

*The Misadventures of the Principle Jura Novit Curia in International Arbitration - A Practitioner's Approach**

Dr. Anna P. Mantakou,

Attorney at Law, Associate at the Hellenic Institute of International and Foreign Law, Secretary General of the Hellenic Association for Arbitration, ICC Court Member

I. INTRODUCTION

During the last five years, a number of leading decisions of French and Swiss Courts have triggered a discussion¹ in the field of international arbitration questioning or limiting the power of an Arbitral Tribunal to rely in the Arbitral Award upon provisions and/ or questions of the applicable law not pleaded by the parties during the arbitral proceedings. The topic itself, raising issues which range from the *modus vivendi* between state and arbitral justice up to the contents and respect of due process in arbitration, presents a high degree of sophistication; that is why it was chosen as a modest contribution in this Volume to fit the profile of Professor Dr.

* The opinions expressed in this Article are personal opinions of the author

1. During the last five years the topic has been discussed in multiple conferences on International Arbitration and quite a lot has been electronically written or published by academics, practitioners and students. See inter alia Cécile Chainais, *L'arbitre, le droit et la contradiction: l'office du juge arbitral à la recherche de son point d'équilibre*: *RevArb* (2010) 3-44 ; Julian D.M. Lew QC, *Jura Novit Curia and Due Process* (2010) electronic copy available at: <http://ssrn.com/abstract=1733531>; Claus von Wobeser, *The Effective Use of Legal Resources: How much is too much and what is the role for Jura Novit Curia* (2010) electronic copy available at: www.josemigueljudice-arbitration.com/xms/files/02; Christian P. Albert, *Jura Novit Curia in International Commercial Arbitration: how much justice do you want?: in S. Kröll (Ed.) International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (2011) 3-32; Tereza Giovannini, *International Arbitration and Jura Novit Curia - Towards Harmonization*: TDM(2012), www.transnational-dispute-management.com; Gisela Knuts, *Jura Novit Curia and the Right to be Heard - An Analysis of Recent Case Law: Arbitration International* (2012) 669-688; David Sandberg, *Jura Novit Arbitrator? How to apply and ascertain the content of the applicable law in international commercial arbitration in Sweden* (Student Essay): electronic copy available at: <https://gupea.ub.gu.se/handle/2077/30248>; See also, already since 2008 the ILA Recommendations on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration, Resolution No. 6/2008: electronic copy available at: www.ila-hq.org/en/committees/index.cfm/cid/19. The latter, precious in its nature, is of an unidentified normative value.

Spyridon Vrellis. The author's tentative is however much less ambitious and shall be confined to the core of the discussion and the repercussions in arbitral practice thereof.

II. The Maxim *Jura Novit Curia*

A. The General Context

According to this maxim, almost inherent in continental jurisdictions, the Court applies the law *ex officio, sua sponte, proprio motu*, namely without being limited to the legal arguments advanced by the parties; in some jurisdictions the parties are not even compelled to submit legal arguments or to invoke law provisions in order to seek judicial protection²; this reflects the related principle *da mihi factum, dabo tibi ius* ("give me the facts and I shall give you the law"), sometimes also given as *narra mihi factum, narro tibi ius*: it is incumbent on the parties to furnish the facts of a case and the responsibility of the judge to establish the applicable law and its content³. Thus, based on the *Jura Novit Curia* principle, the Judge or the Court, has the power and the duty⁴ to base its decision or rely upon rules, law provisions, legal theories, case law or general principles of the applicable law not advanced by the parties during the procedure.

In contrast with what is the general rule in the Continent, in the Anglo-American family of laws the Judge has a more passive role; it is presumed that the Court does not know the law and is confined to adjudicate the case on the exclusive basis of the legal pleadings of the parties' counsel. It has been held that : "*perhaps the most spectacular feature of English procedure is that the rule curia novit legem has never been and is not part of English law*"⁵.

