Iura Novit Curia versus *Iura Novit Arbiter* in International Arbitration

PhD. student **Ingrid A. MÜLLER**[1]

Abstract

The paper analyzes the distinction between the two presumptions mentioned in the title.

At first glance, it seems that the application of both the Iura Novit Curia and the Iura Novit Arbiter principles in international arbitration is redundant. After all, what are the Arbitrator and the Arbitral Tribunal if not a private judge and, respectively, a private Court? However, the distinction between the two concepts becomes extremely important in certain stages of the arbitration, especially when it comes to purely procedural matters. As such, there is a difference between the arbitral process that takes place in front of the Arbitral Tribunal and incidental or additional procedures that take place in front of State Courts (even after the arbitral award has been rendered, e.g. an annulment procedure or at the stage of recognition or enforcement of a foreign arbitral award). In conclusion, the use of both expressions in parallel is justified. Iura Novit Curia corresponding strictly to the role of Domestic Courts in an arbitration, at all stages (both incidental and additional matters during the arbitral process and in follow up procedures) and addressing the knowledge of the Courts' lex fori (e.g. public order/public policy issues), unless explicitly excluded by applicable provisions. While Iura Novit Arbiter pertaining to the role of the Arbitral Tribunal per se – although, in this case, the expression is more a misnomer, the presumption being limited by the choices of the parties as an assertion of party autonomy, a main characteristic of arbitration as an alternative dispute resolution method.

Keywords: *international arbitration, the role of domestic courts in arbitration, Iura Novit Curia, Iura Novit Arbiter, party autonomy.*

JEL Classification: K15, K33, K39, K49

1. Preliminary considerations

Usually, when it comes to international arbitration, scholars and practitioners refer to either the principle of *Iura Novit Curia* or to the principle of *Iura Novit Arbiter* to describe the powers of arbitral tribunals to interpret and apply certain norms independently of the parties' assertions. Those using the former generally equate arbitral tribunals with courts on all aspects, while those using the latter, more specific term, implicitly recognizing the particularities of arbitral tribunals as circumscribing their powers to the autonomy of the parties. Only rarely the fact that those two principles are referring to different situations is even acknowledged.[2]

But there is quite a difference between them. Going back to the historical

[1] Ingrid A. Müller - Attorney-at-Law, LL.B., LL.M. in International Arbitration, LL.M. in Public International Law, '20 LL.M. Columbia Law School, '20 Honoree, Parker School of Foreign and Comparative Law, United States of America; '21 LL.M. in European Law, Université Paris 1 Panthéon-Sorbonne, France, ingrid.muller@columbia.edu.

[2] *See e.g.* Ferrari, Franco & Cordero-Moss, Giuditta eds., "*Iura Novit Curia* in International Arbitration", Juris, 2018.

development of *Iura Novit Curia* as a (civil law) legal principle[3] and to the paradoxical preponderance of common law institutions[4] in international arbitration despite the historical "hostility of common law to arbitration"[5].

As such, they should be treated accordingly.

Although the subject is too broad to be exhaustively detailed here, the present paper purposes to briefly analyze the particularities of each principle and to conclude on whether a clear distinction should become the norm in order to accurately express the particularities of arbitration as an alternative dispute resolution method.

2. The distinction

As mentioned in the introductory part, *Iura Novit Curia* is a civil law inspired principle. Accordingly, it is normally applied in an inquisitorial fashion being derived directly from another civil law legal principle, *i.e.* the *Active Role of the Judge*. Thus, it is not that the judge necessarily *a priori* "knows the law" as the *Iura Novit Curia* principle states on its face, but that it is mandated to actively find out and apply (all) the relevant law(s). There are, however, limitations.

As for the *Iura Novit Arbiter* principle, it is immediately evident that it is more limited in scope by the very reference pertaining to arbitration considering that one of the main characteristics of this alternative dispute resolution method is deference to the parties' choice of applicable law as an expression of the doctrine of party autonomy.

Also, while both principles have their place in the arbitral process, the applicability of one principle or the other depends on the stage that the arbitration is in since there are differences between the process administered by the Arbitral Tribunal and procedures in Domestic Courts relating to that arbitration — whether during or after the arbitral award has been rendered[6].

A more detailed analysis of the two principles, their respective limits, and their roles in international arbitration will be discussed below.

