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**The Right to be Heard and the Right to
Hear: Cultural Dimensions of
International Commercial Arbitration**

By

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Lectures and Addresses

The Right to be Heard and the Right to Hear: Cultural Dimensions of International Commercial Arbitration

A LUNCHTIME TALK AT THE LONDON ARBITRATION CLUB,
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by THOMAS R. KLÖTZEL

1. INTRODUCTION

I am honoured to address this august band and to speak to you on “Cultural Dimensions of International Commercial Arbitration”. I thank you for the kind invitation. It is a talk over lunch. I am not sure whether my words are a kind of *amuse oreilles* before we have the dessert and coffee. If so, drinks and law go together well. As Richard Sheridan put it:

“A bumper of good liquor
Will end a contest quicker
Than justice, judge or vicar.”

I gave some thought to what cultural dimensions of international commercial arbitration may be. The answer is not simple. The first time I thought of that topic was at a Roundtable Discussion which I had the privilege to chair at the Regional Centre for Arbitration in Kuala Lumpur. In the discussion I was asked whether racial considerations play any role in Europe for selecting an arbitrator. For a moment, I was speechless. I had never asked myself such a question. My answer was that I have never considered ethnic considerations in selecting an arbitrator, and that I would rather consider issues like the legal education of a potential arbitrator such as whether he has been trained in a common law system or a civil law tradition depending on the place of arbitration and the law applicable to a dispute.

This answer shows that the cultural dimension in arbitration is driven by the law itself. From the vast ocean of rules and regulations constituting what law in today’s world means I have chosen one aspect which is probably as old as the law itself. *Audiat et altera pars*, the old Roman maxim enshrining the right to be heard which existed in ancient Greek already. Euripides about 428BC wrote in the *Heraclidae*: “In case of dissension, never dare to judge till you have heard the other side.” The question I have asked myself when preparing today’s talk goes a step further: in addition to the right to be heard, do the parties have a right “to hear”? What do I mean by such a right “to hear”? It would go beyond the well-accepted practice to prepare, for analytical purposes and for ease of discussion, a list of the points at issue as opposed to those that are undisputed. To prepare such a list very often has advantages and is a tool to select the best and most economical process for resolving a dispute. But this is not what I mean. I am thinking of not only a collection of points at issue but a preliminary analysis of these issues. A preliminary analysis of legal matters and, as the case may be, evidential issues as well, which is based on the written materials before an arbitral tribunal and the oral submissions of the parties if a hearing has already been held.

Let me now turn to the legal framework which may help us in finding answers.



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2. ARTICLES 18 AND 19 OF THE UNCITRAL MODEL LAW AS THE “MAGNA CARTA OF ARBITRAL PROCEEDINGS”

I propose to look at the UNCITRAL Model Law as a kind of benchmark for answering the question. The Analytical Commentary on the draft text rightly described as the “Magna Carta of arbitral proceedings” the former Art.19 of the Model Law, which was split later in Arts 18 and 19.


Article 18 adopts the basic notions of a fair and due process in requiring: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” It is well settled that Art.18 is of central importance for the entire arbitral process and is addressed to both the arbitrators and the parties.

Article 19 guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented:

- “(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”



The principle of procedural autonomy is the crucial point in establishing truly international commercial arbitration. This procedural autonomy is the instrument to do away with local peculiarities and traditional standards which may be found in the *lex arbitri*. However, in practice, we often see that the parties make only little use of the freedom that they have under Art.19, para.(1). They often refer to standard arbitration rules of a recognised arbitration institution which, however, simply repeat the procedural freedom of the parties and the procedural discretion of an arbitral tribunal failing an agreement of the parties on the procedure as established in Art.19, para.(2).



