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Do Procedural Human Rights Requirements Apply to Arbitration – a Study of Article 6 (1) of the European Convention on Human Rights and its Bearing upon Arbitration

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Contents

Summary

Arbitration is generally viewed as a form of dispute resolution more or less removed from the control of states. Such a view is based on the notion that this form of dispute resolution rests upon an agreement between parties. Without questioning the notion of arbitration as resting upon an arbitration agreement, it can be argued that there also is significant state involvement. Such involvement includes, but is not limited to, the fact that arbitration agreements in most legal systems are treated as bars to initiate judicial proceedings and as well as the fact that most legal systems provide mechanisms through which arbitral awards can be enforced. The question thus arises as to whether the existence of state involvement in arbitration means that arbitral proceedings shall be subject to procedural human rights requirements. The question examined in this thesis is whether the procedural requirements set forth in Article 6 (1) of the European Convention on Human Rights apply to arbitration.

In the thesis it is concluded that Article 6 (1) *prima facie* applies to arbitration. The term *prima facie* is used as the waiver doctrine developed by the European Court and Commission of Human Rights also applies. When determining the validity of waivers, a distinction is made between before and after-the-fact waivers. A general requirement for all waivers is, however, that they should be done "without constraint". Waivers made beforehand are permitted with regard to the right to a public and oral hearing. However, such waivers are most likely not permitted in most cases with regard to certain other rights set forth in Article 6 (1), such as the right to an independent and impartial tribunal as well as the right to "equality of arms" and to be heard. The picture is different with regard to after-the-fact waivers: all rights in Article 6 (1) may in principle be waived after the fact.

Furthermore, it is concluded that arbitrators are not under a direct obligation to ensure that arbitral proceedings comply with Article 6 (1). The conduct of arbitrators is neither directly attributable to states, nor is there any reason to believe that arbitrators, as a result of "Drittwirkung" being assigned Article 6 (1), can be held directly responsible for Article 6 (1) violations. Instead, states are under an obligation to put in place mechanisms through which Article 6 (1) rights can be given effect. This means that arbitrators indirectly are bound to ensure that Article 6 (1) rights are respected in arbitral proceedings, at least if they wish their award to stand the scrutiny of setting-aside and/or enforcement proceedings.

Finally, it is concluded that a person who is of the opinion that a state has not put in place remedies through which Article 6 (1) rights can be given effect in principle has two options. Firstly, the person in question can argue this point before national courts. How the national courts will view such an argument is in part dependant on whether the courts are entitled to reinterpret or strike down national legislation which violates Article 6 (1).

Secondly, if the first option is unsuccessful and all domestic remedies have been exhausted, the person could complain to the European Court in Strasbourg. However, even provided that such a complaint is successful, the person in question could only receive just satisfaction. Another consequence may also be that the state which has been found in violation of Article 6 (1) changes its legislation to bring it in line with that provision.

Preface

I would like to thank my family for the invaluable support given to me during my student years. I would also like to thank three people, in particular, who I had the privilege of getting to know in Lund – Teresa Andersson, Johan Fredriksson and Gina Sharro – for their steadfast friendship in good as well as bad times. Finally, I would like to thank my supervisor – Professor Peter Westberg – for showing me a great deal of patience.

Abbreviations

ADR	Alternative dispute resolution
ATF	Arrêt du Tribunal fédéral
DR	Decisions and Reports of the European Commission of Human Rights
ECHR	European Convention on Human Rights
ECrtHR	European Court of Human Rights
HRA	Human Rights Act
ICC	International Chamber of Commerce
ILC	International Law Commission
LCIA	London Court of International Arbitration
SAR	Stockholm Arbitration Report
SCC	Stockholm Chamber of Commerce
TF	Tribunal fédéral
Yb	Yearbook of the European Convention on Human Rights

1 Introduction

1.1 Background

The point can be made that arbitration is the ideal form of dispute resolution. It combines two central characteristics of judgements – their binding force and enforceability – with a high degree of freedom for private parties to make their own procedural arrangements. Whether one agrees with this point is largely a reflection of one's view on how the balance between the competing demands of justice should be struck.[1] Some commentators seem to feel that parties in arbitration, especially in light of the privileged position afforded this form of dispute resolution by states in terms of e.g. enforcement, are given too much autonomy with regard to procedure, leading to what has been described as a "privatisation" of the judicial function.[2] Essentially, there is a fear that the dimension of truth in justice and the procedural principles associated with it are being sacrificed for the sake of promoting speedy and less costly dispute resolution. Granted, most states have enacted laws on arbitration where certain procedural requirements are set forth. However, these laws are in general largely non-mandatory and, as a consequence, subject to contrary party agreement. In addition, in most legal systems there are no barriers, at least in theory, to prevent states from amending their laws on arbitration in order to dilute the procedural rights that nevertheless are afforded parties in those laws. Doing so may at times seem like an attractive option for a state, especially since such measures might lessen the burden on courts and increase the attractiveness of the state as a site of arbitration.

This brings us to the issue that will be examined in this thesis: the relationship between procedural human rights requirements and arbitration. As the thesis' title indicates, this issue will be examined from the perspective of the European Convention on Human Rights (hereafter "the Convention" or "ECHR") – a convention to which more than 40 European states are signatory, including states where some of the world's most influential arbitration institutions are located.[3]

The overriding aim of this thesis will be to ascertain whether the Convention imposes certain procedural guarantees with regard to arbitration. Guarantees that would, if applicable, constitute a European procedural public policy that the signatory states could not violate without risking the embarrassment of being found in breach of the Convention by

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[1] Adrian Zuckerman argues that there are three dimensions by which justice can be measured: the dimensions of truth, time and cost. See Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, at 3.

[2] See e.g. Heller, *Constitutional Limits of Arbitration*, at 11.

[3] To name a few, the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

the European Court of Human Rights in Strasbourg (hereafter "the European Court" or "ECrtHR"). However, finding out to what extent, if any, the Convention is relevant to arbitration involves answering a set of complicated questions, questions which are posed and developed in the section below.

1.2 Purpose and deliminations

As mentioned above, the purpose of this thesis is to examine the relationship between the Convention and arbitration. More specifically, it is the relationship between the procedural rights set forth in Article 6 paragraph 1 of the Convention and arbitration that will be studied. Article 6 (1) of the Convention provides that everyone, when rights and obligations of a civil nature are being determined, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Convention also contains substantive rights that potentially may be of relevance to arbitration. Article 8 (1) of the Convention, which stipulates that everyone has the right to respect for his/her private and family life, may, for example, become relevant in arbitration if an arbitral tribunal asks a national authority to enforce a decision according to which documents should be disclosed between and produced by the parties.[4] However, for reasons of time constraint, the effects of these rights on arbitration will not be considered. In addition, this thesis will not address, other than generally, the various forms of state-imposed proceedings that sometimes are referred to as "statutory arbitration".[5] In such proceedings, the procedural guarantees found in Article 6 (1) of the Convention are directly applicable, as has been ruled on numerous occasions.[6] As a result, only arbitration based on agreement, or "conventional arbitration", as it sometimes is called, will be examined. The term arbitration will consequently only be used to refer to this type of arbitration, unless otherwise expressly stated.

At first sight, the idea of studying the relationship between Article 6 (1) of the Convention and arbitration might seem pointless if not slightly absurd. After all, the Convention, like most other international law treaties, creates obligations primarily for its signatory states. Arbitration, on the other hand, is generally seen as a private form of dispute resolution, more or less removed from the control of states. Indeed, some legal commentators share this view and therefore dismiss any application of Article 6 (1) of the Convention to arbitration.[7]

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[4] Haydn-Williams, *Arbitration and the Human Rights Act*, at 294.

[5] It can be argued that the expression "statutory arbitration" is a form of contradiction in terms since an agreement to arbitrate may be seen as an essential feature of arbitration. See e.g. Jarrosson, *L'arbitrage et la Convention européene des droits de l'Homme*, at 581.

[6] See e.g. *Bramelid and Malmström v. Sweden*, App. Nos. 8588/79 and 8589/79, decision of 12 October 1982, and *Lithgow and Others v. United Kingdom*, App. No. 9006/80, decision of 8 July 1986.

[7] See e.g. Jarrosson, *L'arbitrage et la Convention européene des droits de l'Homme*, at 576.

However, the case law of the European Court and the European Commission of Human Rights[8] (hereafter "the Commission"), as well as the opinions of a majority of legal commentators, point in a different direction, namely that the procedural rights contained in Article 6 (1) of the Convention in principle *can* apply to arbitration.[9] Another question is whether the Convention actually will apply in a given case. Indeed, as Michael Mustill and Steward Boyd rightly point out, in many cases the Convention "will not in fact do so, or will do so in only a much attenuated way."[10] Getting back to the aim of this section: What questions are relevant to ask in order to understand the relationship between Article 6 (1) of the Convention and arbitration? In the following, this relationship will be analyzed by answering four broad questions:[11]

- *Is an arbitration agreement a waiver of the right to state-administered justice under the ECHR?* Answering this question involves, *inter alia*, determining the requirements of validity of waivers and their scope.

- *Does the ECHR provide for a right to a "fair" arbitration?* This question requires, *inter alia*, determining whether the arbitration agreement should be seen as a "blanket" waiver of all the rights under Article 6 (1) or whether some of those rights do apply to arbitral proceedings.

- *Are arbitral tribunals bound by the ECHR?* This question involves, *inter alia*, determining whether the actions of arbitral tribunals may be attributed to states and, if that is not the case, whether the rights set forth in Article 6 (1) may apply in legal relations between private parties.[12]

- *Do states have an obligation under the ECHR to supervise arbitral proceeding?* Answering this question involves, *inter alia*, establishing whether states, even though the actions of

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[8] Until 1 November 1998, the Commission screened all complaints for admissibility. Only if found admissible would complaints be handed over to the European Court. As of 1 November 1998 the Commission has ceased to exist and its functions have been subsumed within the European Court.

[9] Just to name a few, see Petrochilos, *Procedural Law in International Arbitration*, at 153; Briner & von Schlabrendorff, *Article 6 of the European Convention on Human Rights and its Bearing upon Arbitration*, at 91-93 and Heller, *Constitutional Limits of Arbitration*, at 14. However, as will be seen, even among those principally in favor of applying the ECHR to arbitration there is debate as to in what way and to what extent the rights in Article 6 (1) apply to arbitration.

[10] Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, at 77.

[11] These questions are similar to those posed by George Petrochilos in his analysis of human rights law requirements in arbitration. See Petrochilos, *Procedural Law in International Arbitration*, at 109.

[12] The term *Drittwirkung* is used to describe when provisions concerning human rights apply in legal relations between private parties, and not only in the legal relations of individuals vis-à-vis public authorities. See van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, at 15.

> arbitral tribunals cannot be directly attributed to them, nevertheless have a duty to check that arbitral proceedings meet the standards of Article 6 (1).

Granted, there is a certain overlap between the questions stated above. Nevertheless, it is my opinion that the essential elements of the relationship between the Convention and arbitration will come to light through answering them. The next issue that arises is to address what sources may be used in order to answer the questions posed above, an issue that is dealt with in the section below.

1.3 Method and material

Based on what has been discussed so far it is possible to conclude that the method employed in this thesis will be founded on the principles of traditional legal dogmatism. This conclusion can be drawn from the fact that the aim of the thesis – to examine to what extent, if any, the procedural rights in Article 6 (1) of the Convention apply to arbitration – by its very nature involves attempting to present the law as it stands. Presenting the law as it stands is namely one of the hallmarks of traditional legal dogmatism. What importance, one might ask, does the aim of presenting the law as it stands have with regard to the choice of method? Great importance. The fact that this is the aim means that the choice of method to a certain extent already is determined. The method employed will namely be one that can identify the relevant sources of law.

This brings us to the core of the issue: What are the relevant sources of law in relation to the subject matter of this thesis? The question may be rephrased in the following way: How does one find out what the relationship between the Convention and arbitration is like? With the exception of the obvious, i.e. that the Convention text itself is a source of law with regard to the meaning of the Convention, answering this question requires a "leap of faith". This is the case since the Convention itself does not contain any provisions laying down the sources of law. In this case, the "leap of faith" consists of studying the rulings of the European Court and Commission in search of more information about what the sources of law are, something that of course is contradictory since it assumes that such rulings are in fact a source of law, albeit (pardon the expression) a source of law on sources of law. Leaving this contradiction aside, what information is there to be found in the rulings of the European Court and Commission on this issue?

One ruling that sheds some light on the question is the *Golder* case.[13] In this judgment, which concerned whether Article 6 (1) secures a right of access to courts, the European Court declared that when interpreting the Convention it should be guided by Articles 31 to 33 of Vienna Convention on the Law of

[13] *Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18.

Treaties (hereafter "the Vienna Convention"). The argument used by the European Court in order to justify the application of these provisions was that they at the time reflected "generally accepted principles of international law".[14] At this stage, the critically inclined reader might want to make the following objection: the above-mentioned articles in the Vienna Convention contain rules of interpretation, not sources of law. True, but in practice it is often near impossible to draw a clear line between sources of law, on the one hand, and rules of interpretation, on the other. This is also the case with regard to some of the rules laid down in Articles 31 to 33 of the Vienna Convention. Granted, most the of provisions in these Articles, especially the main rule in Article 31 (1) (c) – according to which a treaty shall be interpreted in good faith and in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose – can be characterized as typical rules of interpretation. However, one rule given in the Vienna Convention clearly blurs the line between sources of law and rules of interpretation, namely Article 31 (c), which states that, together with the context, account should be taken to "any relevant rules of international law applicable in the relations between the parties." It was precisely this rule that the European Court referred to in the *Golder* case when it stated that Article 6 (1) of the Convention included a right of access to court since such a right ranked among the general principles of law recognized by civilized nations.[15]

Consequently, it can be concluded that, in addition to the Convention text itself, general principles of law recognized by civilized nations are a source of law relevant with regard to establishing the meaning of the Convention. When identifying such principles of law, the European Court and Commission often seek to establish whether there is a common core of law among the signatory states, or a "European standard", as such a core is called by some legal commentators.[16]

Moving ahead, what other sources can be characterized as sources of law? Are, for example, the rulings of the European Court and Commission afforded the standing of sources of law? As previously mentioned, the use of the *Golder* case above implies that such rulings indeed are afforded some standing. However, as has been pointed out on numerous occasions, there is no strict rule of precedent with regard to the rulings of the European Court and Commission. This is in part due to the fact the Convention is seen as a "living instrument which must be interpreted in the light of present day conditions, subject always to the achievement of its purpose of protecting

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[14] *Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18, para. 29.
[15] Ibid, para. 35.
[16] See e.g. *Gillow v. Untied Kingdom*, judgment of 24 November 1984, Series A, No. 109, para. 69. This case is mentioned by Petrochilos as an example of when the European Court relied on a common core of law among the signatory states in order to "fill the content" of the Convention. See Petrochilos, *Procedural Law in International Arbitration*, at 113. The expression "European standard " is a translation of the Swedish term "europeisk standard", which is used by Hans Danelius. See Danelius, *Mänskliga rättigheter i europeisk praxis*, at 60.

human rights."[17] To the extent that the rulings of the European Court and Commission are taken into consideration, the judgments and decisions of the former carry more weight than the decisions of the latter.[18] Whether other sources than the ones mentioned above, e.g. the works of legal scholars, are considered to be sources of law, or simply sources of inspiration, is difficult to determine, and for reasons of time constraint this question will not be dwelt upon further.

