PROFOUND ANALYZE REGARDING COMPATIBILITY OF ART. 6 OF ECHR WITH CONSENSUAL ARBITRATION

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Abstract
Nowadays, parties in civil or commercial transactions and business enterprises need to resolve their disputes in an effective manner, in short period of time and if possible in private proceedings, requirements that are offered by arbitration procedures. The question in such case is how human rights are guaranteed by arbitration proceedings and further more how the right to a fair trial is being guaranteed in such proceedings.
The paper will analyze in profound the issue of compatibility of Article 6 of ECHR, the right to a far trial with consensual arbitration. It will analyze the relevant provisions of ECHR that are potentially applicable to consensual arbitration and will examine deeply the compatibility of Article 6 of ECHR, the right to a fair trial with arbitration clauses and procedures by analyzing the terms "Everyone", "Civil Rights and Obligations" in arbitration proceedings, "Right of Access to Justice", Right to a Tribunal and Due Process of Law.
The paper will also present some conclusions and potential recommendations that will need to be reflected in procedural legislation in Albania.

Purpose or objective of a paper
This paper will assess and examine deeply the compatibility of Article 6 of ECHR, the right to a fair trial with arbitration clauses and procedures.

Procedures/Data/Observations
The findings will be presented through deep legal analyzes of concepts of fair trial; these issues will be illustrated with ECHR case law.

Conclusion
The right to a far trial is a very important principle of trial proceedings, and therefore it needs to be considered by parties in consensual arbitration proceedings.
Consensual arbitration[1] derives from an arbitration agreement freely entered into between parties who submit their dispute to arbitration tribunal freely chosen by them[2].
In order to assess the applicability of ECHR to consensual arbitration, this paper will be mainly focused on analyzing the relevant provisions of ECHR that are potentially applicable to arbitration and than examine the scope of the waiver of Art. 6 (1) that ECHR guarantees, where parties enter into an arbitration agreement.
There are very few provisions of ECHR which are of relevance for arbitration, but the most significant is art. 6(1) "*right to a fair trial*[3]". This provision enumerates procedural rights that courts should comply in order to preserve a certain standard of justice and contains an implied right of access to justice.
*"In the determination of his **civil rights and obligations** […] **everyone** is entitled to a fair and public hearing within a reasonable time by an independent and impartial **tribunal** established by law […]"*

This provision clearly states that "*everyone*" is entitled to have their "*civil rights and obligations*".

I. Meaning of "Everyone"

Art. 34 of ECHR provide that human rights obligation before the European Court of Human Rights is open not only to individuals but also to companies. It provides that "*the Court may receive may receive applications from any person, non-governmental organizations or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and Protocols thereto*". Since companies are the primary subjects of international commercial arbitration and since individuals are in no way excluded, arbitration proceedings do met the "everyone" requirement of Art. 6(1) of ECHR. In this respect, there is full compatibility of such ECHR right with arbitration.

II. Meaning of "Civil Rights and Obligations"

The existence of a dispute on civil rights and obligations is a simple perquisite to meet in arbitration proceedings since disputes of commercial nature, with a pecuniary value fall within the autonomous ECHR meaning of "civil[4]". Moreover, there is authority for the intention that the result of an arbitration procedure, i.e an arbitral award is a "good" protected by Protocol No 1 to ECHR (Article 1 on the protection of property), thereby confirming the economic value at stake in arbitration proceedings.
Article 6(1) of ECHR requirements apply not only to criminal and administrative disputes, but also to civil proceedings so their application to arbitration proceedings does not raise in principle any compatibility issues. Considering that Art. 6(1) of ECHR is relevant to arbitration and that arbitration is compatible with the ECHR we can

[1] **Consensual arbitration** is identified as an arbitral proceeding established by the consent [free will] of the parties, expressed that either at an arbitration clause or arbitration agreement.
[2] Krings Ernest / Matray Lambert, "Le juge et l'arbitre" 59 Rev. Dr. Int. Et dr. Comp. 227,254 (1992).
[3] The right to a fair trial is included in Art. 6(1) of ECHR based on inspiration by Universal Declaration of Human Rights (1948, Art. 10 and 11(1) and United Nations Covenant on Civil and Political Rights (1966 Art. 14).

