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Arbitrators' Initiatives to Obtain Factual and Legal Evidence

by PHILLIP LANDOLT*

ABSTRACT

Arbitrators generally have wide powers to take initiatives to obtain factual and legal evidence, but rarely are they under a duty to do so. The central concern of the article is to identify factors which arbitrators may refer to in exercising these powers. The principal factors discouraging such initiatives are concern for party autonomy, concern to avoid increase in the duration and costs of the arbitration, concern to avoid the appearance of partiality, and concern not to reduce predictability. The conclusion is that in general arbitrators should refrain from taking such initiatives, absent the presence of specific justificatory factors, which the article also seeks to identify.

I. INTRODUCTION

International arbitrators are generally vested with wide discretion in most matters of procedure. The virtues of this flexibility have been much extolled and rightly. Every dispute presents striking individual characteristics which are material to the appropriateness of procedures to resolve it. Arbitrators use their discretion to adapt the procedure to the specific circumstances of the case.

But if a procedural void may be favoured at the outset of an international arbitration, and countenanced until the stage at which the essential characteristics of the case bearing upon the appropriate type of procedure come into focus, this void becomes increasingly obnoxious as the arbitration moves into and through the evidential stage.¹

There are a number of matters which almost as a matter of course attract attention in procedural orders at an early stage of an arbitration. For the most part, the rights and opportunities of the parties vis-à-vis each other, such as the number of written submissions, rights of disclosure, features of witness statements

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¹ See W. W. Park, *Arbitration's Protean Nature in Arbitration of International Business Disputes* 457, 463 (Oxford University Press 2006): "The dark side of all this discretion lies in the discomfort that a litigant may feel when arbitrators make up the rules as they go along, divorced from any precise procedural canons set in advance."

and the examination of the other side's witnesses at the hearing, are all routinely subjected to regulation.

What is, however, almost invariably lacking is any real circumstance to or guidance on the role that the arbitral tribunal itself will have in the arbitration proceeding. In general, this is not the sort of thing that comes in for regulation subsequently in an arbitration either, since arbitrators as a whole do jealously guard their freedom of procedural action.

One of the most important aspects of the arbitral tribunal's activity in any international arbitration proceeding is the initiatives it may take to obtain factual and legal evidence. As important as this is to the conduct of proceedings, it too falls within the general rule of procedural silence.

One might be able to live with this situation if in exercising their discretion on when to take such initiatives arbitrators were guided by a more or less uniform and accepted set of considerations. These considerations would not be binding on the arbitrators of course, but at least the parties would have a general idea of what to expect, and the impression of *ad hoc* excursions by the arbitrators would be avoided.

The place for the elucidation of principles by which arbitrators might wish to be guided in determining how to exercise their discretion is commentary in the legal literature or perhaps a set of guidelines by a reputable body of experts like the IBA Arbitration Committee.

There is remarkably little commentary on arbitrators' initiatives to obtain factual evidence, but there is now a substantial body of commentary on arbitrators' initiatives to obtain evidence of law. Most of the latter commentary examines the application of the *iura novit curia* (the court knows the law) principle developed in the context of a number of civil law civil procedure systems.² A significant study of arbitrators' initiatives to obtain legal evidence is the 2008 report of the International Commercial Arbitration Committee of the International Law Association on 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration' (the '**ILA Report**').³

The subject matter of the ILA Report is a limited segment of the broader topic of arbitrators' initiatives to obtain factual and legal evidence. As the ILA Report states, it does not attempt to address the following issues:

² '*iura novit curia*' entails a power or duty of an adjudicator to ascertain the law independently of party submissions. Among others, see A. Demolitsa, *The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law*, 27 *ASA Bulletin* 426 (2009); C. Kessedjian, *Principe de la contradiction et arbitrage* in *Revue de l'arbitrage* 1995 – 3, 381; J. D. M. Lew, *iura novit curia and Due Process in Liber Amicorum Serge Lazareff* 397 (Editions A. Pedone 2011); J. Waincymer, *International Arbitration and the Duty to Know the Law*, 28 *J. Intl. Arb.* 201 (2011); T. Isele, "The Principle *iura Novit Curia* in International Arbitration" in [2010] *Int. A.L.R.* 14; T. Giovannini, "International Arbitration and *Jura Novit Curia* – Towards Harmonization" in *Transnational Dispute Management*, September 2011.

³ International Law Association, International Commercial Arbitration Committee, *Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, 2008, L. G. Radicati di Brozolo and M. Friedman, rapporteurs.

1. the power of arbitrators to make enquiries as to facts and to order on their own motion measures as to evidence such as appearance of fact witnesses, production of documents, site visits or expert evidence;
2. the power of arbitrators to characterize or recharacterize legal relationships; and
3. the power of arbitrators to determine or modify causes of action.⁴

The ILA Report canvasses and reports upon the potential sources of law and commentary in relation to its topic. It concludes that there are very few such sources, if any, but rather proceeds to identify a number of general principles which it designates as 'intrinsic to international commercial arbitration'⁵ and which ought to influence an arbitrator's behaviour in this relation. According to the ILA Report, arbitrators should mainly leave initiatives on law to the parties, but it is the arbitrators' duty to render an award respecting a certain objective standard of correct application of the law. So where sufficient material on the law is lacking, arbitrators should make their own enquiries, within the parameters of the dispute set by the parties, and give the parties a chance to comment on these arbitrator initiatives. The ILA Report then provides a series of specific recommendations applying the aforementioned general recommendations, as well as recommendations on certain '[s]pecial circumstances'.⁶ The latter occur where there is a rule of public policy, where there are special proceedings such as default and expedited interim relief proceedings, and when after complying with all the other recommendations the content of applicable law has still not been ascertained.

The present article seeks to review the obtaining of factual and legal evidence more broadly than the ILA Report does, that is, it is sought here to review the topic as a conceptual whole. The article identifies as the two central concerns of arbitrators' initiatives in this area concern for party autonomy, and concern for saving costs and time. It also identifies a number of other concerns. This article is dubious about claims that in most cases the parties seek an award corresponding to any objective standard of correctness of fact and law beyond what the parties themselves submit, as properly clarified in some circumstances by the arbitrators. The predominant conclusion from this review of concerns for arbitrators to take account of in deciding on when and how to take initiatives on evidence of fact and even law is that a good deal more restraint is indicated than is generally supposed. In addition, it seems unavoidable that arbitrators should sound the parties out as early as possible on how they view arbitrators' initiatives to obtain factual and legal evidence, and consider casting a rule on this in an early procedural order.

The article will proceed as follows. First, a scheme will be presented for conceptualizing arbitrators' initiatives. Second, it will be shown that arbitrators enjoy a generalized *power* to take initiatives to obtain evidence of fact and law, but

⁴ *Id.* at 5.

⁵ *Id.* at 19.

⁶ *Id.* at 23.

are under no generalized enforceable *obligation* to do so. Lastly, the enquiry will move to the circumstances where, in the general absence of an enforceable obligation to do so, arbitrators *should* or *should not* take such initiatives.

II. CONCEPTUAL BASIS OF THE ENQUIRY

(a) Distinction between evidence of fact and evidence of law

This article uses the term ‘evidence of law’ not so as to suggest that arbitrators must approach the ascertainment of law as a common law court does in respect to foreign law, namely by applying substantially the same methods as it applies to ascertain facts. The term ‘evidence of law’ as used here simply connotes the building blocks of legal conclusions. The ‘building blocks of legal conclusions’ generally comprise (i) legal argument (reasons) and (ii) authority (although it is to be hoped that authority is in any particular instance not entirely estranged from reason). So even where the judge or arbitrator supplies the legal arguments or legal authorities they are still ‘evidence of law’.

The term ‘law’ is at times found being used to contemplate the building blocks of the law, namely legal arguments and authority, and at times to contemplate legal conclusions about law. The latter include legal conclusions ascertaining the content of the rules of law, the applicability of those rules, and the application of those rules. ‘Evidence of law’ as used in this article makes clear that it is the building blocks of law that is contemplated in this expression.

In fact, in this article the term ‘evidence’ without more might have been used to designate the building blocks of both legal and non-legal propositions, together, without distinction. Indeed, as will be seen, in this article the position will be taken that usually arbitrators should approach initiatives to obtain the building blocks of non-legal propositions on the one hand and legal propositions on the other on substantially the same basis.

But the term ‘evidence’ as used in the literature does tend to contain an ambiguity in that one of its common acceptances excludes law⁷ and the other does not. It was felt best to avoid all doubt by spelling out that both evidence of fact and evidence of law are contemplated in this article.⁸

⁷ It is true that, unlike evidence of fact, in some sense legal argument as evidence does not exist until it is submitted or used in an arbitration. One tends to think of evidence as something existing in the world independently of its having been submitted in an arbitration.

⁸ The ILA Report, *supra* n. 3 at 2 outlines a different conceptual basis: “Both common and civil law are in agreement that facts are to be pleaded and proven by the parties and that courts in general should decide on proven facts and should not make inquiries as to issues not raised by the parties. The legal traditions, however, diverge as to causes of action and the status of law in civil litigation.” (footnote omitted) It is certainly true that almost all civil procedure systems leave it exclusively to the parties to plead the facts. Moreover, as will be seen in section 5 below, this is not without incidence on judges’ initiatives since invariably they are proscribed from taking initiatives of factual and legal evidence which would relate to facts beyond those pleaded by the parties. It is true too that all civil litigation systems place a burden for proving any factual allegation on one or the other party. But that does not mean that all civil procedure systems leave it exclusively to the parties to prove

A word should also be said here about the two meanings of the term 'fact' and which of these two is intended in the expression 'evidence of fact' in this article. Fact can mean a legal conclusion about non-legal matters (i.e. legal conclusions about the specific instance). Second, it can mean non-legal matters themselves used as components of legal conclusions. It is this latter meaning which is contemplated in the term 'evidence of fact' used in this article. To simplify matters, 'evidence of fact' includes such evidence even if for any reason it is excluded from proof of a legal proposition (including proof of a fact, in the first meaning).

These clarifications are not a mere matter of pedantry, but, it is submitted, are vital to avoid confusion surrounding the question of the respective roles of the parties and judges or arbitrators in gathering the building blocks of judgments and arbitration awards.⁹

In the legal literature analysing the respective roles of, on the one hand, the adjudicator (classically a judge) and, on the other hand, the parties, an analytical distinction is often made between initiatives to ascertain fact and initiatives to ascertain law. In such usage, 'law' is clearly meant as 'legal conclusions about legal matters' and 'fact' as 'legal conclusions about non-legal (i.e. factual) matters'.

Such a facts/law analytical distinction in examining adjudicators' initiatives, and in particular those of arbitrators, is confusing since facts and law (in the sense in which proponents of the distinction use them, i.e. as conclusions) are not the atomic elements which together build judgments and arbitration awards. It is evidence of fact and evidence of law that are. Facts, as used in the facts/law distinction, are a combination of law and evidence of fact. The determination of facts entails drawing *legal conclusions* about evidence (of fact).

As regards arbitrators' initiatives, it is possible to identify a principled basis for a distinction between the obtaining of evidence of fact and the obtaining of evidence of law. This is true even though in this article the adoption of any such distinction will be rejected. In fact, the *iura novit curia* principle operates in civil procedure systems upon this distinction.

As regards arbitrators' initiatives, there is no principled basis to suggest that facts (understood as legal conclusions about factual evidence) and law should be treated differently. That is as if to say that time is composed of day and evening, instead of day and night.

(b) *Positive and negative initiatives by arbitrators on factual and legal evidence*

In practice, most arbitrators' initiatives on factual and legal evidence aim for the positive introduction of evidence. But some exclude evidence. Both positive and negative arbitrators' initiatives are of concern in this article, with the following exception.

facts. In fact, most major civil procedure systems in the world make the proving of facts the shared responsibility of the parties and the judge in varying degrees.

⁹ While on the subject of precision in the use of language, it might be noted that courts' decisions and orders, insofar as they are based upon evidence of fact and law are also contemplated here, as are arbitrators' decisions and orders (and not just their awards).

Provided three conditions are satisfied, negative initiatives by the arbitrators, where the arbitrators signal to the parties that they are *not interested* in certain legal issues, and therefore are not interested in the factual and legal evidence to support them, are not of concern in this article.¹⁰ Nor are arbitrators' initiatives to say that they have heard enough factual or legal evidence on a certain issue, consistent with the satisfaction of these three conditions.

The first condition is that this decision of the arbitrators must be conclusive, and that this conclusiveness is sufficiently conveyed to the parties in the taking of the initiative. Second, this exclusion of issues must leave other issues already introduced by the parties, and at all events the arbitrators do not substitute new or other issues upon which they wish to hear evidence on. Third, prior to taking this sort of negative initiative the arbitrators must have granted the parties a sufficient opportunity to present evidence on the conclusively excluded issues. Otherwise, party autonomy is negatively affected. For more on party autonomy as a crucial value to be protected in relation to initiatives to obtain factual and legal evidence, see section IV(c)(i) below.¹¹

The reason why negative initiatives by arbitrators satisfying these three conditions are not of concern in this article is that they are of unalloyed benefit to the parties, and require no further discussion. They are a sort of approximate pre-decision. Coming to a decision on the dispute is a matter entirely for the arbitrators, and therefore so is ruling out certain possibilities at a stage prior to the final determination. Such initiatives save costs and time while respecting the relevant values, notably party autonomy.

(c) *Initiatives to obtain factual evidence*

The range of arbitrators' initiatives to obtain factual evidence depends upon the particular types of evidence, which in arbitration are principally the following:

¹⁰ Where an arbitral tribunal positively directs the parties to concentrate on certain issues already identified by the parties as relevant in a way that lets the parties know that these issues will or almost certainly will be the basis of the tribunal's decision, this too operates as a negative initiative effectively excluding other issues. It is noted that the approach in paragraph 3 of the preamble to the *IBA Rules on the Taking of Evidence in International Arbitration* with its language clearly indicating that the arbitrators are *not* bound by their declaration of the relevant issues would not amount to an approximate pre-decision: "Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, *the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.*" (emphasis added) See also M. E. Schneider, *Combining Arbitration with Conciliation in International Dispute Resolution: Towards an International Arbitration Culture* 57 at 61, ICCA Congress series no. 8 (Kluwer Law International 1996): "Some arbitrators go further and, after the initial exchange of pleadings, the production of written evidence and the offer of further evidence in the form of witness testimony, indicate the subject matter on which they wish to hear such further evidence. They may do that in general terms or identify specific points of fact for which they believe that such evidence is or may be required. Through this identification, they indicate the substance matters which appear relevant to them for the decision of the case and on which evidence is required."

¹¹ See also L. L. Fuller, *The Forms and Limits of Adjudication* in 92 *Harv. Law Rev.* 353 at 364 (1978–1979): "[...] the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."

1. Documentary evidence
2. Witness evidence of fact
3. Expert evidence of fact

Arbitrators may obtain documentary evidence essentially by ordering the parties or requesting third parties to submit it. Arbitrators may obtain witness evidence of fact by ordering a party to procure the participation and testimony of a witness, or by requesting the witness to provide testimony and to participate. If a witness is already appearing at the hearing, the arbitrators may obtain evidence by asking questions of the witness. Arbitrators may obtain expert evidence of fact by commissioning an expert themselves, by ordering the parties to commission an expert (or experts), and by asking questions of experts which the parties are using (and of experts otherwise commissioned).

(d) Initiatives to obtain evidence of the law

Initiatives to obtain evidence of the law involve either legal arguments or legal authorities. 'Legal arguments' is intended here in a broad sense to contemplate legal arguments relating to applicable law, causes of action, issues, or arguments in a strict sense of reasons in support of a position under a legal issue. Legal authority is a legal argument the force of which is based in whole or in part upon a requirement to follow it, such as a statute, a contractual provision, or a precedent case in a common law system, or a statement of the law in a published work by a professor of law in civil law systems. As regards arbitrators' initiatives to obtain evidence of the law, there is little if any difference between legal arguments and legal authorities.

Arbitrators' initiatives to obtain evidence of the law can take the form of (i) a request to the parties to make further legal arguments and submit further legal authorities, (ii) the arbitrators taking it upon themselves to do so themselves, or (iii) the arbitrators commissioning a legal opinion from an expert which contains legal arguments and (references to) legal authorities.

(e) The example of civil procedure systems

It is axiomatic that the civil procedure of a particular state where an international arbitration is seated does not apply in that international arbitration without more. It can only do so if it is ordained for application by virtue of a state's *lex arbitrii*. Much to the contrary, *leges arbitrii* almost invariably exclude the application of the civil procedure of their state, subject to the parties' agreement or a direction of the arbitral tribunal, which in practice very seldom occurs.

Yet because international arbitration is for important purposes considered to be a functional alternative to litigation before courts, in examining arbitrators' initiatives to obtain evidence of fact and law one might look for guidance to the rules of civil procedure on these matters in the principal systems around the world.

The ILA Report takes the view, however, that what courts do is of very little assistance in devising rules to guide arbitrators in their initiatives to obtain

evidence as to the law.¹² The ILA Report bases this view on the fact that national legal systems are too varied to draw out principles of universal application, and that there are a number of ‘fundamental differences’ vis-à-vis arbitration, notably that national systems have specific rules to deal with these problems and this is not the case and should not be the case for arbitration, and national courts can always have recourse to their expertise or deemed expertise in their own national legal system.

