

EUROPEAN CONVENTION ON HUMAN RIGHTS' IMPACT  
ON CONSENSUAL ARBITRATION  
AN ÉTAT DES LIEUX OF STRASBOURG CASE-LAW AND  
OF A PROBLEMATIC SWISS LAW FEATURE

by

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## I. Introduction

Consensual arbitration derives from an arbitration agreement freely entered into between parties who submit their dispute to arbitrators who the same

parties have freely chosen.<sup>1</sup> Arbitration has grown substantially as a method for solving international commercial disputes, notably since the second half of the twentieth century.<sup>2</sup> This period coincided with the coming into force of the European Convention on Human Rights (“ECHR”).<sup>3</sup> The *travaux préparatoires* of the ECHR are silent as to its applicability to arbitration.<sup>4</sup> More than five decades of application of the ECHR have elapsed and very few decisions of the ECHR bodies, the Commission<sup>5</sup> (“Eur. Comm’n H.R.”) or the Court (“Eur. Ct. H.R.”) are available on the issue of the potential application of the ECHR to consensual<sup>6</sup> arbitration.<sup>7</sup> Interestingly enough, legal scholars only recently tackled the issue.<sup>8</sup> The same lack of enthusiasm seems to have

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<sup>1</sup> KRINGS Ernest/ MATRAY Lambert, “*Le juge et l’arbitre*,” 59 Rev. dr. int. et dr. comp. 227, 254 (1982).

<sup>2</sup> NEWMAN, Lawrence W., “*International Arbitration – Unfinished Business*,” New York Law Journal, 3<sup>rd</sup> April, 2001, p. 3; CREMADES Bernardo M., “*Introductory Remarks*,” in VAN DEN BERG A. J., *International Dispute Resolution: Towards An International Arbitration Culture*, International Council for Commercial Arbitration Congress Series N° 8, Kluwer, The Hague, 1998, p. 17.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4<sup>th</sup> November, 1950, 213 U.N.T.S. 221, E.T.S. 5 with subsequent additional protocols.

<sup>4</sup> DAL, Georges-Albert, “*Le point de vue belge*,” in CAMBI FAVRE-BULLE / DAL / FLÉCHEUX / LAMBERT / MOURRE, *L’arbitrage et la Convention européenne des droits de l’homme*, Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001, pp. 57-68, notably 59.

<sup>5</sup> After the reform of the control mechanism in the ECHR as amended by Protocol No. 11 (enacted on 11<sup>th</sup> May, 1994 and entered into force on 1<sup>st</sup> November, 1998) the Court and no longer the Commission deals with the admissibility of a request.

<sup>6</sup> “Consensual” arbitration is here understood as arbitration proceedings established by the consent of the parties expressed either in an arbitration clause or in an arbitration agreement. This paper will not deal with “forced” (also called mandatory or compulsory) arbitration, i.e., arbitration proceedings organised by a State to solve a specific matter, since the full application of ECHR guarantees to “forced” arbitration proceedings is not controversial. See, e.g., Eur. Ct. H.R., *Lithgow et al. v. United Kingdom*, 8<sup>th</sup> July, 1986, A/102.

<sup>7</sup> Research uncovered only six decisions on admissibility of potential violations of Art. 6(1) ECHR in cases of consensual arbitration. Five have been rendered by the former Commission and one by the Fourth Section of the Court: see, unreported Eur. Ct. H.R. Dec., *Suovaniemi v. Finland*, Application No. 31737/96, 23<sup>rd</sup> February, 1999; Eur. Comm’n H.R. Decs., *Nordström v. The Netherlands*, Application No. 281017/95, 27<sup>th</sup> November, 1996, 87-A Eur. Comm’n H.R. Dec. & Rep. 112 (1996); *Molin v. Turkey*, Application No. 23173/94, 22<sup>nd</sup> October, 1996 (unreported); *Axelsson v. Sweden*, Application No. 11960/86, 13<sup>th</sup> July, 1990, 86 Eur. Comm’n H.R. Dec. & Rep. 99 (1990); *R. v. Switzerland*, Application No. 10881/84, 4<sup>th</sup> March, 1987, 51 Eur. Comm’n H.R. Dec. & Rep. 93 (1987); *X. v. Federal Republic of Germany*, Application No. 1197/61, 5<sup>th</sup> March, 1962, 5 Yearbook ECHR 88 (1962). Reported and unreported decisions of both the Eur. Comm’n H.R. and the Eur. Ct. H.R. are available on [www.echr.coe.int](http://www.echr.coe.int).

<sup>8</sup> ADAM, Samuel, “*Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights – An Anglo-Centric View*,” 21 Journal of International Arbitration 413-437 (2004); LAMBERT, Pierre, “*L’arbitrage et l’article 6, 1<sup>o</sup> de la*

infected Swiss commentators,<sup>9</sup> despite the fact that there exists an interesting Swiss Federal Tribunal body of case-law. Consequently, this paper will first draw an *état des lieux* on the applicability and compatibility of the ECHR with arbitration, and then on the scope of the waiver of Art. 6(1) ECHR guarantees where parties enter into an arbitration agreement, as well as on the potential liability of a State (signatory to the ECHR) for violations of Art. 6(1) ECHR on its territory within the frame of a consensual arbitration (see *infra* II.). Thereafter, this paper will briefly expose the concrete application of the ECHR to consensual arbitration in Switzerland and examine a problematic feature of Swiss arbitration law relating to the exclusion of challenges to arbitral awards (see *infra* III.) before concluding on the impact of the ECHR on consensual arbitration (see *infra* IV.)

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*Convention européenne des droits de l'homme*," in CAMBI FAVRE-BULLE / DAL / FLÉCHEUX / LAMBERT / MOURRE, *L'arbitrage et la Convention européenne des droits de l'homme*, Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001, pp. 9-22; MOURRE, Alexis, "Le droit français de l'arbitrage international face à la Convention européenne des droits de l'homme," 120 Gazette du Palais 2066-2079 (2000); MATSCHER, Franz, "L'arbitrage et la Convention," in PETTITI / DECAUX / IMBERT (ed.), *La Convention européenne des droits de l'homme – Commentaire article par article*, Economica, Paris, 2<sup>nd</sup> ed., 1999, pp. 281-292; WEDAM-LUKIC, Dragica, "Arbitration and Article 6 of The European Convention On Human Rights," 64 Arbitration – Journal of the Chartered Institute of Arbitrators 16-21 (1 Supplement, 1998); JARROSSON, Charles, "L'arbitrage et la Convention européenne des droits de l'homme," 35 Revue de l'arbitrage 573-607 (1989).

<sup>9</sup> KAUFMANN-KOHLER, Gabrielle / SCHULTZ, Thomas, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer, The Hague, 2004; CAMBI FAVRE-BULLE, Alessandra, "L'état de la jurisprudence en Suisse," in CAMBI FAVRE-BULLE / DAL / FLÉCHEUX / LAMBERT / MOURRE, *L'arbitrage et la Convention européenne des droits de l'homme*, Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001, pp. 69-76; PONCET, Dominique / CAMBI FAVRE-BULLE, Alessandra, "Un arbitre indépendant et impartial aux termes de l'article 6, 1<sup>o</sup> de la Convention européenne de droits de l'homme – Un point de vue de la Suisse," in *Les droits de l'homme au seuil du troisième millénaire – Mélanges en hommage à Pierre Lambert*, Bruylant, Bruxelles, 2000, pp. 655-671; HABSCHIED, Walther J., "Schiedsgerichtsbarkeit und Europäische Menschenrechtskonvention," in Gerhardt / Diederichsen / Rimmelpacher / Costede (ed.), *Festschrift für Wofram Henckel zum 70. Geburtstag am 21. April 1995*, Walter de Gruyter, Berlin, New York, 1995, pp. 341-352; JACOT-GUILLARMOD, Olivier, "L'arbitrage privé face à l'article 6 § 1 de la Convention européenne des Droits de l'Homme," in MATSCHER / PETZOLD (ed.), *Protecting Human Rights: The European Dimension – Studies in honour of Gérard J. Wiarda*, Carl Heymanns, Köln, Berlin, Bonn, München, 1988, pp. 281-294.

## **II. Applicability of the European Convention on Human Rights to Consensual Arbitration**

To assess the applicability of the ECHR to consensual arbitration, this paper will first highlight the relevant provisions of the ECHR that are potentially applicable to arbitration (see *infra* II.A.) and then examine the compatibility of one of its most relevant provisions with arbitration (see *infra* II.B.). Then the issue of the scope of the waiver of Art. 6(1) ECHR guarantees where parties enter into an arbitration agreement will be addressed (see *infra* II.C.), as well as the potential liability of a signatory State to the ECHR for violations of Art. 6(1) ECHR on its territory (see *infra* II.D.)

### **A. Potentially Relevant Provisions of the European Convention on Human Rights to Consensual Arbitration**

There are very few provisions of the ECHR which are of relevance for arbitration. These are Arts. 1, 6(1), 34 ECHR, and Protocol No 1 to the ECHR (Art. 1 on the protection of property). The most significant is Art. 6(1) ECHR.<sup>10</sup> This provision enumerates procedural rights courts must comply with to preserve a certain standard of justice and contains an implied right of access to justice (see *infra* C.).

### **B. Compatibility of Art. 6(1) ECHR Rights With Arbitration**

The present paper focuses on a limited set of human rights directly connected to legal procedure, which in human rights jargon is traditionally referred to as the “right to a fair trial.” Such right consists in many interconnected

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<sup>10</sup> Arts. 1 and 34 ECHR, and Protocol No 1 to the ECHR (Art. 1 on the protection of property) will also be briefly addressed in this paper, see respectively *infra* II.D. and notes 12, and 15 and accompanying text.

guarantees. Within the geographically constrained ECHR such right stems from Art. 6(1) ECHR,<sup>11</sup> which reads in relevant part:

*“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” (see *infra* II.B.1.) is entitled to have their “civil rights and obligations” (see *infra* II.B.2.) adjudicated.

