

# Application of the Article 6(1) of the ECHR in International Commercial Arbitration

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## 1. Introduction

At the first sight the European Convention on Human Rights (“EHCR“ or “Convention”) and international commercial arbitration (“arbitration”) have nothing in common. First theoretical discussions concerning the application of human rights provisions in arbitration appeared in the end of eighties. The direct application of human rights was refused. Even though the regulation of human rights is to be found in several international instruments, this paper will focus only on the EHCR. The ECHR poses the specific position among human rights instruments as it has an effective mechanism aiming at its enforcement. There is a rich case law of European Court of Human Rights (“the Court”) which enables to better understand the ECHR. The Court has not expressly decided on the relation between the ECHR and arbitration so far. However, the change in its position is apparent.

The key point in the relation between the ECHR and arbitration is the Article 6(1) of the ECHR which covers the procedural rights and right to fair trial. In this paper, the relation between the Article 6(1) and arbitration will be analyzed from the point of view of several aspects: admissibility of arbitration from the point of view of the ECHR, the difference between the compulsory and voluntary arbitration, court proceedings relating to arbitration and direct application of Article 6(1) in arbitration.

## 2. To the relation between the ECHR and arbitration

First theoretical discussions concerning the application of human rights provisions in arbitration appeared in the end of eighties. The direct application of human rights was refused. The Court has dealt with this question much longer, but it has not expressly decided on the relation between the ECHR and arbitration so far. However, the change in its position is apparent.<sup>1</sup> We can understand the relation between arbitration and human rights as sharing of values or on the contrary as two independent areas that are substantially different.<sup>2</sup> Even though the opinions on this relation differ, none of them insists on the non-existence of any relation between these two areas.

<sup>1</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 10-01-2011], p. 159 – 160. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>.

<sup>2</sup> Id., p. 167.

The rights enshrined in the ECHR which may play a role in the arbitration proceedings can only be detected by interpretation, since the Convention itself does not mention arbitration. Therefore, the ECHR does not also define its scope in relation to arbitration. Generally, only the rights concerning the civil proceedings come into consideration.<sup>3</sup>

The key point in solving the relation between the ECHR and arbitration is the Article 6(1) of ECHR, which covers the procedural rights and right to fair trial.<sup>4</sup> Article 6(1) establishes especially the following rights: the right to an access to justice, the right to an independent and impartial judge, the right to set up a claim including the right to be heard, the principle of equal treatment, the right to receive a reasoned decision, the right to receive a decision within a reasonable time, the right to the public proceedings.<sup>5</sup>

The relation between the Article 6(1) and arbitration could be analyzed from the point of view of several aspects: the admissibility of arbitration from the point of view of the ECHR, the difference between the compulsory and voluntary arbitration, court proceedings relating to arbitration and direct application of Article 6(1) in arbitration.

### 3. The admissibility of arbitration from the point of view of the ECHR

According to the Court, the conclusion of the arbitration agreement is permissible if not concluded under constraint. The Court came to this opinion in the decision *Deweere v Belgium*.<sup>6</sup> The Court states that it is possible to waive the right to hear the case before a court in civil cases. One of the frequently used possibilities of this waiver is the conclusion of arbitration agreement. Such a waiver is not contrary to ECHR, however, the non-existence of con-

<sup>3</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 10-01-2011], p. 396. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>4</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 10-01-2011], p. 395 – 416. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>; SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 10-01-2011], p. 413 – 438. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>; MCDONALD, N. More Harm than Good? Human Rights Considerations in International Commercial Arbitration. *Journal of International Arbitration*, 2003, Vol. 20, No. 6, [cit. 10-01-2011], p. 523–538. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2003045&type=toc&num=1&>>; JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 10-01-2011], p. 159 – 172. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>.