There are indeed important distinctions between civil litigation before courts and international arbitration which result in it being inapposite mechanically to translate what judges do to the situation facing arbitrators. These distinctions will be identified in this article, and their consequences regarding arbitrators’ initiatives will be traced.

Nonetheless, in modern legal systems one civil procedure system responds to essentially the same concerns and functional necessities as any other civil procedure system. And dispute resolution is common not only to all such civil procedure systems but, as will be contended below, it is *the exclusive concern and functional necessity of international arbitration*.

By consequence, often where there is unanimity of approach on any point across modern civil procedure systems this approach is instructive to international arbitration. In addition, where there are differing approaches across civil procedure systems, one can often see varying attempts to reconcile dispute resolution (the unitary goal of international arbitration) with other goals of civil procedure systems.

III. ARBITRATORS HAVE THE POWER BUT NO ENFORCEABLE OBLIGATION TO TAKE EVIDENTIAL INITIATIVES

(a) *General*

One seeks in vain a binding norm of universal application in international arbitration expressly providing that arbitrators have the power to take initiatives to obtain evidence of fact and law. But that arbitrators do have such powers is in fact almost universally the case. It is moreover the position that there is very little constraining arbitrators in how they choose to exercise this power.

(b) *Systems of arbitration law, arbitration rules, and other instruments*

The approach in arbitration laws and rules concerning arbitrators’ powers to take initiatives is usually silence.¹³ But there are exceptions where positive statements

¹² ILA Report, *supra* n. 3 at 12 : “[...] beyond 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.”

¹³ See Ch. P. Alberti, *Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?* in *International Commercial Law: Synergy, Convergence and Evolution* 3, 16 (S. M. Kröll, L. A. Mistelis, et al., eds.,

empower arbitrators to take initiatives. Section 34 of the English *Arbitration Act*, 1996 for example, admirably places the question of what initiatives the arbitral tribunal may take in ascertaining 'the facts and the law' front and centre. It provides that:

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. (2) Procedural and evidential matters include— [...] (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law [...].

Article 22.1(c) of the LCIA Rules, mirroring section 34(2)(g) of the *Arbitration Act*, 1996, provides that the arbitral tribunal shall have the power:

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 the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement.

The ICC Rules¹⁴ expressly provide a general grant of power to (and duty upon) the arbitral tribunal to proceed 'within as short a time as possible to establish the facts of the case by all appropriate means'.¹⁵ Article 25 of the ICC Rules then confers the power on the arbitral tribunal of its own motion specifically to call an oral hearing to hear the witnesses submitted by the parties and any other person,¹⁶ to appoint experts,¹⁷ and to obtain any additional evidence from the parties.¹⁸ The only instance of the principal evidential powers not expressly conferred upon the arbitral tribunal under the ICC Rules is the power to obtain documentary and witness evidence independently of the parties, although it would appear that by Article 25(5) of the ICC Rules the arbitral tribunal may require a party to procure the submission of a document or tender any person as a witness. At all events, such powers are arguably within the broad grant of powers to the arbitral tribunal in Article 25(1) of the ICC Rules.

As for the method of ascertainment of the content of the law, the ICC Rules provide no guidance except that in Article 21(2): 'The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.'

Even instruments specifically dedicated to laying down rules on taking evidence in international arbitration do little to constrain the arbitrators' powers. Such is

Alphen aan den Rijn: Kluwer Law International 2011): "The state[ment] of affairs with regard to the current domestic arbitration laws on ascertaining the law and its contents leaves a lot to desire. [...] Similarly, the rules of arbitral institutions are mostly silent on how the applicable law and its contents should be ascertained."

¹⁴ Unless otherwise stated, references to the ICC Rules in this article are to the 2012 edition.

¹⁵ Article 25(1) of the ICC Rules.

¹⁶ Article 25(3) of the ICC Rules.

¹⁷ Article 25(4) of the ICC Rules.

¹⁸ Article 25(5) of the ICC Rules.

the case, for example, under the *IBA Rules on the Taking of Evidence in International Arbitration* of 29 May 2010. Article 3.10 provides that the arbitrators may request the production of documents '[a]t any time before the arbitration is concluded [...]'. This is subject to the arbitral tribunal's assessment of certain considerations under Article 9.2(g), including 'procedural economy, proportionality, fairness or equality of the Parties' which might prevent an arbitral tribunal from intervening in extreme cases, but, it is thought, not frequently.

(c) *Legal literature*

(i) *Initiatives on evidence of law*

Various commentators have claimed to find a power for arbitrators to take initiatives to obtain evidence of the law in different sources. It has been said, for example, that the arbitrators' duty to decide the case entails a power to take initiatives in relation to the law. Such a power has also been ascribed to the application of the maxim *iura novit curia*, i.e. that the court, or here the adjudicator, 'knows the law'.¹⁹ This maxim is frequently found governing civil procedure law in civil law, i.e. continental, jurisdictions, such as Belgium, France, Germany, Italy, and Switzerland. Although the principle behaves variously across civil procedure systems, and has differing effects in these systems,²⁰ one effect it has in common is that it does empower (on occasion the power is contained in a duty) judges, subject to varying conditions, to take initiatives to ascertain the law. Commentators, third, point to the existence of provisions enabling arbitrators' initiatives in certain arbitration laws as the building blocks of such a principle.²¹ A fourth basis invoked by commentators to evidence the existence of a power with arbitrators to take initiatives in relation to law is that allegedly parties usually want a 'correct' decision based on the applicable law.

(ii) *Initiatives on factual evidence*

Commentators tend to cast doubt on or at least express reservations about the existence of a generalized power for arbitrators to take initiatives to obtain factual evidence. The ILA Report observes that:

¹⁹ A. Demolitsa, *supra* n. 2 at 426–427: "[...] the power – and not the obligation – of arbitrators to ascertain such contents on their own initiative constitutes a facet of their jurisdictional mission and cannot be questioned as such. Either under the maxim '*iura novit curia*', which is accepted for arbitrators as well in civil law jurisdictions though under differing attenuations and conditions, or on the basis of explicit provisions of a national law or of arbitration rules (UK Arbitration Act, Section 34(2)(g), LCIA Arbitration Rules, Article 22(1)(c)), this power should be considered as generally accepted [...]" ; M. Kurkela, '*Jura Novit Curia*' and the Burden of Education in International Arbitration – A Nordic Perspective in 3 *ASA Bull.* 486 (2003); T. Giovannini, *supra* n. 2 at 5–6, arguing that by *iura novit curia* there is a general obligation upon international arbitrators to ascertain the law, independently of the parties' submissions.

²⁰ Ch. P. Alberti, *supra* n. 13 at 4.

²¹ See A. Demolitsa, *supra* n. 2, as quoted in *supra* n. 19.

Both common law and civil law acknowledge that arbitrators do not have independent fact-finding powers.²²

While commentators tend to concur that arbitrators have no generalized power to take initiatives in relation to factual evidence, they generally do not enunciate justifications for this proposition. In a recent article, however, the following two bases for why '[...]' the arbitrator is bound by the facts that the parties submit' were identified:

The facts are – in contrast to law – not something certain, but require proof. The parties are generally in a better position to ascertain them, as they were actually involved.²³

Commentators would also appear to be concerned that arbitrators' initiatives to obtain factual evidence might have the effect of expanding the dispute. The relevant law and legal principles are circumscribed and controlled by the evidence, so this concern is greater concerning initiatives as to evidence of fact, than concerning initiatives as to evidence of law.

(d) *Assessment of arbitrators' power to take initiatives to obtain factual and legal evidence*

(i) *Rejection of alleged bases for arbitrators' initiatives*

Almost every arbitration finds the arbitrators under a duty to apply some corpus of legal rules or other, usually a recognized legal system, the one exception being where arbitrators are empowered to decide in equity (e.g. as *amiables compositeurs*, etc.). If, therefore, this duty to apply the law entailed a power for the arbitrators to take initiatives to obtain evidence of the law, it would approximate to a principle of generalized application.

It is, however, not the case that such a power for arbitrators ensues from their duty to apply the law. One sees this in view of the fact that where the arbitrators simply decide upon the parties' submissions on law, it cannot generally be said that they are not adequately applying the law. Inferring such a power upon the arbitrators' duty to apply the law disregards that the parties have an incentive to provide the arbitrators with evidence of the law. It will be a rare case when the arbitrators are entirely bereft of legal material. In order to seat such a power upon the arbitrators' duty to apply the law, one needs to go further. One needs to be able to understand the duty as requiring the arbitrators to apply the law to an objective standard independent of the views of the parties. As will be seen in section IV(c)(iii)(B) below, this is usually a problematic premise in international arbitration.

²² ILA Report, *supra* n. 3, at note 10 at page 5. See also at 2: "Both common law and civil law are in agreement that facts are to be pleaded and proven by the parties and that courts in general should decide on proven facts and should not make inquiries as to issues not raised by the parties."

²³ T. Isele, *supra* n. 2 at 24.

Arbitrators' power to take initiatives in matters of law cannot derive from the principle *iura novit curia*. This principle applies as a component of civil procedure governing judges' behaviour before state courts. It is trite law that civil procedure rules of the state of the place of arbitration do not apply to international arbitrations, the procedure of which is governed by that state's *lex arbitrii*. *Iura novit curia* is almost never part of a *lex arbitrii*. The one notable exception is Swiss arbitration law, where this maxim founds a duty upon arbitrators and therefore, for the greater reason, founds a power to take legal evidence initiatives. See section III(f)(iii) below.

It might be that commentators are making the weaker claim that the principle *iura novit curia* applies as a principle in arbitrations by analogy.²⁴ By such thinking, what arbitrators do is substantially identical to what judges do such that this principle applying to judges applies to arbitrators.

To begin, however, the principle does not apply universally, indeed nor does its effect whereby judges may seek out evidence of the law and not depend on the parties for it. It operates exclusively in civil law systems. Common law systems, albeit diverging on the question of when if ever courts may travel beyond the parties' legal submissions, do not rest any court powers of initiative upon the principle.

It is only where a civil procedure principle is virtually universal that it might commend itself for application in international arbitration. The alternative basis of analogical force, that all or most elements of a particular arbitration can be attached to states whose *leges fori* contain the working in question, is a decidedly weak one tending as it does to appeal to presumed expectations of the parties. As epitomized by certain claims criticized in section (IV)(c)(iii)(B) below, in international arbitration literature the most varied and unexpected expectations are strapped upon parties.

In addition, as regards knowing the law, the role of arbitrators is distinguishable from that of judges. Judges are masters of their own legal system, or at least their training and careers ought to make them so. At a minimum, judges can be expected to know where to find the law of their legal system. With the notable exceptions of Germany and Italy (and in a hybrid form in Switzerland),²⁵ the *iura*

²⁴ M. S. Kurkela, *supra* n. 19 at 500 argues that the adage applies as a principle. It is interesting that Kurkela appears to limit this conclusion to situations of an international arbitration "having its seat in Finland or in Sweden." (at 487) The basis for this limitation is unclear.

²⁵ See R. Hausman, *Pleading and Proof of Foreign Law – a Comparative Analysis* in *The European Legal Forum*, 1-2008, I-1 to I-60 (2011); for Germany, see K. P. Berger, "The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction", (2009) 25 *Arbitration International* 217 at 220 "It is an essential and core maxim of German procedural law that foreign substantive law, like German law, is law and not fact. Since the days of *Savigny*, German private law and foreign private law are considered to be of the same universal legal quality." The wording of §293 ZPO appears to foresee the treatment of foreign law as fact, to be proven "if it is unknown to the court", but in practice this does not occur. See W. Wiegand, *Rechtsetzung und Rechtsdurchsetzung, Festschrift Kellerhals* 127, 130–131 (M. Jametti Greiner, B. Berger & A. Güngerich eds., Staempfli 2005). For England, the case of *B v. A*, [2010] EWCH 1626 (Comm), per Tomlinson J. nicely illustrates the point, at para. 21: "In the present case however I find it difficult to ascribe any formal status to the Dissenting Opinion. In so far as it expresses conclusions of Spanish law which go beyond any evidence as to the content of that law given at the arbitration, I do not see how I can have regard to it."

novit curia principle by and large only applies to judges knowing the law of their own forum, the law they are called upon to apply repeatedly, day after day.

Arbitrators, by contrast, for these purposes too, 'have no forum'. They are called upon to apply a great variety of substantive laws.²⁶ The resultant corpus of potential legal norms is simply too vast for any arbitral tribunal to pretend to mastery of it to the degree to which judges master or should master their home legal system.²⁷

Moreover, the correlation between authoritative expertise in a particular substantive law and appointments as an arbitrator, while not altogether accidental, is nonetheless a distinctly attenuated one. Arbitral appointments are made by reference to a great multitude of factors. Acquaintance with the substantive law is a frequent although not invariable one; recognized expertise in it, decidedly rarer.

Judges, moreover, are agents of the state whose law they will generally be applying. They may be under a duty to that state to maintain the integrity of the law, with the result that they will want to look beyond what the parties submit by way of evidence of law. Arbitrators have no general duty to any state to apply their law to a certain standard.

Moreover, a legal system will often intend that the decisions of its courts have legal effects beyond the particular dispute in question. In the common law, a court

²⁶ See C. Chainais, *L'arbitre, le droit et la contradiction: L'office du juge arbitral à la recherche de son point d'équilibre* in *Revue de l'arbitrage* 1, 3 at 8 (2010): "[...] must one, can one reasonably demand of an international arbitrator that he should know the entirety of the rules of the applicable law? Does this really compose part of his commission? A certain pragmatism should doubtless predominate in this question." ("[...] doit-on, peut-on raisonnablement, exiger de l'arbitre international qu'il connaisse l'ensemble des règles de droit applicables?" (footnote omitted))

²⁷ See J. D. M. Lew, *Proof of Applicable Law in International Commercial Arbitration* in *Festschrift für Otto Sandrock* 581, 596–597 (K. P. Berger, W. F. Ebke & S. H. Elsing eds., Verlag Recht und Wirtschaft 2000): "From the perspective of international arbitration, there would appear to be some clear benefits to allowing (and even encouraging) the tribunal to familiarize itself with the applicable substantive foreign law. Arbitrators should not be subject to the limitations inherent in choosing between the conflicting opinions of the parties' experts. Understandably, arbitration tribunals are not generally eager themselves to undertake lengthy research into foreign law or to reach conclusions different to that argued for by one of the parties. The assignment of serving on a tribunal, in such circumstances, could become extremely difficult for practising lawyers, as a practical matter of time. There is also the potentially difficult matter of the tribunal obtaining access to the necessary foreign law source materials to reach the correct decision (particularly if there is the burden of obtaining appropriate translations). Moreover, the practical considerations of expense may well deter the parties from wanting tribunals to undertake such research"; C. Kessedjian, *supra* n. 2 at 404 determines that, for similar reasons, the adage *da mihi facta, dabo tibi ius* ("give me the facts and I shall give you justice") does not apply in arbitration: "First, one is driven to the conclusion that because of the lack of nationality itself of international arbitration proceedings, the *da mihi factum, dabo tibi jus* adage is inapt in defining the respective roles of the parties and the judge in international arbitration. Moreover, the multiplication of 'informal sources' and of what it is now accepted to call 'soft law' or 'non-law', which does apply to international commercial transactions, leads to increased uncertainty in resolving disputes and difficulties in assessing the precise influence which these sources may exert on an arbitral tribunal in its reflection process leading to a final decision." ("Force est d'abord de constater que du fait même de l'anationalité des procédures d'arbitrage internationales, l'adage *Da mihi factum, dabo tibi jus* est impropre à définir le rôle respectif des parties et du juge dans l'instance arbitrale. De surcroît, la multiplication de 'sources informelles' et de ce qu'il est désormais convenu d'appeler le 'droit mou' ou le 'non droit', qui serait néanmoins applicable aux opérations du commerce international, entraîne une plus grande incertitude dans la solution des litiges et une difficile appréciation de l'influence exacte que ces sources peuvent exercer sur le tribunal arbitral dans le processus de réflexion pour parvenir à la décision finale.")

decision might be formative of the law, as binding precedent. In the civil law, broadly, a line of judgments is ordained to be evidence of the law, which when departed from calls for at least an explanation. By contrast, in principle, arbitration awards are personal to the parties and specific to the particular dispute.²⁸ In principle, arbitral awards have no precedent value.²⁹ This flows from the fact that the arbitrators do not pronounce judgment in the name of a state but rather as agents of the parties alone. It also follows as a practical matter from the fact that arbitration awards are private, and often confidential.

It should also be observed that the continuity and regularity of courts and the lack of these qualities with arbitral tribunals also explains why arbitration awards rightly are not intended for use in other disputes, and why, in turn, arbitral tribunals need not bother with concerns beyond those of the parties before them. Judges are appointed for periods of time extending beyond a particular dispute, as a rule extended periods of time. Because judges deal with numerous disputes, and for other reasons, there is a much tighter community of judges in any legal order

²⁸ See the IIA Report, *supra* n. 3 at 12: “[...] unlike courts, arbitral tribunals are not state or public international law organs. Such entities exercise a public function and they must consider interests that transcend those of the litigants before them, including the transparency and consistency of the rules on pleading and proving foreign law. Decisions they make could become formal or informal precedents for future cases. Arbitrators are typically selected and paid to resolve the current dispute only, without concern for parties that are not before them.”

