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The International Arbitrator’s Dilemma: 
Transnational Procedure versus Home Jurisdiction

A German Perspective

by KLAUS PETER BERGER*

ABSTRACT

Every international arbitrator is necessarily influenced by the core legal values of his home jurisdiction. These values relate to both the conduct of the proceedings and the decision-making on the merits. In both areas, international arbitration has developed its own best practice standards and transnational legal principles and rules. The arbitrator’s task is to reconcile the manifold influences of his home jurisdiction with the transnationalized structures of international arbitral proceedings. This article examines these issues from the perspective of the German legal system.

I. INTRODUCTION

ANDREAS F. LOWENFELD, one of the grand old men of international arbitration and one of its finest thinkers, once compared arbitration to a ‘two-way mirror’ resulting in a comparative procedure: the participants in a legal system see themselves as others see them, and at the same time, they get an idea of how others approach tasks similar to their own.  

1 This view of the arbitral process is based on the fact that the approach that an arbitrator takes towards the conduct of the arbitration is necessarily influenced by the core legal values and principles of his or her home jurisdiction. While some arbitrators do so deliberately, others act intuitively, not realising that in making a certain decision during the course of


an arbitration, he or she mirrors the core legal values and principles of his or her home jurisdiction:

It seems natural that, when exercising ... [his or her procedural] powers, an arbitrator should refer to concepts from the legal system in which he or she grew up, especially if he or she already has experience as an attorney, a judge or a domestic arbitrator. The importance of concepts from an arbitrator’s ‘native’ legal system is usually implicit and sometimes even unconscious.2

Sometimes, these core values and principles of the home jurisdictions of those involved in a given arbitration are similar, leading to a ‘natural harmonisation’ of legal solutions, sometimes they differ, requiring the development of ‘hybrid’ approaches by all participants in the arbitral process.

It goes without saying that these differences may have a significant potential to impact the conduct of arbitration proceedings. In looking at the arbitral process as a ‘two-way mirror’, Andreas Lowenfeld has rightly emphasised that the ‘enlightened introspective’ that one gets by pursuing this approach relates to both procedure and substance.3 This article lists 10 core legal principles, five related to procedural and five related to substantive law, which tend to shape and influence the approach that German arbitrators take towards the resolution of disputes in international commercial arbitration.

II. FIVE CORE PRINCIPLES OF PROCEDURE

(a) Arbitration is Genuine Judicial Decision-Making

Leaving aside the generally accepted notions of arbitral due process and party autonomy, the most basic principle or core value of German law related to arbitral procedure is that it is generally agreed today that arbitrators perform genuinely judicial functions. In a long line of cases, the German Federal Supreme Court has held that arbitrators exercise private justice as genuine judicial decision-making.4 The ‘Leitmotiv’ of the German arbitration law reform of 1998, when Germany adopted the UNCITRAL Model Law, as reflected in the travaux préparatoires, was the equality of arbitral and court justice.5 Arbitral tribunals are not considered to be rivals of, but viable alternatives to domestic courts.

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Sometimes, however, German counsel who are not familiar with the arbitration process tend to carry this general principle too far. They assume that arbitration is merely a mirror image of German court procedure, i.e. a substitute for instead of an alternative to litigation in German courts. Based on this misconception, these counsel argue that specific provisions for German court procedures contained in the German Code of Civil Procedure must apply mutatis mutandis in arbitration. They do not understand that the Tenth Book of the German Code of Civil Procedure contains a self-contained system of arbitration law, the UNCITRAL Model Law. Based on this misunderstanding, German counsel often argue that party representatives cannot be heard as witnesses before a domestic or international arbitral tribunal because, pursuant to sections 445, 448 of the German Code of Civil Procedure, they cannot be heard as witnesses before German courts.\(^6\) This view, of course, is not correct because these provisions do not apply in arbitration.\(^7\) Also, article 4(2) of the IBA Rules on the Taking of Evidence reflects the general consensus that party representatives can be heard as witnesses before international arbitral tribunals.\(^8\) Applying automatically technical provisions related to procedures before German courts in arbitrations which have their seat in Germany is also contrary to the modern trend, triggered by the increasing pressure from users, to avoid a further ‘judicialisation’\(^9\) of international arbitration.

(b) The Tribunal Controls the Proceedings

As a consequence of the principle just explained, German practitioners tend to conduct the arbitration based on the assumption that the role of arbitrators and counsel during the hearing is similar to that in a German courtroom. Thus, the arbitral tribunal is in the driver’s seat, i.e. in control of the proceedings and conducts the hearing, always in close coordination with the parties, in a more ‘inquisitorial’ manner. This does not mean that the court actively investigates the facts.\(^10\) Rather, the court exercises control over the process of fact-gathering conducted by the parties, its procedural powers being of a mere ‘managerial’ nature.\(^11\) This managerial approach is reflected in a letter sent by a German chairman of an ICC arbitral tribunal to one of his co-arbitrators. When asked how he would handle the questioning of witnesses and whether he would allow cross-examination, the German chairman replied:

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\(^6\) See for this principle R. Greger in R. Zöller, *Zivilprozessordnung* (27th edn, 2009), para. 373, No. 4.


\(^8\) International Bar Association (ed.), *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999), art. 4(2) provides: ‘Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative’.


\(^10\) See infra.

\(^11\) See G. Wagner, *infra* n. 7 at No. 209.
It seems to me that the questioning [of witnesses] should be left to arbitrators but that the parties or their lawyers should also have the right to put questions to witnesses after asking the chairman of the arbitration tribunal to let them do so.\textsuperscript{12}

This statement reflects the general practice before German courts where the judge is expected to have read the parties’ briefs and documents submitted to him and the role of the lawyers is generally limited to suggesting to the judge questions that should be asked.\textsuperscript{13}

It is obvious that this managerial approach is not in line with the general consensus reflected in article 8(2) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.\textsuperscript{14} That provision is based on the understanding that cross-examination belongs to the generally accepted arsenal of international arbitral procedure. However, in certain cases the ‘tribunal-first’ approach, i.e. the conduct and control of the hearing of witnesses by the tribunal, may help to save time and costs, a goal which is currently widely discussed and approved in international arbitration circles.\textsuperscript{15} Such an approach requires, however, that the tribunal knows the file and comes to the hearing room as well-prepared as counsel.

