Den Haag* case, reported in (1998) XXIII *Yearbook of Commercial Arbitration* 731.

[93] Unpublished *Arret* 06/17901 of June 19, 2008 Paris Court of Appeal, France.

4. Procedural Considerations for Arbitrators

As emphasised by the enforcement cases, where an arbitrator exercises the authority to go beyond the submissions of the parties, that authority is subject to due process requirements. These procedural considerations protect the fundamental rights of the parties and influence the actions of the tribunal. The right to be heard and the right to equal treatment are highlighted throughout the case law. It is essential that these rights be taken into account in how the tribunal conducts itself and the proceedings.

Different considerations may apply to interim and final relief

Different considerations may possibly apply to relief granted on an interim basis, rather than as part of the final award. This is due to the different purposes served by interim and final relief and the different contexts in which they are granted. Interim or provisional measures are those orders of the tribunal handed down prior to the actual determination of the dispute and the making of the final award. Interim relief does not resolve any point in dispute. Interim relief is usually sought to preserve evidence, protect assets or otherwise maintain the status quo pending the final outcome. Therefore, by its nature, interim relief is temporary, responds to present circumstances and is subject to review and repeal by the tribunal. On the other hand, final relief is binding and conclusive and resolves the issues in dispute. Enforceability of the award, while still an issue for interim measures ordered, is critical for the final award.

Therefore, the tribunal may enjoy greater scope for exercising powers to grant relief in the context of granting interim relief. When issuing final relief, the due process concern that parties be given a full opportunity to address the tribunal on all issues relevant to the award, whether raised in the parties' submissions directly or not, is at its most pressing. The due process considerations discussed above in relation to challenging the award under the New York Convention art.V(1)(b) are directly applicable to the final award. Justice cannot be done nor be seen to be done where parties are denied an opportunity to be heard on decisive points against them, or where one party feels that it has not been treated equally in the hearing process. Due to the nature of the final award, the arbitral tribunal must exercise particular caution where adopting legal reasoning not submitted by the parties or varying the relief granted in any way from that which was sought.

Compliance with due process requirements

The primary means of complying with due process requirements is to give sufficient notice to all parties to the arbitration. Thomas Klotzel has suggested that, as a matter of good practice, an arbitrator should discuss preliminary views with parties or invite the parties to comment upon the extent to which they wish to hear from the tribunal.[94] Where the tribunal intends to grant a remedy or follow legal reasoning not relied upon by the parties, the provision of the tribunal's views to the parties is probably a matter of obligation rather than just one of good practice.

Sufficient notice enables the parties to respond to any decisive points relied upon by the tribunal and to participate actively in the arbitration. Notice also protects the award from challenge on the basis that the tribunal acted independently and therefore exceeded its jurisdiction. In *EEC Property Co v Dr Martin Kaplan*,[95] an arbitral award was challenged on the basis that the award varied the underlying partnership agreement out of which the dispute arose. The Minnesota Court of Appeal found that the award was not without basis in the submissions and that the arbitration clause did not limit the remedies which could be

[94] T.R. Klotzel, "The Right to be Heard and the Right to Hear: Cultural Dimensions of International Commercial Arbitration" (2006) 72 *Arbitration* 27, 30.
[95] 578 N.W.2d 381 (Minnesota Court of Appeal, 1998).

granted. Importantly, the court emphasised that the arbitrator had informed the parties of the remedy he was considering before the award was issued. The parties failed to object and therefore the court held that they waived their right to object.

Similarly, in *Placer v Thiess*,[96] the High Court of Australia dismissed an appeal that the trial judge was not entitled to use a particular method of calculation as it was not the method submitted to the court. This case concerned the breakdown of a partnering agreement. The plaintiff claimed damages for wrongful termination of the agreement. The defendant counterclaimed that the plaintiff was in breach of the contract as it inflated its costs estimates. The trial judge found for the defendant by using a particular method of calculation to estimate the costs. The High Court held that the method of calculation of the trial judge was open to him on the facts and on the submissions of the parties, and reasonable in the circumstances.[97] In particular, an expert witness had mentioned the method of calculation although neither party relied on it. It was emphasised that the evidence relied upon had been tendered in open court and the parties had not objected to it. Adequate notice had been given and the trial judge did not rely upon material that was not brought to the notice of either party.

The precise contents of the notice and whether other action on the part of the tribunal is necessary will turn on the circumstances of the case. However, the requirements may vary depending on whether the tribunal is adopting alternative legal reasoning from that submitted by the parties but granting the remedy requested, or whether the tribunal grants broader or different relief to that submitted by the parties.

Adopting legal reasoning not submitted by the parties

Where an arbitrator adopts as the basis of the relief granted legal reasoning which was not submitted or relied upon by the parties, the arbitrator is probably under an obligation to give notice to the parties of his or her view. Although it is not clear whether the arbitrator must make his or her views known to the parties immediately upon forming them, or later on in the process, it is suggested that notice must be given before the final award is rendered. This is in line with the ratio of *The Vimeira* handed down by the English Court of Appeal.[98] Further, once notice is given, the parties should also have an opportunity to make submissions on that point if they wish. That may mean that where the hearing has otherwise been concluded, it may be recommenced for further submissions to be taken.

Granting remedy not requested

Where an arbitrator grants a remedy which the parties have not requested, the arbitrator is probably also under an obligation to give notice to the parties of his or her intention to grant that remedy and then to provide the parties with a reasonable opportunity to make submissions regarding that remedy. This is to prevent surprise. An arbitrator should also take into account the fact that, although not a strict boundary, the relief requested by the parties is probably a limit on the power of the tribunal. Notice to the parties is therefore even more pressing than in the case where different legal reasoning to the reasoning submitted is adopted. Notice and the opportunity for the parties to be heard also serve another important role in this case. A challenge to the award or its enforcement will probably be refuted where the party alleging that the tribunal exceeded its jurisdiction was given sufficient notice and failed to make any objections to the tribunal taking that course of action, as in *EEC Property Co v Dr Martin Kaplan*.[99]

[96] (2003) 196 A.L.R. 257.
[97] *Placer v Thiess* (2003) 196 A.L.R. 257 at [32]–[33].
[98] *Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep. 66 (*The Vimeira*), discussed above.
[99] 578 N.W.2d 381 (Minnesota Court of Appeal, 1998).

As canvassed above, both common law and civil jurisdictions share the view that due process requires an arbitrator to give notice to parties of adverse conclusions on determinative points they have not addressed or of which they have not been made aware. The precise notice requirements, as with many matters of procedural fairness, will turn on the circumstances of each case. Practicality and fairness should be the guiding principles in determining how to give sufficient notice and respect to the parties' right to a fair and full hearing.

5. Conclusion

Arbitral tribunals do and should have wide-ranging powers to determine relief, though these powers are exercised within the parameters set by the parties' claims and due process requirements. Ultimately, the extent to which an arbitrator or tribunal will exercise an authority to apply law to the facts independent of the parties' submissions depends on both practical and legal considerations, as well as the particular circumstances of each arbitration. The model of *iura novit curia* in international arbitration proposed emphasises flexibility and shared responsibility between parties and the arbitral tribunal. This reflects the importance that arbitral procedure remains adaptive. The core benefits of arbitration as a form of dispute resolution, namely finality, celerity and cost effectiveness, should, it is suggested, be promoted through the way in which the tribunal exercises its authority.