²⁹ See G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 2006 *Freshfields Lecture* 23 *Arb. Intl.* 357, 359–360 (2007). See also J. Paulsson, “International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law” in 3(5) 2006 *Transnational Dispute Management* who argues that, like the International Court of Justice, arbitration tribunals “whenever they are created by treaties which refer to the applicability of international law” (at 12) should proceed upon the basis of *iura novit curia* when dealing with public international law. In the *Fisheries Jurisdiction* cases the ICJ accepted that the principle applied to its own proceedings since it was “an international judicial organ”. But like courts in national legal systems, the ICJ is plainly an institutional organ of the legal system whose laws it applies. See Article 7(1) of the Charter of the United Nations, referring to the ICJ as an “organ” of the UN, along with the General Assembly and the Security Council, and others. The UN Charter has been extremely widely accepted by states. The UN Charter ensures the substantive legitimacy of the ICJ moreover in that its judges are elected by organs of the international legal system (the UN General Assembly and the UN Security Council) and, by Article 9 of the ICJ Statute, the election of ICJ judges must ensure that the result is representative of “the main forms of civilization and of the principal legal systems of the world”. Reflective of the ICJ’s institutional status, its judges serve for terms of nine years and may be re-elected. Any judge *ad hoc* in any case will always be greatly outnumbered by elected judges. Thus the powers of the ICJ are entrenched in the international “constitutional order”, and in particular they are part of that wide and enduring international consensus on rules for making rules. The Statute of the ICJ is appended to the UN Charter and enjoys the same legitimacy. Like judges in national legal systems, it can be seen that judges of the ICJ reasonably conceive that their responsibility in deciding cases placed before them extends beyond a responsibility to the particular disputants in the case, and in particular to expounding the law to an objectively correct standard. Arbitral tribunals set up under a treaty, such as a BIT, are readily distinguishable. They have no mandate to speak for the international legal order, but rather are constituted to decide the dispute which the specific litigants have placed before them. Even the state parties to a BIT as well as to one of the rare multilateral investment treaties do not speak in the name of the international legal order, let alone the arbitral tribunals appointed to act under such treaties. Reflective of the fact that the sole role of a treaty arbitral tribunal is to settle a particular dispute, the life of the tribunal is co-extensive with that dispute settlement. The pronouncements of treaty arbitral tribunals may be invoked by later arbitral tribunals (and indeed by courts and the ICJ itself) to support their legal determinations, but that is no argument that the purpose of any determination by an arbitral tribunal should be anything other than to settle a particular dispute. To contend otherwise is to argue *post hoc ergo propter hoc*. This is not to say, however, that one does not sympathize with Paulsson’s high-minded enterprise of promoting the creation of norms and authority in the area of international investment law.

than there is of international arbitrators. Moreover, in civil procedure systems the procedure is largely uniform across cases, while in international arbitration there is proudly little uniformity of procedure. These important elements of variance from one arbitration to another make it problematic to accept the influence of an arbitration award on a later case.

With sports and investment arbitration certain of the reasons militating against relying on arbitration awards from earlier cases in a present determination will in general apply with lesser force. Sports and investment arbitration awards are more readily published than commercial arbitration awards. While there is no strict doctrine of precedent in sports and investment arbitration, arbitration tribunals dealing with sports and investment questions generally follow a practice of adverting to previous awards on relevant points, for guidance in the case before them.³⁰

Although with sports and investment arbitration this rationale applies with lesser force, it still applies. More so than with court litigation, arbitrators in sports and investment arbitrations are the agents of the parties, whose interests are therefore more exclusively operative in their determinations than would be the case if the dispute were before the courts.

Nonetheless, ICSID arbitrations would appear to present a special case as regards arbitrators' initiatives to ascertain the law. As will be seen in section III(f)(iv) below, there may actually be an enforceable duty on ICSID arbitrators to take such initiatives in certain cases. Where there is such a duty, it follows there is also such a power.

Lastly, there are policy reasons to oppose the application of the *iura novit curia* principle in international arbitration. Under it judges have a duty to ascertain the law which creates a tension with the parties' rights to be heard.³¹ In international arbitration where party autonomy is such a surpassingly important value (see section 4(c)(i) below), any such curtailment of the parties' rights to be heard is repugnant.³²

³⁰ G. Kaufmann-Kohler, *supra* n. 29 at 365–373.

³¹ W. Wiegand, *supra* n. 25 at 138 : “Of issue here is the question whether it makes any sense to consider that there has been a violation of the right to be heard when the court legally categorizes the facts put before it by the parties or which they have only brought to the court’s attention. As illuminating as the postulate of the right to be heard is in relation to facts, it appears problematic in relation to the application of the law. At all events, such an approach is incompatible with the basic thinking behind the principle *iura novit curia* such that the question arises whether one should jettison the principle or limit it.” “Es geht um die Frage, ob es tatsächlich Sinn macht, eine Verletzung des rechtlichen Gehörs anzunehmen, wenn das Gericht auf Grund des ihm unterbreiteten Sachverhalts diesen rechtlich anders subsumiert als die Parteien dies vorgetragen oder auch nur in Betracht gezogen haben. So einleuchtend das Postulat des Anhörens der Parteien bezüglich der tatsächlichen Entscheidungsgrundlagen ist, so problematischer scheint es hinsichtlich der Rechtsanwendung. [. . .] Jedenfalls aber ist solch ein Ansatz mit den Grundgedenken des Prinzips *iura novit curia* nicht vereinbar, so dass sich die Frage stellt, ob dieses Prinzip aufgegeben oder eingeschränkt werden muss.”

³² See also M. E. Schneider, *supra* n. 10 at 62: “Nevertheless, arbitrators often do not consider themselves bound by the legal characterization given by the parties to their claims. However, where they do so, they should observe the right of the parties to be heard not only on the facts relied upon but also on the legal rules applied by the arbitral tribunal.”; T. Giovannini, *Qui contrôle les pouvoirs des arbitres : Les parties, l’arbitre ou la cour d’arbitrage* in *Les Arbitres internationaux*, vol. 8, Centre français de droit comparé 135, 144 (Société de législation comparée 2005): “In face of the variety of national approaches which have been reviewed, in my opinion an arbitrator

The case for the existence of a generalized principle empowering arbitrators to take initiatives on law due to the presence of arbitration laws so providing is also not a compelling one. This is because such provisions are conspicuously rare. As noted by Demolitsa,³³ section 34(2)(g) of the English *Arbitration Act*, 1996 is one of them. But there are not many other examples,³⁴ and certainly not enough to permit the claim that widespread practice evidences the existence of a general principle.

Virtually all arbitration laws are silent both about arbitrators' initiatives regarding factual evidence and arbitrators' initiatives regarding evidence of law. It might astonish that there are actually more provisions in arbitration rules expressly granting the arbitral tribunal the power to take initiatives to obtain factual evidence than there are for arbitrators to obtain evidence as to the law. Article 27(3) of the 2010 UNCITRAL Arbitration Rules provides, for example:

ought to adopt the approach which is most equitable, that is, to permit the parties to express themselves on every legal argument which might be relied upon by the arbitrators in their final award." ("Confronté aux différentes solutions nationales évoquées, l'arbitre devra à notre avis adopter la solution la plus équitable, soit celle consistant à permettre aux parties de s'exprimer sur tout argument juridique susceptible d'être retenu par lui dans sa décision finale. Cette approche nous paraît la seule compatible avec la nature consensuelle de l'arbitrage et la nature souvent hybride des règles de droit applicables au fond du litige." English international arbitration law shows a rigorous concern for the protection of the right to be heard properly undistorted by any effects of the *iura novit curia* principle. For a case where the English court annulled an arbitration award where the arbitrator decided on a basis not argued by the parties as a violation of the right to be heard (i.e. a violation of the duty under s. 33(1) of the *Arbitration Act* 1996 to give "each party a reasonable opportunity of putting his case" see *Vee Networks Ltd v. Econet Wireless International Ltd* [2004] EWHC 2909 (Comm) per Colman J; see also *Compania Sud-Americana de Vapores S.A. v. Nippon Yusen Kaisha* [2009] EWHC 1606 (Comm) where Beatson J found that, on those facts, the arbitrators' reliance on an argument abandoned by the party who advanced it was a violation of the requirement to give "a reasonable opportunity of dealing with the evidential foundation" of the other party's case, since, on those facts (and perhaps more generally, "in an adversarial system"), "cross-examination was important". However since this right to be heard question arose in good time for the arbitral tribunal to take it into account in the award, the court determined that this irregularity did not lead to "substantial injustice" within the meaning of s. 68(2) of the *Arbitration Act*, 1996. By contrast, in Swiss arbitration law there is an unsatisfactory constriction of the right to be heard due to the operation of the notion that *iura novit curia* applies to arbitrators too. Under Swiss law there is no violation of the right to be heard insofar as the legal elements which the arbitrators relied upon in the award without notice to the parties and without giving them an opportunity to comment were not such as would surprise the parties. The thinking is that anything the parties could have anticipated they had a sufficient opportunity to address, but effectively forbore to do so. Moreover the Swiss Supreme Court takes a very narrow view of what the parties might not reasonably have anticipated. See ATF 130 III 35 consid. 5, decision 4P.260/2000 of 2 March 2001, as well as decision 4A_108/2009 of 9 June 2009. Often in reality a party simply did not and even could not have anticipated a legal argument or issue upon which the determination turns, and therefore substantially suffers a violation of its rights to be heard. In addition, an unfortunate unintended consequence of this position in Swiss arbitration law is a tendency for parties in an arbitration to expand the legal argumentation and legal issues, with the attendant costs increases of the arbitration, as parties strive to express themselves on questions not even raised by the other side, but which they might be deemed to have anticipated. For a thorough comparison of English and Swiss law concerning *iura novit curia* see M. Arroyo, *Which is the Better Approach to Jura Novit Arbitrator – the English or the Swiss?* in *New Developments in International Commercial Arbitration* 2010 27–54 (Ch. Müller & A. Rigozzi eds., Schulthess 2010).

³³ A. Demolitsa, *supra* n. 2.

³⁴ For an example in Dutch law and an example in Danish law see the ILA Report, *supra* n. 3 at 13.

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

Clearly this contemplates only factual evidence, since if it also contemplated legal evidence it would mention obvious categories of legal evidence such as statutes, case law, and commentary (and not just documents and exhibits). In these new UNCITRAL Rules there is no equivalent requirement in relation to evidence on the law.³⁵

Similarly, Article 25(5) of the ICC Rules provides that, '[a]t any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.'³⁶ These rules contain no similar provision positively empowering the tribunal to take initiatives to obtain legal evidence.

Similarly, Article 22.1(e) of the LCIA Rules provides:

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:

[...]

(e)

to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant [...]

Again, the LCIA Rules make no express pronouncement on the arbitrators' powers to take specific initiatives in relation to law.³⁷

The allegation that the expectations of the parties are to obtain a correct award is dealt with in section IV(c)(iii)(B) below. It will be concluded there that this allegation is usually incorrect. Those who make it rarely give reasons in support, and those reasons they do give are unconvincing.³⁸

(ii) *Basis for the existence of a power for arbitrators to take initiatives concerning factual and legal evidence*

Despite the inadequacy of these reasons cited to support the existence of a power for arbitrators to take initiatives to obtain factual and legal evidence, it remains

³⁵ The 1976 UNCITRAL Rules did not confer any general power upon the arbitrators to take initiatives to obtain legal evidence either, and they included the same requirement regarding initiatives to obtain factual evidence at Article 24(3).

³⁶ This article is found under the rubric "Establishing the Facts of the Case" in the ICC Rules and therefore does not relate to legal evidence (even the legal treatment of factual evidence does not seem to be contemplated here).

³⁷ See, however, Section 22.1(c) of the LCIA Rules cited in section 3.2 above, which is a general grant of powers expressly covering initiatives both as to factual and legal evidence.

³⁸ On the other hand, among those making this claim are highly experienced arbitration practitioners. One senses therefore that there is doubtless a case to be made in favour of arbitrators being under an obligation to satisfy an objective correctness standard in their arbitration awards. It would be most welcome to see that case articulated by its proponents.

that arbitrators most certainly have this power, and that this operates so widely in international arbitration that it may be considered a general principle. The simple reason for this is that, as a general rule in arbitration, the arbitrators are masters of the procedure, except where the parties agree otherwise – and generally they do not -, and there is usually no adverse legal consequence of arbitrators taking these initiatives. Awards are generally not set aside because arbitrators have taken such initiatives, nor are they generally refused enforcement on this basis. Again, generally speaking, arbitrators are not removed for taking such initiatives.

(e) Limits on arbitrators' power to take initiatives

(i) General

A more difficult question is what objective limits there may be on the powers of arbitrators to take initiatives to obtain evidence of fact and law. One must distinguish between actions of arbitrators which will attract deterrent legal consequences and those which will not. Inasmuch as there are no such consequences, it follows that arbitrators have acted within their powers.

It may be observed that, generally speaking, arbitrators' initiatives on factual and legal evidence are not subject to an enforceable obligation to be exercised properly, as contrasted to, for example, the exercise of an administrative tribunal's discretion. So the exercise of such powers by arbitrators cannot be impugned on the basis, for example, that it violated the principle of proportionality, that it has adverted to irrelevant factors, or that it was arbitrary.

(ii) Removal of arbitrators for bias

It is true that there is a danger when an arbitrator's initiatives result in advantage to one party, and therefore disadvantage to the other. The arbitrator may appear to be acting partially, and to be biased. It would, however, only be in the rarest of circumstances that this would amount to a basis upon which the arbitrator could be removed for a violation of his duty of impartiality and independence. To begin, if a tribunal composed of more than one arbitrator so acted, it cannot be envisaged that they could all be biased. It is decidedly unlikely that three or more arbitrators are all prey to the same source of bias, such as the same financial interest, or even that they are all subject to bias albeit upon different sources. Thus bias as evidenced by initiatives to obtain factual and legal evidence could only arise either when the chairman is empowered to take procedural decisions alone, or when there is a sole arbitrator.

Even where there is a chairman empowered to make procedural decisions alone or a sole arbitrator, it is still extremely unlikely that his initiatives will result in his removal for bias. This is because in principle the arbitrator has the power to take initiatives, so it will only be where it can be established that he acted upon a biased intention that his action may be successfully impugned. There will usually be any number of innocuous explanations for the initiative, for example a search for

deeper truth than the parties' submissions have elucidated, or a concern about compliance with mandatory norms.

By consequence, it will only be in the most extreme circumstances that an arbitrator's initiatives provide a ground for his removal because of bias.

(iii) *Nullification of and refusal to enforce an arbitration award*

(A) GENERAL

The only remaining legal consequence of arbitrators' initiatives is therefore the nullification of the arbitration award at the place of arbitration, or a refusal to recognize and enforce it.

The grounds upon which international arbitration awards may ordinarily be set aside or refused recognition and enforcement are of course few and narrow. Among these, a party seeking to deprive the award of legal force may only realistically hope to appeal to (i) a failure to respect the right to be heard; (ii) a failure to respect an obligation to treat the parties equally; (iii) *ultra petita*; and (iv) procedural efficiency.

(B) RIGHT TO BE HEARD

Many leading arbitration systems require arbitrators first to alert the parties to any new matters of fact and legal propositions and authorities which they will rely on in their award, and to afford the parties the opportunity to comment on them. This is, for example, clearly the position in France. In Switzerland, however, it is much more difficult to cause the court to interfere with the arbitration award on this basis. It is only where the parties could not reasonably expect the arbitral tribunal to rely on certain legal propositions that the requirement arises to bring them to the attention of the parties and to allow the parties to comment on them.³⁹

In extreme cases, arbitrators' initiatives may stifle or even stultify the parties' initiatives. It is the parties' initiatives alone which compose the satisfaction of their right to be heard. Arbitrators' initiatives must not constrict the parties' opportunities to submit evidence, legal authorities and legal argument, and to comment on those of the other party.

(C) EQUAL TREATMENT OF THE PARTIES

If an arbitrator takes initiatives to obtain evidence of facts or law, he will not do so idly, and there is every prospect that the result will bear upon the substantive outcome. Therefore, arbitrators' initiatives may well entail decisive effect. Arbitrators are required to treat the parties equally. Clearly any procedural decision which has decisive effect runs the risk of violating this principle. On the other hand, even with such decisive effect, if the arbitrator can say that he would

³⁹ B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* 374 (2d ed., Sweet & Maxwell 2011): "[...] the court (or arbitral tribunal) shall – as an exception – grant the parties a reasonable opportunity to express themselves on the rule(s) of law it intends to apply if otherwise such application of the law would come as a surprise for them." See also *supra* n. 32.

have acted in similar fashion whichever party were to have benefited, then this should suffice to ensure compliance with the principle. It would make such assertions more credible if the arbitrator sets out rules at the outset of the case on the conditions upon which she may exercise her discretion to take initiatives to obtain factual and legal evidence.

(D) *ULTRA PETITA*

The predominant tendency in arbitration is to treat as *ultra petita* only those awards which decide beyond the relief sought by the parties, and not those in which the reasoning goes beyond the parties' submissions, if in fact the result of this is an award within the relief sought by the parties. By consequence, arbitrators need not usually fear interference with their award on the basis of a challenge of *ultra petita*. Still, as recorded by Gary Born,⁴⁰ some arbitration systems depart from this general approach, and are more invasive of awards on the grounds of *ultra petita*, treating certain reasoning (i.e. the introduction of new legal issues) beyond that of the parties, or different from that of the parties, as a basis for *ultra petita* objection.