Having described the two major tendencies in relation to the maxim at hand, I need to make clear from the outset, that my discussion of the topic has nothing to do with the Judge's or Arbitrator's duty, power or techniques to determine the law or the rules of law applicable to a specific legal relationship, lacking the parties' choice in this respect⁶; nor it has to do with the methods for establishing the

2. As for example Article 216.1 (a) of the Greek Code of Civil Procedure.

3. See the excellent general analysis of Wikipedia in this respect under *Jura Novit Curia*.

4. For an analysis of the "*pouvoir - devoir*" issue in this respect, see Cécile Chainais, *op.cit.*, at fn.1, 20-22.

5. Of Advocate General Jacobs in the European Court of Justice cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, European Court reports 1995 Page I-04705, par. 33. The commentator to which Jacobs refers is F. A. Mann, *Fusion of the Legal Professions?: Law Quarterly Review* 1977), 369.

6. In this respect, modern institutional arbitration rules give a lot of freedom to arbitrators. See for example Article 21 of the 2012 ICC Rules for the applicable law on the merits of a case. The same

contents of a foreign law, a legal activity varying within the various jurisdictions. For the purposes of this paper the discussion starts once the applicable law has been determined and its content, regardless whether domestic or foreign, is known to the Court through either the submission of the parties or through a legal expertise or otherwise⁷; therefore my discussion is confined to the possibility merely of the Arbitral Tribunal to proceed with its own research on and/or knowledge of the applicable law, without being bound by the legal arguments and material pleaded with or by the parties.

B. The Principle *Jura Novit Curia* in Arbitration - The Era of Innocence

In the past decades the issue at hand, even existent in theory, was not actually an issue in the practice of international arbitration. As a matter of fact, the principle *Jura Novit Curia* and the possibilities or powers of Arbitral Tribunals emanating from this principle was seemingly the rule almost worldwide. From major arbitration legislations, such as the UNCITRAL Model Law and the English Arbitration Act 1996, it derives that the principle *Arbiter Novit Curia* is well embodied in the field of arbitration. Article 23 of the Model Law provides that both the Claimant and Respondent shall state in their statements of claim and defence the "...facts supporting their claim [and defence], the points at issue and the relief or remedy sought....". One may easily detect the absence of any reference to points of law⁸.

Section 34.2.g of the English Arbitration Act contains an acknowledgment of the principle under discussion stating that it shall be for the Arbitral Tribunal to decide whether and to what extent should itself take the initiative in ascertaining the facts and the law⁹.

freedom is afforded in relation to the determination of the rules governing the proceedings by Article 19 of the ICC Rules.

7. Regarding specifically arbitration, despite the *cliché* that arbitral tribunals do not know any law, as they are not state courts having the knowledge of the law of the respective jurisdiction, what usually happens in arbitral practice is that at least one arbitrator has a solid legal background on the applicable law chosen by the parties.
8. Unless, under the same provision, the "...the parties have otherwise agreed as to the required elements of such statements".
9. However, eminent experts of English law suggest that my naïve understanding of this provision may not be correct: See: Bruce Harris/Rowan Planterose /Jonathan Tecks, *The Arbitration Act 1996. A Commentary*, 3rd ed., (2003) 189. The authors, while accepting that the provision of Article 34.2.g of the Act removes the possibility of debate as to whether arbitrators may act in an inquisitorial manner, they add, nevertheless, that the tribunal must be mindful of its duties under Section 33 of the Act relating to Due Process "...particularly for example, by giving all the parties an opportunity of commenting on any evidence it obtains or any law it thinks applies". Along the same lines Julian D. M.Lew QC (*op.cit.* at fn.1, p. 12 and fn.49) suggests that the obligation of the Arbitral Tribunal to share with the parties its intention and content of the applicable law it seeks to apply on its own initiative forms part of the Due

Along the same lines, major institutional arbitration rules provided- and most of them still provide- that it is sufficient for a request for arbitration to contain " ...*a description of the claim and an indication of the facts supporting it*"¹⁰; or " ... *the general nature of the claim and an indication of the amount involved, if any.*"¹¹. The 1998 ICC Rules required simply " ... *a description of the nature and circumstances of the dispute giving rise to the claim (s)*"¹², when dealing with the mandatory content of the Request for Arbitration.

