Kluwer Arbitration Blog

Iura Novit Curia Stealing the Limelight (Again)

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The recent decision of the Paris Court of Appeal on the annulment of the ICC award in the case De Sutter P. – K., DS2 S.A., et al. v. Republic of Madagascar brings the "*iura novit curia*" issue back into the limelight.

The dispute arose in 2012 when the Attorney General of the Malagasy Supreme Court launched a national proceeding "*in the interest of the law*", which suspended the enforceability of the judgment rendered by the court of the first instance (confirmed by the Court of Appeal) in favour of the Malagasy company Polo Garments Majunga, fully owned by Belgian nationals Peter and Kristof De Sutter, directly or through their Luxembourgian company DS2.

The first instance decision ordered the Malagasy insurance company NY Havana S.A. to reimburse Polo Garments Majunga an amount of approximately €5.2 million as in order to cover the damages it suffered during the civil unrest that followed the 2009 coup in Madagascar.

Peter and Kristof De Sutter, Polo Garments Majunga, and DS2 ("Claimants") filed a request for arbitration at the ICC Court, alleging an infringement of the BIT between the Republic of Madagascar and the Belgium–Luxembourg Economic Union ("BIT"). They claimed that the Attorney General's decision to start the proceeding "in the interest of the law" was taken with the exclusive purpose of suspending the immediate enforceability of the first-instance decision against NY Havana, whose majority stakeholder is the Republic of Madagascar itself.

The Claimants requested the sole arbitrator to rule that their rights under the BIT were violated by the Republic of Madagascar, and that the latter should pay damages for €5.2 million together with an interest of 6% (i.e. the legal interest rate applicable in Madagascar) from the due date until the date of the decision of the Court of Appeal confirming the first instance decision, as well as from this moment until the 30th of June 2014.

The sole arbitrator rejected the claims for capital and interests calculated from the due date until the judgment of the Court of Appeal as not covered by the BIT (and still pending before the Malagasy Supreme Court). Regarding the interests requested from the date of the judgment of the Court of Appeal until the 30th of June 2014, the arbitrator ruled that this amount had to be qualified as compensation for the damages suffered by the Claimants in consequence of the suspension of the enforceability of the first instance judgment, and that applying a 6% annual rate on capital was a fair way of calculating such damage.

The Republic of Madagascar filed a request of annulment of this award at the Court of Appeal of

Paris.

The Court ruled that the sole arbitrator had based his decision on legal grounds that were not pleaded by the parties, and that the parties were denied the right to be heard on such grounds since these grounds were newly and *ex officio* raised by the arbitrator. In particular, the Paris Court of Appeal criticized the arbitrator's autonomous decision to re-qualify the relief sought by claimants as a claim for the compensation of damages while the Claimants had instead requested the payment of interests on the capital amount due by the respondent. Never had they (at least explicitly) asked for the compensation of damages in this respect.

This decision is in line with previous judgments rendered in France on the (mis)application of the iura novit curia maxim in international arbitration: in Gouvernement de la République arabe d'Egypte v. Société Malicorp Ltd, Overseas Mining Investments Ltd v. Commercial Carribean Niquel and Engel Austria GmbH v. Don Trade, French courts ruled that *ex officio* application of legal provisions that were not pleaded by the parties, even if this does not constitute an unexpected and unforeseeable development of the case, may entail a violation of the "*principe du contradictoire*" and can be a valid ground for the annulment or refusal of enforcement of an award.

This position is, however, not shared by other jurisdictions. Since its formative decision in the Tvornica case, the Swiss Federal Court had often reaffirmed that

> "in Switzerland, the right to be heard concerns particularly factual findings. The parties' right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, according to the principle jura novit curia, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties."

The parties must be invited to express their position only if "*the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected relevant*" and ultimately amounts to a surprise for them.

ICSID annulment committees generally seem to follow the Swiss approach although it cannot be stated that ICSID case-law on this issue is settled yet. In a recent decision, the annulment *ad hoc* committee in the case Caratube International Oil Company LLP v. Republic of Kazakhstan offered an in depth analysis of the *iura novit curia* issue, starting with a clear identification of the two key principles that come into play in the evaluation of arbitrators' initiatives to apply substantive provisions *ex officio*:

> "- the parties' right to be heard, and
> – tribunal's right (or even duty – a tribunal confronted with inept pleadings cannot content itself with the less implausible of the parties' arguments) to apply the principle iura novit curia."

The *ad hoc* committee held that the parties' right to be heard is violated only when the exercise of

iura novit curia powers leads to the application of legal provisions or arguments that do not fit within the legal framework argued during the procedure. It nonetheless recognized that it is good practice for arbitral tribunals deciding to exercise *iura novit curia* to invite the parties to comment on the new legal arguments, as it would reduce the risk of errors or mistakes.

