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THE PRINCIPLE IURA NOVIT ARBITER IN THE COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE AND PRODUCTION OF SANTO DOMINGO.

Summary

Of jurisprudential and doctrinal origin, the principle of iura novit arbiter is peacefully accepted in domestic and international arbitrations, as an indispensable instrument to ensure procedural effectiveness and the enforcement of the award.

Keywords

Iura novit curia, legal qualification, due process, immutability of litigation, iura novit arbiter, applicable law, domestic arbitration, international arbitration, institutional arbitration.

1.- Iura Novit Curia. Article 4 of the Dominican Civil Code establishes that the judge who refuses to judge alleging silence, obscurity or insufficiency of the law, is punished for denying justice **(1).** The legislator presumes that the judge knows the law *("da mihi factum, dabo tibi ius: give me the facts, I will give you the right")* and as such, he has the duty and the power to give the facts and legal acts their true qualification and apply to them the law that governs the matter, without being tied to the name that the parties have erroneously given them and regardless of whether they have omitted to do so or have required the application of other legal texts **(2).** Of doctrinal and jurisprudential origin, the application of this principle is peaceful in our country, provided that the judge grants the parties, the exercise of that power, the opportunity to defend their respective interests, in the light of the new legal classification, during the

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investigation of the process and in the course of the debates **(3)** in order to preserve their right of defense and contradiction **(4)** and not violate the principle of immutability of the litigation **(5).** Thus, the court may reclassify a claim for the nullity of a contract as a claim for termination of contract, when it finds that it is based on a breach of contract **(6)**; reclassify a claim for nullity on the grounds of injury and wilful misconduct, as a claim for a declaration of simulation of an act of sale that disguises a loan contract **(7)**; reclassify a claim for partition of a de facto partnership that the plaintiff called a claim for partition of community property **(8)**); reclassify a plea of lack of jurisdiction as a request for dismissal of the claim **(9)**; reclassify a motion for inadmissibility of the appeal in cassation as a motion for revocation **(10),** among other cases.

2.- Iura Novit Arbiter. It is the adaptation of the *rule iura novit curia* to the field of arbitration: *the arbitrator knows the law*. Unlike the judge, the arbitrator has a contractual mandate from the parties to resolve their dispute, who have chosen him under the assumption that he has the preparation and knowledge to achieve it, implicitly recognizing him, a power to qualify ex officio his facts and legal acts, determine the law applicable to them, investigate evidence, to provide an effective and enforceable award:

> *"The hybrid nature of arbitration - contractual institution in its origin and jurisdictional in its function - as well as the fundamental interests that it is intended to realize,* ***require, in short, that the arbitrator be recognized a certain freedom in the determination of the law applicable to the substance of the dispute, as well as in its interpretation and application.*** *Without prejudice to the respect due to the choice by the parties of the applicable law,* ***the arbitrator is not necessarily subject to their***

> ***claims with respect to it, nor to the proof made by them of the content of that right***. ***He can, on the contrary, investigate it autonomously by all the reliable means at his disposal*** *- laws, jurisprudence, doctrine, experts, etc." 46 – as* ***well as to control the correctness of the legal qualifications operated by the parties, in order to reach a decision that is materially correct and, hoc sensu, fair".*** ***(11)***

3.- In Spain, the country of origin of our arbitration legislation, the principle *of iura novit curia* is expressly contemplated in Article 218.1.2 of the Civil Procedure Law:

> *"The court, without departing from the cause of action by resorting to grounds of fact or law* ***other than those that the parties have wished to assert****,* ***shall rule in accordance with the rules applicable to the case, even if they have not been correctly cited or alleged by the litigants."*** ***(12)***

4.- Curiously, the Arbitration Law 60/2003 of December 23, 2003, of Spain, LA **(13)** does not expressly provide for the application of the principle *iura novit curia* to arbitration. Nor do the regulations of Spanish arbitration centers, such as the Civil and Commercial Court of Arbitration (*wwwcimarbitraje.com*); the Spanish Court of Arbitration (*corteesapanolaarbitraje.com*); the Madrid Court of Arbitration (*www.arbitrajemadrid.com*); the European Arbitration Association (*www.asociacioneuropeade arbitraje.org*). However, it is unanimously and consistently recognized by Iberian jurisprudence**:**

> *"Consequently with what has been analyzed, we understand that the substantial modification alleged by the plaintiff has not occurred, nor therefore the lack of defense that is alleged, as we have analyzed, since it does not occur when,* ***by virtue***

of the principle iura novit curia, both the Arbitrator and the Judge limit themselves to applying rules different from those invoked by the parties, without altering the essential factual component of the action brought or the causa petendi". **(14)**

5.- Gómez-Iglesias Rosón states that "*...the jurisprudence has not stopped to analyze whether or not there are reasons why this principle should be applied to the arbitral procedure..."* and proposes *"... resort to the general rules that, in the case of the procedural rules applicable to arbitration, are set out in Article* 25 LA." "*Thus, the ex officio application of legal rules by arbitrators must be considered to be included in their broad procedural discretion."* **(15):**