## 1. “Everyone”

Art. 34 ECHR provides that human rights litigation before the Eur. Ct. H.R. is open not only to individuals,<sup>12</sup> but also to companies.<sup>13</sup> Since companies are the primary users of international commercial arbitration, and since individuals are in no way excluded, arbitration proceedings do meet the “everyone” requirement of Art. 6(1) ECHR. There is no incompatibility of such ECHR right with arbitration.

## 2. “Civil Rights and Obligations”

The existence of a dispute on civil rights and obligations is not a problematic requirement to meet in arbitration proceedings because disputes of a commercial nature, with a pecuniary value, fall within the autonomous ECHR meaning of “civil.”<sup>14</sup> Moreover, there is authority for the proposition that the

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<sup>11</sup> The right to a fair trial embedded in Art. 6(1) ECHR was inspired by the Universal Declaration of Human Rights of 1948 (Arts. 10 and 11(1)) and has been echoed with slight differences by the United Nations Covenant on Civil and Political Rights, 16<sup>th</sup> December, 1966, 999 U.N.T.S. 171 (Art. 14).

<sup>12</sup> Art. 34 ECHR reads in relevant part: “*The Court may receive applications from any person, non-governmental organisation 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 or the protocols thereto.*”

<sup>13</sup> EMBERLAND, Marius, “*The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic*,” 20 J. of Int. Arb. 355, 361 (2003).

<sup>14</sup> See, Eur. Comm’n Dec., *Axelsson supra* note 7 (consensual arbitration) where 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) ECHR. See also, Eur. Comm’n Rep., *Bramelid & Malström v. Sweden*, App. Nos. 8588/79 and 8589/79, 12<sup>th</sup> December, 1983, 38 Eur. Comm’n H.R. Dec. & Rep. 38, §29 (1984); see also the admissibility

result of an arbitration procedure, i.e., an arbitral award is a “good” protected by Protocol No 1 to the ECHR (Art. 1 on the protection of property),<sup>15</sup> thereby confirming the economic value at stake in arbitration proceedings.

Finally, Art. 6(1) ECHR requirements apply, not only to criminal and administrative, but also to civil proceedings so that their application to arbitration proceedings (germane to civil proceedings) does not raise in principle any compatibility issues. Knowing that Art. 6(1) ECHR is relevant to arbitration and that arbitration is compatible with the ECHR it is time to examine whether the signing of an arbitration agreement excludes the application of the ECHR.

### **C. Arbitration Agreement: Waiver of Art. 6(1) ECHR Rights?**

To determine whether (and if so which of) Art. 6(1) ECHR rights are waived by the entering into an arbitration agreement one must first consider the implied “right of access” to justice (see *infra* II.C.1.) together with the express right to a “tribunal” (see *infra* II.C.2.), and then express “due process” rights (see *infra* II.C.3.).

#### **1. The Implied “Right of Access” to Justice**

The right of access is an implied procedural guarantee of Art. 6(1) ECHR established since 1975.<sup>16</sup> Thus, Art. 6(1) ECHR applies already before any

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decision in the same applications, 12<sup>th</sup> October, 1982, 29 Eur. Comm’n H.R. Dec. & Rep. 84, §2c (1982), 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 Eur. Court Dec., *Bentham v. The Netherlands*, 23<sup>rd</sup> October, 1985, A/97, §§34-6. See also, JACOT-GUILLARMOD, Olivier, “Rights Related to Good Administration of Justice (Article 6),” in MACDONALD, Ronald St. J. / MATSCHER, Franz / PETZOLD, Herbert (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, Boston, London, 1993, p. 390.

<sup>15</sup> Art. 1 of Protocol No 1 to the ECHR reads in relevant part: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.” See, BENCHENEB, Ali, “La contrariété à la Convention européenne des droits de l’homme d’une loi anéantissant une sentence arbitrale,” 42 Rev. arb. 181, 186 and 188-9 (1996) where the author stresses that under Strasbourg case-law (Eur. Ct. H.R., 9<sup>th</sup> December, 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, A/301-B, §40) an arbitral award is a “good” protected pursuant to property rights.

<sup>16</sup> Eur. Ct. H.R., *Airey v. Ireland*, 9<sup>th</sup> October, 1979, A/32, §26; *Golder v. United Kingdom*, 21<sup>st</sup> February, 1975, A/18, §§25-40, notably §36.

proceedings are commenced.<sup>17</sup> The right of access to justice (the right to submit one's claims to an adjudicator: a judge or an arbitrator) can in no way be validly waived,<sup>18</sup> but the right to submit one's claims to a "tribunal" (i.e., a national court or a compulsory arbitration scheme) may be waived in favour of consensual arbitration (see *infra* II.C.2.). Thus, the implied right of access refers to the access to justice not to a State's tribunal.<sup>19</sup>

## 2. The Express Right to a "Tribunal"

To determine whether an arbitration agreement is a waiver of State Courts' jurisdiction it is necessary to examine whether an arbitral tribunal is a "tribunal" under Art. 6(1) ECHR.

The Eur. Ct. H.R. held that "*the word 'tribunal' in Article 6 para. 1 (Art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country.*"<sup>20</sup> The Court held so within the frame of a compulsory arbitration scheme, and it does not provide guidance as to whether a purely consensual arbitral panel would be deemed a "tribunal" within the ambit of Art. 6(1) ECHR. The Eur. Comm'n H.R. touched upon the issue with regard to consensual arbitration already in

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<sup>17</sup> MATSCHER, *supra* note 8 at 282.

<sup>18</sup> See, MOURRE, *supra* note 8 at 2071. See also, BADDELEY, Margareta, "*Le sportif, sujet ou objet? - La protection de la personnalité du sportif*" 137 ZSR/RDS 135, 234 (1996) on Art. 27 of the Swiss Civil Code.

<sup>19</sup> MOURRE, *supra* note 8 at 2072. It should be noted that the costs inherent to arbitral proceedings have not been viewed so far as a violation of the right of access to justice. Then, a dismissal of arbitration proceedings for non-payment of fees is not disproportionate or otherwise a breach of Art. 6(1) ECHR's right of access to the courts; for an application under Swedish law, see GATENBY, John & MENIN, Kate, "*Observations*," 7 Stockholm Arb. Rep. 184, 186 (2004:2). The fact that free legal aid is available to parties before national courts and not before arbitral tribunals seems not to be problematic because the State must not provide free legal aid for every dispute relating to a civil right, see *Airey v. Ireland* *supra* note 16. No "positive measure" (see *Airey*, §25; JACOT-GUILLARMOUD, Olivier, "*Rights Related to Good Administration of Justice (Article 6)*," in MACDONALD, Ronald St. J. / MATSCHER, Franz / PETZOLD, Herbert (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, Boston, London, 1993, pp. 391-2.) of the State is required in order for a party with financial difficulties to secure access to a system of justice outside of the State system, see *obiter dictum* in Federal Tribunal decision of 19<sup>th</sup> September, 1973, *Gregor v. Bureau de l'assistance judiciaire du canton de Vaud*, ATF 99 Ia 325, 329 (1973) = 122 JdT I 253, 254 (1974). See also, ZEN-RUFFINEN, Piermarco, *Droit du sport*, Schulthess, Zurich, 2002, p. 502. Moreover, it is not a human right to get compensation for costs incurred in enforcement proceedings, see EDLUND, Lars, "*Observations*," 4 Stockholm Arb. Rep. 98, 100 (2001:1).

<sup>20</sup> *Lithgow et al. v. United Kingdom*, *supra* note 6 at §201. See also, Eur. Ct. H.R., *Campbell and Fell*, 28<sup>th</sup> June, 1984, A/80, §76.

1962 and held that the entering into an arbitration agreement is a partial waiver of the exercise of rights embedded in Art. 6(1) ECHR, notably of the right to a “tribunal.”<sup>21</sup> But at the same time the Commission wonders *obiter* whether the initial validity of consent (to arbitrate) is not vitiated by the incompatible subsequent conduct of the arbitrators (during the arbitral proceedings) with the ECHR.<sup>22</sup> Such “floating consent” approach is of no help and actually legal scholars are divided as to whether an arbitral tribunal is a “tribunal” within the meaning of Art. 6(1) ECHR.<sup>23</sup>

Actually, it seems that the word “tribunal” in Art. 6(1) ECHR means a State’s tribunal (be it a national court or an arbitral tribunal to where the parties have the obligation to refer their disputes) as opposed to a consensual arbitral tribunal created through the agreement of the parties.<sup>24</sup>

The right to a tribunal is not an absolute one and States retain some leeway to limit it as long as the substance itself of the right is not harmed (otherwise such right would simply be considered as negated, and thus violated).<sup>25</sup> European bodies will notably check whether there exists a legitimate objective for the limitation and whether the means used are reasonably proportionate to the objective aimed at.<sup>26</sup> The mere existence of the possibility to limit such rights

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<sup>21</sup> *X. v. Federal Republic of Germany*, *supra* note 7 at 94-96. See also, LAMBERT, *supra* note 8 at 17.

<sup>22</sup> VELU, Jacques / ERGEC, Rusen, *La Convention européenne des droits de l’homme*, Bruylant, Bruxelles, 1990, pp. 364-365, §407.

<sup>23</sup> See e.g., as proponents: LAMBERT, *supra* note 8 at 17-18, interpreting Eur. Ct. H.R., *Cyprus v. Turkey*, 10<sup>th</sup> May, 2001, Reports 2001-IV 1, §233; *Rolf Gustafson v. Sweden*, 1<sup>st</sup> July, 1997, Reports 1997-IV 1149, §45; and *Belilos v. Switzerland*, 29<sup>th</sup> April, 1988, A/132, §64; see also, AMBROSE, Clare, “*Arbitration and the Human Rights Act*,” 4 L.M.C.L.Q. 468-494 (2000). See e.g. as opponents: ROBINSON, William / KASOLOWSKY, Boris, “*Will the United Kingdom’s Human Rights Act Further Protect Parties to Arbitration Proceedings?*” 18 *Arbitration International* 453, 457 (2002); MATSCHER, Franz, “*La notion de ‘tribunal’ au sens de la Convention européenne des droits de l’homme*,” in *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme*, Nemesis-Bruylant, Bruxelles, 1996, 29ff., notably 34.

