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About the author:

Sandija Novicka graduated from the Law Faculty of University of Latvia in 2002 and obtained her LL.M in International and European Law from the Riga Graduate School of Law in 2003. She is working in Deloitte & Touche as legal consultant.

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RGSL Working Papers under the rubric '**New Authors, New Topics**' introduces the work of **Sandija Novicka**. The current publication is based on her Master Thesis entitled *Use of the European Convention of Human Rights' argumentation in arbitration proceedings: When, how?* submitted in fulfilment of requirements of the Masters' Degree in International and European Law at RGSL.

The opening up of Central and Eastern European economies to foreign companies and investors has brought up many questions that local governments have had to deal with. One of the most important issues concerns the ways and means that would ensure that above all the populations of these countries benefit from free market economies. This has proven to be a serious challenge, for example, in Latvia with several arbitration proceedings pending involving the State and the investor.

This paper discloses highly topical debate and developments in relation to arbitration proceedings, and their character, and discusses a few selected areas of possible disputes that might be dealt with in arbitration. The unique feature of this work is the analysis and application of the case law of the European Court of Human Rights in relation to both the procedure and substance of mixed arbitration.

This is yet another venture into the domain of the relationship between private and public law, showing that more overlap and inter-relationship exists than is typically acknowledged.

RGSL is pleased to present this academic contribution on a particularly relevant and challenging issue of application of human rights standards in arbitration proceedings.

Ineta Ziemele
Söderberg Professor of
International Law and Human Rights at the RGSL

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Introduction

In *Antoine Biloune, Marine Drive Complex Ltd. (MDCL) v. Ghana Investments centre, the Government of Ghana* the claimant, Mr. Biloune, claimed damages for expropriation, denial of justice and violation of human rights.¹ In 1986, MDCL, of which Mr. Biloune was the principal shareholder, and Ghana Investment Centre (a State agency) concluded an investment agreement according to which MDCL was allowed to construct an extensive 4-star hotel resort complex. However, in August 1987, the Accra City Council issued a Stop Work notice. Later, demolition of the project was ordered, and Mr. Biloune was arrested and held in custody for thirteen days without charge. Finally, Mr. Biloune was deported from Ghana to Togo.

When the case came before the arbitral tribunal it ruled:

Long established customary international law requires that a State accords foreign nationals within its territory a standard of treatment no less than that prescribed by international law. Moreover, contemporary international law recognises that all individuals, regardless of nationality, are entitled to fundamental human rights, which in the view of the Tribunal, include property as well as personal rights, which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from minimum standards to which nationals are entitled, or that this Tribunal is authorised to deal with allegations of violations of fundamental human rights.²

Further the Tribunal added:

This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes 'in respect of' the foreign investment. Thus, other matters - however compelling the claim or wrongful the alleged act - are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.³

Is such a conclusion still valid today? Can a claim of violation of human rights be an independent cause of action before an arbitral tribunal in a dispute between an investor and a State? Are human rights applicable to arbitration proceedings at all?

The topic of this discussion is not only of theoretical interest in international law, but has considerable practical importance in the real

¹ *Antoine Biloune, Marine Drive Complex Ltd. (MDCL) v. Ghana Investments centre, the Government of Ghana*, Award of October 27, 1989, in A.J. Van Den Berg (ed), *Yearbook: Commercial arbitration*, Volume XIX, The Netherlands, Kluwer Law and Taxation Publishers, 1994, at pp.11-32.

² *Ibid*, para. 8, at p. 16.

³ *Ibid*, para. 9, at p. 16.

world. Especially in the Baltic States, since after the collapse of the Soviet Union this area is considered particularly attractive for foreign investment. As a result, more and more frequently we hear about different types of disputes between these States and foreign investors.

For this reason, answers to the questions stated above will be sought by analysing the possibility to apply the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (the Convention) in disputes between States and foreign investors. In particular, analysis will examine whether the standard of a fair trial as embodied in Article 6(1) of the Convention is applicable with regard to arbitration, and whether the doctrine developed by the European Court of Human Rights (the ECtHR) in the area of expropriation, and control of the use of property may be applied in arbitration proceedings.

However, prior to providing answers to those questions, it has to be determined what is the applicable law in those arbitration proceedings, what role public international law currently plays in arbitration, and how arbitration clauses can affect applicability of human rights in arbitration proceedings.

I Preliminary issues

1. Law applicable in arbitration proceedings

Application of human rights in arbitration proceedings depends on the applicable law in those proceedings. There are four separate choice-of-law issues that can arise in connection with an international arbitration:

- a) the substantive law governing the merits of the parties' underlying contract and other claims;
- b) the substantive law governing the arbitration agreement of the parties;
- c) the procedural law applicable to the arbitration proceedings;
- d) the conflict of law rules applicable in selecting each of the foregoing laws.⁴

1.1. Procedural law applicable to arbitration proceedings

The applicable procedural law is of importance for the purpose of this study, since it deals with issues related to the right to a fair trial. That is, the applicable procedural law will determine such issues as the appointment and qualification of arbitrators, any challenge to arbitrators,

⁴ G.B.Born, *International Commercial Arbitration. Commentary and Materials*, 2nd ed., The Hague, Kluwer Law International, 2001, at p. 42.

the extent of judicial intervention in the arbitral process, procedural conduct of the arbitration, and the form of any award.⁵

In most cases, the procedural law applicable to the arbitral proceedings will be the law of the arbitral *situs* - the place where the parties have agreed that the arbitration will be seated.⁶ In the case of institutional arbitration, procedural questions will mainly be settled by the rules of the respective arbitration institution. In such cases, the law of the arbitral *situs* will play only a subsidiary role. Furthermore, the parties have the power to agree on application of a different procedural law than that of the arbitral *situs*. Finally, it has to be remembered that parties' authority to choose the law applicable (including rules of some arbitration centre) to the arbitral proceedings does not imply that they have the right to disregard mandatory provisions of the law of the arbitral *situs* and the public policy provisions in effect at the seat of arbitration.⁷

1.2. Substantive law governing merits of the parties' underlying contract and other claims

The substantive law governing merits will determine whether the Convention can be applied to resolve the dispute between the parties. Today, the concept that choice of law by the parties has to be accepted is a general principle of conflict law and part of transnational law.⁸ It is also widely accepted that the parties are able to choose not only a national law, but other rules as well.⁹ If parties have not chosen the applicable rules, the task of the arbitral tribunal is to determine such rules. Thus, the parties agree on the applicable substantive law, or the arbitrators will determine it.

2. Role of public international law in arbitration

The traditional law of nations drew no clear line dividing what later came to be understood as public and private international law. The law of nations was concerned indiscriminately with matters between individuals, between individuals and States, and between States.¹⁰ However, Jeremy Bentham substantially reduced the scope of this discipline of law by introducing the term *international law* to designate the *law of nations*.

⁵ Ibid, at p.43.

⁶ R.Garnett, H.Gabriel, J.Waincymer, J.Epstein, A Practical Guide to International Commercial Arbitration, New York, Oceana Publications, Inc, 2000, at p.21.

⁷ J.G.Frick, Arbitration and Complex International Contracts, The Netherlands, Kluwer Law International, 2001, at p. 65.

⁸ Ibid, at p. 45.

⁹ Ibid.

¹⁰ Dickinson, "The Law of Nations as Part of the National Law of the United States", 101 U. Pa. L. Rev. 26, 26-27 (1952) cited in M.W.Janis, An Introduction to International Law, 3rd ed., the USA, Aspen Law & Business, 1999, at p. 239.

According to his definition of the term international law, this branch of law governs only relations between States.¹¹ Thus, the law of nations, a law common to individuals as well as to States, was transformed into two international law disciplines, one “public”, the other “private”. The former was deemed to apply to States, the latter to individuals.¹²

However, nowadays it is becoming increasingly clear that this division, although useful for systematization, is artificial, since in many cases it is hard to draw a clear borderline between these two disciplines of international law. One instance where this appears is arbitration proceedings between the State and a private person.

Arbitration of a dispute arising within an international economic transaction involving one or more public entities would be considered as commercial, particularly when the arbitration takes place between a state, or a state-owned entity, and a foreign private undertaking.¹³ Generally, in transactions with a private individual, a State is reducing itself to the condition of a private person and usually subjects itself to a dispute settlement mechanism used between private persons. Therefore, such transactions are mostly governed by private international law.

However, the involvement of a public entity will have a specific impact. Primarily, it will influence determination of the rules governing the merits of the dispute and enforcement of the award. Thus, among other things, the involvement of a public entity may require application of public international law. As a result, public international law, including human rights law, plays a significant role in regulation of relations between the State and a private party.

Moreover, the experts of the Commission on Human Rights of the United Nations in their working paper stressed that:

... the relationship between human rights and international trade, investment and finance policy and practice is of paramount importance to the United Nations system... the predominant view among economists and policy makers in multilateral institutions is that any hindrance to enhanced global trade, investment and finance is a bad thing for humanity. However, liberalization in the global regimes of trade, investment and finance does not, *ipso facto*, lead to more positive impacts on the well - being of humankind in general or to the enhancement of economic development in particular.¹⁴

¹¹ J.Bentham, An Introduction to the Principles of Morals and Legislation (Burns and Hart eds. 1970), p. 296 cited in M.W.Janis, An Introduction to International Law, at p. 238.

¹² M.W.Janis, An Introduction to International Law, at p. 242.

¹³ P.Fouchard, E.Gaillard, B.Goldman on International Commercial Arbitration, The Netherlands, Kluwer Law International, 1999, at p.40.

¹⁴ J.Oloka-Onyango, D.Udagama (1999). Human rights as the primary objective of international trade, investment and finance policy and practice. Working paper submitted to the Commission on Human Rights of the United Nations, E/CN.4/Sub.2/1999/11, para. 3. Available on the internet at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1999.11.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1999.11.En?Opendocument) (Printout available). Last visited 1 March 2004.

Thus, it is currently admitted that human rights, international trade, and investment policy are interrelated. Therefore, the question is not whether international public law applies to international commercial arbitration between the State and the foreign investor, but rather to what extent it applies.¹⁵

To see to what extent and how the public international law comes within the scope of arbitration proceedings, it is necessary to separately examine:

- 1) the procedural law applicable to the arbitration;
- 2) the applicable law as chosen by the parties;
- 3) the applicable law as determined by arbitrators.