2.1. *Iura Novit Curia*

Da mihi factum, dabo tibi ius.[7,8] An accurate representation of how judges are usually expected to decide on cases before them in civil law systems. It draws from the principle of the *Active Role of the Judge*. And, as a civil law inspired legal principle, *Iura Novit Curia* perfectly complements this maxim because "the court knows the law". Or should know it. And is not only allowed but required to discern it even contrary to

[3] For details see *Infra*, section 2.1.

[4] Starting with the doctrine of party autonomy itself, or fact that the applicable law has to be "presented" to arbitrators as in adversarial systems or allowing discovery or certain privileges, all of which are mainly common law inspired institutions (with the exception of attorney client communication privilege that is also found in civil law systems).

[5] Wolaver, Earl S. "The Historical Background of Commercial Arbitration." *University of Pennsylvania Law Review and American Law Register* 83, no. 2 (1934): 132–46, p. 139. https://doi.org/10.2307/3308189, last visited, June 21st 2022.

[6] *E.g.* An annulment procedure or at the stage of recognition or enforcement of a foreign arbitral award.

[7] Give me the facts, I will give you the law.

[8] *See* Rosenfeld, Friedrich Iura Novit Curia in International Law, Chapter 16, Ferrari, & Cordero-Moss eds., "Iura Novit Curia in International Arbitration," Juris, 2018.

the parties' assertions, under penalty of denial of justice.

Iura Novit Curia has its limitations though.

Mostly due to the quasi-autonomy that the parties enjoy in courts in demarcating the dispute to be decided upon. This is substantively different from party autonomy in international arbitration and — despite widespread misunderstanding in the relevant literature — distinguished from other tangential principles, such as the *Right To be Heard*[9].

The court is bound, for example, by the parties' choice of area of law considering that the same facts could hypothetically be interpreted through the lenses of multiple areas of law. And the court going against the parties' disposition in this regard and deciding based on a completely different area of law could be deemed *infra/ultra/extra petita* given its responsibility to address everything that it was requested to decide upon but nothing more, under the *omnia petita* principle. But not if the court decides, under the parties' chosen area of law, upon different provisions than those asserted by the parties themselves.

It is also limited by the mandatory laws potentially applicable, *i.e.* public order/ public policy issues[10,11], *etc*.

Still, quite different from what is expected of an arbitrator, isn't it? Especially since for different stages of the arbitral process the distinction between the two concepts becomes even more relevant, mainly pertaining to procedural matters. For the Arbitral Tribunal normally decides on all things related to an arbitration (except where otherwise prohibited by applicable norms) while the Courts usually decide only on incidental or follow up procedures, such as when it comes to enforcement of a foreign award or in an annulment procedure.

There are also different bodies of laws potentially applicable[12] by the Courts versus the Arbitral Tribunal depending on the stage, issue at hand[13], and applicable legal order.[14]

Which is exactly why this paper suggest the need for the arbitration community to consider the *Iura Novit Curia* and *Iura Novit Arbiter* as two different legal principals altogether.

2.2. *Iura Novit Arbiter*

In contrast to the *Iura Novit Curia* principle, the *Iura Novit Arbiter* principle is

[9] Found both in civil law systems and in common law systems, it's usually considered a component of the *Right to a Fair Trial the* latter being almost universally recognized regardless of the legal order applicable, whether in Constitutions, Human Rights treaties, or customary laws.

[10] Although usually considered analogous, there are differences between the notions of *public order* from civil law systems and *public policy* from common law systems. See C. Leaua, F.A. Baias (ed.)"*Arbitration in Romania. A practitioner's Guide, Kluwer Law International 2016*", endnote 404.

[11] Mistelis, Loukas.A., Lew Julian. D. M., "*Pervasive Problems in International Arbitration"*, Ed. Kluwer Law International, 2006.

[12] Lew, J.D.M., Mistelis, L.A, Kroll, S. "Comparative International Commercial Arbitration", Kluwer Law International, The Hague 2003.

[13] Compare, for example, the interpretation of *lex fori* and *lex arbitri* "public order/public policy issues" in enforcement of foreign awards procedures vs. in annulment procedures at the place of arbitration.

[14] Barraclough Andrew and Waincymer, Jeff, "Mandatory Rules of Law in International Commercial Arbitration", Melbourne Journal of International Law, Volume 6, 2005.

a common law inspired institution, having its roots in the principle of contractual freedom[15]. Interestingly, contractual freedom is also found in civil law systems but its application does not extend so much as to limit the courts in overriding the parties' choice of the relevant law if it finds it necessary. The arbitration related interpretation of this principle is distinctive, having more of an adversarial approach.

