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

THANK YOU

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