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The ECtHR Judgment in BEG SpA v Italy: A Human Right to a Conflict-Free Arbitrator? Part I

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The relationship between commercial arbitration and European human rights law raises a number of conceptually difficult issues. How can the State be regarded as responsible at all for conduct of private arbitral proceedings? And how does the concept of an independent and impartial tribunal apply to a decision-making body appointed by the parties themselves?

The European Court of Human Rights ("ECtHR") has gradually assembled a jurisprudence on these questions in the context of the procedural guarantees of Article 6(1) of the European Convention on Human Rights ("Convention"). Its latest contribution to the field is its judgment of 20 May 2021 in *BEG SpA v Italy* ("BEG" or the "judgment").

BEG SpA v Italy: The Facts

In 2000, BEG concluded a co-operation agreement with Enelpower SpA to develop and operate an Albanian hydroelectric power plant. Enelpower was a wholly owned subsidiary — previously an internal division — of ENEL, Italy's State-owned power operator (which in 2000 was in the process of privatisation). The agreement contained a clause referring disputes to arbitration under the rules of the Arbitration Chamber of the Rome Chamber of Commerce ("ACR"). Under Article 21 of the ACR Rules, the agreement operated as a waiver of the right to bring a nullity appeal under Article 827 of the Italian Code of Civil Procedure ("CCP"). In November 2000, BEG commenced an arbitration seeking termination of the agreement and the equivalent of some €130m in damages for breach. BEG appointed GG as its arbitrator. Enelpower appointed NI. The parties appointed PDL as presiding arbitrator. He resigned and was replaced by AV.

Following a meeting of the tribunal on 25 November 2002, an award dismissing BEG's claim was signed by a majority of the tribunal – NI and AV – without GG's signature. The award was deposited with the Rome District Court on 6 December 2002 with a view to obtaining a decree of enforceability (Article 825 CCP).

At the heart of the subsequent Convention complaint lay an alleged conflict of interest affecting NI. At the time of his appointment by Enelpower, NI acted as counsel to its parent entity, ENEL, in unrelated judicial proceedings. NI had also previously served as Vice-Chair and a Board member of ENEL between 1995 and 1996, overlapping with negotiation of the co-operation agreement.

BEG maintained that it did not become aware of those matters until 5 December 2002 when its lawyers learned the information by chance. ACR had invited the party-appointed arbitrators in February 2001 to disclose in writing any conflict of interest. GG stated that he had no conflict, but NI simply accepted appointment without explicitly declaring the absence of a conflict. On 6 December 2002, some 15 minutes after the deposit of the award, BEG submitted a request for NI's removal.

As the domestic proceedings unfolded there were complex disagreements among the parties, the arbitrators and ACR about the sequence of events surrounding the award and BEG's objection to NI. Following proceedings in the Rome District Court and Court of Appeal, the Court of Cassation eventually dismissed BEG's nullity appeal in April 2009 (judgment, 24-37). BEG lodged its complaint with the ECtHR in January 2010, alleging violation of the Article 6(1) right to an independent and impartial tribunal.

A Short Detour: *Mutu and Pechstein*

The ECtHR previously analysed the relationship between Article 6 and arbitral proceedings in *Mutu and Pechstein v. Switzerland* (2018). There, the ECtHR found Switzerland responsible for the conduct of proceedings before the (entirely private) Court of Arbitration for Sport (CAS), but dismissed on the facts the applicants' complaints of lack of independence and impartiality on the part of the tribunal (see also here).

The ECtHR reasoned that a State is responsible for a dispute resolution procedure before a private law body such as the CAS because of its interaction with the State legal system. It held that determination of a dispute by arbitration is not necessarily incompatible with the Article 6(1) right of access to a court. Parties may agree to divert their private pecuniary disputes from a "classic" court to arbitration. However, because this results from a waiver of a Convention right, the ECtHR distinguishes between "voluntary" and "compulsory" submission to arbitration. A "voluntary", and thus effective, waiver of Convention rights must be made "willingly, lawfully and unequivocally" and attracts "minimum safeguards" commensurate with its importance. But where the applicant had no real choice but to agree to arbitration, the guarantees of Article 6 apply with full force.

The ECtHR recalled that under Article 6(1), a court must be sufficiently independent and must meet "subjective" and "objective" tests of impartiality. However, in arbitration "to which consent has been given freely, lawfully and unequivocally, the notions of independence and impartiality may be construed flexibly" given the role of the parties themselves in appointing the tribunal (judgment, 147).

On the facts, the ECtHR accepted that the Federal Supreme Court had fully investigated the question of independence and impartiality. The constitutional arrangements of the CAS made it "similar to a judicial authority independent of the parties" (judgment, 157). However, Ms. Pechstein – unlike Mr. Mutu – had not made a "free and unequivocal" waiver of her Article 6(1) rights. Absent valid waiver of the right to a public hearing, the private hearing under the then CAS rules violated that element of Article 6(1).

Mutu and Pechstein left important questions unresolved. In what circumstances might the ECtHR go behind the evaluation of independence and impartiality by the domestic court? What does the "flexible" standard of independence and impartiality connote in practice? Is there a real difference

between the "full" guarantees of Article 6(1) which apply to "compulsory" arbitration, and the standards applicable to "voluntary" arbitration (a question obscured by the significant factual differences between the two applicants' cases)? What does the ECtHR's case-law tell us about its attitude to arbitration more broadly?

BEG SpA v. Italy: The ECtHR's Reasoning

This case – in which the Italian courts were seised of the matter between 2002 and 2010, and the ECtHR between 2011 and 2021 – is hardly a triumph of judicial expedition. The ECtHR was not assisted by having to address an exhaustive series of procedural objections by the Italian government to the admissibility of the claim, eventually resolved in BEG's favour. That left admissibility turning on jurisdiction *ratione personae* – that is, the issue of State responsibility for the arbitral proceedings.