> *"Art. 25. Determination of the procedure 1. In accordance with the provisions of the preceding article, the parties may freely agree on the procedure to be followed by the arbitrators in their proceedings. 2. In the absence of agreement, the arbitrators may, subject to the provisions of this Law, conduct the arbitration in such manner as they deem appropriate. This power of the arbitrators includes that of deciding on the admissibility, relevance and usefulness of evidence, on its practice, even ex officio, and on its evaluation"* ***(16).***

6.- In our country, Articles 30 and 33 of the LAC establish similar provisions to avert and make up for any error, insufficiency or obscurity incurred by the parties in the process, in the naming of the acts and facts of the case, in the legal qualification of the same, the determination of the applicable legal norm, the production, Instruction and evaluation of the evidence and, in general, of any other aspect essential for the resolution of the dispute:

"ARTICLE 30. (LAC)- Admissibility and Value of Evidence. ***In the absence of agreement between the parties, the arbitrators may, subject to the provisions of this Act, conduct the investigation in such manner as they deem appropriate. This power of the arbitrators includes that of deciding on the admissibility, relevance, value and usefulness of the evidence****"*

*"ARTICLE 33(LAC) Rules Applicable to the Merits of the Litigation. (..).****2)****Without prejudice to the provisions of the preceding paragraph, the arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute." (...).****(3) If the parties do not indicate the applicable legal rules, the Arbitral Tribunal shall apply such rules as they deem appropriate****."*

7.- In the scope of the Court's institutional arbitration, Articles 22.1, 25.1, 25.2 and 27.2 of the RA confer broad powers on the arbitrators to carry out, even ex officio, the legal classification of the facts and legal acts of the case, determine the laws applicable to them, request, order evidence and evaluate them, for which it can be stated that, As in Spanish domestic arbitration, the following are authorized to apply the *principle iura novit arbiter* :

"Art. 22.1. (RA) The procedural rules and rules of law by which the arbitrators shall conduct and decide the proceedings shall be those ***that the Arbitral Tribunal deems applicable, according to the facts and circumstances of the case and in accordance with the law chosen by the parties****."*

"Art.25.1 (RA) The Arbitral Tribunal shall investigate the case as soon as possible, ***by such means as it deems appropriate.(...)"***

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*"Art. 25.2. (RA**)** At any stage of the proceedings, the Arbitral Tribunal may request the parties to appear in order to obtain any information or to bring about an agreement between them. Likewise, it may **require the parties to present documents, evidence,** as well as the hearing of witnesses, expert report or **any other evidence within the period determined by it."***

*"Art. 27.2(RA) **In accordance with its intimate conviction, the Arbitral Tribunal shall determine the admissibility, relevance and merits of the evidence provided**."*

8.- It is worth asking here: can the parties agree in the commitment or arbitration clause or in the mission act, the exclusion of the application of the principle *iura novit arbiter* by arbitrators in internal arbitrations of the Court? The refusal is necessary for three reasons: first, it is a mandatory institutional procedure to which the parties have voluntarily submitted, by virtue of paragraph IV of Article 15 of Law 181-09, of June 4, 2009 **(17)** and Articles 4.1b), 4.3 and 23 of the LAC in its final part:

*"Paragraph V.- Dispute Settlement. The resolution of disputes submitted to the Center shall be governed **by the rules and procedures in force at the time of signing the arbitration clause or commitment, which must be contained in the regulations prepared for that purpose by the Board of Directors and approved by the Board of Directors of the Chamber.** The Management Firm may also adopt internal rules of procedure"*

*"Art. 4.- For the purposes of this law: 1) with regard to the rules of procedure, arbitration may be: b) **Institutional: It is one in which the parties submit to a procedure established by an arbitration center**."*

"Art. 4.- (...) (3) Where a provision of this Law relates to the arbitration agreement or any other agreement between the

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> *parties,* ***all provisions of the Arbitration Rules to which the parties have submitted shall be deemed to fall within that agreement****."*
>
> *"Art. 23. Subject to the provisions of this Law, the parties shall be free to agree on the procedure to be followed by the arbitral tribunal in its proceedings, in accordance with the provisions of this Law.* ***In the case of institutional arbitration and if the corresponding rules provide for any mandatory procedure, this shall govern****."*

Second, without those intrinsic powers, the Court's arbitrators would not be able to conduct the arbitral process, which is essentially designed to *"... To investigate the case as soon as possible, by the appropriate means. (...)"* as mandated by *article* 24.1 of RA *and "(...) to act in the most favorable direction to the conduct of the process. (…)* as recommended by the *Complementary Rules to the CRC Arbitration Rules "* and, above all**,** to issue an enforceable award. This is how the best doctrine understands it:

> *"I agree with Kaufmann-kohler, Jarrosson and Hascher: the will of the parties finds as its limit* ***the essence of judicial power****.* ***The preponderance of the procedural powers of arbitrators is justified by the desire for efficiency, inherent in arbitration."*** ***(17)***

9.- Would the agreement of the parties to rule out the application of the principle *iura novit arbiter* in the international institutional arbitration of the Court be valid? Paragraph VI of the aforementioned Law 181-09, provides for the possibility that *"... the parties have agreed to submit directly to its jurisdiction..."* acting *"... as an institution that is the venue for international disputes...".* ***(18)*** Such a power of attorney necessarily implies that: **(a)** the applicable regulation shall be the RA; **b)** the seat of the arbitral tribunal shall be the domicile of the Court in the city of Santo Domingo, National District; and **c)** the procedural rules (among which are implicit the powers of the arbitrators to apply the

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principle curia novit arbiter) by which the arbitral tribunal will conduct the process shall be "*...in accordance with the law chosen by the parties*." as provided in Articles 20 and 22.1 of the RA and Article 33.2 of the LAC:

> *"Article 20.- Seat of the Court**.** The seat of the Arbitral Tribunal shall be located **at the principal address of the Chamber of Commerce and Production of Santo Domingo, Inc.** However, the Arbitral Tribunal shall have the power to deliberate and hold hearings in any other place that it chooses or that it agrees with the parties."*
>
> *"Article 22.1.- Rules Applicable to the Procedure and the Merits. **The procedural rules and rules of law by which the arbitrators will conduct and decide the process will be those that the Arbitral Tribunal deems applicable,** according to the facts and circumstances of the case and **in accordance with the law chosen by the parties**. "*
>
> *"Article 33.2.- Rules applicable to the merits of the dispute. (…) (2) Without prejudice to the provisions of the preceding paragraph, **where the arbitration is international, the arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute**. Any indication of the law or legal order of a particular state shall be understood to refer, unless otherwise stated, to the substantive law of that state and not to its conflict-of-laws rules."*

10.-In this scenario, several situations could be presented to the arbitrators of the Court depending on the foreign law chosen by the parties. Let us look at some of them as illustrative examples:

(i) If Spanish Law 60/2003 on Arbitration is chosen, where the doctrine considers it feasible to agree on the non-application of the *iura novit*

arbiter, since it is a procedural rule and depends on the will of the parties, it would clash with the mandatory nature of the Court's RA and the inherent preponderance of the procedural powers of its arbitrators to conduct and decide the process by the rules that it deems applicable:

> *"This application of the general rule in procedural matters to determine the intervention of the arbitrator in application of the law implies a double additional conclusion. In the first place, the rule iura novit curia,* ***as a rule of a procedural nature, is subject to the autonomy of the will of the parties*** *(art. 25.1° LA). Therefore,* ***there is nothing to prevent the parties from mutually limiting the arbitrator's initiative in the application of the law*** *or, in other words****, the parties may exclude iura novit curia from the arbitration proceedings. (...)*** *Secondly, since it is a procedural matter, the decision on the advisability or otherwise of applying ex officio legal rules not invoked by the parties* ***is in the hands of the court****, as part of its powers of procedural direction of the arbitral proceedings."* ***(19)***

(ii) In the case of opting for the law of the State of New York, which is frequent in the Sports Arbitration of the Court **(20),** the Federal Arbitration Law does not contemplate that the arbitral tribunal investigate or apply ex officio the rules that it deems appropriate **(21).** However, the United States Court for the Southern District of New York recognized the power of the arbitrator to ask the defendant if he would request the rejection of the claim on the grounds of statute of limitations, which the defendant then raised, being accepted and dismissing the claim for nullity of the award due to the arbitrator's bias. because a personal interest of the arbitrator has not been demonstrated and the claimant has had the opportunity to defend itself against the proposed means of limitation: *"To request an opinion on a potentially relevant aspect, especially when both parties have*

been given the opportunity to formulate their arguments in this regard, is certainly legitimate. In fact, it is within the powers of the arbitrator to dismiss a sua sponte case on the basis of the statute of limitations, even without giving the party raising it an opportunity to file a brief on the matter." **(22).** Accordingly, the arbitrator is unlikely to approve an agreement of the parties that limits the arbitrator's powers to investigate, characterize and apply of its own motion the rule of law that it considers appropriate.

(iii) If French law is chosen, Article 16.3 of the New Code of Civil Procedure, applicable to arbitration by virtue of Article 1464 of said Code, provides*: "The judge may not base his decision on the means of law that he provides ex officio, without first inviting the parties to submit their observations."***(23).** French jurisprudence considers that arbitrators have not only the power to qualify ex officio, but also *"... the obligation to investigate, in order to apply the appropriate rule of law, the true legal nature of the convention that they must assess in its conditions of execution"* **(24).** Here, it seems evident that the parties could not repeal by agreement the aforementioned legal text that expressly enshrines the power of the arbitrator to provide and apply ex officio the corresponding rule of law.

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