(E) PROCEDURAL EFFICIENCY

Lastly, it might be contended that arbitrators have no power to take initiatives to obtain evidence of facts and law when to do so would result in great disruption of the arbitral process. Such a contention would derive much of its force from the fact that, more so than in court proceedings, the expense of the arbitrators themselves and of the procedure are being borne by the parties themselves. Really inefficient interventions, such as late initiatives, can be extremely expensive for the parties.

In favour of such a contention, one might invoke the supposed existence of a general principle of procedural efficiency operating, or at least emerging,⁴¹ in international arbitration. Nonetheless, however far such a principle may have emerged, it cannot be said to be today a viable basis upon which to challenge an arbitration award. By consequence, it cannot amount to an objective limitation upon arbitrators' powers to take initiatives to obtain factual and legal evidence.

(F) CONCLUSION

In conclusion, in extreme cases, where the arbitrators have introduced considerations, especially unexpected considerations, without hearing the parties on them, or by their inquisitorial zeal have entirely suffocated the parties' opportunity to test the evidence, there may be a violation of the right to be heard which attracts legal consequence. This would constitute an objective limit to

⁴⁰ G. B. Born, *International Commercial Arbitration*, vol. 2 at 2608 (Kluwer Law International 2009): "Nonetheless, cases arise where a tribunal's award is annulled for addressing issues or granting relief that exceeds the scope of the claims presented to it by the parties. Even in such cases, however, an arbitral tribunal does not exceed its authority under Article 34(2)(a)(iii) by relying on arguments or authorities not raised by the parties to support their claims."; ILA Report, *supra* n. 3 at 19: "Arbitrators who decide a dispute on a legal rule not invoked by the parties could in some cases be accused of exceeding their mandate."

⁴¹ G. Kaufmann-Kohler, *Globalization of Arbitral Procedure* in 36 *Vand. J. Transnat'l L.* 1313, 1321 (2003).

arbitrators' powers. Otherwise, arbitrators' discretion is unconfined in taking initiatives to obtain factual and legal evidence.

(f) *Enforceable duties on arbitrators to take initiatives*

(i) *Enforceable duties are rare*

Because international arbitration systems grant such broad procedural powers to arbitrators, and because they wish to interfere with awards only sparingly, there exists very little by way of enforceable obligations upon arbitrators.

The most poignant illustration of the dearth of enforceable duties on arbitrators is that where arbitrators take no initiatives at all they are perhaps best assured of rendering an inviolate award. If an arbitrator writes his award based alone on the evidence submitted by the parties, the legal arguments rehearsed by the parties, and the contractual provisions and statutory norms relied on by the parties, there is virtually no danger that the award will be nullified or refused enforcement as in violation of the right to be heard. Ultimately, procedural norms which might occasion interference with an arbitral award contemplate exclusively the opportunities of the parties themselves to know the case against them and to respond to it. These procedural norms never require the pro-active initiatives of the arbitrators to ensure that all relevant factual evidence and legal norms are considered. Moreover, there is certainly no review on the merits to chasten the drafters of a legally feeble award.

There are three instances where the arbitral tribunal is arguably under an enforceable duty to ascertain the law.

(ii) *Jurisdiction*

Arbitrators must take the initiative to obtain evidence of the law in relation to the assessment of their jurisdiction upon a jurisdictional challenge by a party. The reason for this is that arbitrators never have exclusive jurisdiction to determine their jurisdiction. Generally speaking, the courts of the place of arbitration also do, and at all events courts before which enforcement is sought may refuse enforcement on the basis of the tribunal's lack of jurisdiction.

Moreover, quite frequently courts where annulment is sought review for jurisdiction anxiously. There is no objection to this, for example under the New York Convention, and indeed one might contend that such searching review is legally indicated. Arbitration is a jurisdiction of exception, and exacting verification that the conditions of such jurisdiction are satisfied is ordinarily appropriate.

The result of courts examining jurisdiction so carefully is that if the arbitral tribunal reaches a different view or adopts a different approach, its decision is likely to be invalidated by a court. This results in an effective enforceable obligation upon arbitrators to take the initiative to ascertain the law in connection with their jurisdiction.

It should be noted here, however, that if a party does not contest an arbitral tribunal's jurisdiction, and even in some cases where a party omits to raise a particular basis of challenge to an arbitral tribunal's jurisdiction, it will be deemed to have consented to that jurisdiction. This is, for example, the intended operation of Article 16(1) of the 2006 UNCITRAL Model Arbitration Law.⁴² As a rule, where a party does not raise its challenge to jurisdiction on a timely basis, it is treated as having accepted that jurisdiction. In the result, the arbitral tribunal's initiatives here will ordinarily be confined to refining the analysis on law and perhaps facts within the bounds of a party's jurisdictional challenge.⁴³

(iii) *Iura novit curia under Swiss arbitration law*

Under the principle *iura novit curia*, arbitrators sitting in Switzerland are obliged to ascertain and to apply the law.⁴⁴ The source of such an obligation has been doubted,⁴⁵ and indeed it is not susceptible of easy justification. But under Swiss arbitration law, in principle may validly rely entirely on the parties to provide them with the law to be applied, and take no initiatives themselves, especially as concerns non-Swiss substantive law.⁴⁶ Therefore, there would be no legal consequences for

⁴² Article 16 (2) provides: "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified."

⁴³ A case illustrating these matters is *Joseph Charles Lemire & others v. Ukraine*, ICSID Case No. ARB/06/18, 28 March 2011. The majority (Professor Juan Fernández-Armesto (presiding arbitrator) and Jan Paulsson) found that the respondent had not sufficiently challenged jurisdiction over the claimant's shareholder's derivative action and that therefore the tribunal had jurisdiction over it. See paras. 35 to 39 of the tribunal's second award (of Mar. 28, 2011). Insofar as the question can be characterized as one of jurisdiction, the majority is clearly right, since if the respondent has not raised the point it has consented to the jurisdiction asserted by the claimant (and this question is not a matter over which the ICSID Convention takes a view independently of the will of the parties). But the objection is actually conceived of by the dissenting arbitrator, Dr Jürgen Voss, as being in the first place one of substance, and only alternatively one of jurisdiction. On either basis, Voss was of the view that the tribunal should have raised the issue of its own motion. See paras. 103 to 105 and 421–422 of Dr Voss' opinion. Interestingly, at para. 424 Voss cites an article of Paulsson (the article referenced in footnote 30 above) for the proposition that, in the area of international law, arbitral tribunals must look beyond the parties' pleadings in determining the legal position. The thought-provoking view in Paulsson's article is briefly criticized in footnote 30 above.

⁴⁴ Decision of the Swiss Supreme Court of Mar. 2, 2001 in 4P.260/2000, at consideration 5.b., referring to ATF 120 II 172 and ATF 116 II 594: "In accordance with the case law of the Swiss Supreme Court, both state courts and private arbitration tribunals are obligated to judge legal consequences of their own motion". ("Nach der bundesgerichtlichen Rechtsprechung sind sowohl die staatlichen Gerichte als auch die privaten Schiedsgerichte verpflichtet, die Rechtswirkungen [...] von Amtes wegen zu beurteilen [...]").

⁴⁵ G. Kaufmann-Kohler, *Iura novit arbiter – Est-ce bien raisonnable ? Réflexions sur le statut du droit de fond devant l'arbitre international in De Lege Ferenda, Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* 71, 74 (Editions Slatkine 2004): "Yet it is in vain that one searches for the source of this obligation. It is not found in the law of arbitration. It cannot be situated either in an analogy to the requirements upon a state judge." ("Or c'est en vain que l'on cherche la source de cette obligation. Elle ne se trouve pas dans le droit de l'arbitrage. Elle ne se situe pas non plus dans l'analogie avec la réglementation applicable par le juge étatique.")

⁴⁶ Decision of the Swiss Supreme Court of Apr. 27, 2004 in 4P.242/2004 at consideration 7.3: "In accordance with Art. 16, para. 1 of the Swiss Private International Law Act, in determining the content of applicable foreign law a court may request the co-operation of the parties and in matters involving economic rights the

arbitrators refusing to take initiatives to ascertain the law, unless they actually enunciated, either in the award, in the arbitration proceedings, or in setting aside proceedings before the Swiss Supreme Court, that they acted as they did upon the belief that they had no power to take such initiatives.

If they make such a statement, and, it is submitted only so, the Swiss Supreme Court may nullify the award based on Article 190(2)(b) of the Swiss Private International Law Act (the '**Swiss PIL Act**'), which concerns misassessments of jurisdiction. This would seem apparent from a decision of the Swiss Supreme Court.⁴⁷ In that case, arbitrators declined to apply EC competition law (now EU competition law) on the basis that they had no powers to do so. The Swiss Supreme Court nullified their award, holding that the arbitrators did in fact have power to apply EC competition law, and their deciding otherwise was a misassessment of their jurisdiction in violation of Article 190(2)(b) of the Swiss PIL Act.⁴⁸

(iv) *ICSID arbitration*

There is a third instance where arbitrators may be under an enforceable obligation to take initiatives to obtain evidence of the law. It is ICSID arbitration.

One of the bases for the annulment of an ICSID award is that the arbitral tribunal 'manifestly exceeded its powers' (Article 52(1)(b)). One of the situations where manifest excess of powers has been found is where the tribunal failed to apply the applicable law.⁴⁹ In the *Enron v. Argentina* annulment decision⁵⁰ the *ad hoc* committee observed that the arbitral tribunal had not addressed the issue of whether Argentina's reaction to the alleged state of necessity was the only possible reaction. It also noted that the parties did not seem themselves to have identified and discussed this issue.⁵¹ It then went on to declare:

Having said that, the Tribunal is required to apply the applicable law, and is required to state sufficient reasons for its decision.⁵²

court may impose the proof of foreign law upon the parties" ("[. . .] Gemäss Art. 16 Abs. 1 IPRG kann ein Gericht bei der Feststellung des Inhalts des anzuwendenden ausländischen Rechts die Mitwirkung der Parteien verlangen und bei vermögensrechtlichen Ansprüchen den Nachweis ausländischen Rechts den Parteien überbinden. Soweit der Schiedsrichter von dieser Möglichkeit Gebrauch machte, hat er nicht gegen den Ordre public verstossen [. . .]"). See also the ILA Report, *supra* n. 3 at footnote 44 on page 15.

⁴⁷ 118 II 193 of 28 April 1992.

⁴⁸ See also the ILA Report, *supra* n. 3 at 14 and at footnote 45 at page 15 referring to a decision of the Swiss Supreme Court on the point (*D. d.o.o. v. Bank C.*, 27 April 2005, *ASA Bulletin*, 2005, at 719 *et seq.*).

⁴⁹ Referring to the *Amco II* Annulment Decision, paragraphs 7.12 and 7.19; *Klöckner* Annulment Decision, paragraphs 59 and 169; *Mitchell* Annulment Decision, paragraph 45; *CMS* Annulment Decision, paragraph 135; *MTD* Annulment Decision, paragraphs 46–47; *Soufraki* Annulment Decision, paragraph 86.

⁵⁰ *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. (Claimants) v. The Argentine Republic (Respondent)* (ICSID Case No. ARB/01/3), annulment decision of 30 July 2010.

⁵¹ *Enron v. Argentina* Annulment Decision, *supra* n. 50 at ¶375: "The Committee notes that from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the questions set out above, which would provide an explanation for why the Tribunal did not expressly address them."

⁵² *Supra* n. 50 at ¶376.

On a further issue, whether Argentina may have contributed to the situation which it sought to characterize as a state of necessity, the *ad hoc* committee again observed that the parties had made no submissions on the issue, which the committee found relevant, but again states that this does not dispense the arbitral tribunal from identifying the issue itself and applying the relevant principles:

As in the case of the ‘only way’ requirement, the Committee notes that from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the issue of the legal definition of the expression ‘contributed to the situation of necessity’ in Article 25(2)(b) of the ILC Articles. However, the Committee again considers that the Tribunal is nonetheless required to apply the applicable law.⁵³

The *ad hoc* committee then found that the mere reliance on an economist’s report could not be said to be an application of the law within the requirements of Article 52(1)(b) of the ICSID Convention.⁵⁴

While it is certainly true that, as a general principle, *ad hoc* committees sitting in ICSID arbitration award annulment proceedings are not to review how arbitral tribunals applied the law, the *Enron* Annulment Decision is an indication that an arbitral tribunal’s failure to identify issues, and therefore failure to apply any legal principles under them, may constitute a basis for annulment as a manifest excess of powers. This same case evidences that this is so in principle even where the parties themselves failed to identify those issues, and therefore failed to make submissions on the relevant law under them.

The decision of the *Enron v. Argentina ad hoc* committee may be an isolated one in this regard. But it does sit within a tradition of robust review for manifest excess of powers under the ICSID system. By consequence, there is some basis to conclude that ICSID arbitral tribunals, unlike most every other arbitral tribunals, may be under an enforceable duty to take initiatives to identify the relevant issues and to supply at least some law for every issue not identified by the parties.⁵⁵

⁵³ *Supra* n. 50 at ¶392.

⁵⁴ *Supra* n. 50 at ¶395.

⁵⁵ But see the decision of 1 November 2006 of the *ad hoc* committee in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, at para. 57: “[...] the Arbitral Tribunal would have been welcome to address *ex proprio motu* the other provisions of the Treaty, which might potentially excuse taking such measures against the Claimant. A comparable approach would have been along the lines of the adage *jura novit curia* – on which the DRC leaned heavily during the Annulment Proceeding – but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option [...]”

IV. THE EXERCISE OF ARBITRATORS' POWER TO TAKE INITIATIVES TO OBTAIN FACTUAL AND LEGAL EVIDENCE

(a) *General*

The pivotal question, the one of greatest practical importance, is how should arbitrators be guided in exercising their discretion to take initiatives to obtain factual and legal evidence?

Despite arbitrators' vast discretion, there is clearly a correct way for them to act, or at least a narrow range of acceptable responses to any procedural question.⁵⁶ One might say that, in such circumstances, there is an unenforceable duty on the arbitrators to act within certain confines. This is true even if there is no clearly right or wrong approach, but rather a range of approaches which are more or less appropriate. Unenforceable duties upon arbitrators are simply courses of action indicated by professional prudence, the exercise of judgment against an array of factors, in such a way as the informed observer can conclude that the choice made is an or even *the* appropriate exercise of a discretion.

The essential proposition which will be advanced here is that in respect of arbitrators' initiatives to obtain evidence of facts and law a great deal more reserve is usually indicated than is widely supposed. Taking arbitration as it is widely practised today, it is in fact only in a limited number of circumstances that arbitrators will properly take such initiatives. The considerations identified here also suggest the preferred form of arbitrators' initiatives.

(b) *Primary responsibility for initiatives to obtain factual and legal evidence in international arbitration*

Civil procedure systems adopt a wide range of approaches in the obtaining of factual and legal evidence.⁵⁷ Initiatives are shared between the parties and the judge in varying proportions. In Germany, for example, it is principally the court that takes initiatives for obtaining both factual and legal evidence.⁵⁸ In France, it is

⁵⁶ This analytical scheme is also found in the ILA Report, *supra* n. 3 at 8: "In considering these questions, the Committee is also mindful that there are important differences between what arbitrators can do in the sense that they have the requisite authority, what they ought to do as a matter of good practice, and what they must do to comply with legal or professional obligations imposed on them. As this Report will elaborate, the Committee believes that arbitrators typically have wide authority to address legal matters, and in exercising that authority they are constrained only by a small number of important principles, which are reflected in international arbitration conventions such as the New York Convention as well as in arbitration laws and rules. In short, there is a great deal that they can do and not much that they must do. This implies considerable discretion for arbitrators in determining the applicable law and its contents. Consequently, much of what can constructively be said about this topic concerns how arbitrators ought to exercise their substantial discretion as a practical matter."

⁵⁷ See the excellent survey of various civil procedure systems' approaches to initiatives to ascertain the law in the ILA Report, *supra* n. 3 at 8–12.

⁵⁸ By ZPO §131 the parties must attach documentary evidence that they wish to rely on to their pleadings. By ZPO §142(1) the court can order a party or a third party to submit documents referred to in pleadings. By ZPO §143 the court can order a party to submit documents in the party's possession which relate to the

the parties who take initiatives to obtain factual evidence, although the French court has extensive powers of initiative in relation to factual evidence.⁵⁹ By contrast, initiatives to obtain legal evidence are almost the exclusive province of the court. In Swiss civil procedure, in the ordinary case, the court is responsible for the proof of facts and the parties are under an obligation to assist, and the court has the primary responsibility for initiatives as to legal evidence.⁶⁰ In England, the parties have virtually exclusive responsibility for bringing forth the factual evidence upon which they will rely.⁶¹ As regards the law, again it is the parties chiefly who are responsible for determining the relevant authorities. Only on rare occasion will the court take initiatives to supplement the authorities which the parties place before it.

The distinct lack of uniformity of approach in relation to these matters across civil procedure systems would tend to suggest that in arbitration a great variety of approaches should also be employed.

Arbitration law systems, as was noted in section (III)(b) above, have decidedly little to say about these matters, and arbitration rules almost invariably maintain a determined agnosticism about them. Indeed, on the rare occasion where an arbitration law system or arbitration rules takes a position on the matter it is generally to place responsibility with the arbitral tribunal to lead the enquiries.⁶²

Yet it is unmistakable that arbitration as it is practised today places the primary responsibility for initiatives to obtain both factual and legal evidence upon the parties.⁶³ There is therefore a question as to what influence, powerful enough to

proceedings and the decision. By ZPO §422 there is a limited power for a party to obtain the submission of documents in the possession of the other party. ZPO §284 provides that the hearing of evidence must be in accordance with a decision of the court (ZPO §358) of prescribed content (ZPO §359), although particular provision may be made by the court with the parties' consent. By ZPO §357(1) the parties are permitted ("[d]en Parteien ist gestattet") to be present during the hearing of the evidence.