[4] For more information see Decision of European Commission *Axelson v. Sweden*, Application No. 11960/86, July 1990, [Nr. 86 & Rep. 99]. This is one of six decisions on admissibility of potential violation of Art. 6(1) of ECHR, in cases of consensual arbitration / www.echr.coe.int .
In this case, the Commission considered a private contractual dispute between a taxi owner and a taxi company to be of importance to the taxi owner business activities and this concerned "civil rights and obligations" within the meaning of Art. 6(1) of ECHR.
We can refer also to the Decision of European Commission on Human Rights regarding the case *Bramelid & Malström v. Sweden* [Application No. 8588/79 and 8589/79, of December 1983 and the admissibility decision in the same application [October 1982 of European Commission] where the Commission easily accepted the existence of a civil dispute in a compulsory arbitration. In case of doubt, the relevant criteria were well exposed by the Decision of European Court on Human Rights in the case *Benthem v. The Netherlands,* October 1985, A/97, §§ 34-6.

shift to examining whether the signing of an arbitration agreement excludes the application of ECHR.
To conclude whether Art. 6(1) of ECHR are waived by entering into an arbitration agreement, we must consider initially the meaning of wording "the right of access to justice" collectively with "tribunal" and "due process of law".

III. The right of "access to justice"

The right of access to justice is an implied procedural guarantee of Art. 6(1) of ECHR, established initially at the cases *Golder v. United Kingdom* (1975) and later on on *Airey v. Ireland* (1979); as s result, Art. 6(1) of ECHR applies already before proceedings are commenced. The right of access to justice, the right to submit claims to an adjudicator that might be a judge or an arbitrator, can in no way be waived validly. Instead, the right to submit claims to a "tribunal", that might be a national court or an arbitration format / panel, might be waived in favor of consensual arbitration. Therefore, the right of access to justice refers to the access of justice not only to a state tribunal[5].

IV. The right to a "Tribunal"

In order to conclude whether an arbitration agreement is a wavier of state Courts' jurisdiction, it is necessary to analyze whether an arbitral tribunal / panel is considered as a "tribunal" under the meaning of Art. 6(1) of ECHR. In this respect, European Court on Human Rights, at case *Lithgow et al. v. United Kingdom*[6], held that "*… the word 'tribunal' worded in Article 6 para. 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard machinery of the country…".*
The court held that within the frame of a compulsory arbitration format, and it does not provide guidance at to whether a purely consensual arbitration panel would be considered a tribunal, within the scope of Art. 6(1) of ECHR. European Commission mentioned this issue with regards to consensual arbitration and held that entering into an arbitration agreement is a partial waiver of the exercise of rights embedded in Art. 6(1) of ECHR, notably of a right to a tribunal[7]. At the same time, the Commission questions whether the initial validity of consent to arbitrate might or might not be violated by the incompatible subsequent conduct of the arbitrators during the arbitral proceeding with the ECHR. Such "floating consent" approach is of no help and actually and legal scholars are divided as to whether an arbitration tribunal is a tribunal within the scope and meaning of Art. 6(1) of ECHR[8].
Considering the fact that ECHR is an international agreement, signed and ratified by parties that are States, considering also the fact that ECHR is a document aiming to protect and guarantee human rights of individuals when these are violated by States itself, the meaning of the word "tribunal" in Art. 6 of ECHR refer only to state courts and tribunals, where parties voluntarily address their disputes to be resolved, as opposed to consensual arbitration, where parties reject the right to address the dispute for resolution to a national or state court / tribunal by choosing the arbitration proceedings, which is a private way for resolving the dispute, by a consensual arbitration tribunal / panel, established by the agreement of parties.
The right to present the dispute for resolution to a tribunal is not an absolute right, therefore States maintain some flexibility to limit it as long as the essence and substance of the right itself is not violated. European Court could check whether exists legitimate objective for limitation of right to a tribunal and whether the means used are reasonably proportionate to the objective aimed[9]. An individual can validly waive the right to a tribunal in favor of a consensual arbitration[10], as long as the waiver was unambiguous and not forced; the waiver should be clear and voluntarily[11].
Usually, European Court on Human Rights is conscious that in the States domestic legal systems, the waiver of parties' rights to address the dispute for resolution to a State tribunal is often encountered in the model and wording of arbitration clauses in the contracts. Pursuant to European Court on Human Rights, the waiver party has undeniable advantages for the individual concerned as well as for the administration of justice; thus the waiver does not in principle affront ECHR[12]. Scholars claim that a consensual arbitration tribunal is an acceptable replacement for a national court and enjoys full adjudicative authority and derives its power from a valid agreement to arbitrate[13]. Therefore, an arbitration agreement is in principle a waiver from State Courts jurisdiction.
An arbitration agreement represents a waiver of national courts to adjudicate the merits of the dispute covered by the arbitration agreement. In most instances, an arbitration agreement is not a full waiver of national courts for as much as national courts have authority for requiring provisional measures, for deciding on arbitration awards challenges, for deciding on arbitration awards enforcement etc. potentially, every domestic arbitration law, even of the countries that had ratified ECHR provide for possibility of having arbitral awards set aside before national courts on limited grounds[14]; Belgium and Switzerland provide for the possibility of waving any recourse/appeal for challenging the arbitration award as long as they have no residency in these countries.