<sup>5</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 10-01-2011], p. 397. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>6</sup> Judgment of the European Court of Human Rights, 27.2.1980, *Deweere against Belgium*, Application No. 6903/75. Available from database HUDOC: < <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=6903/75&sessionId=58302187&skin=hudoc-en>>.

straint is a necessary prerequisite.<sup>7</sup> *Bělohávek* states that the authority to enter into an arbitration agreement stems primarily from the expression of the free will. The freedom of will is guaranteed both by the constitutional regulations of human rights and the ECHR.<sup>8</sup>

#### 4. Compulsory arbitration and court proceedings relating to arbitration

Article 6(1) is fully applicable in the compulsory arbitration which is arbitration required by law. This conclusion follows especially from the decision of the European Commission of Human Rights (“Commission”) *Bramelid and Malmstrom v Sweden*.<sup>9</sup> In this decision, the Commission concluded that *in this case recourse to arbitration was compulsory and the applicants were unable to bring their case to the court capable of settling the dispute and offering the guarantees set forth in the Article 6(1). The Commission has to therefore consider whether these guarantees were respected in the proceedings before the arbitrators.* Compulsory arbitration is to be equated with the classical court proceedings.<sup>10</sup>

Article 6(1) applies also in the case of court proceedings relating to arbitration. A court of a Contracting State deciding for example on the annulment of an arbitral award is bound by the ECHR.<sup>11</sup>

<sup>7</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 12-01-2011], p. 398 a 408. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>; SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 12-01-2011], p. 417. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>.

<sup>8</sup> BĚLOHLÁVEK, A.J. *Rozhodčí řízení, ordre public a trestní právo*. Komentář I. díl. Praha : C.H. Beck, 2008. p. 203.

<sup>9</sup> Report of the European Commission of Human Rights, 12.12.1983, Lars Bramelid and Anne Marie Malmstrom against Sweden, Application No. 8588/79 and 8589/79. Available from database HUDOC: <<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=58302187&skin=hu-doc-en&action=request>>.

<sup>10</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 12-01-2011], p. 398 a 408. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>; SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 12-01-2011], p. 419 – 423 a 431 – 432. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>.

<sup>11</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 12-01-2011], p. 399. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>; SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 12-01-2011], p. 429. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>; JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 12-01-2011], p. 168. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>.

## 5. Direct application of the Article 6(1) in arbitration

The direct application of Article 6(1) in arbitration has both its proponents and opponents. The arguments against the direct application can be divided into three groups. Firstly, there is the argument based on the waiver of rights. The second argument is based on the allegation that the arbitrators are not tribunal established by law in the sense of Article 6(1). According to the third argument, the ECHR is binding only for states.

### 5.1. The waiver of rights

The waiver of rights is based on the fact that by concluding the arbitration agreement the parties waive the rights under the Article 6(1). The concept of waiver is known to the most legal systems. The right to the judicial protection is a right, not an obligation. It is possible to waive the right to judicial protection. One of the possibilities how to do so is to conclude the arbitration agreement. This was confirmed by the Court in the decision *Deweer v Belgium*.<sup>12</sup> *Bělohávek* states that if there is a conflict between the free will and inalienability of a right, we have to come from the assumption that the expression of the individual's will was made freely and with full awareness of the consequences of this expression. Only if a doubt concerning the freedom of the expression arises, it will be necessary to examine whether this expression results in the waiver of a right in such an extent that is inadmissible.<sup>13</sup>

The initial approach of the Commission gave evidence of the complete waiver of rights under Article 6(1) in the case of conclusion of the arbitration agreement.<sup>14</sup> However, there is an obvious advancement in the Court's case law. At present, we can only talk about the partial waiver of rights.<sup>15</sup> The current position of the Court can be summarized into three points. First, the Court requires the arbitrators to comply with the basic rights contained in the Article 6(1) unless the parties have expressly or tacitly waived these rights. Second, the arbitration agreement does not represent the waiver of all rights under the Article 6(1). Thirdly, the waiver of a right is valid only if it is permissible.<sup>16</sup>

<sup>12</sup> SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 13-01-2011], p. 417. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>>.

<sup>13</sup> BĚLOHLÁVEK, A.J. *Rozhodčí řízení, ordre public a trestní právo*. Komentář I. díl. Praha : C.H. Beck, 2008. p. 204.

<sup>14</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 13-01-2011], p. 160. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>>.

<sup>15</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 13-01-2011], p. 400. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>>.

<sup>16</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 13-01-2011], p. 164. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>>.