⁵⁹ By Art. 9 CPC (i.e. the (nouveau) Code de procédure civile) the parties must prove their factual claims. By Art. 10 CPC the court may order a wide variety of evidential measures. By Art. 11 CPC the parties must cooperate with the court's evidential measures.

⁶⁰ Article 55 CCP enunciates the *iura novit curia* principle: "The court shall apply the law of its own motion." ("Le tribunal applique le droit d'office.") For foreign law, by Article 2 CCP, Art. 16 of the Swiss PIL Act applies, which, while maintaining the *iura novit curia* principle, foresees that the court can acquit itself of this obligation by transferring it to the parties. See note 47 above.

⁶¹ By section 32.1 of the CPR (i.e. the Civil Procedure Rules) ("Power of the court to control evidence"), the judge may take measures in relation to the evidence. In practice it is the parties through their counsel who select the evidence they wish to submit, who identify witnesses, and who take the lead in questioning witnesses. Expert evidence is a special case, presenting greater formal powers for the judge and less for the parties. But in practice it is the parties who take the initiative to identify expert witnesses and submit their evidence, subject of course to the permission of the court, which is usually accorded. A feature of English law which typifies party prominence in matters of evidence is that the judge has no power to compel a party to produce a witness. See *Lloyd's v. Sir W. O. Jaffray BT*, 2000 WL 989565 (decision of Cresswell J of the Commercial Court).

⁶² See, for example, Art. 184(1) of the Swiss PIL Act providing that, "[t]he arbitral tribunal shall itself proceed with the administration of evidence." ("Le tribunal arbitral procède lui-même à l'administration des preuves"; see also Art. 25(1) of the ICC Rules: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.")

⁶³ It is significant that the ILA Report recommends that it be the parties who bear principal responsibility for the ascertainment of the law in international commercial arbitration. See ILA Report, *supra* n. 3 at 22: "Arbitrators should primarily rely on the parties to articulate legal issues and to present the law, and disputed

overcome the traction of the civil procedure example in many cases, has conditioned this reality in international arbitration.

The almost invariable operation of party initiative as the principal basis for the adducing of factual and legal evidence in international arbitration is doubtless in part a natural response to the fact that in the beginning the better knowledge of the case is with the parties who must acquaint the arbitrators with its factual and legal elements. But this cannot in itself be compelling of the position since, as has been seen, civil procedure systems too face this situation.

It is submitted that this reality is explained by the importance of party autonomy in international arbitration, and perhaps also in some small measure by concerns of predictability. It will moreover be contended that it is not at all due to any concern for saving time and costs.

(c) *Factors tending to favour caution in arbitrators' initiatives*

(i) *Party autonomy*

(A) NOTION OF PARTY AUTONOMY

A central value in most every arbitration, but especially in commercial arbitration, is that of party autonomy.⁶⁴ Party autonomy is often understood to be limited to

legal issues." The IIA Report is not entirely clear about why this should be. It would, however, appear that the reasoning relates to the proposition cited at page 19 of the IIA Report that "[a]rbitrators should primarily rely on the parties to articulate legal issues and to present the law, and disputed legal issues." The difficulty in linking this proposition to this particular recommendation of the IIA Report is that the proposition is explained by reference to a factor arguing for arbitrator passivity and a factor arguing against. For present purposes, however, what is significant is that the distinguished committee that authored the IIA Report aligns itself with this undeniable postulate, that it is the parties who principally should have the power of initiative to ascertain the law. It is also significant that Professor Kaufmann-Kohler's model agreement for the ascertainment of law in international arbitration reposes principal responsibility with the parties. See G. Kaufmann-Kohler, *The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Contents*, 26 *ASA Special Series* 79 at 84 (2006): "*The parties shall establish the content of the law applicable to the merits.* The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the arbitral tribunal is empowered to apply to such issue any rule of law it deems appropriate." (emphasis added); see also J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* 476 (2d ed., Sweet & Maxwell 2007): "Arbitral practice, albeit varied, seems to show a tendency to leave to the parties the responsibility of introducing the explanations and proofs for their legal arguments (sometimes by means of expert opinions)."; see also Ch. Alberti, *supra* n. 13 at 28: "The tribunal should remind the parties that it is primarily their task to advance all facts and legal reasoning on all disputed issues they wish the tribunal to consider."; and again at 30: "Tribunals usually operate under the assumption that the primary burden of establishing the law and contents lies on the parties even in the absence of any procedural order."

⁶⁴ See *Redfern and Hunter on International Arbitration* at 365 (N. Blackaby & C. Partisides, eds., 5d ed., Oxford University Press 2009): "Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration." G. Cordero Moss, *Tribunal's Powers Versus Party Autonomy* in *Oxford Handbook of International Investment Law* 1207, 1211 (P. Muchlinski, F. Ortino & Ch. Schreuer eds., Oxford University Press 2008): "It is not unusual for legal doctrine on international commercial arbitration to focus its attention on the consensual character of arbitration and emphasize that the arbitral procedure should be left totally to the parties. Party autonomy is, and rightly, so, deemed to be the clear fundament of commercial arbitration; as a consequence, the arbitral tribunal is deemed to have a rather restricted scope for its own initiative. This

giving primacy to the requirements of the parties as expressed in their agreements, procedural and otherwise. This, however, misunderstands party autonomy, as surely as did the law's former insistence that 'a man and his wife are one person'.⁶⁵ In fact, respect for party agreement on procedural matters in arbitration is but a manifestation of party autonomy. Party autonomy, as a value in international arbitration and elsewhere, is in reality something much fuller and richer. As the plain meaning of the word 'autonomy' would suggest, it is the principle by which each party *individually* is constrained to the minimum extent. Party autonomy is therefore the autonomy of each party vis-à-vis every other party, and indeed, every other person or interest, including autonomy from the arbitral tribunal. Accordingly, arbitration law systems' respect for party agreement is a core manifestation of the principle of party autonomy as properly understood, but it is not all nor even the greater part of party autonomy.

(B) PARTY AUTONOMY AND THE DEMANDS OF ARBITRATION USERS

The reason for party autonomy is that parties generally place a supremely high value on keeping control of their case as far as they can. There is a general concern not to be caught up in the machinery of justice which may not be responsive or exclusively responsive to their own particular case and which may in particular impose on them standard-form features.

One of the frequently overlooked appeals of international arbitration, emphasizing the importance of party autonomy, is that business people wish for proceedings to approximate, as much as possible, the business environment in which they operate, feel comfortable in, and are best equipped to assess. For such business people, international arbitration, especially commercial arbitration, is an extension of the communication, influence, and persuasion process which they engage in on a daily basis, the 'pursuit of policy by other means'.

When the parties alone take initiatives to obtain the factual and legal evidence there is no constriction of one party's autonomy without corresponding expression of the other party's. When an arbitral tribunal takes initiatives it is a deadweight loss, entailing a constriction in both parties' autonomy.

(C) PARTY AUTONOMY EXPRESSES SCEPTICISM ABOUT AUTHORITY

There is also a negative case for party autonomy. It proceeds from a suspicion of authority, and the belief that authority cannot be relied upon properly to serve the individual's interests. The parties' interests are best determined by the parties themselves.

neutral role of a tribunal that does not interfere with the autonomy of the parties, that listens to their arguments, and confines its own role to deciding which of the presented arguments deserves to win, is sometimes defined as the 'role of umpire'".

⁶⁵ *Vir et uxor consentur in lege una persona* ("Under the law a man and his wife are treated as one person").

(D) PARTY AUTONOMY AND SELF-DETERMINATION

Autonomy is a value in and of itself. In exercising autonomy, private individuals, such as business people, enjoy the dignity of self-determination, the exercise of their rational wills unimpeded by outside interference. This value is secured even if the exercise of autonomy results in wrong, or otherwise sub-optimal outcomes.

(E) PARTY AUTONOMY AND OPTIMAL OUTCOMES

Of course hegemonic economic thinking today holds that the exercise of autonomy is in fact a motor of optimal outcomes. Leaving the parties each to pursue its rational self-interest should generally advance this cause.

In arbitration, more so than in litigation, the paradigmatic requirements of this dialectic process are generally present. Parties in arbitrations tend to be sophisticated actors able to call upon the necessary threshold of resources to assert their interests.

(F) PARTY AUTONOMY AND SCEPTICISM ABOUT OBJECTIVE TRUTH

Moreover, quite independently of such thinking, it is a matter of general prudence, whether one conceives the world as post-lapsarian or post-modern, to be acutely sceptical about the possibility of acceding to objective truth. This is especially the case in international arbitration, where one's most fundamental and ingrained assumptions are unrelentingly challenged by other ways of doing things in other legal systems and other cultures. In face of the reality of imperfect knowledge, it is also a matter of general prudence to accept the dialectic method as a powerful engine of truth generation. In arbitration, leaving self-interested actors each equally to wield its means of persuasion, without outside interference, may well be the best guarantor of 'truth'.

(G) CONSEQUENCES OF VALUE OF PARTY AUTONOMY ON ARBITRATORS' INITIATIVES

The expression of the value of party autonomy in international arbitration procedures means that the role of the arbitral tribunal is subsidiary both to (i) that which can be accomplished by the parties each pursuing its self-interest and (ii) that which the parties together agree.

Party autonomy in its fuller understanding is the main reason why in arbitration proceedings, as they are almost invariably found today, it is unquestionably the parties themselves who have the main initiative on evidence of both fact and law.

But more than that, the identification of the crucial value of party autonomy in international arbitration should guide arbitrators in their determination on when they should take initiatives to obtain evidence. Usually, arbitrators' interventions will upset the expression and operation of party autonomy in an international

arbitration.⁶⁶ The answer is, therefore, that in principle arbitrators should not so intervene, and they should only do so where the free operation of party autonomy in an international arbitration will in particular circumstances fail to achieve the benefits which party autonomy achieves as a rule, or where other values of similar importance require expression.

(ii) Efficiency and saving time and costs

It is important to take arbitration as it is and as it is practised in determining the effect of arbitrator initiatives on the cost of arbitration. When arbitrators consider initiatives to obtain factual and legal evidence, a failure to account for this reality, it will be contended here, will frequently add to costs and time in the arbitration.

Today arbitration proceedings almost invariably feature predominantly party initiatives in relation to both factual and legal evidence. Where an arbitration follows this usual model, arbitrator initiatives will ordinarily be supplemental to the parties' initiatives to obtain evidence of fact and law. That supplementary activity by the arbitral tribunal will generally entail an increase in costs. In keeping with the desire to encroach upon party autonomy to the minimum extent necessary, arbitrators will ordinarily request that the parties obtain the further factual evidence and legal authorities, or provide further submissions on the new legal arguments. That will obviously result in costs increases for the parties. But even where the arbitrators take it upon themselves to obtain the extra factual evidence or legal authorities, this can entail an increase in costs for the parties. Certainly this is the case if, as in LCIA arbitrations, the arbitrators are paid on an hourly basis. But even if the arbitrators are paid largely on an *ad valorem* basis, such as in ICC arbitrations, the arbitration institution will generally take into account significant extra work in setting the arbitrators' fees. Moreover, if the arbitral tribunal mandates a third party to perform work, for example an expert, the costs of this will be visited upon the parties in full.

It is indeed rare in practice for an arbitral tribunal to intervene to suggest relevant factual or legal evidence until the parties' pre-hearing submissions are in. The arbitral tribunal generally begins to take its initiatives with its questioning of witnesses at the oral hearing, and with the suggesting of legal arguments at the hearing. It is moreover usually only at the oral hearing or just thereafter that arbitral tribunals request documents or other evidence that the parties have not submitted in the arbitration. Requests by the arbitral tribunal so made may signal to the parties that the points of factual and legal evidence they have thus far included and have been concentrating on may well not be the matters on which the arbitral tribunal will base its decision. In the result, all the parties' exertions on points other than the new ones identified by the arbitral tribunal will have been wasteful skirmishes, where 'ignorant armies clash at night'.

⁶⁶ K. Hober, *Arbitration Involving States* in *The Leading Arbitrators' Guide to International Arbitration* 2nd ed., 669 (L. W. Newman & R. Hill eds., Juris Publishing 2008).

There are two exceptions to this rule that arbitrators' initiatives will entail extra costs. The first is where the arbitrators intervene early enough, before the parties have done much by way of submitting their own factual evidence and legal authorities and submissions, to indicate what factual evidence and legal authorities or topics of submissions the arbitral tribunal feels it useful to receive, or to direct that it will control the submission of certain evidence, notably expert evidence, instead of the parties.

Although such early intervention may entail a savings in costs, it ineluctably comes at the expense of party autonomy. The earlier the arbitrators' intervention, the less free the parties will have been in fashioning their cases on factual and legal evidence.

The second exception is approximate pre-decisions, as discussed in section II(b) above.

Arbitrator initiatives will as a rule only save costs and time where from the outset it is clear that it will be the arbitrators who are to bear primary responsibility for the factual evidence collection and identification of evidence of the law. In such a case it is not what the arbitrators do which is supplemental to what the parties do, and therefore an added cost, but the contrary.

From a strict saving time and costs point of view there is of course a question as to who should bear primary responsibility for evidence gathering, the arbitral tribunal or the parties. As has been seen, it is perhaps a theoretical one, since it has been decisively resolved in practice in favour of party initiative.

There is support in the literature that civil procedure systems which invest the judge with the primary responsibility for obtaining the factual and legal evidence are actually more efficient than civil procedure systems which place this primary responsibility with the parties.⁶⁷ Moreover, unlike parties' counsel, arbitrators, as they are remunerated, are not even under as great an incentive to do more work and thereby increase costs and expenses.

On the other hand, even where the arbitrators have the principal initiative on factual and legal evidence, in order to know what their prospects are in the arbitration, the parties are nonetheless going to identify the relevant factual evidence, and perform extensive analysis in relation to the law. Thus either way, there will be a degree of supplementary cost involved in having the arbitrators bear primary responsibility for initiatives.

If saving costs and time in arbitration were the only value being pursued, it may be that a case could be made for having the arbitrators bear the primary

⁶⁷ J. H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985). Also, a central proposition behind the revolutionary case management powers granted to judges under the English CPR was a concern to control the costs and duration of litigation. See paragraph 3 of *Access to Justice - Final Report* by Lord Woolf, July 1996: "There are those who have misgivings about the need for my proposals and their ability to effect beneficial change. Concern has been expressed that my proposals for case management will undermine the adversarial nature of our civil justice system. The concerns are not justified. The responsibility of the parties and the legal profession for handling cases will remain. The legal profession will, however, be performing its traditional adversarial role in a managed environment governed by the courts and by the rules which will focus effort on the key issues rather than allowing every issue to be pursued regardless of expense and time, as at present." (emphasis added)

responsibility for initiatives. But this is not the situation. Other values must be given voice, in particular party autonomy.

Moreover, where the arbitrators have the primary initiative on factual and legal evidence, the parties lose control of the costs of the arbitration. It seems highly desirable that the parties be allowed to determine the level of their own investment in the arbitration. In arbitration, this is significant since the parties bear all of the costs, unlike in litigation, where the judges and hearing facilities are largely paid by the state. There is also regrettable uncertainty in costs attending such arbitrators' initiatives, when parties can no longer assess this, because of the variable of costs incurred in particular to respond to initiatives of the arbitrators.

In the final analysis, in assessing the costs consequences of arbitrators' initiatives, it is best to take arbitration as one finds it, and as it must be in view of crucial values, that is, where the primary initiative is with the parties. In such circumstances, it is clear that arbitrators' initiatives are generally an occasion of extra costs.

(iii) *The role of the arbitrator and the objective(s) sought to be achieved by the arbitral award*

(A) GENERAL

The circumstances in which the arbitrator ought to take initiatives to obtain evidence of fact and law must depend on the role of the arbitrator and the objectives of the arbitral award.⁶⁸ In what follows, it will be argued that, for the most part, the arbitrator's role is no more than to resolve a dispute between private parties. In such cases, arbitrators' initiatives should be few and far between. On the other hand, special circumstances may exist in the individual arbitration where the arbitrator may legitimately perceive that her role goes beyond mere dispute resolution. In such cases, there may be justification for a more pro-active role for arbitrators in seeking to fulfil those other goals.

