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Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law

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I. Introduction

On 9 February 2009 the Swiss Federal Tribunal (FT) quashed a Court of Arbitration for Sport (CAS) award (Case reference 4A_400/2008). Annulment of an award is a rare enough event to call attention in itself, though this case warrants further inspection. The issue is not the choice of the applicable law (Article 187 paragraph 1 Swiss Federal Private Law Act, (PILA)), but rather concerns whether arbitrators are allowed to go beyond the parties' submission with respect to the governing law.

Arbitral practice is that the parties bring forth their legal arguments in their written submissions and "prove" the content of the chosen law by various evidentiary means, such as documents (be it authorities, whether statutes, court decisions, arbitral awards or legal writings), or legal experts.

However, to what extent may, or should the arbitrators ascertain for themselves the content of the governing law, possibly identify legal issues which the parties did not raise, and how should they proceed? I do not intend to discuss here whether it is opportune for the arbitrators to act *ex officio*: the answer may, for instance, depend on whether or not arbitrators and counsel are particularly familiar with the governing law. Rather, I wish to ascertain what requirements they must satisfy when they venture into second-guessing the content of the governing law after the parties' submissions.

II. Jura Novit Curia

It is widely accepted that neither the finding and evaluation of the facts nor the application of the substantive law by arbitrators will be subject to *a real* control by national courts (see for example Section 34 (2) (g) of the 1996 English Arbitration Act, Section 34 (2) (b) (ii) of UNCITRAL Model Law, Section V (2) (b) of the 1958 New York Convention).

It is probably also widely accepted that the parties may, by consent, bind the arbitrators, namely prohibit them from invoking/identifying the applicable law beyond the parties' submissions (e.g. Section 34 (1) of the 1996 English Arbitration Act).

This notwithstanding, under ordinary circumstances, the arbitrators may in their discretion determine the content of the governing law. However, within which confines? The FT has found the answer in the "*jura novit curia*" doctrine: it is an obligation upon the arbitrators to apply the law *ex officio* (FT Decision of 30 September 2003, 4P.100/2003, 22 ASA Bulletin (2004) No. 22,

p. 574 ff., especially fig. 5, p. 579). Hence, if an arbitrator applies, as he must, the governing law beyond the submissions of the parties, there will be no case for an annulment of the award. Neither will the arbitrators have decided "*ultra petita*" (that is, unless the parties have made use of their aforementioned option to restrict the content of the governing law to what they have submitted), nor will they be able to raise an objection of *lack of substantive jurisdiction*. In principle, there is no violation either of due process as the parties should know that the judges and the arbitrators know the law and will apply it (Art. 190.2 of the PILA limits proceedings for setting aside an award to five grounds, which are lack of jurisdiction, going beyond the claim submitted to the arbitral tribunal, due process, violation of public policy and incorrect constitution of the arbitral tribunal). However, in extreme circumstances, due process, namely the right to put one's case in an adversarial proceeding, will bar the arbitrators from basing their award on a principle, a doctrine, a statute, a precedent etc., which the parties did not mention and of which they had no possibility to perceive the relevance and materiality (see same FT Decision, same page). The FT has always insisted that the arbitrators should not "surprise" the parties, namely that the arbitrators should not find legal arguments that the parties could never have expected in view of their submissions and the briefing of the case (same FT decision, page 581).

So far, the FT had always used "*jura novit curia*" to reject setting aside proceedings, namely to save awards which arbitrators had, arguably, based on legal reasons beyond the arguments of the parties. In fact, the only known decision to me which did quash an award, namely the above-mentioned 30 September 2003 decision, found fault with the arbitrators as they relied on a contractual clause which the parties had not discussed. Thus, *it is not really a matter of substantive law* but that the law is being applied without the parties' being able to make their submission on that substantive law.

As far as I am aware, the FT Decision of 9 Feburary 2009 represents the first time the FT annulled an award in spite of "*jura novit curia*".

III. The facts of the case

The circumstances of the case are rather simple. A Brazilian football player, living in Portugal and the player's Spanish agent ("agent") had entered into an agreement granting the agent, on an exclusive basis, the right to find a new club for the football player. The football player then found a new job, allegedly without any assistance from the agent. The agent subsequently claimed his fees. The competent body in FIFA rejected the claim.

Upon appeal, CAS also rejected the agent's claim. The CAS confirmed that the agent had not shown any activity. However, before the CAS, the agent had argued that, in case of exclusivity, Swiss law did not require a causal link between the agent's activity and the finding of a job by the player. In fact, both parties argued this question before the CAS.

IV. The CAS Decision

The CAS rejected the recourse as it found no causation. However, in order to support its decision, the CAS added a supplemental reasoning by relying on a Federal Statute, to which neither party had alluded to. This Federal Statute provides for the annulment (?) and annuls any exclusivity clauses in agency agreements relating to employment contracts.

Had the CAS not added this supplemental argument, *its award would have withstood scrutiny*. The matter would have been whether the CAS had made an error of fact (causation link?) or an error in law (is it necessary to show a causal link if there is exclusivity of the agency agreement)?

Nevertheless, the Federal Tribunal did quash the award. It found that the arbitral tribunal was wrong in assuming that the above-mentioned Federal Statute (relating to the agency agreement in employment matters) was applicable. The FT enunciated that such statute applied only if the agent resided in Switzerland. This was not the case. In fact, the case in point had no link whatsoever with Switzerland (except for the seat of the Tribunal). This is to say that the appellant (the agent) could not anticipate that the CAS would use, as an argument the provision of the statute (relating to agency in employment matters) manifestly inapplicable so as to conclude that the exclusivity clause is null and void and, hence, require a causal link (which was not proved) between the activity of the agent and the conclusion of the work contract between the player and the Portuguese Club. Especially as neither party had relied on the statute in question during the arbitral proceedings. The CAS should have, to say the least, warned the parties of its intent to apply the said Federal Statute on Agency Agreements in Employment Contracts so that the broker could then have put his case to oppose the application of the bill in question. Thus, in abstaining from requesting the parties' position, the CAS violated the agent's right to be heard.

V. Questions

I have two questions:

• In which cases should courts quash an award (or refuse enforcement) when arbitrators rely on legal provisions (or substantive law doctrines at large), which neither party had broached during the arbitration?

• This recent case concerns a sports matter. The FT has repeatedly stated that, even in international matters, it would not necessarily apply the same principles in sports arbitrations as in international commercial arbitration. Should arbitrators be more restrictive in their application of substantive law when it comes to sports matters, employment matters at large or, to take another example, consumer arbitrations? For instance, should they pay tribute (so to speak) to the well-known circumstance that sports professionals and employees frequently do not have the assistance of counsel totally familiar with the governing law or of legal experts opinions in that governing law?

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