In the decision *Suovaniemi and Others v. Finland*,<sup>17</sup> the Court states that *there is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6. Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. An unequivocal waiver of Convention rights is valid only insofar as such waiver is permissible. Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6.*

By entering into the arbitration agreement, the parties unequivocally waive only the right to access to the court and the right to public hearing.<sup>18</sup> Such waiver is permissible, which is confirmed by the Court in its decisions. According to the decision *Axelsson and Others v. Sweden*<sup>19</sup> *the right of access to the courts is not absolute. In the majority of the Contracting States, the right of access to courts is restricted or subject to special conditions in respect of minors, vexatious litigants, persons of unsound mind, persons declared bankrupts and, as in this case, persons who are bound by an arbitration agreement. Such regulations are not in principle contrary to Article 6, where the aim pursued is legitimate and the means employed to achieve the aim is proportionate.* In the same decision, the Court considers also the question of public hearing. *The public character of court hearings constitutes a fundamental principle enshrined in Article 6(1). Neither the letter nor spirit of the provision prevents a person from waiving of his own free will, either tacitly or expressly, the entitlement to a public hearing. A waiver must, however, be made in an unequivocal manner and not run counter to any important public interest.* In the decision *Suovaniemi and Others v. Finland* the Court adds that *the right to a public hearing can be validly waived even in court proceedings. The same applies, a fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity.*

By concluding the arbitration agreement the parties do not waive automatically other rights contained in Article 6. The parties would have to waive them separately, either expressly or impliedly.<sup>20</sup> The theory of waiver, however, only answers the question which rights under Article 6 the parties waive by enter-

<sup>17</sup> Decision of the European Court of Human Rights, 23.2.1999, Osmo Suovaniemi and others against Finland, Application No. 31737/96. Available from database HUDOC: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=31737/96&sessionid=58302187&skin=hudoc-en>.

<sup>18</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 13-01-2011], p. 400. Available from Kluwer Law Online: <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>19</sup> Decision of the European Commission of Human Rights, 13.7.1990, Jon Axelsson and others against Sweden, Application No. 11960/86. Available from database HUDOC: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=11960/86&sessionid=58306421&skin=hudoc-en>.

<sup>20</sup> See e.g. decision *Suovaniemi* against Finland, where the Court dealt with the question of the waiver of the rights to impartial arbitrator. For details see BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 13-01-2011], p. 412–413. Available from Kluwer Law Online: <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

ing into the arbitration agreement and which they do not. But this theory does not answer the question how the rights, which the parties do not waive, should be applied in the arbitration proceedings.<sup>21</sup>

### 5.2. Tribunal established by law

The second argument supporting the non-application of Article 6 in the arbitration proceedings results from the wording of Article 6(1). Article 6 shall be applied before the tribunal, which was established by law. The arbitrators are not such a tribunal; Article 6(1) is therefore not applicable before them.<sup>22</sup> Arbitrators are established by the agreement of the parties, even if this agreement derives its binding force from the law.<sup>23</sup>

The Court considers the concept of tribunal established by law in the decision *Lithgow and others v United Kingdom*.<sup>24</sup> According to the Court *the word tribunal in Article 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; thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees.*

Besson does not agree with this argument. According to him, the sense of the concept of tribunal established by law is to exclude the creation of exceptional courts. Arbitration is different, it is established by law in the sense that it is established and organized by law.<sup>25</sup> The author of this paper completely agrees with this opinion as she also assumes that the basis of arbitration is the legal order of a particular state from which the arbitrators derive their authority.<sup>26</sup>

### 5.3. The ECHR is binding only on states.

This argument is based on the fact that the ECHR is binding only on the Contracting States. The ECHR set enforceable obligations to the Contracting States, that are responsible for the breach of these obligations. The arbitrators

<sup>21</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 13-01-2011], p. 401. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>22</sup> Id, p. 401.

<sup>23</sup> KAUFMANN-KOHLER, G.: Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration. In *Berg, A.J. Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, No. 9 (1998)*. The Hague : Kluwer Law International, 1999, p. 362. Available from Kluwer Arbitration: <<http://www.kluwerarbitration.com>>.

<sup>24</sup> Judgment of the European Court of Human Rights, 24.6.1986, *Lithgow and others against The United Kingdom*, Application No. 9006/80; 9262/81; 9263/81;9265/81; 9266/81; 9313/81; 9405/81. Available from database HUDOC: <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=9006/80&sessionId=58306421&skin=hudoc-en>>.

