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ARBITRATION AGREEMENTS AND PROTECTION OF THE RIGHT TO A FAIR TRIAL

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ABSTRACT

Arbitration is a dispute settlement mechanism based on an agreement of the parties. Party autonomy to conclude an arbitration agreement is well established and recognized by the UNCITRAL Model Law on Arbitration and various national laws. However, party autonomy to conclude an arbitration agreement raises certain challenges for protection of human rights. One of them is how an arbitration agreement is compatible with Article 6 of the European Convention on Human Rights, which establishes the right to a fair trial before the state court. Conclusion of an arbitration agreement means that the parties waive their right to submit the dispute to the state court and instead create biding jurisdiction of arbitration court. This waiver of the right to a fair trial before the state court raises questions as to what extent the procedural guarantees of the right to a fair trial are applicable in arbitration court. What are the requirements for such a waiver of the right to a fair trial before the state courts?

KEYWORDS

Arbitration, party autonomy, right to a fair trial, arbitration agreement, human rights

INTRODUCTION

An arbitration agreement is the cornerstone of arbitration.[1] In principle, the parties are free to craft an agreement to arbitrate, whether in form of arbitral clauses prior to a dispute or *compromis* entered into after a dispute has arisen, as they wish. Yet, while parties are free to choose procedural and substantive rules, the autonomy of their choice is limited. It is subject to statutory limits and public policy considerations. Together they establish the scope of arbitrability and thus limit the range of disputes that can be submitted to arbitration. One of the aims of the limits to party autonomy is to protect the rights of the parties themselves and the public in general, and more generally – human rights. In practice, the interplay of the limits to party autonomy and the protection of human rights has posed some questions and raised discussions.[2] One of these rights, the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights (hereinafter – Convention), is particularly relevant in this context. Article 6 applies to the national courts of the Member States of the Convention. However, it is debatable to what extent arbitral tribunals seated in or operating under the laws of the Member States of the Convention have to ensure the rights and guarantees set out in the Convention. While some general principles, such as the independence and impartiality of the adjudicators, apply in a very similar manner in litigation before the national courts and arbitral tribunals,[3] the application of other basic guarantees of the right to a fair trial in arbitration proceedings is in obscurity. Moreover, some national courts even stated that provisions of the Convention are not applicable in arbitration proceedings.[4] This leads to a question as to what extent the right to a fair trial may be limited by an arbitration agreement. Can the right to a fair trial be waived and if so, under what conditions? Are the parties when renouncing the recourse to national courts also renouncing their rights to a fair trial?

The Convention itself is silent on these matters. The authors of this article believe that the parties to an arbitration agreement may indeed to some extent limit the right to a fair trial as it is enshrined in the Convention. In order to establish the scope of party autonomy, this article analyzes the case law of the European Court of

[1] Christopher Lau and Christin Horlach, "Party Autonomy – The Turning Point?" *International dispute resolution* Vol. 4, No. 1 (2010): 121-130.
[2] Paula Hodges, "The relevance of Article 6 of the European Convention on Human Rights in the context of arbitration proceedings," *International Arbitration Law Review* 10(5) (2007): 163-169; William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015); Sebastien Besson, "Arbitration and Human Rights," *ASA Bull.* 24 (2006); Catherine A. Kunz, "Waiver of right to challenge an international arbitral award is not incompatible with ECHR: Tabbane v. Switzerland," *European International Arbitration Review* (2016); Cécile Chainais, "Exigences du procès équitable et arbitrage existence et essence du droit à un procès arbitral equitable": 267; in: L. Milano, ed., *Convention européenne des droits de l'homme et droit de l'entreprise* (Nemesis/Anthemis, 2016).
[3] Paula Hodges, *supra* note 2: 163-169.
[4] *Judgment of the Cour de Cassation Civ. 1re of 20 February 2001 in case Cubic Defense Systems c. CCI*, D. 2001. 99-12.574.

Human Rights (hereinafter – ECHR), domestic laws on arbitration and civil proceedings as well as other sources. Also, this article focuses on the national legislation of arbitration proceedings of various states. This comparative method reveals how the challenges of party autonomy are addressed in different states.

This article consists of three parts: firstly, the freedom and limits of parties to conclude an arbitration agreement; secondly, effects of a valid arbitration agreement, and thirdly, an arbitration agreement as a waiver of the right to a fair trial.

1. PARTY AUTONOMY TO CONCLUDE AND ARBITRATION AGREEMENT AND THE RIGHT TO A FAIR TRIAL

Parties to any commercial relationship are free to agree how to settle their disputes. As opposed to litigation, a specific separate agreement to arbitrate is necessary in order to ensure that a party could submit a claim to arbitration unilaterally once a dispute arises. Article 7(1) of the UNCITRAL Model Law on Arbitration (hereinafter – Model Law) defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". The Model Law, which serves as a framework for national arbitration laws in many jurisdictions, does not pose any limits as to the scope of the party autonomy in how it should be drafted. Autonomy of the parties in determining the rules of procedure is of special importance in international cases.[5] However, the party autonomy directly relates to the guarantees of the right to a fair trial since it restricts access to the state court. Thus, it is important to analyze whether the party autonomy to conclude an arbitration agreement is absolute and what safeguards should be established to reach the balance between the party autonomy and access to the state court.

