CMR UNIVERSITY
SCHOOL OF
LEGAL STUDIES, BENGALURU.

CMR University Journal
for Dispute Settlement and Arbitration
Vol.1 (01), April 2022, PP. 01-15

Equal Treatment in Arbitration

G. Priyadarshini*

Introduction

For a long time, it was considered that arbitration did not require fair trial guarantees since commercial players were cautious of their secrecy and that arbitral processes, in any case, did not raise such problems. The lack of a public record of the proceedings, due to their secret character, gave the false impression that the parties had agreed to waive their right to a fair trial. Fair trial rights are prominently featured in major commercial arbitration instruments, such as Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which states: The parties shall be treated equally and each party shall be given a full opportunity to present his case.[1]

Given that arbitration is a legitimate exception to the jurisdiction of civil

* *Student of IX Semester B.A.,LL.B. (Hons), School of Legal Studies, CMR University*
[1] I Bantekas, P Ortolani, et al., UNCITRAL Model Law on International Commercial Arbitration: Commentary 38-49 (Cambridge University Press 2020).

and commercial courts, which are inherently subject to fair trial requirements, arbitral tribunals must be held to the same standards. What is the theoretical legal foundation for applying the same fair trial legal framework to both normal courts and arbitral tribunals? Despite international arbitration's autonomy and "international" nature, two arguments have been proposed to show that arbitral procedures are only a component of the law and legal system of the seat of arbitration and that the arbitrator is, by extension, an organ dispensing that law.

Further, it is important to remember that fairness in a fair trial attempts to protect the parties' interests as well as the effective administration of justice.[2] According to established case law, determining whether the procedures are fair requires considering the processes as a whole,[3] however a significant deviation in one aspect of the procedures (for example, the parties' right to present their argument) is sufficient to cause a violation. For arbitration, it's worth noting that the European Court of Human Rights (ECtHR) has created a precedent under which domestic (long-established) court practice might depart from Article 6(1) ECHR

[2] Nideröst-Huber v. Switzerland, 25 EHRR 709 (1998).
[3] Ankerl v. Switzerland, 32 EHRR 1 (2001).

within certain bounds.[4] Arbitral hearings are, mutatis mutandis, a long-standing court procedure.

Based on the foregoing, though the idea of equality in Article 18 of the Model Legislation does not have the same foundations as its equivalent in general human rights law, it encompasses the concepts of non-discrimination and arbitrariness. This is because Article 6 of the European Convention on Human Rights (ECHR) primarily addresses the right to a fair trial in criminal procedures, while it also applies to civil and commercial actions, as will be demonstrated.[5] As a result, while arbitral processes are subject to all local and international fair trial obligations, the permissive character of arbitration allows for certain uniqueness.

Sources of the Equal Treatment Principle in Arbitration

All parties in civil/arbitral procedures should be given equal treatment, including the opportunity to present their case to the best of their abilities. In the context of arbitral procedures, where does this right come from? While one could point to arbitration-specific instruments like Article 18 of the Model Law and similar provisions in domestic arbitral statutes

[4] Kerojärvi v. Finland, 32 EHRR 8 (2001).
[5] Dombo Beheer B.V. v. the Netherlands, 18 EHRR 213 (1994).

(both Model Law-adherent and others), the fair trial guarantees enshrined in such instruments can be found in general human rights treaties as well as civil procedure laws and statutes.[6] It is beyond the scope of this article to offer a complete explanation of civil procedure legislation, but their fair trial requirements have been elucidated through basic international human rights law as well as case law from international human rights tribunals. Subsequently, the ECtHR's case law is heavily referenced in this article. For a variety of reasons, this is justifiable.

