

ARBITRATION AND HUMAN RIGHTS

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1. This contribution is drawn from a speech given in Vienna on 4 April 2009 at a conference jointly organized by the Young Austrian Arbitration Practitioners and the Young Arbitrators Forum of the ICC. It is partly based on a previous and more substantial article published in the ASA Bulletin¹.

The topic here discussed is the impact of Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or the "Convention") on arbitration, with a focus on the possible impact of this provision on the validity or effectiveness of the arbitration agreement in case of impecuniosity of the parties, in practice of the claimant.

2. Two preliminary observations should be made.

First the Convention does not define its scope of application in relation to arbitral proceedings. Therefore, this question can only be determined by way of interpretation and analysis of the case law.

¹ S. Besson, Arbitration and Human Rights, ASA Bul. 3/2006, pp. 395 - 416.

Secondly, the Strasbourg Court, and previously the Commission, have not to my knowledge addressed the issue of the relationship between - voluntary - arbitration and human rights in a comprehensive manner. There are several decisions relating to arbitration, but their exact meaning is not always easy to identify². In addition, this case law does not appear always coherent.

3. Art. 6 (1) ECHR establishes different procedural rights³, in particular:

- the right of access to court;
- the right to an independent and impartial tribunal;
- the right to present one's case, including the right to be heard, the principle of equal treatment and the right to obtain a reasoned decision;
- the right to obtain a decision within a reasonable time.

4. The relationship between arbitration and these procedural rights can be analyzed from different perspectives.

I will limit myself to addressing four of them, three being rather uncontroversial and one more controversial. I will then discuss specifically the issue of impecuniosity and its impact on the arbitration agreement.

5. First, an agreement to arbitrate is permissible under the European Convention, provided it was not reached under "constraint"⁴. A possible interesting question is whether the concept of "constraint" simply refers to ordinary contract law, or whether it is a specific notion to be defined on the basis of uniform and international standards.

² See S. Besson, *op. cit.*, p. 407 ff for excerpts of the case law.

³ S. Besson, *op. cit.*, p. 397.

⁴ *X v. Germany*, Application N° 1197/61, DR 8, p. 68; *Deweert v. Belgium*, Series A, N° 35, p. 25, para. 49.

In the second case, "constraint" could become an additional defense in some cases to contest the validity of the arbitration agreement.

6. Secondly, it is not disputed that article 6 (1) ECHR is fully applicable to compulsory arbitration, i.e. arbitration imposed on the parties by law⁵. In such a case, arbitration is just another name for court litigation. Article 6 (1) ECHR applies in a compulsory arbitration even if the parties had the right to choose their arbitrators⁶.

This principle is apparently clear but the concept of compulsory arbitration may be uncertain in some cases. Typically, in sports-related disputes, arbitration is normally not imposed by law, but it is very often imposed on the athletes by their Federation or by the International Olympic Committee. It is not "compulsory" but "forced" arbitration.

Interestingly, this question was echoed in an important decision of the Swiss Federal Tribunal, which decided that the possibility to waive the right to challenge an international award in Switzerland under Art. 192 PILS was not opposable to the athlete; in that context the Swiss Federal Tribunal stated that this inopposability was all the more justified in the light of the right of access to justice resulting from Art. 6 (1) ECHR⁷.

⁵ Court, 24 June 1986, *Lithgow et al. v. United Kingdom, Bramelid and Malmstrom v. Sweden*, Applications N° 8588/79; 8589/79; DR 38, p. 18-41.

⁶ In *Bramelid and Malmstrom v. Sweden*, the commission held that recourse to arbitration was compulsory and that the guarantees set forth in Article 6 (1) of the Convention were to be respected, even though the applicants were entitled to appoint their arbitrator (paras 13 and 32).

⁷ ATF 133 III 235: "*Cette conclusion s'impose avec d'autant plus de force que le refus d'entrer en matière sur le recours d'un athlète qui n'a eu d'autre choix que d'accepter la renonciation au recours pour être admis à participer aux compétitions apparaît également sujet à caution au regard de l'art. 6 CEDH*".

7. Thirdly, it is not disputed that article 6 (1) ECHR is applicable to court proceedings related to arbitration⁸. A court of a contracting State requested to appoint or to challenge an arbitrator or to review an arbitral award is hence bound by the Convention. In that respect, the Convention differs from the Lugano Convention and from the Brussels Convention, now the EC Regulation, which exclude arbitration as a whole from their scope of application and also exclude court proceedings specifically related to arbitration⁹.
8. A much more controversial issue is whether article 6 (1) ECHR is directly applicable before the arbitral tribunal? A number of scholars have submitted that article 6 (1) ECHR is not directly applicable before the arbitral tribunal¹⁰.

Without entering into all the debate, the most serious argument for the non-applicability of article 6 (1) ECHR before the arbitral tribunal is in my opinion derived from the structure of the Convention.

