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"Jura novit curia"

– Selected topics on "best practice" in commercial arbitration

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The «menu»

- The basis of «jura novit curia» in international arbitration
  - Is it safe to assume that *arbitrator(s)* «know the law»?
- The overall legal question
  - To what extent must the Tribunal decide the case (and write the award) based on the «legal basis» invoked and argued by the parties?
- To be more specific concerning the «legal basis»
  - To what extent can the Tribunal – *in its interpretation and application* of the invoked «legal basis» – rely on legal arguments and legal sources not invoked by the parties?
  - And when can a legal argument or legal source be considered «invoked»?
    - Could it be sufficient that the legal arguments and legal sources were included in the (massive) Legal Abstracts?
- Relevance
  - The topic goes to the heart of predictability and transparency in arbitration
- Caveat – I will mainly address «best practice»
  - Hence, I will only touch on the minimum standard under the NYC
  - Furthermore, I assume that the arbitration clause does not address the question (for example, by referring to *ex aequo et bono*)

The dilemma

- In principle, strict adherence to «Jura novit curia» may be cost efficient and simplify the proceedings
  - The pleadings, the hearings and the award should not be overly burdened with legal matters
  - «Straight-forward legal questions» may safely be left to the Tribunal
  - The problem: To determine what is a «straight-forward» legal matter
- On the other hand, the parties should be able to argue their legal understanding of their claim/defense
- And the Tribunal should not «assist» any of the parties to develop their legal arguments (equality and impartiality)
  - A recurring topic is how to clarify legal questions without giving one of the parties an improper advantage
- How to strike a fair balance?
  - No universal formula, but the following may serve as an overall test:
  - Generally, the parties (counsel) should not be surprised by the Tribunal's legal reasoning in the award and the legal sources relied on

The dilemma – cont´d

- How to avoid such a surprise?
  - The Tribunal should ensure contradiction on the law
    - In particular, the legal grounds that will be decisive for the outcome of the award
  - The latter may, however, sometimes be difficult to predict before the hearing (and even under the hearing):
    - Typically, because counsel does not develop its legal arguments before the Closing Statement
      - Unfortuntately, this is a recurring situation in cases not being properly «front-loaded»
    - It might also happen that the Tribunal does not fully understand the decisive legal grounds before its deliberations after the hearing
- How to strike the balance is best illustrated by certain examples (to which I will revert)
- First I will address certain particular features of «jura novit curia» in international arbitration

A key question: Is it proper to assume that arbitrators «know the law»?

- «Jura novit curia»: a cornerstone of litigation
  - That the «judge knows the law» goes without saying with regard to key features of the domestic law
- «Jura novit curia» in international arbitration?
  - At the outset, it also goes without saying that an arbitrator should know the (substantial) «law»
  - But the picture may be (far) more complex in international arbitration
    - Not rarely, only one or two of the arbitrators have first hand knowledge of the applicable substantive law
    - Hence, it is not correct that the whole Tribunal «knows the law»
  - The latter may have a bearing on the present questions
    - For example, it may be necessary to address even more «straight-forward» legal questions in the pleadings and the hearing

Selected cases – three categories

- The principle of «Jura novit curia» in arbitration (if any) is hard to grasp
- It may be easier to say what it does not allow the Tribunal to do «on its own»
- In this context, it might be beneficial to distinguish between three categories
  - First, where the Tribunal must limit itself strictly to the legal basis invoked by the parties
  - Second, the intermediate category where the Tribunal should be cautious to rely on legal arguments or legal sources not invoked by the parties
  - Third, where the law is so «straight forward» that the Tribunal can «apply it on its own»

The first category:

«Jura novit curia» does not allow the Tribunal to decide the case based on non-invoked defenses etc.

- We are now in the forbidden end of the scale
- Example 1: Non-invoked defenses
  - After deliberations, the Tribunal considers the claim or counterclaim to be time-barred under mandatory law and/or the contract
  - But none of the parties have invoked any such defense
  - In my opinion, the answer is evident
    - The Tribunal cannot decide the case on the basis of such a defense
- Example 3: Contract Act Section 36
  - But not invoked Section 33 or «failed assumptions»
- Example 2: Reversed burden of proof
  - A reversed burden of proof would have a strong bearing on the parties presentation of the facts and the witnesses to be provided

The third category:

The core of the «jura novit curia» = «Straight-forward law»?

- We are now in the opposite end of the scale
- What is «straight-forward» law (if any)?
  - Interpretation of contracts is *the* recurring issue in commercial arbitration
  - The uncontroversial elements of interpretation
    - The reference to the «reasonable person» etc.
- But what about «rules» of interpretation not invoked by any of the parties, for example:
  - The «common understanding» rule
  - The so-called *contra proferentem rule*
  - The «inherent system» of the contract and gap-filling with the background law (a recurring topic)?
  - The Tribunal should be (very) cautious about relying on such non-invoked rules
    - The relevant factual matrix may not be sufficiently enlightened to ensure a proper application
    - In any case, the Tribunal's reliance on such non-invoked rules may turn out to be a (big) surprise for the parties

The second category:

The difficult intermediate cases

- The problem
  - Sliding scale between the green and the red category
  - You should only walk on orange and red if you are confident that no car is coming …
- Example 1: Calculation of damages
  - Provided that there is a defect, Claimant has claimed 90 in damages
  - But even though the Respondent did not dispute the calculation of the claim, the Tribunal reduced the amount to 1/3 of the claimed 90
  - This is the nutshell of a Norwegian Supreme Court case (Rt. 2005 p. 1590), where the sole arbitrator's calculation of damages etc. was set aside due to lack of contradiction on the law
- Example 2: Time-bar («foreldelse») and new case law
  - Respondent has invoked mandatory time-bar and the traditional case law, but has «missed» a new and highly relevant Supreme Court decision
  - The Tribunal *prima facie* considers the new decision to be hard to align with Respondent's interpretation of the time-bar provisions
  - If so, the Tribunal should ask the parties to comment the new case

Summary – narrowing down the scope of «Jura novit curia»

- The taste of the pudding is the award
- The parties (at least counsel) shall be able to see in the award:

  (1) that the case is decided on the legal basis for the claim/defense that was invoked by the parties, and;

  (2) that the Tribunal, in its finer interpretation and application of the invoked legal basis of the claim/defense, essentially relies on the legal arguments and legal sources presented by the parties.
- The first yardstick: pretty much straight-forward
- The second yardstick: What is meant by «essentially»?
  - The award must not necessarily be limited to the legal arguments and legal sources invoked by the parties
    - That is not required to comply with the minimum standard under the NYC
  - But what is best practice? The Tribunal should be cautious about doing so without first allowing contradiction on the legal matter
  - In particular, if the legal argument or legal source serves as a key element of the *ratio decidendi*

How to carry out «best practice» in practice? The arbitrator's perspective

- The traditional approach
  - Reluctance to ask legal questions to counsel
    - In particular, in Sweden
    - The logic: Might «assist» one of the parties and hence be an issue with regard to equality and impartiality
  - Reluctance to adress «loose ends» after the hearing
    - «Not necessary» to decide the case
- Are arbitrators too cautious in this respect?
  - Potential significant downside by not addressing
  - Limited downside by addressing/clarifying
    - Typically, be post-hearing briefs
  - As a former counsel, I know what I would prefer
  - It is all about predictability for the parties