<sup>25</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 13-01-2011], p. 401. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>26</sup> Svobodová, K. Místo konání rozhodčího řízení – rozhodující kritérium určení lex arbitri. In *Dny práva – 2009 – Days of Law*, Brno : Masarykova univerzita, 2009. Available from <[http://www.law.muni.cz/sborniky/dny\\_prava\\_2009/files/rozhodci\\_rizeni.html](http://www.law.muni.cz/sborniky/dny_prava_2009/files/rozhodci_rizeni.html)>.

are private individuals, who cannot be regarded as public authorities and who cannot be subject to the liability under the ECHR.<sup>27</sup> For the existence of the responsibility of a Contracting State under the ECHR, it must be proved that the State really violated the Convention. The fact that the arbitration proceedings took place in the territory of a Contracting State is not sufficient to establish the liability.<sup>28</sup>

A number of arguments have arisen against this opinion. We can start from the statement that every state has the right to control activities on its territory. If arbitration proceedings deprive an individual of the fundamental rights, the state has to be considered responsible.<sup>29</sup> As the arbitrators are not public authorities, it is not a direct responsibility. In order a state to be actually responsible for the violation of fundamental rights in arbitration proceedings, there has to exist a way, how the state may impose an effective control over the arbitration.

In the decision *R. v. Switzerland*<sup>30</sup> the Commission concluded that *the state cannot be held responsible for the arbitrators' actions unless, and only in so far as, the national courts were required to intervene*. In the decision *Jakob Boss Sohne KG v Germany*,<sup>31</sup> the Commission states *the State's responsibility is not completely excluded as the arbitration award has to be recognised by the German courts and be given executory effect by them. The courts thereby exercise a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they consider to have been carried out in conformity with fundamental rights and in particular with the right to be heard*. It follows from these decisions that the liability of Contracting States for the arbitration is not completely excluded. However, it applies only in the case, if a State performs certain function in relation to arbitration.

*Besson* states that the arbitrators are substitute for judges; they exercise the judicial function, even though its realization is subject to the agreement of the parties. The arbitrators are not common private individuals, because they have special rights and obligations that are normally carried out by the courts.<sup>32</sup> According to *Besson*, the responsibility of the state and the scope of application of the rights under the ECHR are not the same thing. The only question is, whether the procedural guarantees under the Article 6(1) form part of the legal order of the state, where the place of arbitration is located, and

<sup>27</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 14-01-2011], p. 401. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>28</sup> SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 14-01-2011], p. 424. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>.

<sup>29</sup> *Id.*, p. 424.

<sup>30</sup> Decision of the European Commission of Human Rights, 4.3.1987, R. against Switzerland, Application No. 10881/84. Available from database HUDOC: <<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=58306421&skin=hudoc-en&action=request>>.

<sup>31</sup> Decision of the European Commission of Human Rights, 2.12.1991, Jakob Boss Sohne KG against The Federal Republic of Germany, Application No. 18479/91. Available from database HUDOC: < <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=18479/91&sessionId=58306745&skin=hudoc-en>>.

<sup>32</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 17-01-2011], p. 402. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

whether they fall within the scope of basic procedural rules which have to be followed by the arbitrators, or within the scope of procedural public policy. If the courts of a Contracting State are obliged to apply the EHCR during the control of the arbitral award, it is not satisfactory to reject the same obligation to the arbitrators.<sup>33</sup>

The question different from the scope of application of Article 6(1) is, whether the Contracting States are obliged to issue specific rules to ensure that the arbitrators shall respect the rights under Article 6(1). It is the question of State's liability for the arbitration proceedings held on its territory. The States are obliged to issue the legal regulation that requires that basic procedural rules are complied with in the arbitration proceedings. The States should also refuse recognition and enforcement of arbitral award made in violation of these rules. Should the States also ensure the control of arbitral awards? If such an obligation exists, the agreements excluding the possibility to annul arbitral award would be inadmissible. The position of the Court in this respect is not clear.<sup>34</sup> *Samuel* concludes that the State where the arbitration takes place is under no obligation to protect human rights contrary to the express agreement of the parties.<sup>35</sup> *Besson* is of a similar opinion.<sup>36</sup>