This Convention is only directed at the contracting States. Under article 1, the *contracting States* shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.

⁸ R. Briner/F. von Schlabrendorff, Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration, *in: Liber Amicorum Karl-Heinz Böckstiegel*, p. 89-109; Ch. Jarrosson, *L'arbitrage et la Convention européenne des droits de l'homme*, Rev. arb. 1989, p. 587-588; J.-F. Poudret/S. Besson, *Comparative Law of International Arbitration*, 2nd ed., Sweet & Maxwell Ltd, London, 2007, p. 67 N. 89.

⁹ Article 1 (2) lit. d of the EC Regulation N° 44/2001 reads as follows: "*1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*

2. The Regulation shall not apply to:

(...)

(d) arbitration."

On this provision, see generally J.-F. Poudret/S. Besson, *op. cit.*, p. 62-63 N. 84.

¹⁰ S. Besson, *op. cit.*, p. 400 ff.

Arbitrators are private individuals who cannot be considered as organs of the contracting States and who cannot trigger a liability under the Convention.

This argument is convincing, at least in the first place. It led many authors to conclude that article 6 (1) was only "indirectly" applicable before arbitrators¹¹.

However, another approach is also possible¹². Arbitrators are substitutes for judges and they exercise a public mission even if their intervention is conditional upon an agreement between the parties. In that respect, arbitrators, acting in this capacity, are not like any other private individuals because they have specific rights and duties, which are normally exercised by the courts.

Even more importantly, the liability of the State, on the one hand, and the scope of application of the Convention, on the other hand, are two different issues. To address the second question, it is more important to determine whether the procedural guarantees of article 6 (1) ECHR have been incorporated to the national legal system of the seat of the arbitration and whether they fall within the concept of procedural public policy. If this is the case, it can be reasonably submitted that arbitrators must directly apply these procedural guarantees.

This is however still a controversial debate and some courts do not seem to be ready to accept Art. 6 ECHR in the field of arbitration.

¹¹ Among others, Jarosson, *op. cit.*, p. 579-581; J.C. Landrove, European Convention on Human Rights' Impact on Consensual Arbitration, An *"Etat des Lieux"* of Strasbourg Case-Law and of a Problematic Swiss Law Feature, *Troisième Cycle des Facultés de droit de Berne, Fribourg, Genève, Lausanne et Neuchâtel*, Human Rights Recentered, ed. Samantha Besson/Michel Hottelier/Franz Werro, 2006, p. 99; J.-F. Poudret/S. Besson, *op. cit.*, p. 67 N. 87; *contra*, D. Poncet/A. Cambi Favre-Bulle, *Un arbitre indépendant et impartial aux termes de l'article 6 1° de la Convention européenne des droits de l'homme, un point de vue de la Suisse, in: Mélanges en l'honneur de Pierre Lambert*, Bruxelles 2000, p. 670 (submitting that article 6 (1) applies in arbitration).

¹² S. Besson, *op. cit.*, p. 402.

9. I now come to the specific question as to whether Article 6 (1) ECHR, more specifically the right of access to justice, can under certain circumstances affect the enforceability of the arbitration agreement on the ground of impecuniosity¹³.

In practice, the argument of impecuniosity is likely to be raised by a claimant, who will bring its claim before the courts and apply for legal aid, and who will explain that he cannot or can no longer afford the costs of arbitral proceedings.

Can a party rely on its own impecuniosity in order to avoid the arbitration? This question shows the tension between two potentially conflicting principles, the binding effect of the arbitration agreement, on the one hand, and the principle of access to justice, on the other hand. Which one should prevail and on which grounds?

10. Two preliminary observations can be made.

First, the impecuniosity or lack of sufficient funds to initiate arbitral proceedings is different from the bankruptcy of a party¹⁴. A party may lack the funds to finance the arbitral proceedings even if it is not technically in bankruptcy. Conversely, a party in bankruptcy may have enough funds to conduct an arbitration.

Secondly, the impact of impecuniosity on the validity or effects of the arbitration agreement is not only, and not even primarily an issue of human rights¹⁵. It is principally a contractual issue, bearing in mind that the arbitration agreement is a contract having a special (procedural) nature.

¹³ See, generally, K. Sachs, International Arbitration and State Sovereignty, "Protection of the Weak Party in Arbitration", *Revista Brasileira de Arbitragem*, 2007/vol. 13, pp. 98-106; G. Wagner, Impecunious Parties and Arbitration Agreements, *SchiedsVZ* 2003, pp. 206 et seq.; S. Kröll, The "Incapable of Being Performed" Exception in Article II (3) of the New-York Convention, *in Enforcement of Arbitration Agreements and International Arbitral Awards, The New-York Convention in Practice*, Gaillard/Di Pietro, Cameron May, London, 2008, pp. 323-353, p. 343.

¹⁴ K. Sachs, *op. cit.*, p. 100.

¹⁵ S. Kröll, *op. cit.*, p. 348-349.