<sup>24</sup> This is also the ECJ’s view regarding the impossibility for a consensual arbitral tribunal to refer issues to the ECJ (for a preliminary ruling pursuant to Art. 234 EC, formerly Art. 177 EC) because it is not regarded as a court or a tribunal of a Member State, see ECJ, Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages et Culture SA* of 27<sup>th</sup> January, 2005, §§11-17, not yet reported; ECJ, Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* of 1<sup>st</sup> June, 1999, [1999] ECR I-3055, §34; ECJ, Case C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG et al.* of 23<sup>rd</sup> March, 1982, [1982] ECR 1095, §§7-16. See also, JACOT-GUILLARMOD, *supra* note 9 at 286; KRINGS / MATRAY, *supra* note 1 at 253.

<sup>25</sup> *Lithgow et al. v. United Kingdom*, *supra* note 6 at §194.

<sup>26</sup> *Id.*



renders it waivable: an individual can validly waive the right to a tribunal<sup>27</sup> in favour of a consensual arbitration,<sup>28</sup> as long as the waiver was unambiguous and not forced,<sup>29</sup> i.e., clear and voluntary.<sup>30</sup> The requirement of absence of duress or constraint merely requires that the consent of the parties be freely given.<sup>31</sup>

The Eur. Ct. H.R. is aware that in the Contracting States' domestic legal systems a waiver of one's right to have one's case dealt with by a State's

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<sup>27</sup> PFANNKUCHEN-HEEB, Silvia, "Der Zivilprozess im Lichte von Art. 6 Ziff. 1 EMRK," in SUTTER, Patrick / ZELGER, Ulrich (ed.), *30 Jahre EMRK-Beitritt der Schweiz: Erfahrungen und Perspektiven*, Stämpfli, Bern, 2005, p. 228, §4.2.2. who deals with Art. 27 of the Swiss Civil Code.

<sup>28</sup> CORBOZ, Bernard, "Le recours au tribunal fédéral en matière d'arbitrage international," 124 *Semaine Judiciaire* II 1, 3 (2002); FROWEIN, Jochen Abr. / PEUKERT, Wolfgang, *Europäische Menschenrechtskonvention – EMRK-Kommentar*, 2<sup>nd</sup> ed., N. P. Engel, Kehl, Strasbourg, Arlington, 1996, p. 207, §64; MIEHSLER/VOGLER, "Art. 6 EMRK," in KARL, Wolfram (ed.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, Carl Heymanns, Köln, Berlin, Munich, 1986, p. 85, §280.

<sup>29</sup> Eur. Ct. H.R., *Colozza and Rubinat v. Italy*, 12<sup>th</sup> February, 1985, A/89, §28; *Albert and Le Compte v. Belgium*, 10<sup>th</sup> February, 1983, A/58, §35; *Le Compte, Van Leuven and De Meyere v. Belgium*, 23<sup>rd</sup> June, 1981, A/43, §59; *Neumeister v. Austria*, 7<sup>th</sup> May, 1974, A/17, §36. See also, KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 73.

<sup>30</sup> VAN DIJK, P. / VAN HOOF, G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> ed., Kluwer, The Hague, London, Boston, 1998, p. 427f.; OLDENSTAM, Robin, "Observations," 7 *Stockholm Arb. Rep.* 332, 338 (2004:2). FROWEIN, Jochen Abr. / PEUKERT, Wolfgang, *Europäische Menschenrechtskonvention – EMRK-Kommentar*, 2<sup>nd</sup> ed., N. P. Engel, Kehl, Strasbourg, Arlington, 1996, p. 207, §64 with further references. In case of transfer of the contract including the arbitration clause or in case of assignment of rights included in the same contract, should the arbitration clause be transferred together with the contract or claim to the assignee who was not an initial party to the arbitration agreement? Difficult question that has found no clear rule at the international level. Only the new Norwegian Arbitration Act that entered into force on 1<sup>st</sup> January, 2005, provides a clear rule that such transfer is automatic. The *travaux préparatoires* of the Act show that Norway dealt with the issue of a potential conflict of the adopted solution with Art. 6(1) ECHR guarantees and found it unproblematic, see SVENSEN, Thomas, "New Norwegian Arbitration Act – Draft Statute," 6 *Stockholm Arb. Rep.* 47, 54 (2003:1). There should be some safeguards to make sure that the waiver made by the assignee is clear and voluntary (as for instance by assuring the awareness of the assignee by requiring due notice of the existence of the arbitration clause from the assignor). The author intends to analyse this complicated issue as part of his forthcoming doctoral thesis on the consequences of assignment of rights on agreements to arbitrate, and will therefore leave the question unexplored within this short contribution.

<sup>31</sup> It should be noted that where the arbitration clause is imposed by the employer to the employee (inasmuch as it is a usual and indispensable provision of the work contract) the employee is "free" to refuse the employment and accordingly "free" not to sign the arbitration clause. Thereby, the Commission seems to close the door to "economical duress" arguments. See, *X. v. Federal Republic of Germany*, *supra* note 7 at 94-96. See also, LAMBERT, *supra* note 8 at 13, footnote 8.

tribunal is frequently encountered in the shape of arbitration clauses in contracts.<sup>32</sup> According to the Eur. Ct. H.R. the waiver has undeniable advantages for the individual concerned as well as for the administration of justice and thus the waiver does not in principle offend against the ECHR.<sup>33</sup> On this point the Court shares the view of the Commission.<sup>34</sup> Legal scholars add that a consensual arbitral tribunal is an acceptable replacement for a national court provided the former enjoys full adjudicative authority,<sup>35</sup> and derives its powers from a valid agreement to arbitrate.<sup>36</sup> Consequently, an arbitration agreement is a waiver of State courts' jurisdiction.<sup>37</sup>

### 3. Express "Due Process" Rights

Legal scholars affirm in substance that as long as the choice of an arbitral tribunal instead of a State's tribunal is "regular," i.e., the choice conforms to the State's law as well as to the ECHR, the parties to the arbitration agreement should, in principle, bear the consequences of their choice and should not be able to complain before ECHR bodies that they did not benefit from all the guarantees embedded in Art. 6(1) ECHR.<sup>38</sup>

This affirmation raises the issue of which of Art. 6(1) ECHR procedural guarantees can be validly waived by an arbitration agreement.

It cannot be deduced from the mere choice of having a dispute settled by consensual arbitration instead of by a national court that the application of the

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<sup>32</sup> Eur. Ct. H.R., 27<sup>th</sup> February, 1980, *Deweere v. Belgium*, A/35, §49. VELU / ERGEC, *supra* note 22 at p. 348, §394.

<sup>33</sup> *Id.* See also, SPIERMANN, Ole, "Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties," 20 Arb. Int. 179, 182 (2004) with further references.

<sup>34</sup> See, *Deweere supra* note 32 at §§55-56 of the Report. See also, *X. v. Federal Republic of Germany*, *supra* note 7 at 94-96.

<sup>35</sup> Eur. Ct. H.R., *Beaumont v. France*, 24<sup>th</sup> November, 1994, A/296B, §38; *Zumtobel v. Austria*, 21<sup>st</sup> September, 1993, A/268A, §32.

<sup>36</sup> KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 74.

<sup>37</sup> An arbitration agreement is at least 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 inasmuch as national courts remain competent for ordering provisional measures, for deciding on arbitral awards challenges, or for deciding on awards enforcement. As to challenges, virtually every national arbitration law of the signatories to the ECHR provides for a possibility to have the arbitral award set aside before a national court on limited grounds, see HABSCHIED, *supra* note 9 at 349. Only a few signatories (Belgium and Switzerland, see *infra* note 119 and accompanying text) provide for the possibility to waive any recourse against the award, see *infra* III.

<sup>38</sup> JACOT-GUILLARMOD, *supra* note 9 at 287; KRINGS / MATRAY *supra* note 1 at 260.

ECHR is wholly excluded.<sup>39</sup> The right to a fair trial is part of all democratic countries and as a concept ranks to the level of international public policy.<sup>40</sup> Besides, a restrictive interpretation of Art. 6(1) ECHR would not serve a good administration of justice.<sup>41</sup> Therefore, the conclusion reached by some legal scholars<sup>42</sup> that the ECHR is not (and should not be) applicable to consensual arbitration was too quick an inference.<sup>43</sup> One cannot simply reason that because the ECHR fully applies (“without any restriction”) to forced arbitration it should not apply at all to consensual arbitration. European bodies never reached any such conclusion. On the contrary, the very first decision of the Eur. Comm’n H.R. on consensual arbitration held clearly that the entering into an arbitration agreement is to be legally construed as a “partial” waiver of Art. 6(1) ECHR guarantees.<sup>44</sup> Since the signing of an arbitration agreement implies in and of itself no full waiver of Art. 6(1) guarantees, we will now focus on which guarantees are validly waived and which are not.

To deal with such an issue the time factor is of the essence. 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 avail itself of it in case it does not immediately complain about it. In most national arbitration systems a party who does not immediately object to a violation of its due process rights during the arbitration proceedings is then estopped from challenging the award or from opposing to its enforcement before a national court on this very ground.<sup>45</sup> The same holds true under most institutional arbitration rules, where the partial waiver derives from the parties’

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<sup>39</sup> MOURRE, *supra* note 8 at 2069.

<sup>40</sup> MATSCHER, *supra* note 8 at 282.

<sup>41</sup> Eur. Ct. H.R., *Delcourt v. Belgium*, 17<sup>th</sup> June, 1970, A/11, §25 *in fine*. HOTTELIER, Michel / MOCK, Hanspeter / PUÉCHAVY, Michel, *La Suisse devant la Cour Européenne des droits de l’homme*, Droit et Justice No. 60, Nemesis, Bruylant, Bruxelles, 2005, p. 101; JACOT-GUILLARMOUD, Olivier, “Rights Related to Good Administration of Justice (Article 6),” in MACDONALD, Ronald St. J. / MATSCHER, Franz / PETZOLD, Herbert (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, Boston, London, 1993, p. 382.

