"THE GOVERNING LAW: FACT OR LAW?" – A TRANSNATIONAL RULE ON ESTABLISHING ITS CONTENTS*

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I remember a deliberation many years ago. One of my coarbitrators, a Canadian, suggested dismissing a claim because – he said – "they have not proven the law". I was young and inexperienced, and surprised: "But they do not have to prove the law", I replied. And that is when I realized that we were working on very different assumptions.

The topic of this paper is the status of the substantive law governing the dispute before the arbitrators. Is it a fact to be proven by the parties or is it law to be investigated by the arbitrators?

To avoid any misunderstanding, the topic is not *which* substantive law applies. We assume that this choice has been made by the parties or the arbitrators. This choice having been made, the focus is on how to establish the contents of the chosen law.

To answer this question, I will address three aspects:

- First, the state of the law in national courts (1. below);
- Second, the law and practice in arbitration (2. below);
- Third, the emergence of a transnational rule (3. below).

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* On this topic, see this author's other publications and the citations they contain : *Iura novit arbiter* – Est-ce bien raisonnable?, in Anne Héritier-Lachat and Laurent Hirsch (eds), De lege ferenda – Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch, Editions Slatkine Genève, 2004, pp. 71-78 ; and The Arbitrator and the Law: Does he/she know it? Apply it? How? And a few more questions, ITA Newsletter, Vol.18 Nr 3, Summer 2004; also published in Arbitration International, 2005, pp. 631-638, and reprinted in this Special Series; see also JULIAN D. M. LEW, Proof of Applicable Law in International Commercial Arbitration, in Festschrift für Otto Sandrock zum 70. Geburtstag, Klaus Peter Berger, Werner F. Ebke, Siegfriend Elsing, Bernhard Großfeld, Gunther Kühne (eds), Heidelberg, 2000, pp. 581-601.

1. National courts

Let me start with the first part dealing with the practice in national courts. Like my Canadian co-arbitrator, many arbitration practitioners approach the status of the law governing the merits by reference to the rules applicable in their home courts. With due respect, such an approach makes little sense. The situation in national courts and the one in international arbitration are very different. National courts have a *lex fori* and any other law is foreign. Arbitral tribunals have no *lex fori* and, hence, the very concept of foreign law is misplaced.

Whatever the merits of equating national courts and international arbitration, since the equation is often made, we cannot dispense with looking at the application of foreign law in national courts. It varies significantly. Simply put, there are two main approaches. Some jurisdictions regard foreign law as a fact which must be proven by the parties and others as law on which the court may *ex officio* conduct its own research.

English law is representative of the first approach[1]. The reason for such an approach is primarily a practical one. As an English court stated in the eighteenth century already, "*the way of knowing foreign laws is by admitting them as facts*"[2]. In other words, this approach facilitates the courts' access to the contents of a law with which it is not familiar.

By contrast, the **Swiss or German legal systems**[3] treat foreign law as law; the court can or must research foreign law *ex officio*. In Switzerland, this rule is embodied in Article 16 PIL Act:

"The contents of the foreign law shall be established by the authority on its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties.

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[1] Admittedly, this may be viewed as an oversimplification. Indeed, in English courts, foreign law is a fact of a very special nature; see RICHARD FENTIMAN, Foreign Law in English Courts – Pleading, Proof and Choice of Law, Oxford University Press, Oxford 1998.

[2] Mostyn v. Fabrigas [1775], quoted by Fentiman fn.1.

[3] On German law, see JAN KROPHOLLER, Internationales Privatrecht, 5th edition, Tübingen, 2004, pp. 625-630. For a comparison of the major European systems on this topic, see TREVOR C. HARTLEY, Pleading and Proof of Foreign Law: The Major European Systems Compared, in International and Comparative Law Quarterly (1996), vol. 45, part 2, pp. 271-292.

Swiss law applies if the contents of the foreign law cannot be established."

