

lura novit arbiter is not
a 'chèque blanc' to
disregard due process
in arbitral proceedings:

Canaf Group Inc. v. Kilembe
Mines Limited, Miscellaneous
Application No. 47 of 2023



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Introduction

On 10th June 2025, Justice Anna B. Mugenyi, the head of the Commercial Division of the High Court of Uganda, issued a ruling in the case of **Canaf Group Inc. v. Kilembe Mines Limited, Miscellaneous Application No. 47 of 2023 (Application)** in which she set aside an arbitral award on the basis that the arbitrator had dealt with a matter beyond the scope of the submission to arbitration.¹ She also held that the award was contrary to public policy under section 34(2)(b)(ii) of the Arbitration and Conciliation Act, cap. 5 (**ACA**) because it “contravened the principles of natural justice and fairness” as the arbitrator “dealt with a matter that was neither referred to arbitration nor properly ventilated by the parties.”²

Background

The dispute arose from a mineral exploration and feasibility study agreement in which the Respondent, Kilembe Mines, a Uganda Government-owned mining company, represented to the Applicant, Canaf Group Inc., that it had an exclusive prospecting license over the entire area to be explored under the agreement. In fact, Kilembe Mines did not have a prospecting license over the entire area but just a portion of the area, which affected the financial viability of the project. Canaf referred the dispute to arbitration seeking damages for the misrepresentation because it had relied on Kilembe Mines’ representation to raise the funds it had used in the exploration activities under the project.

During the arbitration proceedings, seven issues were framed for determination, including whether Kilembe Mines had breached the agreement due to its misrepresentation regarding the extent of the prospecting license it held. The parties did not plead, lead evidence on, or raise any issue as to the legality of the agreement. At the conclusion of the oral hearing, however, the arbitrator wrote to the parties inviting them to address him on certain provisions of the Mining Act in their submissions, if they so wished. The arbitrator’s letter did not explain the reason for this request to the parties.

Later in his final award, the arbitrator noted that he had “asked the parties to address the above provisions so that the parties would have full opportunity to give their positions on those provisions. [He] felt that from the initial reading of the pleadings and the documentary evidence adduced by both parties, it would be important for [him] to consider their applicability, if at all, and if so applicable, their meaning and impact on the matter.”³

1. Canaf Group Inc. p.6.
2. Canaf Group Inc. p.6.
3. Canaf Group Inc. p.5.

The arbitrator noted that although the parties had in their joint scheduling memorandum agreed on the issues for his determination, he was not limited to those framed issues. The arbitrator was at liberty to raise and resolve additional issues that arose during the proceedings if deemed relevant and pertinent to the determination of the dispute. He then pre-empted the issue on whether there was breach of contract as claimed by Canaf by holding that the agreement was illegal and unenforceable *ab initio* because Kilembe Mines lacked an exclusive prospecting license for the whole area which the parties sought to explore which was a legal requirement under the applicable mining laws in Uganda at the time the contract was concluded. He therefore dismissed the Applicant's claim.

Dissatisfied, Canaf filed an application seeking to set aside the arbitral award on five grounds, including that the arbitral award dealt with a dispute as to illegality which was not contemplated by and did not fall within the terms of the reference to arbitration.

Setting aside the arbitral award, the Court stated that “[A]lthough an arbitrator is not strictly confined to the list of framed issues and *may consider legal matters arising from the pleadings or evidence*,⁴ this discretion must be exercised in a manner consistent with natural justice.” The Court reasoned that “raising and resolving the issue of illegality after the close of hearings, without full and informed participation by the parties, violated the parties’ right to be heard and the principle of fair adjudication.”⁵

The court’s holding reaffirms that much as the arbitrator might know the law, (*iura novit arbiter*), they cannot apply the law to determine issues not canvassed by the parties.

iura novit arbiter and due process in arbitral proceedings

The principle of *iura novit arbiter* is a rephrasing of the principle of *iura novit curia* (“the court knows the law”).⁶ The principle of *iura novit curia* as conceived by Aristotle and described in his works -*On Rhetoric*, presupposes that the court is a “lawgiver to the parties and not a law-taker from the parties”.⁷ In arbitration, the principle of *iura novit arbiter* means that “subject to the governing law, [arbitrators may] apply a legal provision or principle that they consider relevant and helpful to solve the dispute even if the parties have not pleaded or invoked it under the relevant law, provided it is compatible with claims, defences and requested relief.”⁸

4. Canaf Group Inc. p.6. (emphasis added).

5. *Id.*

6. A. Ross, (2024). “Abdel Wahab proposes ‘iura novit arbiter’ protocol in Freshfields lecture”, Global Arbitration Review, accessible at Abdel Wahab proposes “iura novit arbiter” protocol in Freshfields lecture – Global Arbitration Review.