One interesting aspect of any work based on the principles of legal dogmatism is that the strive to describe the law as it stands not only determines the method employed, but also to a large extent what material is used. Some of the material in this essay is used because of its character as a source of law. This is the case with the Convention text, the law common to signatory states, as well as the judgments and decisions of the European Court and Commission. Other material used in this thesis, such as the published material of legal commentators, does not constitute sources of law, but rather tends to comment on such sources. Below, some of the research already conducted by legal commentators on the relationship between Article 6 (1) of the Convention and arbitration is presented. The purpose of this presentation is to outline the different viewpoints among commentators vis-à-vis the application of Article 6 (1) of the Convention to arbitration, not to discuss those viewpoints in any length or depth – that will instead be done later on in the main body of the thesis.

1.4 Previously conducted research

There are a number of ways in which the research previously conducted on the relationship between the Convention and arbitration may be presented. One way is of course to do so in a chronological manner. However, in my opinion, a more fruitful way is to sort the research by the position taken with regard to the applicability of the Convention to arbitration. When using this criterion, three basic viewpoints can be distinguished.

The first view has already been mentioned, namely that Article 6 (1) is not applicable to arbitration since the Convention only binds states and the acts of arbitral tribunals cannot be attributed to any state. This view has, in my opinion, been most eloquently advanced in an article by Charles Jarrosson. In it Jarrosson argues that an application of Article 6 (1) to arbitration would both be contrary to the "letter" and the "spirit" of the Convention.[19] Jarrosson's conclusions are largely based on his interpretation of the European Court and Commission rulings concerning arbitration. However, it must be noted that the European Court and Commission have given

[17] Haydn-Williams, *Arbitration and the Human Rights Act*, at 293 and 305. In support of this opinion, Haydn-Williams cites *Tyrer v. United Kingdom*, judgment of 25 April 1975, Series A, No. 26.
[18] Ibid, at 305.
[19] Translation from the French terms "la lettre" and "l'esprit", respectively. See Jarrosson, *L'arbitrage et la Convention européene des droits de l'Homme*, at 577.

several rulings on arbitration since Jarrosson's article was published in 1989, a number of which cast doubt upon the correctness of his analysis.[20] The view Jarrosson gives voice to is shared by a number of other commentators, including Oliver Jacot-Guillarmond, who, although not quite as categorically as Jarrosson, in principle rules out any application of Article 6 (1) of the Convention to arbitration. However, Jacot-Guillarmond's analysis also shares the same problem as Jarrosson's in that it is somewhat outdated, being conducted in 1988.[21] A more recent proponent of non-application of Article 6 (1) to arbitration is Adam Samuel, who puts forward his view in an article which deals not only with arbitration, but also with the larger issue of the relationship between the Convention and alternative dispute resolution (ADR). Interestingly, Samuel does not even mention two decisions which appear to undermine the validity of his conclusions.[22]

A second, and more commonly held viewpoint among commentators is that the Convention indeed can apply to arbitration, albeit only in an indirect way. According to this view, Jarrosson and others who share his opinion are considered to confuse the question of attribution under international law with the distinct issue of the primary international obligation of a state. As George Petrochilos points out, the international law obligations of an arbitral tribunal cannot be the starting point when examining the application of Article 6 (1) to arbitration. This is the case, Petrochilos argues, because arbitral tribunals have no international obligations. Instead, he concludes, the starting point must be to determine the obligations of states under the ECHR in order to establish whether those obligations have any affect with regard to arbitral tribunals.[23] According to Petrochilos and other commentators who share his views, such as Robert Briner, Kurt Heller, Frans Matscher and Fabian von Schlabrendorff, just to name a few, states signatory to the ECHR have an obligation to put in place checks to ensure that the requirements in Article 6 (1) are given effect to by arbitral tribunals.[24] This does not mean that they believe that the responsibility of states is engaged as soon there is a violation of Article 6 (1) by an arbitral tribunal. Instead, responsibility occurs as a result of a state's failure to provide remedies in state courts against such violations by arbitral tribunals, or, when such remedies exist, the state courts fail to sanction violations.[25]

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[20] Most notably *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991 and *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999. However, Jarrosson's view seems to be confirmed in *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996.

[21] Jacot-Guillarmond, *L'arbitrage privé face à l'article 6 § 1 de la Convention européene des Droits de l'Homme*, at 282-283.

[22] Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human* Rights, at 416. The two cases are, of course, *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991 and *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

[23] Petrochilos, *Procedural Law in International Arbitration*, at 153-154.

[24] See Briner & von Schlabrendorff, *Article 6 of the European Convention on Human Rights and its Bearing upon Arbitration*, at 91-93; Heller, *Constitutional Limits of Arbitration*, at 12-13; Matscher, *L'arbitrage et la Convention*, at 290-291.

[25] Petrochilos, *Procedural Law in International Arbitration*, at 112-113 and 153-154.

This view on the relationship between the Convention and arbitration finds support, although inconclusive, in the jurisprudence of the European Court and Commission.[26] If correct, its consequences are that arbitral tribunals indirectly are bound to comply with Article 6 (1). Otherwise state authorities cannot, as Petrochilos argues, give effect to the award and proceedings of arbitral tribunals without engaging the international responsibility of the state.[27]

The third, and probably least represented viewpoint on the applicability of the Convention to arbitration is that arbitral tribunals themselves have a direct obligation under the ECHR to comply with the Article 6 (1) requirements. Such a view is based on either of the following two positions. Firstly, and obviously, some commentators maintain that the actions of arbitral tribunals are attributable to states, meaning that no additional action (or inaction) by (other) state authorities is necessary in order to engage the responsibility of the state. This type of direct application of Article 6 (1) has especially been suggested by British commentators, e.g. Clare Ambrose and Jonathan Haydn-Williams, in connection with discussions on the scope of the Human Rights Act 1998 (hereafter "the HRA"). The HRA, which is designed to give "further effect" to (not incorporate) the Convention in the UK, contains provisions that define "public authority" in a way which has been interpreted as potentially encompassing arbitral tribunals. However, as some legal commentators admit, the practical implications of arbitral tribunals being directly bound by the Convention are fairly small, at least if one concurs with the viewpoint expressed above, i.e. that states have an obligation to ensure that the requirements in Article 6 (1) are given effect to by arbitral tribunals. The existence of such an obligation means that states have to enact laws making Article 6 (1) directly binding on arbitral tribunals anyway, rendering the question whether the acts of arbitral tribunals can be directly attributed to states rather irrelevant.[28]

As indicated above, the position that arbitral tribunals themselves have an obligation to comply with the Article 6 (1) requirements can be based on another argument, namely that "Drittwirkung" can be assigned to Article 6 (1). The term "Drittwirkung" refers to the phenomenon when human rights provisions apply not only with regard to states, but also in the relations between individuals.[29] In the case of arbitration, "Drittwirkung" would mean that parties could initiate legal action for damages against arbitral tribunals based on violations of Article 6 (1). Few commentators subscribe to the view of "Drittwirkung" of Article 6 (1) ECHR with regard to arbitration. One of those who appear to do so is Jean-Hubert Moitry, although it must be noted that the French case upon which he bases his

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[26] For example the previously mentioned cases *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991 and *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

[27] Petrochilos, *Procedural Law in International Arbitration*, at 154.

[28] Haydn-Williams, *Arbitration and the Human Rights Act*, at 289 and 302; Ambrose, *Arbitration and the Human Rights Act*, at 468 and 479.

[29] van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, at 15.

conclusion no longer can be considered to be a reflection of the law as it stands in France, making it virtually irrelevant even as a source of inspiration with regard to the interpretation of the Convention.[30]

As previously mentioned, the purpose of this section has not been to present the various views on the application of the Convention to arbitration in any length or depth. Furthermore, the research referred to in the presentation is not exhaustive - other material on the relationship between the Convention and arbitration will also be used in the study.

1.5 Disposition

The thesis is structured in the following way. The next chapter (Chapter 2) is intended to introduce the reader to the parts of the Convention relevant to the subject matter. Initially, the general structure, principles of interpretation and scope of the Convention are discussed. Thereafter, the attention is turned toward the provision on which this study focuses, namely toward the procedural guarantees set forth in Article 6 (1). Chapter 3 deals with what is, of course, the core of the study: the relationship between the procedural requirements in Article 6 (1) and arbitration. This chapter is divided into four sections, each broadly dealing with one of the questions posed earlier (Chapter 1.2). The analysis of the relationship between Article 6 (1) and arbitration in Chapter 4 is based upon traditional legal dogmatism. In other words, it is an attempt to describe the law as it stands. However, some normative statements are also made. Finally, in the last chapter (Chapter 5), some concluding remarks on the issue are made.

[30] Moitry, *Right to a Fair Trial and the European Convention on Human Rights*, at 116 and 121.

2 The European Convention on Human Rights

2.1 General

Most, if not all, readers are familiar with the historical backdrop against which the Convention developed: the Second World War. The atrocities committed during the war made it clear to most observers that nations could not be relied upon to guarantee the protection of human rights. Out of this realization the idea of setting up some form of collective guarantee of human rights was born, an idea that eventually resulted in the signing of the Convention on November 4 1950.

The entry into force of the Convention marked a paradigm shift with regard to how human rights were viewed. Previously, the principle of state sovereignty had ruled supreme and human rights were seen as an issue to be exclusively decided upon by each nation. With the entry into force of the Convention, that was no longer the case. The signatory states were now obliged to adhere to certain standards set forth in the Convention. However, it was not only this fact which made the Convention revolutionary. Equally important was the fact that it contained a unique mechanism by which the signatory states' adherence to the Convention could be controlled – a mechanism giving individuals the right to institute legal action against a member state in Strasbourg.

It must, however, be noted that the control system constructed in many ways was a result of a compromise between the human rights of individuals and the principle of state sovereignty. This was reflected in the fact that the system of individual applications was made optional for signatory states. In addition, the Commission was set up in order to function as a form of "filter" for applications, determining which ones would reach the European Court. Both limitations have since been abolished, meaning that all signatory states now accept individual applications and that the European Court tries such applications.

Even though the Convention has its own control mechanism (i.e. the European Court), the supervision and implementation of the Convention rights rests primarily with the national authorities of the signatory states.[31] As a result, the effect of the Convention cannot be measured by simply studying the case law of the European Court and Commission, also the case law developed by the courts in the Convention states must be taken into consideration. This is also the case with regard to rulings concerning the relationship between Article 6 (1) and arbitration, which serves to explain

[31] van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, at 1-2 and 5.

why some cases from national courts are discussed in the thesis despite them not being sources of law with regard to Convention.

So what then are the effects of a European Court judgment in which a state is found in breach of the Convention? From a strictly legal perspective the effects are few. Firstly, according to Article 41 ECHR, the European Court may award the applicant "just satisfaction" (i.e. damages). Secondly, and more importantly, a judgment may be seen as containing an implicit demand directed at the state that has been found in breach of the Convention. The content of this demand is that the state has to take measures, e.g. legislative action, to ensure that the violation does not occur anew, or else risk being found in breach of the Convention once again, which for most states must seem as quite a daunting prospect.[32]

2.2 Principles of interpretation

As previously mentioned (Chapter 1.3), the European Court declared in the *Golder* case that the rules of interpretation found in Articles 31 to 33 of the Vienna Convention should be used when interpreting the Convention.[33] Article 31 of the Vienna Convention, which is entitled "General rule of interpretation", sets forth the main rule of interpretation in its first paragraph:

"A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The reference made above to the "object and purpose" of a treaty is of particular interest with regard to the interpretation of the Convention. As the European Court has stated on numerous occasions, the object and purpose of the Convention is to secure that certain human rights and fundamental freedoms are afforded individuals within the jurisdictions of its signatory states.

In what way then, if any, does this purpose affect the interpretation of the Convention? Judging by the case law of the European Court and Commission, its effect is twofold. First, it means that the Convention provisions shall be interpreted in an objective manner. Second, and related to the first point, it means that the Convention provisions shall not be interpreted restrictively. These two principles of interpretation go against the conventional practice according to which conventions are interpreted subjectively and there is a presumption of restrictive interpretation.[34]

However, a third principle (or doctrine) of interpretation – sometimes referred to as the "margin of appreciation" doctrine – modifies what has been said above. The "margin of appreciation" doctrine, which can trace its

[32] Danelius, *Mänskliga rättigheter i europeisk praxis*, at 33.
[33] *Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18, para. 29.
[34] Jacobs & White, *The European Convention on Human Rights*, at 31.

roots to national case law on judicial review of governmental action, in essence, means that the European Court and Commission afford national authorities a certain "margin of appreciation" when determining whether their actions were in conformity with the Convention.

Usually when this doctrine is discussed a distinction is made between determination of facts and determination of questions of law. With regard to the former category, the "margin of appreciation" doctrine is relatively uncontroversial. The argument used in favor of such a margin is that the national authorities are in a "better position" to determine the facts of a case. It must be noted that national law and information on its interpretation also are considered to be factual data from the perspective of the European Court and Commission. However, the question of whether national authorities should be afforded a "margin of appreciation" with regard to questions of law (i.e. Convention law) is much more controversial. Some legal commentators feel that allowing any such margin in relation to questions of law risks undermining the object and purpose of the Convention, i.e. securing the human rights and fundamental freedoms of individuals. Instead, they argue that the European Court and Commission always should conduct an independent examination and interpretation concerning questions of law.[35] However, in reality, national authorities appear to be afforded a "margin of appreciation" also with regard to certain questions of Convention law.[36]

An issue sometimes discussed is whether national authorities (first and foremost national courts) themselves may apply a "margin of appreciation" when determining Convention rights. One view is that the "margin of appreciation" doctrine should not apply before national courts. After all, what authorities if not national courts are suited to determine both questions of fact and law? According to this view the fact that the European Court or Commission might consider a national court's ruling as within the scope of possible rulings is not a relevant matter for the national court to take into consideration when deciding issues concerning the Convention. Consequently, it is argued that the "margin of appreciation" doctrine should be ignored when predicting what outcome a case involving the ECHR in a national court might have.[37] This, of course, also applies to cases involving arbitration, meaning that national courts, if this view is correct, probably are more likely to find national authorities dealing with arbitration in violation of Article 6 (1) than the European Court and Commission are. Below issues concerning the scope of the Convention are discussed, issues which also are relevant with regard to the relationship between Article 6 (1) and arbitration.