<sup>42</sup> JARROSSON, *supra* note 8 at 589-590, §30.

<sup>43</sup> MOURRE, *supra* note 8 at 2069. Likewise, the contrary opinion that the whole ECHR (and not only its Art. 6) applies to consensual arbitration (see, DAL, *supra* note 4 at 63) is too extreme, see *infra* II.D.

<sup>44</sup> *X. v. Federal Republic of Germany*, *supra* note 7 at 94-96. RENSMANN, Thilo, “Anational Arbitral Awards – Legal Phenomenon or Academic Phantom,” 15 *Journal of International Arbitration* 37, 50 (1998).

<sup>45</sup> POUDRET, Jean-François / BESSON, Sébastien, *Droit comparé de l’arbitrage international*, Kluwer, Schulthess, Bruylant, The Hague, Zurich, Brussels, 2002, p. 540; KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 204 with further references.

conduct during the proceedings.<sup>46</sup> The party in such situations is fully aware of all the circumstances and consciously renounces to exercise its right. The situation is quite different where the party declares to waive any of its due process rights in advance, because that party may not foresee all the consequences of such waiver. Unfortunately, neither national arbitration systems nor institutional arbitration rules do provide clear tests as to where it is admissible for a party to waive specific due process rights before a violation is committed.<sup>47</sup>

ECHR case-law teaches us that a “waiver may be permissible with regard to certain rights but not with certain others,”<sup>48</sup> but the Court does not help the reader understand which rights fit in which category, except that the right to a public hearing and, in some more limited instances, the right to an independent and impartial tribunal can be waived. It seems that the implied right of access to justice is not waivable (see *supra* II.C.1.) whereas all other express rights embedded in Art. 6(1) ECHR seem *a priori* waivable but are not always waivable before the fact.

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<sup>46</sup> See e.g., Art. 30 Swiss Rules of International Arbitration (in force as from 1<sup>st</sup> January, 2004) “*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 its objection to such non-compliance, shall be deemed to have waived its right to object;*” Art. 33 International Chamber of Commerce (“ICC”) Rules of Arbitration (in force as from 1<sup>st</sup> January, 1998) “*A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its right to object;*” Art. 25 American Arbitration Association (“AAA”) International Arbitration Rules (as amended and effective 1<sup>st</sup> April, 1997) “*A party who knows that any provision of the rules or requirement under the rules has not been complied with, but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object;*” Art. 30 United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules (as adopted on 15<sup>th</sup> December, 1976) “*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;*” and Art. 32.1 London Court of International Arbitration (LCIA) Arbitration Rules (effective 1<sup>st</sup> January, 1998) which provides that “*A party who knows that any provision of the Arbitration Agreement (including these Rules) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object.*”

<sup>47</sup> KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 204.

<sup>48</sup> *Suovaniemi v. Finland*, *supra* note 7.

### a) Art. 6(1) ECHR Express Rights Waivable Before the Fact

The mere signing of an arbitration agreement is a valid waiver of a right to a “tribunal” (see *supra* II.C.2.), and to a “public” trial “within a reasonable time:”

The right to a “public” trial (including a public hearing and a public decision)<sup>49</sup> is probably the less absolute Art. 6(1) ECHR guarantee. Actually, a party falling under the jurisdiction of a State may validly (expressly or tacitly, but unequivocally) waive such right so long as it does not hurt any important public interest.<sup>50</sup> In the arbitration tradition neither hearings nor awards are public.<sup>51</sup> Then the mere signing of an arbitration agreement implies the automatic renunciation to a public hearing and ECHR case-law specifically mentions that publicity is one of the principles waived by the signing of an arbitration agreement.<sup>52</sup>

The right to a decision “within a reasonable time” is certainly of concern to users of arbitration because speed is often cited as a reason why parties choose arbitration instead of national courts to solve their disputes. In fact, the “delegation” by the State of its power to adjudicate cases to arbitrators serves the purpose of avoiding lengthy proceedings and should not give rise to critics because the Eur. Ct. H.R. expects States to organise their judicial systems so as to respect Art. 6(1) ECHR. Since Art. 6(1) ECHR protects the parties against excessively slow proceedings, it can be said that said “delegation” of powers is an efficient measure taken by a State to meet the ECHR celerity requirements.<sup>53</sup>

But celerity is a relative concept. Circumstances of the case in point (such as complexity of the subject matter, behaviour of the parties during the

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<sup>49</sup> A distinction between the hearing and the judgement is recognised by both the terms of Art. 6(1) ECHR and by the Eur. Ct. H. R.; stricter standards are imposed to the public pronouncement of a judgement than to the public hearing of the underlying proceedings: Eur Ct. H.R., *B. v. United Kingdom*, 24<sup>th</sup> April, 2001, 34 EHHR 19 (2002), p. 529, 538-542, §§32-49 and concurring opinion of Judge Bratza p. 545 at § O17.

<sup>50</sup> See for consensual arbitration: *Axelsson et al. v. Sweden*, *supra* note 7. See also generally, Eur. Ct. H.R., *Håkansson and Sturesson v. Sweden*, 21<sup>st</sup> February, 1990, A/171, §66; *Pretto v. Italy*, 8<sup>th</sup> December, 1983, A/71, §§26-28; *Axen v. Germany*, 8<sup>th</sup> December, 1983, A/72, §§31-32; *Albert and Le Compte v. Belgium*, *supra* note 29 at §35; *Le Compte, Van Leuven and De Meyere v. Belgium*, 23<sup>rd</sup> June, 1981, A/43, §59. See also, ADAM, *supra* note 8 at 422.

<sup>51</sup> There is some indirect publicity where the “*juge d’appui*” at the seat of the arbitration is being called upon, or where the award is being challenged or sought to be enforced before a national court. See, JACOT-GUILLARMOD, *supra* note 9 at 288.

<sup>52</sup> *Id.* See also, *Nordström v. The Netherlands*, *supra* note 7 at 112-117, notably 116.

<sup>53</sup> JACOT-GUILLARMOD, *supra* note 9 at 289.

proceedings, dilatory measures, what really is at stake in the proceedings) are of the essence.

The possibility to ask the State to control the duration of arbitral proceedings will be of importance.<sup>54</sup> Although not *per se* incompatible with arbitration the control of the celerity of arbitral proceedings poses practical problems: State courts do not inquire *sua sponte* on the duration of arbitral proceedings held within their territory. Hence, European bodies will not check whether an arbitral tribunal needed too much time to reach a decision. Only the time needed by a national court to control the duration of such arbitral decision will be controlled.<sup>55</sup>

#### **b) Art. 6(1) ECHR Express Rights Only Waivable After the Fact**

The mere signing of an arbitration agreement is not a valid waiver of a right to a “fair hearing” and to an “independent and impartial tribunal:”

In a “fair hearing,” each party should be allowed, *inter alia*, to present both factual and legal arguments, to timely consult the file, to present one’s case and to test and rebut the case of the other party,<sup>56</sup> to participate in the adduction of evidence, and to be represented or assisted by a lawyer. Such expectations are easily transposable to any procedure be it judicial, administrative, or arbitral so that there is no incompatibility of application. The scope of the right to a fair hearing is wide and depends so much on State laws (on evidence, arbitration) contents that no generalisation is possible, because any violation will be examined on a case-by-case basis giving great deference

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<sup>54</sup> In Switzerland, Art. 17 of the Concordat intercantonal sur l’arbitrage (“CIA”) allows the party to a domestic arbitration to call upon a State’s tribunal in case of undue tardiness of an arbitral tribunal’s decision. But see, *R. v. Switzerland supra* note 7.

<sup>55</sup> *R. v. Switzerland, supra* note 7 at 102. But see, Federal Tribunal decision of 7<sup>th</sup> September, 1993, *F. Spa and M. SpA v. M.*, ATF 119 II 386, 389 (1993) which held that the requirement that a decision be rendered within a reasonable time pursuant to Arts. 4 Swiss Fed. Cst. and 6(1) ECHR is a limit to the suspension of arbitral proceedings.

<sup>56</sup> An arbitral tribunal applying a legal rule which has not been invoked by the parties should call the parties attention to the existence of the rule, and give them an opportunity to comment on the rule’s relevance in the case at stake. A new qualification by the arbitral tribunal of a legal issue, in absence of any communication to the parties may contradict the right to a fair trial under Art. 6(1) ECHR. However, where the parties themselves have already dealt with the relevant legal issue and cited to a court’s case an interpretation of case-law could not be considered as an unfair surprise to the parties (it would merely be an application of the *jura novit curia* principle) see, Judgment by the Svea court of appeal rendered in 2000 in the *Gustafsson* case 8090-99, Stockholm Arb. Rep. 251ff. (2003:1). See also, KELLERHALS, Franz / BERGER, Bernhard, “*Jura novit arbiter*,” in Bucher / Canaris / Honsell / Koller (eds.), *Norm und Wirkung*, Festschrift für Wolfgang Wiegand, Staempfli, Beck, Bern, München, 2005, pp. 387-405.

to the specific circumstances of the case in point.<sup>57</sup> Consequently, the requirement that a hearing be fair may require some adaptations to be applied to arbitral proceedings but is in no way inapplicable to arbitration. An in-depth study of the span of every procedural guarantee emanating from the right to a fair hearing would go far beyond the scope of the present paper. It shall be sufficient to recall that the right to a fair hearing encompasses the concept of “*égalité des armes*.” It is then essential that arbitration proceedings respect the right to be heard and an equal treatment of the parties.<sup>58</sup>

Two issues are sometimes stressed as potential infringements on fair hearing requirements in arbitration proceedings. First, one could reasonably doubt whether there is compliance with Art. 6(1) ECHR where one party has considerably deeper pockets with which to fund the dispute resolution process than the other. So long as no party is deprived from the access to justice (i.e., to an adjudicator, e.g. an arbitral tribunal, see *supra* II.C.1.), and inasmuch as each party had a reasonable opportunity to present its case and to test the opposing case, the proceedings should not be viewed as unfair merely because one party devoted greater funding to the case than the other.<sup>59</sup> Second, the use of interim measures represents a dilemma in arbitral proceedings because for conservatory measures to be efficient stealth and surprise are of the essence. The dilemma resides in the fact that remaining fair and transparent, giving each party proper notice and providing each side with the ability to present its case and thus enjoy basic procedural rights prevents an efficient ordering of conservatory measures because a party can easily evade a measure such as an attachment of assets if informed in advance.<sup>60</sup> Nevertheless, both examples on

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<sup>57</sup> JACOT-GUILLARMOD, *supra* note 9 at 287-88.