*Jaksic* rejects the argument that only the States are bound by the ECHR on the basis of the horizontal effect of the Article 6(1). Human rights rules are primarily binding for States with regard to the State's duty not to interfere with the private individual's sphere. This is the vertical approach. However, the States also have the duty to take positive steps in order to ensure the effective protection of human rights. Article 1 of the ECHR states that human rights rules are intended for individuals. For the application of the ECHR is irrelevant whether an infringement of a right results from the exercise of public authority or from an act or omission of an individual.<sup>37</sup>

The ECHR has also the horizontal effect. Remedial, statutory and intermediary horizontal effect can be distinguished. The ECHR has no direct remedial horizontal effect. An individual cannot rely on another individual's liability for infringement of the right contained in the Convention. However, the ECHR has the indirect remedial horizontal effect. The States will be responsible for the violation of the Convention, if they do not sanction the violations of human rights within their territory. Direct statutory horizontal effect represents the actual essence of the protection of individuals' human rights. The courts of the Contracting States shall comply with the EHCR every time they decide disputes between individuals.<sup>38</sup>

<sup>33</sup> *Id.*, p. 402.

<sup>34</sup> *Id.*, p. 405.

<sup>35</sup> SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 17-01-2011], p. 427. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>>.

<sup>36</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 17-01-2011], p. 405. Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>>.

<sup>37</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 17-01-2011], p. 161. Available from Kluwer Law Online: <<http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>>.

<sup>38</sup> *Id.*, p. 162.



The intermediary horizontality is crucial for the purpose of applying Article 6 in the arbitration proceedings. This horizontality raises the question whether the provisions of the ECHR create enforceable claim between the parties. The Court issued a decision which can be regarded as the confirmation of intermediary horizontal effect. This is the decision *Transado-Transporters Fluviais Do Sado, S. A. against Portugal*.<sup>39</sup> The applicant, the company Transado in this case alleged that its right to possessions under the Article 1 of Protocol No. 1 has been violated and that the arbitration proceedings had been unfair under the Article 6. Transado operated in Portugal a ferry across the River Sado under a contract concluded with the authorities of the port Setúbal (APS). The contract contained the arbitration clause. Article XXVI of the contract stated that on expiry of the contract the APS would become the owner of all assets and equipment, including ships. However, Transado would be entitled to compensation in respect of those assets acquired by it with the APS's agreement which had not yet been written off on expiry of the contract. The compensation would correspond to the value that had not been written off. To this end, the applicant company and the APS were required to reach agreement on the writing-off periods for the assets in issue. Such an agreement was never reached. APS terminated the contract in 2001. Transado submitted its request for compensation to the APS. APS rejected this request. Transado commenced the arbitration proceedings. On the basis of interpretation of the Article XXIV the arbitrators concluded that Transado had no right to compensation.

The Court holds that *it must first determine whether there was interference by a public authority with the applicant's right of property. In this regard, it notes that it is understood that, in the instant case, no interference with the applicant company's right to peaceful enjoyment of its possessions can be attributed to the Portuguese authorities. The Court's role consists of ascertaining whether the arbitration tribunal's interpretation of the disputed concession contract constituted interference with the applicant company's right to peaceful enjoyment of its possessions and, if so, whether such interference was justified.* The Court decides that *there was no interference by the public authorities with the applicant's right to peaceful enjoyment of its possessions, the deprivation of property having been the result of the interpretation of a clause in the concession contract by the arbitration tribunal.* The applicant also claimed the violation of Article 6(1) in arbitration proceedings. He in particular argued that the arbitrators were not impartial and that no appeal was possible against the arbitral award. The Court reiterates that *Article 6 does not preclude the setting up of arbitration tribunals in order to settle certain disputes. Indeed, the word tribunal in Article 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.* The Court comes to the conclusion that *there is no evidence to support the applicant company's contention that the proceedings before the arbitration tribunal were unfair. It follows that there is no appearance of a violation of Article 6(1) of the Convention.*

<sup>39</sup> Decision of the European Court of Human Rights, 16.12.2003, *Transado-Transporters Fluviais Do Sado, S.A. against Portugal*, Application No. 35943/02. Available from database HUDOC: <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=35943/02&sessionid=58306745&skin=hudoc-en>>.

According to *Jaksic*, this decision is clear in two aspects. Firstly, the provisions of the ECHR extend to contract concluded between individuals. Second, the arbitrators have the duty to act in accordance with the ECHR.<sup>40</sup> From the part of the decision dealing with the Article 6 it is possible to imply that the Court deems the Article 6 to be applicable in the arbitration proceedings.