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[35] van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, at 585-586 and 605.
[36] Danelius, *Mänskliga rättigheter i europeisk praxis*, at 57.
[37] Haydn-Williams, *Arbitration and the Human Rights Act*, at 293.

2.3 Scope of Convention

Four concepts – *ratione loci*, *ratione personae*, *ratione materiae*, and *ratione temporis* – define the outer limit of the Convention's reach. The first – *ratione loci* – refers to the fact that a state as a rule only is liable for violations committed within its territory. This rule is manifested in Article 1, according to which states are obliged to secure to everyone within their jurisdiction the rights and freedoms set forth in the Convention. However, as the European Court has stated on numerous occasions, the concept of jurisdiction in the Convention is not restricted to the territory of its signatory states, but also e.g. applies to the acts of state officials abroad.[38]

The next concept – *ratione personae* – has two sides. First, it concerns the question who may submit an individual application (active legitimation). Second, and more interesting in the context of arbitration, it points out against whom such an application may be directed (passive legitimation). It follows from Articles 19 and 35 (1) of the Convention that applications may be directed only against states. The question thus arises as to how one determines whether an application is directed against a state. A number of principles have developed with regard to the determination of state responsibility, most of which are set forth in the International Law Commission's (ILC) Final Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter "the ILC Draft on State Responsibility"). The general rule of attribution of conduct to a state is found in Article 4 of the ILC Draft on State Responsibility. Article 4 provides that the conduct of any state organ shall be regarded as an act of that state, regardless of whether the organ exercises legislative, executive, judicial or any other function. Articles 5 to 11 contain additional rules on attribution, characterized by the fact that the distance between the act and the state appears to grow with each provision. Consequently, Article 11 states that conduct which is not attributable to a state shall nevertheless be considered to be an act of that state if and to the extent that the state acknowledges and adopts the conduct as its own. Article 11 and other relevant articles in the ILC Draft on State Responsibility will be discussed in the next chapter (Chapter 3), which, as previously stated, deals with the relationship between the Convention's Article 6 (1) and arbitration.

The third concept mentioned initially in this section – *ratione materiae* – refers to the fact that individual applications have to concern rights and freedoms set forth in the Convention. This rather obvious fact follows from Article 34 of the Convention.[39] The last concept – *ratione temp*oris – is also rather straightforward. It means that the Convention is not applicable to acts or facts that have taken place before the Convention entered into force in the state in question.[40]

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[38] See e.g. *Loizidou v. Turkey*, judgment of 23 March 1995, Series A, No. 310.
[39] van Dijk & van Hoof, Theory *and Practice of the European Convention on Human Rights*, at 75-79.
[40] Ibid, at 9.

As stated, the four concepts discussed above collectively determine the reach of the Convention, the demands of each being necessary to fulfil if the Convention at all is to apply. They are usually considered to be rules pertaining to competence rather than admissibility. However, interestingly, in the case law of the European Court and Commission no clear distinction is made between competence, on the one hand, and inadmissibility, on the other.[41] This is a result of the fact that applications which fall outside the competence of the European Court and Commission usually are rejected with reference to Article 35, an article which sets forth the admissibility/inadmissibility grounds. The specific ground used in these cases is usually Article 35 (3), i.e. that the application is "incompatible with the provisions of the Convention."[42]

Article 35 of the Convention contains other admissibility conditions which, although not employed when issues of competence are determined, nevertheless are important in order to understand the reach of the Convention. Two admissibility conditions are particularly relevant in the context of the subject matter deal with this thesis, the relationship between Article 6 (1) of the Convention and arbitration.

First, as Article 35 (1) provides, all domestic remedies must be exhausted prior to any individual application. If there are no domestic remedies, or if the existing domestic remedies are inadequate from a Convention perspective, then, of course, this condition will not apply. The demand that domestic remedies shall be exhausted also serves to emphasize another point, namely that the responsibility of supervising and implementing the Convention rights primarily rests with the national authorities of the signatory states. Only if the national authorities for some reason have failed to protect Convention rights are individual applications accepted.

The second admissibility condition to be discussed is found in Article 35 (3) and provides that applications shall be declared inadmissible if they are "manifestly ill-founded". Unlike the other admissibility conditions set forth in Article 35, this condition requires that some form of *prima facie* opinion on the facts and legal grounds. Why is this admissibility condition considered to be especially relevant with regard to arbitration? For the simple reason that it usually is with reference to it that individual applications concerning the application of Article 6 (1) to arbitration are dismissed. Considering the number of times the procedural rights of Article 6 (1) have been mentioned, it is high time to move on to the next section, which, of course, deals with Article 6 (1) of the Convention.

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[41] As mentioned above, the Commission previously decided on questions of admissibility. As of 1 November 1998, the European Court has this responsibility. Therefore both will be mentioned in the context of admissibility.

[42] van Dijk & van Hoof, Theory *and Practice of the European Convention on Human Rights*, at 67.

2.4 Article 6 (1)

Before the various procedural guarantees of Article 6 (1) are discussed, it might be a good idea to remind the reader of its content. The relevant parts of Article 6 (1) read as follows:

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

It goes without saying that it is first and foremost the first sentence cited above which is of relevance. The second sentence only concerns the grounds on which the publicity of a trial may be limited. As stated above (Chapter 2.2), one of the principles of interpretation that applies to the Convention is that its provisions shall not be interpreted restrictively. In the *Delcourt* case, the European Court established that this principle of interpretation is especially important with regard to Article 6 (1). In the case, the European Court made the following observation:

"In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and purpose of that provision."[43]

A number of the procedural rights contained in Article 6 (1) can be characterized as being associated with the truth dimension of justice, i.e. the aim of ensuring legally correct decisions. This is in particular the case with regard to guarantees such as the principle of "equality of arms" and the right to a trial before an independent and impartial tribunal.

However, Article 6 (1) also contains a right which caters to the time and cost dimensions of justice, namely the right to a "hearing within a reasonable time". This attempt to satisfy competing dimensions of justice may be seen as commendable, but it has also been criticized by some legal commentators. Samuel, for example, argues that it in principle is impossible to satisfy the competing requirements of Article 6 (1). In Samuel's own words: "The civil court can be trapped. It may wish to adopt a speedier process to avoid breaching the 'within reasonable time' rule and in doing so break the requirement of a fair and public hearing."[44]

Leaving this conflict aside, which, after all, in no way is unique to Article 6 (1), but present in more or less all systems of civil procedure, Article 6 (1) can be said to contain a twofold obligation. First of all, it provides for a right of access to court, meaning that the signatory states must have in place a

[43] *Delcourt v. Belgium*, judgment of 17 January 1970, Series A, No. 11, para. 25.
[44] Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human* Rights, at 2-3.

system of civil procedure that is available to everyone within their jurisdiction. A right of access to court does not expressly follow from the wording of Article 6 (1) and this right is, as mentioned above, a product of the European Court's ruling in the *Golder* case. Secondly, Article 6 (1) contains a right to justice of a certain quality. This means that court proceedings must comply with the procedural requirements set forth in the article.[45] However, before the twofold obligation contained in Article 6 (1) can be examined, it is necessary to discuss the meaning of the expression "(i)n the determination of his civil rights and obligations", which, after all, determines when those obligations will apply.

2.4.1 Civil rights and obligations

The European Court and Commission have long held that the question as to what constitutes "civil rights and obligations" cannot be answered by reference to how national law is categorized. Instead the European Court and Commission have given the term an autonomous interpretation, independent from the classifications of national law. In the *Ringeisen* case, for example, the European Court considered it irrelevant that an Austrian court had applied rules of administrative law in the case, its decision was nevertheless considered to be decisive for the relations of civil law.[46]

However, this does not mean that national law is totally irrelevant with regard to the meaning of "civil rights and obligations". It is, after all, the national laws of the Convention states that determine what is a right or an obligation. The autonomous interpretation only concerns whether a right or an obligation is to be regarded as "civil" or not. It must be noted that the way national law classifies various claims under certain circumstances may affect, albeit indirectly, even the interpretation of the term "civil". If a certain classification is widespread among the signatory states, it might be considered to be in accordance with a general principle of law, or "European standard", to interpret a claim in a particular way.[47] Moving ahead, what are the rights afforded parties when "civil rights and obligations" are being determined?

2.4.2 Access to court

As mentioned, Article 6 (1) not only contains procedural guarantees in relation to judicial proceedings, but also sets forth a right of access to court. The existence of such a right was first recognized in the *Golder* case, which has been discussed in Chapter 1.3 for its importance in another context, namely as a result of the fact that the European Court there made use of the rules of interpretation in Articles 31-33 of the Vienna Convention to reach its conclusions.

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[45] Petrochilos, *Procedural Law in International Arbitration*, at 111.
[46] *Ringeisen v. Austria*, judgment of 16 July 1971, Series A, No.13, para. 94.
[47] Jacobs & White, *The European Convention on Human Rights*, at 128-129.

The facts of the *Golder* case read, in short, as follows. The applicant was detained in an English prison where riots broke out. He was accused by a prison officer of having assaulted him. Even though no charges were brought against him, information about the incident remained in his record. The applicant, therefore, wished to bring proceedings for defamation in order to have his record cleared. However, legislation regulating prison activity precluded this. The applicant then brought his claim to Strasbourg arguing, *inter alia*, that the legislation in question violated his right of access to court under Article 6 (1).[48] The European Court concluded that such a right indeed did exist under Article 6 (1), basing its conclusion in part on the existence of two general principles of law recognized by civilized nations:

"…in civil matters one can scarcely conceive of the rule of law without their being a possibility of access to courts…The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles."[49]

Furthermore, the European Court considered that any interpretation of Article 6 (1) that did not include a right of access to court could have potentially dangerous consequences:

"Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependant on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook…"[50]

However, the right of access to court is not absolute and without its limitations. As early as in the *Golder* case, the European Court discussed possible limitations with regard to e.g. minors and persons of unsound mind.[51] As the European Court has pointed out subsequently, the right of access to court "by its very nature calls for regulation by the state".[52] The issue of limitations with regard to Article 6 (1) will be discussed at length in the next chapter because of its relevance in relation to arbitration. The section below deals with the other side of Article 6 (1) – the obligation to dispense justice of a certain quality, sometimes also referred to as the "substantive content" of Article 6 (1).[53]

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[48] *Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18, paras. 10-18.
[49] Ibid, paras. 34-35.
[50] Ibid, para. 35.
[51] Ibid, para. 39.
[52] *Philis v. Greece*, judgment of 27 August 1991, Series A, No. 209, para. 59
[53] Petrochilos, *Procedural Law in International Arbitration*, at 112 and 130.

2.4.3 Right to a fair trial

The obligations set forth in Article 6 (1) have been described using the French term "obligations de résultat". This means that the obligations are designed in order to achieve a certain result; in the case of Article 6 (1) a fair trial. The specific rights listed in Article 6 (1) are, of course, essential features of a fair trial. However, as Francis Jacobs and Robin White point out, compliance with the specific rights listed in Article 6 (1) will not alone guarantee that there has been a fair trial. From the case law of the European Court and Commission a number of other features of a fair trial have emerged. Principal among these is the concept of "equality of arms".[54] In the *Dombo Beheer* case the European Court said the following about the meaning of "equality of arms" in the context of civil cases:

> "The Court agrees with the Commission that as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent"[55]

The European Court's statement above touches upon another right which is seen as an ingredient of a fair trial, namely the right to be heard. As Petrochilos, in my opinion rightly, points out, party equality is pointless if one is not given a reasonable opportunity to present one's case.[56] Besides the principle of "equality of arms" and the right to be heard, there are additional rights that, whilst not expressly mentioned in Article 6 (1), nevertheless are considered to be an integral part of the notion of a fair trial. One such right is the right to a reasoned opinion. However, for reasons of time constraint, these rights will not be further discussed. Instead, the remaining part of the section will focus on the procedural guarantees specifically listed in Article 6 (1).

First mentioned of the guarantees stated in Article 6 (1) is, of course, the right to a public hearing. The expression "public hearings" implies that hearings should be both public and oral. With regard to the former requirement, the European Court and Commission view publicity as a guarantee of the fairness of a trial. Publicity is considered to protect against arbitrary rulings and enable society to control the administration of justice.[57] However, the publicity of hearings is subject to a number of limitations that are expressly set forth in Article 6 (1). The publicity of hearings may, for example, be limited on grounds of public policy, national security or privacy. In addition, Francis and Jacobs argue that the case-law seems to allow for some proceedings to take place in private even though none of the permitted limitations in Article 6 (1) is applicable.[58] The latter requirement mentioned above, that proceedings should be oral, is fairly straightforward

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[54] Jacobs & White, *The European Convention on Human Rights*, at 123-124.
[55] *Dombo Beheer BV v the Netherlands*, judgment of 27 October 1993, Series A, No. 274-A, para. 33. Cited in Jacobs & White, *The European Convention on Human Rights*, at 124.
[56] Petrochilos, *Procedural Law in International Arbitration*, at 145.
[57] *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A, No. 71, para. 21.
[58] Jacobs & White, *The European Convention on Human Rights*, at 140-141.

and will not be discussed at length in this context. However, it must be noted that against an unrestricted right to an oral hearing stands a statement in a European Court judgment, albeit an *obiter*, that seems to give states the opportunity to limit that right under certain circumstances, for example in order to avoid delay and cost.[59]

A specific guarantee found in Article 6 (1), which aims to avoid delay, and indirectly cost, is, of course, the right to judgment within a reasonable time. When determining whether there has been unreasonable delay in violation of Article 6 (1), the European Court and Commission first and foremost take three aspects into account: the complexity of the case, the behaviour of the parties and the court, and the significance of the case for the parties.[60] It goes with saying that it is impossible to state in abstract the precise content of this right. Instead a case-by-case approach has to be taken.