<sup>58</sup> MATSCHER, *supra* note 8 at 282.

<sup>59</sup> Certain jurisdictions, such as Hong Kong, created a system whereby arbitrators have the power to cap the costs of the proceedings, see s.2GL of the Arbitration Ordinance (Cap 341). See also, HOUGHTON, Anthony, “*Does Arbitration Infringe Your Human Rights?*” 3 Asian Dispute Review 76, 77 (2001), where the author studies the issue in relation to the 1991 Hong Kong Bill of Rights Ordinance (Cap 59). Such cost capping suggestion would certainly add objective equality to the proceedings, but would also pave the way for a counter argument by the party that wanted to fund far more than the cap. The latter would probably complain that the proceedings were unfair because the arbitrators did not set the cap at a reasonably realistic level. Moreover, the argument could be made that the access to the tribunal was materially denied because the party could formally obtain access to the arbitral tribunal by being able to pay the advance on costs but could not then have its lawyers perform all the necessary reasonable work to prepare the case because of the cost capping.

<sup>60</sup> The issue is complicated by the fact that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”), New York, 10<sup>th</sup> June, 1958, (330 U.N.T.S. 38) does allow a recalcitrant party to invoke the fact that it was not able to present its case as a ground for refusal of recognition and enforcement of an arbitral award. See, Art. V(1)(b) NYC. See also, on the whole issue: RYSSDAL, Anders, “*Interim and*

funding and on interim measures present themselves in a similar way in ordinary court proceedings and thus are not an “arbitration specific” issue. Consequently, there is no great difficulty in applying fair hearing requirements to arbitration proceedings.

The concept of “independent and impartial” tribunal gave rise to a wide array of cases related to national courts. To be independent, a tribunal must be independent towards both the administration and the parties.<sup>61</sup> As to impartiality, European bodies proceed with a subjective-objective test.<sup>62</sup> Not only must a judge be subjectively (or actually) impartial,<sup>63</sup> he must also be objectively impartial,<sup>64</sup> i.e., he must be seen to be impartial in the eyes of a reasonable man.<sup>65</sup> To assess independence and impartiality European bodies will take a close look at the composition of the tribunal, the appointing procedure of its members, the duration of their tenure, and the possibility to challenge them.<sup>66</sup>

The Eur. Ct. H.R. gave guidance as to how to assess the independence and impartiality of a compulsory arbitral tribunal.<sup>67</sup> It seems that the independence of the Tribunal which usually covers the independence towards the State and the parties, also covers the strict equality for the parties in the influence on the composition of the arbitral tribunal.<sup>68</sup> But the principle of independence and impartiality cannot be the basis of one’s absolute right to appoint an arbitrator

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*Conservatory Measures: Theory, Strategies & a Practical Experience in Lithuania*,” 4 Stockholm Arb. Rep. 25, 26-7 (2001:1).

<sup>61</sup> Eur. Ct. H.R., *Campbell and Fell v. United Kingdom*, *supra* note 20 at §78.

<sup>62</sup> Eur. Ct. H.R., *Piersack v. Belgium*, 1<sup>st</sup> October, 1982, A/53, §30.

<sup>63</sup> Eur. Ct. H.R., 10<sup>th</sup> June, 1996, *Pullar v. United Kingdom*, Reports 1996-III, §§28ff.

<sup>64</sup> See, Eur. Ct. H.R., *Piersack v. Belgium*, *supra* note 62. See also, MOURRE, Alexis, “Réflexions sur quelques aspects du droit à un procès équitable en matière d’arbitrage après les arrêts des 6 novembre 1998 et 20 février 2001 de la Cour de Cassation française,” in CAMBI FAVRE-BULLE / DAL / FLÉCHEUX / LAMBERT / MOURRE, *L’arbitrage et la Convention européenne des droits de l’homme*, Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001, pp. 23-55, at 50.

<sup>65</sup> SANDY, David, “Independence, Impartiality, Arbitration and the Human Rights Act in England,” 20 Arb. Int. 305, 314 (2004).

<sup>66</sup> Eur. Ct. H.R., *Sramek v. Austria*, 22<sup>nd</sup> October, 1984, A/84, §§38-9.

<sup>67</sup> See, *Lithgow et al. v. The United Kingdom*, *supra* note 6 at §202. See also, *Bramelid & Malström v. Sweden*, *supra* note 14 at §§33-40 of the Report, where the Commission unanimously declared that the requirement of independence and impartiality had not been respected in relation to a compulsory arbitral tribunal. See also, VELU / ERGEC, *supra* note 22 at p. 457, §542.

<sup>68</sup> See, *Bramelid & Malström v. Sweden*, *supra* note 14 at §§33ff. See also, COHEN JONATHAN, Gérard / JACQUÉ, Jean-Paul, “Activité de la Commission européenne des droits de l’homme,” 31 *Annuaire français de droit international* 418, 427 (1985).



since the arbitrators have to remain independent from the parties.<sup>69</sup> Nevertheless, as to consensual arbitral tribunals, the Eur. Comm'n H.R. holds applications inadmissible because national courts need not ensure that consensual arbitral proceedings conform to Art. 6(1) ECHR and accordingly States are entitled to decide the grounds on which an arbitral award may be challenged.<sup>70</sup> The fact that a national law applies less stringent standards of fairness to arbitration proceedings than those required by Art. 6(1) ECHR is apparently not contrary to that provision.

With all due respect, one cannot but disagree with the Commission's approach because in areas concerning public policy (*ordre public*) of the member States of the Council of Europe any decision alleged to be in breach of Art. 6(1) ECHR calls for particularly careful review.<sup>71</sup> The "*ordre public*" nature of Art. 6(1) ECHR guarantees is no obstacle to a partial waiver of such guarantees.<sup>72</sup> But still the nature of certain of such rights excludes the possibility to waive their enforcement in advance.<sup>73</sup> Accordingly, a party cannot waive, in advance, its right to challenge the arbitral tribunal (which represents its right to an independent and impartial tribunal) because such right pertains to public policy.<sup>74</sup> But a waiver of the exercise of such right is admissible during the proceedings.<sup>75</sup> The same reasoning holds true for the right to a fair hearing.<sup>76</sup>

Consequently, all due process rights are not equally waivable. In other words, there are levels among due process rights so that some of them are more fundamental than others and pertain to public policy. Those more fundamental rights are not waived by the mere signing of an arbitration agreement because at the time of the signing parties are not aware of all the consequences of a waiver. Subsequent conduct during the proceedings (once the facts are known) may affect those fundamental rights that could not have been waived

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<sup>69</sup> See, *Bramelid & Malström v. Sweden*, *supra* note 14 at §§38-40 of the Report. See also, PETROCHILOS, Georgios, "*Observations: Party Plurality and Appointment of Arbitrators*," 5 Stockholm Arb. Rep. 205, 212 (2002:1).

<sup>70</sup> *Nordström v. The Netherlands*, *supra* note 7 at 112-117, notably 116.

<sup>71</sup> *Deweert v. Belgium*, *supra* note 32 at §49.

<sup>72</sup> LAMBERT, *supra* note 8 at 16.

<sup>73</sup> See, *Albert and le Compte*, *supra* note 29 at §35, and Eur. Ct. H.R., *H. v. Belgium*, 30<sup>th</sup> November, 1987, A/127, §54.

<sup>74</sup> KRINGS / MATRAY *supra* note 1 at 259; FLÉCHEUX, Georges, "*Propos introductif*," in CAMBI FAVRE-BULLE / DAL / FLÉCHEUX / LAMBERT / MOURRE, *L'arbitrage et la Convention européenne des droits de l'homme*, Droit et Justice No. 31, Nemesis, Bruylant, Bruxelles, 2001, pp. 7-8, who believes the concept of impartiality is an international custom; and DAL, *supra* note 4 at 57-68 who states that independence and impartiality of arbitrators are fundamental principles of every democratic society.

<sup>75</sup> See, *Suovaniemi v. Finland* and *X. v. Federal Republic of Germany*, both *supra* note 7. See also generally, *Deweert v. Belgium*, *supra* note 32, §§49-54.

<sup>76</sup> See *supra* note 40 and accompanying text.

beforehand (right to a fair hearing, and right to an independent and impartial tribunal).<sup>77</sup>

Then the signing of an arbitration agreement merely waives the right to a State's tribunal, and the right to a public hearing within a reasonable time, but does not affect fair hearing aspects (such as equality of arms, right to be heard, etc.) nor the right to an independent and impartial tribunal.<sup>78</sup>

Thus, in those countries that are signatories to the ECHR, both arbitrators and national judges, respectively indirectly<sup>79</sup> and directly, will focus on human rights principles as the expression of transnational procedural standards.<sup>80</sup>

#### **D. Liability of the State for ECHR Violations in Consensual Arbitration?**

Art. 6(1) ECHR guarantees the right to a tribunal "established by law." The phrase "law," in the autonomous meaning of the ECHR, does not formally correspond to the characterisation given by municipal law, but is rather any law in the material sense.<sup>81</sup> Thus, whether the set of provisions is named an act, a statute, or an ordinance is not decisive. Where the law directly creates the arbitral tribunal, such as in compulsory arbitration, then the arbitral tribunal is deemed to be established by law.<sup>82</sup> What about a consensual arbitral tribunal appointed by the parties within the frame of a State's arbitration law? Consensual arbitral tribunals are usually not pre-constituted,<sup>83</sup> because for both practical and tactical reasons the parties refrain from appointing their arbitrators already at the moment they sign an arbitration clause.<sup>84</sup> Is it

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<sup>77</sup> MOURRE, *supra* note 8 at 2071-3.