The human rights or constitutional dimension is just an additional factor in the analysis, which may possibly influence the traditional approach based on contract law because the contract to arbitrate has a direct consequence on the parties' right of access to justice.

11. The impact of impecuniosity on the validity of the arbitration agreement was analyzed differently in different jurisdictions.
12. In England, a decision of the Court of Appeal of 1980 held that such impecuniosity had no bearing on the effectiveness of the arbitration agreement and did not render the arbitration agreement "incapable of being performed"¹⁶. The court stated, in particular, the following "*[t]he agreement only becomes incapable of performance (...) if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, I think, a circumstance of that kind*"¹⁷.

The analysis appears to be based purely on contract law (doctrine of frustration), and does not raise or see any constitutional problem¹⁸. At that time, UK was however not a party to the ECHR.

More recently, the House of Lords briefly mentioned, in passing, the impact of Art. 6 ECHR in the Fiona Trust case¹⁹.

¹⁶ *Paczy v. Haendler & Natermann* [1981] 1 Lloyd's Report 302 (CA) = YCA 1982, p. 445.

¹⁷ YCA 1982, p. 447.

¹⁸ S. Kröll, op. cit., p. 346.

¹⁹ House of Lords, *Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others (Appellants)* [2007] UKHL 40.

The argument was not related specifically to the impecuniosity of a party, but the statements of the House of Lords, are nevertheless worth being mentioned. The court stated the following: *"Mr Butcher [Counsel to a party] submitted that the approach to construction and separability adopted by the Court of Appeal infringed the owners' right of access to a court for the resolution of their civil disputes, contrary to art. 6 European Convention on Human Rights. I do not think there is anything in this point. The European Convention was not intended to destroy arbitration. Arbitration is based upon agreement and the parties can by agreement waive the right to a court"* (§ 20).

These are strong statements, which show that English courts would be reluctant to accept an argument of impecuniosity grounded on the Convention.

13. In sharp contrast, German courts have held that an arbitration agreement may become ineffective if the claimant cannot finance the arbitral proceedings²⁰.

Until 2000, the German Supreme Court held that the claimant had in such circumstances an extraordinary right to terminate the arbitration agreement²¹. In 2000, it released a new decision which went even further since it held that the arbitration agreement would become automatically "incapable of being performed" in case of impecuniosity²².

This case law was rendered in a domestic context but it does not suggest that the result should be different in an international context²³. Moreover, it is important to mention that the court explicitly referred to the constitutional and human rights dimension of the effective legal protection, which a party cannot be deprived of.

²⁰ BGHZ 51, 79, 82; NJW-RR 1994, 1214, 1215; S. Kröll, op. cit., p. 347; K. Sachs, op. cit., p. 103.

²¹ BGHZ 41, 104, 107 et seq.; BGHZ 51, 79, 82; BGHZ 77, 65.

²² BGH, decision of 14 September 2000, NJW 2000, 3720; YCA 2002, p. 265.

²³ K. Sachs, op. cit., p. 103.

14. Austrian case law appears to be to the same effect and grant the party who cannot afford the arbitration an extraordinary right to terminate the arbitration agreement²⁴.
15. Indian decisions also found that the arbitration agreement may become incapable of being performed if the party is not able to finance the arbitral proceedings, in this case because of currency and exchange control difficulties²⁵.
16. This survey shows that the jurisdictions are split on this question, which might become increasingly important in view of today's difficult economic environment.

The answer to this question is certainly not easy. The efficiency of arbitration is at stake and it cannot be accepted too easily that the lack of funds become an excuse for refusing to arbitrate.

It has also been rightly stressed that it is difficult to assess the reality of the alleged impecuniosity of a party, and that this issue may give rise to manipulations and abusive behavior²⁶.

On the other hand, arbitration is meant to offer an efficient mechanism for settling disputes; it is not designed to prevent the parties from pursuing their legal remedies.

17. A possible distinction could be made between the cases where the impecuniosity already exists at the time of the conclusion of the arbitration agreement and the situation where such impecuniosity occurred subsequently and as a result of

²⁴ Oberster Gerichtshof, 4 September 1936, SZ 18/151; H. W. Fasching, *Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren*, JBI 1993, p. 545 ff, 554; S. Kröll, op. cit. p. 347.

²⁵ Supreme Ct. India, 13 July 1960, *M/s V/O Tractoroexport v. M/s Tarapore and Co.*, YCA 1976, p. 188; YCA 1979, p. 271.

²⁶ K. Sachs, op. cit., p. 102; S. Kröll, op. cit., p. 349.

unforeseeable circumstances²⁷. The defence of impecuniosity would be stronger in the latter situation.

However, this distinction is certainly not the end of the debate, which is likely to continue for some time among scholars and before courts or arbitral tribunals.

²⁷ J.-F. Poudret/S. Besson, *op. cit.*, p. 425, para. 497.