‘Humanising’ Arbitration: the interplay between human rights and arbitration in recent European Court of Human Rights case law

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More often than not, arbitrators and practitioners are faced with multiple national legal systems – and even the interaction of international, regional and supranational regimes – when resolving disputes. As President Spano of the European Court of Human Rights (‘ECtHR’) highlighted,[1] the ‘margin of appreciation’ doctrine serves to strike a balance in this context between state sovereignty and fundamental rights – be it the right to fair compensation, which is crucial in most investment arbitration proceedings, or even procedural safeguards and substantial rights under international and regional treaties.

In the context of the Council of Europe, if we accept that there is a ‘constitutional’ right to arbitration as ‘a manifestation of the very broad right to “respect for private

1 A. Kelly, ‘Human Rights and Arbitration: A discussion between the President of the European Court of Human Rights and Neil Kaplan’ in Kluwer Arbitration Blog (30 November 2020) <http://arbitrationblog.kluwerarbitration.com/2020/11/30/human-rights-and-arbitration-a-discussion-between-the-president-of-the-european-court-of-human-rights-and-neil-kaplan/> accessed 28 September 2022.

life" enshrined in article 8"[2] of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), then it is certainly worth examining how this right interacts with the other rights and freedoms.

This article explores the ECtHR's most recent developments in this area, specifically as regards Article 6(1) of the ECHR and Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ('Protocol No 1').

Procedural rights: Article 6(1) of the ECHR and the dimensions of the right to a fair trial

Procedural safeguards such as those set out in Article 6(1) of the ECHR[3] might at first sight appear to be at odds with the ability to submit disputes to alternative dispute resolution methods such as arbitration.[4] It comes as no surprise that the vast majority – if not all – of the applications to the ECtHR regarding arbitration proceedings concern, to some extent, alleged violations of these rights.

In its 1999 decision on the admissibility of the *Case of Osmo Suovaniemi and others v Finland* ('*Suovaniemi*'), the ECtHR considered that 'a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6' and that, even if 'such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6, unequivocally renouncing the right to an impartial arbitrator was not incompatible with the ECHR.[5]

The Court did not limit itself to examining whether the procedural guarantees within the arbitration proceedings could be deemed waived; it also assessed whether a hypothetical waiver would extend to any procedural guarantees that domestic courts could ultimately afford

In declaring the application inadmissible, and despite noting that the grounds the applicants relied upon to question the arbitral tribunal's impartiality were expressly established in the Finnish Arbitration Act, the Court accepted the domestic courts' findings that the waiver was unequivocal. The ECtHR justified this on the fact that 'the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, while also alluding to the cost of re-examining the original dispute if the award were annulled.

For some time, the ECtHR did not pronounce on the application of 6(1) to voluntary arbitral proceedings beyond what had been established in the *Suovaniemi* decision.[6] This changed on 20 May 2021 with the *Beg S.p.A v Italy* ('*Beg S.p.A.*') Judgment – in which the ECtHR departed from its more permissive approach in *Suovaniemi* and not only declared a very similar case on arbitrator impartiality admissible, but went even further by applying a two-tiered test (i.e. from both an objective and subjective perspective) to the arbitrator impartiality requirement.[7]

It is worth noting that, in contrast to its approach in *Suovaniemi*, the Court did not limit itself to examining whether

2 V. Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), pp 42–43.

3 Art. 6(1) ECHR: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

4 V. Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), pp 42–43.

5 *Osmo Suovaniemi and Others v Finland*, ECtHR (Fourth Section), Application No 31737/96, Decision on Admissibility (23 February 1999) ('*Suovaniemi*'), p 5. There are limits to this waiver (e.g. it cannot be done in advance); see V. Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), p 42.

6 The ECtHR shunned the matter in other recent decisions. See *Noureddine Tabbane v Switzerland*, ECtHR (Third Section), Application No 41069/12, Decision (24 March 2016).

7 'Impartiality normally denotes the absence of prejudice or bias. According to the Court's settled case-law, for the purposes of Article 6 § 1 the existence of impartiality must be determined according to a subjective test, that is, on the basis of the personal convictions and conduct of a particular judge, by ascertaining whether he showed any personal prejudice or partiality in a given case, and also according to an objective test, that is, whether the court offered, in particular through its composition, guarantees sufficient to exclude any legitimate doubt about his impartiality (see, among many authorities, Nicholas v Cyprus, Application No 63246/10, § 49, 9 January 2018), *Beg S.p.A. v Italy*, ECtHR (First Section), Application No 5312/11, Judgment (20 May 2021) ('*Beg S.p.A.*'), para 129.