The first sentence sets the rule: the court must establish the contents of foreign law *ex officio*, which is the consequence of regarding foreign law as law. The following sentences introduce an exception by permitting the court to require the parties' cooperation or entirely delegating to them the task of establishing foreign law. Finally, Article 16(2) sets a default rule for the event that the contents of foreign law cannot be established. In such case, the court is allowed to resort to Swiss law.

US federal law provides for a similar solution, though with more flexibility, in Rule 44.1 of the Federal Rules of Civil Procedure:

"A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, ***may*** *consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a* ***ruling on a question of law.****"* (Emphasis added)

In other words, foreign law is law and the court has broad authority to conduct its own research, but no duty to do so.[4]

2. International arbitration

So much for court practice. Let us go over to the second aspect, the law and practice in arbitration. Guidance is practically non-existent in national arbitration laws. There is, however, one interesting rule in the English Arbitration Act 1996, which signals a departure from the strict view that foreign law is deemed a fact. Section 34(1)(g) of the Act provides that the procedural powers of the arbitral tribunal include determining:

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;"

[4] For an analysis of Article 44.1 Federal Rules of Civil Procedure and its application by U.S. courts, see LOUISE E. TEITZ, From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in U.S. Courts, in Journal of Maritime Law and Commerce, Vol. 34, No.1, January 2003, pp. 97-118.

The tribunal's power is subject to party autonomy, i.e. an agreement of the parties would prevail over the arbitrators' determination. Unlike the English Act, Chapter 12 of the Swiss PIL Act is silent on this issue. The status of the governing law is a matter of procedure. As such it falls within party autonomy or, if the parties do not make use of their autonomy, within the powers of the arbitrators under Article 182 PIL Act. The consequence is that the arbitrators are free to apply the method to determine the contents of the applicable law which they prefer. Are there limits to this freedom? To answer this question, one must look to the grounds for annulment of the award. The answer found in cases dealing with annulment of awards reads "*iura novit arbiter*". Or in the terms of the Federal Court:

"Le principe iura novit curia, *qui est applicable à la procédure arbitrale, impose aux arbitres d'appliquer le droit d'office."*[5]

There are two main effects of this principle. First, the award is not *ultra petita* if it is based on legal grounds other than those on which the claimant relied. Second, there is no violation of the right or opportunity to be heard, if the tribunal does not consult the parties about the application of law.

There is an exception to this second effect, however, whenever the arbitrator bases his or her decision on a wholly unexpected legal rule which was not addressed in the proceedings, and which none of the parties could have anticipated to be relevant to the outcome:

"L'arbitre s'apprête à fonder sa décision sur une norme ou un principe juridique non évoqué dans la procédure antérieure et dont aucune des parties en présence ne s'est prévalue et ne pouvait supputer la pertinence in casu."[6]

What is unexpected is a question of assessment, or in the words of Federal Court: *"Ce qui est imprévisible est une question d'appréciation"*[7]. When assessing the unexpected nature of the rule applied by the arbitral tribunal, the Federal Court exercises restraint, i.e. it does not easily accept that an award is based on an unexpected legal reasoning. It

[5] ATF 19.12.2001, 4P.114/2001, cons. 3.a, not reported.

[6] ATF 130 III 35 ; see also ATF 18.10.04, 4P.104/2004, cons. 5.4, in ASA Bulletin 2005/1 p.164, at p. 170.

[7] ATF 130 III 35, cons. 5.

does so to take into account the involvement of lawyers of different legal backgrounds in international arbitration:

"*Il convient de se montrer plutôt restrictif dans le domaine de l'arbitrage international, pour tenir compte de ses particularités ([...]; coopération d'arbitres de traditions juridiques différentes)*".[8]

One may debate whether the presence of participants from different legal traditions should not trigger precisely the opposite consequence, i.e., whether the arbitral tribunal should consult with the parties more often, not less, before adopting a specific legal solution.