To begin with, among its worldwide equivalents, the Court's jurisprudence on the right to a fair trial is the most detailed. Second, it reflects customary international law and basic legal ideas to a significant extent.[7] Third, it is a part of the *lex arbitri* of the Council of Europe's 47 member states, which make up the majority of the world's arbitration fora, not to mention that it may be an intrinsic component of the parties' agreement's controlling legislation (for Council of Europe member States). Fourth, arbitral processes are explicitly included in the ECtHR's

[6] M Gebauer, Uniform Law, General Principles and Autonomous Interpretation, Unif. L Rev 683(2005).
[7] OJ Settem, Applications of the Fair Hearing Norm in ECHR Art 6(1) to Civil Proceedings, 96–121 (Springer 2015).

fair trial provisions.[8] Finally, the European Court of Human Rights has a well-established concept on the margin of appreciation, which member states are allowed to use while completing their treaty duties.[9]

While international human rights legislation and local civil procedure regulations establish a basic foundation for fair trial guarantees in arbitral processes by establishing basic principles, it is their special application to arbitral procedures that clearly defines their particular scope and exceptions. Consequently, arbitration-specific instruments (formal, informal, or contract-based), along with domestic court judgments, provide more insight into the range of acceptable deviations, because complaints about equal treatment will result in setting aside proceedings in the seat of arbitration. Although the Model Law outlines other fair trial obligations, damaged parties can seek annulment (set aside) of judgments that violate party equality under Articles 34(2)(ii) and 22. Given the unique nature of arbitral proceedings, it is critical that the right to equality, as developed in the ECtHR's jurisprudence, be applied to seminal commercial arbitration instruments, including the Model Law, in a way that makes them consistent and complementary, as required by Article 2A

[8] Klausecker v. Germany, EHRR SE8 (2015).
[9] G Letsas, Two Concepts of the Margin of Appreciation, 26 OJLS 705 (2006).

of the Model Law.

Restrictions On Party Autonomy

The parties do not have complete control over the arbitral process. Arbitral processes are legal procedures, even if arbitral tribunals are not usually seen as being "created by law," and are thus subject to the same fair trial guarantees as other legal procedures.[10] As previously stated, the seat's (and maybe the nation of enforcement's) human rights duties must be considered during the proceedings.[11] The seat's human rights responsibilities are part of its *lex arbitri*, and the tribunal would fail in its duty to make an enforceable judgment if it ignored the seats and the intended country of enforcement's human rights duties. Although it is impossible to force arbitrators to be aware of the ECtHR's and other human rights courts' and tribunals' evolving law, arbitral institutions and lawyers must ensure and often do, that the parties' processes comply with core fair trial guarantees.[12]

[10] Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Ors., ECR 1095 (1982).
[11] Transado - Transportes Fluviais do Sado v. Portugal, App No 35943/02, ECtHR (2003).
[12] G Petrochilos, Procedural Law in International Arbitration, 112 (Oxford University Press 2004).

In practice, courts apply a rigorous interpretation of the right to fair and equal treatment in arbitral proceedings. In *Lufuno Mphaphuli & Associates (PTY) Ltd. v. Nigel Athol Andrews Bopanang Construction CC*, the South African Constitutional Court was asked to set aside an award due to three "secret" meetings between the arbitrator and the respondent during the arbitration, as well as the fact that not all correspondence between the respondent and the arbitrator was provided to the appellant. The applicant cited Article 34 of the RSA Constitution, which guarantees the right to a public hearing in disputes. Arbitral tribunals are not immediately protected, according to the Court, because hearings are not open to the public and arbitrators are not always independent, at least in the sense of court judges. The Court also cited Article 18 of the Model Law and Section 33 of the English Arbitration Act, both of which it deemed to codify a constitutional concept, albeit it did so with the caveat that fairness is a product of circumstances.