The last specific guarantee which is set out in Article 6 (1) is the right to a trial before an independent and impartial tribunal. First, it must be noted that there is some discussion as to whether the notions of "independence" and "impartiality" can be separated from each other in the context of the Convention. Regardless of what viewpoint is held with regard to this issue, legal commentators seem to agree that the two concepts are deeply interconnected, perhaps even indistinguishable. For instance, a judge who is independent will in general also be impartial, although this is not necessarily always the case.[61]

In general, however, the two terms are separated from each other. Independence is used when discussing a tribunal's relationship to the branches of government (i.e. the executive and legislative branches) as well as to the parties.[62] Impartiality, on the other hand, refers to whether the tribunal (or any of its members) is biased with regard to a particular ruling. In the case-law, a distinction is made between a subjective and objective approach to impartiality. The subjective approach refers to the personal impartiality of the tribunal members. Their impartiality is presumed unless the opposite is proven. As a result of the difficulties associated with proving actual bias, an objective approach to impartiality has developed. The objective approach involves determining whether a judge offers guarantees that are sufficient to dispel any legitimate doubt concerning his or her impartiality. This approach usually tends to focus on the appearance of a lack of impartiality.[63] The importance of appearance is conveyed by the English saying "justice must not only be done, it must also be seen to be done." A final point must be made with regard to Article 6 (1). The fact that a breach of Article 6 (1) has occurred during a court proceeding does not necessarily mean that a state ultimately will be found in violation of that

[59] *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A, No. 263.
[60] Jacobs & White, *The European Convention on Human Rights*, at 145.
[61] Petrochilos, *Procedural Law in International Arbitration*, at 133.
[62] See e.g. *Ringeisen v. Austria*, judgment of 16 July 1971, Series A, No.13, para. 95.
[63] van Dijk & van Hoof, Theory *and Practice of the European Convention on Human Rights*, at 338; Jacobs & White, *The European Convention on Human Rights*, at 137.

article. This is the case since breaches to a certain extent can be remedied if an appeal procedure in which Article 6 (1) is respected is put in place. Consequently, when determining whether a violation of Article 6 (1) has occurred it is necessary to examine all instances in which a matter has been tried.

The observant reader might have noticed that one important aspect of the Convention, especially in the context of arbitration, has not been discussed in this chapter, namely the issue of waiving one's rights under Article 6 (1) of the Convention. The reason for this is quite simple: the issue of waivers is of such fundamental importance in determining the relationship between Article 6 (1) of the Convention and arbitration that it is best discussed in the next chapter, which, of course deals with the applicability of Article 6 (1) to arbitration.

3 The European Convention on Human Rights and Arbitration

3.1 General

Before the questions posed initially in this thesis (Chapter 1.2) are discussed, it is, in my opinion, necessary to outline some of the main features of arbitration. It as, after all, these features that will be analyzed in light of Article 6 (1) of the Convention. A number of the features of arbitration will be dealt with in more detail in the sections below.

One essential feature of arbitration is that it rests on an agreement by the parties according to which disputes between them are to be determined by an arbitral tribunal. Arbitration is, therefore, consensual in nature, which is why it is contradictory to refer to various forms of state-imposed mechanisms of dispute resolution as "arbitration". This is the case regardless of whether, or even more so when, the adjective "statutory" is used in order to qualify the noun. An agreement to arbitrate may refer to future disputes between the parties as well as disputes that already exist.

A second feature of arbitration is that there are essentially two types: institutional and ad hoc. In the case of institutional arbitration, the parties agree to have their dispute administered by an arbitration institution. Arbitration institutions often have their own procedural rules, which, as Finn Madsen points out, both modify and supplement governing national laws on arbitration. By referring a dispute to an arbitration institution, the parties in general agree to have their dispute dealt with in accordance with the institution's rules.[64] In institutional arbitration, a number of issues specific to it concerning Article 6 (1) arise. One much discussed issue is whether the decisions taken by arbitration institutions in the course of their administration are subject to Article 6 (1) requirements. At least as far as the Paris Court of Appeal is concerned they are not.[65] It must, however, be noted that this question has not been tried by the European Court or Commission. Ad hoc arbitration, on the other hand, does not involve administration by any arbitration institution. Instead, the proceedings are based on the parties' agreement, which, of course, often also modifies and supplements the governing national law on arbitration. However, also in ad hoc arbitration the parties can choose to refer to arbitration rules, in this case rules such as the UNCITRAL Arbitration Rules that do not demand the participation of any arbitral institution.[66]

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[64] Madsen, *Commercial Arbitration in Sweden*, at 13-14

[65] Paris Court of Appeal, 1ére Chambre, Section A, *Cubic Defense Systems Inc. v. International Chamber of Commerce*, decision 1987/15465 of 15 September 1998. Upheld by the Cour de Cassation, decision 255 FS-P of 20 February 2001.

[66] Madsen, *Commercial Arbitration in Sweden*, at 14.

A third feature of arbitration that distinguishes it is that the parties are free to select their own tribunal. As Alan Redfern and Martin Hunter point out, sometimes this freedom is unreal as a result of the fact that the parties have delegated their choice to, for example, an arbitration institution.[67] In most cases, though, the parties retain the right to choose their own tribunal, a fact that may give rise to questions regarding the arbitrators' independence and impartiality. Moving ahead, what other features of arbitration can be distinguished? Only two additional features will be mentioned in this context.

One is that national laws regulating arbitration more or less invariably provide for some form of setting-aside proceeding before national courts (this is also true with regard to the UNCITRAL Model Law, on which quite a few national arbitration laws in the Convention States are based). The review that national courts undertake in setting-aside proceedings is, however, limited in scope and generally does not concern the substance of a case. Instead, the review aims to check whether certain basic requirements, mostly of procedural nature, have been fulfilled during the arbitral proceedings. In some jurisdictions the arbitration laws even allow parties to agree to exclude any recourse to the courts to have an award set aside. As will be seen below, there is some discussion as to whether laws allowing such agreements are compatible with Article 6 (1) of the Convention.[68]

The final feature of arbitration discussed here is that arbitral awards, like judgments, are enforceable, either after a decision of a court or of another national authority, depending on what authority is responsible for enforcement under national law. As a result of the near universal ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "the New York Convention"), arbitral awards may also be enforced in a large number of states other than the state in which the award was rendered, making it, somewhat paradoxically, in general more attainable to seek the enforcement of arbitral awards in foreign countries than judgments.[69] The New York Convention does, however, include provisions according to which its signatory states are given the opportunity to require foreign awards to pass a public policy test, an opportunity which, at least to my knowledge, more or less all states have ceased upon. It is also fair to assume that the enforcement authorities of most states conduct at least some sort of test when deciding on the enforcement of domestic awards. In any case, the fact that the enforcement of arbitral awards requires some sort of decision by national authorities means that the arbitration, at least temporally, will be in the realm of state

[67] Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, at 8.
[68] See e.g. Petrochilos, *Procedural Law in International Arbitration*, at 124, who believes that exclusion agreements are acceptable from a Convention perspective.
[69] However, arbitrators are not considered to be entitled to demand enforcement of compensation decisions under the New York Convention. See e.g. Heuman, *Arbitration Law of Sweden: Practice and Procedure*, at 566.

control, a fact that the European Commission in the *Boss* case considered to be of relevance with regard to the application of Article 6 (1).[70]

Before the four questions posed initially are discussed in detail, it is, in my opinion, also necessary to comment upon the sources of law which are used when answering them. What material is considered as sources of law with respect to the Convention has already been commented upon previously (see Chapter 1.3). What is meant here is instead whether the relevant sources of law are clear and coherent in their view on the relationship between Article 6 (1) of the Convention and arbitration. The answer to this question is unfortunately in the negative. This is a result of the fact that both the Convention text and the case-law of the European Court and Commission are unclear and incoherent on the issue of the application of Article 6 (1) requirements to arbitration, at least as far as some of the rights found therein are concerned. As mentioned in Chapter 1.4, legal commentators are also divided on the subject. As a consequence, Mustill and Boyd's view, namely that any answers regarding the application of Convention rights to arbitration are bound to be tentative, seems to be correct.[71]

Before the issue of the arbitration agreement as a waiver of the right to state-administered justice is considered, it is also, in my opinion, necessary to examine whether dispute resolution through arbitration constitutes a determination of "civil rights and obligations". Establishing that is the case is, of course, necessary if Article 6 (1) at all is to apply. As Mustill and Boyd point out, it is in general taken for granted in the rulings of the European Court and Commission that the expression "civil rights and obligations" includes the rights and obligations which are the subject of arbitrations. In at least two cases, however, the Commission has mentioned the issue explicitly. In the *Axelsson* as well as the *Hedlund* case, the Commission concluded that the question which had been determined through the arbitral award concerned "civil rights and obligations", making Article 6 (1) *prima facie* applicable with regard to the issue.[72]

3.2 An arbitration agreement is a waiver of the right to state-administered justice?

As it has been said, Article 6 (1) contains a twofold obligation: first, a right of access to court and, second, a right to justice of a certain quality. This section deals with the relationship between the right of access to court and arbitration. As mentioned above, a right of access to court does not follow expressly from the wording of Article 6 (1). Instead, the right is a product of the European Court's interpretation of Article 6 (1) in the *Golder* case. One issue of relevance with regard to the scope of the right of access to court

[70] See *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991.
[71] Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, at 76.
[72] *Axelsson and Others v. Sweden*, App. No. 11960/86, decision of 13 July 1990; *Hedland v. Sweden*, App. No. 24118/94, decision of 9 April 1997.

was not discussed in the previous chapter (Chapter 2.4.2), namely that of waivers. Examining how waivers are viewed under the Convention is necessary in order to understand not only the relationship between the right of access to court and arbitration but also the relationship between Article 6 (1) and arbitration in general. The overriding question treated in this section is consequently whether an agreement to arbitrate is a waiver of the right to state-administered justice.

At first sight, dividing the issue of waivers and Article 6 (1) into two sections – one dealing with waivers and the right of access to court and the other with waivers and the substantive (procedural) rights set forth in Article 6 (1) – might seem illogical to say the least. After all, if an arbitration agreement is considered to constitute a waiver of the right of access to court, is it not then per definition also a waiver of the substantive rights in Article 6 (1)? This may be argued since it is hard to imagine where someone who is considered to have waived his/her right of access to court would turn to complain about violations of substantive Article 6 (1) rights.

Even though the objection made above is valid, it, in my opinion, rests upon an erroneous assumption, namely that a waiver of the right of access to court by an arbitration agreement is without limitations. Such limitations do in fact exist, especially with regard to the temporal scope of the waiver. Whilst agreements to arbitrate invariably are treated as bars (although in general non-mandatory ones) to initiate ordinary court proceedings, the laws of most states, as mentioned in Chapter 3.1, provide at least a limited court review of arbitration at a later stage, for example in the form of setting-aside proceedings and/or enforcement proceedings. The existence of such court review legitimates dividing the issue of waivers under Article 6 (1) into two parts – one dealing with waivers and the right of access to court as such and the other focusing on waivers and the substantive rights set forth in Article 6 (1). After all, the existence of setting-aside and enforcement proceedings indicates that court review of arbitration in general concerns something more than simply whether an agreement to arbitrate constitutes a waiver of the right of access to court. The question whether national arbitration laws provide for procedural rights similar to those set forth in Article 6 (1) is, however, strictly speaking, not dealt with in this thesis. The question posed in this thesis is rather whether the Convention itself places an obligation on its signatory states to put in place laws that give effect to Article 6 (1) requirements in arbitration, not whether signatory states in fact have done so – regardless of whether they have done so because of the Convention or not.

Before the question dealt with in this section, whether an agreement to arbitrate is a waiver of the right of access to court, is discussed something also has to be said about the terminology used when discussing waivers and the Convention. Sometimes a waiver that is effective under the Convention is referred to as a “valid” waiver. The fact that not all waivers are acceptable under the Convention can, however, also be expressed using other expressions, such as the one used above where this distinction was made by

adding the expression "effective under the Convention".[73] In this thesis, no single term is used in order to express this distinction and at times it is not even made in the text. However, the reader should bear in mind the rather obvious fact that not all waivers are accepted from a Convention point of view. Getting back to the question posed initially in this paragraph, the European Court and Commission have on numerous occasions held that the right of access to court in principle may be waived. This view is natural given that Article 6 (1) is considered to provide only a possibility for one to have access to a court of law. It does not stipulate an absolute requirement that all disputes concerning civil rights and obligations should be dealt with by way of court judgement.[74]

What does this mean in the context of arbitration? It means that the right of access to court in principle is waived when parties agree to arbitrate. This view has, *inter alia*, been put forward in the *Deweer* judgment, where the European Court, in a case concerning the imposition of a fine by way of settlement under constraint of provisional closure of Deweer's business, made the following general observation about waivers of the right of access to court:

> "In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; on this point the Court shares the view of the Commission…"[75]

The observant reader may have noted that the expression "in principle" has been used above when discussing whether waivers of the right of access to court are acceptable from a Convention perspective. This caveat refers to the fact that the European Court and Commission have consistently held that an arbitration agreement, in order to be viewed as a valid waiver of the right of access to court, has to fulfil certain basic requirements. Aside from the requirement that all waivers of Convention rights have to be "unequivocal", i.e. clear – a condition that in general is fulfilled in the context of arbitration since arbitration agreements more or less invariably are in writing, two criteria for the validity of waivers of the right of access to court have emerged in the case-law of the European Court and Commission.[76] The first one – that an arbitration agreement has to be concluded without constraint in order to be treated as a valid waiver – is well-established in the rulings of the European Court and Commission and uncontroversial among legal

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[73] See e.g. *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999, where the Commission in the same decision uses various terms, such as "permissible", "valid", "acceptable" and "effective for Convention purposes", to make this distinction.

[74] Petrochilos, *Procedural Law in International Arbitration*, at 113.

[75] *Deweer v. Belgium*, judgment of 27 February 1980, Series A, No.35, para. 49.

[76] See e.g. *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A, No. 227, para. 37, where the European Court states that waivers must be established in an "unequivocal manner".

commentators.[77] The other criterion – that agreements involving issues of public interest may make arbitration inappropriate and waivers of the right of access to court in such cases invalid – only finds support in one Commission decision and is controversial among legal commentators. Below, the requirement of "absence of constraint" in the context of arbitration agreements is first discussed.

3.2.1 Absence of constraint

As mentioned above, the notion that arbitration agreements are invalid as waivers of the right of access to court if concluded under constraint is well-established in the case-law of the European Court and Commission. Sometimes this requirement is expressed in other terms, for example by referring to an arbitration agreement as invalid if concluded under "duress".[78] Regardless of what expression is used the meaning is the same, namely that a waiver of the right of access to court has to be voluntary in order to be considered valid and effective under the Convention.