(B) THE PARTIES DO NOT GENERALLY SEEK A 'CORRECT' OUTCOME BUT RATHER ONE CONSONANT WITH THEIR SUBMISSIONS

It was mentioned in section III(d)(i) *in fine* that it is not generally accurate to say that parties expect a 'correct' award. It was also mentioned that there is little if any evidence or argumentation in favour of the view that parties expect a correct

⁶⁸ See the ILA Report, *supra* n. 3 at 6: "The way in which arbitrators approach the applicable law and its contents is thus a vital issue for international commercial arbitration. It is also, in some sense, a fundamental one. It alludes to the question of the very role of the arbitrator. If an arbitrator's sole function is to resolve the dispute presented by the parties, then the arbitrator presumably may – perhaps must – determine the law based solely on what the parties tell him it is. If, however, the arbitrator has supplementary obligations – derived from professionalism, a pledge to the parties or an institution to decide a dispute according to law, or public policy considerations – then the arbitrator may have to retain the ability to probe beyond what the parties say about the applicable laws and rules."

award, and, where this bold position is taken, it is often not backed up by any reasons, or by cogent reasons.⁶⁹

Where a party loses because the tribunal has preferred the other side's submissions to its own, what it is dissatisfied with is invariably that it lost. It is not unhappy because the arbitral tribunal failed to supply a basis that might have

⁶⁹ W.W. Park, *Truth-Seeking in International Arbitration* in *The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution Is About?*, 1–38 ASA Special Series No. 35 (M. Wirth, Ch. Rouvinez & J. Knoll eds., JurisNet 2011) examines the demands of truth-seeking and other goals in arbitration procedures. Professor Park appears to accept the premise that the more objectively correct an award the better it is, subject to the claims of competing values. See for example, at 4: "To fulfil its promise of enhancing economic cooperation, arbitration must aim at an optimum counterpoise between truth-seeking and efficiency". On the other hand, Professor Park does suggest at 3 that "truth" in an arbitration award may be relative truth, limited by what the parties have put before the arbitrator: "Accuracy in arbitration means something other than absolute truth as it might exist in the eyes of an omniscient God. *In examining the competing views of reality proposed by each side*, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defences. They recognize that some answers are better than others, even if perfection proves elusive." (emphasis added). Again at 3 Professor Park suggests that it is no goal of international arbitration to have the law applied to an absolute correct standard, but rather a reasonable application will suffice: "An arbitrator's main duty lies not in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says."; J. D. M. Lew, *supra* n. 2 at 399: "[...] the expectation is that a tribunal will correctly apply the substantive rules to issues presented by the facts in each case."; J. Waincymer, *supra* n. 2 at 210: "Surveys have shown that a correct and just outcome is the most highly valued aspect of arbitration", where the survey in question is the Global Center for Dispute Resolution Research survey of May 2002 on "International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People", first published in *International Business Lawyer* of May 2002, and reviewed in R. W. Naimark & S. E. Keer, *What do parties really want from international commercial arbitration?*, Dis Res. J. (Nov. 2002–Jan. 2003) where the authors note that "[t]he most significant result of the forced-rank survey is that an overwhelming majority of the parties ranked a fair and just result as the most important attribute [...]". Although the authors themselves suggest that "fair and just" has a component of the award being "right", they are expressly conscious that what the parties think is "fair and just" is to some degree determined by how their interests fared in the award. At all events, it is submitted that "fair and just" is something different from an expectation that the award be an objectively correct application of the law. See, further, T. Isele, *supra* n. 2 at 22: "It should be borne in mind that in most cases such an authority of the arbitrator to ascertain the law *sua sponte* does comply with the parties' expectations. Parties usually want a 'correct' decision based on the applicable law." Isele cites G. Born, *International Commercial Arbitration*, vol. 1, at 82 (Kluwer Law International 2009) for this proposition, but what Born appears to say there is that parties value finality more than legally correct outcomes in arbitration, as shown by their choosing to forego "appellate rights". Perhaps the most reflective treatment of the supposed party expectation of awards which proceed upon an objectively correct application of the law is M. Wirth, *Ihr Zeuge Herr Rechtsanwalt! Warum Civil Law Schiedsrichter Common-Law-Verfahrensrecht anwenden in SchiedsVZ* 8 (2003) at footnote 36: "The particularity of the field of arbitration is, however, that the arbitrator derives his authority from a commission from the parties, and not from state authority as a judge does. From this there results a natural striving to do what is 'right' for the parties. This entails not only deciding the dispute efficiently, but also and perhaps more importantly, reaching a decision which is based on a fully constructed understanding of the relevant factual circumstances of the case ("Sachverhalt"), such that the actual circumstances are taken into account and not just those which were pleaded, and in this sense is 'correct'. Associated with this is the expectation, that a decision so made will be acceptable to both of the parties the arbitrator is serving. It ought to be the professional aspiration of every arbitrator to achieve such acceptance." ("Das Besondere am Schiedsgerichtswesen ist jedoch, dass der Schiedsrichter seine Entscheidungsbefugnis nicht wie der staatliche Richter aus staatlicher Autorität, sondern aus einem Auftrag der Parteien bezieht. Daraus ergibt sich ein natürliches Bestreben, es den Parteien 'recht' zu machen. Dies beinhaltet nicht nur, den Streit effizient zu entscheiden, sondern ebenso und vielleicht noch wichtiger, eine Entscheidung zu treffen, die auf einem vollständig erstellten Sachverhalt gründet, somit den tatsächlichen und nicht nur den plädierten Verhältnissen Rechnung trägt und in diesem Sinne 'richtig' ist. Daran knüpft die Erwartung, dass ein solcherart gefällter Entscheid für beide Auftraggeber, die sich im Streitverfahren gegenüberstehen, akzeptierbar ist.")

turned the tables. In the clash of titans which is international arbitration, parties generally take responsibility for their decisions, and those of their highly expert counsel. They know that they have only themselves to blame. There is simply no expectation of a benevolent force intervening *ex machina* to favour them.

Legal problems are generally not susceptible of one uncontroversially correct solution. So any arbitrator's intervention will generally be particularly reviled by the losing party as an active subjective preference for the other side. Even in the rare case where the arbitrator's third way is so obviously correct and no other solution is, the party who sees defeat snatched from the jaws of victory because of the arbitrator's initiatives will still feel that the arbitrator has unfairly tipped the scales in favour of the winning party by helping it argue its case.

It is telling that the legal literature on civil procedure treats any valid judicial search for truth beyond the parties' submissions as justified only insofar as it may vindicate interests external to those of the parties.⁷⁰ This is the view of J. A. Jolowicz, one of the most distinguished comparative civil procedure authorities:

It has been suggested earlier that, if no more is needed of a dispute resolution procedure than the production of a way to resolve the parties' dispute which the parties will accept and adopt to bring their dispute to an end, it is unnecessary that the decision should be 'correct'. So long as the parties are willing to act on the basis of the proposed solution – for whatever reason – that is all that is required. *Such an approach is harmless and useful if the dispute resolution process used is a form of ADR or other extra judicial procedure, including, of course, a voluntary agreement between the parties, reached without third party involvement. It is not harmless if the parties have resorted to litigation. The most important reason of principle for this assertion lies in the fact that litigation takes place in the courts of law before judges appointed by the State to exercise the judicial power over persons subject to its jurisdiction.* It is one thing for a judge to seek to persuade the parties to a dispute to try to reach an amicable settlement or resort to ADR: it is quite another for him to pronounce a judgment that he has reason to believe is based on findings of fact that are incorrect or flows from an incorrect application of the law based, for example, on an untested concession by one or more of the parties. If he were to do so he would make a mockery of the rule of law. This is all the more important where the litigation is such as to bring into play one of the public or quasi-public purposes [...].⁷¹ (emphasis added)

Mirjan Damaška, another distinguished comparative civil procedure expert, equates the absence of state policy to impose values with legal procedures devoted exclusively to conflict resolution. Moreover, he makes the point that the parties themselves expect no more of litigation than that the decision maker maintain a scrupulous neutral attitude in relation to procedure and not in relation to 'elusive' substance:

[...] in canvassing an ideal conflict-solving process, a decision maker must be imagined to whom all concerns other than the resolution of a dispute pale into insignificance. Clearly, the extreme laissez-faire state provides the best ground on which those attitudes can flourish; such a state

⁷⁰ In this arbitration is contrasted with the goals of civil litigation. See N. H. Andrews, *The Passive Court and Legal Argument* in *C.J.Q.* 1988, 7(APR), 125 at 125: "The civil courts are not merely concerned with the settlement of disputes. The High Court and appellate courts are also expositors of the law; responsible both for creating new law and keeping existing principles in good order."

⁷¹ J. A. Jolowicz, *Civil Litigation: What's it for?* 67 Cambridge L.J. 508, 518 (2008).

whose paramount task is to provide a forum for the settlement of conflicts in civil society, and whose very legitimacy rests on its image of neutral conflict resolver. *What do citizens of such a state expect as they take before the court the disputes that they cannot resolve themselves? They realize that the outcome of the lawsuit is uncertain and that correct results can be elusive; what they expect from the decision maker most of all is equality of treatment – a neutral, objective, or impartial attitude.*⁷² (emphasis added)

In relation to the framing of factual issues, Damaška argues that judges' initiatives sacrifice the parties' interest in dispute resolution to societal goals:

True, the judge may have good reason to look at facts other than those in dispute between the parties, but in doing so he would become 'inquisitive' on his own and no longer limited to resolving the controversy. Where the judge is permitted to range beyond the allegations of the parties, the state interest in implementing its policies and programs can trump the interest of the parties in having their dispute resolved.⁷³

In relation to the framing of legal issues, Damaška contends that this is *per se* to favour one party over the other:

Whenever he expands the scope of legal issues, potentially dispositive elements enter the case independent of party contest and the side disfavoured by the adjudicator's pet theory may believe that the decision maker has unfairly aided the adversary. While it is true that the potential damage could be contained by subjecting the adjudicator's independent theory to party contest, the favored side need say nothing about that theory: 'the balance of advantages' has already been tilted in its direction by the court's independent action.⁷⁴

The significance of these conclusions relating to litigation as far as arbitration is concerned is that in arbitration, unlike in litigation, generally speaking, the only interests that matter are those of the parties.⁷⁵ All state interests (except those of the state *qua* disputant), for instance, are abstracted. In such circumstances, procedural functions which can only be justified by reference to values other than those of the parties must fall away. The result is a shot across the bow of any arbitral tribunal contemplating initiatives to obtain factual and legal evidence.

It should moreover be observed that civil procedure does not seek absolute truth anyhow, since civil procedure systems generally leave it to the parties to make

⁷² Mirjan Damaška, *The Facts of Justice and State Authority* 135–136 (Yale University Press 1986).

⁷³ Damaška, *supra* n. 73 at 111.

⁷⁴ Damaška, *supra* n. 73 at 114.

⁷⁵ See also Lord Saville of Newdigate, *International Financial Services Conference: Has London Met the Challenge?* 23 Intl. Arb. 431–432 431, (2007) who points out, first that the point of arbitration is no more than dispute resolution, and second that correctness standards are only for purposes beyond those of the parties: "Arbitration, however, does not exist for the purpose of making law, but as a means of resolving disputes between parties. It is the parties that bear the cost of arbitration. In my view, before considering any changes in this respect [i.e. increasing access to the supervisory courts], we would have to be sure that they, the users of arbitration, are ready, willing and able, for the purpose of developing English law, to bear the substantial added costs and delays occasioned by excursions to the English courts." Lord Saville also makes a third point relevant to this article, namely that achieving a correctness standard, beyond what the parties have submitted, attracts extra costs which the parties will have to bear.

factual allegations, and the court will not range beyond those.⁷⁶ The outcome of the litigation depends on the parties' factual allegations, and does not usually look behind or beyond them. The lesson from civil procedure, it is submitted, is that it seeks legal coherence within the bounds defined by the parties and not correspondence with objective factual reality.

Where parties only submit certain factual evidence or certain legal authorities, or only make certain legal arguments, they can be treated as having waived all others. Their legal arguments can be viewed as their requests as to how the tribunal should treat the law.

The more usual and defensible claim on this basis, a distinctly less ambitious one, is that the parties expect that the arbitrators will issue an enforceable award.⁷⁷ Wherever then there is an enforceable duty on the arbitrators to take initiatives, clearly the arbitrators should do so, in order to avoid exposing their award to judicial interference.

(C) THE PARTICULARITY OF ARBITRAL JUSTICE?

It is often suggested, more or less candidly, that arbitral justice is a special type of justice, different than that to be had before state courts.⁷⁸ It is suggested, for instance, that arbitral justice is closer to commerce. It is suggested that arbitral justice is international whereas state justice is irredeemably tainted by parochialism.

If arbitral justice is a particular type of justice, it does not, however, follow that arbitrators should be more robust in taking initiatives. It does not follow that the parties seek a correctness standard of commercial or international justice. Indeed, as the criteria of justice become more distant from the pure application of law, the tendency is that parties, who are generally international business entities, have a more privileged perspective than that of the arbitrators as to these criteria.

⁷⁶ See K. P. Berger, *supra* n. 25 at 226: "[. . .] there is another core procedural principle underlying the German law on taking of evidence: the court's task is not to search for the objective truth but for the formal truth (formelle Wahrheit). The court must deduce this formal truth solely from the briefs, documents and other materials which the parties have submitted to the court. This core principle is based on the idea that civil procedures serve the purpose of enforcing the private rights of the parties and that there is no public interest in determining facts *ex officio* which are the basis of a private dispute between the parties."

⁷⁷ See, for example: J.D.M. Lew, *Proof of Applicable Law in International Commercial Arbitration, Festschrift für Otto Sandrock*, 2000, 581 at 585: "Parties generally embark on the arbitral process with an overarching goal: to obtain an enforceable award."; G. B. Born, *International Commercial Arbitration*, vol. 1 at 76 (Kluwer Law International 2009): "Another vital objective, and attraction, of international arbitration is to provide relatively enforceable agreements and awards." Born at 82 appears to deny that parties rate highly the obtaining of a "correct" award: "On balance, anecdotal evidence and empirical research indicate that business users generally consider the efficiency and finality of arbitral procedures favorably, even at the expense of foregoing appellate rights."; J. Butchers & Ph. Kimbrough, *The Arbitral Tribunal's Role in Default Proceedings*, 22 Arb. Intl. 233 (2006): "The bottom-line test of an arbitral tribunal's performance of its duty is whether the award can be set aside under the local law of an applicable jurisdiction or recognition or exequatur thereof can be refused." See also provisions in leading arbitration rules constituting as overriding or at least important principles that the rules are to be interpreted consistently with the aim to result in an enforceable award, such as Article 41 of the ICC Rules and Article 32.2 of the LCIA Rules.

⁷⁸ This is the premise underlying the passage from M. Wirth, quoted in note 71 above.

It is often suggested that arbitral justice contains an intrinsic balsam of conciliation, perhaps best encapsulated in the French expression 'couper la poire en deux', the approximate common law equivalent of 'equity is equality'. Doubtless such thinking was once more prominent than it is now. International arbitration did find its genesis in informal treatment of the law, for example by arbitrators untrained in the law, but closely acquainted with commerce. Article 17(2) of the 1998 ICC Rules was a fossil from that era, proclaiming as it did that '*[i]n all cases the Arbitral Tribunal shall take account of [...] the relevant trade usages.*'(emphasis added) This superb exhortation always and everywhere to take account of relevant trade usages looked much like an attempt to impress how close ICC arbitration decision-making is to commerce, and conversely, how what courts do is not. Article 21(2) of the current ICC Rules admirably recalibrates the position in harmony with the modern view of international arbitration: 'The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.'

The fact is that international arbitration has become differentiated as it has evolved. The most widely-found species of international arbitration decision-making has evolved towards more accuracy in the application of the law within the limits of the role of arbitrators. Where international aspects or commercial requirements show the law in its traditional application to be inadequate, within a purposefully restricted compass they are taken into account by a cadre of arbitrators who are almost invariably highly qualified legal practitioners.

Lesser species of international arbitration are left to concentrate more firmly on commercial, trade, and international factors, such as commodities arbitrations. Fittingly, commercial persons, without corrosive formal legal education, decide such cases.

In these latter cases, unless there is a real and telling differential in the commercial or international knowledge of the arbitrator and that of the parties (see section IV(d)(ii) below), there is no need for the arbitrators to take particular initiatives. There is nothing about such standards which require their absolute attainment in the arbitral award, and the subordination of the arbitrator's essential task of resolving the dispute.

(D) SUBJECTIVE AUTHORITY OF THE PARTICULAR ARBITRATOR

Certain features of international arbitration do express the possibility of the particularism of arbitral justice. For example, the great store placed upon parties' involvement in the selection of arbitrators would seem to suggest a particular authority in the person of the arbitrator.

For the most part, however, the particular confidence that the parties place in the arbitrator is not a licence for the arbitrator to introduce subjective preferences into her decision-making. It is usually no more than the ample fulfilment of a bedrock prerequisite that the parties have confidence in their adjudicator.

There will, however, be rare cases where the parties intend the subjective person, and views of the arbitrator to be expressed in the award. These cases may or may not be coterminous with party authority for the arbitrator to decide in

equity (e.g. as an *amiable compositeur*). In such cases, it would appear appropriate that the arbitrator be more proactive in identifying factual evidence and legal authority than ordinarily, in order to construct the basis for her subjective views.

(E) ARBITRATION AS CUSTOM-MADE JUSTICE AND COURT JUSTICE AS OFF-THE-SHELF

Court procedures are one size fits all, or very few sizes fit all. Arbitration, by contrast, offers the possibility of custom-grade procedures, adapted to the particular dispute.

A principal reason for the standardization of court procedures is a concern to maintain a proportion between the cost of the administration of justice to the public, and the accuracy of truth-finding in the substantive result. Fuller procedures generally attract greater costs, and therefore civil procedure strikes a compromise between truth-seeking and controlling costs. Moreover, there are cost efficiencies in standardization.⁷⁹

It might therefore be thought that the absence of public interest in the cost of procedures entails that arbitrators should be less concerned with the additional costs of their interventions. Yet the parties themselves are usually very concerned to control costs which they themselves pay, and they are much more directly affected by these costs than the public at large is affected by the cost of the administration of justice. Therefore it will only be in the rare case that the parties are relatively unconcerned about the cost of the arbitration that the costs increase in arbitrators' initiatives will not be a factor.