In other words, in the field of arbitration the principle *Jura Novit Curia* in its wide reaching form possible was in a way incorporated even in Anglo American set of rules, which purportedly are not familiar with the maxim in their court's litigation system. The explanation is rather simple: based on the major international instrument in the field, namely the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards together with the majority of domestic legislations in relation to the grounds for setting aside an arbitral award the maxim of arbitration, both international and domestic, is that arbitral awards are not subject to review on their merits, either on questions of facts or law. This is in principle the basic feature of arbitration, which differentiates the arbitral award from the state court's decision; this is simultaneously the dynamism and risk of arbitral proceedings, a risk, however, fully assumed by the parties and the legislator with regard to arbitration. Within this basic arbitration feature the question how the arbitrator applied or construed the applicable law, rightly or wrongly, lays, subject to the public order and *ultra petita* reservations, beyond the setting aside control exercised by state courts on arbitral awards. *A fortiori* under the arbitration maxim "no review on the merits" the reliance of the arbitral tribunal upon law provisions, principles, case law, theories and bibliographic sources of the applicable law not pleaded by or with the parties would lead the discussion of the topic at hand moot.

On the other hand, it has always been a tendency by state courts, often for presumably good causes, to enlarge the contents of public policy or *ultra petita* notions in an effort to cure injustices (as perceived by state courts) of arbitral awards and set them aside. It is within this context, namely the expansion of the *de*

Process principle under Article V(1)b and V (1) c of the New York Convention. These views bring up the next issue which is the content of the Due Process principle, see *infra* under III.

10. Article 2.3 (e) of the American Arbitration Association Rules.

11. Article 3.3 (e) of the Swiss Arbitration Rules. A step further, Article 18.2 (b) and 18.2 (c) of the same Rules require the Statement of Claim to refer only to the facts supporting the claim and the point at issue.

12. Article 4.3 (b) of the 1998 ICC Rules.

jure limited judicial control over arbitral awards, that the Due Process principle was brought into play with regard to the issue at hand.

III. The Due Process Principle

A. The General Context

The due process of law principle within the constitutional, criminal or administrative law context falls outside the scope of this paper. The principle, itself, has a wide form, and different variants¹³, but it is one of the milestones of every "civilized" legal system. In the field of civil and commercial disputes resolution the due process principle is reflected and implemented merely as the right to be **summoned and heard**, the so called adversarial proceedings or *audiatur et altera pars* principle; or *la principe du contradictoire*¹⁴ in the French speaking countries.

B. Due Process in Arbitration - The Traditional Approach

In international arbitration the due process principle is embodied in Article 5.1 (b) of the New York Convention and the respective Article 34.2 (a) (ii) of the UNCITRAL Model Law, both texts providing that an arbitral award may be refused recognition and enforcement or may be set aside if "*the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.*" Inherent to these rights also comes the impartial, fair and equal treatment of the parties by the arbitral tribunal. In this respect, Article 22.4 of the 2012 ICC Rules provides that: "*In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.*"

All arbitration legislations and institutional rules contain similar provisions defining in a way the content of due process in arbitration; amongst them one of the more pertinent wordings is, in my view, the one of Article 886.2 of the arbitration provisions of the Greek Code of Civil Procedure, originally designed¹⁵ to apply to both domestic and international arbitration. Article 886.2 reads as follows: "*During the arbitration proceedings the parties shall have the same rights*

13. See the Anglo American general overview in Black's law Dictionary, 4th ed., (1990) under "due process of law".

14. See the relevant entries on *contradiction* and *contradictoire (principe du)* in the Gérard Cornu, *Vocabulaire juridique* (2003), where the specific principle is confined to the parties' right to be duly summoned, even if some of them do not finally appear, to present their arguments and debate the arguments of the opposed party.