When it comes to *Iura Novit Arbiter* the most important aspect is reconciling its underlying premise — that the Arbitral Tribunal can consider on its own potentially applicable provisions — with the limitations imposed on the Arbitral Tribunal's powers by party autonomy.

In fact, the limits imposed on the powers of the Arbitral Tribunal to apply independent reasoning are considered so important to the very nature of arbitration that even some courts recognize them in follow up procedures, mandating that Arbitral Tribunals bring to the parties for discussion any provisions and reasonings not addressed by the parties themselves on which The Arbitral Tribunal intends to base its decision.[16] Not surprising given that party autonomy is the "*guiding principle in determining the procedure to be followed*"[17] having the most impact on deciding the applicable law in arbitration[18] and one of the characteristics most sought after for arbitration as an alternative dispute resolution method.[19]

However, at the same time, party autonomy is itself limited[20] in certain respects depending on numerous factors. Such as whether it is an international or a domestic arbitration, an investment or a purely commercial one. Or due to the fact that there are many mandatory laws[21] potentially applicable at any stage of an arbitration[22], irrespective of the parties' choices. Undoubtably, the parties enjoy less freedom of choice[23] after an Arbitral Tribunal has been vested with deciding on a dispute than beforehand.[24]

There is also a certain subjectivity of the arbitrators[25] in interpreting the

---

[15] Cheshire, Geoffrey. Chevalier, James J. Fawcett, and Peter Manchin North, "Cheshire and North's Private International Law", 13th ed., Butterworths, 2005.

[16] Jemielniak Joanna, Pfisterer Stefanie, "*Iura Novit Arbiter* revisited: towards a harmonized approach?" *Uniform Law Review*, Volume 20, Issue 1, March 2015, pp. 56–80, https://doi.org/10.1093/ulr/unv009, last visited June 21st, 2022.

[17] Redfern, Alan and Hunter, Martin, with Blackaby, Nigel and Partasides Constantine, "Law and Practice of International Commercial Arbitration", 4th edition, 2004 at p. 315.

[18] See also Blessings, Marc, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" Journal of International Arbitration, Volume 14, Issue 23, 1997.

[19] Livingstone, M.L. "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?", Journal of International Arbitration, Volume 25, Issue no. 5, 2008, pp. 529-535.

[20] Depending of what theory on the nature of arbitration is considered. Not so much when the autonomous nature of arbitration is applied. For details *see* Yu, Hong-Lin, "A Theoretical Overview of the Foundations of International Commercial Arbitration", Contemporary Asia Arbitration Journal, Volume 1, Issue 2, p. 255, 2008.

[21] See Berman, George A. and Mistelis, Loukas A. "Mandatory Rules in International Arbitration" New York: Juris Publishing, 2011.

[22] *Supra*, note 11.

[23] Berman, George A., "The "Gateway Problem" in International Commercial Arbitration", 37 Yale Journal of International Law 1 (2012).

[24] See Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedure", Journal of International Arbitration, Volume 24, Issue 3, 2007, pp. 327-339, Wolters Kluwer.

[25] See Gaillard, Emmanuel, "The Role of the Arbitrator in determining the applicable law", Leading Arbitrators' Guide to International Arbitration, 3rd edition, Chapter 18, 2014.

applicable law chosen by the parties, even when the law is relayed in detail by the parties or their representatives[26].

So[27,28] the decision on where exactly is the intersection between party autonomy and other factors relevant to a certain dispute is the attribute of the Arbitral Tribunal. This is where the *Iura Novit Arbiter*'s role becomes evident as essential, albeit limited, in shaping the appliable law in international arbitration. It stands guard in ensuring the completion of one the most important responsibilities of an Arbitral Tribunal, which is to render an enforceable award.

3. Conclusion

Although party autonomy is one of the most important characteristics of arbitration as an alternative dispute resolution method, there are limits imposed on it by certain factors at every stage of an arbitration. Thus, giving leeway for the Arbitral Tribunal's input. This dynamic is expressed in the *Iura Novit Arbiter* principle, which in itself is limited by the parties' choices yet of the utmost importance in any arbitration.

At the same time, almost paradoxically, the role of domestic courts is rather extensive and potentially decisive at certain stages in the arbitral process. In fairness, mostly on administrative matters but also — depending on applicable norms and other factors — essential in follow up procedure such as vacating an arbitral award or enforcing a foreign arbitral award. And this is where the *Iura Novit Curia* principle distinguishes itself from the former as the Courts are less likely than an Arbitral Tribunal to give expression to the parties' choices since there are more extrinsic factors to consider (such public order/public policy, procedural *lex fori*) which the Courts knows, can, and should apply on its own.

