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Iura Novit Curia in Investment Treaty Arbitration: May? Must?

David M. Bigge (US Department of State) · Thursday, December 29th, 2011

Iura novit curia *(usually translated as "the court knows the law")* refers to the power and/or obligation of a court to conduct its own legal analysis outside the parties' pleadings. While there are very few decisions on iura novit curia in the investment treaty arbitration context, a small number of investment treaty arbitral tribunals and ad hoc annulment committees have found that they have similar powers. More recently, at least two ICSID annulment committees have gone further, suggesting that iura novit curia is not only a power tribunals may exercise, but one tribunals must exercise. This short note does not address the appropriateness of iura novit curia in investment treaty arbitration, but is intended to summarize the different ways the concept has been applied in this forum.

While *iura novit curia* is not widely addressed in investment treaty arbitration jurisprudence, several arbitral tribunals and ICSID annulment committees appear to have accepted that they can render awards based on authorities other than those pleaded by the parties. The 2002 decision of the ad hoc annulment committee in *Compagñia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, is typical of these decisions in its summary analysis. The *Vivendi* committee explained that while the reasoning adopted by the underlying tribunal "came as a surprise to the parties, or at least to some of them . . . this would by no means be unprecedented in judicial decision-making" and was not a basis for annulment. The language in Vivendi was quoted and applied by the ad hoc annulment committee in *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, one of the four annulment decisions published during the summer of 2010. As another example, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, the tribunal exercised its assumed *iura novit curia* power in utilizing compound interest to calculate damages, despite the fact that neither party argued for compound interest.

Three important limitations on an investment treaty arbitral tribunal's *iura novit curia* power have been identified by ICSID ad hoc annulment committees. First, according to the annulment committee in *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4, an ICSID tribunal cannot apply legal authorities outside the law applicable to the dispute. Second, and similarly, the annulment committee in *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, recognized that an ICSID tribunal cannot, "by formulating its own theory and argument . . . go[] beyond the 'legal framework' established by the Claimant and the Respondent," for example by deciding the case "on the basis of tort while the pleas of the parties were based on contract."

Finally, in 2006, the ad hoc annulment committee in *Mr. Patrick Mitchell v. Democratic Republic*

of Congo, ICSID Case No. ARB/99/7, held that while tribunals **may** have *iura novit curia* powers, they are not **required** to exercise them. The *Mitchell* annulment committee wrote that a tribunal "is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option…." A similar delineation was recognized by the tribunal in *CME Czech Republic B.V. v. Czech Republic*, which was heard under the UNCITRAL rules. In *CME*, the tribunal made clear that it was not "bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties and the Tribunal to be essential to the Tribunal's decision."

The 2010 annulment decision in *Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. Republic of Argen*tina, ICSID Case No. ARB/01/3, seems to have derogated from the rule announced in *Mitchell*, implying (if not clearly stating) a *iura novit curia* obligation on investment treaty arbitration tribunals. Curiously, the *Enron* annulment committee paid lip service to the *iura novit curia* rule announced in *Mitchell*, writing that "a Tribunal is . . . certainly not required to address arguments that have not been put by the parties." Nonetheless, the *Enron* ad hoc committee proceeded to annul the underlying arbitral decision on the ground that the tribunal failed to apply the applicable law, faulting the tribunal for overlooking arguments and facts that were not raised by the parties.

To the extent the *Enron* annulment committee believed that *iura novit curia* is not merely a power but an obligation on the tribunal, such a view would not be unprecedented. Judge Lagergren, in his 1979 decision in *BP Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 53 ILR 297 (1979), a case arising under a concession contract, found that – at least in the context of a sovereign respondent's default – an arbitrator is "both entitled **and compelled** to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant" (emphasis added).

The *Enron* decision may also reflect the approach of the ICJ decisions cited in 2009 by the ICSID ad hoc annulment committee in *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14. In determining that an ICSID annulment committee has *iura novit curia* powers, the *RSM* committee relied on the ICJ decisions in *Fisheries Jurisdiction* and *Military and Paramilitary Activities in and against Nicaragua*. These ICJ decisions assume that *iura novit curia* is not only a power held by the ICJ, but an obligation on the court. In *Fisheries Jurisdiction*, the ICJ wrote that " [t]he Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute." In the *Nicaragua* case, the ICJ cited to the 1927 PCIJ decision in *S.S. Lotus* in holding that it was "bound" to apply *iura novit curia* in order to determine whether it had jurisdiction in the absence of an appearance by the respondent State.

While citing these strongly-worded ICJ decisions, the *RSM* ad hoc committee did not expressly address whether *iura novit curia* is a power or an obligation of investment treaty arbitration tribunals. Jan Paulsson, in his article on the generation of legal norms in investment treaty arbitration, attempts to connect the dots by citing to Article 38 of the ICJ Statute and *Fisheries Jurisdiction* to support his argument that tribunals have a *iura novit curia* obligation. As Paulsson explains, "a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two." J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, ICCA Congress Series No. 13 (Kluwer, 2007), at 879.

Before concluding, it is worth noting the effect local rules and practices may have on *iura novit curia* in non-ICSID investment treaty arbitration. For example, in *Bogdanov v. Moldova*, SCC Case 93/2004, an investment treaty claim heard under the Stockholm Chamber of Commerce rules, the sole arbitrator found that she "remains free, within the borders of the applicable law . . . to give the legal qualifications and determine the legal consequences that it deems appropriate, even if they were not pleaded by the parties." Applying Swedish arbitral practice, the Bogdanov arbitrator wrote that if *iura novit curia* is exercised, the parties should be invited to comment on the new legal authorities, lest the parties be "surprise[d] by the consideration of legal issues that were not taken into consideration in the proceedings." While this "no surprise" rule was not part of the *iura novit curia* principle stated by the *Vivendi* annulment committee, it is consistent with with recent decisions of several European courts in the context of commercial arbitration, as well as with the recommendations of the International Law Association in its 2008 paper, *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*.

Unfortunately, the investment treaty arbitral decisions expressly or implicitly addressing *iura novit curia* deal with the issue cursorily, providing little analysis and scant support. The textual basis for an investment treaty arbitral tribunal to exercise *iura novit curia* powers remains unclear. To this author's knowledge, it is not specifically provided for in any bilateral investment treaty, although arguably it may fall under the *ex aequo et bono* or similar provisions included in some treaties. There is no express provision for *iura novit curia* in the ICSID rules (as opposed to, for example, the LCIA rules). Furthermore, scholarship sheds little light on the basis for *iura novit curia* in the specific context of investment treaty arbitration. As recently as 2007, Paulsson described *iura novit curia* in investment treaty arbitration as a "fundamental issue . . . not yet to have been considered in the depth it obviously deserves." It is fair to conclude that a theoretical or legal framework for an investment treaty arbitral tribunal's exercise of *iura novit curia* powers remains undeveloped. Certainly whether those assumed powers rise to the level of obligation is an unresolved question.

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