

Kyiv Arbitration Days

Badly pleaded cases – what arbitrators should do and what they can't do?

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Powers – *Ex officio* investigation of the facts

- **ICC Arbitration Rules (2021)**

- “The arbitral tribunal shall proceed within as short a time as possible to *establish the facts of the case by all appropriate means.*” (Article 25(1))
- “At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.” (Article 25(4))

- **LCIA Arbitration Rules (2020), Article 22.1:** “The Arbitral Tribunal shall have the power (...) *only after giving the parties a reasonable opportunity to state their views* (...) (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal *should itself take the initiative in identifying relevant issues and ascertaining relevant facts...*”
- *See also* **UNCITRAL Arbitration Rules (as revised in 2010), Article 27(3); IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 3(10).**

Powers – *Ex officio* application of the law

- ***Jura novit curia*** – Principle according to which the adjudicator may apply the law *ex officio* without being bound by the legal arguments or legal reasoning of the parties
 - **ILA Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (2008), Recommendation 1:** “At any time in the proceedings that a question requiring the application of a rule of law (including a question of jurisdiction, procedure, merits or conflicts of laws) arises, *arbitrators should identify the potentially applicable laws and rules and ascertain their contents* insofar as it is necessary to do so to decide the dispute.”
 - **LCIA Arbitration Rules (2020), Article 22.1:** “ The Arbitral Tribunal shall have the power (...) *only after giving the parties a reasonable opportunity to state their views* (...) (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal *should itself take the initiative in (...) ascertaining relevant facts and the law(s) or rules of law applicable...*”

Duty not to exceed your mandate *(ne ultra petita)*

- **UNCITRAL Model Law on International Commercial Arbitration (1985), Article 34(2):** “An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (...) (iii) the award deals with *a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration...*”
- **English Arbitration Act 1996, Section 68(2):** “Serious irregularity means (...) (b) the tribunal exceeding its powers...”
- **Ukrainian Law on International Commercial Arbitration No 4002-XII, Article 34(2)(1), para 3.**

Duty to conduct the arbitration efficiently

- **ICC Arbitration Rules (2021), Article 22(1):** “The arbitral tribunal and the parties *shall make every effort to conduct the arbitration in an expeditious and cost-effective manner*, having regard to the complexity and value of the dispute.”
 - *But see* Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), para 92: “The arbitral tribunal and the parties must *conduct the arbitration in an expeditious and cost-effective manner...*”
- **LCIA Arbitration Rules (2020), Article 10.2:** “The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (...) (iii) *does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.*”
- *See also* **UNCITRAL Arbitration Rules (as revised in 2010), Article 17(1).**

Due process

- **ICC Arbitration Rules (2021), Article 22(4):** “In all cases, the arbitral tribunal shall act *fairly and impartially* and ensure that each party has a *reasonable opportunity to present its case*.”
- **See also UNCITRAL Arbitration Rules (as revised in 2010), Article 17(1); IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 9(2)(g).**

Impartiality and independence

- **ICC Arbitration Rules (2021), Article 11(1):** “Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.”
- **LCIA Arbitration Rules (2020), Article 5.3:** “All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or authorised representative of any party. No arbitrator shall give advice to any party on the parties’ dispute or the conduct or outcome of the arbitration.”
- *See also* **UNCITRAL Arbitration Rules (as revised in 2010), Articles 11 and 12(1); IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Principle 1.**