There is another principle related to the taking of evidence which follows from the court’s active role in controlling the proceedings. It is an essential and core maxim of German procedural law that foreign substantive law, like German law, is law and not fact.\textsuperscript{16} Since the days of Savigny, German private law and foreign private law are considered to be of the same universal legal quality.\textsuperscript{17} Therefore, in German court proceedings, the fundamental 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

\textsuperscript{12} A.F. Lowenfeld in A.F. Lowenfeld (ed.), supra n. 1 at p. 44.

\textsuperscript{13} See S. Elsing and J. Townsend, ‘Bridging the Common Law–Civil Law Divide in Arbitration’ in (2002) 18(1) Arb. Int’l 55 at p. 62, stating that ‘the idea of a witness being presented by the lawyer for a party in the question-and-answer format of common law direct examination is vaguely distasteful to civil lawyers. And the idea of a witness being required to agree or disagree with statements by a lawyer in the format the common law calls cross-examination is positively repugnant to them’.

\textsuperscript{14} International Bar Association (ed.), IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), art. 8(2) states: ‘The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning’.

\textsuperscript{15} See ICC Commission on Arbitration (ed.), Techniques for Controlling Time and Costs in Arbitration (2007), p. 7 et seq.; see also M. McLwraith and K. Schroeder, ‘The View from an International Arbitration Customer: In Dire Need of Early Resolution’ in (2008) 74(3) Arbitration 3 at p. 4: ‘There is no need to explain why businessmen like speed, are impatient with delay, and abhor unnecessary cost’; see also at p. 10: ‘frustration with the length and expense of the arbitration process is increasingly cited as the rationale for favouring court resolution (or at least for no longer favouring arbitration)’; A. Fiebinger and C. Gregorich, ‘Arbitration on Acid: Fast-Track Arbitration in Austria from a Practical Perspective’ in (2008) Austrian Arbitration Yearbook 237.


\textsuperscript{17} See for the origins of this view F. Savigny, System des heutigen Römischen Rechts (1984), vol. VIII, p. 26 et seq.
the law') apply to both German and foreign law. This means that it is the task of the German judge and not of the parties to find, construe and apply foreign law, without being limited in the pursuit of this task by any formal rules of evidence. Even if the court asks the parties for their cooperation in finding and interpreting the foreign law, the correct application of this law remains the court’s sole responsibility. This principle is manifested in section 293 of the German Code of Civil Procedure.

(c) The Tribunal Should Always Ensure a Time- and Cost-Efficient Conduct of the Proceedings

Because arbitration is regarded as judicial decision-making, German practitioners tend to look at the arbitral process through the lens of the basic procedural maxims and values on which German procedural law is based. One of them is the so-called ‘maxim of concentration/maxim of expedition’ (Konzentrationsmaxime, Beschleunigungsmaxime). The legislative policy underlying this maxim is to speed up the procedure before German courts. In order to preserve the overriding goal of procedural efficiency, the judge as ‘manager’ of the proceedings must conduct the proceedings in an economical manner, preferably in one hearing.

Two very significant and efficient case management tools which belong to the standard arsenal of German courts are based on this maxim.

First, section 273(2), No. 1, of the German Code of Civil Procedure allows German judges to issue an order requiring one or both parties to ‘supplement or explain’ their briefs ‘by declaring themselves, prior to the hearing, on legal issues which, in the eyes of the court, require clarification’. Such an order may relate to the structuring of confusing factual submissions, the calculation of an amount of damages claimed by one side or the submission or drawings or photos in order to allow the court a better understanding of the subject matter of the dispute.

Secondly, to ensure efficiency in the taking of evidence, section 358a, first sentence, of the German Code of Civil Procedure allows the court to issue an ‘order related to the taking of evidence’ (Beweisbeschluss). In this order, the court indicates to the parties prior to the hearing which evidence it intends to take on which disputed facts and which party carries the burden of proof for these facts, thereby providing early transparency to the parties as to the means of evidence and the facts which the court deems relevant for the taking of evidence. The efficiency of these case management tools is further enhanced by other provisions.

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18 See H. Prütting, in Münchener Kommentar zur ZPO (3rd edn, 2006), para. 293, No. 2; A. Spickhoff, supra n. 16 at p. 286 et seq.
19 H. Prütting, supra n. 18 at No. 25.
21 See R. Greger in R. Zöller, supra n. 6 at para. 273, No. 6; Baumbach et al., supra n. 20 at para. 273, No. 18; U. Foerste in Musielak, supra n. 20 at para. 273, No. 10.
such as sections 282, 296 of the Code. They reflect the parties’ intrinsic duty to foster a speedy and economic conduct of the proceedings (Prozessförderungspflicht), e.g. by requiring them to make factual and legal allegations and to submit evidence ‘in a timely way that is consistent with a diligent and efficiency-oriented conduct of the proceedings’.\footnote{See generally, R. Greger in R. Zöller, supra n. 6 at Einleitung No. 54; H. Prütting, supra n. 18 at para. 282, No. 2; A. Baumbach et al., supra n. 20 at Grez para. 128 No. 12 and para. 282, No. 2.}

Even though these provisions relate to court proceedings and do not automatically apply in arbitration,\footnote{See supra.} they are deeply rooted in German procedural tradition.\footnote{See J. Langbein, ‘The German Advantage in Civil Procedure’ in (1985) 52 Univ. Chicago L Rev. 823 at p. 827 et seq.} In addition, these provisions have a considerable influence on counsel’s role in court proceedings, which is not simply to present facts and legal arguments but to direct the court’s attention to particularly cogent lines of legal and factual enquiry in order to assist the court in narrowing its inquiry.\footnote{Ibid. p. 829; see also B. Kaplan, A. von Mehren and K. Schaefer, ‘Phases of German Civil Procedure’ in (1958) 71 Harvard L Rev. 1193.}