The Court could be signalling that acknowledging Article 1 of Protocol No 1 violations pursuant to the non-enforcement of domestic awards requires a more careful assessment of national laws and procedures, regarding which each state has wide discretion

the procedural guarantees within the arbitration proceedings could be deemed waived; it also assessed whether a hypothetical waiver would extend to any procedural guarantees that domestic courts could ultimately afford:

> [T]he Court finds that the applicant company could not be considered to have unequivocally waived both the guarantee of impartiality of the arbitrators, as established under the Rules of the ACR […], and the expectation that the domestic courts would ensure that the arbitral award complied with the relevant rules in the Italian CCP, including those relating to the impartiality of the arbitrators […]. Consequently, the arbitration proceedings had to afford the safeguards provided for under Article 6 § 1 of the Convention[.][8]

Despite the ECtHR's efforts to ascertain the dissimilarity between the *Suovaniemi* decision and the *Beg S.p.A.* Judgment, this second requirement does not seem to have been added because of any real factual differences between the two cases.[9] The Court's change of approach is probably due to its wish to clarify – and even tone down – the *Suovaniemi* presumption rather than resolve a substantial difference on the merits.

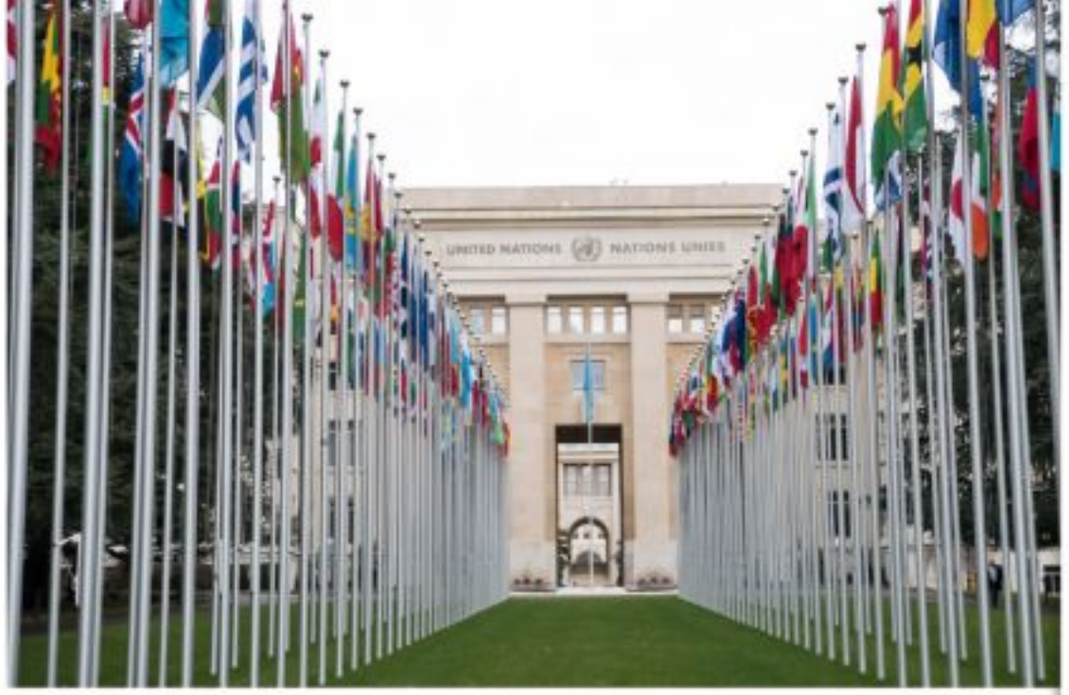
Read within the broader context of the ECtHR case law, *Beg S.p.A.* may not be such a radical U-turn but rather a dilution of the former drastic distinction drawn between forced and voluntary arbitration.

In *Suovaniemi*, the Court had already stressed that a waiver of procedural rights in arbitration should be both voluntary and unequivocal in order to distinguish it from cases where arbitration is legally imposed or 'forced' – a scenario that the European Commission on Human Rights had previously addressed in the 1983 *Case of Lars Brameldi and Anne Marie Malmström v Sweden* ('*Brameldi*').[10] In the ECtHR's view, forced arbitration proceedings merit a closer examination of the fulfilment of Article 6(1) requirements, given that the waiver is imposed on the parties rather than consented to.

It may well be, however, that it is not the law forcing the parties to resort to arbitration, but one – substantially more powerful – party imposing it on the other.