The ECtHR noted that Italian law "conferred jurisdiction on the domestic courts to examine the validity of arbitral awards". Here, the courts had exercised that jurisdiction. The District Court's decree gave the award "the force of law in the Italian legal order", and the appellate courts "examined and dismissed" the nullity appeal (judgment, 65). The ECtHR therefore had jurisdiction to examine "the acts and omissions of the ACR as validated by the Italian domestic courts" (judgment, 66).

On the merits, the ECtHR first had to determine whether the right relied on had been effectively waived. It affirmed that the Article 6 "right to a court" does "not necessarily" mean access to a "court of law of the classic kind, integrated within the standard judicial machinery of the country". A "tribunal" may be a body "set up to determine a limited number of specific issues", so long it offers "the appropriate guarantees". Thus "[a]rbitration clauses, which have undeniable advantages for the individuals concerned as well as for the administration of justice, do not in principle offend against the Convention" (judgment, 126). The ECtHR once more referred to the distinction between "voluntary" and "compulsory" arbitration. Here, it was common ground that the arbitration proceedings were voluntary in nature. Thus the focus was on whether the applicant waived "in an unequivocal manner… its right to have its dispute with Enelpower settled by an independent and impartial tribunal" (judgment, 136).

The ECtHR concluded:

- BEG's acceptance of the ACR arbitration pre-dated Enelpower's appointment of NI as arbitrator (judgment, 137).
- BEG's omission to challenge NI's original failure to make an explicit declaration about conflicts was not a waiver of its right to an independent and impartial tribunal. Article 6 of the ACR Rules compelled each arbitrator to indicate in their written declaration any relationship with the parties or interest in the subject-matter, hence the absence of an explicit disclosure entitled BEG to "legitimately presume" that none existed (judgment, 138-139).
- The Government's suggestion that BEG was "most probably aware", through GG, of the links between NI and ENEL was "based on a presumption of knowledge which does not rest on any concrete evidence" of BEG's knowledge (judgment, 140).
- BEG had sought NI's withdrawal as soon as it discovered his professional links with ENEL. BEG had appealed against the award on that basis, and the domestic courts duly considered the

merits of its complaint. The facts "radically differed" from *Suoveaniemi and others v. Finland*, in which the ECtHR found an "unequivocal" waiver where a party failed to seek an arbitrator's withdrawal after becoming aware of grounds of challenge. (judgment, 141-142).
- There had therefore been no unequivocal waiver of impartiality, and the arbitration proceedings "had to afford the safeguards" of Article 6(1) (judgment, 143).

Turning to the substance, the ECtHR largely reiterated well-established principles including those stated in *Mutu and Pechstein* (compare *BEG* 128-133 with *Mutu and Pechstein* 140-144). However, it added some observations – nearly all based on previous authority about judicial proceedings – that provide interesting insight into its thinking on the application of Article 6(1) to arbitration. Thus "…a tribunal's member must be independent *vis-a-vis* the executive, Parliament, but also the parties" (judgment, 128). As regards impartiality, "the objective test is functional in nature: for instance, professional, financial or personal links between a judge and a party to a case… may give rise to objectively justified misgivings as to the impartiality of the tribunal". Thus the "nature and degree" of the connection is important (judgment, 131). As in *Mutu and Pechstein*, appearances matter because "what is at stake is the confidence which the courts in a democratic society must inspire in the public" (judgment, 132).

Applying those principles, the ECtHR held:

- The "public" or "private" status of ENEL and Enelpower was irrelevant to NI's independence and impartiality. What mattered were "the relationships between ENEL and Enelpower" (judgment, 144).
- There was no evidence of "personal prejudice or bias" on NI's part, hence no subjective lack of impartiality (judgment, 145).
- NI served as Vice-Chair and Board member of ENEL when ENEL itself was directly negotiating the power plant project with BEG. Given the "importance and economic stakes" of the project, and regardless of whether he was personally aware of the negotiations, "NI's senior role in the entity… whose subsidiary Enelpower would later oppose [BEG] in the arbitration proceedings, seen from the point of view of an external observer, could legitimately give rise to doubts as to his impartiality" (judgment, 148-149).
- NI had acted as counsel to ENEL in concurrent civil proceedings, albeit concluded by a judgment of the Court of Cassation before appointment of the tribunal in the present case. However, when the concurrent dispute began, Enelpower was an internal division of ENEL and even after 1999 was still its wholly-controlled subsidiary. Since the domestic courts' consideration of BEG's nullity appeal, the CCP had been amended to broaden the grounds for removing an arbitrator "to an extent similar to ordinary courts of law" (a change the ECtHR noted "with interest", judgment 150-152).

Overall, "NI's impartiality was capable of being, or at least appearing, open to doubt and that [BEG's] fears in this respect can be considered reasonable and well-founded." There had been a violation of Article 6(1). (judgment,153-154). The ECtHR awarded €15,000 for non-pecuniary damage as just satisfaction under Article 41 (162-163).

In the wake of *BEG*, is a contracting State now in principle answerable under the Convention for the conduct of all private arbitral proceedings taking place within its jurisdiction? What does the case tell us about the relationship between the independence and impartiality test developed in the international arbitration context on the one hand, and the ECtHR's application of Article 6 to arbitral proceedings on the other? These questions are addressed in the remaining post in this series

(Part II).

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This entry was posted on Thursday, July 29th, 2021 at 8:17 am and is filed under Arbitrators, European Convention on Human Rights, European Court of Human Rights, Independence and Impartiality, International arbitration
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