German arbitrators, exercising their procedural discretion to structure the proceedings and the taking of evidence, sometimes use these case management tools in arbitration intuitively in order to speed up the process and to ensure an efficient conduct of the arbitration. It is not surprising for someone familiar with German court proceedings that the idea of early legal guidance of the parties by the tribunal (which requires the members of the tribunal to deal with and discuss among themselves the legal issues involved at a relatively early stage of the proceedings) has found its way into the Preamble of the IBA Rules on the Taking of Evidence. Paragraph 3 of the Preamble provides:

\begin{quote}
Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.\footnote{IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), Preamble, para. 3.}
\end{quote}

This provision takes account of a frequent complaint of the users of international arbitration which involves those relatively straightforward disputes that could easily have been resolved or settled expeditiously if the key issue(s) had been addressed by the tribunal head-on at the beginning or an appropriate early stage of the proceedings.\footnote{M. McIlwrath and K. Schroeder, supra n. 15 at p. 8.} As paragraph 1 of the Preamble of the IBA Rules clarifies, this proactive approach towards the determination of the issues relevant for the decision of the dispute is intended to ensure an ‘efficient and economical … [conduct of] the taking of evidence in international commercial arbitrations’. Likewise, proactivity of case management by the arbitral tribunal is a recurring theme in the ICC Report on \textit{Techniques for Controlling Time and Costs in Arbitration}.\footnote{See \textit{Techniques for Controlling Time and Costs in Arbitration}, supra n. 15 at pp. 18 (para. 15) and 24 (para. 32).}
Another core value which follows from the basic principle explained above and
which is closely related to the duty to proceed in a cost- and time-efficient
manner is that, in conducting arbitration proceedings, German arbitrators,
counsel and parties tend to adopt the settlement-friendly approach of German
judges. This approach does not mean that the tribunal merely informs the
parties "that they are free to settle all or part of the dispute at any time during the
course of the ongoing arbitration". Rather, it is characterised by the arbitrators’
proactive attitude towards a potential settlement of the dispute. This approach is
reflected in section 278(1) of the German Code of Civil Procedure and has found
its way into the Arbitration Rules of the German Institution of Arbitration (DIS).
Section 32.1 of the DIS Arbitration Rules provides:

At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable
settlement of the dispute or of individual issues in dispute.

This basic procedural value of his home jurisdiction certainly influences a
German arbitrator’s approach to settlement in arbitration. In fact, a recent study
has confirmed that there is a correlation between an arbitrator’s propensity to
encourage an amicable solution and the treatment of settlements in his or her
home jurisdiction.

However, common law arbitrators and counsel have always looked with
skepticism and even with some dismay at this pragmatic approach to settlement
in arbitration. They consider it as a premature and therefore inadmissible
revelation of the tribunal’s view of the legal issues that are at stake in the arbitration.
It seems that these objections are due to some fundamental misunderstandings
and uncertainties as to how exactly this proactive settlement technique works in
practice. The following issues deserve particular attention in this context.

(i) The tribunal conducts a ‘settlement meeting’ in which the chances for and
the possible content of a settlement agreement are being discussed with the
parties. During that meeting, the tribunal will typically present a proposal
as to possible settlement terms to the parties; a settlement agreement
may be concluded by the parties during or subsequent to the meeting.

24(2) Arb. Int'l 265; see also, J. Langbein, supra n. 24 at p. 831 et seq.: ‘In this business-like system of civil
procedure, the tradition is strong that the court promotes compromise. The judge who gathers the facts soon
knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering
on the most important issues still unresolved’.
30 See Techniques for Controlling Time and Costs in Arbitration, supra n. 15 at p. 28.
31 The German and English text of the DIS Arbitration Rules is available at www.dis-arb.de; see for a
commentary on DIS Arbitration Rules, s. 32, S. Elsing in K.-H. Bockstiegel, S. Kroll and P. Nacimiento
32 G. Kaufmann-Kohler and F. Bonnin, supra n. 2 at p. 85, emphasising that in their study on settlement rates
of civil and common law ICC arbitrators, Swiss and German arbitrators come top; see also at p. 80.
(ii) Taking such a proactive approach towards settlement in arbitration is not routine;\textsuperscript{33} whether such an approach is adopted in a given case depends on the tribunal's careful evaluation of the nature of the dispute and the underlying commercial interests of the parties, and the overt or covert 'signals' as to the parties' willingness to settle which are sometimes sent to the tribunal.

(iii) The tribunal never adopts a proactive approach towards a settlement of the dispute (as a 'surprise move') at the outset or even before, but typically at the end of the hearing and after the taking of evidence, when both counsel and arbitrator(s) have a deeper understanding as to which are the crucial issues and facts of the case that need to be considered in settlement discussions.

(iv) The discussion of possible settlement terms is typically preceded by a preliminary determination (\textit{vorläufige Rechtsansicht/Rechtsgespräch}) of the legal issues involved by the arbitral tribunal;\textsuperscript{34} in providing the parties with this preliminary view, the arbitral tribunal makes it clear that this 'snapshot' view of the legal issues may change once the arbitration proceeds.

(v) Sometimes, a discussion of settlement terms between parties and tribunal is not conducted immediately after the hearing; instead, the tribunal, as a final remark at the end of the hearing and after it has delivered its preliminary determination of the legal issues involved, offers its assistance to the parties and declares its readiness to meet with the parties in the future to discuss a possible settlement, \textit{should both sides so wish.}\textsuperscript{35}

(vi) The process should not be confused with the hybrid procedures that one finds in Chinese arbitration practice, when parties sometimes do not know whether they are still in the arbitration mode or already in the mediation mode; instead, the process is and remains an arbitration from beginning to end, albeit enriched with a settlement window.

(vii) For the reasons indicated immediately above, the discussion of settlement terms with the arbitral tribunal must not be confused with mediation; typically, no caucus sessions are conducted but the tribunal discusses the case in the presence of all parties because the due process rules of the German Arbitration Act, and the parties' right to be heard in particular, have not ceased to apply.