A separate concern is that because arbitrators are not forced into a straightjacket of standardized procedures, it may be thought that they should take advantage of their freedom by launching initiatives. The answer to this is that any particularity of arbitral procedures must be in the service of the parties. The parties' interests are, as seen above, best served by allowing them to control the initiatives as a rule, and only exceptionally by the arbitrators' taking the lead here. If the parties wish the arbitrators to take initiatives, they will voice a preference for this at the outset of the arbitration.

(iv) Arbitrators' initiatives create uncertainty for the parties

Where the parties only have to meet the case advanced by the other side, that case is generally known from the outset, or virtually from the outset. The parties generally have a good sense of the factual circumstances surrounding the dispute before their first submissions, and they have generally researched the relevant law prior to making those first submissions. They generally present their best case on the law in those very first submissions, although revelations from the other side, and other factors, will often result in fine-tuning of these positions especially over the initial stages of the arbitration leading up to the oral hearing.

⁷⁹ One sees suggestions of such matters in the quotation from M. Wirth in note 71 in section IV(c)(iii)(B) above.

In practice in fact, quite often intense negotiations precede the arbitration, negotiations often involving or even led by counsel who will conduct the arbitration for their client if the negotiations fail. In such cases the parties will know each other's factual evidence and legal arguments and will have presented their own factual evidence and honed and developed their respective legal arguments, and identified the focal points of the differences between them, even before the arbitration is initiated.

But the parties often have much less knowledge of how the arbitral tribunal would treat matters of obtaining factual and legal evidence. The presence of an active arbitrator changes the dynamic between the parties, creating significant uncertainty which is difficult to quantify for business people making decisions on how to resource the arbitration, and whether to pursue other avenues with a view to obtaining what is at issue in the arbitration or as much of that as possible.

The uncertainty concerning arbitrator initiatives is compounded in that procedural rules in arbitrations usually say nothing about the circumstances in which the arbitrators may take initiatives, while strictly providing for when the parties may.

Additionally, in international arbitration the range of legal treatments is much wider than in litigation before courts. Ultimately, this proceeds from the general absence of review of arbitration awards on the merits. In practice, arbitrators enjoy virtually unconfined powers in determining the applicable law and the extent of parties' choice of applicable law. Arbitrators often limit, attenuate, or otherwise adapt the applicable law in view of indeterminate considerations specific to the arbitration context, such as regard to trade usages,⁸⁰ and putative party expectations, for example as to neutrality or internationality. In the result, the material scope of the factual evidence and legal arguments and authorities which the arbitral tribunal might seek is of surpassingly great compass and the resultant uncertainty of the parties correspondingly vast.

The prospect of arbitrators taking initiatives means that instead of simply facing only the particular case that the other side is putting, a party faces an ocean of potential cases.

(v) Arbitrators' initiatives may upset other legitimate values the parties seek to protect

If parties are not submitting certain factual evidence, not making certain legal arguments, or not relying on certain legal authorities, they may have a legitimate reason not to do so. This may be, for example, to protect certain legitimate interests or persons from within a party's organization. It may also be to avoid exacerbating the dispute with the other party by touching a raw nerve discovered

⁸⁰ The classic example is Article 21(2) of the ICC Rules. See also Article 35(3) of the 2010 UNCITRAL Arbitration Rules: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction." See also Article 28(4) of the 2006 UNCITRAL Model Law which is very similar to Article 35(4) of the 2010 UNCITRAL Rules, differing only in its apparent assumption that there will always be relevant contractual terms and trade usages.

earlier, for example in failed settlement negotiations. It may be to avoid jeopardizing other arrangements or relations with the other party, or the possibility of future arrangements and relationships with it. Prudent arbitrators should remain constantly aware of the law of unintended consequences when girding themselves to take initiatives.

(vi) Arbitrators' initiatives distort the system of party incentives

The parties have an incentive to present the factual evidence and the legal arguments and authorities which best support their case. If arbitrators involve themselves here, this distorts this incentive system, and creates a moral hazard. Why should a party that elects not to expend resources on its legal defence for example by obtaining a legal opinion from specialized counsel be propped up by the arbitral tribunal?

(vii) Illegitimate motives for arbitrators' initiatives

The neutrality of an arbitrator who remains passive is never questioned. But every initiative taken by an arbitrator raises the issue of the arbitrator's reason or reasons for taking action. Before taking any initiative arbitrators therefore carefully examine the reasons for taking such initiatives. In this they are conscious of the illegitimacy of a great number of potential motivations: Is a legal argument particularly attractive to the arbitrator in some part because it was he who thought of it? Does an arbitrator wish to take initiatives since she wishes to show it is she who is in charge? Is he motivated by a fear of appearing uninterested or even unknowledgeable about the case? Does she wish to showcase to the parties, the other arbitrators, or the arbitration institution, especially the ICC, who review arbitration awards in draft, what a fine arbitrator she is, a crafter of weighty and compendious awards, a standout from the stolid pack who passively leave it to the parties to administer the factual and legal evidence, a creative arbitrator able to think outside of the 'box' of the parties' submissions? Is the arbitrator motivated by envy for comparatively abler or simply admirably able counsel? Is the arbitrator sub-consciously redressing the balance where the parties' respective counsel prove to be of unequal effectiveness although both are perfectly competent? All of these are inappropriate reasons upon which in whole or in part to take initiatives.

Moreover, arbitrators are acutely aware that since these motives cannot usually be demonstrably excluded as potential explanations for why the arbitrator acted as he did, there must be a particularly good outwardly-verifiable reason available to ascribe the initiative to, or doubts will subsist with the party so disfavoured. Lord Hewart's dictum of justice needing also to be seen to be done applies with particular poignancy here.

(viii) The problem of inquisitorial or prosecutorial momentum

The specific problem of inquisitorial or prosecutorial momentum arises where arbitrators take the initiative to obtain factual and legal evidence. One may best

observe the problem by taking the extreme case where the arbitrator assumes the exclusive responsibility for obtaining the factual and legal evidence, that is, a pure inquisitorial system. In this case, there is the danger that the arbitrator's pursuit of any particular view of the case becomes a self-fulfilling prophesy. The arbitrator gets caught up in the chase, and loses the necessary detachment to contemplate other explanations or approaches.⁸¹

This problem lies at the bottom of the prohibition upon one and the same person acting as both prosecutor and adjudicator.⁸² It is true that a prosecutor's task is deliberately to pursue a certain view of the case, to the purposeful exclusion of others, i.e. the prosecutor pursues a view of the case which will favour a conviction. An arbitrator will not generally act deliberately to pursue a certain view of the case. In the arbitrator's case, it is merely the sub-conscious momentum which operates, less decisively perhaps, to carry her ineluctably to the confirmation of certain presuppositions.

It is true that the choice of arbitration, and moreover the choice of arbitration rules expressly allowing the arbitrator to take all initiatives to obtain factual and legal evidence, may be said to act as a waiver of the right to an impartial and independent tribunal. But such a waiver will generally need to be expressed unequivocally to be effective.⁸³ Where, as is usual, the arbitration law or rules simply leave a discretion for the arbitrator to ascertain the facts and law 'by all appropriate means', it would probably be found that this was no effective waiver, but rather the arbitral tribunal was compelled to exercise this discretion in conformity with fundamental rights requirements.

In the *European Human Rights Convention* system, which expresses universal concerns, also of application to arbitration, the conflation of the roles of prosecutor and adjudicator may be cured where there is a sufficiently exacting appeal or even review process against that prosecutor/adjudicator's determination.⁸⁴ It is significant that in arbitration there is notoriously little opportunity to interfere with an arbitration award, challenges and bases for non-enforcement being highly constricted. This problem of inquisitorial momentum is thus a potential occasion of violation of both the guarantee of equality and the right to be heard. It is also a vivid illustration why certain arbitration systems consider that the right to be heard *in an adversary procedure* is either a further procedural imperative, or a refinement on the right to be heard.

⁸¹ See N. H. Andrews, *supra* n. 71 at 133: "If a person engages too readily in debating an issue, the chances are reduced that he might see the other point of view and test the *idée fixe* which perhaps underlies his position."

⁸² See, for example, as regards criminal matters, where such situations more generally occur, *De Cubber v. Belgium* (1984) 7 EHRR 236 where the fact that a trial judge had been previously involved in the prosecution stage of the case constituted a violation of the right to an impartial and independent tribunal under Article 6 of the ECHR.

⁸³ See, for example, *Pfeiffer and Plankl v. Austria*, (1992) 14 EHRR 692 and *Oberschlick v. Austria* (1991) 19 EHRR 389.

⁸⁴ See *Byron v. UK*, (1996) 21 EHRR 342 where it was held that non-compliance with Art. 6 of the ECHR (interference of the executive in judicial proceedings) was cured by the existence of judicial review (which is of course not an appeal, and certainly not a *de novo* appeal).

(ix) *No other interests than the parties' usually operate in international arbitration*

(A) GENERAL

It is generally accepted in the literature that, by express agreement, the parties may validly restrict the arbitrators from deciding on factual evidence and even legal evidence not submitted by the parties. This is a clear demonstration of the primacy of party interests in the context of initiatives to obtain legal evidence.

But one may go further. It is the general position in international arbitration that *no* interests operate but those of the parties.

The arbitral award generally has, for example, no effect beyond its effects on the parties themselves. No system of precedent obtains in arbitration. In investment and sports arbitration later tribunals refer to the awards of earlier tribunals but that does not mean that those earlier tribunals were properly engaged in anything other than settling the dispute before them. Any influence of earlier awards on later tribunals is merely accidental, and ought to take this into account amongst the many factors attenuating any such influence.⁸⁵

Arbitrators will generally have no valid interest in rendering an award based upon evidence of law and fact beyond that submitted by the parties. They may feel for some reason or other that their award on this basis does not reflect a deeper existential or legal reality, but it is not their job to have it do so. There is generally no professional embarrassment for arbitrators in this situation since they are not asked to meet this standard. Doubtless Hercules was good for a thirteenth and fourteenth labour, but he was not asked to perform them.

Arbitral institutions have no valid interest in ensuring that the application of substantive law is correct. Arbitral institutions may be responsible for the choice of arbitrators, and, insofar as this choice has been made with reasonable care, arbitral institutions are not responsible for how the arbitrators decide. Since arbitrators themselves have no valid interest in rendering an award correct in their view to a standard exceeding anything in the parties' submissions, for the greater reason, nor does the arbitral institution.

It might be asked whether the well-being of arbitration as a means of dispute resolution has any legitimate interest in ensuring that awards proceed upon a correct treatment of applicable law. Any such interest is even more remote than that of arbitral institutions, and cannot validly be protected in individual arbitrations.

⁸⁵ See section IV(c)(iii)(B) above where it was argued that the only legitimate goal of arbitration is the settlement of the dispute between the parties to the arbitration. See also S. Nappert, "By Wit or Fortune Led: Thoughts on a Role for Precedent in International Commercial Arbitration" in (2008) 5(3) *Transnational Dispute Management*: "The users of international commercial arbitration, therefore, seek a tribunal that is entirely focused on resolving their dispute, rather than contributing to the advancement of arbitral jurisprudence." See also section III(d)(i) above.

*(d) Factors tending to favour arbitrators' initiatives**(i) Valid interests other than those of the parties*

In section IV(c)(ix) above it was concluded that the only interests which usually fall to be vindicated in an international arbitration are those of the parties. There are, however, three situations where interests other than those of the parties validly arise in international arbitration.

The first and simplest one in relation to initiatives is the application of mandatory norms, which by definition engage fundamental state interests. It is rare that the violation of a mandatory norm in an arbitral award will actually expose the award to judicial interference. Nonetheless, the arbitrators may properly take the view that they are under a duty, albeit often one that does not attract legal consequences, to apply mandatory norms. Arbitrators may, for example, take the view that states' support of arbitration, or even states' non-interference with arbitration, presupposes that arbitrators take states' interests in mandatory norms seriously, as a state's courts would. Arbitrators may also take the view that the coherent application of choice of law principles requires arbitrators to take into account valid state interests just as they take into account the interests of the parties.⁸⁶

Since the interests behind mandatory norms are not the parties' or not necessarily the parties', arbitrators may legitimately take the view that a mandatory norm will not be applied or properly applied unless the arbitrators take factual and legal initiatives to ensure such application.

The second situation where interests other than those of the parties are legitimately engaged in international arbitration is where the outcome of the arbitration will have a sufficiently immediate and substantial impact on interests other than those of the parties, in particular the public interest.

The classic case is an investment arbitration where a fundamental public interest is at stake.

⁸⁶ See Ph. Landolt, *The Application of EU Competition Law in International Arbitration in Switzerland in EU and US Antitrust Arbitration* 558 (G. Blanke & Ph. Landolt eds., Kluwer Law International 2011): "Arbitral freedom could be curtailed if arbitrators do not apply mandatory norms. Moreover any systematic failure on the part of arbitrators to apply mandatory norms may, over time, lead states to reduce the scope of arbitral freedom, perhaps by means of the creation of non-seat challenges to awards, more intensive scrutiny upon enforcement requests, or even denunciations of the New York Convention. [...] The main reason for arbitrators to concern themselves with interests beyond those of the parties before them is, however, that in arbitration, as in court litigation, it is legally coherent to do so. In this relation, there is nothing special about arbitration which would attenuate the duty to apply mandatory norms vis-à-vis judges' application of foreign mandatory norms. For example, the reasons for judges to apply foreign mandatory norms are never ascribed to a hoped for reciprocity, that is, that judges of other states will apply the mandatory norms of a judge's state in exchange. Indeed, on the contrary, to arbitrators no law is truly 'foreign'. Mandatory norms emanating from any source therefore have equal claim to apply as far as arbitrators are concerned. In reference to the fundamental exercise behind conflicts of law and the ubiquity of the applicability of mandatory norms in conflicts of law systems, arbitrators will recognize that the application of mandatory norms is legally indicated."

In most cases, however, the party resisting the investor's claim will be the state or a state agency, which will usually be concerned to put forward evidence and legal arguments and authorities consistent with the public interest. Such cases therefore do not need to be treated differently from ordinary commercial cases.

On the other hand, the state party in an investment arbitration may for some reason have no interest in protecting certain public interests in an arbitration, for example the interests of a minority, or the interests aligned with another political movement.⁸⁷ Here, arbitrators may legitimately take initiatives in factual evidence and law to ensure that their award is consistent with relevant applicable law.

On the whole, however, any tendency of investment arbitration to elevate the interests of the investor over other interests, such as public interests, and on occasion human rights of others, is a failure of the substantive law. These are not ailments which are properly treated by means of arbitrators' initiatives. It might be protested that the best means to introduce concern for other interests into the substantive law is to ensure that these interests are given voice in arbitrations. But that is to put the cart before the horse. Arbitrators, in their capacity as arbitrators, unlike judges, especially common law judges, do not properly act as engines of legal development.⁸⁸

Third, in certain limited circumstances, there is an interest of the arbitrators themselves to take initiatives in relation to law and perhaps even factual evidence. This arises when it would be professionally embarrassing for the arbitral tribunal to be confined to choosing between the better of the parties' submissions. Usually, any initiative required by the arbitrators here will be one of legal evidence. But if the legal outcome can be rendered more correct by some slight intervention in relation to factual evidence, in view of the factors designated here, it might be justified too for arbitrators to take initiatives in relation to factual evidence.

But such circumstances where arbitrators have a legitimate personal interest in taking such initiatives, whether of factual or legal evidence, are severely circumscribed.

⁸⁷ This phenomenon also occurs in criminal cases, where the prosecutor exercises her discretion not to prosecute, or to limit the prosecution. See, for example, the Dissenting Opinion of Presiding Judge Wolfgang Schomburg in the Sentencing Judgment (IT-02-61-S) of the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in *Prosecutor v. Miroslav Deronjić* of Mar. 30, 2004, at paragraph 7, page 84 of the Transcript: "When it comes to prosecuting crimes against individuals, a Prosecutor acts with the goal to stop a never-ending circle of 'private justice', meaning mutual violence and vengeance. This goal can only be achieved if the entire picture of a crime is presented to the judges. In criminal procedure then, there are reasons why judges may wish to dig deeper into the evidence than that presented by the prosecutor."

⁸⁸ F. S. Nariman, *The Spirit of Arbitration*, 16 Arb. Intl. 261 at 262 (2000): "The private nature of arbitration excludes any law-making function." Nariman was speaking in the context of international commercial arbitration and not investment arbitration, but the latter is as much private as commercial arbitration in the crucial sense that both fundamentally engage *lites inter partes*.

(ii) *The arbitrator has been appointed for her particular expertise which is the subject of the initiative*

Where manifestly the parties have chosen the arbitral tribunal or an arbitrator on it for her particular authority or expertise and the initiative relates to the employment of that expertise a more proactive stance by arbitrators in respect of such initiatives may be envisaged. For example, the parties may have chosen a professor of contract law, or a retired judge as arbitrator for her particular authority in the applicable law. Otherwise, in observance of the reasons for remaining passive, arbitrators may legitimately refuse to improve upon the parties' legal submissions, legal authorities, and factual evidence.