Be this as it may, looking at possible limits to the arbitrators' freedom, another question which arises is whether the method of establishing the contents of the substantive law may give rise to an annulment for violation of public policy on the ground of Article 190 (2)(e). The question was addressed by the Federal Court in a decision issued in April 2005.[9] The (Swiss) sole arbitrator had requested the parties to prove the differences between the applicable Croatian Statute on bills of exchange and Swiss law. He had proceeded in such manner because both legislations followed the uniform law on bills of exchange. Before the Federal Court, the applicant alleged that the arbitrator had breached the principle *iura novit curia*, which amounted to a violation of *ordre public*. Here one needs to remember that the Federal Court had held earlier that *iura novit curia* imposes on the arbitrators a duty to apply the law *ex officio*.[10] No, answered the Federal Court, there is no violation of *ordre public*. Indeed, pursuant to Article 16(1) PIL Act, a Swiss judicial court may impose the establishment of the contents of foreign law on the parties. This was exactly what the arbitrator had done and, hence, there could be no issue of a violation of *ordre public*.

Now back to our question: are there limits to the arbitrators' power to determine the method of establishing the governing law? Except for limits arising out of a possible agreement of the parties and the requirement that the arbitral tribunal must consult with the parties on the application of an unexpected legal rule, there appear to be no limits.

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[8] Loc. cit.

[9] ATF 27.04.05, 4P.242/2004, cons. 7.3, in Bull. ASA 2005/4 p. 719, at pp. 723-724.

[10] ATF 19.12.2001, quoted above in footnote 6.

Bearing this in mind, let us now look at arbitration practice. Arbitration rules are of little or no assistance. In day-to-day arbitration, is there a uniform practice emerging? It may be premature to affirm so in general terms. I would, however, venture to say that, at least when the arbitrator is unfamiliar with the applicable law, the general understanding is that the parties will put forward the law. Doing so, do they believe that the arbitrator is bound by their submissions? Does the arbitrator feel bound?

3. A transnational rule

These questions lead us to the third and last aspect of this presentation, which is a proposal for a transnational rule. What should it be? Drawing from the earlier discussion, three points can be made:

- First, a hard and fast *iura novit curia* rule would be inappropriate in international arbitration. This is due to the transnational legal environment involving participants from different legal cultures. It is also due to the possible difficulties of access to the applicable law, be it for reasons of language, availability, or reliability of the pertinent sources.

- Second, a pure "law is fact" approach would not be appropriate either. Depending on the person of the arbitrators, proving the law maybe a futile exercise. For instance, counsel would be ill-advised to submit an opinion of Swiss law to a Swiss contract law professor in which one of his colleagues purports to teach him contract interpretation.

- Third, as a consequence, any appropriate transnational solution must be found between the two extremes, for instance along the lines of Rule 44.1 of the Federal Rules of Civil Procedure. Specifically, such a transnational rule could read as follows:

"The parties shall establish the contents of the law applicable to the merits. The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such contents. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the result of the tribunal's research.

If the contents of the applicable law are not established with respect to a specific issue, the Arbitral Tribunal is empowered to apply to such issue any rule of law which it deems appropriate."

This transnational rule calls for three comments:

- The rule is a merger of different civil procedure traditions. As such it is meant to apply in a transcultural environment. It may nevertheless have to be further adjusted to the specific cultures involved and to the needs of the specific case.

- The scope of application of the fall-back rule, which provides that the tribunal may apply the rule which it deems appropriate when the contents of the applicable law cannot be established, is relatively limited. It will only come to bear if the applicable legal system provides no method for filling gaps or if the contents and outcome of this method cannot be established.

- To avoid that the tribunal and the parties "work on different assumptions", to come back to my Canadian co-arbitrator mentioned at the outset, the status of the applicable law and a rule such as the one just proposed should be discussed and preferably agreed upon at the initial procedural hearing.

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