Iura novit curia vs. right to be heard: how to strike the balance?

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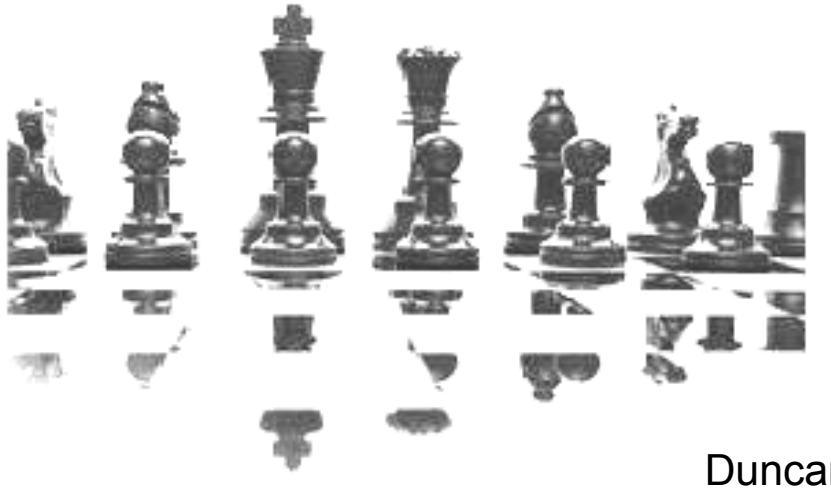

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Overview

- Commonly assumed no common law equivalent.
- Even in national court proceedings, the position may not be so absolute -- more a matter of characterisation than substance?
- Different considerations arise in international arbitration and a different statutory regime applies -- more uniformity?
- Same practical need in common law jurisdictions to strike a balance as in civil law jurisdictions:
  - Case for internationally applicable guidelines and/or express provision in arbitration rules?
  - What practical steps can be taken to clarify the approach of the tribunal and/or the expectations of the parties (e.g., in the agreement to arbitrate, procedural order/Terms of Reference)?

Iura novit curia
The traditional English view

- No judicial recognition of a doctrine of *iura novit curia* as such:
  - "*perhaps the most spectacular feature of English law is that the rule curia novit legem has never been and is not part of English law*" (Mann, "Fusion of the Legal Professions," Law Quarterly Review, 1977, 367 at p. 369).
- Need to prove foreign law as a question of fact:
  - Foreign law must both be pleaded and proven – otherwise, presumed to be the same as English law (*Fremoult v. Dedire* (1718) 1 P. Wms 429).
  - Contrast with Rule 44.1 of the United States Federal Rules of Civil Procedure and Principle 22.1 of the UNIDROIT Principles of Transnational Civil Procedure.

Iura novit curia
A recalibration of the traditional view?

- Long-recognised that judges are entitled (and in some circumstances obliged) to raise points of law *sua sponte*:
  - A.G. Jacobs in the *van Schijndel* cases ECR C-430/93 C-431/93 ("*such contrasts between different legal systems often prove to be exaggerated and this case is no exception*").
  - *Jain v. Trent Strategic Health Authority* [2009] UKHL 4.
- Increased judicial activism.
- Greater emphasis on judicial control of procedures and the efficient and proportionate resolution of disputes.

Iura novit curia
Why is international arbitration different?

- National law rules of civil procedure not applicable.
- Arbitral tribunal has a different statutory mandate:
  - English Arbitration Act 1996, s. 46 (1) (tribunal shall decide the dispute "*in accordance with the law chosen by the parties*" or "*such other considerations as are agreed by them or determined by the tribunal*") -- c.f. UNCITRAL Model Law, art. 28 (1).
  - English Arbitration Act 1996, s. 34 (2)(g) ("*subject to the right of the parties to agree any matter*," tribunal can determine all procedural and evidential matters, including "*whether and to what extent the tribunal should take the initiative in ascertaining the facts and the law*") -- also reflected in LCIA Rules, Rule 22.1 (c).

Iura novit curia
Why is international arbitration different?