7. *Id.* See also; *Gol Linhas Aereas (formerly VRG Linhas Aereas SA) v. Matlin Patterson Global Opportunities Partners (Cayman) II LP & Others*, [2022] UKPC 21, para. 86. (“In civil law jurisdictions a more proactive approach on the part of the court or tribunal in applying the law is generally recognised, reflected in the Latin maxims “iura novit curia” (the court knows the law) and “da mihi facta, dabo tibi ius” (give me the facts and I will give you the law). On this approach it is expected that the judge will bring his or her own knowledge of the law to bear in deciding a case, independently and in addition to the legal arguments and materials adduced by the parties.”)

8. *Id.*

The applicability of the principle of *iura novit arbiter* in international arbitration is contested.⁹ The principle is largely more accepted in civil law jurisdictions than it is in common law jurisdictions because in civil law jurisdictions, courts have a duty to know and apply the relevant law even in cases where the parties have not made their respective submissions.¹⁰ The courts are bound by the parties' submissions on facts and are given an independent role to apply the relevant law even where the parties do not make their arguments on it.¹¹ The approach is, however, different in common law jurisdictions, such as Uganda and England and Wales, where parties or their counsel are expected to establish both the facts and the law and the court or arbitrator is not expected to play an inquisitorial role in the case.¹²

In England and Wales, for example, arbitral tribunals cannot make their decision on the premise of a statutory provision, case law or any legal concept not known to the parties unless they allow the parties to make submissions in respect of the proper reading of such law.¹³ An award founded on a statutory provision, case law or legal concept to which the parties have not been allowed to make submissions on its proper reading is liable for a challenge under section 68 of the English Arbitration Act.¹⁴

The application of the *iura novit arbiter* principle in arbitral proceedings in Uganda is summed up in the decision of the High Court in **Roko Construction Limited v. Kobusingye Janet, Miscellaneous Cause No. 22 of 2021**, which was referred to with approval in the **Canaf v. Kilembe Mines** ruling. In that decision, Justice Stephen Mubiru summarised the principle as applicable in Uganda as follows:

"...it is not a breach of natural justice for an arbitrator to adopt an issue as a link in [their] chain of reasoning if the parties did not raise or contemplate that issue, provided that the issue is reasonably connected to the issues which the parties did raise and contemplate and if the party aggrieved had a reasonable opportunity to address all of the essential building blocks for the arbitrator's conclusion on that issue...."¹⁵

9. *Id.*

10. L. Mistelis & M. Potocnik, (2018). "Iura Novit Arbiter in England and Wales: The Exercise of Arbitral Discretion", in F. Ferrari & G. Cordero-Mossilura (ed.) *Novit Curia in International Arbitration*. Juris Legal Information, p. 136, accessible at Chapter 6 – Iura Novit Arbiter in England and Wales: the Exercise of Arbitral Discretion. See also; *Gol Linhas Aereas (formerly VRG Linhas Aereas SA) v. Matlin Patterson Global Opportunities Partners (Cayman) II LP & Others*, [2022] UKPC 21, para. 85. ("Broadly speaking, there is a difference of approach between common law jurisdictions and civil law jurisdictions with regard to the role of the court or tribunal in ascertaining and applying the law. In common law jurisdictions it is primarily a matter for the parties to decide what arguments of law to advance, and those arguments frame the issues for the court to decide. In England it is not uncommon, and certainly more frequent than it once was, for judges to undertake some legal research of their own and to raise points of law which have not been raised by the parties. If the court proposes to rely on such a point in deciding the case, however, it is expected that the court will give the parties an opportunity to address the point (if necessary, by inviting further written submissions after the conclusion of the hearing").

11. *Id.*

12. *Id.* at 137.

13. *Id.* at 149.

14. *Id.* See also; *OAO Northern Shipping Company v. Remolcadores de Marin*, [2007] EWHC 1821 ("If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance ... These principles apply to unargued points of law or construction as they do to unargued questions of fact.")