(viii) Because the process remains an arbitration, the tribunal has no difficulty in converting any settlement terms agreed upon by the parties into an award on agreed terms pursuant to section 1053 of the German Arbitration Act (= Article 30 of the UNCITRAL Model Law).

\textsuperscript{33} See for the settlement practice before German courts R. Gregor in R. Zöller, supra n. 6 at para. 278, No. 26.
\textsuperscript{34} See for the advantages of such a preliminary determination (\textit{Rechtsgespräch}) with respect to early transparency and the parties' ability to evaluate their chances and risks, Hafter in C. Reymond and A. Bucher (eds.), \textit{Recueil de travaux Suisses sur l'arbitrage international} (1984), pp. 203, 209; see also, IBA Rules on the Taking of Evidence, supra n. 26 at Preamble, para. 3.
\textsuperscript{35} See infra.
A proactive approach to settlement should not be confused with forcing parties into having to agree on settlement terms they do not want. An essential prerequisite of this technique, which includes both the tribunal’s preliminary determination and the conduct of the ‘settlement meeting’, is, of course, that it is always based on an ‘informed consent’ of both parties, i.e. an agreement concluded by the parties during (not before) the arbitration. The proactive approach is therefore always based on the basic principle of party autonomy as the Magna Charta of the arbitral process.36

The ‘informed consent’ of the parties is an essential prerequisite for any proactive settlement technique. The significance of this principle is reflected in General Standard 4(d) of the IBA Guidelines on Conflict of Interest which provides:

An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.37

The IBA Working Group has added the following official comment to General Standard 4(d):

**Informed consent** by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing.38

It must be stressed that the proactive approach to settlement described above is never an end in itself. It can be an essential tool to reduce costs and time in international arbitration, and thereby as a means to meet the increased pressure coming from users. From this perspective, the proactive approach to settlement reflects an understanding of the arbitral process which maintains the strict distinction between arbitration and mediation but emphasises the potential of arbitration to preserve the business relationship between the parties, an aspect

36 See S. Elsing, supra n. 31 at p. 767 et seq.: ‘The wording of Sec. 32.1 … should not be misunderstood in a way that it is the main task of the arbitral tribunal to cause the parties to settle the dispute amicably … Nevertheless, the arbitral tribunal should take into consideration that a settlement might be in the interest of both parties and it should address the issue once it has the impression that it is the right time. Before presenting a proposal for the settlement of the dispute, the arbitral tribunal should, however, obtain the approval of the parties’ (emphasis added).


38 Ibid. p. 13 (emphasis added).
which, according to recent surveys on the use and acceptance of arbitration in international business, is of major concern to the users of the arbitral process. As Fali Nariman has stated in his Tenth Goff Lecture:

Arbitration must never be considered as excluding from its purview the settlement of a dispute before the arbitrator: because this is of the essence of the spirit of arbitration.40

It is for these reasons that the London-based Centre for Efficient Dispute Resolution (CEDR) has established a Commission that has submitted proposals for a more pro-active role of arbitrators in the parties’ negotiations of settlements during the arbitration. The Commission’s work is based on the understanding that parties generally want their problems solved cost effectively and efficiently and that this will often be best achieved through negotiated settlement. The purpose of the Recommendations set out in the Commission’s draft Report of March 2009 is to provide a selection of tools which can be used by all of the different participants in international arbitration proceedings. These tools are all designed to increase the prospects of parties to the proceedings being able to settle their disputes without the need to proceed through to the conclusion of arbitral proceedings.41

(e) Taking of Evidence before German Courts is Driven by the Courts’ Search for the ‘Formal Truth’

Apart from the absence of a cross-examination tradition, there is another core procedural principle underlying the German law on taking of evidence: the court’s task is not to search for the objective truth but for the formal truth (formelle Wahrheit). The court must deduce this formal truth solely from the briefs, documents and other materials which the parties have submitted to the court.43 This core principle is based on the idea that civil procedures serve the purpose of enforcing the private rights of the parties and that there is no public interest in determining facts ex officio which are the basis of a private dispute between the parties. The judge may therefore focus on his or her role as ‘manager’ of the proceedings and rely on the parties presenting to the court all facts which are favourable to them and their case.45 It is then the task of the judge to consider

39 See Queen Mary School of International Arbitration and PricewaterhouseCoopers (eds.), International Arbitration: Corporate Attitudes and Practices 2006, p. 2 emphasising that 69 per cent of the respondents indicated that a dispute resolution policy (that includes arbitration) helps to minimise the escalation of disputes; see also, the 2008 Study, both available at www.pwc.co.uk/eng/publications/international_arbitration_2008.html
41 See www.cedr.com/about_us/arbitration_commission/; the CEDR-Commission has conducted a consultation phase until August 2009 after which the final Report will be published.
42 See supra n. 13.
43 See A. Stadler in H.-J. Musielak, supra n. 20 at para. 138, Nos. 1, 2; A. Baumbach et al., supra n. 20 at para. 286, No. 13; D. Leipold in F. Stein and M. Jonas, supra n. 20 at para. 286, Nos. 22, 23.
44 See supra.
45 See I. Saenger, ZPO (2nd edn, 2007), Einleitung IV, No. 65.
and evaluate in a conscientious manner the circumstances which speak for and against the formal truth of a party’s factual allegation which he or she deems relevant for the decision of the dispute.

Two other principles related to the taking of evidence follow from this core maxim and may have an impact as to how German practitioners approach the conduct of an international arbitration.

First, the emphasis in German court proceedings is clearly on written evidence, i.e. contemporaneous documents. The authenticity of documents submitted to the court is generally assumed (sections 437, 439(3) of the German Code of Civil Procedure). There is no need to receive oral confirmation on this issue through additional witness evidence, unless the authenticity of the document is contested by the other side:

A civil law practitioner will be likely to present the tribunal with a neat set of documents well in advance of the hearing. Those documents will be considered self-authenticating, and counsel will use the hearing to draw the arbitrator’s attention to key provisions without any preliminary introduction by a witness.46

The substantial weight which German procedural law attaches to documentary evidence is also reflected in section 580, No. 7(b) of the German Code of Civil Procedure. That provision allows a claim for the resumption of proceedings in order to have a new trial in case one party finds a new document which would have allowed a more favourable decision. Such a claim may not be raised, however, where favourable evidence other than documents appears after the judgment has been rendered.