One phenomenon relevant with regard to the issue of absence of constraint is statutory arbitration, a form of dispute resolution which, as mentioned, is not dealt with other than generally in this thesis. I may be argued that the fact that arbitration is statutory means that there is constraint. This is, of course, true. However, in the case of statutory arbitration it is hard to even claim that an agreement exists. This is probably why a distinction seems to have been made in the case-law of the European Court and Commission between the constraint present in statutory arbitration and constraint related to the conclusion of arbitration agreements. Regardless of the delimitation made earlier with regard to statutory arbitration, it is, in my opinion, of interest to discuss the Commission's ruling in the *Bramelid* case, not least because it is one of the leading authorities on the permissibility of arbitration under the Convention.[79]

The applicants in the *Bramelid* case were two minority shareholders of a corporation. Under Swedish law a main shareholder who has more than 90% of the shares of a company can force minority shareholders to sell their shares. In such situations, the minority shareholders can also force the main shareholders to buy their shares. In case of dispute on the price of purchase, Swedish law provides that the price is to be determined by an arbitral tribunal consisting of three arbitrators. Under the Swedish law existing at the time of the dispute, the main shareholder could appoint one arbitrator by himself/herself, whilst the minority shareholders had to appoint one together. If they could not agree on who to appoint, an arbitrator would be appointed for them by an authority. In the *Bramelid* case, the applicants had

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[77] See e.g. *Deweer v. Belgium*, judgment of 27 February 1980, Series A, No.35, para. 49.
[78] See e.g. *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996, where this expression is used.
[79] *Bramelid and Malmström v. Sweden*, App. Nos. 8588/79 and 8589/79, decision of 12 October 1982.

failed to reach agreement and an arbitrator had consequently been appointed for them. In the proceedings, the applicants complained, *inter alia*, that the arbitrators to whom the dispute that been referred did not constitute an independent and impartial tribunal within the meaning of Article 6 (1). In its decision, the Commission argued that a distinction had to be made between voluntary and compulsory arbitration. With regard to the former category of arbitration Article 6 (1) normally does not pose a problem, the Commission argued. By entering into an arbitration agreement voluntarily the arbitrating parties are considered to have waived their right of access to court. If, on the other hand, arbitration is compulsory in the sense that it is required by law, the parties cannot be considered to have validly waived that right since they have no option but to refer their dispute to arbitration. Therefore, the Commission concluded, arbitral tribunals, when arbitration is statutory, must offer all of the guarantees set forth in Article 6 (1).[80] This view on the relationship between Article 6 (1) and statutory arbitration has since been confirmed by the Commission in the *Lithgow* case.[81]

Having mentioned the *Bramelid* and *Lithgow* cases, the relationship between Article 6 (1) and statutory arbitration can be left aside. It should, however, first be noted that the cases before the European Court concerning violations of Article 6 (1) rights in various forms of state-imposed proceedings are likely to increase as a result of the attempts made by states to lessen the burden of courts by creating alternative forms of dispute resolution. In these cases, Article 6 (1) may very well be the last line of defence against state measures directed at making court procedures more "flexible " by removing time-consuming and costly procedural rights.

Getting back to the issue at hand, the requirement that arbitration agreements must be concluded without constraint in order to be valid, what can be said more specifically about this condition of validity? First of all, the condition was set forth as early in 1962, in the first case before the Commission on the subject of Article 6 (1) and arbitration. In this case, which unfortunately is available only in French, the Commission stated that arbitration agreements were not valid as waivers if "la clause compromissoire…ne l'avait signée sous la contrainte."[82] The purpose here is not to list every case in which the European Court or Commission has stated that absence of constraint is a requirement if an arbitration agreement is to be an effective waiver of the right of access to court. Such cases are numerous, for example in the *Deweer* case the European Court concluded that "(a)bsence of constraint is at all events one of the conditions to be satisfied…"[83]

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[80] *Bramelid and Malmström v. Sweden*, App. Nos. 8588/79 and 8589/79, decision of 12 October 1982, DR 29, at 69; Haydn-Williams, *Arbitration and the Human Rights Act*, at 306.
[81] *Lithgow and Others v. United Kingdom*, judgment of July 8 1986, Series A, No. 102.
[82] *X v. Federal Republic of Germany*, App. No. 1197/61, decision of 5 March 1962, YB 5, at 96.
[83] *Deweer v. Belgium*, judgment of 27 February 1980, Series A, No.35, para. 49.

What is more interesting is instead how the European Court and Commission in light of all these decisions have managed to avoid to give the requirement any real meaning. To my knowledge, the European Court and Commission have never found an arbitration agreement invalid as a waiver as a result of it being concluded under constraint. Even worse, the European Court and Commission have yet, again to my knowledge, to even give any examples of what type of circumstances might be relevant when determining whether an arbitration agreement has been concluded under constraint. It must be noted that there exist some perfectly natural explanations for this, the obvious one being that national laws on arbitration more or less invariably include provisions enabling parties to complain of constraint or duress before national courts. In several cases before the European Court and Commission, the availability of national remedies with regard to this condition has manifested itself in that applications based on constraint have been found inadmissible on grounds that the national remedies have not been exhausted.[84] Based on the observation that national laws on arbitration universally, or at least in the Convention states, provide some sort of remedy against arbitration agreements concluded under duress, it might be tempting to argue that this Convention requirement is meaningless. That would, in my opinion, be an erroneous conclusion, especially in light of the fact that the rule of law is a relatively new concept in a number of states signatory to the Convention. Therefore, it cannot be excluded that it will be necessary in the future for the European Court to develop a more precise doctrine with regard to the question whether agreements to arbitrate have been entered into voluntarily. For the time being, however, the protection at the national level seems to be sufficient.

3.2.2 Issues of public interest

As stated above, the Commission has set forth an additional criterion for the validity of arbitration agreements as waivers of the right of access to court. This criterion – that arbitration agreements can be invalid if they concern issues of public interest – only finds support in one decision of the Commission – the *Axelsson* case. In general, the Commission has adopted the position that the Convention has no view on subject-matter arbitrability.[85] It should also be noted that the statement made in the *Axelsson* case in this regard is an *obiter*. The facts of this case are the following.

The applicants, a group of Swedish taxi drivers, joined an economic association for taxi drivers in Malmö because it was essential from an economic point of view to do so. This was the case since the association ran the only taxi dispatch exchange in the area. The applicants later came into conflict with the association and were excluded for long periods. The membership agreement between the applicants and the association included

[84] See e.g. *Molin Insaat v. Turkey*, App. No. 23173/94, decision of 22 October 1996.
[85] See e.g. *X v. Federal Republic of Germany*, App. No. 1197/61, decision of 5 March 1962, YB 5, at 96.

an arbitration clause, a clause which the applicants argued violated their right of access to court.[86] The Commission began its decision by reiterating the well-established view that state regulations limiting access to court in case of arbitration did not in principle offend against the Convention. However, the Commission also added the following comment:

"The Commission finds no indication that the dispute…involved any issues of public interest which would have made an arbitration inappropriate or unreasonable."[87]

Given that this *obiter* statement conflicts with the previous case-law of the Commission and has not been repeated since, it is perhaps wise, as Petrochilos suggests, to disregard it. Petrochilos himself argues that Article 6 (1) in itself is not an obstacle to the submission to arbitration of more or less any dispute that involves the determination of civil rights and obligations.[88] On the other hand, it must be noted that the Convention does not guarantee a right to arbitration, meaning that states are free to limit the type of disputes that can be submitted to arbitration. Indeed, in many Convention states certain types of disputes concerning civil rights and obligations, such as disputes involving consumers, may not be arbitrated.

3.2.3 Exclusion agreements

As indicated earlier, there is some disagreement as to whether agreements to exclude all recourse to the courts to have an award set aside are compatiable with the Convention or not. Some, like Petrochilos, argue that such agreements should be permitted on the grounds that states cannot be in breach of their duty to supervise arbitral proceedings if the parties themselves have agreed to give up such supervision. It must be assumed that Petrochilos bases his opinion on the assumption that the agreement constitutes a valid waiver of the access to court in accordance with the requirements stated above. Others, like Heller, argue that exclusion agreements are questionable in light of the case-law of the European Court and Commission.[89]

In jurisdictions where exclusion agreements are permitted, one condition for their validity is usually that they only are accepted in international proceedings, i.e. when none of the parties has its residence in the country of arbitration. In addition, the legislation of countries which allow exclusion agreements in general provides that an award rendered in such proceedings is to be treated as a foreign award, should one of the parties ever seek enforcement of the award in the country where it originated. This means that enforcement has to take place in accordance with the rules of the New York

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[86] *Axelsson and Others v. Sweden*, App. No. 11960/86, decision of 13 July 1990;
[87] *Axelsson and Others v. Sweden*, App. No. 11960/86, decision of 13 July 1990; Haydn-Williams, *Arbitration and the Human Rights Act*, at 307-308.
[88] Petrochilos, *Procedural Law in International Arbitration*, at 116.
[89] Heller, *Constitutional Limits of Arbitration*, at 17, See e.g. *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991 and *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

Convention, rules which set forth procedural requirements similar to those found in Article 6 (1).[90] Without legislation equating such awards with foreign ones it would, in my opinion, be hard to argue that exclusion agreements are acceptable from a Convention perspective. This especially is the case in light of what will be discussed in the next section, which deals with the applicability of the substantive procedural rights in Article 6 (1) to arbitration proceedings.

3.3 A right to a fair arbitration?

More interesting than the question of whether an arbitration agreement constitutes a waiver of the right of access to court is to what extent, if any, the procedural rights set forth in Article 6 (1) apply to arbitral proceedings. As suggested in Chapter 3.2, these questions are of course interconnected in the sense that it would not be relevant to discuss the various procedural rights in Article 6 (1) if an arbitration agreement was considered to be a total and permanent waiver of the right to state-administered justice.

It has already been said that Article 6 (1) is a provision which aims to achieve a certain result: a fair trial. Not only the specific rights listed in Article 6 (1) are considered to be requirements of a fair trial, the same is true with regard to the various procedural principles, such as the principle of party equality, that have been developed in the case-law of the European Court and Commission.

The first step when trying to ascertain to what extent, if any, the rights in Article 6 (1) apply to arbitration is, of course, to determine what effect the arbitration agreement itself has with regard to the application of Article 6 (1). The overriding question is whether the arbitration agreement itself is a "blanket" waiver of all the rights in Article 6 (1). The answer to that question is, not surprisingly, in the negative. The European Court and Commission have held that the agreement to arbitrate itself implies only a partial waiver of the guarantees set forth is Article 6 (1).[91] The question thus arises as to what procedural rights are implied to be waived by the arbitration agreement. This question slightly differs from the issue whether the parties by specific reference in the arbitration agreement can waive certain Article 6 (1) rights which are considered to be of fundamental importance, for example the right to an independent and impartial tribunal and the principle of party equality. The question discussed here is rather which rights, if any, are considered to be automatically waived simply by agreeing to arbitrate. With regard to at least one of the rights listed in Article 6 (1) there seems to be a near universal consensus that waiver is automatic, namely the right to public hearing. This is considered to be a direct consequence of the private nature of arbitral proceedings. In the *Nordström*

[90] See Briner & von Schlabrendorff, *Article 6 of the European Convention on Human Rights and its Bearing upon Arbitration*, at 100.
[91] See e.g. *X v. Federal Republic of Germany*, App. No. 1197/61, decision of 5 March 1962, *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

case, the Commission made the following statement of relevance in relation to the relationship between publicity and arbitration:

"In some respect – in particular as regards publicity – it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6 (Art. 6), and that the arbitration agreement entails a renunciation of the full application of that Article."[92]

With the exception of publicity, it is difficult to argue with any certainty that any other right in Article 6 (1) is automatically waived as a result of the agreement to arbitrate. As a consequence, it must be concluded that all rights in Article 6 (1), save the right to publicity, *prima facie* apply to arbitral proceedings. It must also be concluded that in order to waive the remaining rights in Article 6 (1), assuming that all of those rights in fact may be validly waived, something more specific than simply an arbitration agreement is needed. What is meant here is, for example, a reference to arbitration rules that stipulate that no oral hearing shall take place. If such a specific reference is included in the arbitration agreement the attention instead turns toward the issue whether the right or rights in question may be validly waived at all, even if the waiver is specific. When answering the question whether it is permissible to waive certain rights under the Convention, legal commentators often make a distinction between waivers made before and after the fact.[93] The "fact" in this context refers to the incident at which a violation of the Convention occurred. A distinction between those waivers made before and those made after the fact is also made below where the permissibility of waivers of certain rights is discussed. In this discussion, it is assumed that the basic requirements of validity discussed in Chapter 3.2, for example absence of constraint, are fulfilled.

3.3.1 Permissibilty of waivers before the fact

The issue dealt with under this heading concerns to what extent it is permissible to waive Article 6 (1) rights (save the right to publicity, which, as stated, is considered to be waived automatically) in advance through an arbitration agreement. It must be admitted that this question is somewhat theoretical as the European Court and Commission in general look at both the arbitration agreement and the subsequent behaviour of the parties when determining whether a waiver effective under the Convention has taken place. As a result, the cases in which the European Court and Commission expressly have ruled on whether it is permissible to waive Article 6 (1) rights in advance are few and far between. It is nevertheless, in my opinion, of interest to briefly discuss to what extent the parties beforehand can agree to "contract out" of Article 6 (1). After all, it is by examining this matter that the scope of the parties' freedom to make procedural arrangements beforehand in arbitration becomes apparent. Luckily, this issue has been discussed by some legal commentators. In addition, there exist a couple of

[92] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996.
[93] Heller, *Constitutional Limits of Arbitration*, at 15-16.

statements from the European Court and Commission that can be drawn upon to make conclusions.

It is, for example, clear that parties beforehand can waive their right to an oral hearing. This follows from the fact that it on numerous occasions has been held that the right to an oral hearing can be waived in advance even in court proceedings.[94] If this right can be waived with regard to court proceedings, then there is little to suggest that such a waiver would not be permissible in relation to arbitral proceedings. This view is also supported by legal commentators, *inter alia*, by Petrochilos, who argues that a waiver of the right to an oral hearing should be accepted as a legitimate type of waiver of Article 6 (1) rights.[95]

Moving ahead, what other Article 6 (1) rights, if any, may be waived by specific reference in an arbitration agreement? Is it, for example, possible for arbitrating parties to waive their right to a decision within a "reasonable time"? As mentioned in Chapter 2.4.3, the right to a decision within a reasonable time is impossible to define precisely. This fact has consequences with regard to its application to arbitration. However, as Petrochilos argues, there seems to be no reason to exclude a requirement of reasonable time in arbitration. That such a requirement applies to arbitration is also supported by the *Rychetsky* case, which only is available in French, where the Commission was asked to determine whether arbitral proceedings held in Switzerland that had lasted for eight years were in conformity with Article 6 (1). The Commission did not rule on the unreasonableness of the entire eight year period. Instead, the Commission limited its query to apply only to the period after which the Swiss courts had been asked to intervene, a period of approximately six months. Such a delay was not considered to be unreasonable.[96] As a requirement of reasonable time appears to apply to arbitration, can this requirement be waived in advance in an arbitration agreement? In principle, this question has to be answered in the affirmative. Arbitrating parties are most likely permitted to agree in advance to extend the arbitral proceedings beyond the limit of reasonableness.[97] Nevertheless, in the unlikely event that they wish to do so, there most certainly must exist some limit beyond which delays cannot be tolerated. However, absent a ruling from the European Court or Commission on the issue, it is impossible to determine where this limit lies.