<sup>78</sup> KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 74; MOURRE, *supra* note 8 at 2071.

<sup>79</sup> As will be seen (*infra* II.D.), human rights do not apply directly before arbitral tribunals, but have an indirect impact on the way arbitral proceedings are conducted, because of the potential threat of a challenge of the award or of a denial of recognition and enforcement by the competent national court which must directly guarantee fundamental rights.

<sup>80</sup> KAUFMANN-KOHLER / SCHULTZ, *supra* note 9 at 204.

<sup>81</sup> Eur. Ct. H.R., *James et al. v. United Kingdom*, 21<sup>st</sup> February, 1986, A/98, §67.

<sup>82</sup> *Lithgow et al. United Kingdom*, *supra* note 6 at §§200f.

<sup>83</sup> JACOT-GUILLARMOD, *supra* note 9 at 291.

<sup>84</sup> Among reasons why parties refrain to appoint the arbitral tribunal before any dispute arises are: the risk that any of the appointed arbitrators dies before the proceedings are commenced and the related risk that the arbitration clause cannot be enforced because of dilatory measures taken by the counter-party, or because arbitration clauses containing the names of the arbitrators might well be considered to have been entered into *intuitu personae*. In the latter hypothetical, the arbitration clause could lapse if the recalcitrant respondent proves successful in arguing that arbitration was only envisaged with regard to

sufficient then for a consensual arbitral tribunal to be constituted pursuant to the legislative framework organised by the State? In other words, is it enough that the State indirectly establishes the possibility for the parties to constitute a consensual arbitral tribunal to consider the latter to be established by law and subject to Art. 6(1) ECHR guarantees? Or, is it necessary that the State itself directly creates a compulsory arbitration scheme? European bodies did not yet decide precisely on the issue, but some clues are available: legal scholars are divided as to whether the fact that a State recognises by statute the validity of consensual arbitration is sufficient to consider it “established by law.”<sup>85</sup> Other legal commentators draw a distinction between the “creation” of a tribunal by the legislator and the “designation” of judges, and provide examples where even national judges are not designated by the legislator but are either elected (lawyers acting as deputy-judges) or randomly designated (members of a jury).<sup>86</sup> Preference should be given to the approach that considers a consensual arbitral tribunal indirectly “established by law,” although not formally. An arbitral tribunal should be guided by the arbitration agreement which established it, but such effect of the arbitration agreement only exists because the State opens the way for arbitration in its statutes.<sup>87</sup> Therefore, any consequences on the State’s responsibility ought to be nuanced, keeping in mind the subsidiary character (only upon party’s request) of any State’s intervention in the arbitration proceedings.<sup>88</sup> Nonetheless, the fact that a State judge helps implementing an arbitration scheme by appointing an arbitrator upon the request of a party does not render the arbitral tribunal directly “established by law” within the meaning of Art. 6(1) ECHR. Accordingly, Art. 6(1) ECHR is not directly applicable to arbitrators,<sup>89</sup> and their awards cannot be directly appealed before ECHR bodies.<sup>90</sup>

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the appointed arbitrator and that otherwise parties would not have opted for arbitration at all. In the former hypothetical, a recalcitrant party could take advantage of the absence of a scheme to replace arbitrators in the arbitration agreement and the arbitration clause could become pathological. One tactical reason for not nominating an arbitrator in the arbitration clause is that before the dispute arises the parties do not usually know what could be the subject-matter of any future dispute and are thus not in a position to choose who could be the better arbitrator to understand their case.

<sup>85</sup> In favour, see, PONCET/CAMBI FAVRE-BULLE *supra* note 9 at 667. *Contra*, see JARROSSON, *supra* note 8 at 592, §35.

<sup>86</sup> See, LAMBERT, *supra* note 8 at 19.

<sup>87</sup> HABSCHIED, *supra* note 9 at 349.

<sup>88</sup> JACOT-GUILLARMOD, *supra* note 9 at 294; VOYAME, Joseph, “L’Etat et l’arbitrage commercial international,” in REYMOND/BUCHER (ed.), *Recueil de travaux suisses sur l’arbitrage international*, Schulthess, Zürich, 1984, pp. 15-22, notably 18, §9 and 21, §17.

<sup>89</sup> *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 *Business Law International* pp. 444-445 (2004); OLDENSTAM, *supra* note 30 at 337-8; BENCHENEB, *supra* note 15 at 182-3.

<sup>90</sup> KRINGS / MATRAY *supra* note 1 at 256.

Besides, pursuant to Art. 1 ECHR States shall secure to “everyone within their jurisdiction” the rights and freedoms embedded in the Convention. One may reasonably wonder whether by signing an arbitration agreement parties do not place themselves outside of the State’s jurisdiction, and consequently also outside of the scope of application of the ECHR. Actually, arbitrators acting within the geographical boundaries of a country are not representatives of the State and may not directly create a State’s liability before the Eur. Ct. H.R. and thus the signing of an arbitration agreement would act as a total waiver of the guarantees embedded in the ECHR. This paper tried earlier to demonstrate that the reality is not so clear-cut and that the waiver of the right to a national tribunal (embedded in any arbitration agreement) does not fully exclude the obligation for the State to protect the parties according to the ECHR. Since the State authorises consensual arbitration within its legal system (an arbitral tribunal as seen is indirectly “established by law”), the State’s liability may be created under the ECHR where the effect given to the arbitration agreement or to the arbitral award is contrary to ECHR principles. Therefore, there is an indirect application of the ECHR to consensual arbitration.

Since the State must act as guardian of certain fundamental rights, its control may have an influence on the way arbitration proceedings are handled, and even bar the recognition and enforcement of an arbitral award (on the basis of a violation of international public policy).<sup>91</sup> Hence, arbitrators must keep the ECHR guarantees in mind where an arbitral agreement or award may be enforced in a signatory country to the ECHR. It is so because under most institutional arbitration rules arbitrators must endeavour to render an enforceable award.<sup>92</sup>

Therefore, the entering into an arbitration agreement does not lead to an exclusion of the application of the ECHR, but does not lead to its full application to consensual arbitration proceedings either. It is so because a valid waiver of certain limited rights embedded in the ECHR excludes the application of the ECHR and consequently allows the State to escape its liability, but only as to those limited rights. Besides, States enjoy a certain

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<sup>91</sup> Within the frame of the recognition of foreign court decisions, the European Court of Justice recently held that Art. 6 ECHR represents international public policy for the interpretation of Art. 27(1) of the Brussels Convention, see ECJ, Case C-7/98, *Dieter Krombach v. André Bamberski* of 28<sup>th</sup> March, 2000, §44. See also, VELU / ERGEC, *supra* note 22 at p. 364, §407; FLÉCHEUX *supra* note 74 at 8 who speaks of “international custom” for certain ECHR guarantees such as impartiality.

<sup>92</sup> See e.g., Art. 35 International Chamber of Commerce (“ICC”) Rules of Arbitration (in force as from 1<sup>st</sup> January, 1998) according to which the arbitrators “*shall make every effort to make sure that the Award is enforceable at law.*” See also, Art. 32.2 London Court of International Arbitration (LCIA) Arbitration Rules (effective 1<sup>st</sup> January, 1998) which provide that the arbitral tribunal “*shall make every reasonable effort to ensure that an award is legally enforceable.*”

leeway (*marge d'appréciation*) while organising the control of awards. Furthermore, some of Art. 6(1) ECHR guarantees actually fall outside of the scope of the State's court control (see, e.g., right to a decision within a reasonable time) unless the State has the possibility to control it *sua sponte*. Finally, the parties may validly waive, within certain limits, some of the Art. 6(1) ECHR guarantees.

There is neither an exclusion nor an incompatibility of arbitration with the ECHR. Where ratifying the ECHR States are not delegated any obligation to prevent parties under their jurisdiction to entrust consensual arbitrators with the resolution of their disputes.<sup>93</sup> The Eur. Ct. H.R. considers that arbitration is no threat to the protection of human rights because it already protected the right of a party to an agreed upon arbitration proceedings against the attempt of a State to impose upon its counterpart (through the enactment of a specific law) its desired proceedings.<sup>94</sup>

In sum, the human right of access to justice (see *supra* II.C.1.) does not, in principle, obligate the State in which the arbitral tribunal is situated to allow the annulment of awards. But the waiver of the right to legal protection by national courts is only admissible if the fairness of the proceedings is ensured through the supervision of national courts. Therefore, a certain degree of State supervision (through the setting up of an effective award annulment procedure) is required under article 6(1) ECHR as to those very fundamental rights that cannot be waived before the fact. Such violation of a duty to provide for effective annulment proceedings securing the preservation of fundamental due process guarantees, stemming from Art. 6(1) ECHR, is the area where State's liability can be asserted.

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<sup>93</sup> In *Axelsson v. Sweden* and in *X. v. Federal Republic of Germany*, both *supra* note 7, the Commission legitimizes the recourse to consensual arbitration by recognising a "legitimate aim of encouraging non-judicial settlements and of relieving the courts of an excessive burden of cases."

<sup>94</sup> Eur. Ct. H.R., 9<sup>th</sup> December, 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, A/301-B, §§41-50 where Strasbourg judges probably had in mind the application of the *pacta sunt servanda* principle, see BENCHENEB, *supra* note 15 at 190.

### **III. Concrete Application of Art. 6(1) ECHR Rights to Arbitration in Switzerland**

After making a few introductory remarks on how the ECHR fits in the Swiss legal system (*infra* III.A.), how conventional, constitutional and statutory rules reconcile (*infra* III.B.) and how the Swiss Federal Tribunal applies the ECHR (*infra* III.C.) a potentially problematic feature of Swiss arbitration law will be addressed (*infra* III.D.).