This last suggestion mirrors the best practices recommended by the International Law Association in 2008 and testifies of a converging trend on this topic.

In light of the above, there is no general consensus on the extent of the powers and duties of arbitrators in applying the *iura novit curia* maxim. As the recent decision of the Paris Court of Appeal illustrates, some national jurisdictions have neither adhered to the ILA recommendations nor share the views of the Swiss Federal Court or those of many ICSID annulment committees on this issue. In this context, arbitral tribunals still need to carefully balance the pros and cons of exercising *iura novit curia* powers, and to ensure due process.

The pro-active attitude of arbitrators towards the ascertainment and application *ex officio* of legal arguments not pleaded by the parties is, in our view, justified when public policy provisions are at stake. Arbitrators' intervention can reduce the risks of annulment or non-enforcement of the award (the duty to render an enforceable award is perhaps a "Lazy Myth", but still with a certain appeal within the arbitral community).

Granting the parties the opportunity to comment on new legal arguments makes sense and does not raise any particular concern when the arbitral tribunal is able to raise such arguments at an early stage of the procedure. However, it is not uncommon that arbitral tribunals become aware of the necessity of applying a legal provision or reasoning not argued by the parties only at a very late stage of the procedure, if not while drafting the award. At that point, reopening the procedure for the sake of allowing the parties to present their views on the new legal arguments will inevitably lead to a delay and increase costs.

In our view, it is however better to give the parties the opportunity to share their views on legal arguments that may be brought in by the tribunal even at a late stage of the procedure.
In most cases, it will reduce the risks of annulment of the award on the basis of violation of the principle of the right to be heard, and at the same time, will likely ensure a higher level of consistency of the decision with international public policy provisions applicable to the merits of the case. Increasing the chances for the award of reaching finality and being enforceable more expeditiously may ultimately generate significant efficiencies in terms of time and costs and this more than justifies the decision of reopening the arbitral procedure, even at a very late stage.

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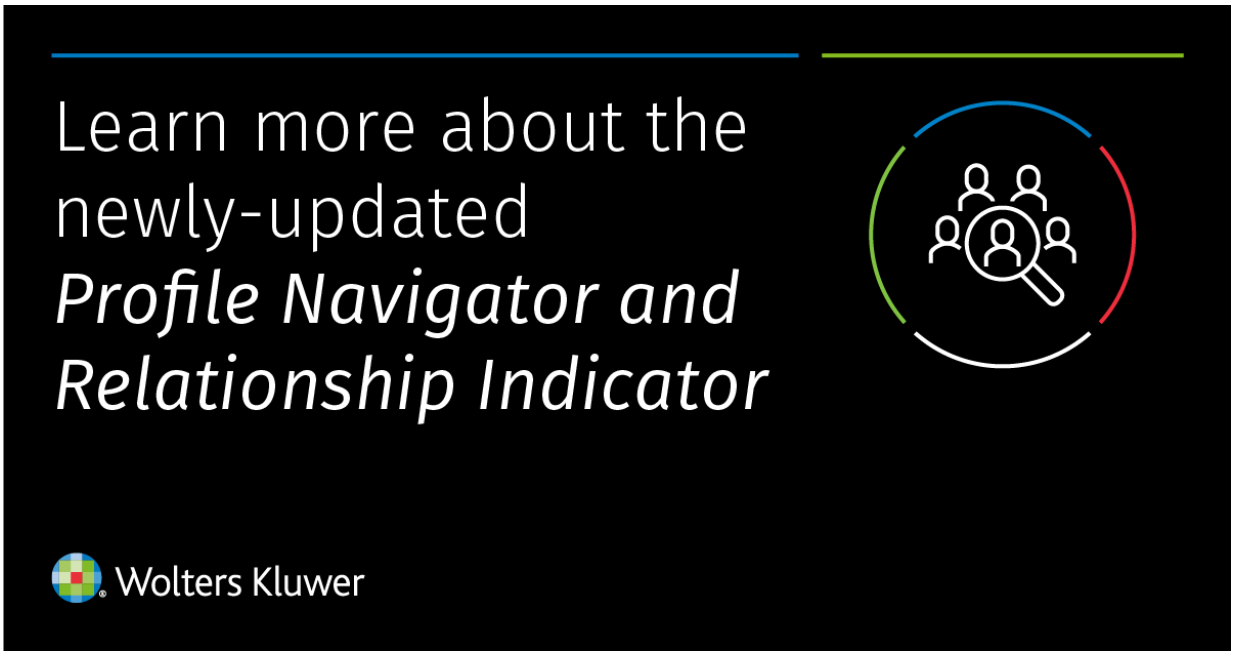

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