A Comparative Analysis of Content-of-Laws Inquiry and Its Importance for International Commercial Arbitration

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How is the content of laws determined, and by whom, in international commercial arbitration?

This topic mainly concerns an old legal assumption: *iura novit curia*, the Latin legal maxim for *"the court knows the law"*. While somewhat reasonable and predictable on the face of it since anyone can reasonably expect the court to know the law, the assumption paves the way for some serious practical consequences: If the court knows the law, parties are mostly expected to furnish the facts alone and leave the establishment of the law to the courts who are not bound by the legal arguments advanced by parties. At extremes, a court can also apply the law which has never been argued by any party who may be inevitably deprived of their right to be heard.

The maxim *"iura novit curia"* allows courts an investigative approach to the determination of the law and is mostly known as a reflection of investigative (inquisitorial) legal tradition as followed by civil law countries. On the contrary, common law tradition is generally thought to place importance on the adversarial setting where parties are expected to ascertain and even prove the law as if it is a factual matter. As an extension of the civil law approach, Turkish Law dictates that a judge determines the content of foreign law and applies the same to the dispute on its own motion.[fn]See the Law No. 5718, Article 2/1 which reads as follows *"judge applies the conflict of laws rules and the applicable foreign law as per such rules on his own motion"*.[/fn] The Common Law approach, on the other hand, applies a completely different treatment when it comes to the application of foreign law. For example, in England, the judge resolves the dispute according to English Law unless the contents of the applicable foreign law are sufficiently proven by the concerned party.[fn]In the same direction see Bumper Development Corporation v Commissioner of Police of Metropolis [1991] 1 WLR 1362, 1368.[/fn]

In arbitration, *"iura novit curia"* translates as *"iura novit arbiter"* for the same purposes. And the distinction between common and civil law approaches plays a vital role. If not perceived correctly by arbitrators or counsels, the shortcomings could lead to the annulment of an award.

Points to Consider: How Major Legal Orders Responded to the Content-Of-Laws Inquiry for International Commercial Arbitration Purposes?

In Sweden, the Svea Court of Appeal ruled in 2004 that arbitrators are not bound by the parties' actions regarding legal provisions and arguments,[fn]See the case T 7866-02 dated 27 August 2004.[/fn] meaning that arbitrators can apply legal norms without having been previously referenced by either party. This is the same for Switzerland with a slight difference. Unlike the Svea Court of Appeal, Swiss courts made clear that arbitrators are only free to ascertain the content of law as long as this does not come as a surprise to the parties.[fn]See Federal Tribunal Decision of 30 September 2003, 4P.100/2003.[/fn] For Switzerland seated arbitrations, arbitrators can rely on any norm of the law notwithstanding this being raised by the parties. However, if parties cannot be expected to anticipate the application of this norm, they should be given an opportunity by the arbitrators to address their arguments. French courts follow the same lines with strict deference to *principe de la contradiction*.[fn]See Revue de l'arbitrage, 2010 p. 112, 3 Dec 2009, Cour d'appel de Paris (Pôle 1 – Ch. 1).[/fn]

Moving on to common law countries, we see that the adversarial approach is applied in contrast with civil law countries. In other words, it is expected to see that arbitrators are under no obligation to ascertain the content of the applicable law. While this is the case, it is very interesting that the Arbitration Act of England under Art. 34 allows the tribunal to choose freely which approach is to be followed. That is to say, arbitrators can follow the inquisitorial approach in an arbitration seated in England. However, this comes with a caveat: Generally applicable norms must be observed. For example, parties must be given the opportunity to present their case and be heard. This means that arbitrators should solicit further submissions from the counsels on the legal grounds that were not invoked by the parties. The Hong Kong Arbitration Ordinance also provides a similar legal treatment.[fn]See § 56(7) of the Hong Kong Arbitration Ordinance.[/fn] That is to say, arbitral tribunals are also granted the right to ascertain the content of the law without confining themselves to parties' submissions. Nevertheless, Hong Kong courts also opined that if arbitrators are to ascertain the content of the applicable law on their motion, they need to consult the parties and grant them the opportunity to make further submissions.

How Should Arbitrators and Party Counsels React to the Content-Of-Laws Matter?

No harmonised set of rules has been achieved globally so far in terms of how the sources of law are found and applied. But seeing how this relates to international commercial arbitration is a mysterious task. In fact, international commercial arbitration settings mostly witness the interplay between different legal regimes and traditions. This is especially so when the seat is different from the law applicable to the merits and arbitrators come from completely different legal systems. At the meeting point of all different legal references, arbitrators must decide which method to adhere to: Should they apply the inquisitorial or the adversarial approach in terms of determination of substantive law applicable to the merits? And more importantly – on what basis is this determination to be made?

The ICC Dispute Resolution 2018 Statistics (See here) shows that 842 new cases are registered in 2018 with the laws of 114 different nations, states, provinces and territories are chosen as the law applicable to parties' contracts while these arbitration proceedings are seated in over 60 countries. The statistics indicate a possible clash between the substantive law applicable to the contract and the *lex arbitri*. Different laws mean different resolutions to the content-of-laws inquiry. In other words, the following questions arise: Should arbitrators follow the method employed by the courts of substantive law? Or should they follow the method employed by the courts of *lex arbitri*?

It goes without saying that parties hold the ultimate control over establishing the content of the applicable law according to the principle of procedural autonomy. They can opt for limiting the arbitrators' authority to rely on only the legal sources pleaded by the parties or for the opposite. In

other words, parties would be wise to determine how the law will be ascertained and by whom, *i.e*. solely by parties, arbitrators or by both. This selection can be made by striking the right balance between two extremes: adversarial or inquisitor approach. In the absence of such agreement, the most practical approach would be to fall back on *lex arbitri* as was also suggested by Christian Collantes in this blog post, while the writer sees the application of *iura novit arbiter* as the duty of arbitrators with some certain limits.

This practical approach follows a very basic requirement: Not to have the award set aside. As the courts of the seat will hear any potential annulment action, it is wise to follow its principles. But the enforceability of an arbitral award does not end with not being set aside by the seat. It only begins there and is followed by further scrutiny from the enforcement courts. In other words, the arbitral award, which is based on a legal norm that has never been advanced by parties, could escape judicial scrutiny of the seat which follows *iura novit curia*. However, the same arbitral award may be denied enforcement by the courts where enforcement is sought due to violation of due process, *i.e.* not providing an opportunity to parties to mount their arguments against such legal norm. While it is practically impossible to ascertain if *iura novit arbiter* is adhered to in each and every possible enforcement venue, it is advised to be precautious by acting as if it does not exist and by providing ample opportunity to parties in order for them to exercise their right to be heard.

Conclusion

Drifting across all different approaches, one can realise a very clear pattern common to all possible options despite the clear divergence in the nature of adversarial and inquisitorial methods: Arbitrators should consider not only the *lex arbitri* but also all possible laws of states where enforcement may be sought when determining its mandate as to the content-of-laws inquiry. Particular focus must be invested in the process for the arguments that may come as a surprise to parties who should be given a fair opportunity to mount their arguments on legal norms first introduced by arbitrators. The most vigilant practice would be to permit parties to opine on all new legal norms brought by arbitrators. Counsels, on the other hand, must be cautious that they play a significant role in the determination of law and should invest equally in the process even when this seems to be the duty of arbitrators.