So, the two principles are pertaining to different situations.

In conclusion, we see a need for the independent use of both when it comes to international arbitration. *Iura Novit Curia* corresponding strictly to the role of Domestic Courts throughout the arbitral process and *Iura Novit Arbiter* applying (as already does) strictly to the role of the Arbitral Tribunal *per se.*

Bibliography

1. Barraclough Andrew and Waincymer, Jeff, "Mandatory Rules of Law in International Commercial Arbitration", Melbourne Journal of International Law, Volume 6, 2005.
2. Berman, George A., "The "Gateway Problem" in International Commercial Arbitration", 37 Yale Journal of International Law 1, 2012.
3. Berman, George A. and Mistelis, Loukas A. "Mandatory Rules in International Arbitration" New York: Juris Publishing, 2011.

[26] Mcgough, Y., Meier, A. "Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to Be Heard in International Arbitration: an Analysis in View of Recent Swiss Case Law". (2014), 32, ASA Bulletin, Issue 3, pp. 490-507.

[27] For the relation between the limits on party autonomy and extrinsic factors, such as mandatory rules or conflict of laws issues, see Böckstiegel, Karl-Heinz, "The Role of Party Autonomy in International Arbitration, ICDR Handbook on International Arbitration", Chapter 9, 3rd edition, 2017.

[28] See also Hochstrasser, Daniel, "Choice of Law and Foreign Mandatory Rules in International Arbitration" Journal of International Arbitration, Volume 11, Issue 57, 1994.

4. Blessings, Marc, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" Journal of International Arbitration, Volume 14, Issue 23, 1997.
5. Böckstiegel, Karl-Heinz, "The Role of Party Autonomy in International Arbitration, ICDR Handbook on International Arbitration, Chapter 9, 3rd Edition, 2017.
6. Cheshire, Geoffrey. Chevalier, James J. Fawcett, and Peter Manchin North, "Cheshire and North's Private International Law", 13th ed., Butterworths, 2005.
7. Ferrari, Franco & Cordero-Moss, Giuditta eds., "*Iura Novit Curia* in International Arbitration," Juris, 2018.
8. Gaillard, Emmanuel, "The Role of the Arbitrator in determining the applicable law", Leading Arbitrators' Guide to International Arbitration, 3rd Edition, Chapter 18, 2014.
9. Hochstrasser, Daniel, "Choice of Law and Foreign Mandatory Rules in International Arbitration" Journal of International Arbitration, Volume 11, Issue 57, 1994.
10. Jemielniak Joanna, Pfisterer Stefanie, "*Iura Novit Arbiter* revisited: towards a harmonized approach?" *Uniform Law Review*, Volume 20, Issue 1, March 2015, pp. 56–80, https://doi.org/10.1093/ulr/unv009 last visited June 21st, 2022.
11. Leaua, C. & Baias, F.A. (ed.), *Arbitration in Romania. A practitioner's Guide,* Kluwer Law International, 2016.
12. Lew, Julian D.M., Mistelis, Loukas A, Kroll, Stefan, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003.
13. Livingstone, M.L. „Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?", Journal of International Arbitration, Volume 25, Issue no. 5, 2008, pp. 529-535.
14. Mcgough, Y., Meier, A. "Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to Be Heard in International Arbitration: an Analysis in View of Recent Swiss Case Law", 32, ASA Bulletin, Issue 3, 2014, pp. 490-507.
15. Mistelis, Loukas.A., Lew Julian. D. M., *Pervasive Problems in International Arbitration*, Ed. Kluwer Law International, 2006.
16. Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedure", Journal of International Arbitration, Volume 24, Issue 3, 2007, pp. 327-339, Wolters Kluwer.
17. Redfern, Alan and Hunter, Martin, with Blackaby, Nigel and Partasides Constantine, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004.
18. Rosenfeld, Friedrich Iura Novit Curia in International Law, Chapter 16, Ferrari, & Cordero-Moss eds., "Iura Novit Curia in International Arbitration," Juris, 2018.
19. Wolaver, Earl S. "The Historical Background of Commercial Arbitration", *University of Pennsylvania Law Review and American Law Register* 83, no. 2, 1934: 132–46, https://doi.org/10.2307/3308189, last visited, June 21st 2022.
20. Yu, Hong-Lin, "A Theoretical Overview of the Foundations of International Commercial Arbitration", Contemporary Asia Arbitration Journal, Volume 1, Issue 2, 2008.