The reasons why parties do not exercise this freedom with enthusiasm are manifold. Let me just name two:

- (i) The proper conduct of a procedure may raise complex issues, in particular with respect to the evidentiary process. An agreement can fail simply because the parties are so deep in a dispute that even knowledgeable and reasonable counsel cannot agree anything. Counsel may also be cautious and wish to avoid risks by agreeing to a procedure which may create a difficult situation for their party at some later stage.
- (ii) A second consideration can be that, in the event of a final award being made against one party, an action to set aside an award on the ground of misconduct is much more difficult to establish if there was a detailed agreement of the parties on procedural issues. A misconduct charge, arguing that the tribunal did not adopt procedures suitable to the circumstances of the case which resulted in a serious irregularity, is much easier to argue if the parties kept quiet.

Therefore, the arbitrators very often have to make suggestions to the parties dealing with the organisation of the arbitral proceedings, from practical details concerning written submissions and evidence, to the handling of documentary evidence and witnesses, including in which manner proffered evidence is taken and the like. In that situation, it is obvious that the tribunal can propose to the parties that, at a certain stage of the proceedings, the tribunal could proactively form a preliminary view of the dispute and communicate it to the parties. And, I think, a panel should do so. From my perspective, that was nothing unusual. Article 17 of the Model Law empowers a tribunal to order interim measures of protection which, very often, imply the need for it to form a preliminary view on the merits of the dispute. Accordingly, if there is an agreement of the parties, the tribunal has to inform the parties

of its preliminary views. Under no circumstances can the disclosure of the preliminary view of an issue by the tribunal be regarded as a violation of the arbitral tribunal's obligation to remain impartial and independent during the entire arbitration proceedings.

The question, however, is whether this may be seen differently in case of parties not expressly empowering the tribunal to communicate a preliminary analysis of issues to them. Let us see whether we can find guidance in constitutional guarantees on procedure.

(1) The right to present a case

The right to be given a full opportunity to present a case is an element of the constitutional right to be heard, for example under Art.6 of the European Convention of Human Rights and Art.103 of the German Constitution.

I propose to look first at Art.6 of the European Convention on Human Rights.

“Article 6—Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

I did not find anything in the case law of the European Court of Human Rights at Strasbourg on the question whether the right to be heard includes a right to hear from a court or an tribunal. The application of Art.6 to arbitration proceedings is well settled. In the recent case *Agrotehservis v Ukraine*,¹ the European Court of Human Rights did not see any problems in reviewing decisions of the Highest Arbitration Court of the Ukraine under the advisory review procedure of the Ukrainian court when it was held that the principle of legal certainty and the right “to a court” were infringed.

Let us now look at Art.103 of the German Constitution: “(1) In the courts every person shall be entitled to a hearing in accordance with the law.” The application of this paragraph is well settled. From the perspective of German constitutional law, it is not required that a court make a dialogue with the parties on legal matters before rendering a decision. Although there is lot of controversial discussion, there is no duty of the court to entertain such dialogue. There is only a prohibition of surprising decisions which exists, for example, in case of the application of a legal provision which none of the parties had seen in their submissions. However, it is fully recognised that such dialogue makes sense and that is an expression of wise judicial practice.

In the proceedings before German state courts, in civil matters, under the Civil Proceedings Act s.139 para.(1) the court has a proactive role and must give directions with the aim that the parties file full submissions on all relevant facts and make pertinent motions. For that purpose, a judge has to discuss the subject-matter in dispute with the parties from the factual and also from the legal side. However, according to the German prevailing opinion in doctrine in the law of arbitration, the duty of an arbitral tribunal to give directions in legal and evidential matters does not go as far as the corresponding duty of a judge in a state court. It must be done if the parties have agreed to do so. If not, however, it is in the discretion of the tribunal to give these directions.

In my practice as an arbitrator I have had excellent experience with a proactive approach in carefully analysing the positions of the parties in the arbitration and communicating to

¹ Application No.62608/00, judgment of July 5, 2005 published at www.worldlii.org/eu/cases/ECHR/2005/451.html.



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the parties what the tribunal thinks of a case on a preliminary basis. This may lead to a fresh risk assessment by each party which may then result in an interaction of the parties to reconsider commercial solutions of their dispute.