2.1. Procedural law and public international law

Neither in international law nor in municipal civil law are the parties allowed to contract out of legal norms pertaining to the realm of public policy. One of the basic characteristics of public policy is the difficulty in determining its contents, and hence there is no universal definition thereof. It is nevertheless clear that public policy (*ordre public*) encompasses the basic economic, legal, political, religious, and social standards of a certain State, which are so important that they "demand preservation regardless of the price and without exception".¹⁶

With regard to arbitration proceedings it is important to distinguish between internal and international public policy. The Luxembourg Supreme Court, in *Kersa Holding Company Luxembourg v. Infracourtage, Famajuk Investment, Isny* ruled that:

according to Article V(2)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the public policy of the State where the arbitral award is invoked is not the internal public policy of that country, but its international public policy, which is defined as being all that affects the essential principles of the administration of justice or the performance of contractual obligations, that is, all that is considered 'as essential to the moral, political or economic order' and which *per se* must necessarily exclude the enforcement of an award incompatible with the public policy of the State where it is invoked.¹⁷

Thus, the notion of international public policy is more restricted than internal public policy. International public policy, according to the

¹⁵ A.F.M. Maniruzzaman, "International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View" (2001) 20 Wis. Int'l L.J. (Wisconsin International Law Journal), at p.3. Available at: Lexis-Nexis database. Last visited 10 July 2003.

¹⁶ G.C.Cheshire, P.M.North, Private international law, London, 1987, at p.131 cited in H.Sikiric, "Arbitration and public policy: Arbitration proceedings and Public Policy" (2000) 7(85) Croatian Arbitration Yearbook, at p.86. Available at: Lexis-Nexis database. Last visited 10 August 2003.

¹⁷ *Kersa Holding Company Luxembourg v. (1) Infracourtage, (2) Famajuk Investment, (3) Isny*, Cour Superieure de Justice, December 24, 1993 cited in H.Sikiric, Arbitration and public policy: Arbitration proceedings and Public Policy, at p. 91.

generally accepted doctrine, is confined to violation of fundamental conceptions of legal order, including fundamental human rights,¹⁸ in the country concerned.

The function ascribed to international public policy has been considered to be of a positive character, in the sense that its effect has been said directly to influence the arbitrators in resolving a given dispute. However, public policy may also have a negative function. This negative function may take two forms: first to exclude the application of laws and rules which would normally be applicable, and second to exclude the application of the national public policy of a given state, in case such public policy would contradict international public policy.¹⁹

Consequently, notwithstanding the applicable procedural law as chosen by the parties or determined by the tribunal, norms pertaining to the realm of international public policy will prevail. Therefore, those provisions of the Convention that have the status of international public policy have to be observed even during arbitration proceedings, and it is not for the parties to amend them by agreement.

2.2. Applicable substantive law as chosen by the parties and public international law

In order to protect their interests and taking into consideration the uncertainties of State law, private parties usually insist on international law as the applicable law, whether jointly with the domestic law of the State, or excluding it.

In such case there are no obstacles for applying argumentation based on the Convention, provided that the particular State is a party to the Convention. Once the State has ratified the Convention, it becomes part of that State's international obligations.

More complicated is the situation where the parties have failed to include international law as the applicable law and have set only the domestic law of the State as the applicable law. In such a case, the possibility to apply international law depends considerably on whether the State may be deemed to be monist or dualist.²⁰ In the case of a monistic State, "international treaties are part of domestic law as a consequence of international ratification or a corresponding expression by the State of its will to become bound by the Treaty, and publication only; no separate

¹⁸ Allsop Automatic Inc. v. Tecnoski snc, Corte di Appelo Milano, December 4, 1982, 30 Riv.Dir.Int.Priv.Proc. (1994), at 873-874 cited in H.Sikiric, Arbitration and public policy: Arbitration proceedings and Public Policy, at p. 91.

¹⁹ K.Hobér, Extinctive Prescription and Applicable Law In Interstate Arbitration, Uppsala, Iustus Förlag, 2001, at pp. 130-131.

²⁰ It has to be noted that in our days many States use methods characteristic to both monism and dualism.

legislative measure is needed”.²¹ By contrast, in the case of a dualistic State, in order to implement an international treaty, a separate domestic act is necessary, for the purposes of giving all or a part of the treaty provisions domestic validity.²²

To the extent that international law is becoming applicable internally, it may be considered as a part of a system of domestic law chosen by the parties, and may be relied upon before the tribunal. Thus, in the *Pyramids* case (also known as the SPP case), the tribunal of the International Commercial Chamber (the ICC) accepted that Egyptian law was the proper law of the contract. However, the tribunal took the view that international law could be deemed part of Egyptian law.²³ Similarly, in the *Aminoil* case the tribunal applied primarily the law of Kuwait that had, in the tribunal’s view, international law as an integral part of it.²⁴ Therefore, even if the parties have agreed on domestic law as applicable law, the Convention may be applied as part of domestic law provided it has been adequately transformed into the legal system of a State, or is part of the domestic law directly.

Unfortunately, the status of international law under domestic constitutions is by no means uniform.²⁵ Therefore, the question arises whether the tribunal may take into account the Convention, although it is not transformed in the domestic law and is not part of the domestic law directly.

There are good reasons to consider that international law can be taken into account. In *SPP v Egypt* the tribunal ruled that when municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the tribunal is bound to apply the relevant principles and rules of international law.²⁶

The same approach is advocated by the so-called theory of internationalisation of State contracts. The theory of internationalisation of State contracts suggests that, no matter what law the parties to such a contract choose as the proper law of the contract, international law

²¹ M.Scheinin, “International Human Rights in National Law”, in R.Hanski, M.Suksi (eds), *An Introduction to the International Protection of Human Rights*, 2nd ed., Abo Academy University, Institute for Human Rights, 2000, at p.18.

²² Ibid.

²³ *SPP (Middle East) Ltd and Southern Pacific Projects v. Egypt and EGOTH* [1988] LAR 309, at 330, in A.F.M.Maniruzzaman, “State Contracts In Contemporary International Law: Monist Versus Dualist Controversies” (2001) 12 EJIL (European Journal of International Law). Available at: Lexis-Nexis database. Last visited 1 August 2003.

²⁴ *Aminoil* case, 66 ILR 518, cited in A.F.M.Maniruzzaman, “State Contracts In Contemporary International Law: Monist Versus Dualist Controversies” (2001) 12 EJIL. Available at: Lexis-Nexis database. Last visited 1 August 2003.

²⁵ G.S.Tawil, International Centre For Settlement of Investment Disputes. Applicable law, at p. 9. Available on the internet at: http://www.unctad.org/en/docs/edmmisc232add5_en.pdf. Last visited 1 March 2004.

²⁶ Supra note 23.

superimposes their choice and applies automatically as the overriding law.²⁷ Thus, in his separate opinion in the *Norwegian Loans* case Judge Lauterpacht observed that:

It may be admitted... that an 'international' contract must be subject to some national law... However, this does not mean that that national law is a matter that is wholly outside the orbit of international law. National legislation ... may be contrary, in its intention or efforts, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel, and if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law.²⁸

Therefore, it cannot be denied that one of the parties to a State contract, i.e. the State, is a subject of international law, and that public international law governs its conduct by providing certain international minimum standards with respect to the treatment of aliens. Consequently, even where the parties have chosen only the domestic law of the host State as the applicable substantive law, the Convention may be applied.

2.3. Applicable law as determined by arbitrators and public international law

A similar outcome occurs where the parties have failed to agree on the applicable law, and the matter is left for the tribunal to decide. It is considered that the blend of State law and international law represents a well-balanced solution to the delicate problem of the law applicable to State contracts, to the extent that the differing interests at stake are thus better reconciled.²⁹

Such approach is reflected in several international instruments. The 1962 United Nations resolution on Permanent Sovereignty over National Resources subjects state nationalizations and expropriations of foreign property to the rules of international as well as national law.³⁰ Article 42(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID) provides that in the

²⁷ A.F.M.Maniruzzaman, "State Contracts In Contemporary International Law: Monist Versus Dualist Controversies", 12 EJIL. Available at: Lexis-Nexis database. Last visited 1 August 2003.

²⁸ Separate Opinion of Judge Lauterpacht, Case of Certain Norwegian Loans, ICJ Reports (1957) 9 cited in SPP (Middle East) Ltd and Southern Pacific Projects v Egypt and EGOTH [1988] LAR 309, at 330, in A.F.M.Maniruzzaman, "State Contracts In Contemporary International Law: Monist Versus Dualist Controversies" (2001) 12 EJIL. Available at: Lexis-Nexis database. Last visited 1 August 2003.

²⁹ P.Bernardini, The Law Applied by International Arbitrators to State Contracts, in R.Briner, L.Y.Fortier, K.P.Berger, J.Bredow (eds), Law of International Business and Dispute Settlement in the 21st Century, Köln, Carl Heymans Verlag KG, 2001, at p. 63.

³⁰ Supra note 12, at p.247.

absence of choice of law, the Tribunal should apply the law of the State party to the dispute and such rules of international law as may be applicable. While drafting the ICSID, it was made clear that international law could be used not only to fill in the gaps in domestic law, but also to remedy any violations of international law that may arise through application of State law.³¹

Tribunals, too, pursue this approach. The majority in the award of August 24, 1978, in *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.* ruled that:

Although the Agreement was silent as to the applicable law, we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the application of principles of public international law which govern the responsibility of States for injuries to aliens. We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.³²

Due to those considerations, it is even suggested that the international arbitrator's tendency to apply both domestic law and rules of international law is supported by trade usages.³³ Thus, in the absence of choice of law, tribunals tend to apply both domestic law and rules of international law when arbitrating State contracts.

2.4. Content of international public law

Once it has been determined that public international law is applicable to a dispute between a State and a foreign investor, an international arbitrator can have recourse to every source of international law provided in Article 38(1) of the Statute of the International Court of Justice.³⁴ The accompanying report of the executive directors of the World Bank on the preparation of the ICSID has put expressly on the record that the reference to "international law" in Article 42(1) of the ICSID should be understood in the broad sense of Article 38(1) of the Statute of the International Court of Justice.³⁵

Consequently, the Convention as part of international law covered by Article 38(1) of the Statute of the International Court of Justice may be

³¹ Supra note 25, at p. 23.

³² *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*, in G.R.Delaume, "State Contracts and Transnational Arbitration" (1981) 75 A.J.I.L. (The American Journal International Law), at p.803. Available at: Lexis-Nexis database. Last visited 15 July 2003.

³³ *Framatome, Alstom-Atlantique and Spie Batignoles v. Atomic Energy Organization of Iran*, the award of the ICC of 30 April 1982, in P.Bernardini, *The Law Applied by International Arbitrators to State Contracts*, p.64.

³⁴ Supra note 15, at p.35.

³⁵ *Ibid*, at p.37.

applied in arbitration proceedings between the State and a private person in cases when international law is part of the applicable law.

