

QUESTIONNAIRE ON *JURA NOVIT CURIA*

I. INTRODUCTION

The parties' arbitration agreement and pleadings set the scope for the power of the arbitral tribunal (AT). However, the AT, when developing its legal reasoning, is not bound to follow exclusively the parties' instructions. The AT's leeway, also known as the principle of *jura novit curia*, is partially regulated in a series of sources. These sources, however, do not necessarily provide a comprehensive framework. Also, they vary from country to country. The purpose of this questionnaire is to provide a basis for analyzing the matter comprehensively. For a more extensive explanation of the reasoning underlying the questions contained here, see G. Cordero-Moss, "The Arbitral Tribunal's Power in Respect of the Parties' Pleadings as a Limit to Party Autonomy on *Jura Novit Curia* and Related Issues", in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration*, JurisNet 2016, pp. 289-330.

II. DEFINITION OF THE SUBJECT MATTER

Under the heading "*jura novit curia*", the following situations are understood:

- a) **The AT's power to make its own legal inferences from the factual basis that was proven by the parties.**

In some situations, this may lead to the AT applying a different legal basis from what the parties pleaded. For example, the AT may infer from the proven facts that the performance did not violate the applicable provisions on delivery time (as pleaded by the claimant), but that it violated the applicable provisions on quality specifications;

- b) **The AT's power to apply the governing law to interpret, construe, supplement or correct the contract.**

In some situations, this power may lead to results that contradict the wording of the contract. For example, the governing law may contain rules (such as the principle of good faith) that lead to construing the contract differently from what a literal interpretation would suggest (such as restricting the power of one party to exercise the contractual right of termination); or the governing law may contain ancillary

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obligations that extend the scope of the parties' obligations (such as a duty to give information); or the contract may contradict mandatory rules of the governing law (such as rules restricting the effects of contractual clauses on exclusion of liability);

- c) **The AT's power to apply the legal sources it deems applicable, even if they do not belong to the law chosen or pleaded by the parties.**

For example, the law chosen in the contract may be not applicable because the matters at issue are subject to a specific law that may not be excluded by party autonomy, such as in the areas of company law or property law; or overriding mandatory rules from a third law may be applicable;

- d) **The AT's power to order, independently from the parties' pleadings, the remedies that follow from the sources of law the AT deems applicable.**

If the scope of the AT's power is understood as being given by the relief sought by the parties, the margin for the AT's power to independently order remedies that follow from the AT's own legal reasoning is restricted. For example, the AT may order payment of a sum of money that corresponds to, or is within the limits of, the sum sought by one of the parties, but the payment is ordered on a legal basis different from the basis invoked by that party – for example, the payment is defined as a reduction of the price due to defective quality of the goods, rather than as a reimbursement of damages due to a delay in performance.

If the scope of the AT's power is understood as being given by the facts presented by the parties, the margin for the AT's power to independently order remedies that follow from the AT's own legal reasoning is wider. For example, the AT may have based its reasoning on a provision of the applicable law (not invoked by the parties) that sanctions its violation with invalidity. The AT may therefore have declared the contract invalid – notwithstanding that the parties may have pleaded, respectively, payment of the provision allegedly due under the contract and reimbursement of damages caused by an allegedly negligent performance.

The following questionnaire should be answered in respect of each and every of these issues.

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III. EXPRESS LAW PROVISIONS RELEVANT TO *JURA NOVIT CURIA*

In the field of international commercial arbitration there are some important international sources, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and various sources of soft law, such as the UNCITRAL Model Law on International Commercial Arbitration, guidelines issued by the International Bar Association (IBA), and the like. However, a significant role is played also by domestic arbitration law. Furthermore, the area of *jura novit curia* is not subject to a systematic, express regulation. Section IV will investigate how other sources may become relevant to fill the gaps or guide the application of the express rules.

The interplay among the express sources may be of relevance to the matter of *jura novit curia*. In particular:

- A. The ultimate borders for the AT's power in respect of the parties' agreement or pleadings are found in the grounds for refusing enforcement of the award (on invalidity of the award, *see* section III.B). In particular, the following rules of the New York Convention may have relevance:
 - a) *Fair hearing* (article V(1)(b)): Is this ground applicable in your jurisdiction in a way that may be relevant to *jura novit curia*? For example, in a scenario where the award is based on issues that one of the parties did not have the possibility to comment on. Does it apply only to questions of fact or also to questions of law? Does it apply only to new elements introduced by the AT as basis for the decision, or also to the inferences drawn by the AT from the proven facts and to the AT's legal reasoning?
 - b) *Procedural irregularity* (article V(1)(d)): Is this ground applicable in your jurisdiction in a way that may be relevant to *jura novit curia*? For example, if procedural rules were violated, and this may compromise the principle of due process. Does it apply to any of the procedural rules mentioned in section III.C below? Does it apply also to a scenario where the AT applied non-state law ("rules of law") on its own motion, but according to the applicable arbitration rules or arbitration law it only had the power to apply state law ("law")? Does it apply to other situations?