In arbitration, party autonomy stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through a consensual agreement.[6] Some tribunals suggest that the parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding.[7] Leading international and national instruments of arbitration proceedings acknowledge party autonomy as well.[8]

[5] *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 13.
[6] *Judgment of the Supreme Court of Canada of 4 April 2019 in case TELUS Communications Inc. v. Wellman Supreme*, 2019 CSC 19, 2019 Carswell Ont 4913.
[7] *Judgment of the Supreme Court of Canada of 20 March, 2003 in case Desputeaux c. Éditions Chouette*, (1987) inc. SCC 17, 2003 CSC 17, 2003 Carswell Que 342.
[8] Gary Born, *International Commercial Arbitration*, Volume 1 (Wolters Kluwer, 2009), 82.

National laws on arbitration also acknowledge party autonomy but provide some safeguards[9]. For instance, Article 1(b) of the Arbitration Act 1996 (UK) establishes that the parties should be free to agree on how their disputes should be resolved, subject only to such safeguards as are necessary in the name of public interest. Some national laws impose that only certain types of disputes can be settled in arbitration. The so called "objective arbitrability" often concerns matters which involve state and particular legal matters which due to their nature shall only be settled in state courts.[10] One notable example is Article 1030(1) of the Code of Civil Procedure of Germany, which establishes that any claim under property law may become the subject matter of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effect insofar as the parties to the dispute are entitled to conclude a settlement regarding the subject matter of the dispute. Moreover, pursuant to Article 1030(2) of this act an arbitration agreement regarding legal disputes arising in the context of a tenancy relationship for residential space in Germany is invalid. In such way the national law restricts the party autonomy to conclude arbitration agreement depending on the subject matter of the dispute.

Such limitations of party autonomy are established in Article 12(2) of the Law on Commercial Arbitration of the Republic of Lithuania, according to which disputes designated to be heard in administrative proceedings may not be resolved by arbitration, but can be heard cases the examination of which is assigned to the competence of the Constitutional Court of the Republic of Lithuania. Disputes arising out of family legal relationships and disputes concerning the registration of patents, trademarks and designs may not be submitted to arbitration. Disputes arising out of employment and consumer contracts may not be submitted to arbitration, unless the arbitration agreement was entered into after the dispute arose. Furthermore, the Supreme Court of Lithuania found that the parties have no right to submit to arbitration a dispute regarding the validity of the writ of execution issued by a notary since notary acts on behalf of the state and thus only state courts can revise such actions.[11]

Furthermore, it is debatable whether the parties enjoy the autonomy to submit to arbitration disputes deriving from insolvency (bankruptcy).[12] Disputes deriving from bankruptcy proceedings are particular, since the interests of all the debtor's creditors must be ensured and the principle of *vis attractive concursus* is applicable. For instance, the case law of Spain suggests that arbitration may contradict the

[9] *Ibid*.
[10] Remigijus Jokubauskas, Mykolas Kirkutis, Egidija Tamošiūnienė, and Vigintas Višinskis, *Ginčų nagrinėjimas komerciniame arbitraže* (Vilnius: MRU, 2020), 56.
[11] *Ruling of the Supreme Court of Lithuania of 29 November 2018, in case No. e3K-3-278-313/2018*.
[12] Remigijus Jokubauskas, Mykolas Kirkutis, Egidija Tamošiūnienė, and Vigintas Višinskis, *supra* note 10, 59.

effectiveness of insolvency proceedings. In 2019 the Commercial Court of Santander found that the parties (in Spain registered company and persons operating in England) have entered into an agreement under which all arising from the contract should be subject to arbitration in London.[13] A company registered in Spain initiated insolvency proceedings in Spain. No arbitration proceedings were instituted at that time. Under the Spanish law (Article 52.1 of the Spanish Insolvency Law), commencement of insolvency proceedings does not affect the arbitration agreement, but the court, in the context of insolvency proceedings, may suspend its enforcement (sp. *suspensión de sus efectos*). In this case the court applied this option, gave priority to the efficiency of the insolvency proceedings and found that the arbitration process would result in the incurrence of new costs for the debtor and thus the creditors' claims would be satisfied to a lesser extent.

Also, in France in matters which are related to public policy arbitration it is excluded because it may not ensure all the appropriate rights of a respondent. Such examples are cases which concern collective disputes. For instance, all types of collective insolvency disputes resolution mechanisms (fr/ *sauvegarde, redressement, liquidation des enterprises*).[14] Nevertheless, the French Court of Cassation has found that an insolvent party has the right to take part in arbitration because the access to justice through arbitration is governed by the same principles as in cases concerning access to court proceedings, as set out in Article 6 of the Convention.[15]

While the parties have a lot of autonomy in arbitration matters, it is generally accepted that their freedom is not limitless. Party autonomy is subject to important exceptions, such as mandatory principles of fairness, neutrality, equality which are the basis of due process or "natural justice".[16] Also, the English courts have acknowledged that party autonomy is limited by the domestic law that regulates legal relationship between the parties: "[i]n principle, party autonomy does not mean complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties"[17]. The case law of the US courts suggests that party autonomy to choose arbitration may be barred by mandatory requirements of the applicable domestic law, including minimum standards of