3. Scope of arbitration clause and tribunal's competence to consider human rights aspects

It is a fundamental rule that international commercial arbitration is consensual: the parties can only be required to arbitrate that which they have agreed to arbitrate.³⁶ However, during the early part of the last century, many national courts held that arbitrators were forbidden from considering non-contractual claims based on public policy. This view was also reflected in the previously mentioned case of *Antoine Biloune, Marine Drive Complex Ltd. (MDCL) v. Ghana Investments centre, the Government of Ghana*.³⁷

Fortunately, this view is no longer valid. During the last two decades, national courts in most developed jurisdictions have abandoned traditional restrictions on the power of arbitrators to consider public policy and statutory claims.³⁸ As examples, the cases of *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth Inc.*,³⁹ *Rodriguez de Quijas v. Shearson/American Express*⁴⁰, and *Eco Swiss China Time Ltd v. Benetton Int'l*⁴¹ can be mentioned.

The arbitration rules of main arbitration centres do not preclude arbitration of public policy and statutory claims as well. Analysis of arbitration rules shows that there is a tendency to consider as many disputes as possible to be capable of settlement by arbitration.⁴² Thus, the Rules of the London Court of International Arbitration do not put a limit on the disputes that may be referred to it.⁴³ Nor do the rules of the Arbitration Institute of the Stockholm Chamber of Commerce limit their applicability to given classes of disputes.⁴⁴ Therefore, the modern arbitration clause referring broadly to disputes arising "in connection with" a contract or "all

³⁶ Supra note 4, at p.567.

³⁷ Supra note 1, para. 9, at p. 16.

³⁸ Supra note 4, at p.565.

³⁹ *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth Inc.*, 473 U.S. 614 (1985). Available on the internet at: <http://caselaw.lp.fidlaw.com/scripts/getcase.pl?court=US&vol=473&invol=614>. Last visited 17 July 2003.

⁴⁰ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Available on the internet at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=490&invol=477>. Last visited 1 March 2004.

⁴¹ Case 126/1997 *Eco Swiss China Time Ltd v. Benetton Int'l*, [1999] ECR I-03055.

⁴² M.Rubino-Sammartano, *International Arbitration. Law and Practice*. 2nd ed., The Hague, Kluwer Law International, 2001, at p. 173.

⁴³ LIAC Arbitration Rules, Available on the internet at: <http://www.jus.uio.no/lm/lcia.arbitration.rules.1998/landscape.pdf>. Last visited 1 March 2004.

⁴⁴ Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Available on the internet at: http://www.sccinstitute.com/_upload/shared_files/regler/sccrules.pdf. Last visited 1 March 2004.

disputes relating to the contract” would give the arbitral tribunal latitude to rule also on quasi-contractual claims or statutory claims, provided that they have sufficient factual nexus to the parties’ contract.⁴⁵

Moreover, today most arbitral institutions favour the broadest possible model clauses.⁴⁶ As a result, only if one implies exclusion - “all disputes except disputes based on tort or non-contractual claims” - most arbitration agreements would fail as a matter of interpretation to grant the arbitrator the power to resolve such claims.⁴⁷

Consequently, if a claim based on human rights law has sufficient nexus to an investment agreement, there are no obstacles for the arbitral tribunal to take a decision on this claim.

4. *Ratione personae* criterion for application of the Convention

The final preliminary issue for application of the Convention in arbitration proceedings is the *ratione personae* criterion. It is generally accepted that human rights exist for human beings. In contrast, human rights and private corporations, traditionally, have not been linked terms.⁴⁸

However, this is no longer the case. In *Autronic AG*, the ECtHR stated that Article 10 of the Convention applies to “everyone”, whether natural or legal persons.⁴⁹ Therefore, legal persons enjoy certain human rights.⁵⁰

⁴⁵ G.B.Born, *International Commercial Arbitration*, at p. 566.

⁴⁶ UNCITRAL Arbitration Rules. Model Arbitration Clause. Available on the internet at: <http://www.bcicac.ca/cfm/index.cfm?L=83&P=87>. Last visited 1 March 2004; Model Arbitration Clause of the International Chamber of Commerce. Available on the internet at:

http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules_arb_english.pdf

Last visited 15 July 2003.

⁴⁷ *Supra* note 4, at p.566.

⁴⁸ S.G.Wood, B.G.Scharffs, “Applicability of Human Rights Standards to Private Corporations: An American Perspective” (2002) 50 *Am. J. Comp. L.* (American Journal of Comparative Law), at p.538. Available at: Lexis-Nexis database. Last visited 10 July 2003.

⁴⁹ Case of *Autronic AG v Switzerland*, the ECtHR, para.47. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/sift/215.txt>. Last visited 1 March 2004.

⁵⁰ Besides the rights embodied in Article 10 of the Convention, legal persons enjoy other human rights, like right to a fair trial (see Case of *Sovtransavto Holding v. Ukraine*, the ECtHR. Available on the internet at: <http://hudoc.ecthr.coe.int/Hudoc1doc2/HEJUD/200305/sovtransavto48553jv.chb425072002.trad.doc>. Last visited 1 September 2003), right to freedom of assembly and association (see Case of *United Communist Party of Turkey and others v. Turkey*, the ECtHR. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc2/HEJUD/199810/turkish%20communist%20party%20batj.doc>. Last visited 1 March 2003), right to effective remedy (see Case of *VGT Verein Gegen Tierfabriken v. Switzerland*, the ECtHR, Available on the internet at: [http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/200305/vgt.batj\(sl\).doc](http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/200305/vgt.batj(sl).doc). Last visited 1 March 2004), right to non-discrimination (see Case of the *National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v. The United Kingdom*, the ECtHR. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc2/HEJUD/199810/building%20societies%20batj.doc>. Last visited 1 March 2004), right of property (see Case of *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, the ECtHR. Available on the internet at:

Consequently, in arbitration proceedings, not only natural persons and States, but legal persons as well, may use an argumentation based on the Convention. It remains only to be clarified what are the arguments and rights on the basis of which those arguments may be developed.

II Procedural matters

1. Application of Article 6(1) of the Convention to arbitration

In the determination of one's civil rights and obligations or criminal charge, Article 6(1) of the Convention provides to everyone a right to have the case decided by an impartial and independent tribunal instituted by law. Proceedings must be fair, and hearings held in public. They must lead in a reasonable time to a judgment in conformity with the law.⁵¹

In common law and civil law countries the basic right of any person to a fair hearing and proceedings qualifies as one of the most fundamental human rights. At the same time, the goal of international commercial arbitration is efficiency and speed of proceedings. In order to achieve this goal, States have adopted legal acts aiming to simplify the whole process of arbitration starting from the procedure before the arbitral tribunal and ending with the process for recognition and enforcement of awards, both at the domestic and international levels. Thus, many acts of failure in the course of arbitral proceedings are not usually punished, because of the relaxed set of standards.⁵²

This tendency is also reflected in the case law of the ECtHR. In *Le Compte, Van Leuven and De Meyere* the ECtHR ruled that:

demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect.⁵³

Thus, the Convention makes it possible for the parties to derogate from the jurisdiction of State courts and accept the jurisdiction of an autonomous institution whose decision is equated with a judgment of a State court. However, the question is whether in this way all rights

<http://hudoc.ECtHR.coe.int/Hudoc1doc2/HEJUD/200307/eugenia%20michaelidou%20%2016163jv.chb3%2031072003e.doc>. Last visited 1 September 2003).

⁵¹ Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe. Available on the internet at: <http://conventions.coe.int/treaty/en/Treaties/Word/005.doc>. Last visited 1 March 2004.

⁵² J.Velu, "Article 6 of the European Convention on Human Rights in Belgian Law", (1970) 18 Am. J. Comp.L. (The American Journal of Comparative Law), at p.115. (Printout available).

⁵³ Case of *Le Compte, Van Leuven and De Meyere v. the Kingdom of Belgium*, the ECtHR, para 51. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc2doc/HEJUD/sift/107.txt>. Last visited 1 March 2004.

embodied in Article 6(1) of the Convention may be waived and become inapplicable for the sake of efficiency and speed. The answer to this question depends on whether Article 6(1) of the Convention is seen as a part of European public policy.⁵⁴

The European Commission of Human Rights (“the Commission”) has stated that:

“Whereas it follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.”⁵⁵

Unfortunately, the further case law of the Convention’s controlling organs regarding the status of norms embodied in the Convention and their effect on arbitration is unclear. In *Bramelid and Malmström v. Sweden*, the Commission assessed that there had been a violation of Article 6(1) of the Convention since during arbitration not all guarantees were observed. However, such conclusion was reached because the claim concerned an obligatory arbitration. In its decision the Commission emphasised that it should distinguish compulsory from voluntary arbitration.⁵⁶ Thus, at least with regard to compulsory arbitration prescribed by law, there is no doubt about applicability of Article 6(1) of the Convention. In those cases, the conditions included in Article 6(1) of the Convention are directly applicable.

However, the same cannot be said about voluntary arbitration. In the first case before the Commission concerning arbitration, the Commission took the standpoint that the applicant waived the jurisdiction of a state court by signing the arbitration clause and thus waived the rights arising from Article 6(1) of the Convention.⁵⁷ Further cases decided by the convention’s authorities are not so clear and categorical. In *Deweere v. Belgium, R. v. Switzerland*, and *Nordström-Janzon and Nordström-Lehtinen v. The Netherlands*, the Convention authorities held that a waiver of the right of access to a court, as reflected in an arbitration agreement, should not be considered as amounting to a waiver of all rights under Article 6(1)

⁵⁴ “European public policy comprises the essential interests of the European community as it exists today or will exist tomorrow after the accession of new members.” - W.J.Ganshof van der Meersch, *Organisations européennes*, vol.I, p.371 cited in J. Velu, Article 6 of the European Convention on Human Rights in Belgian Law, at p.266.

⁵⁵ Commission, 11 January 1961, Yearbook IV, pp.138-142 cited in J.Velu, Article 6 of the European Convention on Human Rights in Belgian Law, (1970) 18 Am. J. Comp.L. (The American Journal of Comparative Law), at p.266.

⁵⁶ *Bramelid and Malmstrom v. Sweden*, in M.Giunio, “Arbitration and the Right to a Fair Trial: Right to a Fair Trial and Efficiency of Arbitration Proceedings” (2000) 7 Croat. Arbit. Yearb. (Croatian Arbitration Yearbook), at p.37. Available at: Lexis-Nexis database. Last visited 15 August 2003.

