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## DON'T DROP THE CLIENT: THE SEESAW RULE OF TCF

*Audi alteram partem*, Latin for “hear the other side” or “let the other side be heard,” is a cornerstone of natural justice requiring that no person should be judged without a fair hearing, in which they have an opportunity to respond to allegations against them.

The *audi alteram partem* rule is a fundamental principle of justice that plays a critical role in commercial disputes, including those between service providers and their clients.

In the context of contractual disputes between a company and a client, this means that before taking adverse action against a client (e.g. declaring a default or denying a claim), the client must be given an opportunity to present their side of the story.

The rule serves essential purposes:

- Preventing arbitrary decisions by ensuring decision makers consider all relevant information.
- Protecting individual rights by allowing affected persons to challenge allegations.
- Ensuring accurate outcomes through consideration of competing evidence.
- Maintaining public confidence in institutions and dispute resolution processes.



## Application in Company/Client Disputes:

### Before Decision Making

The *audi alteram partem* rule requires that before a company makes a decision prejudicially affecting a client's rights, the client must be:

1. Notified of the proposed action and the grounds for it.
2. Given an opportunity to make representations or respond to allegations.
3. Allowed to present their version of events or any mitigating circumstances.

For example, where a bank seeks to close a client's account based on allegations of irregular transactions or reputational risk, the rule would require the bank to notify the client of the reasons and allow them an opportunity to respond before finalising the closure.

### During Dispute Resolution

When a contractual dispute proceeds to formal resolution whether through litigation, arbitration, or internal dispute mechanisms, the rule requires that:

- Both parties have equal opportunity to present their case.
- Each party can respond to the other's submissions.
- The decision maker considers all representations before reaching a conclusion.

It is Important to note, the *audi* rule does not guarantee that a party will succeed in the dispute. An adjudicator does not breach the rule by rejecting one party's story in favour of the other's. Where both parties are heard and the adjudicator favours one party's submissions, with reasons given, there is full compliance with the rule.

## Constitutional and Legislative Framework

The *audi alteram partem* rule is firmly embedded in our Constitution:

### Constitutional Foundation

The rule is engrained within the constitutional right to just administrative action, section 33 of the Constitution of the Republic of South Africa, 1996, and given effect through the Promotion of Administrative Justice Act (PAJA), No. 3 of 2000. The Promotion of Administrative Justice Act (PAJA).

Where a company performs a function that constitutes "administrative action," PAJA explicitly requires:



- Adequate notice of the nature and purpose of the proposed action.
- A reasonable opportunity to make representations.
- Clear notice of any right of review or appeal.

#### Exclusion of the Rule

The *audi alteram partem* rule is not absolute. It may be excluded where:

- Statute expressly or by necessary implication indicates otherwise.
- Urgent circumstances require immediate action (e.g. interim order freezing assets in fraud cases).
- Full application would defeat the purpose of the decision (e.g. tipping off suspects in AML investigations).

However, even where full application is initially impractical or impossible, the rule is ultimately applied, albeit later, to conclude the dispute. It is also unreasonable not to apply the rule, even if it is not mandated by legislation or regulators; "if not, why not?".

#### Bank Account Closures and Terminations

The *audi* rule is particularly relevant to bank account closures. Currently, South African banks often rely on the Code of Banking Practice, which only requires "sufficient notice" before termination. This standard has been criticised because it fails to ensure procedural fairness. It has been recommended that the Conduct of Financial Institutions (COFI) Bill address this by incorporating stronger protections, including the right to a fair hearing grounded in the *audi* principle.

Where a bank closes an account based on vague grounds like "reputational risk" without giving the client an opportunity to respond, this ordinarily breaches the *audi* rule and renders the decision procedurally unfair.

#### Credit Agreements and the National Credit Act

The National Credit Act 34 of 2005 has modified the application of common law principles and is cognisant of the *audi* rule. In *National Credit Regulator v Standard Bank of South Africa Limited (44415/16) [2019] ZAGPJHC 182; 2019 (5) SA 512 (GJ); [2019] 3 All SA 777 (GJ)* the court considered the common law right of set-off. The *audi* rule requires that affected consumers be afforded an opportunity to arrange payment terms before banks apply set-off, a requirement that banks previously did not observe.



### Practical Implementation:

7 Steps, to ensure compliance with the *audi alteram partem* rule in disputes with clients, companies should:

1. Provide clear notice of proposed adverse actions and the grounds for them.
2. Allow reasonable time for clients to prepare and submit representations.
3. Disclose prejudicial information to the client before relying on it.
4. Consider all representations genuinely before deciding.
5. Provide reasons for the final decision.
6. Document the process to demonstrate procedural fairness if challenged.
7. Train staff on the requirements of procedural fairness and the audi rule.



### The Audi Alteram Partem See-Saw

- On one side sits the company (the Bank, the Insurer).
- On the other side sits the client.

The goal of the see-saw is not for one side to be stuck in the air while the other touches the ground. The goal is alternating elevation, that is, a state of equilibrium (fairness) where both sides are accommodated, allowing for a fair and stable interaction.

The Seesaw in an Unfair Dispute (Without the Rule):

Without the application of the *audi alteram partem* rule, the see-saw is broken. The company has all the weight and all the leverage. When a dispute arises (e.g. The company suspects fraud or wants to close an account), the company simply digs in and doesn't let go or simply lets go and walks away.