[13] *Judgment of 30 September 2019 of Juzgado de lo Mercantil, Sentencia 000266/2019*.
[14] George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards the Interpretation and Application of the New York Convention by National Courts* (Springer, 2017), 306.
[15] *Judgment of Cour de cassation chambre civile 1 of 28 March 2013 in case No. 11-27770*: "Alors, d'autre part, qu'aucun texte ou principe ne garantissant l'accès à la justice arbitrale – et encore moins à une justice arbitrale gratuite – laquelle résulte d'un libre choix des parties de se soumettre aux conditions, notamment financières, de l'arbitrage qu'elles ont choisi, la Cour d'appel a violé l'article 6.1 de la Convention Européenne de Sauvegarde des Libertés Fondamentales et des Droits de l'Homme, ensemble les textes susvisés."
[16] Andrea Menaker, *International Arbitration and the Rule of Law–Contribution and Conformity, ICCA Congres Series No. 19* (Wolters Kluwer, 2017).
[17] *Judgment of the Supreme Court of New South Wales judgment of March 26 in case American Diagnostica Ltd v Gradipore Ltd.*, 1998 SC, 26 March 1998 44 NSWLR 312.

procedural fairness and equality and concerns of public policy.[18] Scholars also support this view, as private commercial behavior will invariably be subject to various national rules and policies.[19] Parties shall not conclude arbitration agreements that would be in juxtaposition with the mandatory norms and public policy.[20] Public policy constitutes a privilege afforded to each state to exercise complete and permanent sovereignty in dispute settlement process.[21]

Moreover, some institutional arbitration rules also pose limits to the autonomy of the parties wishing to include them into their arbitration agreements. For instance, Article 6(2) of Arbitration Rules of the International Chamber of Commerce (thereafter – ICC)[22] states that by agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court. It is generally agreed that clear language of the provision means that these rules are not suitable for *ad hoc* arbitrations or arbitrations administered by any institution other than the ICC Court. The rules explicitly require the Court, the Secretariat, and the Secretary General to perform certain functions which cannot be delegated to other bodies.[23] Nevertheless, some courts have interpreted that so-called 'hybrid clauses' where one institution's rules are applied by a different institution are valid. [24]

Various examples of national laws and regulations suggest that additional safeguards to autonomy of parties in arbitration agreements shall be established to protect a weaker party of the dispute. For instance, the Code of Civil Procedure of Poland establishes that an arbitration clause should also indicate the effects of such clause to the customers, in particular as to the legal force of the arbitration award or settlement before it, which is equal to the award or settlement concluded before the court after their recognition by the court or after their declaration of enforceability.[25] The German law also establishes some peculiarities when one of the parties to an arbitration agreement is a consumer. In essence, an arbitration agreement in which

[18] Christopher Lau and Christin Horlach, *supra* note 1: 121-130.
[19] Davis Mavunduse and Camilla Andersen, "Party autonomy in international commercial arbitration: a look at freedom, delimitation and judicialization," *International Trade Law & Regulation* 25(2) (2019): 92-106.
[20] *Ibid*.
[21] Moses Oruaze Dickson, "Party autonomy and justice in international commercial arbitration," *International Journal of Law and Management* 60(1) (2018): 114-134.
[22] *Arbitration Rules of International Chamber of Commerce* (2017).
[23] Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris: ICC Publishing SA, 2012), paras 3-192 to 3-195.
[24] *Judgment of the High Court judgment of 22 March 2013 in case HKL Group Co Ltd v Rizq International Holdings Pte Ltd.*, [2013] S.G.H.C.R. 5.; *Judgment of Singapore High Court in Insigma Technology Co Ltd v Alstom Technology Ltd.*, [2009] SGCA 24 where the court upheld an arbitration clause for an arbitration administered by the SIAC applying the ICC Arbitration Rules.
[25] Article 1164^1 (2) of the Code of Civil Procedure of Poland: "W zapisie na sąd polubowny, o którym mowa w § 1, należy także wskazać pod rygorem nieważności, żestronom znane są skutki zapisu na sąd polubowny, w szczególności co do mocy prawnej wyroku sądu polubownego lub ugody przed nim zawartej na równi z wyrokiem sądu lub ugodą zawartą przed sądem po ich uznaniu przez sąd lub po stwierdzeniu przez sąd ich wykonalności."

one of the parties is a consumer, should be drafted in a separate document.[26] Moreover, the case-law of the German courts has recognized that an arbitration agreement to which one of the parties is a consumer is invalid if it is only included in the standard condition of the contract.[27] Such practice shows that when a consumer is a party to an arbitration agreement his or her consent to arbitrate should not only be clear and without doubt, but he or she shall understand the legal effects of an arbitration agreement.

French law establishes that all persons may conclude arbitration agreements relating to rights of which they have the free disposal.[28] Notably, one may not enter into arbitration agreements in matters in which public policy is concerned.[29] Yet, the non-arbitrability does not follow from the mere implication of public policy and is used only in very exceptional circumstances to limit the jurisdiction of an arbitral tribunal.[30] The Civil Code of Lithuania also establishes some safeguards to arbitration agreements to which one of the parties is a consumer. First, such arbitration agreement could be concluded only after the dispute has arisen. Second, the law establishes a presumption that the conditions of the contract are unfair if it abolishes or restricts the consumer's right to bring legal action or other remedies (for example, if it requires that the dispute be settled only in arbitration).[31]

Also, the Supreme Court of Canada has found that courts shall be diligent with arbitration agreements when one of the parties to the agreement is weaker:

> The concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully depending on the context. For example, party autonomy has weaker force in the context of non-negotiated, "take it or leave it" contracts than it does in the context of fully negotiated agreements. It is not surprising, therefore, that legislatures across Canada have put in place various statutes shielding consumers — the weakest and most vulnerable contracting parties — from the potentially harsh

[26] Article 1031(5) Code of Civil Procedure of Germany: "Schiedsvereinbarungen, an denen ein Verbraucher beteiligt ist, müssen in einer von den Parteien eigenhändig unterzeichneten Urkunde enthalten sein."
[27] *Judgment of Federal Court of Germany of 25 January 2011 in case No. XI ZR 350/08*.
[28] Article 2059 of Civil Code of France: "Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition."
[29] Article 2060 of Civil Code of France: "On ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public. "
[30] Yves Derains and Laurence Kiffer, "National Report for France (2013 through 2018)": 12; in: Lise Bosman, ed., *ICCA International Handbook on Commercial Arbitration* (2018); *Cour d"appel Paris, 19.05.1993, Sté. Labinal v. Sté. Mors et Westland Aerospace*, Rev. arb.1993.
[31] Article $6.228^4(2)(18)$ of the Civil Code of the Republic of Lithuania: "Preziumuojama, kad nesąžiningos yra sutarties sąlygos, kuriomis panaikinama arba suvaržoma vartotojo teisė pareikšti ieškinį ar pasinaudoti kitais pažeistų teisių gynimo būdais (<…> reikalaujama perduoti spręsti ginčus tik arbitražui <…>)."

results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts.[32]

Overall, autonomy to conclude arbitration agreements is not absolute and shall be compatible with at least mandatory rules of the national regulation and public order. Additionally, another set of criteria derive from the requirement of due process in arbitration tribunal. The authors believe that arbitration proceedings must comply with some fundamental aspects of the fair (due) process which derives from the basis of any fair dispute resolution mechanisms. Notably, various examples from the regulation of arbitration process stipulate that peculiarities may be found in specific legal relationships, especially when one of the parties to an arbitration agreement is weaker (for instance, a natural person or a consumer). Such safeguards for the weaker party of the dispute are accepted in various states and could be regarded as a common state practice. Such safeguards are important to reach a proper balance between the party autonomy and access to the state court.

2. THE IMPACT OF A VALID ARBITRATION AGREEMENT ON THE RIGHT TO A FAIR TRIAL

A valid arbitration agreement produces several important effects. It creates an alternative jurisdiction to the state courts precluding them from exercising jurisdiction over the disputes that the parties have agreed to submit to arbitration (*negative consequence of arbitration agreement*). At the same time, the parties grant jurisdictional powers to private individuals, i.e. arbitrators, (*positive consequence of arbitration agreement*). The analysis of these effects is relevant since it reveals the impact of a valid arbitration agreement on the right to a fair trial.

Furthermore, when concluding an arbitration agreement, parties have a right to choose the applicable substantive law (to the main contract and the arbitration agreement itself) as well as procedural rules which, subject to mandatory laws, allow the parties to shape the proceedings any way they find suitable. Usually the right to a public hearing is waived by parties to an arbitration agreement by including confidentiality clauses. This reflects the private nature of the proceedings.[33] Additionally, because an arbitration agreement is fundamentally contractual, it may not be withdrawn or in any way altered without the consent of all the parties to the agreement, even if one of the parties no longer finds it as favorable.

Regarding the principle of negative competence – competence, according to which the national courts must refuse to exercise jurisdiction in case of a valid

[32] *Judgment of the Supreme Court of Canada of 4 April 2019 in case TELUS Communications Inc. v. Wellman Supreme*, *supra* note 6.
[33] Paula Hodges, *supra* note 2: 163-169.

arbitration agreement – it is not always explicitly expressed in legislation. For example, the Law of Commercial Arbitration of the Republic of Lithuania establishes the definition of an arbitration agreement, but is silent about the bar to settle the dispute in state courts. German law, on the other hand, explicitly states that if the case is brought before a court regarding a matter that is subject to a valid arbitration agreement, the court has to dismiss the complaint as inadmissible (unless the arbitration agreement to be null and void, invalid, or impossible to implement).[34] The Swiss law has a similar provision.[35] The French law also explicitly mentions that a court shall decline jurisdiction in cases when a dispute is subject to an arbitration agreement, except if an arbitral tribunal has not yet been constituted and the arbitration agreement is *manifestly* void or inapplicable.[36]

The Supreme Court of Lithuania has clarified that under Article 2 of the Law on Commercial Arbitration of the Republic of Lithuania arbitration is defined as a means of resolving a dispute where natural or legal persons resort to or undertake to resolve a dispute between them on the basis of their agreement to apply not to a state court, but to an arbitration tribunal chosen by them or established by law. An arbitration agreement is a contract by which the parties agree to settle disputes between them in a manner other than a national court of their choice. Thus, an arbitration agreement means that the parties refuse to hear disputes between them in national court. This agreement shall be binding on the parties of an arbitration agreement and they cannot change it unilaterally, nor can they harm it, for example, in the event of a dispute, instead of the arbitration tribunal filing a lawsuit to the national court. The Supreme Court of Lithuania noted that when there is an arbitration agreement, the national court must waive its jurisdiction, because the parties shall enforce their arbitration agreement. It means in the event of a dispute parties have to apply to arbitration tribunal, thus fulfilling their agreement. In essence, this is the significance of an arbitration agreement in civil matters clarified in the case law.[37]