15. From 1968 up to 1999, when Greece adopted the UNCITRAL Model Law on international commercial arbitration, the arbitration provisions of the Greek CCP were applicable to both domestic and international arbitration.

and obligations, the principle of equality of the parties being observed; the parties must be invited to appear during the hearings, to develop their contentions orally or in writing at the arbitrators discretion and to adduce proof."

In consideration of the above, one may legitimately support that the due process principle in arbitration, as far as the parties right to a fair hearing is concerned, is confined to the parties' right to be summoned, heard plus fairly and equally treated by the arbitral tribunal. Due process in its widest form, implying that the parties have also the right to be heard and submit comments in relation to applicable law issues dealt with by the arbitral tribunal on its own initiative, it is excluded in arbitration under what one may call the traditional approach; this proposition stands and applies also to arbitrations which either develop within or potentially may come into contact - due to either the applicable law on the arbitration agreement or to the merits or to the seat of the arbitration or due to the country of the potential enforcement of the award- with legal systems that in court litigation apply the due process principle in its widest form, as described right above.

This is so, because, as explained above (under II, B), as a matter of principle, the way that the arbitrator dealt with questions of law on the merits of the case does not fall within the judicial review of arbitral awards; the setting aside procedures against arbitral awards envisaged by almost all modern legislations, as a rule, exclude any control on points of fact or law. If the parties wish for a second substantive look at the arbitral award, they may opt for an appeal to another arbitral tribunal or they should ensure to specifically agree not to exclude an appeal on point of law against the arbitral award in jurisdictions, as England¹⁶, that they provide for such a remedy against arbitral awards.

However, it is this widest form of the due process principle, which has been used by the French courts in setting aside procedures and led to the blending of the two principles with various repercussions into arbitral practice, as it shall be explained below.

16. Section 69 of the English Arbitration Act provides for an Appeal on Point of Law against the arbitral award, unless the parties have otherwise agreed. It has to be reminded that the position of English courts, since the 80's has been that when the parties agree to arbitration under institutional arbitration rules that they incorporate exclusion agreements (as the ICC Rules), they have "otherwise agreed" for the purposes of Section 69. See, Konstantinos D. Kerameus, Waiver of Setting-Aside Procedures in International Arbitration: *Amer.J.Comp.L* (1993) 73-78; Anna P. Mantakou, The Formation of the Arbitration Agreement in International Transactions (1998) 78-81. Bruce Harris/Rowan Planterose /Jonathan Tecks, *op.cit.* at fn.9, 334.

IV. - The “Blending” of the two Principles

A. La “Nouvauté” of the French Courts

As from 1995 the position of the French *Cour de Cassation*¹⁷ was that since the parties to an arbitration have chosen a specific law to govern their dispute and the arbitral tribunal has applied specific provisions of this law (Swiss law in that case), the parties cannot complain that the arbitral tribunal applied *ex officio* provisions of the law chosen by them and upheld the validity of the arbitral award. This decision is in full compliance, with what I call the traditional approach.

However, the French Court of Appeal in 2008¹⁸ rendered a decision quashing the *exequatur* of an arbitral award in the field of international arbitration on the grounds that the arbitral tribunal applied some provisions of the Egyptian civil code, which were not specifically pleaded by the parties, notwithstanding that Egyptian law was the law explicitly chosen by them. The Court of Appeal founded its decision on the violation by the Arbitral Tribunal of the “*principe du contradictoire*”, in the sense that the Arbitral Tribunal did not submit to the consideration of and comments by the parties the provisions of the Egyptian civil code, which the tribunal decided as applicable *proprio moto*. In 2009, the same Court of Appeal¹⁹ set aside an arbitral award in a dispute between an Austrian and a Serbian company law on the grounds that the Arbitral Tribunal found the contract partially null and void, as per the request of the one party, on the basis of the so called *Wegfall des Geschäftsgrundlage*²⁰ principle of the applicable Austrian law; according to the Court, the Arbitral Tribunal that applied said principle *ex officio*, deprived the parties, who had not invoked this principle, from their right to be heard in relation to this specific matter.