The Result: The company side stays firmly on the ground or just abandons the client (its decision is implemented immediately), while the client side crashes



down hard or is left hanging aimlessly in the air. The client has no leverage and no way to influence the position of the board. They are subjected to the force of the company's unilateral decision. This represents arbitrary action and procedural unfairness.

The Seesaw in a Fair Process (Applying the Rule):

The rule acts as the central pivot and the balanced seating of the see-saw. It ensures that the mechanism works properly.

1. The Notice (The First Push): The company wants to act (e.g. declaring the client in default). It does not just drop its side. Instead, it pushes gently to communicate its position. This push tells the client, "I am moving; here is why I am moving, and you need to respond to maintain the balance."

*This is the company providing notice of the proposed action and the grounds for it.*

2. The Response (The Counterweight): The client, now aware of the company's position, can lean into their own side of the see-saw. They present their version of events, their evidence, or their explanation.

*This is the client's opportunity to be heard and make representations.*

3. The Equilibrium (Fair Deliberation): For a moment, the see-saw moves up and down as both sides present their arguments. The company sees the weight of the client's case; the client sees the weight of the company's concerns. Neither side has unilaterally crashed to the ground.

*This is the decision making process considering all representations before reaching a conclusion.*

4. The Final Decision (Coming to Rest): After hearing both sides, the decision maker (the company, or court/ombud) must make a call. Someone will eventually step off, and the see-saw will come to rest. It might rest with the company (upholding their initial concern) or the client (rejecting the complaint).

*Note, even if the final decision favours the company, the process was fair. The client was not simply dropped; they had a chance to shift the balance. This satisfies the requirement of procedural fairness.*



Failing to apply the *audi alteram partem* rule is not just a legal misstep; in the competitive commercial environment, it is often a reputational disaster waiting to happen.

In this social media age, a single client's story can go viral, regulators publish enforcement actions for public consumption; the reputational damage from treating clients unfairly can far exceed the monetary cost of the original dispute.

### **Specific Types of Reputational Risk:**

#### 1. The "Bully" Brand Perception (Social Media Firestorm)

When a client is cut off, blacklisted, or debanked without explanation or a chance to respond, their natural reaction is to share their story.

- The Risk: The company is painted as a corporate bully that tramples on the little guy. In an era of social justice and consumer activism, narratives of "the bank ruined my life without even asking me why" gain significant traction.

#### 2. The "Guilty Until Proven Innocent" Stigma

The *audi alteram partem* rule presumes that everyone deserves a chance to explain. Failing to apply it signals to the market that the company operates on a presumption of guilt.

- The Risk: Potential and existing clients lose trust. If clients believe the company might freeze their assets or terminate their policy based on a mere allegation (without hearing their side), they will take their business to a competitor who promises procedural fairness.

#### 3. Erosion of Stakeholder and Investor Confidence

Reputational risk is not only about customers; it is largely about the money behind the company.

- The Risk: Institutional investors and shareholders are increasingly focused on ESG (Environmental, Social, and Governance) criteria. Governance specifically looks at how a company treats its stakeholders and whether its decision making is ethical and fair.

#### 4. Amplified Regulatory Scandal (The Name and Shame Effect)



When a company ignores *audi alteram partem* and a client complains to a regulator (e.g. The Ombud or the FSCA), the dispute becomes public record.

- The Risk: Regulatory bodies often publish their findings. If a ruling finds that a company acted in a “procedurally unfair” or “arbitrary” manner, this becomes a permanent stain on the company's record.

The company gains a reputation as a repeat offender or an organisation that needs regulatory oversight to be fair, potentially triggering more frequent audits.

#### 5. The Legacy of Bitterness (Client Churn and Negative Marketing)

A client who was not heard does not just walk away silently; they become a detractor.

- The Risk: Detractors actively dissuade others from using the service. They will warn friends, family, and colleagues: “Whatever you do, don't use [Company X]. If something goes wrong, they won't even listen to you.”

It costs significantly more to acquire a new client than to retain an existing one. Failing to apply *audi* creates unnecessary churn and forces the company to spend more on marketing to overcome the negative word of mouth.

#### 6. Media Portrayal as a Robot (Inhumane)

Companies already struggle with the perception that they are faceless, algorithm-driven machines, treating customers as numerical inputs.

- The Risk: When a company applies a decision without a hearing, it reinforces the narrative that there are no humans behind the desk, just hard rules. A story about a bank repossessing a widow's house without responding to her letters (ignoring her side) is a media gift to journalists looking for a scandal.

The company becomes the poster child for corporate greed or incompetence, a label that can stick for years.

#### 7. Increased Scrutiny and Distrust from Partners

Companies rely on partners and brokers to bring them business.



- The Risk: If brokers perceive that their clients are being treated unfairly (i.e. blacklisted/terminated without a hearing), they will stop referring business to that institution. They do not want their own reputation tarnished by association.

### **Conclusion**

In the court of public opinion, process is product. If a client feels the process was rigged because they were never heard, they will destroy the company's reputation with the same dedication as if the product itself had failed. Applying the *audi alteram partem* rule is not just about legal compliance; it is a critical component of reputational risk management.

Let Cyclopedic Consulting help you embed the *audi* principle in your dispute resolution processes.

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