#### **A. Self-Executing Character of the European Convention on Human Rights in Switzerland**

Under Swiss law, international treaties such as the ECHR are self-executing,<sup>95</sup> i.e., they form part of the Swiss legal system and are directly applicable as from the date they enter into force in Switzerland.<sup>96</sup> The ECHR entered into force on 28<sup>th</sup> November, 1974, in Switzerland.<sup>97</sup>

#### **B. Relationship Between Art. 6(1) ECHR, the Swiss Federal Constitution, and the Swiss Law on Arbitration**

According to the *principe de faveur* (favour principle) the Swiss Federal Tribunal expressly applies the most favourable rule (among those available: Federal and Cantonal Constitutions, and the ECHR) that provides the utmost

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<sup>95</sup> *Validité immédiate*, see AUER, Andreas / MALINVERNI, Giorgio / HOTTELIER, Michel, *Droit constitutionnel suisse*, Volume I, L'Etat, Staempfli, Berne, 2000, pp. 444-445, §1267. For an example of a jurisdiction where international treaties are executory, i.e., do not become part of local law unless adopted in some form by the local parliament, see the English Human Rights Act 1998 which formally enacted the ECHR in England. See also, ADAM, *supra* note 8 at 415.

<sup>96</sup> On the issue whether rules are sufficiently precise to be directly applied, see CAFLISCH, Lucius, "La pratique suisse en matière de droit international public 2003," 14 SZIER/RSDIE 661, 670 (2004) with further references.

<sup>97</sup> RS 0.101.

protection to the fundamental right at stake.<sup>98</sup> But since the procedural guarantees of Art. 6(1) ECHR are said to be equivalent to the fundamental rights protected by the Swiss Constitution,<sup>99</sup> the favour principle finds here no application. For instance, the right to an independent and impartial arbitrator is guaranteed both by the Swiss Federal Constitution (“Fed. Cst.”) and the ECHR.<sup>100</sup> According to the Federal Tribunal Art. 6(1) ECHR does not have a wider scope of protection than Art. 58 Fed. Cst. (now Art. 30)<sup>101</sup> The same holds true for other due process guarantees such as the right to be heard where Art. 6(1) ECHR gives no further protection than Art. 4 Fed. Cst. (now Art. 9).<sup>102</sup> Moreover, similar guarantees are included in the Swiss law of arbitration.<sup>103</sup> This is so because Art. 6(1) ECHR guarantees differ little from procedural norms of any democratic legal order.<sup>104</sup> Procedural public policy protects the right to a fair trial.<sup>105</sup> As a result, codified procedural public policy (Art. 190(2)(a-d) PILA) somewhat overlaps residual public policy (Art. 190(1)(e) PILA) where the protection is of ECHR nature because some rights protected by invoking the ECHR through proceedings before the Federal Tribunal under Art. 190(2)(e) PILA are also expressly provided by Art. 190(2)(a-d) PILA, such as the right to a properly constituted tribunal, the right to equal treatment of the parties, and the right to be heard. Hence, there are in Switzerland three layers of due process protection: the conventional, the constitutional and the statutory and despite such apparently excellent

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<sup>98</sup> HOTTELIER, Michel, *La convention européenne des droits de l'homme dans la jurisprudence du tribunal fédéral*, Payot, Lausanne, 1985, p. 38 with further references.

<sup>99</sup> HABSCHIED, *supra* note 9 at 344.

<sup>100</sup> RONEY, David. P. / FROSSARD Viviane, “How Final is Final? National Court Approaches to Decisions on Challenges by Arbitral Institutions,” 6 Stockholm Arb. Rep. 92, 106 (2003:2) with further references.

<sup>101</sup> *X. v. Neuchâtel*, 9th March, 1999, ATF 125 I 119, 122 (1999); *G. v. Zuerich*, 19th March, 1996, ATF 122 I 18 (1996); *B. v. Obwalden*, 24th August, 1994, ATF 120 Ia 184 (1994); *Baragiola v. Lugano*, 15th February, 1990, ATF 116 Ia 14 (1990); PONCET / CAMBI FAVRE-BULLE, *supra* note 8 at 662, §14 *in fine*; HOTTELIER, *supra* note 98 at 39.

<sup>102</sup> HOTTELIER, *supra* note 98 at 40 with further references.

<sup>103</sup> Swiss law of arbitration is embedded in chapter 12 (Arts. 176-194) of the Private International Law Act, RS 291 (“PILA”). Arts. 180(1)(c) and 190(2)(d) PILA respectively protect the independence of the arbitrator and the equal treatment of the parties and their right to be heard.

<sup>104</sup> EMBERLAND, Marius, “The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic,” 20 J. of Int. Arb. 355, 357 (2003).

<sup>105</sup> Unreported Federal Tribunal decisions of 18<sup>th</sup> September, 2001, 4P.143/2001, §§3a and 3aa; and of 7<sup>th</sup> August, 2001, 4P.124/2001, §3; SCHWEIZER, Philippe, “L’ordre public de l’article 190 al 2 lit. e LDIP: le caméléon court toujours,” in BIEBER, Roland (ed.), *Mélanges en l’honneur de Bernard Dutoit*, Droz, Genève, 2002, pp. 271-285, notably p. 273 and 281.

protection the statutory system allows for a loophole to public policy protection (*infra* III.D.).

### **C. From Indirect to Direct Application of the European Convention on Human Rights Guarantees to Consensual Arbitrations with Seat in Switzerland**

In 1986, the Federal Tribunal held that the ECHR did not apply to arbitral proceedings.<sup>106</sup> Thereafter, even though the Eur. Comm'n H.R. found no violation on the side of Switzerland as it dealt with the case,<sup>107</sup> the Federal Tribunal changed its approach and held that Art. 6(1) ECHR does also apply to arbitral proceedings.<sup>108</sup> Unfortunately, the Federal Tribunal did not explain why it so dramatically changed its approach.<sup>109</sup>

What clearly results from the Federal Tribunal case-law is that the guarantees of Art. 6(1) ECHR apply only to proceedings before State tribunals formally established by law. Therefore, such guarantees do not directly apply to arbitrators. However, ECHR guarantees apply to proceedings for setting aside an arbitral award before state tribunals.<sup>110</sup> Actually, a direct setting aside of an arbitral award rendered on the Swiss territory is not available before Strasbourg authorities.<sup>111</sup> Art. 6(1) ECHR only comes into play where the arbitral award is being challenged before the Federal Tribunal.<sup>112</sup>

The Federal Tribunal clearly distinguished the fact that ECHR does not apply to proceedings before an arbitral tribunal from the issue of whether the very

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<sup>106</sup> See, *R. v. A.*, ATF 112 Ia 166 (1986). See also, CAMBI FAVRE-BULLE, *supra* note 9 at 70.

<sup>107</sup> *R. v. Switzerland*, *supra* note 7.

<sup>108</sup> See, *X. v. Y.*, 30<sup>th</sup> April, 1991, ATF 117 Ia 166 (1991) confirmed by unreported ATF *Hitachi v. SMS*, 30<sup>th</sup> June, 1994, 15 Bull. ASA 99 (1997) and *Egemetal v. Fuchs*, 28<sup>th</sup> April, 2000, ATF 126 III 249 (2000) with regard to experts in arbitration. See also, CAMBI FAVRE-BULLE, *supra* note 9 at 71-2.

<sup>109</sup> CAMBI FAVRE-BULLE, *supra* note 9 at 73.

<sup>110</sup> Federal Tribunal decision of 11<sup>th</sup> June, 2001, *A. v. UEFA and TAS*, ATF 127 III 249 (2001), relevant unreported excerpt (§2d/aa) available under 4P.64/2001 on the Federal Tribunal's website: [www.bger.ch](http://www.bger.ch), or 19 ASA Bulletin 566, 571 (2001); Federal Tribunal decision of 22<sup>nd</sup> July, 1986, *R. v. A.*, ATF 112 Ia 166, 168 (1986). See also, KNOEPFLER François / SCHWEIZER, Philippe, *Arbitrage international – Jurisprudence suisse commentée depuis l'entrée en vigueur de la LDIP*, Schulthess, Zurich, 2003, p. 584.

<sup>111</sup> HABSCHIED, *supra* note 9 at 345.

<sup>112</sup> See, *R. v. Switzerland* *supra* note 7; ATF 112 Ia 166, 168 (1986); HAEFLIGER, Arthur / SCHÜRMAN, Frank, *Die Europäische Menschenrechtskonvention und die Schweiz*, 2<sup>nd</sup> ed., Stämpfli, Bern, 1999, p. 148.



same arbitral tribunal violated essential principles of procedure.<sup>113</sup> Actually, Art. 6(1) ECHR guarantees are so essential that virtually all national legislations and international conventions on arbitration guarantee their protection. Most of such guarantees are of universal value and pertain to international public policy or even to transnational public policy. This being so, arbitrators must respect such guarantees otherwise their awards would be subject to a challenge on public policy grounds. As seen above (*supra* II.C.3.b.) international arbitrators sitting in any signatory country to the ECHR such as Switzerland must respect *ordre public* (public policy) in their awards.<sup>114</sup> In Switzerland, ECHR guarantees have, like in other signatory countries,<sup>115</sup> an *ordre public* nature. Since human rights are of *ordre public* nature in Switzerland, a violation of Art. 6(1) ECHR guarantees would fall under the ambit of Art. 190(2)(e) PILA.<sup>116</sup>

Basic due process being a core public policy principle,<sup>117</sup> it should not be waivable before the fact. This leads us to a problematic feature of the arbitration laws of some signatories to the ECHR.

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<sup>113</sup> Federal Tribunal decision of 11<sup>th</sup> June, 2001, *A. v. UEFA and TAS*, cited *supra* note 110 at §2d/aa; Federal Tribunal decision of 30<sup>th</sup> April, 1991, *X. v. Y. AG*, ATF 117 Ia 166, 168 (1991) = 140 JdT I 313, 314 (1992). See also, GAUCH, Peter / AEPLI, Viktor / STÖCKLI, Hubert, *Präjudizien zum OR – Rechtsprechung des Bundesgerichts*, 5<sup>th</sup> ed., Schulthess, Zurich, 2002, p. 430, §38; VILLIGER, Mark E., *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, 2<sup>nd</sup> ed., Schulthess, Zurich, 1999, p. 278, §439.

