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Give Me the Facts and I'll Give You the Law: What Are the Limits of the Iura Novit Arbiter Principle in International Arbitration?

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The discussion about whether and how the arbitral tribunals can apply the *iura novit arbiter* (INA) principle has been widely debated in different studies of international arbitration. INA allows the arbitrator to amend and to replace wrongly invoked law or the law not invoked by the parties. However, the arbitrator cannot go beyond the request, base its decision on facts other than those claimed by the parties, or exceed the mission entrusted in the arbitration agreement as to the applicable law, under penalty of putting the future award at risk of possible cancellation for contravening the principles of congruence, contradiction, and due process.

Determining what law governs in international arbitration is a complex task that has been the subject of several studies,[1)] as arbitrators normally deal with different rules that could be simultaneously applicable: the substantive law or *lex causae*, the law applicable to the agreement of arbitration, the *lex arbitri* and the regulation of the arbitration institution. Many times these refer to different national rights and even different legal systems.

To contextualize the above, according to ICC statistics,[2)] in 2017, the laws of 104 different nations was applied. In 99% of the cases, the arbitrators chose the applicable national law while only 1% of the contracts opted for soft law, e.g. UN Convention on the International Sale of Goods (5), EU legislation (5), the UNIDROIT Principles of International Commercial Contracts (1), Lex Mercatoria (1), "International Customary Law" (1), UNCITRAL Law (1) and the ICC Incoterms (1).

On the other hand, there are precedents from ICSID annulment committees that have accepted that INA is a "power" that arbitrators must apply. Likewise, the application of INA has been accepted in non-ICSID investment treaty arbitrations, e.g., in *Bogdanov v. Moldova*, Case SCC 93/2004.

Who is in a better position to know the law?

Arbitral tribunals are in a better position to know the law. A decision-making process that eliminates the discretion of arbitrators in applying the law is not consistent with the purpose of the mission entrusted to them by the parties through the arbitration agreement.

"Knowledge of law" must be understood in a manner related to the specific case. The arbitrator is not obliged to know all the laws, but his mission is to use the legal tools (within the rules of the game) to settle the dispute in accordance with justice. Is it not precisely for this reason that they were appointed by the parties? It would be absurd to say that a tribunal exercises its powers to settle the dispute only on the basis of what has been said by the parties.

If within their analysis of the laws the arbitrators identify some rule or principle that has been ignored by the parties (involuntarily or intentionally) and that could be crucial for the decision of the case, should the tribunal simply ignore said rule or principle because the parties did not mention it? The task of the tribunal to submit an award strictly according to law is not bound by what has been said by the parties.

This has been understood, e.g., in *Duke Energy International Peru Investments No. 1 v. Republic of Peru*, ICSID Case No. ARB / 03/28, annulment (March 1, 2011), paragraph 96:

> The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed.

Also, that the arbitral tribunals do not pronounce on a question that the parties have submitted constitutes a breach as well of the mandate that the parties have granted them in the agreement.[3)]

Faculty or duty?

INA is not a faculty of the tribunal, because the institutionality of arbitration would be jeopardized if the arbitrators had the freedom to decide, at their discretion, to apply the laws. Likewise, and by definition, a faculty does not contain any obligation or burdensome consequences for its owner due to its non-observance.

Instead, INA constitutes an imperative and it is the responsibility of the arbitrator to redirect the legal foundations of the parties when they are insufficient (whether involuntarily or intentionally) to resolve the dispute with justice. Therefore, it would not be an arbitrary act that the arbitrators can apply the appropriate rules to the facts exposed by the parties.

Our position is the application of the INA is a duty that must be exercised by the arbitrator but under certain limits, mainly based on the need to protect the future

award of the arbitral tribunal, since accepting the contrary would violate the right to due process.

Possibility or reality?

The INA principle is widely accepted in judicial litigation, particularly in Civil Law jurisdictions such as Germany, Switzerland, Sweden and Finland. In the Common Law jurisdictions where the adversarial system prevails and it is the parties who contribute the integrally to the debate, this principle is not even known.[4)]

However, the applicability of INA is not linked to a division between Civil Law and the Common Law jurisdictions. Rather, the central axis of the problem is the evaluation by the courts of the extent to which the arbitral tribunals have taken the parties by surprise when applying the INA.

In this regard, it is worth bearing in mind the criteria raised from Article 34(1) and (2)(g) the English Arbitration Act 1996,[5)] or to follow the International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (Resolution Number 6/2008), whose points 10 and 11 indicate that "If arbitrators intend to rely on sources not invoked by the parties, they should bring those sources to the attention of the parties and invite their comments, at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case. Arbitrators may rely on such additional sources without further notice to the parties if those sources merely corroborate or reinforce other sources already addressed by the parties […]".

Along the same lines, Fouchard, Gaillard and Goldman argue that the use of INA is inadequate in arbitration; however, they suggest a practical solution: arbitrators should offer the parties the opportunity to discuss the laws that they intend to apply. The exception to this rule would be if the rule invoked is of such a general nature that it was understood to be included implicitly in the allegations.[6)]

The pathological scenario in the application of INA in international arbitration arises when any of the parties is not allowed to adequate defense on the arguments presented by the arbitral tribunals. Since the arbitration does not have a second instance to review the merits of the dispute, the position of arbitrators regarding the application of the principle is somewhat skeptical, careful and reserved.

Recommendations

In order to allow courts to fulfill their duty and legally shield their decisions, we make the following recommendations:

- Parties should be guaranteed sufficient opportunity to present their cases.
- The *petitum* and the factual grounds of the *causa petendi* are not a matter of

discussion in the application of INA.

- The general rule is that the tribunal cannot find a *ratio decidendi* in an element other than the *causa petendi* invoked (principle of congruence).
- If the arbitral tribunal omitted the application of rules of public order, this would jeopardize the validity of the arbitral award, its subsequent recognition and enforcement.
- For its application, it is not enough for the arbitral tribunal to conclude that the application of the *jura novit curia* principle is acceptable at the seat of arbitration.
- The application of INA should be analyzed in the context of the provisions of *lex arbitri* regarding the annulment of arbitral awards, since they constitute the external limits of the tribunal's authority to determine the content of the *lex causae*.
- The court should also examine the context of the denial of execution rules in the different jurisdictions in which it is necessary to apply the award.

In conclusion, in international arbitration, it is an inherent duty of the arbitrator arising from the agreement of the parties that, in case they have legitimate doubts about specific points of the law, arbitrators can investigate on their own to clarify these doubts and take into account such inquiry at the moment of forming their criteria for the resolution of dispute, under the limits indicated here.

References

↑1 KAUFMANN-KOHLER, Gabrielle. The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions. Arbitration International, Volume 21, Issue 4, December 2005, p. 631-638.

↑2 ICC Dispute Resolution Bulletin, Issue 2, 2018, ICC Practice and Procedure, p. 61.

↑3 Vivendi c. Argentina, Decision on Annulment, paragraph Nº 86.

↑4 Lew, Julian; Mistelis, Loukas; Kroell, Stefan. Comparative lnternational Commercial Arbitration, La Haya: Kluwer Law International, 2003, pp. 725-726.

↑5 *"(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*".

↑6 FOUCHARD, GAILLARD & GOLDMAN. International Commercial Arbitration. Boston: Kluwer Law International, 1999, p. 692.

This entry was posted on Thursday, January 10th, 2019 at 4:00 am and is filed under Awards, Due process, Iura Novit Curia
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