Secondly, there is no US-style pre-trial discovery in German procedural law. The German Federal Supreme Court has stated that the German law on the taking of evidence is based on the core principle that, absent a specific statutory basis, no party is under any obligation to make available to the other side documents and other materials necessary for that side to win its case.47 This is one reason why the taking of evidence is conducted by the court, not by the parties. Since 2001, the German Code of Civil Procedure contains a provision (section 142) which grants the courts the power to order the parties to the proceedings or third parties, ex officio and prior to the hearing, to produce documents to which one party has made reference in its briefs. However, it is generally agreed that this provision is not only an instrument for the taking of evidence but must also be considered as yet another tool for the efficient conduct of the proceedings by the court, allowing the judge to complete the file before him or her on its own initiative.48 Also, the travaux préparatoires for section 142 relate to the transfer of documents from other proceedings or third parties.

46 S. Elsing and J. Townsend, supra n. 13 at p. 61.
48 See supra.
142 have made it very clear that this provision does not change the generally accepted view that US-style documentary discovery is not compatible with German law and that it may even contravene German public policy. This view is reflected in the fact that Germany does not provide judicial assistance under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters in foreign proceedings related to documentary pre-trial discovery. It is for all these reasons that German courts handle section 142 very restrictively. Fishing expeditions known from pre-trial discovery procedures are therefore not allowed under that provision. This restrictive approach is reflected in the view maintained by German commentators that section 142 does not allow the court to order the production of a ‘complete collection of files’ to which one side has made reference in its brief.

How does this status of German law relate to international arbitration practice? The trend in international arbitration is not to follow a specific approach in favour of the ‘formal’ or ‘objective’ truth. Rather, the procedural discretion left to the arbitrators under modern arbitration laws and rules and the absence of detailed rules on the approach to be taken by the tribunal vis-à-vis the finding of the truth allows them to adopt a pragmatic, synthesis-like approach, weighing the need to find the truth with the need for a cost- and time-efficient conduct of the proceedings. Given that arbitral awards are final and not subject to appeal, the natural tendency of international arbitrators will be in favour of a broader approach towards fact-finding and taking of evidence, unless they are operating in a ‘fast-track’ scenario. This does not mean, however, that international arbitrators, no matter whether they are from Germany or from other jurisdictions, favour full-fledged US-style ‘discovery’. As to the production of documents, the best practice standard reflected in article 3(3) of the IBA Rules


51 Germany has made a reservation under Art. 23(1) of the Hague Convention, see s. 14(1) of the German statute transforming the Convention into German law, BGBl. 1977 I, p. 3103.


53 R. Greger in R. Zöller, supra n. 6 at para. 142, No. 1 in fine; A. Baumbach et al., supra n. 20 at No. 7 in fine; see also, W. Uhlenbruck, ‘Gerichtliche Anordnung der Vorlage von Urkunden gegenüber dem Insolvenzverwalter’ in (2002) Neue Zeitschrift für das Recht der Insolvenz und Sammlung 589 at p. 590.


56 See P. Hobeck, V. Mahnken and M. Koebke in (2008) International Arbitration Law Review 84 at p. 87; ‘A company having to chose between a highly detailed and well founded decision from a neutral third party in the course of prolonged and costly proceedings and a less perfectionist but still well argued decision in less costly and lengthy proceedings of a more summary nature will frequently opt for the second of these two alternatives’; see also, K.P. Berger, ‘The Need for Speed in International Arbitration: the New Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS)’ in (2008) 25(3) J Int’l Arb. 595.
on the Taking of Evidence, especially the need for any Request to Produce under that article to be sufficiently specific and narrow and to pass the ‘relevance’ and ‘materiality’ test, requires that the tribunal adopts a restrictive approach towards the production of documents in international arbitration. However, the actual practice under article 3 of the IBA Rules varies considerably, depending on the background of the arbitrators and the specificities of the individual case. No matter what approach is taken by any given arbitral tribunal, it must be emphasised that absent a special agreement to the contrary by the parties, there is no such thing as (document) ‘discovery’ in international arbitration!

III. FIVE CORE PRINCIPLES OF SUBSTANTIVE (COMMERCIAL) LAW

(a) The Contract Constitutes an ‘Organism’ of the Parties’ Legal Rights and Duties

Core values and key commercial principles are often shaped and influenced by cultural differences. Such differences may extend to the meaning and understanding of such essential concepts as a contractual agreement. Given that contractual disputes play a dominant role in international commercial arbitration, these differences may well have a significant impact on counsel’s and/or arbitrators’ approach to the resolution of such disputes. In fact, different legal systems have different views on the meaning, nature and raison d’être of a contract.

German contract law theory has its origin in the classical contract theory which has its roots in Roman law and is dominated by technical rules and strives for predictable and precise solutions. This classical theory regards a contract primarily as a formal deal (pactum, contractus), i.e. as a mutual promise that reflects the intentions of the parties, binds both sides and forms the basis of legal rights and duties of the parties. Thus, the classical doctrine is characterised by the dominance of the principle of sanctity of contracts (pacta sunt servanda). Japanese and Arabic parties, on the other hand, tend to look behind the formal written document and to focus on the relationship between the two sides that is opened by the signing of the contract and flexible and open to modification. In these

59 See R. Zimmermann, supra n. 58 at p. 716; C. Fried, Contract as a Promise (1981), p. 117: ‘A contractual regime must maintain the integrity of bargains, and this means not reversing the allocation of risks on which the parties evaluated their bargains when they made them. Bargains are struck and their prices valued on the assumption that they will be kept’; see also, J.L. Brierly, Principles of the English Law of Contract and of Agency in its Relation to Contract (19th edn, 1945), p. 4: ‘We may … define the law of Contract as that branch of our law which determines the circumstances in which a promise shall be legally binding on the person making it … A Promise in fact connotes an Agreement between the parties to it’.
cultures, the contract is regarded as open-ended, the parties rely more on oral commitments and permanent accommodations than on written and signed documents.