<sup>114</sup> Art. 190(2)(e) PILA reads: “*The award may only be annulled [...] if the award is incompatible with public policy.*” Some authors consider human rights as being part of transnational public policy (“*ordre public transnational*”), see RACINE, Jean-Baptiste, *L’arbitrage commercial international et l’ordre public*, L.G.D.J., Paris, 1999, p. 399, §719; as well as some national courts, see unreported decision of the Cour d’appel de Bruxelles, 1<sup>ère</sup> chambre suppl., 6<sup>th</sup> December 2000, 1995/AR/1964, summarised in 121 Gazette du Palais 861, 862 (2001). Other courts view *ordre public* as an universal principle protected as an international human right, see Corte di appello di Milano, 4<sup>th</sup> December, 1992, *Allsop Automatic Inc. v. Tecnoski s.n.c.*, 30 Riv. Dir. Int. priv. e proc. 873 (1994), translated into English in 22 ICCA YB 725, 726 (1997).

<sup>115</sup> See e.g., Belgium: VELU / ERGEC, *supra* note 22 at p. 83, §99; France: MOURRE, *supra* note 64 at 26; United Kingdom: ROBINSON, William / KASOLOWSKY, Boris, “*Will the United Kingdom’s Human Rights Act Further Protect Parties to Arbitration Proceedings?*” 18 *Arbitration International* 453, 463 (2002) with further references.

<sup>116</sup> HABSCHIED, *supra* note 9 at 345 and 348.

<sup>117</sup> EMBERLAND, Marius, “*The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic*,” 20 *J. of Int. Arb.* 355, 358 (2003).

#### **D. Exclusion of the Right to Challenge an Arbitral Award on Public Policy Grounds: the Swiss Example**

As seen above, (*supra* II.C.3.) an arbitration agreement is not a complete waiver of all Art. 6(1) ECHR guarantees. The hard core of Art. 6(1) ECHR seems to encompass the observance of due process, and especially the right to a fair hearing and to the independence and impartiality of the tribunal, which may not be renounced in advance.<sup>118</sup> All these rights may be renounced during the proceedings by mere inactivity of a party who is aware of the violation.

Therefore, a party may also not validly renounce, in advance, its right to challenge an award before State courts where ECHR standards are not met. Therefore, it is questionable whether national arbitration laws expressly providing for a possibility for the parties to agree on an exclusion of the right to challenge an award are compatible with ECHR standards.<sup>119</sup>

Through the signing of an arbitration agreement parties to arbitration proceedings expect that arbitrators will abide by ECHR principles, notably, independence and impartiality, and the right to a fair trial.<sup>120</sup> Parties may shape their arbitral procedure as they see fit but they may not disregard some mandatory rules that provide minimal procedural guarantees in the proceedings, such as the right to be heard, or the right to challenge an arbitrator, and they cannot exclude the possibility of setting aside an arbitral award as to such grounds.<sup>121</sup>

This is so because there is a limitation to party autonomy in the interest of the parties themselves: parties to an arbitration agreement cannot validly agree on a procedure that would directly violate certain fundamental public policy principles such as due process, and natural justice.<sup>122</sup> Party autonomy and the freedom to contract (*liberté contractuelle*) is not a right protected by the

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<sup>118</sup> HELLER, Kurt, “*Constitutional Limits of Arbitration*,” 4 Stockholm Arb. Rep. 7, 16 (2001:1).

<sup>119</sup> See e.g., Art. 192 PILA that allows parties to an arbitration agreement to fully waive their right to challenge an award as long as they have no domicile or residence in Switzerland; Art. 1717(2) Belgian Code of Civil Procedure that limits the jurisdiction of Belgian courts within the frame of award challenges to arbitration proceedings involving at least a Belgian national or resident. See also, s.51 of the 1999 Swedish Arbitration Act where public policy (Art. 33(2) of the same Act) is a non-waivable ground, beyond the power of the parties to exclude; HELLER, *supra* note 118 at 17.

<sup>120</sup> CAMBI FAVRE-BULLE, *supra* note 9 at 74.

<sup>121</sup> WEDAM-LUKIC, *supra* note 8 at 19.

<sup>122</sup> OLDENSTAM, *supra* note 30 at 337.

ECHR, it must then be so for the arbitration agreement as well.<sup>123</sup> This is all the more so valid in Switzerland since the latest decision of the Federal Tribunal is quite flexible as to the clarity of the language needed to constitute an exclusion agreement.<sup>124</sup> The parties should only be authorised to exclude the challenge of an arbitral award on grounds that do not pertain to public policy. Moreover, an additional problem arises because through exclusion agreement parties lose a degree of jurisdiction (the annulment). This might be acceptable where a true examination of ECHR guarantees takes place at the enforcement stage, but it becomes impossible to ensure compliance with ECHR guarantees where the arbitration ended with an award declining jurisdiction (*per se* not enforceable).

Accordingly, arbitral tribunals are authorised to adjudicate disputes subject to the supervisory jurisdiction of national courts which will control whether very fundamental human rights pertaining to public policy have been respected or validly waived.<sup>125</sup> ECHR guarantees are thus indirectly applicable to consensual arbitration through the national court's *a posteriori* control that cannot be waived in advance with regard to public policy grounds.

#### **IV. Conclusion**

An arbitral tribunal with seat in Switzerland (or in any signatory country to the ECHR) is indirectly bound to respect Art. 6(1) ECHR's principles through the threat of the Federal Tribunal's (or of the country's competent court for setting aside proceedings) review of a challenged arbitral award. In Switzerland, the Federal Tribunal applies directly (and not analogically) certain essential guarantees of Art. 6(1) ECHR to arbitral proceedings.

The content of the guarantees protected by Art. 6(1) ECHR is very much the same as general principles protected under Swiss law so that parties in dispute often refer only to the Swiss constitution and do not even refer to the ECHR,<sup>126</sup> or the Federal Tribunal states that the boundaries of the guarantees of Fed. Cst and ECHR are alike.

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<sup>123</sup> BENCHENEB, *supra* note 15 at 185 with further references.

<sup>124</sup> See, *A. v. B. and C.*, 4<sup>th</sup> February, 2005, ATF 131 III 173 (2005), and compare with the former stricter approach in the multiple cases therein cited, notably with *S. v. K. Ltd.*, ATF 116 II 639 (1990).

<sup>125</sup> ROBINSON, William / KASOLOWSKY, Boris, "Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?" 18 *Arbitration International* 453, 462 (2002).

<sup>126</sup> See e.g., in Belgium, DAL, *supra* note 4 at 57-68.

Besides, one may legitimately doubt whether the issue of applicability of the ECHR to consensual arbitration has any practical interest since arbitration practitioners strive to respect fundamental rights and due process.<sup>127</sup> The issue is important to demonstrate what are the boundaries of the control by signatories to the ECHR. Since the ECHR only directly concerns States and their tribunals, and since the principle of applicability of the ECHR to the control made by state tribunals over the consensual arbitral award is now uncontroversial, there still remains the issue of the modalities of such control.<sup>128</sup> Arbitral tribunals are consensual tribunals that do not represent States and accordingly are not organs whose conduct could lead to a State's liability. Only States are liable for violations of the ECHR and only the State must ultimately indemnify a party for violations committed. Hence, the ECHR does not apply directly to arbitrators.<sup>129</sup> But a State should not authorise any violation of the ECHR and should not recognise and enforce any arbitral award that would violate the ECHR. A State should not allow a consensual arbitration award that would violate the ECHR to have effect in its legal order without being potentially submitted to a liability under the ECHR. From such *imputabilité* derives an indirect application of the ECHR to arbitration through the State judge's control of the award. Since the ECHR is part of international public policy or *ordre public*, no total waiver of due process guarantees can exist.<sup>130</sup> But partial waivers are admissible in the sense that consensual arbitration acts as a mitigating factor of the control that State tribunals must exert over arbitral awards by virtue of its international obligations deriving from the ECHR.<sup>131</sup> But there is no *contrôle préventif*: as long as there is no award (be it interim or final) there is no possibility to reprimand any violation of the ECHR, and actually, as long as there is no challenge (or recognition and enforcement proceedings) of the award there is no control by the State.<sup>132</sup> This is the reason why a full exclusion of the right to challenge an arbitral award on public policy grounds is not acceptable. But since most national arbitration laws provide for a control of arbitral awards on limited grounds (and only very few provide for an exclusion of challenge) arbitrators would be well advised to observe the spirit of Art. 6(1) ECHR during the arbitral proceedings.<sup>133</sup> And

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<sup>127</sup> MOURRE, *supra* note 64 at 27.

<sup>128</sup> *Id.* at 29.

<sup>129</sup> *Id.* at 30.

<sup>130</sup> *Id.* at 31.

<sup>131</sup> *Id.* at 32.

<sup>132</sup> The existence of the award containing a violation is not sufficient to impose liability on a State, the award must have been in some way presented before State court by a party willing either to challenge or enforce such award. Research uncovered no legal system of a signatory to the ECHR where national courts would *sua sponte* verify the contents of arbitral awards absent any request of a party.

<sup>133</sup> *X. v. Federal Republic of Germany*, *supra* note 7 at 94-96. See also, HELLER, *supra* note 118 at 12.

actually the case-law of European bodies calls for State control over arbitration.<sup>134</sup> The indirect application of the ECHR to consensual arbitration will not dramatically change the face of arbitration since national laws and international conventions on the topic already provide for the respect of procedural guarantees close to those protected by Art. 6(1) ECHR. What may evolve in the minds of international arbitrators is the awareness that human rights may come within the hazy boundaries of public policy in the country where they are sitting as arbitrators.

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<sup>134</sup> See, Eur. Comm'n H. R. unreported decisions: *Firma Heinz Schibler KG v. Germany*, 2<sup>nd</sup> December, 1991, Application No. 18805/91; *Jakob Boss Söhne KG v. Germany*, 2<sup>nd</sup> December, 1991, Application No. 18479/91; both based on the unreported seminal case: Eur. Comm'n H. R., *M. & Co. v. Germany*, 9<sup>th</sup> February, 1990, Application No. 13258/87, where transfer of powers by a State to the European Communities did not exclude that States responsibility under the ECHR with regard to the exercise of the transferred powers. See also, HELLER, *supra* note 118 at 13.