In my view, the above two decisions of the French Court of Appeal transplanted into arbitration a concept, which seems to apply in French judicial proceedings²¹, completely disregarding one of the elementary features of arbitration as opposed to litigation, namely the no review on the merits principle. The above two key decisions of the French courts proceeded with a rather peculiar, to say the least,

17. Cass.civ. 1re, 28 fév.1995, Sté générale pour l'industrie c/ Stè Ewbank, *Rev.arb.*, 1995.597.

18. Paris, 1re, Ch.C, Sect.C, 19 juin 2008, Gouvernement de la République arabe d' Egypte, *Rev.arb.*, 2010,105.

19. Paris, Pôle1-Ch. 1, 3 déc. 2009, Société Engel,Austria GMBH c/société Don Trade et autres, *Rev.arb. ibid.*

20. This principle, known in French law as *imprévision*, is incorporated in Article 388 of the Greek Civil Code. Under Article 388 however, the court applies the principle of the unforeseeable change of circumstances only upon specific request by the debtor in this respect.

21. See Chainais, *op.cit.* at fn. 1, 25, 57.

melding of the two principles: the *Jura Novit Curia* principle lost its autonomy and became a part of the principle of Due Process in the widest form possible of the latter, whilst in arbitration the Due Process principle is confined to the right of the parties to be equally heard and treated and should not, in my humble view, be extended to the parties having “a say” in the way the Arbitral Tribunal applies the applicable law.

If, in addition to the above, one looks at the specific circumstances of the cases before the French Court of Appeal, two additional remarks apply: in the first of the above referenced case the arbitral award was “sanctioned” because it applied a provision of the applicable Egyptian civil code not pleaded by the parties; the next question is how surprising, unfair or unethical for the parties to an arbitration could be the application of a law provision of a basic legislative text of the applicable law, such as the civil code? It is a pity that the parties in the case had not referred to the specific provision ultimately applied by the arbitral tribunal; but after all who prevented them from referring to this provision and to what extent the arbitral tribunal should have acted as the parties’ “school master” by inviting them to comment in this respect? The remark is slightly different in relation to the second of the above French decisions. The application of the *Wegfall des Geschäftsgrundlage* principle by an arbitral tribunal or state court may be subject, under the applicable substantive law, to a party’s specific request in this respect. In the absence of such a specific request, an arbitral tribunal applying the *Wegfall des Geschäftsgrundlage* principle *proprio motu*, acts *ultra petita* and the arbitral award may be set aside for this reason alone. In such a case the melding of the two principles is unnecessary and gives the impression that state courts wish to insert from the back door an additional ground for setting aside or for the non recognition and enforcement of the arbitral awards not contemplated in the arbitration legislation and international conventions.

B. The Repercussions in Arbitral Practice

After the above discussed French jurisprudence things changed rapidly in arbitral practice, due to Paris being the seat of the world’s leading institution in arbitration, the ICC. The ICC is, as it should be, very sensible in safeguarding the validity and enforceability of the arbitral awards rendered under its auspices. This goal is served merely by the scrutiny of the awards procedure contemplated in the Rules. The attention of Arbitrators sitting in various ICC arbitrations all over the world was drawn to the “new” requirement in order to make sure that every single law provision, principle or case law quoted in the reasoning of their award had been pleaded by or with the parties. Alternatively, arbitrators, using in their awards provisions of the applicable law not pleaded by the parties, were asked to

confirm in their awards, whether, under the applicable law or the law of the seat of the arbitrators, were entitled to do so. For arbitrators coming from continental jurisdictions, where the principle *Jura Novit Curia* is deeply rooted such questions sounded outrageous; it was very difficult for them, lacking any academic discussion or judicial precedent in this respect, to establish a power, which is inherent to their legal culture.