⁵⁷ *X v. Federal Republic of Germany*, 1962, in M.Giunio, *Arbitration and the Right to a Fair Trial: Right to a Fair Trial and Efficiency of Arbitration Proceedings*, at p.37.

of the Convention. In their view, the parties' agreement in favor of arbitration implies only a partial waiver of the guarantees set forth in Article 6(1) of the Convention.⁵⁸

In *Albert and Le Compte v. Belgium*, this line of argumentation was continued by the statement that some of the rights protected under Article 6(1) of the Convention are so fundamental and important in a democratic society that no person should be deprived of their benefit, even when acting completely voluntarily and free from coercion.⁵⁹ Therefore, certain rights set forth in Article 6(1) of the Convention constitute truly inalienable human rights. Those rights, regardless of the parties' choice of procedural rules, need to be guaranteed in arbitration proceedings as a matter of European public policy.⁶⁰ However, the problem is that neither in this case nor in further cases have the Convention's authorities generally and definitively determined the demarcation line between those procedural guarantees subject to possible waiver and those excluded from it.⁶¹

Furthermore, the Commission has indicated that the Convention is binding upon arbitrators only indirectly. In *R. v. Switzerland* the applicant alleged violation of the right to a decision within a reasonable time in voluntary arbitration. The Commission dismissed the claim, explaining that only proceedings before state courts in connection with arbitration proceedings are subject to the scrutiny of the Court, but not arbitration proceedings themselves.⁶² Such standpoint was explained by the fact that the responsibility of the State may not relate to actions of arbitrators but only to actions of state courts to the extent in which they exercise control over arbitration proceedings.⁶³ Thus, it is clear that arbitration proceedings themselves may not be subject to the scrutiny of the ECtHR.

However, the State is not released from the responsibility of ensuring in arbitration proceedings that guarantees having the status of European public policy are observed.⁶⁴ This means that national procedural law has to provide the possibility for the parties to remedy violations of those human rights. Moreover, the State may not enact laws enabling the parties to waive those rights.

⁵⁸ R.Briner, F.von Schlabrendorff, "Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration", in R.Briner, L.Y.Fortier, K.P.Berger, J.Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century*, at p. 91.

⁵⁹ *Ibid*, at p. 92.

⁶⁰ *Ibid*, at p. 93.

⁶¹ *Ibid*, at p. 92.

⁶² *R. v. Switzerland*, 1987, in M.Giunio, *Arbitration and the Right to a Fair Trial: Right to a Fair Trial and Efficiency of Arbitration Proceedings*, at p.37.

⁶³ *Ibid*.

⁶⁴ A.Galic, "Arbitration and the Right to a Fair Trial: Constitutional Procedural Guarantees in Arbitration Proceedings", (2000) 7 *Croatian Arbitration Yearbook*, at p.11. Available at: Lexis-Nexis database. Last visited 15 August 2003.

Consequently, certain guarantees embodied in Article 6(1) of the Convention are part of European public policy and as such have to be observed in arbitration proceedings as well. Moreover, the parties may not waive them. However, it has so far not been definitely stated which guarantees of Article 6(1) of the Convention enjoy the status of European public policy. Finally, those guarantees are binding upon the arbitrators indirectly. The State has to ensure observance of those guarantees in arbitration proceedings through its legislative and judicial apparatus.

2. Corpus of human rights embodied in Article 6(1) - minimum standard

The concept of European public policy covers only the most basic requirements of due process. Among those requirements, the most often mentioned are equal treatment of the parties, the right to an independent and impartial tribunal, and a fair opportunity to present one's case.⁶⁵

2.1. Impartiality and independence of the members of the arbitral tribunal

In arbitration between Country X (Claimant) and Company Q (Respondent), conducted under the UNCIRAL Arbitration Rules, the arbitrator appointed by the respondent was challenged by the claimant on the ground that justifiable doubts existed as to his impartiality.⁶⁶ The arbitrator stated - "this matter is governed by the UNCITRAL Arbitration Rules and its interpretation must be based on their text. However, assistance may be gleaned from jurisprudence in other jurisdictions."⁶⁷ Since United States law was the *lex fori*, and since judicial proceedings in relation to the arbitration process could be taken in the courts of the United States, the arbitrator paid particular attention to the laws of the United States concerning the impartiality of arbitrators.

If such a case were to be decided in Europe, would it be possible for the arbitrator to seek guidelines in the Convention and in the case law of the ECtHR? Moreover, would that be compulsory? The Draft Joint Report of the Working Group On Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration ("the Report") provides that Article 6 of the Convention should be considered as the minimum

⁶⁵ Supra note 58, at p.93. See also A.Jaksic, Arbitration and Human Rights, Germany, Peter Lang, 2002, at pp.55-56.

⁶⁶ Challenge decision of 11 January 1995, in A.J.Van Den Berg (ed), Yearbook. Commercial arbitration, XXII, the Netherlands, Kluwer Law International, 1997, at p. 227.

⁶⁷ Ibid, para.13, at p.231.

standard with regard to impartiality and independence of the arbitrator.⁶⁸ Also, Convention commentators consider the right to an independent and impartial tribunal as a part of European public policy.⁶⁹ Thus, arbitrators deciding issues of impartiality and independence may and should use the Convention and case law of the ECtHR as sources of the content of the applicable standard.

Is there a difference between the standard required by Article 6(1) and the standard used in international arbitration? The Report provides that the standard embodied in Article 6(1) of the Convention and the standard embodied in Article 12 of the UNCITRAL Model Law is virtually the same. The Report states, "if Article 6 of the European Convention of Human Rights applied the yardstick of Article 23 UNCITRAL Model Law, the result would not be essentially different than the actual practice."⁷⁰

The Convention's controlling organs unexceptionally emphasise the importance of the appearance of impartiality. According to the constant case law of the ECtHR, even the appearance of bias and the mere possibility of bias are sufficient to justify a finding of evident partiality within the meaning of Article 6(1) of the Convention.⁷¹ Also under the UNCITRAL Model Law the standard of bias in most jurisdictions is received as the appearance of bias and not actual bias.⁷²

Furthermore, although there are cases where the ECtHR has applied the subjective bias test (from the viewpoint of the party involved), in the majority of cases the ECtHR has held that the standpoint of the parties is not decisive. On the contrary, what plays a decisive role is whether the fear of impartiality could be held objectively justified.⁷³ Also in international commercial arbitration the standard of bias test should be applied objectively (i.e. from the viewpoint of a reasonable third person and not from the subjective viewpoint of the particular party involved in the challenge).⁷⁴ Consequently, the standard of impartiality and independence as required by Article 6(1) and legal acts regulating arbitration are indeed close. However, the problem is that because of strong pro-arbitration policy, in practice failures in arbitration proceedings

⁶⁸ IBA, "Draft Joint Report of the Working Group On Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration", Submitted by the Drafting Subcommittee, October 7 and 15, 2002, para. 2.4. (Printout available).

⁶⁹ Supra note 52. See also R.Briner, F.von Schlabrendorff, Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration, at pp.55-56.

⁷⁰ Supra note 68, para. 2.4.

⁷¹ A.Jaksic, Arbitration and Human Rights, at p. 247.

⁷² Supra note 68, para. 2.1.

⁷³ Case of Coëme and others v. Belgium, the ECtHR, para 121. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc2/HEJUD/200209/coëme%20and%20others.batj.doc>. Last visited at 15 August 2003; Ferrantelli and Santangelo v. Italy, the ECtHR, para. 58. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/sift/582.txt>. Last visited 1 March 2004.

⁷⁴ Supra note 68, para. 2.2.

are rarely punished to preserve speed and effectiveness. As a result, the standard in arbitration practice is to some extent relaxed. Thus, the main task of the ECtHR would be to ensure that the standard embodied in the Convention and used in arbitration is the same not only on paper but also in practice. Similarly, the ECtHR should limit further relaxation of the standard used in arbitration.

Moreover, although terms used to guarantee the legality of arbitration may at first glance appear to be very similar, different arbitral institutions and municipal courts set different standards of independence and impartiality of the arbitral tribunal.⁷⁵ Thus, some harmonisation of this standard is desirable. For that purpose Article 6(1) of the Convention and ECtHR's case law could be of utmost importance. As an example, Switzerland may be mentioned. The Swiss municipal courts have recently begun to interpret the requirements of independence of arbitrators in accordance with the Convention terms and to fill existing legislative gaps by direct application of ECtHR case law.⁷⁶ Consequently, the application of Article 6(1) of the Convention would not only secure the observance of human rights standards, but would also ensure uniformity.

The other unsettled issue is the possibility to waive the right to an impartial and independent tribunal. The ECtHR has so far failed to clearly state whether a party may *ex ante* waive the right to a hearing before an independent and impartial tribunal. Only commentators on the Convention have advocated that this would contradict the Convention and thus may not be permitted. Regarding the possibility to waive those rights *ex post*, the *Suovaniemi* decision provides that the right to an independent arbitrator can be waived if the party fails to challenge the arbitrator, despite being aware of the grounds for challenging him.⁷⁷ However, the ECtHR stressed that the waiver is effective for the purposes of the Convention in the "circumstances of the present case".⁷⁸ Thus, it may be said that even *ex post* waiver of the right to an independent and impartial tribunal is not always possible. The Report supports this line of argumentation as well. According to the opinion expressed in this Report, the parties may not be bound by their waiver of the right to an independent and impartial tribunal in situations which give rise to justifiable doubts as to the arbitrator's impartiality and independence (cases of the "Black List"). On the other hand, the parties can validly waive a potentially existing conflict of interest in situations which are likely to give rise to justifiable doubts as to the

⁷⁵ H.Sikiric, Arbitration and public policy: Arbitration proceedings and Public Policy, at p. 96.

⁷⁶ Supra note 71, at p.330.

⁷⁷ Supra note 58, at p.95.

⁷⁸ Case of *Suovaniemi and others v. Finland*, the ECtHR, cited in A.Jaksic, Arbitration and Human Rights, at p. 252.

arbitrator's impartiality or independence (cases of the "Grey List").⁷⁹ Thus, although the ECtHR has not clearly stated whether the right to an independent and impartial tribunal may be waived *ex ante*, this seems to be forbidden as contrary to European public policy. In contrast, *ex post* this right may be waived, provided that the situation is not one of those included in the "Black List".

To conclude, the right to an independent and impartial tribunal is part of European public policy, and consequently this part of Article 6(1) of the Convention is applicable to arbitration proceedings. Generally, the standard of impartiality and independence used under the Convention and the standard used in international commercial arbitration is the same. However, in practice this is not always so. In this regard, the main function of the Convention and the ECtHR would be to ensure that States fulfill their duty imposed by Article 6(1) of the Convention. Namely, States are obliged not to tolerate a decrease in the standard of independence and impartiality as set out in Article 6 of the Convention for the sake of speed and simplicity of arbitration proceedings. Moreover, interpretation of the requirements of independence of arbitrators in accordance with the Convention terms may be helpful to harmonize the practice of European municipal courts and arbitral tribunals in applying those standards.