While the parties undoubtedly enjoy freedom when it comes to drafting arbitration agreements, they shall exercise such freedom with caution. Arbitration agreements in contracts are also sometimes called 'midnight clauses' because they are often drafted at the very last minute when all the other clauses in the contract had already been agreed upon. Such rush or rather lack of precision may result in pathological clauses that may be inoperative. Whether the courts or tribunals will give effects to such pathological clauses will largely depend on whether the law

[34] Article 1032(1) of the Code of Civil Procedure of Germany.
[35] Article 7 PILA If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall deny jurisdiction […].
[36] Article 1448 of the French Code of Civil Procedure.
[37] *Ruling of the Supreme Court of Lithuania of 9 February 2010, in case No. 3K-3-64/2010*.

applicable to them is 'arbitration-friendly'. For example, in Switzerland unless the 'pathologies' affect the intent to arbitrate, the agreement shall be interpreted based on the principle of *effet utile,* i.e. ignoring the invalid portions of the agreement or replacing it with the default PILA provisions.[38] A similar principle applies in France. According to Article 1507 of the French Code of Civil Procedure, an arbitral agreement is not subject to any form requirements and the only requirement for a valid arbitration clause is the common intention of the parties to arbitrate. Nevertheless, if procedural issues occur, for example related to the constitution of an arbitral tribunal, a *juge d'appui*, i.e. a national judge designated to support arbitral process, would intervene to aid the parties.

Another relevant practical issue is how to determine whether the arbitration agreement corresponds to the real parties' intentions to recourse to arbitration. For instance, in one case the Supreme Court of Lithuania, when dealing with questions whether the parties understood the consequences of the arbitration agreement emphasized that both parties to the agreement were entrepreneurs (businesspersons): "<…> In interpreting arbitration agreements and their limits, the characteristics of the parties to the arbitration agreement must also be taken into account, since they can determine what the true objectives of the parties were. The parties to the present case are businessmen who, by means of contracts, seek a certain economic result".[39] The authors consider that the mere fact that parties to an arbitration agreement are entrepreneurs should not mean that they understood the significance of such agreement and all legal consequences. Although in civil law often entrepreneurs are subject to a higher standard of care and diligence, there are cases in which the arbitration agreement is concluded between a natural person (an entrepreneur) and a company with clearly greater economic capacity and bargaining power. In such cases, there is a possibility that an arbitration agreement is imposed on the natural person (an entrepreneur) and that he or she has not fully understood the consequences of such agreement or even if understood had an option to disagree. In certain situations the courts should assess whether a party fully and correctly understood the significance of an arbitration agreement and its legal effects.

Thus, the legal effects of arbitration agreement require tribunals to act diligently when analyzing such agreements. The authors believe that due to the lack of clear regulation in the national laws about the legal effects of arbitration agreement (first of all, restriction to submit the dispute to the state court) and different economic and legal sources of the parties, the mere fact that the arbitration agreement is concluded shall not bar the party from arguing that they did not understand the legal

[38] Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration Law and Practice in Switzerland* (Oxford University Press, 2015), 130-131
[39] *Ruling of the Supreme Court of Lithuania of 8 July, 2018 in case No. e3K-3-365-969/2016*.

consequences of such agreement and appeal the validity of the arbitration agreement to the court. Though the principle of *effet utile* of arbitration agreements is widely accepted, it shall be balanced with the important legal consequences of arbitration agreement.

3. AN ARBITRATION AGREEMENT AS WAIVER OF THE RIGHT TO A FAIR TRIAL

Article 1 of the Convention establishes that Member States shall secure everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. Nevertheless, the Convention is silent about whether a person whose rights and freedoms shall be secured may refuse such protection and if so, what the requirements for such a waiver are. In essence, a waiver of rights of the Convention is permissible and it is purely the creation of the case law of the ECHR. Thus, it seems that a waiver of rights of the Convention should be interpreted strictly and permissible only in limited situation. Consequently, there is no clear guidance how an arbitration agreement shall satisfy the requirements for a proper waive of the rights of the Convention.

In the case of Jakob BOSS Söhne KG the ECHR stated that the applicant company had voluntarily entered into an arbitration agreement and thereby renounced its right to have its civil rights determined in court proceedings for the conduct of which the state is responsible under the Convention. However, the court noted that this does not mean that responsibility of the state is completely excluded as the arbitration award had to be recognised by the German courts and be given executory effect by them. The courts exercise a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights and in particular with the right of the applicant company to be heard.[40] Therefore, not only arbitral tribunals shall follow the requirements of the fair trial, but also the state courts have to analyze whether the arbitral tribunal ensured procedural guarantees in arbitration proceedings. However, the question arises how the state can ensure due process in arbitration since arbitration is independent from the state's authority. Consequently, if such obligation derives from Article 6 of the Convention, what remedies are available when the state fails to fulfil this obligation? One possible remedy could be liability of the arbitrator. This claim would be heard by the state court.

[40] *ECHR judgment of 2 December 1991 in case Jakob BOSS Söhne KG v. Germany*, petition No. 18479/91, para. 12-13.