15. *Roko Construction Limited* p.12.

In her ruling on the **Canaf v. Kilembe Mines** Application, the judge applied the above principle enunciated in **Roko Construction** and agreed that the “arbitrator’s mere citation of statutory provisions [in his pre-award letter to the parties], without expressly framing illegality as an issue or **setting out its consequences for determination**, denied the parties a fair opportunity to fully present their case on that matter”.¹⁶

The court’s rulings in **Canaf and Roko Construction** emphasize the need to uphold due process in arbitral proceedings. The need to respect due process is not unique to arbitration. It is a principle that underpins the administration of justice in whatever form. At its core, due process “is a legitimate expectation of a party appearing before a decision maker that it has the right to be protected from arbitrary, discriminatory or unfair treatment”.¹⁷ Due process standards are often set out in the laws of the seat, the arbitration rules applicable to the arbitration, and treaties such as the New York Convention.¹⁸

Due process standards include; the equal treatment of the parties, the requirement to provide fair notice regarding both the appointment of the arbitral tribunal and the conduct of the proceedings, the requirement to provide parties with a fair opportunity to present their respective cases and if the tribunal assigns importance to any **ex parte** extrinsic material; the requirement to provide fair notice and to offer the parties the opportunity to address the tribunal on such extrinsic material.¹⁹ If an arbitral tribunal fails to comply with these due process standards, the resultant award might be liable to being set aside. Under the ACA, such an arbitral award can be set aside under various grounds. **First**, that the party was unable to present their case.²⁰ **Second**, that the award deals with a dispute not contemplated by or falling within the terms of the reference.²¹ **Third**, that the arbitral award is not in accordance with the ACA.²²

Whereas an arbitrator has a duty to ensure that the award they render is enforceable at law²³ and therefore cannot simply ignore clear questions of illegality merely because they have not been canvassed by the parties, the arbitrator must balance that duty with the duty to ensure that each party is given a reasonable opportunity to present its case, failure of which is also a ground for setting aside the award or resisting its enforcement as demonstrated by the court’s ruling in Canaf Group.

16. Canaf Group Inc. p.6. (emphasis added).

17. S.K. Davidson & A. Genest, (2025). “Due process and procedural irregularities”, Global Arbitration Review, accessible at Due process and procedural irregularities – Global Arbitration Review. See also; Section 18 of the Arbitration and Conciliation Act, Cap. 5. (“The parties shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case.”)

18. *Id.*

19. *Id.*

20. Section 34(2)(a)(iii) of the ACA.

21. Section 34(2)(a)(iv) of the ACA.

22. Section 34(2)(a)(vii) of the ACA.

23. **Canaf Group Inc.** p.11. See also; Article 42 of the ICC International Arbitration Rules, 2021 (“In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”)

In **Canaf Group Inc. v. Kilembe Mines Limited**, the arbitrator having formed the opinion that the legality of the contract would be in issue upon reading the parties' pleadings, he ought to have raised the issue to the parties immediately to allow them an opportunity to adduce evidence and address him on the issue at the hearing with full awareness of its scope, importance and implications. In the post-hearing letter to the parties, the arbitrator referenced some statutory provisions in the mining laws which he considered to be relevant but failed to explain to the parties why he was raising the provisions which left the parties unclear about their significance which violated the parties' due process rights in the arbitration.

Conclusion

The court's ruling in **Canaf Group Inc. v. Kilembe Mines Limited** reaffirms the importance of due process in arbitral proceedings. While arbitral tribunals in Uganda are under a duty to render enforceable awards and thus must ensure that the awards rendered are in conformity with all binding/applicable laws, they must do so whilst respecting the parties' due process rights. Whereas there is no set procedure on how issues not canvassed by the parties but which the tribunal thinks are relevant should be raised to the parties to solicit their submissions, the ruling emphasises the need for clarity as to what the tribunal would like the parties to address and the need to do it at the earliest possible stage, to allow parties lead evidence and make submissions on the issue.

It is recommended that this should be done before the hearing or at the earliest stage of the hearing while the parties still have an opportunity to present relevant evidence or request for leave to amend their pleadings. An arbitral tribunal that raises the issue belatedly runs the risk of having its arbitral award set aside on the various grounds stated above because such a belated request denies the parties the chance to present evidence if they wish and address the issue during the oral hearing and in their post-hearing briefs.