Having dealt with waivers of the right to an oral hearing and to a decision within a reasonable time, only Article 6 (1) rights considered to be especially important remain. One such right is, of course, the right to an independent and impartial tribunal. Is it permissible to waive the right to an independent and impartial tribunal in advance? The instinctive reaction would be to answer that a waiver of this kind is not permissible. In truth, the

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[94] See e.g. *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A, No. 171, paras. 66-67.
[95] Petrochilos, *Procedural Law in International Arbitration*, at 150.
[96] *Rychetsky v. Switzerland*, App. No. 10881/84, decision of 4 March 1987.
[97] Petrochilos, *Procedural Law in International Arbitration*, at 162-163.

European Court and Commission have yet to rule on the issue, even though the European Court in the *Suovaniemi* case found a waiver of the right to an independent and impartial tribunal permissible based on the behaviour of the party after the fact.[98] Briner and von Schlabrendorff, however, refer to the European Court's reasoning in the *Suovaniemi* case when arguing that it in certain situations should be possible for parties to waive their right to an independent and impartial tribunal beforehand. The situation that Briner and von Schlabrendorff have in mind is when an arbitrator whose possible lack of independence or impartiality is known beforehand nevertheless is appointed without objection from either party.[99] Briner and von Schlabrendorff argue that there is no reason to disallow parties from waiving the right to an independent and impartial tribunal in this situation by agreeing to appoint someone whose dependence or partiality is known to them to be arbitrator. Assuming that the actions of the party in question could have affected the appointment of the arbitrator (e.g. if there existed remedies through which the party could have challenged the appointment), Briner's and von Schlabrendorff's conclusion may very well be correct, even if the case-law of the European Court and Commission does not expressly permit such a waiver. It must be noted that the situation discussed above is different from when the parties already in the arbitration agreement agree that the tribunal must not be composed of independent and impartial arbitrators. Such waivers are most likely not permissible under the Convention. It can also be argued that the situation discussed above in fact concerns after-the-fact waivers.

Finally, something must be said with regard to those rights which, although not specifically mentioned in Article 6 (1), nevertheless are considered to be necessary ingredients of the right to a fair trial. The right referred to are, of course, the right to "equality of arms" and to be heard. To my knowledge, the European Court and Commission have never discussed the question whether it is permissible to waive these rights beforehand in arbitration. Given that the two rights often are mentioned alongside the right to an independent and impartial tribunal, it is fair to assume that waivers of them are to be treated in a similar way, meaning that it is in principle not possible to waive them in advance. However, as is the case with regard to the right to an independent and impartial tribunal, it must be noted that the lack of rulings from the European Court and Commission makes any conclusions concerning the relationship between the right to party equality and the right to be heard, on the one hand, and the permissibility of waivers made in advance, on the other, tentative.[100]

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[98] *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

[99] Briner & von Schlabrendorff, *Article 6 of the European Convention on Human Rights and its Bearing upon Arbitration*, at 95.

[100] Another question is whether the parties under Article 6 (1) validly can agree that the arbitrators shall decide the dispute based on "equity". Some legal commentators question whether such agreements are valid under Article 6 (1) as a decision based on equity cannot be regarded as a determination of "rights and obligations". See e.g. Westberg, *Från statlig till privat rättskipning – reflektioner över frågan om avsägelse från rätten till domstolsprövning*, at note 30.

3.3.2 Permissibility of waivers after the fact

It goes without saying that in one sense all rights may be waived. This is the case since persons are not required to make use of their Article 6 (1) rights. As stated previously, Article 6 (1) only guarantees a possibility for one to enjoy the rights set forth in it, not a requirement for parties to make actual use of them. As a consequence, all rights can be waived if one in the concept of waiver includes all forms of party inaction.

It has been mentioned above that the European Court and Commission often look at both the agreement to arbitrate and the parties' subsequent behaviour when determining whether a valid waiver has taken place. In relation to some rights (e.g. the right to publicity) it is apparent that a valid waiver has occurred simply by agreeing to arbitrate, whilst, at the other end of the spectrum, some rights, regardless of how unequivocal the waiver is expressed, are not even permissible to waive beforehand. Above the "fact" has been defined as the incident at which a violation of the Convention occurred. A perhaps more precise definition would be the point in time when a person gained knowledge of a fact which constituted or in the future could constitute a violation of Article 6 (1). Such a definition could possibly also include the situation when, for example, the parties are aware of an arbitrator's lack of independence or impartiality but nevertheless do not object to his/her appointment.

As argued, all rights may be waived if one views all forms of party inaction as waivers. From this perspective, a party's unwillingness to ever initiate proceedings as a result of an Article 6 (1) violation in arbitration is the ultimate waiver. However, for obvious reasons, it is not this kind of after-the-fact waivers which are discussed in this context. Such waivers have, of course, never been tried by the European Court or Commission since all matters which come before the European Court or Commission require that someone has initiated proceedings arguing that a Convention right has been violated. Consequently, the kind of after-the-fact waivers that are dealt with here concern situations when waivers are argued to have occurred as a result of the behaviour of an arbitrating party after proceedings have been initiated.

After-the-fact waivers may also, as Petrochilos does, be discussed with reference to a concept developed in English law, the concept of collateral estoppel. This concept is based on the opinion that a party must at the first available opportunity raise an objection which the party has with regard to the proceedings. If a party fails to do so, he or she will be implied to have accepted the irregularity and will be estopped from challenging an award based on the violation.[101]

With regard to arbitral proceedings, the European Court's reasoning in the *Suovaniemi* case bears a lot of similarities with the reasoning behind the

[101] Petrochilos, *Procedural Law in International Arbitration*, at 117 and 118.

concept of collateral estoppel. The basic facts of the *Suovaniemi* case are as follows. The applicants instituted arbitral proceedings against a bank based on agreements concerning the sale of shares and the financing of a number of companies. The applicants initially challenged the impartiality of the arbitrator appointed by the bank. However, the applicants thereafter accepted the arbitrator's assurances of impartiality and did not raise the issue anew when evidence of the said arbitrator's partiality emerged later. In the subsequent setting-aside proceedings, however, the applicants once again raised the issue of partiality and argued that the Finnish courts should set aside the arbitral award on this ground. The Finnish courts concluded that, even though there had been reasons to challenge the impartially of the arbitrator appointed by the bank, the fact that the applicants had failed to do so when the evidence pertaining to his partially became known meant that they had lost their right to raise the matter. The applicants subsequently complained to the European Court claiming, *inter alia*, that their right to a fair hearing by an independent and impartial tribunal had been violated as a result of the fact that the Finnish courts had upheld an award which had been given by an arbitrator who lacked independence and impartiality.[102] When considering the applicants' behaviour during the arbitral proceedings, the European Court made the following observation:

"Not only was the submission to arbitration voluntary but, in addition, during the proceedings before the arbitrators the applicants clearly abstained from pursuing their challenge against arbitrator M. In this respect the Court takes note of the decision of the Helsinki District Court of 26 July 1993 according to which, on the one hand, there were reasons to challenge the impartiality of M. under the Finnish Arbitration Act but, on the other hand, the applicants had lost their right to invoke his lack of impartiality as a ground for having the arbitral award quashed, since they had approved him as an arbitrator despite their being aware of the grounds for challenging him. The Court has no reason to question the findings of the domestic court in either respect. In other words, the impartiality of one of the arbitrators was open to doubt under domestic law but the applicants unequivocally accepted this state of affairs in the course of the arbitration proceedings."[103]

The cited section illustrates what is meant by "after the fact". The fact in this case is that the applicants were informed about the evidence pertaining to the impartiality of the arbitrator appointed by the bank. Their subsequent failure to raise the issue was therefore regarded as a consent based on information, or, as it sometimes is expressed, an informed consent. As mentioned, the *Suovaniemi* case concerns waivers of the right to an impartial tribunal. However, given that the right to an impartial tribunal is considered to be one, if not the most important right in Article 6 (1), it is probably fair to conclude that all other rights set forth therein may be waived under similar conditions in arbitral proceedings. One additional requirement regarding after-the-fact waivers must be mentioned. Such waivers can only be effective if effective remedies open to the arbitrating parties to complain about Article 6 (1) violations do in fact exist. If that is not the case, a party's failure to complain can, of course, not be regarded as an effective waiver.

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[102] *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999; Haydn-Williams, *Arbitration and the Human Rights Act*, at 311.
[103] *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

In conclusion, the following question may have entered into the readers' minds: Do there exist violations of Article 6 (1) rights so serious that it is irrelevant whether they are tolerated by the parties, regardless of whether the consent is given before or after the fact? If such violations do in fact exist, the European Court and Commission have yet to come across them. In the context of independence and impartiality, Petrochilos argues that one such violation may be when the arbitral tribunal is composed of corrupt arbitrators.[104] However, absent any ruling by European Court or Commission on the matter, any statement in this regard is bound to be speculative.

3.4 Are arbitral tribunals bound by the ECHR?

The issue dealt with in this section is whether arbitral tribunals themselves are under direct obligation to act in accordance with Article 6 (1) of the Convention, an obligation which presupposes either that the actions of arbitrators are in themselves attributable to states, or, given that is not the case, that Article 6 (1) rights can be assigned "Drittwirkung", i.e. that they can apply also in the relations between individuals. If Article 6 (1) were to be found to be directly applicable to arbitral tribunals, this implies that the European Court's and Commission's case-law concerning waivers also applies before such tribunals, meaning that the type of application discussed here is of the *prima facie* kind: in order to determine whether specific Article 6 (1) rights in any given case in fact do apply one also has to establish if a valid waiver has taken place. Determining whether a waiver has taken place would, strictly speaking, be unnecessary if Article 6 (1) was not even, directly or – as will be discussed in Chapter 3.5 – indirectly, *prima facie* applicable to arbitration. After all, one cannot waive rights that one does not have. The issue discussed first below is whether the actions of arbitrators in themselves are attributable to states.

3.4.1 State attribution and the acts of arbitral tribunals

In Chapter 2.3, four concepts which limit the scope of the Convention were presented: *ratione personae, ratione loci, ratione materiae*, and *ratione temporis*. As mentioned, the concept of *ratione personae*, as manifested in Articles 19 and 35 (1) of the Convention, provides that complaints concerning alleged violations of Convention rights have to be directed against states. What this means is that alleged violations in some way have to be attributed to states. The question thus arises as to whether acts of arbitrators in themselves are attributable to states, meaning that no additional action (or inaction) by state authorities would be needed in order to engage the responsibility of the state under the Convention.

[104] Petrochilos, *Procedural Law in International Arbitration*, at 141.

When answering this question the aforementioned ILC Draft on State Responsibility, which is considered to reflect general principles of law, provides general guidance. Some guidance can also be found in the rulings of the European Court and Commission concerning arbitration. It must, however, be noted that the European Court and Commission have not directly addressed the question of whether arbitral tribunals shall be considered as part of the state. The reason for this is quite simple: the fact that complaining parties have to exhaust their domestic remedies means that the European Court and Commission in general look at the state system for supervision of arbitration rather than at the arbitral proceedings themselves when determining whether a violation of Article 6 (1) has occurred.[105] In the *Rychetsky* case, the Commission came as far as it or the European Court has come in making an authoritative statement with regard to the issue. In the case, the facts of which have been described in Chapter 3.3.1, the Commission came to the conclusion that Switzerland only could be held responsible for the actions of arbitrators (in this case, their delay) if and when national courts had been asked to intervene. Consequently, Switzerland had no responsibility for the delay caused by the arbitral tribunal before its national court had been asked to intervene. The Commission's reasoning indicates that it does not consider the acts of arbitral tribunals to be directly attributable to states. If that had been the case, the Commission would have argued that the arbitrators' delay in itself had engaged the responsibility of Switzerland.[106] Even though, as stated above, the European Court and Commission have had few reasons to rule on the question of whether the acts of arbitrators are directly attributable to states, it is of interest to note, as Haydn-Williams does, that none of the rulings of the European Court and Commission even "suggest that arbitrators are an emanation of the state."[107]

However, the fact that the European Court and Commission have yet to recognize arbitral tribunals as entities for whose acts states are directly responsible has not stopped national courts from ruling that arbitral tribunals are directly bound by Article 6 (1). In Switzerland, for example, the *Tribunal fédéral* has revised its previous case-law and now argues that arbitral tribunals must offer the same guarantees as courts as their awards are equivalent to judgments in terms of their binding force and enforceability.[108] This way of arguing that Article 6 (1) shall apply to arbitration is based on the notion that judgments and awards are equivalent in terms of their "Rechtskraft", i.e. their legal effects.

As mentioned in Chapter 1.4, the fact that the HRA (the act which gives "further effect" to the Convention in the UK in England) defines "public authority" in a way which can be seen as encompassing arbitral tribunals means that the issue of whether arbitral tribunals are under a direct

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[105] Ambrose, *Arbitration and the Human Rights Act*, at 481.
[106] *Rychetsky v. Switzerland*, App. No. 10881/84, decision of 4 March 1987.
[107] Haydn-Williams, *Arbitration and the Human Rights Act*, at 304.
[108] TF, 117 Ia ATF 166, at 168 (cited in Petrochilos, *Procedural Law in International Arbitration*, at 153).

obligation to apply Article 6 (1) has been subject to particularly lively discussions in England. According to Section 6 (3) (a) of the HRA, a public authority is defined as including a court or tribunal. One of the arguments that have been put forward in favour of a direct application of Article 6 (1) to arbitration in the context of the HRA is that arbitral tribunals exercise a public function, even though they do so in private. This is the case since the arbitration agreement in reality requires the permission of the state as it constitutes an agreement to oust the jurisdiction of the courts. Such permission is generally given by states through legislation recognizing arbitration agreements as bars to initiate court proceedings. This fact, alongside the fact that states under certain conditions enforce arbitration agreements, lead some to conclude that arbitral tribunals must be considered to be public authorities under the HRA.[109]

The aforementioned view of the *Tribunal fédéral* and English commentators has so far not found any support in the rulings of the European Court and Commission. Some commentators who are of an opinion that will be discussed in the next section – that states are under an obligation to supervise arbitral proceedings – argue that the existence of such an obligation for states renders the question of whether the actions of arbitral tribunals may be directly attributed to states meaningless: if arbitral tribunals want to ensure that their awards will be given effect to by state courts, which, according to this view, unquestionably are bound by Article 6 (1), then they will be forced to act in a way compatible with said provision anyway.[110] Consequently, according to this view, the arbitrators' implied duty to ensure that an award will stand the scrutiny of setting-aside and/or enforcement proceedings places them under an indirect obligation to act in accordance with Article 6 (1). To what extent the view that it is irrelevant whether the acts of arbitral tribunals are attributable to states is justified is open to debate. It may, for example, be argued that the type of direct action that such attribution enables would help the party whose rights have been violated to achieve vindication. However, it is hard to see how that would be the case given that states in any case are required to ensure that remedies exist so that Article 6 (1) violations are respected.