Scholars agree that Article 6 of the Convention establishes a broad right to a fair trial consisting of these elements: first, the right to (access) a court; second, the right to a fair (proper) process; third, the principle of impartial and independent tribunal established by law; fourth, the right to a public hearing; fifth, the right to a reasonable length of process (shortest possible time).[41] The guarantees under Article 6 of the Convention are directly applicable in arbitration proceedings. Despite the fact that the direct vertical application of the Convention is determined by the state's liability for violations of the Convention, the horizontal application of the Convention should not be overlooked when it is applied by the national courts. The Member States of the Convention also have an obligation to ensure the safeguards protected by the Convention in national law and it is clear from the case law of the ECHR that an arbitration agreement does not constitute a complete waiver of the guarantees of Article 6 of the Convention.[42]

The fair trial rights may be waived expressly or tacitly.[43] The ECHR has interpreted that neither the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly. However, such waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance[44]. Thus, in general a person who is entitled to the right to a fair trial may waive this under some mandatory requirements. The requirement for a waiver to be *an unequivocal manner* stipulates that if a dispute arises whether a person waived his rights, there should be no doubt about such waiver. However, the form of a waiver may vary since the ECHR recognizes that a waiver could be made expressly or tacitly.

The guarantees of Article 6 of the Convention protect the fundamental values which, due to their special importance, are for the most part considered a public matter. National courts review the compliance of arbitration awards with public policy in proceedings for the annulment or recognition/enforcement of an arbitral award. Additionally, national courts are obliged to make every effort that the arbitral award would be enforceable.

Deewer v. Belgium is one of the first case in which the ECHR analyzed the question of waiver of the right to a fair trial when the arbitration agreement was concluded. The ECHR recognized that the right to a court which is an element of the right to a fair trial is no more absolute in criminal than in civil matter,[45] meaning that

[41] Jurgita Petkutė-Gurienė, "Komercinis arbitražas ir teisingo bylos nagrinėjimo garantijos pagal Europos žmogaus teisių konvencijos 6(1) straipsnį," *Jurisprudence* 24 (2) (2017): 471-472.
[42] *Ibid*.: 476.
[43] William A. Schabas, *supra* note 2, 271.
[44] *ECHR judgment of 17 September 2010 in case Scoppola v. Italy (No. 2)*, petition No. 10249/03, para. 135.
[45] *ECHR judgment of 27 February 1980 in case Deweer v. Belgium*, petition No. 6903/75, para. 49.

though persons have this right, it may not be applicable. Consequently, the court found that the waiver of the right to a fair trial is compatible with the Convention:

> In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.[46]

This judgment is important for at least three reasons. First, the ECHR recognized that the right to a court is not absolute and may be waived in civil matters. Second, it admitted that one of such waivers could be an arbitration agreement. Third, it found that such waiver shall satisfy at least two conditions: it shall have undeniable advantages to the person and it shall contribute to the administration of justice. Though the ECHR has not clarified what "*undeniable advantage*" should mean, it seems that it is coupled with the procedure of dispute settlement which is at least not less favorable than litigation before a court. One could also consider that the ECHR requires that a waiver should not only have advantages, but these advantages should be undeniable. In other words, a waiver of adjudication of the dispute in the state court shall be worth it. Unfortunately, the ECHR has not elaborated on this crucial wording in further case-law and it remains still ambiguous. Nevertheless, the court later has reiterated that Article 6 of the Convention does not preclude an arbitration clause.[47]

In practice the ECHR distinguishes between voluntary and forced arbitration. In forced arbitration, which is imposed by the law, parties have no power to litigate in state courts, but instead they have to settle their dispute in arbitration. Thus, the guarantees of Article 6 of the Convention must be ensured.[48] Nevertheless, a different approach exists when there is a voluntary arbitration, which is based on the free will of the parties by concluding an arbitration agreement. A voluntary arbitration is not in principle incompatible with Article 6 of the Convention. The parties are free to settle their disputes from the execution of the contract (fr. *de l'exécution d'un contrat*) since the parties may voluntary renounce rights guaranteed by the

[46] *Ibid*., para. 49.
[47] *ECHR judgment of 8 July 1986 in case Lithgow and others v. the United Kingdom*, petitions No. 9006/80; 9262/81; 9263/81;9265/81; 9266/81; 9313/81; 9405/81, para. 201.
[48] *ECHR judgment of 1 March 2016 in case Tabbane v. Switzerland*, petition No. 41069/12, para. 26: "En outre, il convient de distinguer entre arbitrage volontaire et arbitrage forcé. S'agissant d'un arbitrage forcé, en ce sens que l'arbitrage est imposé par la loi, les parties n'ont aucune possibilité de soustraire leur litige à la décision d'un tribunal arbitral. Celui-ci doit offrir les garanties prévues par l'article 6 § 1 de la Convention."

Convention. However, such renunciation must be free, clear, unambiguous (fr. *libre, licite et sans equivoque*).[49]

There is no doubt that a voluntary waiver of court proceedings in favour of an arbitration is in principle acceptable from the point of view of Article 6 of the Convention.[50] Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 of Convention. As indicated by the cases cited in this article, an unequivocal waiver of Convention rights is valid only insofar as such waiver is "permissible". A 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 of the Convention. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings.[51] Moreover, one of purposes of arbitration proceedings is often to avoid publicity.[52]

The further analysis of the case law shows that the arbitration agreement shall be clear and unambiguous. In case *Transado-Transportes Fluviais Do Sado, S.A., v. Portugal* an arbitration clause was written in a concession contract. The ECHR found that the applicant herself decided to exempt from ordinary courts certain disputes which might arise from the performance of the concession contract. Such arbitration clauses are moreover common in contracts like this one.[53] Though the court agreed that there was no appeal against the award of the arbitral tribunal and found that an arbitration clause is legitimate since it was clear and unambiguous (fr. *licite et sans equivoque*).