#### *5.4. Reasons for the application of the Article 6(1) in the arbitration proceedings*

Some reasons for the application of Article 6(1) were already mentioned in previous paragraphs. These are mainly the following arguments. By entering into the arbitration agreement, the parties do not waive all the rights under Article 6(1). They unambiguously waive only the right to hear the dispute before a court and the right to public hearing. The arbitrators may be a tribunal in the sense of Article 6(1). The arbitrators are not common private individuals. They exercise rights and obligations that are otherwise carried out by the courts. Article 6(1) forms part of *lex loci arbitri* that the arbitrators are required to comply with. Article 6(1) may be used before the arbitrators on the basis of the so-called horizontal intermediary effect of the ECHR.

The reason for the application of Article 6 before the arbitrators may be also the safeguarding the real effectiveness of arbitration. Taking into account that Article 6 will be applied by the courts exercising their supervisory functions, it would be reasonable, if the arbitrators are bound by it from the beginning.<sup>41</sup>

The direct application of Article 6(1) can serve as an instrument of harmonization of international commercial arbitration. All legal regulations of arbitration contain basic procedural guarantees. Although these values are universal, their actual effect is determined by the applicable legal order. Article 6(1) and the Court's case law give a particular example of ensuring the enforcement of the right to the fair trial.<sup>42</sup>

### **6. Indirect application of Article 6(1) on arbitration proceedings**

As mentioned above, Article 6(1) will be applied in the court proceedings relating to arbitration. This rule applies if such proceedings exist under national legal orders. It is the indirect remedial horizontality of the ECHR. The question arises as to whether the ECHR obliges the Contracting States to issue such rules, which would ensure that arbitrators comply with the guarantees contained in Article 6(1).

<sup>40</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 17-01-2011], p. 164. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>.

<sup>41</sup> *Id.*, p. 168.

<sup>42</sup> *Id.*, p. 169.

The States are required to issue an act from which the obligation to respect fundamental procedural principles in arbitration follows. The States are also obliged to refuse recognition and enforcement of the arbitral award, which was rendered in violation of these principles.<sup>43</sup> There is no doubt that the ECHR takes precedence over international conventions that govern arbitration. The same applies in relation to the national legal order.<sup>44</sup>

Do the Contracting States also have the obligation to provide for supportive functions of national courts and especially for supervisory function in the form of annulment of the arbitral award? From the practical point of view, the problem does not arise in most cases because the States set these functions in their legal regulations. However, is it contrary to Article 6, if national law enables to waive the possibility of annulment of arbitral awards? The position of the Court in this respect is clear.<sup>45</sup> In the decision of *R. v. Switzerland*, the Commission found that the State cannot be responsible for the arbitrators' actions, unless the courts are asked to intervene. From the decision *Nordstrom v the Netherlands* follows that the ECHR does not require the courts to ensure that arbitration proceedings is in accordance with Article 6.<sup>46</sup> The decision *Jakob Boss Sohne v Germany* suggests the opposite direction. According to this decision, the conclusion of an arbitration agreement does not mean that the State's liability is completely excluded. The Courts exercise certain control and provide for guarantees of fairness and correctness the arbitration proceedings.

The Contracting States have to take positive measures to ensure the effective protection of human rights.<sup>47</sup> Such measures also include the possibility of reviewing the arbitral award by the courts. Only the right to annulment of the award, which cannot be waived, can be the effective positive measure. However, *Besson* states that the Court focuses more on examining whether the court's decision concerning the review of arbitral award is not arbitrary or unreasonable. The waiver of the annulment of arbitral award can be in certain cases reasonable.<sup>48</sup> *Samuel* says that the state of the place of arbitration is under no obligation to protect human rights contrary to the express agreement of the parties.<sup>49</sup> *Bělohávek* in this context concludes that an individual, who voluntarily chose arbitration as an alternative for protection of his rights, also

<sup>43</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 19-01-2011], p. 404. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>44</sup> JAKSIC, A. Procedural Guarantees of Human Rights in Arbitration Proceedings. A Still Unsettled Problem? *Journal of International Arbitration*, 2007, Vol. 24, No. 2, [cit. 19-01-2011], p. 167. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2007013&type=toc&num=3&>>.