Regardless of the practical benefits of state attribution, it must, as stated above, be concluded that an interpretation of the Convention meaning that the acts of arbitrators are directly attributable to states does not find support in the case-law of the European Court and Commission. One question of interest is whether the position taken by the Swiss courts will cause the European Court and Commission to revise the way in which Article 6 (1) is interpreted. A scenario along those lines is not unthinkable provided that the position of the Swiss courts' gains enough following so that a European Standard may be discerned. At this point in time, however, no such European Standard is discernable.

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[109] Haydn-Williams, *Arbitration and the Human Rights Act*, at 303.
[110] Ibid.

3.4.2 "Drittwirkung" and arbitral tribunals

If the consequences of arbitral tribunals being found to be under a direct obligation to apply Article 6 (1) are small if not non-existent, then the potential consequences with regard to arbitration of "Drittwirkung" being assigned to Article 6 (1) are much greater. As mentioned in Chapter 1.4, the term "Drittwirkung" refers to the controversial concept when human rights provisions are considered to apply not only with regard to states, but also in the relations between individuals.[111] In the case of arbitration, "Drittwirkung" would mean that parties could initiate legal action for damages against arbitral tribunals and/or perhaps individual arbitrators based on violations of Article 6 (1) rights. It must, however, be noted that such legal action could not be initiated before the European Court as this procedure only concerns complaints against states.[112] It is consequently more or less up to the Convention states to decide to what extent, if any, "Drittwirkung" shall be assigned to its provisions. Another opinion would, of course, be to attempt to attribute the actions of arbitrators to the state in accordance with what has been discussed in Chapter 3.4.1 and will be further developed in Chapter 3.5. There is nothing to suggest that the European Court and Commission consider that "Drittwirkung" should be assigned Article 6 (1), even less so with regard to arbitral tribunals. Such an interpretation of Article 6 (1) also lacks widespread support among legal commentators. One of those who nevertheless appear to subscribe to "Drittwirkung" in the context of arbitration is Jean-Hubert Moitry, although it is somewhat unclear upon what source of law he bases his opinion.[113]

A special question is whether arbitration institutions can be held liable for Article 6 (1) violations that have occurred in the course of their administration. Such liability could possibly be based upon "Drittwirkung" being assigned to Article 6 (1). To my knowledge, the European Court and Commission have yet to deal with the relationship between Article 6 (1) rights and arbitration institutions, even less so from the perspective of "Drittwirkung". However, given what has been said above about "Drittwirkung" with regard to arbitral tribunals, it is fair to assume that the European Court and Commission would view any such argument in relation to arbitration institutions with skepticism. This assumption finds support in the *Cubic* case, a French case where a party to ICC arbitration sued ICC for allegedly violating its obligations in the contract that the ICC and the party in question had entered into when the party submitted its dispute with a third party to arbitration. The party argued that, inter alia, the aforementioned contract concerning the administration of the arbitral proceedings by the ICC violated Article 6 (1) rights. In its ruling, the Paris Court of Appeal concluded that the Convention is directed at its signatory states and not at non-profit organizations that are not judicial bodies. Consequently,

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[111] van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, at 15.
[112] Ibid.
[113] Moitry, *Right to a Fair Trial and the European Convention on Human Rights*, at 116 and 121.

arbitration institutions such as the ICC are not considered to be judicial bodies, at least not by the French courts.[114]

Before moving on to the next section the following may be said about what has been concluded in this section. First of all, the case-law of the European Court and Commission shows that the acts of arbitral tribunals are not considered be to directly attributable to states. Secondly, there is nothing in their rulings to suggest that Article 6 (1) is to be assigned "Drittwirkung". At this stage the reader may therefore wonder on which grounds it has been claimed that Article 6 (1) applies to arbitration. The grounds for this claim will be discussed in the next section, which addresses the question whether the Convention places states under an obligation to supervise arbitral proceedings in order to guarantee their compliance with Article 6 (1).

3.5 An obligation under the ECHR to supervise arbitral tribunals?

As stated in Chapter 1.4, the view most commonly held among legal commentators is that states, although the arbitral tribunals themselves are not under a direct obligation to act in accordance with Article 6 (1), must put in place checks to ensure that the requirements set forth in Article 6 (1) are given effect to by arbitral tribunals. Such a view is based on the belief that the international law obligations of arbitral tribunals cannot be the starting point when examining the application of Article 6 (1) to arbitration. This is the case since arbitral tribunals, as concluded in the previous section, have no direct obligations under international law, at least as far as the Convention is concerned. What then do these commentators suggest to be the starting point when examining the application of Article 6 (1) to arbitration? According to, among others, Petrochilos, the point of departure of any examination into the relationship between Article 6 (1) and arbitration should instead be the international law obligations of states under the Convention.[115] The relevant question to ask is therefore whether, and in relation to which rights, states have an obligation to put in place mechanisms by which Article 6 (1) can be given effect?

Before discussing the European Court's and Commission's somewhat contradictory case-law on the issue, it is, in my opinion, helpful to recollect the principle of international law upon which an affirmative conclusion regarding the applicability of Article 6 (1) to arbitration ultimately is based upon, namely Article 11 of the ILC Draft on State Responsibility. Article 11 provides that conduct which is not attributable to states under Articles 4 to 11 nevertheless shall be considered to be an act of that state if and to the extent that the state acknowledges and adopts the conduct in question as its own. This provision is considered to be a reflection of a general principle of

[114] Paris Court of Appeal, 1ére Chambre, Section A, *Cubic Defense Systems Inc. v. International Chamber of Commerce*, decision 1987/15465 of 15 September 1998. Upheld by the Cour de Cassation in decision 255 FS-P of 20 February 2001.
[115] Petrochilos, *Procedural Law in International Arbitration*, at 153.

law and shall therefore be taken into account when interpreting Article 6 (1) of the Convention. After reading Article 11 of the ILC Draft on State Responsibility, at least two questions of relevance in the context of arbitration come to mind. Firstly, does the fact that states confirm and enforce arbitral awards in setting-aside and enforcement proceedings, respectively, mean that they acknowledge and adopt the award and the process that led to it as their own? Secondly, and given that the previous question is answered in the affirmative, do states have an obligation to provide remedies so that Article 6 (1) rights can be given effect to or can states be held responsible only when existing setting-aside or enforcement proceedings fail to ensure that arbitral proceedings and awards meet the standards of Article 6 (1)? As will become apparent in the following, the case-law of the European Court and Commission is somewhat contradictory with regard to both of the questions posed above. However, on one issue there seems to be agreement: states are at a minimum required to put in place a mechanism by which the validity of arbitration agreements as waivers of the right of access to court may be tried. What is meant here is that there is an agreement that states must at least check whether arbitration agreements have been concluded under constraint, including constraint of the statutory kind. If states fail to do so, they will undoubtedly be found in violation of Article 6 (1) and the waiver will be found invalid, meaning that Article 6 (1) will apply in full. As stated in Chapter 3.3, the arbitration agreement will, if valid as a waiver of the right of access to court, also be considered to be a waiver of the right to publicity, the lack of which is regarded as an essential feature of arbitration. Unfortunately, the case-law of the European Court and Commission is not coherent in respect to most other questions concerning state supervision of arbitral proceedings and awards. This especially becomes apparent when comparing the reasoning in the *Nordström* case, on the one hand, with the reasoning in the *Boss* and *Suovaniemi* cases, on the other. Once again it must be noted that if states are found to be under an obligation to ensure that arbitral proceedings are in compliance with Article 6 (1), this implies that the European Court's and Commission's case-law concerning waivers also applies in relation to that obligation, meaning that the type of obligation discussed here is of *prima facie* character. If one wants to determine whether specific Article 6 (1) rights in any given case in fact do apply one also has to establish if a valid waiver has taken place.

3.5.1 State supervision according to the *Nordström* case

The facts of the *Nordström* case may be summarized as follows. The underlying dispute concerned a joint-venture agreement that two Finnish companies had entered into with a Dutch company. This agreement, and also a Deed of Settlement entered into subsequently, provided for arbitration according to the rules of the Netherlands Arbitration Institute. After the two Finnish companies were dissolved, the applicants were assigned any possible claims which the dissolved companies might have had vis-à-vis the Dutch company. The applicants subsequently requested the Netherlands Arbitration Institute to arbitrate in a dispute which had arisen from the

aforementioned agreements. After the arbitrators rejected all claims, the applicants initiated setting-aside proceedings in Dutch courts arguing, *inter alia*, that the award should be quashed on ground that one of the arbitrators lacked independence and impartiality as he had recently worked as a lawyer for a controlling shareholder of the Dutch company. The applicants' claims were ultimately rejected by the Supreme Court, which stated that, when determining whether mere appearances of lack of independence and impartiality were sufficient to successfully challenge an arbitrator, a distinction hade to be made between challenges made in the course of arbitral proceedings and those made after an award had been rendered, as was the situation in the case before the court. The court found that once an award had been rendered a stricter measure had to be applied when deciding whether public order interests had been breached. In such situations awards could only be quashed as being contrary to public order interests if it had to be assumed that the arbitrator had in fact not been independent or impartial, or if the doubts regarding the arbitrators' independence and impartiality were so serious that the disadvantaged party could not be required to accept the award. As the applicants had argued that the award should be set aside because of the mere appearance of independence and impartiality, the Supreme Court rejected their appeal. The applicants subsequently complained to Strasbourg claiming that their right to a fair trial as guaranteed by Article 6 (1) had been violated since the Dutch national courts had upheld an arbitral award given by three arbitrators, one of whom, according to the applicants, lacked independence and impartiality.[116]

First of all, the Commission concluded that the arbitration agreement constituted a "renunciation by the parties of a procedure before the ordinary courts satisfying all the guarantees of Article 6 (Art. 6) of the Convention." The Commission stated that the absence of constraint was nevertheless one of the conditions which had to be satisfied if the arbitration was to have that effect. In the case, the applicants had not even alleged that the agreement to arbitrate was concluded under constraint. Secondly, the Commission went on to say that account should be taken not only to the arbitration agreement, but also to the legislative framework concerning arbitration in order to determine whether national courts had retained some measure of control of the arbitration proceedings and whether this control had been properly exercised in the given case.[117] Based on these observations the Commission made the following conclusion:

"The Commission observes that the grounds on which arbitral awards may be challenged before national courts differ among the Contracting States and considers that it cannot be required under the Convention that national courts must ensure that arbitral proceedings have been in conformity with Article 6 (Art. 6) of the Convention. In some respects - in particular as regards publicity - it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6 (Art. 6), and the arbitration agreement entails a renunciation of the full application of that Article. The Commission therefore considers that

[116] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996; Haydn-Williams, *Arbitration and the Human Rights Act*, at 310.
[117] Ibid.

an arbitral award does not necessarily have to be quashed because the parties have not enjoyed all the guarantees of Article 6 (Art. 6), but each Contracting State may in principle decide itself on which grounds an arbitral award should be quashed."[118]

Taking this statement into account, it is not surprising that the Commission found that the Dutch courts, in considering that the mere appearance of independence and impartiality was not sufficient to quash an award, had not violated the Convention. In addition, the Commission considered it reasonable that Dutch law demanded strong reasons for quashing an already rendered award as that would mean that a long and costly arbitral proceeding would become useless and expense would have to be invested in new proceedings. Consequently, the Commission found the complaint inadmissible on grounds of being manifestly ill-founded.[119]

What conclusions regarding state supervision of arbitration may then be drawn from the Commission's reasoning in the *Nordström* case? One way of interpreting the case is that states, with the exception of checking for constraint, are not required to ensure that arbitral proceedings are in conformity with Article 6 (1). Such an interpretation especially finds support in the above cited statement "each Contracting State may in principle decide itself on which grounds an arbitral award should be quashed." Even though this seems to be the most probable interpretation of the ruling, some of the expressions used by the Commission in the paragraph cited above indicate that it perhaps should not be interpreted as strict. For example, the expressions "in full" and "all" are used when referring to that states do not have to ensure compliance with Article 6 (1). This suggests that there might be some Article 6 (1) rights that states have a duty to ensure compliance with. However, as stated above, the most likely interpretation of the *Nordström* case is that it in principle gives states a *carte blanche* when deciding on which grounds an arbitral award should be set aside.[120]

What has been said above concerns how the Commission in the *Nordström* case viewed the question whether states are under an obligation to ensure that arbitral proceedings are in conformity with Article 6 (1). As stated, in the case the Commission appears to believe that no such obligation exists. However, the Commission seems to have taken a different view with regard to state responsibility when legislation giving effect to Article 6 (1) rights already exists. What is referred to here is the Commission's statement that account should be taken to the legislative framework concerning arbitration in order to determine whether national courts retained some measure of control and whether this control was properly exercised in the given case. In the case, the Commission appears to have applied a test of reasonability evaluating whether the Dutch courts acted properly. As previously stated,

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[118] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996; Haydn-Williams, *Arbitration and the Human Rights Act*, at 310.
[119] Ibid.
[120] Ibid.

the Commission found it reasonable that Dutch law required strong reasons for quashing an already rendered award.[121]

The reasoning in the *Nordström* case has been criticised by a number of legal commentators, not least by Petrochilos, who argues that it leads to an anomalous result insofar that states which do not put in place mechanisms through which Article 6 (1) rights may be given effect in arbitral proceedings will not incur any responsibility under the Convention. On the other hand, if states do put in place such mechanisms they will be considered to have retained some control of the arbitral proceedings and the way in which that control has been exercised will be scrutinized, albeit in a rather permitting fashion.[122] It may be argued that in this sense the *Nordström* case creates incentives for states to refrain from securing procedural rights in arbitration, something which, in my opinion, must be regarded as an unwanted effect. However, as will be discussed below, there is some disagreement as to whether the *Nordström* case reflects the law as it stands.