Another significant issue regarding the waiver of the right to a fair trial is the *extent* of such waiver. Does the conclusion of the arbitration agreement mean that the parties waive all procedural guarantees of Article 6 of the Convention or only some of them? Is there are any legal basis for such distinction? In practice the parties do not include in the arbitration agreement provisions that they waive certain procedural safeguards, but merely decide that the state courts lack jurisdiction to hear certain disputes.

One of the major cases which address this issue is *Suovaniemi and others v. Finland*. In this case the ECHR found that the waiver of rights guaranteed by the

[49] *Ibid*., para. 27: "En revanche, lorsqu'il s'agit d'un arbitrage volontaire consenti librement, il ne se pose guère de problème sur le terrain de l'article 6. En effet, les parties à un litige sont libres de soustraire aux juridictions ordinaires certains différends pouvant naître de l'exécution d'un contrat. En souscrivant à une clause d'arbitrage, les parties renoncent volontairement à certains droits garantis par la Convention. Telle renonciation ne se heurte pas à la Convention pour autant qu'elle soit libre, licite et sans equivoque."
[50] *ECHR judgment of 12 September 1982 in case Bramelid and Malmström v. Sweden*, petitions No. 8588/79; 8589/79.
[51] *ECHR judgment of 21 February 1990 in case Håkansson and Sturesson v. Sweden*, Series A. No. 171, petition No. 12585/86.
[52] *ECHR judgment of 23 February 1999 in case Suovaniemi and others v. Finland*, petition No. 31737/96.
[53] *ECHR judgment of 16 December 2003 in case Transado-Transportes Fluviais Do Sado, S.A, v. Portugal*, petition No. 35943/02, para. 2.

Convention – in so far as it is permissible – must be established in an unequivocal manner.[54] Also, the court decided that a waiver of rights does not mean that a person waives all the rights under the Convention:

> 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.[55]

Thus, the conclusion of arbitration agreement does not mean that the parties will not enjoy all procedural rights deriving from Article 6 of the Convention. Though such reasoning is acceptable since the right to a fair trial contains various procedural guarantees which can be separated, the crucial question of what rights of a fair trial are waived with the conclusion of the arbitration agreement, remained unanswered.

Another significant procedural issue is that the waiver of rights shall affect only a person who expressed the waiver and it shall not affect other persons. *Suda v. the Czech Republic* is a crucial case which established that the person who concludes an arbitration agreement can waive the right to a fair trial, but not a third person. The applicant was a minor shareholder in one enterprise in the Czech Republic. The shareholder meeting of the enterprise decided (the applicant voted against) to wind up the enterprise and sell all shares to the major shareholder. The agreement to sell all shares of the enterprise to the major shareholder was concluded between the enterprise and the major shareholder and established that the price of the sale can be challenged in two months in arbitration. The applicant filed an action to the court challenging the sale agreement, but the domestic courts declared the action inadmissible since the arbitration clause was written in the sale agreement. Therefore, in this case it was not the applicant who signed an arbitration clause and the ECHR considered whether such arbitration clause fulfills the requirements set out in Article 6 of the Convention since the applicant was forced to settle the dispute in an arbitration tough had not signed an arbitration clause.[56] The court found that since domestic law established a mechanism to force the minor shareholders to sell their shares to the major shareholder, appropriate means of defense (fr. *moyens de défense appropriés*) should be granted for the minor shareholder. In this case the applicant himself had not waived his right to a fair trial and only the state court could have provided appropriate defense for the applicant rights.[57] The authors support

[54] *ECHR judgment of 23 February 1999 in case Suovaniemi and others v. Finland*, *supra* note 52.
[55] *Ibid*.
[56] *ECHR judgment of 28 October 2010 in case Suda v. Czech Republic*, petition No. 1643/06, para. 50.
[57] *Ibid*., para. 55.

this position because the right to a fair trial is one of the fundamental human rights and only the person who has this right can waive it.

Furthermore, another relevant issue is the right to appeal against arbitral award to the state court. In the opinion of Albert Bordas, the objective of reviewing awards arises from the nature of judges, who are still humans and can decide wrong, unintentionally or intentionally.[58] The party of the dispute against whom the award was made always has the feeling of "innocence" or "distrust". For this reason, it is necessary that the parties to the arbitration agreement in fact could review an arbitration award thus ensuring the effective exercise of the right to a fair trial.

It is widely accepted that the parties have the right to appeal arbitral award to the state court, but national courts have only limited competence to hear such appeals. However, the question is whether the parties can agree to refuse the right to appeal arbitral award at all. Is such waiving of the appeal against arbitral award compatible to the right to access to the court which is one of the basic elements of the right to a fair trial? These problems were addressed by the ECHR in case *Tabbane v. Switzerland*. In this case the court did not find a violation of Article 6(1) of the Convention, stating that the applicant (Mr. Tabbane), exercising his contractual freedom, had expressly and voluntarily entered into an arbitration clause with Colgate.[59] The court considered that the applicant had expressly and freely waived his right to benefit from the full guarantees, provided by Article 6 of the Convention. The court approved that parties to the arbitration agreement can agree that they waive the right to appeal against arbitral award to any court of law.[60]

This case is important not only because it was the first time when the ECHR examined a waiver of right to appeal an award of international arbitration in the state court, but also a waiver of right to a fair trial in arbitration proceedings.