In *Mutu and Pechstein v Switzerland* and *Ali Riza and Others v Turkey*, the ECtHR displayed a similarly cautious approach in determining the extent to which procedural rights can be deemed waived when arbitration is imposed on sportspersons by parties in a position of authority such as sports governing bodies and influential sports teams.[11]

In the 2010 *Suda v Czech Republic* case, the ECtHR extended this heightened standard to arbitral proceedings to which a party is bound due to third-party



8 Ibid, para 143.

9 The Court states that *Beg S.p.A.* 'radically differs from *Suovaniemi and Others*' in that *(i)* in *Beg S.p.A.* the question of impartiality was allegedly raised – and not withdrawn – between the voting and the signing of the award, that is, before the arbitral proceedings had concluded (even if the parties and the national courts that examined the matter diverged on this point); and *(ii)* the applicant in *Beg S.p.A.* discovered new information after the award was issued. However, the applicants in *Suovaniemi* initially raised a question of impartiality that was withdrawn when the challenged arbitrator stated that his relationship with the other party had ceased. Nevertheless, upon discovering that the contested arbitrator was advising the counterparty on the termination of the agreement that caused the dispute, it tried – and failed – to revive this challenge. As the Court did not examine the merits of these issues in *Suovaniemi* – since the application was not admitted – it is difficult to predict what the outcome would have been had it applied the same standards.

10 *Lars Bramelid and Anne-Marie Malmström v Sweden*, European Commission on Human Rights Applications Nos 8588/79 and 8589/79, Decision on the Admissibility (12 October 1982), paras 76–77, and Report (12 December 1983).

11 *Mutu and Pechstein v Switzerland*, ECtHR (Third Section), Applications Nos 40575/10 and 67474/10, Judgment (2 October 2018) ('*Mutu and Pechstein*'). For an in-depth analysis of *Mutu and Pechstein*, see V. Ferreres, 'When arbitration is not voluntary: the case of Mutu and Pechstein v Switzerland' 4 *Investment Arbitration Outlook*, p 3 <https://fr.zone-secure.net/107881/925267/#page=3> accessed 28 September 2022.

consent.[12] This is not to say that the Court was hinting at the *Beg S.p.A.* rationale eleven years in advance. On the contrary, both parties and the Court were careful in reiterating the differences between forced and voluntary proceedings – and, more specifically, in distinguishing the case at stake from both, so as to justify that the standard applied should not be as lax as in *Suovaniemi*, even if arbitration was not as clearly imposed as in *Brameldi*.[13] The Court concluded that, insofar as the applicants – minority shareholders in a Czech corporation – had not expressly consented to arbitration, they could not be deemed to have renounced their right 'to a fair and public hearing […] by an independent and impartial tribunal established by law' under Article 6(1) ECHR.

In light of these developments, the Court may have seen *Beg S.p.A.* as an opportunity to readapt its case law on imposed arbitration to voluntary arbitral proceedings, albeit with the caution that balancing due process rights and the parties' right to arbitration requires.

The right to property under Article 1 of Protocol No 1

The *BTS Holding, A.S. v Slovakia* Judgment (Application No 55617/17) ('*BTS Holding*') is another notable development in the field of human rights' protection in arbitration proceedings. The alleged violation of the right to property at stake in this application stems from the Slovak courts refusing to enforce a 2012 International Chamber of Commerce ('ICC') arbitral award ordering a Slovak state agency, the National Property Fund ('NPF'), to pay the amounts it owed BTS Holding after the termination of the share purchase agreement ('SPA') under which the latter was to acquire a majority share in the Bratislava Airport following its privatisation.[14]

Although the Bratislava II District Court had initially authorised the award's enforcement, it later concurred with the NPF's objection and denied it. The Bratislava Regional Court upheld this decision, albeit for different reasons, which the Constitutional Court deemed to be complementary to those of the District Court. In sum, the reasons given were that (i) the arbitration clause in the 2006 SPA had been superseded by the 2008 settlement between the parties;[15] (ii) the award was contrary to public policy in that it gave rise to liability for the state that the taxpayers would ultimately end up bearing; (iii) the award provided no timeframe for compliance, nor was the date on which it would become enforceable specified; (iv) the parties had waived their right to recourse; and (v) since the transaction for which the SPA was signed required the Slovak Anti-Monopoly Office's approval, so did the payments established in the award. As the ECtHR noted, the NPF only put forward the first two grounds, the District Court voluntarily presenting the remaining three.[16]

