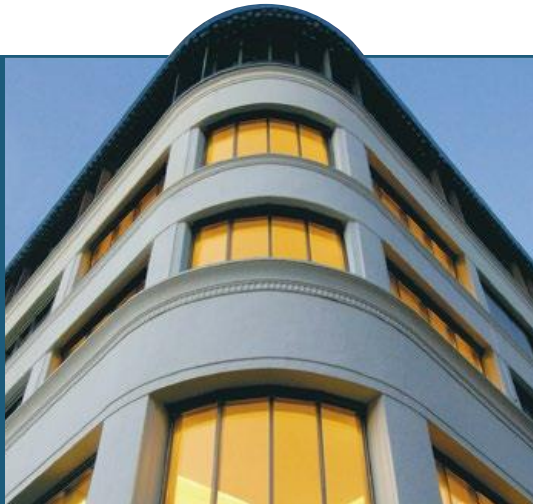


LALIVE



The relevance of national law to drafting
and enforcement of awards:
How to determine the content of the
applicable law

ICC UK Symposium on the Arbitral Award

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How should arbitrators ascertain the content of the applicable law?

- Own investigation of the law?
- Law as presented by the Parties?
- What if aspects of the applicable law have been overlooked?

This question is relevant:

1. For **drafting** the award
2. For **enforcing** the award

How do tribunals navigate these tricky waters?

- Does the answer depend on the **seat** or legal culture of the arbitrators? [Hint: Yes!]
- Is there room for a more **transnational** approach? [Hint: Yes!]

Civil law approach

e.g. France, Switzerland, Germany

- *Iura novit curia*: The Court knows the law



- *Iura novit arbiter*: the Arbitrator knows the law.

Common law approach

e.g.: England

- Questions of law cannot be decided without debate by the parties

Is a transnational approach advisable in international arbitration?

Defining a transnational approach

1. Arbitration is a creature of contract. Arbitrators should rely on the **parties** primarily to articulate legal issues and **present the law**.
2. The Tribunal must decide the dispute within the mandate defined by the arbitration agreement: if a dispute has to be decided in accordance with the law, arbitrators should identify, ascertain and apply **the applicable law**.
3. Arbitrators cannot however exceed their mandate. If they decide a dispute on a legal rule or principle not addressed by the parties, this could be an **excess of their mandate or jurisdiction**.

Defining a transnational approach

4. Due process in arbitration means that parties must be given the **right to be heard**. This requires that parties be given a reasonable opportunity to address important legal points.
5. As part of the duty to render a valid and enforceable award, however, **public policy considerations** may require a special approach to determine the contents of applicable law: Mandatory laws expressing public policy norms may warrant special attention e.g. more freedom for the tribunal to probe, set the agenda and derive legal analysis than for other issues.

- ILA Recommendations on ascertaining the contents of the applicable law in international commercial arbitration (2008)
- The Secretariat's Guide to ICC Arbitration (2012)

THANK YOU

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