However, even though German contract law is known for its rigorous conceptual analysis, it is generally acknowledged in contemporary German legal doctrine that a purely ‘systematic’ or ‘formalistic’ view of the contract provides only the starting point for any legal analysis in this area. Based on the statutory provisions on the construction of contracts (sections 133, 157 of the German Civil Code), this analysis tends to look behind the formal wording of the contract. It takes account of prior negotiations between the parties and the circumstances surrounding the conclusion of the contract, i.e. the ‘context’ in which the contract is located, as well as the subsequent conduct and the interests of the parties underlying the transaction. The contractual relationship is regarded as a complex ‘organism’ or ‘organisation’ of the legal rights and duties of the parties and as a means to achieve a certain economic objective through the allocation of commercial and other risks which are related to that transaction.

Looking at a contract as a means to achieve a certain goal necessarily involves a time element. The time aspect is of particular importance for long-term, ‘relational’ contracts. For these contracts, German legal doctrine provides legal means such as the provision on clausula rebus/frustration in section 313 of the Civil Code (Wegfall der Geschäftsgrundlage). That provision is geared towards striking the delicate balance between the rigid but core principle of pacta sunt servanda and the need to achieve just and fair results in exceptional cases. Such cases involve scenarios in which the economic framework of the transaction has changed dramatically so that performance has become excessively onerous for one side (‘economic impossibility’) or in cases of classical force majeure events such as strikes, riots, natural disasters or terrorist attacks. In these cases, section 313 allows the court to adapt the contract to the changed circumstances. Even though it is not expressly stated in section 313, modern contract doctrine maintains that before the court may interfere, the parties are under a legal duty to renegotiate their contract with a view to adapt it to the changed circumstances. In cases where such adaptation is not possible or not acceptable for one side, that party may terminate the contract.

62 E.A. Kramer, in Münchener Kommentar zum BGB (5th edn, 2006), Vor para. 241, No. 13 et seq.
63 See the contributions in F. Nicklisch (ed.), The Complex Long-Term Contract: Structures and International Arbitration (2002).
This balance between the notion of sanctity of contracts and the striving for justice and fairness in individual cases and the legal consequences of such a process are also reflected in Articles 6.2.1, 6.2.2 and 6.2.3 of the UNIDROIT Principles of International Commercial Contracts (UPICC). Statements of international arbitrators reflect adherence to the fundamental guideline for the performance of this task as laid down in Article 6.2.1 UPICC: the sanctity principle must remain the rule and the assumption of economic impossibility is the exception, reserved for truly exceptional cases:

Extreme instances test the very fabric of the myriad of contracts, which are part of the foundation of international economic exchanges. It is precisely at the extremes that the test is meaningful. An international tribunal cannot disregard legitimate contractual expectations without risking harm to this fabric. Arbitrators have no more business sacrificing legal principle to perceived factual realism than a national court can disregard contractual entitlements because it has the impression that the debtor cannot factually meet its obligations.

Under German law, the filling of gaps in a contract may also be achieved through the principle of ‘supplementary construction’ (ergänzende Vertragsauslegung) under section 157 of the German Civil Code. That doctrine is based on an understanding of the contract as a source of legal rights and duties of the parties and allows the court to supplement the contract in cases where no legal rules are available to fill a gap. In filling the gap, the court must determine the ‘hypothetical will of the parties’ by considering the mutual interests of both sides and by asking itself what the parties would have reasonably written into their contract had they considered that particular case or circumstance when

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66 See N. Nassar, supra n. 61 at p. 201: ‘Tribunals have adopted a reservation that the rebus sic stantibus doctrine, though general in the sense that it is applicable regardless of a clause to that effect, still should be regarded as an exception to the sanctity rule’ (footnote omitted).

67 UPICC, Art. 6.2.1 states: ‘Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship’.

68 See e.g., Partial Award of 21 March 1996 of the Hamburg Chamber of Commerce, (1997) Yearbook Commercial Arbitration 35 at p. 41: ‘the financial straits of the [seller's supplier] and its need for cash are not an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness. Rather, the risk related to the supply is to be borne by the seller, also if the circumstances become more onerous’; ICC Award No. 8486, (1999) Yearbook Commercial Arbitration 162 at p. 168: ‘the defendant … indicated that it was aware of these commercial risks in the relevant trade. In its fax … to the claimant it made clear that it was perfectly aware of the unstable commercial situation … and that it always had to consider that the situation can change suddenly … With respect to these unstable circumstances, which were known to the defendant, it does not seem maintainable that the defendant wants to shift the commercial risks related thereto onto the claimant’.


70 See BGHZ 9, 273; 77, 301 et seq.; BGH (1976) Neue Juristische Wochenschrift 695; J. Ellenberger, in O. Palandt, supra n. 64 at para. 157, No. 2.
concluding their contract. As broad as this principle may appear at first sight, it must not be misunderstood as providing the court with a blank cheque to rewrite the contract for the parties. In applying the principle, the court must always respect the basic notions of party autonomy and *pacta sunt servanda*. The application of the principle of supplementary construction may therefore never lead to a result that is clearly contrary to the actual will of the parties as reflected in the contract (e.g. by rendering the contract null and void), or that exceeds the framework of the original contract, e.g. by changing its purpose, scope or economic equilibrium. If exercised within the boundaries of these fundamental principles, the notion of supplementary construction may provide the necessary flexibility in cases where the complexity of the transaction and the commercial interests of the parties have caused them to move away from the constraints of domestic law and have led to the creation of a self-regulatory contractual arrangement. Such a scenario is typical for many international commercial transactions that come before international arbitrators.