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[5] For more information see *obiter dicta* in Federal Tribunal Decision of Sept. 1973, *Gregor v. Bureau de l'assistance judiciaire du canton de Vaud,* where stated that "*.. the state is required to assure a party in financial difficulties the access to a system of justice, even if this system is outside the state system ..*".
[6] July 1986, A / 102.
[7] See *X v. Federal Republic of Germany* (1962).
[8] See JUAN Carlos LANDROVE Ph.D., Research/Teaching Assistant [University of Geneva], "European Convention on Human Rights' Impact on Consensual Arbitration", 2008, pg. 80.
[9] See *Lithgow at al. v. United Kingdom*, July 1986, A / 102 § 194.
[10] See the decisions of European Court on Human Rights - *Colozza and Rubinat v. Italy,* 1985 and *Albert and Le Compte v. Belgium, 1981.*
[11] In case *X v. Federal Republic of Germany,* should be noted that where the arbitration clause is imposed by the employer to the employee at the working contract, the employee is free to refuse the employment and accordingly free not to sign the arbitration clause.
[12] See SPIERMANN Ole, "*Individual Rights, State Interests and the Power to Waive ICSID Jurisdicion under Bilateral Investment Treaties",* 2004, pg. 179-182.
[13] See the case *Beaumartin v. France,* 1994, A/296B, § 38.
[14] See Cambi-Favre Bulle / DAL / Flecheux / LAMBERT / MOUREE, "L'arbitrage et le l'article 6, 1° de la Convention européenne des droits de l'home " Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001.

V. The meaning of "right to a fair trial / due process of law"

On consensual arbitration procedures, freely chosen by parties, the question raised is whether there should be applicable all procedural guarantees for parties regarding "fair trial or due process of law", as provided by Art. 6(1) of ECHR or these procedural guarantees can validly be waived by parties, by when an arbitration agreement is concluded?

Right to a fair trial in principle is and aims to be part of all democratic countries and therefore this concept is positioned to the level of international policy. European institutions have not articulated fully this issue in specific. That means that it is matter of interpretation, understanding, analysis, explanation that can be considered case by case.

The first decision on European Commission on Human Rights[15] on consensual arbitration stated that entering into an arbitration agreement is to be legally construed as a "partial" waiver of Art. 6(1) of ECHR guarantees. What lawyers can argue about is which guarantees of Art. 6(1) of ECHR could be validly waived and which are not. In principle, a party can waive any of its due process rights after a violation has been committed. The rationale is that the party, who is aware of a violation, waives its right to advantage itself in case it does not complain immediately about it. In national arbitration system, in case a party acts so, it can not challenge the arbitration award; it can neither oppose the ward enforcement before national courts on these very grounds. The same principle is applicable in international arbitration rulings[16], where partial waiver derives from the parties conduct during arbitration proceedings[17].

In some ECHR cases, is stated that a "waiver might me permissible with regard to certain rights but not with certain others[18]", but court had not listed, mentioned or interpreted which rights fit in which category, except to the right of public hearing and the right to an independent and impartial tribunal can be waived in some limited instances.

As mentioned at the part where discussed the right to access to justice[19], this right can not be waived, and *a priori* all rights embedded in Art. 6(1) of ECHR can be waived before the fact.

Conclusion

The applicability issue of Art. 6(1) of ECHR to consensual arbitration procedures represents an important practical interest. Since ECHR directly concern States and their tribunals and since the control of state tribunals over consensual arbitration procedures for due process of law is arguable, there is room for of précising the modalities for such control. Arbitral tribunal ate consensual tribunals that do not represent States and accordingly they are not state institutions whose activity causes States' liability. Only States are liable for violations of ECHR and only State might eventually assure a party for the violation committed. In this respect ECHR does not apply directly to arbiters, but it does not mean that State can authorize violations of ECHR; the State should not recognize and enforce any arbitral award that violates ECHR. For more, State should not allow arbitral awards that violate ECHR to influence on domestic legal order, without being potentially submitted to a liability under ECHR. That implies an indirect application of ECHR to arbitration proceedings through judges' control of arbitral award. Since ECHR is part of international public policy order, no total waiver[20] of due process guarantees can exist.

15 The case X. v. Federal Republic of Germany, supra note 7 & 11.

16 See Art. 30 of UNICITRAL [United Nations Commission on International Trade Law] Arbitration Rules ".. a party who knows that any provision of or requirement under these Rules, has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object ..".

17 See Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, Comparative International Commercial Arbitration, ISBN 9041115684, Published by KLUWER Law International, The Hague/London/New York [www.kluwerlaw.com], printed in Netherlands, 2005.

18 See case Souvaniemi v. Finland, 1999.

19 Supra.

20 See JUAN Carlos LANDROVE Ph.D., Research/Teaching Assistant, University of Geneva, "European Convention on Human Rights' Impact on Consensual Arbitration", 2008, pg. 100, para.2.

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