Human rights law is only one of the many bodies of law that alternative dispute resolution systems may come into contact with. Other underexplored areas, such as the protection of environmental rights, or even the application of international humanitarian law, may present interesting opportunities to not only enrich arbitral practice, but also consolidate its contribution to substantive law discussions and strengthen its legitimacy

The Court rejected all the aforementioned reasons, as it considered that:

> [T]he grounds relied on by the domestic courts were not given and/or fell outside the legal framework for denying enforcement of a foreign arbitration award allowed by the provisions of the domestic law and the New York Convention […]. Be that as it may, and even assuming that denying enforcement of the award on these grounds served a general interest, it has not been shown that it was proportionate to that aim. In that regard, the Court notes again that the Government have advanced no arguments on this aspect of the case and that, while focusing on

12 *Suda v Czech Republic*, ECtHR (Fifth Section), Application No 1643/06, Decision (28 October 2010) ('*Suda*'), paras 49–50.

13 The Court did not analyse the validity of the arbitration clause, as national courts had already done so and the parties had not disputed it. Assuming the clause was valid and accepting that the parties were bound by it as a result of the majority shareholders' consent, it found that the guarantees in Article 6(1) were to strictly apply to the case.

14 The dispute derived from a 2006 SPA whereby BTS Holding, a Slovak company, acquired a majority share in the Bratislava Airport from the NPF pursuant to the airport's privatisation process. The Slovak Anti-Monopoly Office did not approve the transaction within the time limit provided for in the SPA, which caused the NPF to return the amounts BTS Holding had paid under the contract. In 2008, the parties signed a settlement agreement under which the SPA was considered to be validly terminated without any damages having to be paid. The NPF then paid BTS Holding an amount to cover interest accrued between BTS Holding paying the amounts under the SPA and the NPF returning them.
In disagreeing with this decision, and relying on the SPA's arbitration clause, BTS Holding brought the case before an ICC administered tribunal seated in Paris, asking it to consider that 'the amounts paid by the NPF constituted, first, a payment towards repaying the principal amount of the first tranche and, then, payment of interest that had accrued, and not the opposite, as the NPF intended. The arbitral tribunal agreed with BTS Holding, ordering the NPF to pay EUR 1,894,597.52 as principal and annual interest of 14.25% on this amount from the last payment made until the award was complied with.

15 The arbitral tribunal – having declared itself competent to hear the dispute – had already analysed this issue: see *BTS Holding, A.S. v Slovakia*, ECtHR (First Section), Application No 55617/17, Judgment (30 June 2022) ('*BTS Holding*'), para 22.

16 Ibid, para 70.

elements which purportedly precluded the enforcement by reason of public policy or procedural formalities, the domestic courts took no account of the requirements of the protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community rights[.][17]

In the ECtHR's view, this disconnection between the arguments relied on to deny enforcement and the grounds set out in the applicable rules for this purpose – namely, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') –, as well as the disregard for BTS Holding's rights in striking a balance between public order and the fundamental right to property, sufficed to establish that 'the refusal to enforce the applicant company's arbitration award was not justified for the purposes of Article 1 of Protocol No 1.'[18]

Even if the *BTS Holding* case has sparked significant interest amongst the arbitration community, this is not the first time the ECtHR has addressed whether denying enforcement of an arbitral award may qualify as a violation of the right to property. In its 1994 *Stran Greek Refineries and Stratis Andreadis v Greece* ('*Stran Greek Refineries*') Judgment, the ECtHR found that there was a violation of the right to property in the non-enforcement of a domestic award that ordered the Hellenic Republic to pay the applicants compensation for the State's termination of a 1972 contract to construct an oil refinery in the Megara region. The Court considered that the right to compensation derived from the award 'constituted a "possession" within the meaning of Article 1 of Protocol No 1'[19] – a finding it applied *mutatis mutandis* in *BTS Holdings*.[20]

Note, however, that in *Stran Greek Refineries* the ECtHR thoroughly examined the alleged violations of Article 6 of the ECHR – and concurred with one of them – before examining whether the right to property had been violated. Significantly departing from its previous approach, it did not address the alleged violations of Articles 6 – arbitrariness of denying enforcement and lack of legal certainty – and 13 – lack of effective domestic remedies – put forward by BTS Holdings, considering that, although both complaints were admissible, 'there [was] no need to give a separate ruling on them.'[21]

Similarly to the distinction established between the standard applicable to voluntary and forced arbitration (with the considerations made for third-party consent arbitration) in addressing Article 6(1) complaints, the ECtHR could be signalling that acknowledging Article 1 of Protocol No 1 violations pursuant to the non-enforcement of domestic awards

17 Ibid, para 71.

18 Ibid, para 72. Protocol No 1, Art. 1 states 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

19 *Stran Greek Refineries and Stratis Andreadis v Greece*, ECtHR Application No 13427/87, Judgment (9 December 1994) ('*Stran Greek Refineries*'), para 62.