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- c) *Excess of power* (article V(1)(c)): Is this ground applicable in your jurisdiction in a way that may be relevant to *jura novit curia*? For example, in a scenario where the AT decided on matters that were not submitted to arbitration. Does it apply only to factual matters, or also to legal issues – such as where the AT basis its decision on a source that was not invoked by the parties? Or where the legal reasoning of the AT leads to ordering remedies that were not sought by the parties? Does it apply also to the situation where the AT decided according to a law that was different from the law chosen by the parties - based on the reasoning that, the governing law having an impact on the contract, applying a law different from what the parties chose may have an impact on the basis for deciding the dispute?
- B. Another important border for the AT's ability to develop its own reasoning irrespective of the parties' agreement or pleadings, is to be found in the arbitration law of the country of origin of the award, in particular its rules on the validity of the award.
 - a) If your jurisdiction has implemented the UNCITRAL Model Law, please comment on whether the grounds for invalidity relevant to the principle of *jura novit curia* correspond to the grounds of the Model Law, and thus to the grounds for refusing enforcement under the New York Convention. Are these ground applied equally to enforcement and challenge of the validity of the award?
 - b) If your jurisdiction has not implemented the UNCITRAL Model Law, please comment on what grounds for invalidity may be relevant to the principle of *jura novit curia*.
- C. Within the ultimate borders for the validity and enforceability of an award, as seen in sections III.A and III.B above, the applicable domestic arbitration law may have rules on the conduct of the proceedings. Violation of these rules does not necessarily render the award invalid or unenforceable - but under certain circumstances it may do so, if it results in a serious violation of the principle of fair hearing or of procedural law, or even of the principle of public policy (article V(2)(b) of the New York Convention). Among the most common rules of conduct

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set forth in the applicable arbitration law, the following may have relevance to the principle of *jura novit curia*:

- a) The principle that each party carries the burden to prove its own allegations. To what extent does it restrict the AT's ability to develop its own reasoning, particularly if the AT requests additional information (see item b)) to be able to develop its own reasoning? Does it apply only to questions of facts, or also to questions of law?
 - b) The AT's power to request additional information. To what extent does it contradict the principles of burden of proof (see item a)) and impartiality (see item c)))? Does it apply only to clarification of the parties' allegations and pleadings, or does it extend to introducing new elements of fact? Does it apply also to questions of law?
 - c) The principle that the AT shall be impartial. To what extent is it compatible with the AT's power to request additional information and to develop its own reasoning?
 - d) The AT's position in case of default by one party. In this situation, the only factual and legal arguments presented to the AT are those of the claimant. Is the AT precluded from independently evaluating the claimant's pleadings? How far can the AT go in requesting additional information and developing its own reasoning, without compromising the principles of burden of proof and of impartiality?
 - e) Are there any other rules that may impact on the AT's power to develop its own reasoning independently from the parties' agreement and pleadings?
- D. Arbitration Rules of arbitral institutions may have provisions that are relevant to the principle of *jura novit curia*. Please comment on any arbitration rules issued by prominent arbitral institutions in your jurisdiction, and that may have relevance to the subject-matter. In particular:
- a) Do institutional arbitration rules contain provisions reflecting those described in section III.C above? Do they contain other provisions relevant to the principle of *jura novit curia*?

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- b) Do institutional arbitration rules influence the application of the law beyond their scope of application, i.e. in arbitral proceedings that are not regulated by those rules?

IV. THE LAW AS APPLIED BY THE DIFFERENT ACTORS

The formal sources of law described in section III above do not expressly or systematically address the matter of *jura novit curia*. It is, therefore, necessary to investigate how gaps are filled. Moreover, the few express rules leave a considerable margin of discretion to the interpreter. It is, therefore, necessary to investigate where the interpreter finds the criteria for exercising its discretion. Also, it is useful to address whether the law is applied, and the gaps are filled, consistently by the various involved actors.

It should be possible to carry out these analyses on the basis of the answers that you gave to the questions in section III above. In particular:

- A. What sources are applied to fill the gaps or to guide application of the law in the matter of *jura novit curia*:
 - a) Case law (domestic or foreign?)
 - b) Scholarly writings (domestic or international?)
 - c) Sources of soft law (IBA, ALI/UNIDROIT,...)
 - d) Civil procedure law of the seat
 - e) Principles of civil procedure law drawn from a comparison of the connected laws, or considered to be generally recognized
 - f) Private international law of the seat
 - g) Principles of private international law drawn from a comparison of the connected laws, or considered to be generally recognized
 - h) Other sources, please specify which
- B. Is the law applied consistently by the different involved parties? The field of international commercial arbitration is characterized by a variety of sources (international, domestic, non-national of origin). The inclination of a lawyer to apply certain sources rather than others, or to be guided by certain sources in the application of the law, may depend on the context (if the dispute is domestic or international), as well as on the background of the

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interpreter (for example, if the interpreter mainly deals with domestic disputes, is specialized in international disputes or deals with both; if the interpreter mainly acts in court, is specialized in arbitration or acts in both).

Is it possible to detect a pattern in the way in which different sources are used in different contexts? For example:

- a) Are courts more lenient to be guided by their domestic civil procedure principles on *jura novit curia* or by their own private international law when deciding on the validity of an award rendered in their own territory, while they are more lenient to considering international scholarly writings and foreign case law when deciding on the enforceability of a foreign award?
- b) Do lawyers apply different pleading techniques, depending on whether they are specialized in international arbitration or plead mainly before their national courts?
- c) Are ATs more lenient to be guided by the civil procedure or private international law of the seat of arbitration when deciding on domestic than international disputes?
- d) Are ATs more lenient to be guided by international sources when the AT consists of more than one member with different nationalities?