2.2. Equality of arms

Amongst the major components of a fair trial is the principle of equality of arms. According to the ECtHR, the principle of equality of arms means that every party must be given a reasonable opportunity to present its case, and the principle that the parties should have an equal chance to argue their cases.⁸⁰ These principles are considered the cornerstones of court proceedings in all countries governed by the rule of law. As general principles they doubtless also apply to arbitration proceedings in the same way. Any waiver by the parties of compliance with the fundamental requirements of equal treatment of the parties, fair notice of the proceedings, and a fair opportunity to present one's case, would have to be regarded as incompatible with human dignity, reducing the parties to mere pawns in the procedure.⁸¹

Consequently, a waiver of the right to equality of arms as guaranteed by Article 6(1) of the Convention, whether expressly agreed or implied, is inadmissible and can have no binding force. This means that the procedural law which fails to stipulate that the setting aside of an arbitral

⁷⁹ Supra note 68, para. 1.1.

⁸⁰ Case of *Beheer v. the Netherlands*, the ECtHR, para 35. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/sift/435.txt>. Last visited 1 March 2004.

⁸¹ Supra note 58, at p. 97.

award may be sought on the grounds of violation of the principle of equality of arms would be contrary to the Convention. The same applies to a law that enables parties to waive the right to request a setting aside of the award on that ground.⁸²

However, a waiver made in the course of proceedings seems to be acceptable by the majority of authors. That is, if the parties in the proceedings fail to raise an objection with respect to violation of their right to be treated equally *vis-à-vis* their opponents without delay, they will be estopped from later invoking non-compliance with a procedural requirement.⁸³ Thus, the principle of equality of arms as guaranteed by Article 6(1) of the Convention forms part of European public policy, and as such may not be waived by an agreement on arbitration. However, it may be lost once a party fails to raise a timely objection.

2.3. Right to have the proceedings completed within a reasonable time

Amongst other things, Article 6(1) of the Convention requires the proceedings to be completed within a reasonable time limit. When assessing whether there has been unreasonable delay in violation of Article 6(1) of the Convention, the Convention authorities have taken into consideration four aspects: complexity of the case, conduct of the parties, conduct of state institutions, and significance of the case for the parties.⁸⁴ The very essence of arbitration is to settle disputes effectively and quickly. However, in practice even arbitration may not always ensure this. Therefore, it is of importance whether this right embodied in Article 6(1) applies to proceedings before an arbitral tribunal.

The requirement to complete proceedings within a reasonable time binds arbitrators. However, it remains disputable whether this part of Article 6(1) of the Convention applies to arbitrators directly or indirectly. In 1976, the French *Cour de Cassation* in *Bruynzeel* ruled that arbitrators were not obliged to render their award within any time limit, if the parties had not provided for this, since such an obligation was not among international public policy principles.⁸⁵ However, this ruling has been convincingly criticized, by stressing that following France's signature and ratification of the Convention in 1974, international arbitrators may no longer consider that they have no obligation to render their award within a

⁸² Supra note 64, at p. 14.

⁸³ Supra note 71, at p.233.

⁸⁴ Case of Phocas v. France, the ECtHR, at para.71. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc2doc/HEJUD/sift/566.txt>. (Printout available). Last visited 1 March 2004.

⁸⁵ Bruynzeel, 30 juin 1976, Revue de l'Arbitrage, 1977.137, in J.H.Moitry, "Right to a Fair Trial and the European Convention on Human Rights. Some Remarks on the République de Guinée Case" (1989) 2 J. Int. Arb., at p.120. (Printout available).

specified time -limit.⁸⁶ Thus, there is a view that arbitrators are directly bound by the requirement to complete the proceedings within a reasonable time.

Others, to the contrary, suggest that this requirement binds arbitrators only indirectly.⁸⁷ According to this view, the State has a duty to ensure remedies for a party in case of unreasonable delays caused by abusive or dilatory behaviour by the arbitrators. Afterwards, it is up to the parties to make use of existing procedures provided in approved arbitration rules or in national legislation to replace non-performing arbitrators. If the State has not fulfilled this duty, there is a basis to allege violation of Article 6(1) of the Convention.

Consequently, Article 6(1) obliges arbitrators to deliver an award within a reasonable time. However, there are different views as to whether this duty is imposed on arbitrators directly or only indirectly. In the latter case it is for the State to ensure that there are remedies for a party in case of unreasonable delays caused by the behaviour of the arbitrators. Taking into account that the horizontal effect of human rights is still a developing concept and recognized only with regard to some human rights, it has to be admitted that the requirement of Article 6(1) of the Convention to complete proceedings in a reasonable time binds arbitrators only indirectly.

3. Legal consequences in case of violations of guarantees provided for in Article 6(1) of the Convention

As stated above, some guarantees provided for in Article 6(1) of the Convention belong to European public policy and cannot be waived.⁸⁸ Consequently, those guarantees should also be respected in arbitration proceedings. However, those guarantees are binding upon arbitrators indirectly. The Strasbourg authorities view Article 6(1) of the Convention as a provision not directed at arbitral tribunals, but laying upon national courts in the member states the obligation, when reviewing arbitral awards, to check the procedural fairness and correctness of the arbitration proceedings and to set aside any awards rendered in violation of procedural guarantees considered as non-waivable under the Convention.⁸⁹

This means that national procedural law that fails to stipulate that the setting aside of an arbitral award may be sought on the grounds of violation of those rights would be contrary to the Convention. The same

⁸⁶ Ibid, at p.121.

⁸⁷ Supra note 58, at p.98.

⁸⁸ Supra note 52, at p.266; J.H.Moitry, Right to a Fair Trial and the European Convention on Human Rights. Some Remarks on the République de Guinée Case, at p.120.

⁸⁹ Supra note 58, at p.99.

applies to a law that enables the parties to waive the right to request setting aside an award on those grounds.⁹⁰

This applies to institutional arbitration as well. The basis of institutional arbitration, like that of *ad hoc* arbitration, is contractual. A reference to administered arbitration rules implies the parties have agreed to the role to be played by the arbitral institution pursuant to its rules in any subsequent arbitration proceedings. By implication, therefore, if the rules permissibly deviate from the requirements of Article 6(1) of the Convention, the parties are to be deemed to have waived such requirements.⁹¹

What if the rules deviate in a way that is not permissible? In a French case, a party to arbitration proceedings conducted under the Rules of Arbitration of the ICC sued the ICC for alleged violations of its obligations resulting from the contract which the party had concluded with the ICC when it submitted its dispute with a third party to the ICC arbitration. It complained that, amongst other things, its contract with the ICC regarding administration of the arbitral proceedings by the ICC International Court of Arbitration did not respect the rights guaranteed by Article 6(1) of the Convention. The Paris Court of Appeal stated:

...furthermore, this Convention of 4 November 1950, which was signed between the governments of the members of the Council of Europe, is directed at the signatory states and not at a non-profit-making organization that does not constitute a judicial body.⁹²

Therefore, like *ad hoc* arbitration tribunals, institutional arbitration centres are not directly bound by the Convention. Instead, States have the duty to control observance of the Convention.

In this respect, the Commission rendered an important decision on the compatibility of rules of a private association with the Convention's provisions in *X v. Netherlands*. In this case the victim complained of violation of Article 4 of the Convention prohibiting forced labour. In fact, the applicant disputed the transfer system for professional football players laid down in the rules adopted by the Dutch Football Association. The Commission expressed the view with respect thereto that:

... it could be argued that the responsibility of the Netherlands Government is engaged to the extent that it is its duty to ensure that the rules, adopted, it is true, by a private association, do not run contrary to the

⁹⁰ Supra note 64, at p.14.

⁹¹ Supra note 58, at p.102.

⁹² Paris Court of Appeal, 1^{ère} Chambre, Section A, Cubic Defense Systems Inc. v. International Chamber of Commerce, decision 1997/15465 of 15 September 1998; upheld by the Cour de Cassation, decision 255 FS-P of 20 February 2001, in R.Briner, F.von Schlabrendorff, Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration, at p.90.

provisions of the Convention, in particular where the Netherlands courts have jurisdiction to examine their application.⁹³

Thus, in the case of institutional arbitration, any violation generated by the rules of an institutional arbitration is imputable to the State. The State is obliged to ensure that the rules of any private association do not contravene human rights norms. If the State fails to prevent violation and tolerates its occurrence within its jurisdiction, such a violation is attributable to the State.⁹⁴

Which State has that duty? One possibility might be the State where the arbitration is seated. The other possibility - the State where the arbitration centre is located. It seems that the more preferable solution would be the State with the closest connection to the impugnable activities of the private actor, namely the State of legal *situs* of arbitration.⁹⁵

Therefore, the State of legal *situs* of arbitration has the duty to ensure that there is a possibility to challenge the rules of arbitration centres and remedy the situation once those rules are found to be contrary to human rights norms. Consequently, it is highly questionable whether the previously quoted statement would be sufficient for a State to avoid its responsibility under the Convention. Instead of that, the State, upon the request of the party, would have to examine whether the rules are compatible with the Convention and provide a system under which the arbitration centre would have to amend its rules to comply with legal acts.

Furthermore, a violation of European public order gives rise to the duty to deny the recognition or enforcement of any legal act that is performed in contravention of such order.⁹⁶ The forum of recognition or enforcement of foreign arbitral award has to convince itself of whether the content and the proceedings that preceded the rendering of a foreign decision correspond to a minimum protective standard guaranteed by human rights.⁹⁷

The enforcement forum has to examine whether there exist procedural irregularities that taint the initial validity of the arbitration agreement. These procedural irregularities include inherently the right to an independent and impartial tribunal, the right to be heard in adversarial proceedings, equality of the parties, and equality of arms as regards the proper constitution of the arbitral tribunal.

Where the guarantees under Article 6(1) having the status of European public policy have been violated, enforcement should be refused

⁹³ Application No. 9322/81, X v. The Netherlands, D7R, 42.pp.180 and ff., in A.Jaksic, Arbitration and Human Rights, at p.126.

⁹⁴ Supra note 71, at p.218.

⁹⁵ Ibid.

⁹⁶ Supra note 71, at p.59.

⁹⁷ Application No.18805, Heinz Schiebler KG v. FR Germany, in A.Jaksic, Arbitration and Human Rights, at p.321.

on the basis of Article V(1)(b) or Article V(2)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the NYC). The NYC explicitly covers only the right to present one's case.⁹⁸ However, the principle of equality of arms is considered to be part of the right to present the case. Impartiality of the arbitrator is not mentioned either, but it is held that this may be asserted under Article V(1)(b) or Article V(2)(b).⁹⁹ Consequently, arbitral awards violating Article 6(1) should be denied enforcement either as contrary to European public policy or as a violation of the right to present the case. Article V(1)(b) and Article V(2)(b) of the NYC gives sufficient basis for that.