Further, fair trial guarantees should not only apply to the proceedings themselves, but also the preliminary examination of the legitimacy of the submission agreement, since an unfair agreement might jeopardize the parties' equal treatment. As a result, if the arbitration agreement creates an imbalance that unfairly disadvantages one party, the court or tribunal

must declare that section of the agreement invalid and unenforceable. Some courts have shown a readiness to push the idea of equal treatment beyond its reasonable bounds by using quantitative methods to assess equality. The arbitration agreement in *Iwona G. v. A. Starosta I Wspólnicy spóka jawna w B* (Polish case), for example, stipulated that the tribunal be composed of a super-arbitrator who would be selected by arbitrators nominated by each shareholder in the firm. The claimant claimed that his interests were not equally represented since he could only pick one of the seven arbitrators. The Bialystok Court of Appeals ruled that this was a violation of the principle of party equality.[13]

The Principle Of Equality Of Arms

Article 6(1) ECHR, which states that "everyone is entitled to a fair hearing by a tribunal in the assessment of his civil rights and responsibilities," is the essential starting point for evaluating "equality" outside the framework of Article 18 of the Model Law.[14] Fairness pertains to all aspects of the process, not only oral hearings or merits hearings.[15] All

[13] Iwona G. v. A. Starosta i Wspólnicy spółka jawna w B, CLOUT Case 1467 (2011).
[14] Universal Declaration of Human Rights, 10 Dec. 1948, U.N.G.A. Res. 217 A (III), Art. 10.
[15] Stran Greek Refineries and Stratis Andreadakis v. Greece, 19 EHRR 293 (1994).

parties must be given a fair chance to explain their case and present their claims before courts and arbitral tribunals. Furthermore, it requires courts and tribunals to treat parties fairly, that is, without bias or arbitrariness, in making their decisions.

The principle of equality of arms best captures the specific meaning of "equality" in Article 18 as it pertains to adversarial arbitral procedures. This concept mandates that in adversarial procedures, the chances offered to both (all) sides are equitably balanced. Article 6(1) ECHR's need for "fairness" is focused on "procedural" rather than "substantive" fairness (which relates to inherent powers of courts and tribunals). Equality of arms also requires that all admissible evidence be made available to the parties, as well as a fair opportunity to remark on and evaluate it, even if the evidence's legitimacy is questioned.[16] All statements, documents, and other information provided to the arbitral tribunal by one party must be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision must be communicated to the parties, according to Article 24(3) of the Model Law. This emphasizes the importance of well-reasoned awards because it helps courts to determine whether and to what extent a tribunal

[16] Krcˇmár & Ors. v. the Czech Republic, App No 35376/97, ECtHR (2000).

was biased in its consideration of the evidence and the parties' capacity to furnish it.

Apart from evidence-related issues, the ECtHR has found a breach of the equality of arms principle where: a) one party brought an action without informing the other;[17] b) only one of several key witnesses put forward by the parties was heard;[18] c) one party had a significant advantage concerning specific information, putting its opponent at a severe disadvantage;[19] d) a judge/arbitrator declined to adjourn a case even though one of the parties was transported to the hospital for emergency treatment and his counsel was unavailable to represent him at the hearing, resulting in irreparable loss.[20] Although the ECtHR has found that the lack of legal help in circumstances where the parties have a considerable financial imbalance may be damaging to the weaker party's ability to present its case, there is no universal right to legal assistance in arbitral proceedings.[21]

While we have already established that procedural fairness is not a

[17] Beer v Austria, App No 30429/96, ECtHR (2001).
[18] Wierzbicki v. Poland, 38 EHRR 38 (2004).
[19] Yvon v. France, 40 EHRR 4 (2005).
[20] Vardanyan & Nanushyan v. Armenia, App No 8001/07, ECtHR (2016).
[21] Steel & Morris v. the United Kingdom, (2005) 41 EHRR 22.

substantive aspect of the right to a fair trial, the ECtHR has identified a few limited circumstances in which the tribunal's dispositive function may be called into question, particularly where the tribunal's errors are obvious and infringe on rights and freedoms protected by the Convention.[22] Similar to national courts, where setting aside awards due to errors of law or substance is extremely unusual, the ECtHR has done so only in extraordinary situations of evident mistake of judgment that render the decision arbitrary or irrational.[23] When the verdict was deemed to be a denial of justice or the court's reasoning was seen to be "grossly arbitrary," the ECtHR came to the same result.[24]