(b) **General Principle of Good Faith Provides a Behavioural Standard in Contract Law**

The German legal system as a whole is governed by the general principle of good faith (*Treu und Glauben*). Most European civil codes contain a general good faith provision which has its origin in the Roman principle ‘*bona fide*’. For private law, the principle is reflected in section 242 of the German Civil Code. That provision requires every party to exercise its rights and perform its duties in accordance with good faith, taking into account the relevant dealings of the trade concerned. The English *Athens International Airport* decision reveals that even high profile international business disputes related to large infrastructure projects may be dominated by the maxim of good faith and the legal principles and rules derived from it which are being invoked by both sides to support their claims and/or defences.

The problem with section 242 is that it is a blanket clause. It is extremely abstract and does not provide for legal consequences in cases where the provision is not complied with. Rather than providing concrete rights and duties, good faith must be regarded as a behavioural standard according to which contractual relationships should be conducted: the contract is and must be observed as a

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71 See BGHZ 9, 273 at 278; BGHZ 84, 1 at 7; BGHZ 90, 69 at 77; BGHZ 111, 214 at 217; BGH (2005) *Neue Juristische Wochenschrift–Rechtsprechungsreport* 687 at p. 690; J. Busche, in Münchener Kommentar zum BGB, supra n. 62 at para. 157, No. 56 et seq.
The parties are under an obligation to do all that is possible to further their contractual relationship, even if this is contrary to their immediate short-term interests. Objective values such as reliability, loyalty, fairness, reasonableness and good conduct are essential elements of the behavioural standard required from contract parties by the principle of good faith.

German courts and German legal doctrine have developed a whole array of principles and rules based on groups of cases in which the principle has previously been applied. These groups of cases serve to establish a system of specific good faith rules. It is this system which makes the general principle of good faith workable in everyday legal practice. It is by virtue of this function as the originator of individual rules and principles that section 242 has assumed the function of a ‘super-provision’. Trying to provide only a rough overview of these rules and principles would be a hopeless undertaking. Suffice it to state here that the principle of good faith and the legal rules derived from it can have a dual effect on the exercise of the parties’ rights. On the one hand, the principle may serve to supplement the contractual rights and duties of the parties, e.g. by enabling the judge or arbitrator to develop additional, ‘implied’ legal duties, such as an ancillary duty to take care of the assets of the other side, a duty to inform the other side about events that might be of significance for that side, or a duty to provide correct information if the other side has asked for that information. On the other hand, the principle of good faith serves as a means to restrict the exercise of legal rights if such exercise appears as unfair or unjustified under the given circumstances of a case. An example for this ‘limiting function’ of the principle of good faith is the prohibition on contradicting oneself in one’s own legal conduct (venire contra factum proprium), the principle of forfeiture of rights after expiry of a certain amount of time during which the right has not been invoked by the party possessing the right (Verwirkung), and the prohibition on exercising rights which have been acquired in an unlawful way (nemo auditur propriam turpitudinem allegans).

English lawyers have always denied that such a general principle of good faith exists. They consider it as a genuine right of every party to pursue its own interests in exercising its rights. The House of Lords has decided that English law does not recognise and enforce obligations to negotiate in good faith. Also, English lawyers tend to think that the application of such a broad principle like good faith injects far too much insecurity into any adjudication process. This view

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76 N. Nassar, supra n. 61 at p. 143.
77 Ibid. p. 168.
78 M. Schmidt-Kessel in H. Pritting, G. Wegen and G. Weinreich (eds.), BGB Kommentar (3rd edn, 2008), para. 242, Nos. 9 and 12: good faith as an ‘instrument for transporting external (social) values’.
79 See M.W. Hesselink, supra n. 74 at p. 474 et seq.
81 See for a discussion of these principles H. Heinrichs in O. Palandt, supra n. 64 at para. 242, No. 38 et seq.
is reflected in the English Law Society’s Report on *England and Wales: the Jurisdiction of Choice*, which states, in its Preface, that ‘English commercial law provides predictability of outcome, legal certainty and fairness. It is clear and is built upon well-founded principles, such as the ability to require exact performance and the absence of any general duty of good faith’.

In reality, however, the principle of good faith does not allow free-floating equitable (‘ex aequo et bono’) decision-making by the German courts. The German Federal Supreme Court has made it clear that the thresholds for correcting the strict application of the law in order to achieve justice in individual cases through the standard of good faith are very high. Maintaining these high thresholds is meant to preserve the striving for legal certainty as the overriding goal of adjudication by the courts. It is for this very reason that the concept of *clausula rebus* embedded in section 313 of the German Civil Code and the principle of supplementary construction under section 157, which both have their origin in the principle of good faith, are applicable only in exceptional, extreme cases. Many of the decisions reached with this approach are similar to those which English courts would have reached. English law tends to achieve many of the results reached by German courts under the umbrella of good faith through the doctrine of implied duties, estoppel, unconscionability or related doctrines. Also, under the increasing influence of EU law, the general principle of good faith is slowly finding its way into the English legal system.

(c) German Law has Long Since Developed into a Case-Law System

It is a common misconception that courts in civil law jurisdictions apply statutory law while common law courts apply case law. In view of the incompleteness of the German Civil Code there are substantial areas of the law in which ‘the statutory origin has been overlaid by a mass of case law.’ ‘This development is an indication of the gradual convergence of common law and civil law methods, especially in the area of contract law.’ German courts are used to dealing with case law and have long since developed an independent methodological approach which includes issues such as retroactive effect of court decisions, protection of

