

The ne ultra petita Principle in German Arbitration Law

— Summary —

Ne ultra petita, iura novit curia and the prohibition of surprise decisions — the question of the relationship of these three principles to one another was one of the guiding points of this paper since the scope and reach of the principle of ne ultra petita could be comprehensively determined solely by clarifying this preliminary question.

The principle of ne ultra petita is an integral part of the German legal system and German case law has developed guidelines on how to deal with the principle for proceedings before state courts.¹ The situation is different for arbitration proceedings. Owing to the special features of arbitration proceedings, in particular the complexity of the applicable sources of law, the clash of different legal systems and the special importance of party autonomy in the structure and conduct of the proceedings, the question arises as to whether, or how, the principle can be applied in (domestic) arbitration proceedings.

The interrelationship of the principle of ne ultra petita with the right to be heard before a court

In the literature, the existence of the principle of ne ultra petita is largely regarded as a historically logical consequence of party autonomy during civil proceedings.² Viewed in this context, one might expect that a violation of the principle ne ultra petita is as a rule asserted by plaintiffs in proceedings. In practise, however, it is predominantly defendants who invoke the plea of a violation of the principle. This is not surprising because an ultra petita violation by the court usually leads to a more advantageous position for plaintiffs as the award is either higher or different from the asserted claim. In such cases, defendants often object that the court based the decision on aspects that were not part of the parties' petitions. Defendants thus plead that they were surprised by the court's decision. This clearly demonstrates that the principle of ne ultra petita is closely linked to the prohibition of surprise decisions, which is itself a manifestation of the right to be heard before a court.³

The subject matter of the dispute

This having been said, the question arises concerning to what the court is bound by the ne ultra petita principle: what is behind the term "petita"? This question has been answered for German civil proceedings by the Federal Court of Justice, which assumes that the court is bound by the subject matter of the dispute, i.e. the petition and the grounds for the claim. Accordingly, the legal qualification of the asserted claim as presented by the plaintiff is not binding on the court.⁴

¹Cf. Section B. I. 7 below.

²Cf. Section A. II. 1 below.

³Cf. Section A. III. 2. c) and B. II. 13 below.

⁴Cf. Section B. I. 1. a) below.

Ne ultra petita v. iura novit curia

The question arises as to whether it makes sense in arbitration proceedings to bind the Arbitral Tribunal to the legal qualification of the asserted claim put forward by the claimant and not solely to the petition and the grounds for the claim. The answer to this question depends in no small part on whether the principle of *iura novit curia* applies in arbitration proceedings. According to the principle *iura novit curia*, the court knows the law and applies it independently. Although this is an obvious presumption for German judges in German court proceedings, it can occasionally simply not be assumed during arbitration proceedings. Arbitrators do not necessarily have a legal education. Moreover, “foreign” jurists who are not necessarily familiar with the law applicable to the specific dispute are frequently appointed as arbitrators. The Arbitral Tribunal may well not know the law in some cases. This situation leads to the view expressed here that Arbitral Tribunals are authorised, but not obligated, to determine and apply independently the law beyond the scope of the submissions of the parties.⁵ In view of these circumstances, the principle of *iura novit curia* can be assumed to apply solely to a limited extent in arbitration proceedings; nevertheless, Arbitral Tribunals in domestic arbitration proceedings are as a general principle not bound by the legal submissions of the parties. An exception is possible solely if the Arbitral Tribunal deviates so blatantly from the legal arguments put forward that the parties are surprised by the arbitration decision.⁶ This is the point where the interrelationship of the principle of *ne ultra petita* with the right to be heard before a court becomes evident. The two principles appear at this point as in opposition to the principle of *iura novit curia*.

Conclusion

It was consequently determined that the principle of *ne ultra petita* has an essential core element that comes into play whenever a court (Arbitral Tribunal) issues a surprise decision. Outside this essential core element, the principle applies in domestic arbitration proceedings as non-mandatory arbitration law because it has long been recognised across legal systems and can consequently be waived by the parties.⁷

⁵Cf. Section B. II. 12. e) below.

⁶Cf. Section B. II. 13. b) below.

⁷Cf. Section B. II. 8. e) below.