<sup>45</sup> BESSON, S. Arbitration and Human Rights. *ASA Bulletin*, 2006, No. 3, [cit. 19-01-2011], p. 405. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=ASAB2006051&type=toc&num=2&>>.

<sup>46</sup> *Id.*, p. 411.

<sup>47</sup> *Id.*, p. 405.

<sup>48</sup> *Id.*, p. 405.

<sup>49</sup> SAMUEL, A. Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights. An Anglo-Centric View. *Journal of International Arbitration*, 2004, Vol. 21, No. 5, [cit. 19-01-2011], p. 427. Available from Kluwer Law Online: < <http://www.kluwerlawonline.com/document.php?id=JOIA2004028&type=toc&num=2&>>.

voluntarily accepted limitations that are applied on the exercising his rights. Such an individual does not waive any right; he only modifies its content. Restriction of judicial review of arbitral awards does not interfere with the individual's right to claim his rights before a court.<sup>50</sup>

## 7. Conclusion

Currently, there is no clear opinion, whether Article 6(1) directly applies in the arbitration proceedings. There are arguments for both possibilities. Even in the case of refusal of direct application of Article 6(1), it does not mean that the basic procedural principles are not complied with in the arbitration proceedings. They are enshrined in the legal regulations of arbitration.

At present, we can witness a significant shift from the initial strict rejection of the application of Article 6 in the arbitration proceedings, based mainly on the theory of a complete waiver of rights. This was confirmed by the Court itself, which at first refused that by concluding the arbitration agreement the parties waive all the rights under Article 6(1). According to the prevailing opinion, by entering into the arbitration agreement, the parties only waive the right to hear their case before a court and the right to public hearing. On the basis of the Court's case law, it is also possible to conclude that the arbitrators may be a tribunal in the sense of Article 6(1). From the decision *Transado v Portugal*, it can be inferred that the arbitrators are under the duty to act in accordance with the ECHR.

The indirect application of Article 6(1) on arbitration is not questionable. The courts apply Article 6(1) in court proceedings related to arbitration. The Contracting Parties are also obliged to take positive measures to ensure that the rights under Article 6 are followed. The possibility to annul the arbitral award by the court ranks among such measures. However, if the law gives the parties the opportunity to waive the right to annulment of the award, this is not contrary to Article 6. The parties voluntarily waived their right, which is allowed by the ECHR, if the waiver is not made under duress.

The opinions for and against the direct application of Article 6(1) were discussed in the previous paragraphs. The author of this paper tends to the application of Article 6(1) in the arbitration proceedings. She agrees with the view that by the conclusion of the arbitration agreement the parties do not waive all the rights enshrined in Article 6. As was mentioned above, the author thinks that the arbitrators may be a tribunal within the meaning of Article 6. The Contracting States of the ECHR bear indirect responsibility for the violation of rights under Article 6 in the arbitration. If there is such a violation, which was not sanctioned by the state by the annulment or refusal of recognition of arbitral award, it is possible to invoke the responsibility of the State under the ECHR. Thus, if the States in supervisory proceedings apply Article 6(1) and its violation regularly causes the annulment or non-recognition of the award, it would be more effective, if this provision is applied by the arbitrators. Under the present state of theoretical opinions and Court's case law, we consider the

<sup>50</sup> BĚLOHLÁVEK, A.J. *Rozhodčí řízení, ordre public a trestní právo*. Komentář I. díl. Praha : C.H. Beck, 2008. p. 211.

argument, that the procedural guarantees already exist in the arbitration proceedings and it is unnecessary to evaluate the application of Article 6 (1),<sup>51</sup> insufficient.

It is necessary to consider the relation between Article 6(1) and arbitration. The reason is the fact that the Court itself deals with this relationship. Direct application of Article 6 does not cause any harm to the arbitration. Conversely, it may be beneficial to international commercial arbitration, because it can be seen as the harmonizing instrument.<sup>52</sup> The rules contained in Article 6(1) form regularly part of public policy which has to be respected by the arbitrators. Even in the case of direct application of Article 6(1), it is impossible to overlook the specifics of arbitration,<sup>53</sup> which mainly affect the scope of application of Article 6 in the arbitration proceedings.

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