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84 See BGHZ 38, 61, 63; BGH (1985) *Neue Juristische Wochenschrift* 2579 at p. 2580.
85 M. Schmidt-Kessel, *supra* n. 78 at No. 20.
86 See *supra* for these principles.
The International Arbitrator’s Dilemma

legitimate expectations of the parties, and distinguishing of precedents.91 The distinction between common law case law as a formal and binding source of law and civil law case law as a mere source for the recognition of the law (Rechtserkenntnisquelle) is increasingly blurred. It is generally acknowledged today that the task of the civil law judge is not confined to the logical deduction of principles and rules from statutory law (‘mechanical jurisprudence’) but includes the task of creating new law,92 often under the guise of the application of the maxim of good faith.93 Similarly to common law, civil law case law applies by virtue of its persuasive authority.94 The lower courts have to take the case law of higher courts into account in their decision-making and may not deviate from these precedents without compelling reason.95 Thus, the rules and principles developed by the highest courts in Germany and other civil law jurisdictions may be regarded as ‘a piece of genuine statutory law’.96 On the other hand, the case law method of the common law is not considered as a mere means for the creative creation of law by the judge but as a tool for the empirical-inductive finding of the law from the nature of things.97

Thus, German and other civil lawyers, like their common law counterparts, are used to dealing with case law. It is therefore not surprising that German lawyers stated 25 years ago: ‘Case law is our destiny’.98

97 G. Radbruch, *Der Geist des Englischen Rechts* (1946), p. 46; C.K. Allen, *Law in the Making* (3rd edn, 1939), p. 242 et seq.; see also W. Blackstone, *Commentaries on the Laws of England* (15th edn, 1809), vol. I, p. 70: ‘Upon the whole … we may take it as a general rule, that the decisions of courts of justice are the evidence of what is common law in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future’.
98 F. Gamillscheg, ‘Die Grundrechte im Arbeitsrecht’ in (1964) 164 *Archiv der civilistischen Praxis* 385 at p. 445; see also G. Raifbruch, supra n. 97 at p. 15.
(d) German Commercial Law is Based on the Presumed Professional Competence of Merchants

German commercial law is based on the ‘subjective system’. Rather than following the example of sections 1, 633 of the French Code de Commerce and focusing on the nature of a particular transaction as ‘commercial’ (acte de commerce), the German Commercial Code applies to the dealings of ‘merchants’ (Kaufleute). Some rules apply if only one party to a contract is a merchant (b2c transactions), others only if both sides are merchants (b2b transactions). The provisions in the Code, especially those for b2b transactions, are characterised by a substantial reduction of legal protection as compared to the provisions of general contract law contained in the German Civil Code. The underlying rationale for that regulatory approach is that merchants are considered to be able to take care of their own affairs due to their presumed professional competence.99

This approach of German commercial law is in line with transnational business law. In a long line of arbitral awards, ICC arbitrators held that there is a presumption for the professional competence and equality of the parties to an international commercial contract. Parties to international b2b transactions may therefore not argue that they were not aware of the significance of the contractual obligations to which they have agreed.100

This presumption has a significant impact on the way in which arbitrators distribute risks in international contract disputes, e.g. in the area of hardship or clausula rebus discussed above:

As a general rule, one should be particularly reluctant to accept [the doctrine of rebus sic stantibus] when there is no gap or lacuna in the contract and when the intent of the parties has been clearly expressed … Caution is especially called for, moreover, in international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely.101

(e) The German Law on Damages is Based on the ‘Principle of Full Compensation’

The German law on damages is based on the principle of full compensation. Section 249 of the German Civil Code provides that a party that has to pay damages must restore the situation that would have existed if the incident that caused the damage had not happened. This means that the sole purpose of damages is to make good for the disadvantages caused by the damage to the injured party.

This principle has two important consequences related to the amount of damages to be paid. On the one hand, the damaging party has to indemnify the

100 See TransLex-Principle I.2.3 at www.trans-lex.org/909000 and the awards and doctrine reproduced there.
damaged party for all consequences caused by the damage, irrespective of the degree of fault and the fact that having to pay the damage exceeds its economic capability (principle of ‘total reparation’). On the other hand, the principle of full compensation provides not only the minimum, but also the limits of the German law on damages. Damages may not lead to an unjust enrichment, i.e. overcompensation of the party that has suffered the damages because that party gets more than it deserves to eliminate the consequences of the damage. Damages may therefore not serve to penalise the party that has caused the damage. The awarding of punitive damages is contrary to the basic principle of full compensation and therefore contrary to German public policy.102

The parties may, however, include in their contract specific provisions on the calculation of damages, such as liquidated damages clauses or penalty clauses. Under German law, as under many other civil law systems, penalty clauses are valid and subject to a special legal regime (section 339 et seq. of the Civil Code) which allows a court to reduce unreasonably high penalties (section 343). For b2b contracts, section 348 of the German Commercial Code declares section 343 of the Civil Code inapplicable. However, it is generally agreed that even in a b2b context, the principle of good faith may require a reduction of an unreasonably high penalty.103 Penalty clauses that are contained in standard forms are void under section 309, No. 6 of the German Civil Code. Liquidated damages clauses contained in standard forms are valid only if the sum does not exceed the damage that can typically be expected in the cases that fall within the scope of the clause, or if the clause expressly allows the other side to prove that no damage has arisen in a certain case or that the damage is substantially lower than the amount agreed upon in the liquidated damages clause.

IV. CONCLUSION

While it is true that international arbitrators must possess skills which are not linked to a specific legal system (sensitivity, proactivity and even-handedness),104 the legal system of their home jurisdiction provides an important benchmark for the attitude with which they approach the conduct of any arbitration. The 10 core values and principles discussed above provide the framework for the legal background against which German arbitrators tend to approach procedural and substantive issues that may arise in international arbitration proceedings. On the procedural side, the main characteristic features of this legal background are cost- and time-efficiency, as well as a hands-on approach by judges or arbitrators (‘managerial judging’),105 in close coordination with the parties, in the conduct of the proceedings. On the substantive side, the main characteristics are the courts’

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104 C. Brower and J. Sharpe, supra n. 54 at p. 345.
105 J. Langbein, supra n. 24 at p. 823.
commercial approach in the awarding of damages and their willingness to strike a balance between rigour in the application of fundamental legal principles like *pacta sunt servanda*, i.e. legal certainty, and the striving for results which are just and fair under the circumstances of the individual case and in light of the commercial interests of the parties and the risk distribution as agreed upon by the parties in their contract. These are qualities which are essential for the resolution of international business disputes by international arbitral tribunals.