- English Arbitration Act 1996, s. 33(1)(a) and (b) (tribunal has mandatory duties, including duties to give each party "*a reasonable opportunity of putting his case and dealing with that of his opponent*" and to "*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense*") – c.f. UNCITRAL Model Law, art. 18.

- Different practical considerations:
  - Broader base of decision makers than national court judges qualified only in English law?
  - Parties have different expectations as to how a determination will be reached?
  - Parties may be able to vary mandate of arbitrators by contract?
  - Arbitrators have flexibility in defining their own approach at the outset of an arbitration?

Iura novit curia
Challenges – the Balancing Act?

- High threshold in seeking to set aside award:
  - Setting aside under English Arbitration Act 1996, s. 68(2)(a) requires **both**: (a) failure by the tribunal to act fairly and to give each side a reasonable opportunity to present its case; and (b) substantial injustice as a result of that failure (*Trustees of the Edmond Stern Settlement v Levy* [2007] EWHC 1187 (TCC)).
- BUT awards have been set aside because tribunal rendered award based on issues not addressed by parties:
  - *OAO Northern Shipping Company v Remolcadores De Marin SL* [2007] EWHC 1821 (Comm) (award annulled for serious irregularity because tribunal did not give parties the opportunity to address essential building blocks of its conclusion).

Iura novit curia
Challenges – the Balancing Act?

- Where does the balance lie?
  - Most recent cases given tribunals considerable latitude (e.g., *Hussman Europe Ltd v. Al Aleen* [2000] EWHC 210 (Comm).
  - Arbitrator entitled to rely upon knowledge it is reasonable to have expected the arbitrator to have acquired (*Checkpoint v. Strathclyde Pension Fund* [2003] 14 EG 124).
  - Claimant cannot rely on tribunal to escape its own need to discharge its burden (*F Ltd v M Ltd* [2009] EWHC 275 (TCC)).
  - Possible duty to raise issues missed by counsel (*Bandwith Shipping Corporation v Intaari* [2007] EWCA Civ 998)?
- Is the outcome (as distinct from reasoning) substantively different in jurisdictions that recognise *iura novit curia?*

Iura novit curia
International Approaches and Guidelines

- Difference in treatment under arbitration rules:
  - Many (most?) arbitration rules do not expressly address whether (or not) arbitrators can independently ascertain the law.
  - Some arbitration rules do touch upon these issues, albeit with varying degrees of comprehensiveness (e.g., LCIA Rules, art. 22.1(c); CIETAC Rules, art. 29(3) and 37; SIAC Arbitration Rules, art. 24(d)).
- Efforts to establish internationally applicable guidelines:
  - ILA Resolution No. 6/2008 on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (presumption that arbitrators should not introduce legal issues (Recommendation 6, but subject to Recommendation 13).
  - ICC YAF roundtable discussion in September 2010.

Iura novit curia
International Approaches and Guidelines

- Are standards that have emerged under public international law relevant by analogy:
  - Standards articulated in ICSID annulment proceedings (e.g., *CAA and Vivendi Universal v. Argentina,* Annulment Decision, 3 July 2002, 6 ICSID Reports 340).
  - Article 2 of the 1979 Montevideo Convention on General Rules of Private International Law ("*Judges and authorities of the State Parties shall enforce the foreign law in the same way as it would be enforced by judges in the State whose law is applicable, without prejudice to the parties' being able to plead and prove the foreign law invoked*").

Iura novit curia
Practical Steps to Strike the Right Balance

- Address in agreement to arbitrate?
  - May be premature – appropriate scope of application can depend upon issues in dispute and/or qualifications of arbitrators.
- Address in Terms of Reference and/or procedural order?
  - Tribunal can adopt procedures to reflect the particular issues in dispute and its own qualifications and experience.
  - Tribunal can create certainty of expectations at the outset.
  - Parties can make submissions.
  - Would it help make an award less susceptible to challenge?
- Address on an *ad hoc* basis as the arbitration proceeds?

International Dispute Resolution

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