Further, the courts of the seat have looked at breaches of Article 18 from a variety of perspectives. While the rights guaranteed in Article 18 of the Model Legislation are expressed as human rights in human rights treaties, they are also mandated in constitutional or other domestic law as "freedoms," "civil liberties," "natural justice guarantees," or "due process guarantees." Other terms may be used, but they all refer to a specific right in a court or arbitration procedure. The Singapore High Court was faced

[22] Perez v. France, 40 EHRR 39 (2005).
[23] Dulaurans v. France, 55 EHRR 45 (2001).
[24] Barac´ & Ors. v. Montenegro, ECHR 2101 (2011).

with a set aside request in *AMZ v. AXX*,[25] which involved, among other things, a breach of Article 18 of the Model Law. During the arbitral procedures, the plaintiff claimed there were three severe breaches of contract, but the tribunal only identified one and dismissed the claim of a fundamental violation. The plaintiff sought to have the award set aside, claiming that the tribunal had broken natural justice rules under Articles 34(2)(a)(ii) and 18 of the Model Law, because he was unable to present his case and/or the arbitrator, was biased against him and that this breach had resulted in actual prejudice.

The Court determined that there are two natural justice rules. The first need is that the tribunal appears and acts impartially. The second norm of natural justice is *audi alteram partem*, which the Court discussed in detail.[26] First and foremost, tribunals must provide all parties with an opportunity to be heard on all matters. Second, tribunals are unable to dismiss a proposal without first applying their judicial mind to it. Third, tribunals are not required to submit every matter to the parties for comments before making a judgment. Fourth, a tribunal's judgment will be considered unjust only if a reasonable third person in the situation of

[25] AMZ v. AXX, SGHC 283 (2015).
[26] *Id.,*

the party contesting the award could not have foreseen the tribunal's actual reasoning in the award. Finally, tribunals have the authority to make decisions that are not addressed by the parties' submissions if their findings are supported by evidence and do not differ significantly from the parties' viewpoints.[27]

Conclusion

If there is one thing arbitrators should know about human rights, it is that they are an intrinsic aspect of the *lex arbitri*. There is a long line of precedence in states that have embraced substantial international human rights commitments, such as those under the ECHR, where fair trial guarantees apply to both litigation and arbitral processes. As a result, arbitrators must always seek guidance on the potential human rights implications of the proceedings from arbitral institutions, as well as the parties themselves, if appropriate. Foreign arbitrators will not be familiar with the seat's human rights laws and will not be required to be.

Procedural safeguards of human rights may be more extensive than they had imagined. If they fail to comply with the appropriate requirements, their award may be nullified by the courts of the seat, as well as subjecting

[27] *Id.,*

them to tort responsibility. Arbitral institutions would also benefit from training their case managers on fair trial legislation and preparing thorough instructions for all those involved in arbitral processes, as well as consulting an expert on hand inside the institution if in question about specific concerns. The expense of solid legal guidance from human rights specialists outweighs the reputational and financial risk to arbitral organizations and individual arbitrators.

Despite international arbitration's autonomy, the tribunal's powers and relevant law (both substantive and procedural) are bound by the seat's obligatory norms. The seat's necessary standards include equality in all of its aspects.[28] Deviations based on permission are allowed, but only if the consequence of the deviation does not injure one of the parties considerably. Both national and international courts and tribunals have had the chance to expand on the range and breadth of acceptable departures from the equal treatment norm in this context, proving the presence of a transnational judicial conversation on the subject.[29] The general principle enshrined in Article 18 of the Model Law can be found

[28] S Brekoulakis, Public Policy and Mandatory Laws in International Arbitration 64 (Oxford University Press 2019).
[29] PM Moremen, National Court Decisions as State Practice: A Transnational Judicial Dialogue?, 32 North Carolina Jrnal Of Intl. Law & Commercl. Regln. 259 (2006).

in the decisions of international tribunals, such as the ECTHR, as well as domestic courts, arbitral tribunal awards (given the lack of extensive annulment proceedings based on non-equal treatment), and arbitral institutions' instruments around the world.