Sometimes, even in excess of the French case law requirements²², arbitral tribunals were asked to justify under the applicable law their "power" to quote in their arbitral award a single bibliographical quotation not pleaded by the parties; or to make reference to a more recent case law than the one pleaded by the parties or to otherwise refrain from doing so or, ultimately, to reopen the proceedings to give the parties the opportunity to comment on these matters.

As a matter of fact, the underlying *ratio* of the trend at hand is that there exists no violation of the *contradictoire*, as long as the arbitral tribunal invites the parties to submit comments on the legal provisions upon which the arbitral tribunal intends to rely *proprio motu* in order to resolve the dispute. Some support the view that even mandatory rules of the applicable law not pleaded by the parties cannot be applied by the arbitral tribunal on its own motion. However, let us imagine a "consultancy agreement" found by the arbitral tribunal to be the cover for a "bribery agreement" and therefore null and void. It is obvious that the parties shall never ever plead anything on this... This extreme example is given to show that the parties are often unable or unwilling, reluctant for their own reasons or simply not diligent enough to plead (even after specific invitation by the arbitral tribunal) each and all provisions likely to be applied in the resolution of a particular dispute. The suggestion that the best solution is the invitation to the parties to submit their comments on every single legal aspect that the arbitral tribunal has in mind to apply, is at the safe side for the arbitrators and the validity of the award; it disregards, nevertheless, completely the reality and needs of arbitral practice in terms of time, cost, and procedural smoothness and efficiency.

To those who are familiar with the process of rendering an arbitral award it is rather clear that in the majority of the cases the need to rely upon a provision not pleaded by the parties arises after the deliberations of the arbitral tribunal, most probably at the stage of the drafting of the award, namely after the closing of

22. It is rather fortunate that the French Cour de Cassation does not seem, as yet, ready to fully endorse the eccentricities of the Court of Appeal. In 2009 the Cour de Cassation upheld the validity of an arbitral award on the grounds that the reference of the arbitral tribunal to the Polish jurisprudence on the interruption of the prescription was only overabundant to the parties' relevant submissions and therefore no violation of due process took place: Cass. Civ.1re , 6 mai 2009, Societe CIEHC/ societe Comexport, Rev.arb. 2010,90.

the proceedings. In exceptional circumstances, it may arise earlier; but certainly not before the last submissions of the parties, whereby either party may bring into the picture the “appropriate” provision or legal concept. It may happen, after the first or major submissions of the parties, that the arbitral tribunal is in a position to detect that reference to legal provisions critical for the determination of the dispute are missing from the parties’ submission. According to the “new requirements”, the arbitral tribunal must invite the parties to comment either by prolonging the proceedings or, and worst, by reopening them: time, cost and rescheduling of the parties’ planning in all cases; risk for challenges against the arbitral tribunal with all the consequences thereof. These are some of the repercussions in arbitral practice of this new tendency, as it was introduced by French courts and to a certain extent by the Swiss Federal Supreme Court, as it shall be shown below.

Last but not least among the repercussions: the ICC Rules changed in this respect to reflect the new trend. Thus, Article 4.3.c of the 2012 ICC Rules provides that the request for arbitration shall contain “*a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made*”, while in the 1998 Rules the basis upon which the claims are made was not required.

As to parties who are displeased by the outcome of an arbitral award, they now have a new ground in their effort to try to set aside the same; a new ground possibly based on their own intentional or unintentional omissions!