(2) Procedural autonomy of the parties

To sum up, as far as the procedural autonomy of the parties is concerned, the parties have it in their hands to create a right “to hear” by way of procedural agreement. If such an agreement is made, then the tribunal must act accordingly.

(3) Right to hear


Does the right to be heard include the parties’ right “to hear” from the tribunal? A right “to hear” from the tribunal does not exist compulsorily. However, it lies in the discretion of the tribunal to express preliminary views on legal and factual issues in dispute unless the parties expressly say that they are not interested in preliminary opinions. A wise tribunal, however, would inform the parties on this procedural step right at the beginning of the arbitration proceedings and invite their comments.

3. CULTURAL ASPECTS IN APPLYING THE ”MAGNA CARTA” IN PRACTICE



(1) Legal training and education of members of a panel

It is obvious that the legal training and education of the members of a tribunal will strongly influence the exercise of its wide discretion as to how the proceedings are conducted. In Germany lawyers are trained to become judges. After the second state examination, the lawyer has the qualification to become a judge. This qualification also allows a young lawyer to join a Bar and to start practising as an attorney. Accordingly, German lawyers, in general, are trained as judges and have learned the techniques to try civil and commercial cases from the perspective of a judge with the proactive approach required under the Civil Proceedings Act. This is not an inquisitorial approach but an adversarial procedure as it is limited to what the parties have submitted to the tribunal and the evidence they have proffered. Proactive does not mean inquisitorial.



(2) Proactive approach or laissez-faire

With respect to the evidentiary process, let me suggest two from my point of view important tools which can streamline it:

- (i) The first instrument is a so-called Order for Evidence. This is a procedural decision of the tribunal whereby, in respect of relevant and material issues in dispute between the parties, the tribunal will determine the subject-matter in respect of which evidence shall be taken by way of hearing one or more witnesses and also to determine the name of the witnesses which it intends to hear on the basis of the witnesses proffered by the parties.
- (ii) A second aspect is the manner of taking oral evidence of witnesses. There are a number of possibilities as to how witnesses can be heard. From my perspective, the most efficient manner is that a witness is first questioned by the tribunal, normally with the chairman commencing and the co-arbitrators following, whereupon questions are asked by the party who has presented the witness and then by the opposing party. This rather simple organisational measure is an efficient method to properly manage witness testimony.

(3) Participation in settlement discussions of the parties

Under German procedural law, it is the duty of the court at any stage of the proceedings to assist the parties in amicably settling their dispute or individual points at issue. From my experience I know that, in international commercial arbitration, this is a problematic approach. I therefore always write into the standard arbitration clause which I recommend to my clients a sentence which expressly gives that authority to the tribunal regardless of whether the arbitration clause provides for ad hoc arbitration or institutional arbitration. I have found it somewhat frustrating as counsel and as arbitrator, if opportunities to renegotiate commercial solutions of a dispute were easily given away in the course of an arbitration procedure. The whole aspect of a tribunal assisting the parties in finding a settlement is somehow poisoned by the mediation practice of caucusing. Caucusing means separate and individual meetings with each party. However, caucusing is not necessary for an arbitral tribunal and normally not practised in arbitration proceedings in Germany, Austria or Switzerland. Typically, the information that a tribunal has before it, on the basis of the briefs and memorials of the parties, documentary evidence, eventually witness statements and expert reports made by party-appointed experts, is sufficient to form a rather accurate picture of the dispute. Any one-sided information which may change that picture is rather unlikely. A tribunal can therefore openly discuss with the parties possibilities for commercial solutions, taking into account a preliminary analysis of issues from the evidential and legal perspective. That will allow the parties to use such analysis as a starting point for their negotiations or, otherwise, if the parties request the tribunal to do so, to prepare a proposal for a settlement. The amount of assistance which the parties seek from a tribunal in a settlement process is, of course, within their sole discretion.

With these thoughts I shall close. It has been my pleasure to address you and I thank you for your patience. I look now forward to our discussion.