Finally, there is a question whether the European criteria contained in Article 6(1) of the Convention apply only to European parties and to arbitration conducted in Convention countries. Some scholars suggest that the minimum standard set by Article 6(1) of the Convention has at the same time become part of a truly international public policy to be applied throughout the world.¹⁰⁰ Therefore, it might be argued that once the issue of validity of an arbitral award due to violations of the Convention appears before the courts of the Convention's member states, the standard of Article 6(1) should be applied notwithstanding the nationality of the parties and seat of the arbitration.

To conclude, the State under the Convention has the duty to provide in its legislation a procedure enabling the parties to remedy violations of human rights enjoying the status of European public policy committed during the arbitral proceedings. Upon the request of the injured party, the State through its judicial apparatus has to declare the arbitration agreement null and void, set aside any arbitral awards or refuse to grant leave for enforcement of any arbitral awards rendered in the proceedings which contravene the human rights provisions.

III Substantive matters

1. Right to property

The most obvious case where the ECtHR's argumentation may be used in arbitration is alleged expropriation of foreign investments. In such cases foreign investors and States may rely not only on the Bilateral Investment

⁹⁸ Article V(1)(b), Convention On the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959. Available on the internet at: <http://www.jurisint.org/cgi-bin/disp.pl/pub/01/en/152.htm>. Last visited 1 March 2004.

⁹⁹ C.Liebscher, "Global Developments: Fair Trial and Challenge of Awards in International Arbitration" (1999) 6 *Croat. Arbit. Yearb.*, at p.84. Available at: Lexis-Nexis database. Last visited 15 August 2003.

¹⁰⁰ *Supra* note 58, at p.109.

Treaty concluded between the investor's home country and the host State and relevant rules of international law, but also on the Convention.

The traditional customary international standard as embodied in the Declaration of the United Nations General Assembly adopted by its resolution 1803 (xvii) of 1962 on Permanent Sovereignty Over Natural Resources provides that:

nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law...¹⁰¹

Thus, the minimum international standard provides that alien's property can only be expropriated or nationalised if done 1) for a public purpose 2) on a non-discriminatory basis and 3) subject to appropriate or fair compensation.

Although these three conditions of customary international law for the exercise of a State's power to expropriate the property of aliens are well-recognised general principles of international law, their precise content has created great controversy. In practice it may be difficult to determine whether measures taken by the State amount to expropriation or merely consist of control of use of property in the interests of the general public. The next most painful and controversial issue in such cases is the question of "appropriate and fair compensation". Finally, taking into account the vagueness of the concept of public purpose, disputes may also arise with regard to compliance with this requirement. For those reasons, the Supreme Court of the United States has noted:

there are few if any issues in international law today on which opinion seems to be so divided as the limitations of a State's power to expropriate the property of aliens.¹⁰²

Since from the date of adoption of Protocol No. 1 of the Convention, the ECtHR and the Commission have developed considerable practice on cases of alleged expropriation, this practice may provide useful assistance for all of those involved in disputes concerning deprivation of property. By use of the ECtHR's practice, arbitral tribunals, investors and States can ease and hasten the settlement of disputes concerning alleged expropriation. Moreover, this would ensure uniform application of such notions as expropriation, possession, public purpose, and adequate compensation. Finally, since arbitral tribunals today are allowed to rule not only on contractual claims but also on public policy and statutory claims,

¹⁰¹ *Texaco v. Libya*, 53 I.L.R. 389, 483-95 (1978) cited in P.Fouchard, E.Gaillard, B.Goldman on International Commercial Arbitration, at p.648.

¹⁰² *Supra* note 15, at pp. 54-55.

nothing precludes investors from basing their claims before arbitral tribunals on violations of the Convention by the State.

1.1. Expropriation or control of use of property

Both for the private party and the State, the argumentation of the ECtHR may be useful to establish whether measures taken by the State amount to expropriation. Correct determination of this issue is of utmost importance. In case of control of use of property, the State has no duty to pay compensation even if it causes loss to the owner.¹⁰³ An illustration of such a situation is the famous case of *Tilts Communications A/S, Sonera OYJ, Cable & Wireless plc v. the Republic of Latvia and Lattelekom SIA* (“the Tilts case”). In the Framework Agreement of 11 January 1994 concluded between Latvia, Lattelekom and Tilts Communications it was provided that Lattelekom would have exclusive rights in Latvia for a period of twenty years. However, on 1 November 2001 Latvia adopted a new Telecommunication Law. This law provides that Lattelekom’s monopoly extends only up to 1 January 2003. Does this amount to deprivation of Claimant’s possessions, and should the State pay compensation?

One of the ICSID tribunals has ruled that measures of the State amounts to expropriation when “... property rights had been interfered with to such an extent that use of those rights or the enjoyment of their benefits was substantially affected and it results in a loss...”¹⁰⁴ Also the Iran - United States Claims Tribunal defines expropriation by use of similar wording:

it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.¹⁰⁵

Therefore, the mere fact that legal title is still with the original owner does not preclude the existence of expropriation. However, this does not mean that the State commits expropriation whenever it takes some action limiting an owners’ possibility to gain profits by use of their property. In *Sporrong and Lönnroth*, the State granted long-term expropriation permits (twenty-three and eight years respectively), accompanied by prohibitions on construction (twenty-five and twelve years

¹⁰³ Case of *Tre Traktörer Aktiebolag v. Sweden*, the ECtHR, Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/sift/171.txt>. Last visited 1 March 2004.

¹⁰⁴ *Tradex Hellas S.A. (Greece) v. Republic of Albania*, April 29, 1999, Award in the Arbitration ARB/94/2 of the International Centre for Settlement of Investment Disputes, para.135. Available on the internet at: http://www.worldbank.org/icsid/cases/tradex_award.pdf. Last visited 1 March 2004.

¹⁰⁵ *Foremost Tehran, Inc. et al. v. the Government of the Islamic Republic of Iran. et al.*, Award No.220-37/231-1, Iran-U.S. Claims Tribunal, (1987) 10 IRAN-U.S.C.T.R. (Iran -United States Claims Tribunal Reports), at p. 244.

respectively), over two pieces of real property in Stockholm, which resulted in a serious impairment of the enjoyment and disposition of the owners' property. Notwithstanding this, the ECtHR did not consider those measures as amounting to expropriation:

... although the right in question lost some of its substance, it did not disappear. The effects of the measure involved are not such that they can be assimilated to a deprivation of possessions...the applicants could continue to utilise their possessions and, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted..."¹⁰⁶

The same result was reached in *Tre Traktörer Aktiebolag v. Sweden*. The ECtHR characterised the withdrawal of a liquor licence resulting in the loss of a restaurant business as a control of use rather than a deprivation of possessions, stating that:

the applicant company, although it could no longer operate Le Cardinal as a restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein..."¹⁰⁷

Similarly, in the *Tilts* case measures taken by Latvia have to be characterised as a control of use of property rather than deprivation of property. The new Telecommunication Law does not preclude Lattelecom from providing services in the telecommunications area. The only thing it does to open the market for other companies from 1 January 2003. Of course, it may be argued that this would make it harder for Lattelecom to earn the level of profit it was used to. However, ECtHR practice makes it clear that this cannot be a ground for finding expropriation. Moreover, the value of Lattelecom shares demonstrates that Lattelecom, notwithstanding the changes brought in by the new Telecommunication Law, maintains a substantial "economic interest". Therefore, this is a clear example of the State's right to control the use of property. Thus, the only thing that remains to be clarified here is whether or not the control was necessary in the public interest. As demonstrated below, this criterion is fulfilled as well.

In this way, the ECtHR's judgements provide argumentation that can be successfully used during arbitration proceedings in order to determine whether a particular measure taken by the State constitutes expropriation. A clear illustration of this is the case of *Foremost Tehran, Inc. et al. v. the Government of the Islamic Republic of Iran. et al.* In the *Foremost Tehran* case the Tribunal found that measures preventing the payment of certain declared dividends amounted to expropriation of those dividends. However, the Tribunal denied the claim that activities of governmental shareholders

¹⁰⁶ Case of *Sporrong and Lönnroth v. Sweden*, the ECtHR, para.63. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc2doc/HEJUD/sift/109/txt>. Last visited 15 May 2003.

¹⁰⁷ *Supra* note 103.

as a result of which Foremost Tehran's representation on the board of Pak Dairy was reduced from two to one board member, could be considered to amount to expropriation or deprivation of the Foremost companies' ownership interests in Pak Dairy. To support its conclusion, the Tribunal heavily relied on, and quoted in support, parts of the judgement of the ECtHR in *Sporrong and Lönnroth* distinguishing expropriation from the reduction of the possibility to dispose of property.¹⁰⁸

Furthermore, violation of the Convention may be a separate ground for a claim by an investor against the State, provided that this violation has sufficient nexus to the investment agreement. First, use of the Convention may be easier than the use of other international rules - due to substantive case law developed by the ECtHR. Second, it may be important to raise even a simple breach of contract to a violation of human rights protected by the Convention. This is so because conversion of a simple breach of contract law into a wrongful deprivation of possessions in international law, may form the basis for attracting a higher award of damages than would have been the case for a breach of municipal law.¹⁰⁹ Thus, if in the *Tilts* case measures taken by Latvia had been in violation of Article 1 of Protocol 1 of the Convention, it would be more beneficial for the claimant to base its claim directly on the Convention rather than on contractual law.

Consequently, the ECtHR judgments provide argumentation that can be successfully used during arbitration proceedings in order to determine whether the particular measure taken by the State constitutes expropriation. Further, violation of the Convention may be a separate ground for a claim by an investor against the State before an arbitral tribunal.

1.2. Public purpose

One of the requirements for expropriation, as well as for control of the use of property, is that it is carried out for some public purpose. Unfortunately, the public purpose requirement "has not figured prominently in international claims practice..."¹¹⁰ One of the reasons for this could be the fact that the concept of public purpose is broad, and States enjoy a wide discretion in its determination.¹¹¹ For these reasons,

¹⁰⁸ Supra note 105, at p. 248-251.

¹⁰⁹ J. Collier, V. Lowe, *The Settlement of Disputes in International Law. Institutions and Procedures*, UK, Oxford University Press, 1999, at p.245.

¹¹⁰ *Marvin Feldman v. Mexico*, December 16, 2002, Case No. ARB (AF)/99/1, International Centre for Settlement of Investment Disputes (Additional Facility), para.99. Available on the internet at: http://www.worldbank.org/icsid/cases/feldman_mexico-award-en.PDF. Last visited 1 March 2004.