V. The Swiss Position- Back to Proportion?

The Swiss Federal Court has adopted an approach more suitable to the needs of arbitral practice. As early as 2001²³, the Swiss supreme judicial body had set the following principle in relation to the issue at hand: the principle *Jura Novit Curia* is the rule in the field of arbitration; therefore, arbitrators may apply *ex officio* a legal reasoning not pleaded by the parties, as long as this course of action by the arbitral tribunal could have been anticipated by the parties; if, on the contrary, the parties could not have foreseen such a legal reasoning, as well as its relevance (*pertinence*) to their case, the arbitral award may be set aside for violation of the parties’ right to be heard. Following this case law, the same Court set aside in 2009²⁴ a CAS²⁵ arbitral

23. TFS 4P.260/2000, 2 mars 2001, Bulletin ASA, 2001.531, 536 4P.114/2001, 19 déc. 2001, Bulletin ASA, 2002.493, 513.

24. TFS 4A. 400-2008, 9 fév. 2009, Rev.Arb. 2010.141.

25. Court of Arbitration for Sport sitting in Lausanne.

award (Court of Arbitration for Sport) on an agency agreement dispute between a football player and his agent. The agreement was governed by the FIFA rules and Swiss law. The arbitral tribunal relied upon a Swiss law prohibition of exclusivity clauses in employment contracts, a provision that neither party had invoked. On the contrary, the same Court upheld in 2010²⁶ an arbitral award that found an agreement null and void based on the provisions of Swiss law for simulated declaration of will, not pleaded by the parties. The different conclusion reached by the same Court in the above two rather similar cases is demonstrative of the inherent risks of the Swiss position: a large discretionary power of the Court as to what constitutes an element of surprise for the parties. Notwithstanding the above comment, as a principle, the Swiss approach departs from the principle *Jura Novit Curia* only in exceptional circumstances, which resemble the *ultra petita* notion, a ground for annulment of arbitral awards under the traditional approach too.

VI. Conclusion or The Diligent Arbitrator Before the new Trend

The principle *Jura Novit Curia* seems to gradually take the shape of *Jura non Novit Curia*, in that the arbitrator cannot rely upon legal provisions, principles or case law of the law applicable to the merits of the dispute not pleaded by or with the parties' submissions; unless the arbitrator invites the parties to submit comments on law matters upon which the arbitral tribunal intends to apply *ex officio*, the arbitral award may be set aside or it may be refused recognition and enforcement into jurisdictions embracing this emerging principle. It is submitted that this new maxim is contrary to the highest maxim "no review on the merits" emanating from and safeguarded by the major international texts and conventions on arbitration; it complicates the arbitral practice in terms of time and cost and may disrupt the relationship between the parties and the arbitral tribunal.

Despite personal views on the matter, the arbitral tribunal is under the duty to safeguard the validity of its award; to this effect, an arbitral tribunal having the intention to apply *ex officio* questions of law not pleaded by or with the parties has first to examine whether under the law of the seat of the arbitration, the law applicable to the merits of the case and the law of the place(s) of potential enforcement of the arbitral award it is entitled to proceed in such a manner²⁷; if

26. TFS 4A.254/2010, 3 août 2010.

27. For example, the Finnish Supreme Court has affirmed the *Arbiter Novit Curia* principle by stating that the tribunal is not bound by the legal arguments presented by the parties: S2006/716, 7 July 2008, Stockholm International Arbitration Review 2008, 3.260. Therefore, the Supreme Court upheld the validity of the arbitral award which based its reasoning on provisions of the Finnish contract law not pleaded by the parties. For the discussion of this decision see, *inter alia* Gisela Knuts, *op.cit.* at fn.1, 677.

this is not the case, then the arbitral tribunal should invite the parties to make submissions on the questions of law that the arbitral tribunal anticipates to apply *ex officio*. In any event, a complete “unforeseeable by the parties” legal reasoning of the award should always be avoided, unless brought to the parties’ consideration. The parties may confer explicitly to the arbitral tribunal either by the arbitration agreement or subsequently (for example by the Terms of Reference) the power to rely upon questions of law not pleaded by or with the parties. After all, arbitration is based on the will of the parties, who seem to have, under this new trend, the right to decide “how much justice do they want”²⁸, having in mind, though, that the trend is not always your.... friend.

28. Christian P. Albert, *op.cit.* at fn.1.