It may be that the fact of the arbitrators being known to be particularly skilled and experienced in respect of certain matters, and the parties and their counsel not being, is an indication, and in some circumstances alone a sufficient one, for it to be possible to conclude that the parties chose the arbitrators for this particular skill, and therefore envisaged a more proactive approach by the arbitrators in respect of matters in relation to this particular skill or experience.

The question next arises, what is the position if only one party manifestly chose or nominated an arbitrator in view of this arbitrator's particular skill and experience on the subject of particular initiatives of factual and legal evidence? In such a case, clearly it would be inappropriate, and possibly a violation of the mandatory procedural requirement to treat the parties equally, if the arbitrator distinguished between the parties in taking initiatives. Thus either the arbitrator should determine that this factor favours its taking initiatives or that it does not, and apply the result invariably to the parties. The question as to whether the determination should be in favour of arbitrators' initiatives is an uncommonly difficult one. Should one party's desire for a more active tribunal defeat the other party's interest in particular in maintaining its autonomy? Here even more than usual, it would seem advisable in the first instance for arbitrators to request the parties' views.

There is also a question as to whether the parties' or a party's intention that the arbitrator it appointed or nominated actively exercise its special skills and experience should set the standard for the whole of a multi-person arbitral tribunal on which that arbitrator is sitting? Generally speaking, a multi-person arbitral tribunal makes its procedural decisions as a body. But there are initiatives which are within the determination of the individual arbitrator, such as questioning of witnesses. Clearly, one arbitrator should not have any special status concerning initiatives. Thus either the tribunal as a whole determines that this factor favours its taking initiatives both collectively and individually or that it does not, and act accordingly.

(iii) *Procedural failure as a basis for arbitrators' initiatives*

In certain rare cases, a party in an arbitration may not have the wherewithal to provide for its own defence. This will usually occur where the party verifiably lacks

the financial means to defend itself adequately or simply does not enter an appearance in the arbitration.

In such cases, the dialectic truth-finding mechanism is impaired or absent. The arbitral tribunal must then supply the missing case contrary to that of the party fully able to defend itself in the arbitration, or the party participating in the arbitration. That will entail taking initiatives to obtain factual and legal evidence.

But in so acting, the arbitral tribunal should be careful to ensure that only the minimum necessary is done in order to ensure that the case of the participating party is tested. This ensures both that the essential incentive structure on the parties to provide for their own legal defence remains intact, and that the extra costs are proportional to the goal of ensuring procedures which do not *per se* distort outcomes.

(iv) Parties' failure altogether to identify legal norms such that there is a normative void

Almost invariably in international arbitration, arbitrators are under a duty to apply the law. It has been submitted here that this duty is usually satisfied when the arbitrators apply the better view of the law on the legal evidence as submitted to them by the parties. On the other hand, where the parties fail altogether to submit evidence of applicable legal norms (which rarely occurs in practice), this duty on the arbitrators may entail that the arbitrators should seek for evidence of the law. This is discussed further in section V below. It should be mentioned in this connection that it is the parties' identification of the legal issues which should govern in the determination of whether the parties have submitted any legal norms at all. Arbitrators should generally not depart from this identification of issues with a view to discovering *terra nullius* to occupy.

(v) Arbitrators' initiatives to ascertain the true and fuller meaning of the parties' cases, and to correct obvious mistakes or formal deficiencies in a party's case

The arbitrators should be sure that they fully understand what the parties intend to be arguing.⁸⁹ This is particularly the case in cross-cultural situations where the potential for misunderstanding is rife. It is obvious that if the arbitral tribunal does not understand something it should indicate this to the party concerned so that the party may remedy the situation. Otherwise, the right to be heard may be an empty one.

⁸⁹ There is this sense in the quotation from M. Wirth in footnote 79 above, except that Wirth appears to be saying that the standard is an objective one independent of what the parties are submitting, rather than an attempt better to understand what the parties are submitting. See also M. E. Schneider, *supra* n. 10 especially at 62 discussing the importance of "interactivity" between the arbitral tribunal and the parties: "Some rules of civil procedure, occasionally applicable also in arbitration, require or at least authorize the judge or the arbitrator to intervene with the parties so that they present their case properly. Under these rules, the judge or arbitrator, where necessary, must invite the parties to clarify their case. It is the objective of these rules to avoid that, due to incomplete or inadequate presentation, the tribunal would have to reject a case which would otherwise be well founded. While these rules require assistance to the parties for clarification of the case, they do not authorize the judge or arbitrator to make the case of the parties on their behalf or even to suggest modifications in the substance of their claims."

Yet some legal arguments simply make little or no sense. If that is the case, it is not usually for the arbitral tribunal to suggest alternative cases.

Arbitrators should consider the substance of the factual and legal evidence that the parties submit. This might involve the arbitrators interpreting what the parties are arguing, or identifying internal contradictions in a party's argument, and suggesting a path to coherence, or on occasion discussing elements of legal authorities submitted which might challenge the party's understanding, or extrapolating their arguments to have them cover issues which formally they may not.

Thus arbitrators should not remain passive to the extent of rejecting a party's case on the basis of a formal deficiency, for example, a failure expressly to address a certain issue. Of course when so acting, the arbitral tribunal should not only ascertain that the extrapolation is what the party intends, but give an opportunity to the other side to answer the resulting position.

How does this accord with the conclusion here that in most international arbitration the tribunal is not aiming at an objectively correct award? It is simply that in supplying formal deficiencies the arbitral tribunal is still choosing between the cases presented by the parties. It is, however, choosing between the substantive cases presented by the parties, that is, between the cases as the parties intended them to be, and not as they might appear.

Clearly, the difference between introducing a new case or new legal arguments for a party and helping the party correct formal deficiencies in its case will often involve the fine exercise of judgment. The difference is ultimately that between correcting or completing what is already implicit in the parties' arguments and legal authorities, and creating a new argument and searching for new authorities.

(e) Arbitrators' initiatives and the right to be heard

Providing the arbitrators give the parties a sufficient opportunity to comment on the evidence obtained and the law as the arbitrators propose to ascertain it, the parties' rights to be heard will be fulfilled. In such case arbitrators' initiatives have no necessary incidence on the parties' rights to be heard, except perhaps in the limited circumstances where the parties' opportunity themselves to take initiatives, or to recommend such initiatives to the arbitrators, in the obtaining of evidence is effectively eliminated.

There is a question as to what that sufficient opportunity is. In some legal systems, such as in Switzerland, the opportunity is satisfied where the arbitrators did not request party comment on a legal authority, characterization, or argument originating with themselves, but which the parties ought to have expected. Even so, it is undeniably good practice for arbitrators expressly to alert the parties to any and all of their initiatives,⁹⁰ and the result of them, and to give the parties a chance to comment on all of this.

⁹⁰ See, *contra*, F. Stein, M. Jonas, D. Leipold, *Kommentar zur Zivilprozessordnung* Appendix to §1061 N 96 (21st ed., Mohr Siebeck 1997), cited by W. Wiegand, *op. cit.* in n. 26 at 137: "The *iura novit curia* principle applies in the

V. SHOULD ARBITRATORS THINK DIFFERENTLY
ABOUT THEIR INITIATIVES OF EVIDENCE OF FACT
THAN ABOUT THOSE OF LAW?

Since factual evidence is the building-blocks of facts, and facts are the building-blocks of causes of action, the extent of the factual evidence represents a clear limit to a dispute. An increase in factual evidence may of course simply reinforce facts engaged in the causes of action and legal arguments being advanced by the parties. But an increase in factual evidence may also expand the set of facts that may be derived from the evidence, and thereby form the building-blocks of a cause of action or legal argument which had not up to that stage been invoked by a party. Any actions by the arbitral tribunal which expand the factual evidence risk expanding the dispute,⁹¹ with the attendant evils of increased uncertainty, time, and costs being thereby visited upon the parties. On the other hand, insofar as may be relevant in international arbitration (it has been argued this is not, as a rule), the expansion of factual evidence may lead to a more correct outcome. But even civil procedure systems, where they require an objectively correct determination, unanimously leave it to the parties to delimit the scope of the dispute.⁹²

It might be advanced that arbitrators should be more robust in their initiatives concerning evidence of law than concerning evidence of fact, since arbitration law systems, and arbitration rules, place an obligation upon arbitrators to apply the law. But against such contention it may be observed that part of applying the law is obtaining factual evidence, as much as obtaining evidence of the law is.

Moreover, if the contention is that arbitrators must apply the law to an objectively correct standard, it may be responded that only if the facts are built upon sufficient evidence of fact will that outcome actually be correct. There is generally no value in having factual evidence so flimsy that factual conclusions are completely at odds with any reasonable representation of reality, and building a fine, internally coherent legal structure upon that.

On the other hand, where an arbitrator has been chosen for her acknowledged particular expertise in some area, such as a civil law contracts professor might be, that expertise may be conceived of as limited to applying the law correctly based upon certain postulates reasonably derived from the factual evidence. If so, and in

measure that the arbitrator must discuss with the parties any as yet undiscussed important new legal thoughts (as contrasted to mere individual arguments that have occurred to him). (“Der Grundsatz *iura novit curia* gilt mit der Massgabe, dass der Schiedsrichter bisher nicht erörterte, wichtige neue Rechtsgedanken (im Gegensatz zu blossen Einzelargumenten), die ihm selbst kommen, mit den Parteien erörtern muss).”

⁹¹ Major civil procedure systems are virtually unanimous that it is for the parties to define the scope of their dispute, by their factual allegations. This applies in Swiss law, where the determination of the “objet du litige” by the parties is referred to as the *principe de disposition* (*Dispositionsgrundsatz*) and opposed to the *maxime d’office* (*Offizialgrundsatz*).

⁹² See, for example, J. A. Jolowicz, *On Civil Procedure* 195–196 (Cambridge University Press 2000): ‘The French judge of today has greater powers than his English brother in relation to evidence, but in both countries it is for the parties alone, by their respective allegations, counter-allegations and admissions, to set the limits beyond which the judge may not go in finding the facts on which his judgment will be based.’ The result is the ‘objet du litige’.

this narrow circumstance, it would appear valid to take a distinction between initiatives to obtain factual evidence and initiatives to obtain legal evidence.

Another of the distinctions often tried is that dealing with legal evidence requires particular skill, whereas dealing with much factual evidence does not. But arbitrators will not necessarily have better knowledge of the law than counsel. An arbitrator may not be qualified in the particular legal system, while counsel is, or within her firm she can call upon persons with the relevant qualifications. An arbitrator may be isolated and unable to discuss difficult points of law with others. Arbitrators will also ordinarily be much less well paid than counsel, and therefore have less incentive to pursue lines of reasoning.

Here, the exceptional circumstances identified above are the only bases to justify arbitrators' initiatives to ascertain evidence – the arbitrator has manifestly been chosen for her special skill in the law in the absence of the parties' and their counsel's particular skill, or there is a failure of the dialectical system because one of the parties is manifestly incapable of exploiting the legal arguments available to it.

Also, a difference of treatment as between factual and legal initiatives to obtain evidence may be indicated where the parties have altogether failed to identify applicable legal norms. This is because where the evidence of fact is inadequate, the arbitrators may legitimately apply a default rule such as a burden of proof rule in drawing their factual conclusions. This is rational since a certain factual reality may or may not exist. But the essential presupposition about law in international arbitration is that some legal norm exists and must govern. This is what is meant in the ubiquitous statement that arbitrators are under a duty to apply the law, i.e. they must draw legal conclusions.⁹³ As stated in section 42(2) of the ICSID Convention, the tribunal 'may not bring in a finding of *non liquet* on the grounds of silence or obscurity of the law'. In arbitration there is no rational basis for placing a burden of proof on any party as to the ascertainment of the law. Nor is there any rational basis in arbitration to apply a law of the 'forum' or a law most familiar to themselves in default of evidence of the applicable law.⁹⁴

⁹³ This is in fact probably the only constructive application of the maxim "*iura novit curia*" in international arbitration. Cf. the traditional common law position, that where foreign law is obscure it is said not to have been proved, and is deemed to be the equivalent of the home legal system.

⁹⁴ This is not necessarily an incident of the maxim *iura novit curia*. Indeed, it appears that originally the principle *iura novit curia* was limited to knowledge of the *ius commune*, which would apply if the parties did not assert and prove a rule of law from another source. See W. Wiegand, "*Iura novit curia vs. Ne ultra petita* – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts" in *Rechtsetzung und Rechtsdurchsetzung, Festschrift Kellerhals*, M. Jametti Greiner, B. Berger, and A. Güngerich, eds. (Berne: Staempfli, 2005) 127 at 129 - 130: "The law that the judge was obliged to know and apply *ex officio* was restricted by a series of mutually interlocking rules. [. . .] The most important of these was that the judge was obliged to know and apply the *ius commune* insofar as the applicability of a rule from outside the *ius commune* had not been asserted and proven." ("Man hat dasjenige Recht, das der Richter von Amts wegen zu kennen und anzuwenden hatte, durch eine Reihe ineinandergreifender Regeln begrenzt, [. . .] Die wichtigste ist diejenige, dass der Richter das *ius commune* kennen und auch anwenden müsse, sofern nicht die Geltung eines nichtgemeinen Rechts behauptet und bewiesen werde.")

In the result, except in these rare cases, in principle, as between initiatives by arbitrators to obtain factual evidence and their initiatives to obtain evidence of law, no difference in approach is indicated.

VI. CONCLUSIONS: EXERCISE OF ARBITRATORS' DISCRETION TO TAKE INITIATIVES IN PRACTICE

There is much in general to recommend arbitrator passivity as regards the obtaining of factual and legal evidence. Generally speaking, the parties in an arbitration will be concerned to exert their autonomy to the greatest degree possible. Any arbitrators' initiatives will encroach upon party autonomy, a primordial value in international arbitration. Arbitrators' initiatives usually add to the time and costs of the arbitration. Arbitrators' initiatives will usually result in favour to one party and disfavour to the other, and therefore the question of the arbitrator's motivation in so acting will loom. Arbitrators' initiatives inject uncertainty into the arbitration. If the adversary's actions are ordinarily 'known knowns', arbitrators' are at best 'known unknowns' and often 'unknown unknowns'. Moreover, contrary to what is popularly supposed, the arbitrators' duty to apply the law does not usually extend further than to applying it on the basis of the factual evidence and legal submissions and authorities of the parties.

With the exception of approximate pre-decision initiatives mentioned in section II(b) above, all initiatives entail a curtailment of party autonomy. Other things being equal, the earlier such initiatives, the greater the curtailment of party autonomy, but the more favourable the cost and time impact, as a rule. Moreover, initiatives which relate to matters within the scope of the issues, or limit them, will tend to have a lesser cost incidence than those which expand the scope of the issues. Initiatives within the scope of the issues but which reverse the position which the arbitrators would otherwise have come to create greater concern about arbitrator impartiality than those which merely confirm that position.

Arbitrators should satisfy themselves that they have fully understood the parties' arguments and the implications of the legal authorities submitted. That may well involve the arbitrators in asking questions of the parties to clarify their positions, and in turn that may lead the parties to alter or supplement their legal positions, with consequent changes in the factual and legal evidence in support of them (upon the initiative of the parties). But the arbitrators should be careful to aim exclusively at arriving at a complete understanding of the parties' submissions, and not to causing new factual and legal evidence to be introduced because of any dissatisfaction that the arbitrators may feel with the parties' submissions as properly understood.

Moreover, arbitrators should ensure that formal deficiencies in the parties' submissions do not cause them substantive prejudice. This might involve the arbitrators pointing out apparent formal deficiencies and hearing the parties' response to this.

For this reason, but also because it is more consonant with party autonomy, arbitrators will generally be well advised to put their suggestions as to initiatives on factual and legal evidence to the parties, rather than prosecuting such initiatives themselves.

It will only be in limited special circumstances where arbitrators will take initiatives in evidence with a view to favouring a more correct award, independently of the parties' submissions as properly understood. These circumstances include situations where there are mandatory rules to vindicate, where the arbitrator has been appointed with particular regard to her expertise in the subject matter of the initiative (such as the applicable law), where there are wide divergences in the objective capabilities in the subject matter of the initiative as between the arbitrator and the parties, or as between the parties, and where the parties fail altogether to submit legal evidence.

Whatever initiatives on factual and legal evidence the arbitrators take, it seems beyond all controversy that they should do so in abundant respect of the parties' rights to be heard. This means that the parties should be expressly provided with the result of any and all initiatives, and given a fair opportunity to comment on that result, including the opportunity to submit further factual and legal evidence of their own in response.

Seasoned arbitrators do strive to maintain their freedom of decision in procedural matters. But, as has been argued here, important interests are engaged in arbitrators' initiatives to obtain factual and legal evidence. It would therefore seem highly advisable for the arbitral tribunal to take the parties' views as early as possible on the approach the tribunal should adopt concerning initiatives to obtain factual and legal evidence.⁹⁵ The tribunal might on that occasion identify the various matters concerned in this decision, including party autonomy. If the parties present the same position in response, the tribunal should be guided by that, for example, by including an appropriate rule in their early procedural orders. If the parties are in disagreement on the issue, especially if adamantly so, it would seem advisable for the tribunal to settle the matter as part of its early procedural orders. Arbitrators' initiatives are after all, one might say by their very nature, a source of concern as regards the tribunal's being seen to be fair. At the very least, the arbitral tribunal should be ready to explain its individual initiatives by reference to a consistent application of the criteria relevant to taking them, which, it is hoped, have been identified here.

⁹⁵ Ch. Alberti, *supra* n. 13 above at 30–31 makes this point with particular acuity.