¹¹¹ *Case of Malama v. Greece*, the ECtHR, para. 46, 47. Available on the internet at: [http://hudoc.ECtHR.coe.int/Hudoc2doc/HEJUD/200305/malama.batj\(sl\).doc](http://hudoc.ECtHR.coe.int/Hudoc2doc/HEJUD/200305/malama.batj(sl).doc). Last visited 1 March 2004.

arbitral tribunals consider the requirement of public policy as of insignificant importance.¹¹² However, it has to be remembered that State measures in cases of expropriation or control of the use of property have to be not only carried out for a public purpose, but also necessary for that purpose.

This means that interference, including interference resulting from expropriation intended to secure a public purpose, must strike a “fair balance” between the demands of the general interest of the community and the requirements of protection of the individual’s fundamental rights.¹¹³ A reasonable relationship of proportionality between the means employed and the aim pursued has to be maintained, and no disproportionate burden can be imposed on a person who has been deprived of his property.¹¹⁴ Consequently, arbitral tribunals should not only determine whether the interference was committed for the general interest, but also to assess its necessity.

In certain cases, the lawfulness of interference within one’s right of property may depend exactly on compliance with the requirement of proportionality. This was the situation in the case of *Gasus Dosier - und Fördertechnik GmbH v. the Netherlands*.¹¹⁵ Gasus Dosier-und Fördertechnik GmbH (further - “Gasus”) was a German company who sold a concrete mixer and ancillary equipment to a Netherlands company. However, the sales contract contained a retention of title clause. Under this clause, Gasus remained the owner of the equipment sold until full payment of the price.

Unfortunately, the Netherlands company never paid the full price due to insolvency problems. On 31 July 1980 the Tax Bailiff seized all movable assets on the Netherlands company’s premises, including mixer sold by Gasus, for forced sale in pursuance of three writs of execution. Consequently, the mixer was sold for the settlement of the Netherlands company’s tax debt. As a result, Gasus was unable to recover its debt and claimed before the ECtHR that it had been deprived of property. However, the ECtHR by six votes to three decided that this constituted control of use of property necessary to secure the payment of taxes.

All members of the ECtHR agreed that in this case the interference pursued a legitimate aim - to secure the collection of taxes in cases of insolvent tax debtors. However, the main discussion was related to the issue of proportionality. Six members of the ECtHR considered it proportional,

¹¹² Supra note 110, para.99.

¹¹³ Case of Aka v. Turkey, the ECtHR, para 44. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc2doc2/HEJUD/199904/aka%20batj.doc>. Last visited 1 March 2004.

¹¹⁴ Ibid, para. 47.

¹¹⁵ Case of Gasus Dosier - und Fördertechnik GmbH v. the Netherlands, the ECtHR. Available on the internet at: <http://hudoc.ECtHR.coe.int/Hudoc1doc/HEJUD/sift/503.txt>. Last visited 1 March 2004.

stressing that Gasus was engaged in a commercial venture which, by its very nature, involved an element of risk. Furthermore, the ECtHR noted that Gasus was aware of the Netherlands company's solvency problems. Nevertheless, it decided to sell it the mixer without the entire purchase price being paid in advance. Moreover, it did not obtain any other additional security, for example insurance or a banker's guarantee. However, the tax authorities did not have the same means at their disposal for protecting themselves. For those reasons, the majority of the ECtHR concluded that the interference was necessary.¹¹⁶

In contrast, a minority of the ECtHR considered the interference as unnecessary. It noted that in this case there is no evidence of tax fraud; that a burden was imposed on a third party who had nothing to do with the tax debt, and that it was easy to find out who was the owner of the mixer. Finally, the minority argued that the sum recovered by setting aside the property rights of a third party was negligible. Thus, the view of judges on the necessity of measures taken by the State was crucial for the outcome of the case.

Another case where proportionality of State interference could have had a significant impact on the outcome of the case was *Marvin Feldman v Mexico*, decided by the ICSID tribunal. However, in this case the tribunal failed to assess the proportionality of the measures taken by the State. Instead of that, the tribunal stated: "... the conditions (other than the requirement for compensation) are not of major importance in determining expropriation"¹¹⁷. The claim concerned the application of certain tax laws by the United Mexican States to the export of tobacco products by a company owned by Mr. Feldman, a citizen of the USA. In the domestic market Mexico imposes excise tax on production and sale of cigarettes. However, in some circumstances a zero tax rate was applicable to cigarettes that are exported. When cigarettes were purchased in Mexico at a price that included excise tax, and subsequently exported, the tax amounts paid initially could be rebated.

Initially, this provision was also applied to Feldman's company. However, according to him, after protests by one of the largest cigarette producers in Mexico, the government enacted legislation denying rebates for exports by resellers of cigarettes, unless they met certain requirements. As a result, Feldman's company became ineligible for rebates. In domestic proceedings initiated by the claimant those regulations were found to be unconstitutional. Consequently, the Mexican Congress amended the law to allow rebates to all cigarette exporters and the claimant again received rebates for more than a year.

¹¹⁶ Supra note 115, paras. 70-71.

¹¹⁷ Supra note 110, para.99.

However, in January 1993, the claimant was again refused tax rebates. In this case that was done since the claimant did not have invoices where the excise tax was stated separately and expressly. The government did not deny that the claimant previously also had no such invoices, but had been found to be eligible for tax rebates. Moreover, it was not denied that only producers, and not resellers, had access to such itemized invoices. Since the claimant purchased cigarettes from volume retailers, he was never able to obtain invoices separating the tax. As a result during 1993-1995 the claimant did not receive rebates.

From June 1996 to September 1997 the claimant received rebates, on the basis of oral agreement. However, on 1 December 1997 the law was again amended limiting rebates to the "first sale" in Mexico. Furthermore, the claimant was required to repay US \$ 25 million for rebates received in from January 1996 to September 1997. The Claimant initiated arbitration proceedings alleging unlawful expropriation. Among other things the claimant asserted that the requirement of public purpose had not been satisfied. According to him the true intention of the measures taken by the State was to lobby the interests of Carlo Slim, a major owner of Mexico's largest cigarette producer. The government maintained that those amendments were enacted to discourage "grey" market exports and control illegal re-exportation of Mexican cigarettes into Mexico. The tribunal accepted this as a valid public purpose. However, it failed to assess whether the interference caused was necessary. Namely, it was not assessed whether or not a reasonable relationship of proportionality between the means employed and the aim pursued had been maintained and no disproportionate burden imposed on the claimant.

While the amendments of 1 December 1997 limiting rebates to the "first sale" might be found necessary for a public purpose, the same cannot be said about the measures taken by State authorities before that. At that time the law, on the one hand, explicitly allowed tax rebates also in the case of resellers, but on the other hand required specific invoices available only for producers. Moreover, it has to be taken into account that Mexican cigarette producers refused to sell cigarettes to the Claimant to maintain their export monopoly. Therefore, the Claimant was forced to purchase cigarettes from large retailers who could not issue invoices separating the tax. Consequently, the Claimant, rather than all resellers, was precluded from receiving tax rebates. Moreover, it was not contested by the State that other Mexican firms had been permitted to obtain rebates for taxes on exported cigarettes during periods when such rebates were denied to the Claimant, even although they were unable to produce the necessary invoices stating the tax amounts separately. Therefore, the measures taken by the government appear more as creation of a scheme aimed at excluding the Claimant from the cigarette export business rather than an effective and necessary scheme to limit "grey" market exports and control

illegal re-exportation. Consequently, it cannot be excluded that a thorough assessment of the necessity of the State's measures taken in this case could have led to a different outcome in the case.

To conclude, it is not only expropriation or control of the use of property that has to be carried out for a public purpose; the necessity of those actions has to be assessed as well. Unfortunately, arbitral tribunals fail to examine the necessity of State interference considering that the condition of public policy is "not of major importance in determining expropriation". One of the reasons for that could be a lack of knowledge of the requirement of necessity embodied in it. Therefore, knowledge and skilful application of ECtHR case law in this area could lead to supplementary arguments in arbitration proceedings to challenge expropriation.

2. Change of domestic law

In most cases, fear of legislative change for the sole purpose of achieving an altered legal position in a particular contractual relationship is exaggerated. However, it happens. In the most dramatic cases it may lead to the termination of contract, and expropriation of the investor's property. In other cases the consequences are less dramatic but may still have a strong impact on the investment relationship. Typical examples are changes in taxation, environmental standards, and any other aspect of regulatory structure in the investor's activities.

As an example from Latvian experience, the *Tilts* case stands out. As stated above, Latvia enacted a new Telecommunication Law by which it reduced the term of Lattelecom's monopoly to 10 years, even although the Framework Agreement concluded between Latvia, Lattelekom, and Tilts Communication provided Lattelekom a monopoly for twenty years. Therefore, the question is: what are the consequences of such amendments? Can a State escape its contractual obligations by changing legal acts?

In the ICC Case between *the Société des Grands Travaux de Marseille and the East Pakistan Industrial Development Corporation*, where the sole arbitrator had to come to grips with a Presidential Order of Bangladesh which in effect purported to extinguish contractual obligations of the defendant State company, it was ruled that: "It is... painfully clear ...that the Disputed Debts Order was made for the sole purpose of being injected as a spoliatory measure into the present arbitration."¹¹⁸ Similarly,

¹¹⁸ ICC Case 1803/1972 between the Société des Grands Travaux de Marseille and the East Pakistan Industrial Development Corporation, V Yearbook 177 (1980), in W.L.Craig, W.W.Park, J.Paulsson, International Chamber of Commerce Arbitration, 3rd ed., the USA, Oceana Publications, Inc, 2000, at p.103.

in the case of *Setenave v. Settebello* the tribunal unanimously refused to recognise a Portuguese decree designed to procure contractual benefits to a Portuguese State-owned shipyard in detriment to the rights of a foreign purchaser of a supertanker. The tribunal held that to do so would be contrary to “concepts of public policy and morality common to all trading nations.”¹¹⁹ In contrast, in *Banér v. Sweden*, a case concerning the private right to fish on one’s own property, it was ruled that:

legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away.¹²⁰

Therefore, the practice of tribunals is to refuse, as a matter of international *ordre public*, to countenance abuse of legislative power¹²¹, while legislation of a general character is seen as a *force majeure*.¹²² However, the question remains how to distinguish those cases when the State abuses its legislative power from cases when this power is used in the interest of crucial public interest.