20 *BTS Holding*, para 49.

21 Ibid, para 76.

requires a more careful assessment of national laws and procedures, regarding which each State has wide discretion.[22] Given that the New York Convention applies to all members of the Council of Europe, this assessment does not need to encompass the grounds for denying enforcement or recognition of foreign awards – a notion that would confirm the 'constitutional' function that some authors attribute to it.[23]

Be that as it may, *BTS Holding* is a welcome reinforcement of the assertion that arbitral awards constitute 'possessions' protected by the right to property. It also serves as a reminder that awards should only be annulled when they most flagrantly violate procedural guarantees established in the applicable rules, a requirement that cannot easily be overcome by public interest arguments.

The ECHR and beyond

The above-cited cases do not only provide an overview of the most recent developments on safeguarding fundamental rights and freedoms in arbitration, but also showcase how the Council of Europe system may prosper as a result of this interaction.

As the interaction between European Union law, public international law, and private international law becomes more prominent – especially in investment arbitration proceedings –,[24] it is to be expected that arbitration of all sorts becomes increasingly intertwined with other bodies of law. Human rights law is only one of the many bodies of law that alternative dispute resolution systems may come into contact with. Other underexplored areas, such as the protection of environmental rights, or even the application of international humanitarian law, may present interesting opportunities to not only enrich arbitral practice, but also consolidate its contribution to substantive law discussions and strengthen its legitimacy.

Moreover, as new rights develop, they may begin to directly and indirectly impact arbitration – and, given how expeditious arbitral proceedings are, this may happen at an even faster pace than in regular courts. The right to a physical hearing or to a clean and healthy environment are just but some examples of this trend.[25]

The international legal community at large would benefit if such interactions and developments were to be assessed in the context of arbitral proceedings not only before the ECtHR, but in other regional legal orders such as the Inter-American or African systems, and even in the context of the so-called constitutionalisation process of the Charter of Fundamental Rights of the European Union.

In this regard, in a recent address to the international arbitration community, former UN High Commissioner for Human Rights Louise Arbour stressed the need to ensure that arbitration does not impair the development of local justice systems, especially in least-developed countries and regions, but rather encourages it.[26] It is precisely this interplay between arbitration, human rights and – why not – different legal systems (be they national, regional or international) where the key to 'reconciling the idea of justice as a public good with the remarkable growth and success of arbitration as a model of private dispute resolution'[27] may lie.

22 See also *Suovaniemi*, p 5.

23 V. Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), pp 94–99.

24 For a discussion on this topic see, among others, J. Odermatt 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the autonomy of the EU Legal Order' (2021) 6 European Forum, 1255.

25 The UN General Assembly recently declared the right to a clean and healthy environment. See United Nations General Assembly resolution A/76/L.75 of 26 July 2022, 'The human right to a clean, healthy and sustainable environment' <https://digitallibrary.un.org/record/3982508?ln=en> accessed 28 September 2022. The Council of Europe has already issued a Recommendation pursuant to the UNGA Resolution, which Member States must implement within five years, 'Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment (Adopted by the Committee of Ministers on 27 September 2022 at the 1444th meeting of the Ministers' Deputies)' <https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a83df1> accessed 6 October 2022. The Council of Europe has also issued an 'Explanatory memorandum to Recommendation CM/Rec(2022)20, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a7b73e> accessed 6 October 2022.
In the sphere of procedural rights, the Covid-19 pandemic has sparked debate on whether there is a right to a physical hearing. In this regard, see ICCA Report No 10: 'Does a Right to a Physical Hearing Exist in International Arbitration?' <https://www.arbitration-icca.org/icca-reports-no-10-right-to-a-physical-hearing-in-international-arbitration> accessed 28 September 2022.
A separate matter altogether is whether such right to a physical hearing may, once recognised, be waived – which, given that the right to a public hearing as a whole may be waived, seems feasible. See *Suovaniemi,* p 6.

26 T. Fisher, 'ICCA urged to contribute to "greater public good"' Global Arbitration Review (21 September 2022) <https://globalarbitrationreview.com/article/icca-urged-contribute-greater-public-good> accessed 28 September 2022.

27 Ibid.