The Principle of *Iura Novit Curia* in International Arbitration

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Party autonomy is one of the fundamental cornerstones of international arbitration. This principle has many dimensions. One of the basic and most important rules is that the arbitral tribunal should resolve the dispute based on the submissions of parties. The tribunal has the task of evaluating evidence submitted by each party and deciding which position should prevail.

However, most arbitration disputes are not resolved solely based on facts. Another crucial element is the law applicable to the relationships between the parties in a dispute. For that reason, in practice, almost all acting arbitrators are qualified lawyers.

The issue we aim to discuss in this article is whether the application by a tribunal of particular legal provisions is an integral part of party autonomy, or is the tribunal actually free to make its own legal reasoning by invoking legal provisions *ex officio*. What are the limits of the tribunal's discretionary powers in applying law?

This issue is not new. It is often discussed as the principle of *iura novit curia* ("the court knows the law") in international arbitration. Courts in various states have developed practical approaches to this legal concept. At the same time, in emerging arbitration jurisdictions, and especially those with rather inquisitorial judicial traditions (Ukraine being one of them), *iura novit curia* still provides an area for discussion.

Approaches to *Iura Novit curia* in Different Jurisdictions

There are a sufficient number of publicly available court decisions rendered by courts of higher instances in various states, addressing the balance between the arbitrators' mandate granted by the parties and the need to duly apply law to the facts of a case. The principle of *iura novit curia* has also been addressed in the national legislation of certain states as well as arbitration soft law.

The courts deal with the principle of *iura novit curia* usually in the context of proceedings on recognition and enforcement of arbitral awards, as well as in the event of setting aside proceedings. The reason is that the parties can bring an argument that an *ex officio* application by the tribunal of legal provisions, which were not argued and/or mentioned by the parties in their submissions, constitutes an excess of arbitrator mandate, which is a ground to refuse the arbitral award's recognition and enforcement under Article V(1)(C) *of the New York Convention 1958*. A similar argument could also be raised in the setting aside of proceedings. Below we briefly discuss several relevant court decisions.

The Swiss Federal Supreme Court in its decision of 9 August 2018[1] considered an application on setting aside of an ICC arbitral award which dealt with a dispute arising out of a contract between an Algerian public company and a Canadian construction company. The contact was governed by Algerian law.

The contractor challenged the award on the basis that the ICC tribunal applied the principle of equity under Algerian law. However, the contractor alleged that neither party to the dispute directly argued application of the principle of equity in the course of arbitration.

The court dismissed the challenge. In its reasoning, the court *inter alia* stated that the principle of equity forms part of Algerian law. Furthermore, the court concluded that the tribunal is responsible to determine and apply the law, and hence the parties should not have been surprised by the application of the mentioned principle by the tribunal. Therefore, in this case, the Swiss Federal Supreme Court ruled that arbitrators had broad authority in the application of legal provisions to the facts of the dispute.

Another example is from Sweden. Back in 2009, the Svea Court of Appeal rendered a decision in *Systembolaget AB vs Vin & Sprit AB*[2]. This case concerned the setting aside of the SCC arbitral award due to excess of arbitrators' mandate. The underlying dispute arose out of allegedly unjustified partial termination by Systembolaget AB of purchasing agreements concluded between the parties. Vin & Sprit AB brought the case to arbitration seeking damages in connection with termination of the mentioned agreements.

The SCC tribunal upheld the claim and awarded damages to Vin & Sprit AB. In finding that termination of the purchasing agreements was unlawful, the tribunal concluded that the parties had contracted out the right to terminate the agreements according to the general principles of law. Vin & Sprit AB, however, did not raise such an argument during arbitration.

The Svea Court of Appeal set aside the award. In particular, the court ruled that Vin & Sprit AB had, indeed, never claimed that there was an agreement between the parties to exclude application of the general legal principles. At the same time, the court noted that during arbitration, Vin & Sprit AB relied upon contractual provisions regarding termination of the agreements only. Therefore, the Svea Court of Appeal demonstrated a high level of respect towards party autonomy and decided that arbitrators

[1] Text of court decision in the French language is available at: https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F09-08-2018-4A_525-2017&lang=de&type=show_document&zoom=YES&.

[2] Unofficial translation of court decision into English is available at: https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1147059&propId=1578.

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have rather limited powers to apply legal provisions *ex officio*.

The above narrative of two cases demonstrates that there is no uniform approach to the principle of *iura novit curia* in arbitration. Thus, the question arises as to whether it would be reasonable to address it in codified legislation. This might indeed be beneficial for the uniformity of arbitration practice, and this could decrease the vulnerability of certain arbitral awards to challenges.

However, rather few states implemented relevant rules in their national legal systems. In particular, the *UNCITRAL Model Law* is silent on this matter. Article 28 of the *Model Law* merely states that the tribunal shall decide the dispute in accordance with the law chosen by the parties. This rule does not clarify to what extent the tribunal is permitted to invoke legal provisions *ex officio*, if at all.

The positive exception is *English Arbitration Act 1996*. Its Article 34(2)(g) provides that the tribunal should decide "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law". Hence, although the *English Arbitration Act 1996* does not extensively clarify the limits of *iura novit curia*, it at least recognizes the tribunal's power to establish applicable legal provisions on its own motion.

In relation to soft law, the most extensive and clear rules are provided in the recently-adopted *Prague Rules*, which aim to provide guidance on the efficient conduct of international arbitration proceedings. Article 7 of the *Prague Rules* establishes the right of arbitrators to "rely on legal authorities even if not submitted by the parties if they relate to legal provisions pleaded by the parties". However, the tribunal may exercise such power only "provided that the parties have been given an opportunity to express their views" in relation to legal authorities in question.

This approach set out in the *Prague Rules* became, in fact, the universally accepted approach with respect to *iura novit curia* in arbitration proceedings. Recent arbitration practice and legal doctrine clearly uphold the balanced correlation between party autonomy and the duty of arbitrators to apply proper legal provisions to the facts of a case. The parties remain the drivers of any arbitration proceedings, but the tribunal should sometimes take a proactive stance to ensure the lawful resolution of a dispute.

What about Ukraine?

As noted, Ukrainian judiciary primarily follows the inquisitorial legal tradition. Judges in Ukrainian courts regularly apply substantive legal provisions which were not raised or even mentioned by the parties.

Although the majority of arbitrators are not former judges, judicial traditions seem to influence the approaches taken by tribunals in arbitration cases with the seat in Ukraine. This is particularly evident from the publicly available arbitration awards rendered by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the ICAC). For instance, in several recent arbitration awards[3], the ICAC tribunal applied the CISG to the facts of the dispute, although, according to available texts of arbitration awards, neither party argued the application of the CISG.

This approach does not seem to raise concerns with the parties to arbitration. Our analysis of the available decisions of Ukrainian courts on setting aside of arbitration awards did not reveal cases regarding the challenging of an award on the basis that the tribunal exceeded its mandate by applying certain legal provisions *ex officio*.

The parties tend to accept the situation that arbitrators in Ukraine have broad discretion to apply any legal provisions on their own motion. At the same time, further development of arbitration law and practice in Ukraine can bring new tendencies, and the parties may soon start questioning the rather limited respect of Ukrainian-seated tribunals towards party autonomy that exists today.

[3] *Arbitral award of 6 October 2016 in case No. 71 and arbitral award of 29 October 2013 in case No. 36.*