In the case of *Agoudimos and Cefallonian Sky Shipping Co. v. Greece* the ECtHR found a violation of Article 6(1) of the Convention since Greece through its legislative body intervened in legal proceedings in which Greece was a party.¹²³ On 6 February 1983 the ship Omega Kasos was put on compulsory sale by auction. At auction the ship was acquired by Mr. Agoudimos who sold it to the Cefallonian Sky Shipping Co. (“the applicant company”) which in turn sold it to a foreign company. On 17 February 1983 the applicant company asked the registrar of ships to remove the ship from its records since the ship had been sold to a foreigner. The request was refused on the ground that the applicant company had failed to produce a certificate to the effect that debts owed in respect of the ship to the tax and social security authorities prior to the auction had been paid in full. This decision was challenged by the applicant company and the first instance court ruled that “according to the view followed by most courts, a person acquiring a ship put on compulsory sale by auction was not responsible for the previous owner’s debts to the State

¹¹⁹ Case No. 723 of the Netherlands Arbitration Institute, *Setenave v. Settebello*; as reported in *Financial Times* on 27 February 1986, in W.L.Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, at p.104.

¹²⁰ Case of *Banér v. Sweden*, Application 11763/85, 9 March 1989, the European Commission of Human Rights, para 34. (Printout available).

¹²¹ *Supra* note 45, at p.103.

¹²² R.D.Bishop, S.D.Dimitroff, C.S.Miles, “Strategic Options Available When Catastrophe Strikes the Major International Energy Project”, at p.57. Available on the internet at: <http://www.kslaw.com/library/pdf/dimi2.pdf>. Last visited 1 March 2004.

¹²³ Case of *Agoudimos and Cefallonian Sky Shipping Co. v. Greece*, the ECtHR. Available on the internet at: http://hudoc.ECtHR.coe.int/Hudoc1doc2/HEJUD/200110/agoudimos%20-%2038703da.chb2_28062001e.doc. Last visited 1 March 2004.

or the Sailor's social security fund".¹²⁴ Notwithstanding this ruling, the Sailor's social security fund ordered the applicants to pay the tax debt. The applicants challenged this order in the first instance court, which found against the applicants. The applicants appealed this decision. The Court of Appeal upheld the appeal considering that legislation that rendered all the previous owners of a ship responsible for tax debts did not cover owners who acquired a ship put on compulsory sale by auction. The Court of Appeal also noted that a number of decisions that accepted a different interpretation exist, but it was not prepared to follow them.

Before the Sailor's social security fund appealed against this decision to the Court of Cassation and before the Court of Cassation handled the appeal, the Greek Parliament enacted a law interpreting in an authoritative manner the provision concerning the duties of previous owners for tax debts. According to Parliament's interpretation, this provision also concerned owners who had acquired a ship put on compulsory sale by auction. Afterwards the Court of Cassation found in favour of the Sailor's social security fund, arguing that a person acquiring a ship put on compulsory sale by auction was responsible for tax debts of previous owners. To support this conclusion, the Court of Cassation made a reference to the law containing Parliament's interpretation of the provision under the dispute.

The applicants submitted an application to the ECtHR complaining that legislative interference in the litigation opposing them to the Sailors' social security fund amounted to a violation of their right to a fair trial and right of property. The ECtHR upheld this complaint and ruled that:

... while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature - other than on compelling grounds of the general interest - with the administration of justice designed to influence the judicial determination of a dispute. ... The finding is therefore inescapable that the interference of the legislature in the instant case took place at a time when legal proceedings to which the State was a party were pending. In conclusion, the State infringed the applicant's rights under Article 6(1) by intervening in a manner which was decisive to ensure that the outcome of proceedings in which it was a party was favourable to it.¹²⁵

A different conclusion was reached by the ECtHR in the case of the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom.¹²⁶ The

¹²⁴ Ibid, at para.11.

¹²⁵ Supra note 123, para 30.

¹²⁶ Case of the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom, the ECtHR. Available on the internet at:

applicants in this case were three building societies. Those building societies were made up of investors who deposit savings and receive interest or dividends in return, and borrowers who are charged interest on loans taken to buy private residential property. In order to put the taxation of the interest paid by building societies to investors on a similar footing to the scheme introduced for banks, the Government changed the regime for the collection of tax on investors' interest. The applicant societies complained that those amendments in legal acts imposed tax again on interest they had paid in a fiscal year for which liability on their investors' interest had already been discharged. For example, the National & Provincial and the Yorkshire each felt that they were required to pay tax on twenty-seven months' interest for a twenty-four month period. A similar situation existed with the other building societies. However, litigation was commenced only by one building society - the "Woolwich". The applicant societies in press releases associated themselves with the proceedings initiated by the Woolwich.

After two long and complex litigations the Woolwich finally got judgments entitling it to an immediate right to recover the money paid under an illegal demand for taxation. Soon after this, the applicant societies commenced judicial proceedings as well. However, Parliament introduced a new act, which effectively removed any hope of all applicant societies winning their restitution proceedings against the Inland Revenue. The applicant societies submitted an application to the ECtHR complaining that the measures taken by the respondent State deprived them of their right of access to a court and right of property.

The ECtHR ruled that:

the 1986 Regulations was taken without regard to pending legal proceedings and with the ultimate aim of restoring Parliament's original intention with respect to all building societies whose accounting periods ended in advance of the start of the fiscal year. That the extinction of the restitutions proceedings was a significant consequence of the implementation of that aim cannot be denied. Nevertheless, it cannot be maintained that the Leeds and the National & Provincial were the particular targets of the authorities' decision.¹²⁷

Further the ECtHR continued:

...The Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection...However, Article 6(1) cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to

which they are a party. It is to be noted that in the present case the interference caused by section 64 of the 1992 Act was of much less drastic nature than the interference which led the Court to find a breach of Article 6(1) in the Stran Greek Refineries and Stratis Andreadis case ... In that case the applicants and the respondent State had been engaged in litigation for a period of nine years and the applicant had an enforceable judgment against that State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an *inter partes* hearing.¹²⁸

It was also noted by the ECtHR that in adopting the 1992 Act with retrospective effect the authorities in the instant case had compelling public motives, since legal proceedings initiated by the building societies created uncertainty over substantial amounts of revenue collected from 1986 onwards. Moreover, the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the interests at stake. Finally, it was stated that the tax sector is an area where recourse to retrospective legislation is not confined to the United Kingdom.¹²⁹ For those reasons the ECtHR found that neither the right to a fair trial nor right of property had been violated in this case.

Therefore, there may be circumstances when a State may amend legislation in a way unfavourable to individuals without subjecting itself to responsibility. Arguments used by the ECtHR may be very useful for the State in proving its rights to amend legislation and escape any further responsibility. First of all, there should be a "compelling ground of general interest" in the name of which amendments are made. Second, it is important to demonstrate that amendments are because of general considerations and not only because of the contract or obligations at issue. If the State's only motivation in passing the law was its interest not to fulfil its obligations under the dispute, the changes in the law will be considered as an abuse of legislative power.¹³⁰ Furthermore, the knowledge of the investor about possible changes in legislation is important. Once the investor was aware of possible changes in legislation but still continued to invest without taking into account possible changes, it cannot be said that a State abused its legislative power. On the contrary, it would more appear to be abuse on the part of the investor.

Taking into account those criteria, the claim of Tilts Communications A/S, Sonera OYJ, Cable & Wireless plc should be denied. Changes in legislation in this case were made because of the requirements set out by GATT/WTO and the EU. This means that changes in legislation were made because of general considerations crucial to the development of Latvia.

¹²⁸ Ibid, at para 112.

¹²⁹ Ibid.

¹³⁰ Supra note 122, at p.57.

Moreover, the claimants were aware or could not have been unaware of Latvia's aim to join those organizations, as well as about requirements of those organizations in the area of the telecommunication sector. Thus, in this case changes in legislation also negatively affecting the claimant were of a general character and carried out due to compelling general interests. Therefore, they have to be treated as *force majeure* and Latvia may not be found to be under an obligation to pay compensation.

To conclude, ordinary changes in a State's legal system, which constitute adaptation to changing social, economic, legal, and technological conditions, will be treated as *force majeure*. On the other hand, if the change in legislation serves the purpose of defeating undertakings made by the State, then they will lead to State responsibility.

Conclusion

Human rights, international trade and investment policy are interrelated. Thus, the question today is not whether human rights, as part of international public law, applies to international commercial arbitration between a State and a foreign investor, but rather to what extent it applies. Furthermore, human rights apply both to procedural and substantive matters.

As to procedural matters, human rights apply insofar as they have the status of European public policy. Neither in international law nor in municipal civil law are the parties allowed to contract out of legal norms pertaining to the realm of public policy. Consequently, those guarantees of Article 6(1) of the Convention that have the status of European public policy have to be observed in arbitration and may not be sacrificed in the name of speed and efficiency.

Unfortunately, so far the ECtHR has not definitely stated which guarantees of Article 6(1) of the Convention have the status of European public policy. However, from the case law of the ECtHR and legal writings it follows that equal treatment of the parties, the right to an independent and impartial tribunal, and a fair opportunity to present one's case are among those guarantees. Thus, those guarantees have to be ensured in arbitration proceedings. However, arbitrators are bound by the Convention only indirectly.

A direct duty lies upon States. It is the State's duty to provide in its legislation procedures enabling the parties to remedy violations of human rights having the status of European public policy committed during arbitral proceedings. Therefore, in international commercial arbitration a balance is to be struck between fundamental procedural rules and the goals of efficiency and speed of the proceedings. This means that there are certain

limits as to how far the efficiency of arbitration proceedings may be increased by reducing procedural guarantees of the parties.

The Convention may also be applied to the merits of a dispute between the State and foreign investors. One instance where the Convention may be applied as substantive applicable law is in the case of alleged unlawful expropriation or control of the use of property.

First, ECtHR's and Commission practice may be useful in distinguishing expropriation from control of the use of property. Furthermore, ECtHR practice on the public policy requirement may provide useful help to all those involved in disputes concerning deprivation of property. So far arbitral tribunals have failed to examine the necessity of State interference, by limiting their argumentation to stating that the requirement of public policy is "not of major importance in determining expropriation". At the same time, in the practice of the ECtHR the requirement of necessity plays a significant role, and failure by the State to observe it may lead to State responsibility. Therefore, knowledge and skilful application of ECtHR case law in this area could lead to supplementary arguments in arbitration proceedings to challenge expropriation.

Second, arbitral tribunals are allowed to rule not only on contractual claims but also on public policy and statutory claims. Thus, investors may base their claims against the State directly on the Convention, provided that the alleged violation of human rights has sufficient nexus to the investment relations. This may be the easiest way to prove a State's non-compliance with its obligations. Moreover, this can lead to higher compensation, since conversion of a simple breach of contract law into a wrongful deprivation of possessions in international law may form the basis for attracting a higher award of damages than would have been made for a breach of municipal law.

Finally, the practice developed by the ECtHR clarifies how to distinguish those cases of amendments in law when the State abuses its legislative power to defeat undertakings made towards its contractual partners from cases when the State uses its legislative power in the interest of crucial public considerations.