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Arbitrators Applying the Law: Can a Tribunal Decide on a Law that was not Pleaded by the Parties?

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An arbitrator's authority to rely on a law that was not pleaded by the parties has been the subject of extensive discussions in the literature. Anecdotal evidence suggests that civil law jurisdictions broadly tend to adopt a more liberal approach to recognizing such authority in international arbitration, while common law jurisdictions, on the other hand, tend to adopt a more restrictive approach. This authority is derived from the principle *iura novit curia* which means "the court knows the law". It entails the adjudicator's power to determine matters relying on a law that was not pleaded by the parties.

The importance of the divergent approaches is highlighted in the risk of the resultant award being annulled on grounds of a denial of due process. As Julian Lew states, if a tribunal "*goes off on a 'frolic' of its own, the tribunal risks stepping outside its mandate and the award being challenged.*"

This blog post reviews and compares the application of *iura novit curia* in arbitration practice across common and civil law jurisdictions, as well as in investor-state arbitration, to ascertain similarities and differences in its application, posit the application of *iura novit curia* as a principle of transnational international arbitration law, and suggest best practice recommendations for the exercise of the power conferred on the tribunal under this principle.

Application of Iura Novit Curia in Common Law Jurisdictions

Although *iura novit curia* is synonymous with civil law jurisdictions, existing literature suggests its recognition and application in common law jurisdictions. The English Arbitration Act 1996 grants tribunals broad discretion over procedural issues, including deciding the extent to which the tribunal should take the initiative to ascertain facts and law (section 34). English courts, on this premise, have upheld awards that reached decisions on laws that were not pleaded, as long as they were not contrary to law, and the Tribunal did not consciously disregard the law pleaded by the parties. Likewise, courts in Hong Kong have generally upheld the principle and will only annul or refuse to enforce awards where this power is exercised at the expense of the parties' due process rights.

The privy council in Gol Linhas Aereas SA v. MatlinPatterson Global Opportunities Partners

(Cayman) II LP and Others recently upheld a decision of the Cayman Court of Appeal to permit enforcement of an ICC Award resulting from arbitration seated in Brazil under the New York Convention, notwithstanding the fact that the Tribunal had relied on a law that was not pleaded by the parties. The court held that it was not persuaded that the failure of the Tribunal to invite the Respondent to comment on the theory relied on by the Tribunal was so serious a denial of procedural fairness as to justify a refusal to enforce the award.

Application of Iura Novit Curia in Civil Law Jurisdictions

In Germany, the law affords tribunals broad discretion to conduct proceedings as they deem appropriate while requiring that parties be heard (German Constitution, Article 103; German Code of Civil Procedure, Article 1042). The courts in determining post-award proceedings uphold the principle of *iura novit curia*. In recent enforcement proceedings of a German domestic award, the Frankfurt Higher Regional Court declared that the award was enforceable notwithstanding the fact that the Tribunal had relied on an argument not raised by the parties in reaching its decision. The court held that the Tribunal is not bound by the parties' understanding of the law.

On the other hand, the French Court of Appeal in *Engel Austria GmbH v Don Trade* annulled an award on the basis that the Tribunal had applied Austrian law principles that had not been raised or debated by the parties. While French courts recognise the application of *iura novit curia* in international arbitration, the due process principle of *principe du contradictoire*, which implies that parties be allowed the right to comment on, contradict and object to cases made against them, influenced the court's decision.

In Sweden, the Svea Court of Appeal in *City Sakerhet AB v SafeTeam i Sverige AB* confirmed its long-standing case law on Swedish arbitration law that the parties' right to be heard primarily relates to the facts and not the law. The court confirmed that, pursuant to the principle of *iura novit curia*, an arbitrator generally has the authority and discretion to apply the legal rule it considers applicable if the decision is based on the ultimate facts invoked by the parties. The only exception exists when the arbitrator's application of the law comes as a surprise to the parties, i.e., when the parties could not have reasonably expected such application of the law.

In Switzerland, the Swiss Federal Tribunal has confirmed in a long line of decisions that an arbitral tribunal is subject to *iura novit curia*. The Swiss Courts have also held that a Tribunal need not limit itself to arguments advanced by the parties.

Application of Iura Novit Curia in Investor-State Arbitration

In *RSM Production Corporation v. Grenada*, the tribunal relied on *iura novit curia* as a legal justification to reopen arbitral proceedings based on newly discovered evidence. The Tribunal consisted of arbitrators from both civil and common law jurisdictions. Some investor-state tribunals have been willing to act based on *iura novit curia* when such an exercise of power would only be justified by the judicial function theory. In *Caratube International Oil Company LLP v. Republic of Kazakhstan*, for example, the annulment committee noted that the tribunal was able to act beyond the pleadings, implicitly on the basis of *iura novit curia*.

Other investor-state tribunals have been willing to act only where a judicial notice theory could justify its exercise. In *Metal-Tech Ltd. V. The Republic of Uzbekistan*, for example, the tribunal relied upon the Uzbek Applied Research Commentary of the Uzbek Criminal Code published by the Uzbek Ministry of Internal Affairs. To the extent that investor-state arbitration takes place under municipal law, it is important to reference the *lex arbitri* on the scope of *iura novit curia.* In *Bogdanov v. Republic of Moldova*, the Sole Arbitrator from a civil law background ruled on the basis of the *lex arbitri* and held that under Swedish law, which was applicable to the proceedings, it is established that the principle of *iura novit curia* applies, therefore, a Tribunal applying the law is not bound by the pleadings made by the parties, and may on its own motion apply legal sources or legal qualifications that have not been pleaded by the parties.

Practical Recommendations for the Application of Iuria Novit Curia in Arbitration Practice

The Tribunal's reliance on a law not pleaded is more likely in cases where the Tribunal is composed of subject matter experts. In this instance, it may be argued that the law relied on by the Tribunal, although not pleaded by the parties may lead to a fairer outcome or one that emphasises party autonomy in relation to the choice of an arbiter. The parties' choice of arbitrators who are subject matter experts may, due to the arbitrator's knowledge of the law, result in the reliance on laws not pleaded by the parties. This should, however, be done with caution to minimise the risk of the award being challenged and/or annulled.

To curtail this risk, it is recommended that tribunals, in seeking to rely on a law not pleaded by the parties', request that the parties address the Tribunal on the law before relying on it in the award. Beyond ensuring the principles of natural justice are adhered to, it provides the arbitrators with parties' perspectives on the issues and would ultimately lead to fairer decisions.

Conclusion

This inexhaustive review of the practice across the common and civil law divide and investor-state arbitrations shows a growing convergence in the practice of international arbitration to recognise and apply *iura novit curia* in international arbitration. While it is crucial for tribunals to take cognizance of the limits and specific stipulations of the *lex arbitri* where the arbitration takes place under municipal law (e.g., the requirement to prove foreign law), this convergence, in our view, is a possible signal to the acceptance of *iura novit curia* in international arbitration, and by extension, the practice of tribunals' relying on laws other than those pleaded by the parties. This must however be limited by the principles of natural justice, the need to ensure that justice is not just done but seen to be done, and the Tribunal's obligation to render an enforceable award.

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This entry was posted on Thursday, November 17th, 2022 at 9:04 am and is filed under Applicable Law, Civil Law, Common Law, Iura Novit Curia
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