Kluwer Arbitration Blog

Who Should Know The Law: The Arbitrators Or The Parties?

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Much has been written about *iura novit curia* or, as it has been rephrased for arbitration purposes – the *iura novit arbiter* principle in international arbitration. There are three main areas of debate. The first of these areas deals with the different approaches to the role and duties of the decision-making body and the parties between civil law and common law jurisdictions. Traditionally, civil and common law systems arrive at different answers to the question of whether the decision maker has a right or even a duty to investigate and apply the law *ex officio*. Secondly, there is the underlying issue of the status of the applicable substantive law, which largely boils down to the distinction between facts on one hand and the law on the other. In other words, the issue is whether the applicable law is a matter of law to be determined by the decision maker or rather a fact to be proven by the parties. Finally, the discussion moves to the inherent feature of international arbitration, namely a forum where arbitrators and parties from different legal cultures, often foreign to the applicable substantive law and not necessarily being trained lawyers in the first place, need to coexist. These discussions usually arise when a court decision is rendered in enforcement or annulment proceedings concerning an arbitral award (e.g. an interesting contribution to this blog). The post-award stage seems however somewhat late to raise such fundamental issues. What, therefore, can be done earlier in the proceedings in practical terms in order to prevent the reoccurring concerns of *iura novit arbiter*?

Aside from Article 34(1) and (2)(g) of the English Arbitration Act 1996 there is virtually no express regulation as to the application of *iura novit curia* in national arbitration law. This principle has not gained the status of a universally applicable principle, nor it is mandatory procedural law or even understood in the same way in different jurisdictions. While the jurisdictions which implement the principle in domestic litigation have a tendency to recognise it also in international arbitration, there is no common one-size-fits-all solution regarding the *iura novit arbiter* principle.

At the same time, most arbitration rules are of little help as they do not regulate the issue of who carries the burden of determining the content, interpretation and application of the law. There are, however, examples of rules that address the problem more openly.

Unsurprisingly, the 2014 LCIA Rules provide for a regulation corresponding to Article 34(2) of the English Arbitration Act 1996 (Article 22.1(iii)). Another example which goes even further than the LCIA Rules are the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (PCC Rules), which came into force on 1 January 2015. The PCC Rules contain the following provision (in §6 item 2):

> An award may not be based on legal grounds different from those relied on by either of the parties, unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds.

This provision should not be construed as limited to the legal grounds indicated in the statement of claim or statement of defence, but it provides for a general prohibition of rendering an award based on legal grounds other than those identified "by either party". The obvious question that arises is: what should the arbitrators do if the parties do not state the legal grounds for their respective claims and responses, especially since there is no obligation to do so in the PCC Rules, or if the legal grounds identified by the parties are incorrect or incomplete?

If it were not for the express regulation of §6 item 2 of the PCC Rules there could be two radical ways to answer this question: the arbitral tribunal could follow the strict civil law procedure which allows the arbitral tribunal to establish the content of the substantive law and to apply the law *ex officio*; or the arbitral tribunal could follow the common law influenced mechanism by assuming the role of an umpire and deciding the case as pleaded by the parties. The PCC Rules in §6 item 2 provide for a unique and much-desired compromise when compared with these two far from ideal solutions in the context of international arbitration. It takes into account both the inquisitorial and the adversarial systems, yet it is sufficiently flexible so as to encompass arbitration cases depending on the given circumstances.

The compromise essentially provides that as a rule the parties are to submit complete legal arguments, including supporting these with research materials, court rulings and academic studies, and usually independent expert reports. In addition, the arbitral tribunal has the authority to request further details about the applicable substantive law and to decide for itself as to the content of the law. Importantly, the regulation in §6 item 2 of the PCC Rules is designed to avoid surprising the parties with a decision on legal grounds, however it does not limit the tribunal's power to independently inquire into the content of the applicable law within the limits of the parties' respective claims and defences and their submissions on legal grounds.

Giving the limited regulation of this issue at the level of national arbitration law, arbitration rules as well as in arbitration agreements, at a practical level the question of who should know the law should be addressed as early as possible in any arbitration proceedings where this is relevant. Preferably, such issues should already be covered in the first procedural hearing. For example, James H. Carter has suggested the following wording to be included in the first procedural order (terms of reference):

> The arbitral tribunal is to resolve all issues of fact and law that shall arise from the claims and counterclaims and pleadings as duly submitted by the parties, including, but not limited to, the following issues, as well as any additional issues of fact or law which the arbitral tribunal, in its own discretion, may deem necessary to decide upon for the purpose of rendering any arbitral award in the present arbitration. [Carter, James H.; after Waincymer, J., International Arbitration and the Duty to Know the Law, Journal of International Arbitration, The Hague, London, New York 2011, Vol. 28, Issue 3, footnote No. 25, p. 209.]

Another example to consider in the context of terms of reference is:

> The parties shall establish the contents of the applicable substantive law. The Arbitral Tribunal shall have the power, but not an obligation, to make its own inquiries to establish such contents. If the contents of the applicable law are nor established, the Arbitral Tribunal is empowered to apply any rules of law which it deems appropriate. [Arroyo M. (ed.), Arbitration in Switzerland, The Practitioner's Guide, The Hague, London, New York 2013, p. 174.]

The manner in which new legal issues should be handled in practical terms means the involvement of the parties. As a matter of good practice, the view that the arbitral tribunal should clarify that it may at times put questions to the parties on legal issues and that it may research legal sources independently and apply its own knowledge as to the content of the applicable law, should be promoted.

Another practical observation would be to raise the legal issues as soon as they arise. This should, however, be balanced on a case-by-case basis since the arbitrator should not go so far as to become an advocate for one party, unfairly hinting to a party as to the legal grounds that could advance that party's case. The most challenging task before arbitrators is therefore to strike a balance between the fundamental principles of the right to be heard and the equality of the parties, with the ultimate aim of rendering a fair and enforceable award that does not exceed the claims pursued.

Ultimately, international arbitration is a service industry the further development of which is dependent on the trust and consent of its users – the parties. They are more likely to accept an arbitral tribunal's decision if they can follow the rationale and are not surprised by a justification on legal grounds that they have not raised. A much-needed compromise as to the *iura novit curia* principle, transposed for the purposes of international arbitration, is to provide confidence in the arbitral process and its outcomes.

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