The ECHR found that the relevant Swiss regulation of the arbitration reflected policy objectives pursued by the Swiss government (increasing the attraction and efficiency of arbitration in Switzerland, by avoiding a double control of the award in challenge and in enforcement proceedings and reducing the caseload of the Supreme Court).[61] In the opinion of the authors, such goals are important and if there is a sufficient connection to the country of origin of the arbitral tribunal (for example, one of the parties has its domicile, habitual residence or a place of business, or the decision of arbitral award has to be executed in the country of origin of the arbitral tribunal) the waiver of right to appeal against the arbitral award should not be decided as compatible with the Article 6 of the Convention.

[58] Albert Bordas, *Des judgements susceptible d'appel* (Paris, 1904), 1.
[59] *ECHR judgment of 1 March 2016 in case Tabbane v. Switzerland*, *supra* note 48, para. 29.
[60] *Ibid*., para. 30.
[61] *Ibid*., para. 33.

Another recent case of ECHR related to an arbitration proceeding is *Mutu and Pechstein v. Switzerland.*[62] This case was brought to the ECHR by a professional footballer and a speed skater. The court had to consider the lawfulness of proceedings at the Court of Arbitration for Sports and focused on few elements (the free acceptance of the arbitration clause by the applicants; the status of the Court of Arbitration for Sports as an independent tribunal). The ECHR found that Article 6 of the Convention does not preclude the establishment of arbitral tribunals in order to settle certain pecuniary disputes between individuals. Analyzing whether the applicants had waived all or part of the safeguards provided for in Article 6(1) of Convention, the fundamental question was whether the arbitration procedure had been compulsory for them.[63] The court concluded that the applicants had been free to establish commercial relations with the chosen partner without any effect on their freedom to carry out other projects. However, the acceptance of an arbitration clause was not made freely and unequivocally by the second applicant (Ms. Claudia Pechstein), since the rules of the International Skating Union clearly stated that all disputes were to be brought before the Court of Arbitration for Sports.[64]

In general, when the ECHR encounters application of Article 6 of the Convention and arbitration proceedings, it analyzes whether the arbitration was in general fair. Such analysis consists of two steps analysis whether the arbitration clause is clear and unambiguous and the arbitral tribunal was impartial. However, though the ECHR accepts that the waiving of the right to a fair trial by conclusion of the arbitration agreement is lawful, the court has not explained how and when it should be analyzed that arbitration has an "*undeniable advantage*" in comparison to the dispute resolution in the court. Also, the ECHR has not analyzed whether the parties to an arbitration agreement actually understood the consequences of such proceedings. This is necessary for the interpretation of the will of the parties to the arbitration agreement. The authors argue that the ECHR should lay down clear requirements and criteria for the parties to be considered as having waived their rights under Convention and that these rights could not be waived by concluding the arbitration agreement.

CONCLUSION

Arbitration is a dispute resolution method which is based on autonomy of the parties. However, this autonomy is not absolute. The requirements of objective

[62] *ECHR judgment of 2 October 2018 in case Mutu and Pechsteins v Switzerland*, petitions No 40575/2010; 67474/2010.
[63] *Ibid*., para. 103.
[64] *Ibid*., para. 113.

arbitrability are important to ensure that certain disputes due to their nature can only be settled in the state courts. Thus, party autonomy can be restricted by the legislator. Nevertheless, a valid arbitration agreement provides effects of vesting an arbitral tribunal with jurisdiction over a dispute and at the same time restricting the jurisdiction of the state courts over it.

In accordance with the analyzed case law of the ECHR, a valid arbitration agreement limits some fundamental human rights guaranteed by the Convention (for example, access to the state court, right to a public hearing, legal certainty by consistent interpretation of law, right to a proper enforcement procedure). Therefore, an arbitration agreement has to satisfy the minimum requirements established in the jurisprudence of the ECHR. According to the ECHR, it has to be unequivocal and the waiver of rights guaranteed by the Convention has to be made expressly or tacitly, without compulsion. A waiver of rights should not only have advantages, but these advantages have to be undeniable. Thus, a waiver of the right to a fair trial shall have individual and broader advantage than litigation.

It is particularly important whether the party to the arbitration agreement actually understood the consequences of such agreement. The fact that an arbitration clause is unambiguous and clear does not mean that it expresses what the parties actually intend. The understanding of the consequences of an arbitration agreement should be the basis for the analysis of validity of an arbitration agreement. The case law of the ECHR in this regard is too formal since the court examines only whether an arbitration clause is clear and unequivocal and does not analyze whether the parties actually understood the legal effect of the arbitration agreement. In such cases it is important to consider the interests of a weaker party to the arbitration agreement.

According to the case-law of ECHR (see. *Tabbane v. Switzerland* case) it is allowed for parties to waive their right to appeal an arbitral award to the state court. In the opinion of the authors, the right to a court is a fundamental human right which should not be waivable unless proportionate and lawful goals are established by the national law which justify such limitations of access to the court.

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