3.5.2 State supervision according to the *Boss* and *Suovaniemi* cases

As indicated above, the rulings in the *Boss* and *Suovaniemi* cases offer a different take, in comparison to *Nordström*, on the question of whether, and in relation to which rights, states have an obligation to put in place mechanisms through which Article 6 (1) rights can be given effect. The *Boss* case, which was decided prior to *Nordström* and *Suovaniemi*, may be distinguished from those two cases as it deals with a slightly different subject matter, namely state supervision in the context of enforcement proceedings (*Nordström* and *Suovaniemi*, of course, deal with setting-aside proceedings). Consequently, the reasoning in the *Boss* case may be seen at least in part untouched by the European Court's and Commission's subsequent case-law. The facts of the *Boss* case may be summarized as follows.

The underlying arbitral proceedings which the applicant (a German company) complained about had been conducted under the auspices of the ICC Court of Arbitration. According to the arbitral award, the applicant was ordered to pay a certain sum to an Italian company. The Italian company subsequently requested a court in Stuttgart, Germany, to grant an action for the enforcement of the arbitral award. The applicant objected enforcement alleging, *inter alia*, that it had not been heard when the arbitral proceedings, for which there had been had been a time-limit, had been prolonged. After the court in Stuttgart granted the Italian company's action for enforcement

[121] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996; Haydn-Williams, *Arbitration and the Human Rights Act*, at 310.
[122] Petrochilos, *Procedural Law in International Arbitration*, at 159.

of the award, the applicant appealed to no less than three German courts, only the first of which granting the applicant's appeal.[123]

The applicant company subsequently lodged a complaint in Strasbourg arguing, *inter alia*, that its Article 6 (1) rights had been violated in that the German courts had enforced the arbitral award and rejected its objection that it had not been heard when the arbitral proceedings were prolonged. In its decision, the Commission began by stating, referring to its previous case-law, that the applicant company by voluntarily entering into an arbitration agreement had "renounced its right to have its civil rights determined in court proceedings for the conduct of which the State is responsible…"[124] The Commission went on to make the following important qualification:

> "This does not mean, however, that the respondent State's responsibility is completely excluded…as the arbitration award had to be recognised by the German courts and be given executory effect by them. The courts thereby exercised a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights and in particular with the right of the applicant company to be heard."[125]

The Commission, however, ultimately rejected the application as being manifestly ill-founded on grounds that the reasons given by the German courts in their rejection of the applicant's appeal did not "disclose any arbitrariness which would amount to a violation of Article 6 (Art. 6) of the Convention."[126]

The Commission's reasoning bears similarities with the rule set forth in Article 11 of the aforementioned ILC Draft insofar as it appears to mean that states through enforcement acknowledge and adopt the conduct of arbitral tribunals as their own. One possible way of reconciling the reasoning in *Nordström* with that in *Boss* suggested by Haydn-Williams is to argue that the Convention places no duty on states to put in place remedies by which compliance Article 6 (1) can be ensured, but once such remedies have been put in place, states have a duty to ensure compliance with Article 6 (1).[127] The difference between setting-aside and enforcement proceedings must, however, be noted. It is hard to imagine how states, as is imaginable with regard to setting-aside proceedings, could completely do away with enforcement proceedings. This fact means that states always will exercise some form of control over arbitration at the enforcement stage, at which time they will be under a duty to ensure compliance with Article 6 (1).

The next case to be discussed from the perspective of state supervision – *Suovaniemi* – is hard if not impossible to reconcile with the *Nordström* case.

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[123] *Jakob Boss Sohne KG v. Germany*, App. No. 18479/91, decision of 2 December 1991; Haydn-Williams, *Arbitration and the Human Rights Act*, at 308.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Haydn-Williams, *Arbitration and the Human Rights Act*, at 298.

The *Suovaniemi* case, the facts of which have been outlined in Chapter 3.3.2, like the *Nordström* case, deals with setting-aside proceedings. However, the European Court's reasoning in the *Suovaniemi* case can be interpreted as meaning that states not only have a duty to ensure that arbitral proceedings have been in compliance with Article 6 (1) once mechanisms with that aim have been put in place, they are, in addition, under an obligation to ensure that such mechanisms exist in the first place.

The reader might ask how the *Suovaniemi* case may be interpreted to provide such an obligation. The obvious answer is that the European Court, by reaffirming the early case-law according to which an agreement to arbitrate as such only is a partial waiver of Article 6 (1), suggests that states must put in place some kind of mechanism through which those rights which are not waived by the arbitral agreement can be ensured.[128] How else, one might ask, is it possible for individuals to assert those rights if they are violated in arbitral proceedings? To argue that certain Article 6 (1) rights are not waived by arbitral agreements while at the same time not offering remedies so that individuals can secure those rights is, in my opinion, contradictory. After all, what is the point of stating that Article 6 (1) rights such as the right to an independent and impartial tribunal *prima facie* apply to arbitration if there is no corresponding duty for states to enact laws enabling parties assert those rights? The Commission's reasoning in the *Nordström* case may be criticized for a number of other reasons. One point of criticism raised by Petrochilos is that *Nordström* seems to allow states to avoid their international obligations by invoking their own law, a proposition which seems to be in violation of Article 27 of the Convention on the Law of Treaties, a Convention which to a great extent reflects general principles of international law.[129]

How then shall the apparent conflict between the *Nordström* and *Suovaniemi* cases be resolved? One way is to make use of two established principles of interpretation, namely *lex posterior* and *lex superior*. The former principle means that more recent sources of law take precedent, whilst the latter establishes that sources of law of higher standing carry more weight. As the *Suovaniemi* case is more recent as well as of a higher standing (it is a European Court decision), both of the aforementioned principles support the conclusion that the view set forth in *Suovaniemi* reflects the law as it stands.[130] The notion that states are under an obligation to put in place mechanisms by which Article 6 (1) rights also appears to be supported by commentators such as Briner, Haydn-Williams, Petrochilos and von Schlabrendorff, to name a few.

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[128] The early case-law referred to is, of course, *X v. Federal Republic of Germany*, App. No. 1197/61, decision of 5 March 1962. See also *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.
[129] Petrochilos, *Procedural Law in International Arbitration*, at 162.
[130] Haydn-Williams, *Arbitration and the Human Rights Act*, at 305.

4 Analysis

As mentioned in Chapter 1.5, where the disposition of the thesis was set out, this section attempts to describe the relationship between Article 6 (1) and arbitration based on the law as it stands. Before an attempt to do so is done, it may be wise to remind the reader of the previously mentioned remarks by Mustill and Boyd on the subject, namely that any answers regarding the application of Convention rights to arbitration are bound to be tentative.[131]

First of all, it must be noted that the European Court and Commission have consistently held that the right of access to court in principle is waived when parties agree to arbitrate.[132] One of the requirements in order for this to be the case, however, is that the agreement to arbitrate is voluntary in the sense that it has not been concluded under constraint. It must be noted that the European Court and Commission so far have refrained from giving "constraint" any precise meaning. Arbitration which has been imposed on parties by states – "statutory arbitration" – is considered to be involuntary *per se*. In such proceedings, Article 6 (1) applies directly and in full. [133]

Secondly, the fact that an arbitration agreement is viewed as a waiver of the right of access to court does not mean that it is to be regarded as a "blanket" waiver of Article 6 (1). The European Court and Commission have on a number of occasions held that an agreement to arbitrate as such only is a partial waiver of Article 6 (1).[134] The question thus arises as to which Article 6 (1) rights are waived by the arbitration agreement. The case-law is clear insofar as that the right to publicity is considered to be waived automatically simply by entering into an arbitration agreement.[135] However, it cannot be assumed that the parties by agreeing to arbitrate thereby waive any of the other rights set forth in Article 6 (1). This means that the assumption must be that the remaining Article 6 (1) rights apply to arbitration. It should be noted that arbitrating parties in their agreement can include specific waivers regarding the remaining Article 6 (1) rights. Whether such specific waivers are permitted depends upon the right in question. It is, for example, clear that specific waivers, whether in the agreement or otherwise, of the right to an oral hearing are permissible from a Convention point of view.[136] Whether other Article 6 (1) rights such as the right to an independent and impartial tribunal and the right to be heard may

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[131] Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, at 76.
[132] See e.g. *Deweer v. Belgium*, judgment of 27 February 1980, Series A, No.35, para. 49.
[133] See e.g. *Bramelid and Malmström v. Sweden*, App. Nos. 8588/79 and 8589/79, decision of 12 October 1982, DR 29, at 69.
[134] See e.g. *X v. Federal Republic of Germany*, App. No. 1197/61, decision of 5 March 1962 and *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.
[135] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, App. No. 28101/95, decision of 27 November 1996.
[136] See e.g. *Håkansson and Sturesson v. Sweden*, App. No. 11855/85, judgment of 21 February 1990, Series A, No. 171, paras. 66-67.

be waived by specific reference is questionable. Absent any ruling on the question it must be assumed that they cannot.

What has been discussed so far concerns the permissibility of waivers made in advance, i.e. before the fact. The conclusion drawn above is that waivers most likely are not permitted with regard to certain Article 6 (1) rights. Consequently, the Convention does not allow states to permit such waivers in their national laws. The picture is radically different with regard to waivers made after the fact. All Article 6 (1) rights may in principle be waived after the fact. This is a consequence of the fact that individuals in no way are required to make use of their Article 6 (1) rights. If a party chooses to abstain from complaining about an Article 6 (1) violation that has already occurred, there is no reason to view such a waiver as impermissible given that the party in question was aware of the violation. The case-law shows that after-the-fact waivers are permissible even with regard to such fundamental rights as independence and impartiality.[137] There may, however, exist violations so serious they cannot be permitted even though they have been accepted by the parties after the fact. Petrochilos suggests that one such violation may be when an arbitral tribunal is composed of corrupt arbitrators.[138] It must be noted that there exist no basis in the case-law of the European Court and Commission for such a conclusion.

Similarly, there is no basis in the case-law of the European Court and Commission for the conclusion that arbitrators are under a direct obligation to ensure that arbitral proceedings comply with Article 6 (1). The conduct of arbitrators is neither directly attributable to states, nor is there any reason to believe that arbitrators, as a result of "Drittwirkung" being assigned Article 6 (1), can be held directly responsible for Article 6 (1) violations. However, the fact that states are under an obligation to put in place mechanisms by which Article 6 (1) rights can be ensured, means that arbitrators indirectly are bound to ensure that Article 6 (1) rights are respected in arbitral proceedings. If they do not, their award may not stand the scrutiny of setting-aside and/or enforcement proceedings. As mentioned, the case-law of the European Court and Commission provides that states must set forth mechanisms through which Article 6 (1) rights can be given effect.[139] What is meant here is that persons should be given effective remedies which they can use to assert their Article 6 (1) rights. If states do not provide such remedies, they will be found in violation of the Convention. Once again, it must be noted that the obligation of states to ensure that arbitral proceedings are in compliance with Article 6 (1) does not imply that Article 6 (1) rights will be given effect in any given proceeding. The parties still have plenty of opportunity to waive their Article 6 (1) rights. However, the states do have an obligation to ensure that any waivers of such rights take place in accordance with Article 6 (1). Despite all what has been said in this thesis regarding the application of Article 6 (1) to arbitration, it must be mentioned

[137] *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.
[138] Petrochilos, *Procedural Law in International Arbitration*, at 141.
[139] *Suovaniemi and Others v. Finland*, App. No. 31737/96, decision of 23 February 1999.

that neither the European Court nor the Commission has yet to find a waiver in the context of arbitration invalid.[140]

At this stage, the reader may ask what importance the conclusion drawn above – that states must provide mechanisms through which Article 6 (1) rights can be given effect – has in practice. How can a person who is of the opinion that a state has not put in place remedies adequate to secure Article 6 (1) make practical use of such an argument? Given that a person has exhausted all domestic remedies, it is, of course, possible to complain to the European Court in Strasbourg. However, even provided that such a complaint is successful, the person in question can only be awarded just satisfaction for legal costs by the European Court. The fact that the state which has be found in violation of Article 6 (1) may change its legislation to bring it in line with Convention requirements will be of little comfort to the person whose procedural rights have been violated in the arbitral proceedings. The way actual redress can be achieved is if national courts are permitted to reinterpret or perhaps strike down national legislation in light of the Convention. If such a possibility exists, redress can be given in setting-aside or enforcement proceedings, i.e. at a time when the final outcome of the arbitral proceedings still can be affected. However, whether national courts are given such powers is, strictly speaking, ultimately up to the various states signatory to the Convention to decide.

[140] Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human* Rights, at 428.

5 Concluding remarks

The obvious argument against the question studied in this thesis is that it lacks relevance. Granted, national laws on arbitration more or less invariably set forth procedural rights similar to those provided in Article 6 (1) of the Convention. However, as I hope that the discussion in this thesis has shown, it cannot be ruled out that national laws on arbitration in some cases violate the Convention. For example, the legality of exclusion agreements is open to doubt, at least if awards in arbitrations in which such agreements exist are not treated as foreign awards in national enforcement proceedings. Even if one were to assume that the laws on arbitration in all signatory states were in compliance with Article 6 (1), the fact that this provision places certain obligations on states vis-à-vis arbitration still is of relevance due to the fact that the Convention may be viewed as a quasi constitutional norm. Strictly speaking, it is up to each state signatory to the Convention to decide what standing the Convention shall have in national law. However, ignoring, or, even worse, withdrawing from the Convention has far reaching political consequences as membership in the Council of Europe has come to be viewed as essential for all civilized states in Europe. In this sense, the rules set forth in Article 6 (1) of the Convention enjoy much stronger protection than similar rules set forth in national laws on arbitration. What has been said so far concerns the "law on books". It is fair to assume that the Convention is of potentially even greater importance to arbitration from the perspective of "law in action". This is the case since national laws on arbitration, even though in themselves in compliance with Article 6 (1), not are necessarily respected by national courts in practice. In this context one should bear in mind that the rule of law is a relatively new concept in a number of states signatory to the Convention. In such cases, the claim that national courts have acted in violation of the Convention, or, perhaps, if necessary, the threat of instituting proceedings before the European Court may be an effective deterrent. In conclusion, I would like to concur with the following statement made by Mustill and Boyd: "All persons concerned with the conduct of arbitrations have a duty to ensure that they are familiar with the principles of human rights law."[141]

[141] Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, at 77.

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TF, 117 Ia ATF 166