Kluwer Arbitration Blog

Human Rights and Arbitration: A discussion between the President of the European Court of Human Rights and Neil Kaplan

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The intersection between human rights and arbitration is often complicated and ambiguous. The recent discussion between the President of the European Court of Human Rights ("ECtHR"), Judge Robert Spano, Neil Kaplan CBE QC SBS and Chiann Bao during Delos' *In conversation with Neil* webinar (the recording is also available here) unpacked a number of complex issues concerning the applicability of the European Convention on Human Rights ("ECHR" or "Convention") principles to arbitral proceedings.

Margin of Appreciation and Fair Compensation

The ECtHR deals with cases at the intersection of sovereignty and international jurisdiction. As it is grounded in a treaty-based system, Member States are able to retain an element of control over the internal application of ECHR principles. The doctrine known as the margin of appreciation is how this balance is achieved. The margin of appreciation is accordingly a spectrum of deference, which the Strasbourg court bestows on contracting States, dependent on the case. While the margin will be wider in cases concerning economic and social policy, it is more narrow in cases involving breaches of certain rights, such as freedom of expression, freedom of manifesting religion, freedom of assembly, and non-existent in cases of state-agent imposed torture or the taking of life.

The rise of surveillance activities within Member States has led to a number of applications demanding the ECtHR establish to what extent do human rights principles allow for the bulk surveillance of the general public. The recent ECtHR case, ***Catt v UK*** is illustrative of how the ECtHR applies the doctrine of margin of appreciation. The ECtHR found the UK violated a peace activist's right to privacy under Article 8 by allowing the police to collect and retain information about him in an "extremist database" without a pressing need for this. While the ECtHR affirmed previous case law which found that the broad collection of information could pursue a legitimate purpose, it held that, in light of the specific circumstances of the case, it was disproportionate and unnecessary to retain personal data beyond established limits and without scheduled review.

The margin of appreciation is also found in the context of disputes arising from foreign investments: as part of considering the host State's defence to the claims, an arbitral tribunal will have regard to the public policy rationale for the State actions in question and the extent to which

said actions were taken in the public interest. The analysis in this context will be different to that performed by domestic courts, as the competing rights at stake are typically different. President Spano points out that many pre-agreed international investment agreements contain certain investor rights and State obligations to protect foreign investment, which serve to balance individual public interest rights against the interpretation of the provisions. States are therefore typically obliged to pay fair compensation even where dire economic conditions render this extremely burdensome. The margin of appreciation arguably exists in this context to ensure that the fundamental right to fair compensation, as guaranteed under international investment agreements, is protected in parallel to those human rights guaranteed under the Convention.

Arbitration and/vis-à-vis the guarantees under Article 6(1) ECHR

Where two parties opt for a private model of dispute resolution, they are waiving their right to have access to a regular court and public hearing, which is granted by Article 6(1) ECHR. From an ECHR perspective, there is nothing suggesting that voluntary recourse to arbitration is intrinsically anathema to due process. A clear distinction can be observed between voluntary and compulsory arbitration in the ECtHR's caselaw, which is illustrated below through analysis of an example of voluntary arbitration in a commercial contract and an example of compulsory arbitration in a sporting contract.

President Spano demonstrated how the ECtHR handled a recent application concerning a commercial arbitration ***Tabbane v. Switzerland*** (discussed here). The parties to the initial dispute were Tabbane (the applicant), a Tunisian businessman, and Colgate. President Spano relayed, "The tribunal composed [because of the dispute] refused to appoint an expert. After seeking aid from the Swiss Federal Supreme Court, the applicant applied to the ECtHR to claim the arbitral tribunal's refusal to appoint an expert violated Article 6 on procedural fairness. The ECtHR had to decide whether Article 6 could apply in a voluntary arbitration and, whether, even if it did, there had been a violation of due procedural fairness. The Court left the direct applicability of Article 6 open using an 'even assuming' rationale. Hence, even assuming Article 6 applies, the way the arbitral tribunal refused the expert opinion was in line with the general case law of ECtHR".

By contrast, there has been an evolution in the analysis of compulsory forms of arbitration from the formal concept of legal imposition towards an examination of whether a party has been forced into arbitration because of the consequences of not entering into the agreement. This has been recently explored by the ECtHR in the field of sports arbitration (discussed here) where the structural imbalance between sports governing bodies and athletes impacts the integrity of the arbitration agreement.

The recent case ***Ali Riza et al. v. Turkey*** (discussed here) is a clear example demonstrating the ECtHR's power to check whether compulsory consent to an arbitration agreement constituted a violation of Article 6(1) ECHR. The ECtHR grouped five individual complaints together to address the common challenge to the independence of the Turkish Football Federation's Arbitration Committee. The ECtHR found that a certain legal framework was required to exist in order to ensure that compulsory arbitration would not amount to an infringement of Article 6(1) ECHR. The ECtHR concluded that a violation of Article 6(1) had occurred due to i) the structural imbalance between athletes and governing bodies; ii) the lack of independence of the arbitral body; iii) an insufficient mechanism to challenge arbitrators; and iv) the inability to set aside the award.

The importance of independence and impartiality of an arbitral tribunal is therefore greater in cases of compulsory arbitration than party autonomy is in cases of voluntary arbitration. The reasoning behind this is related to the nature of arbitration. Whereas an understanding of arbitration as purely contractual may lead to some considering compulsory arbitration a barrier to due process, a hybrid theory of arbitration clarifies that State support in recognizing arbitration as a private method of dispute resolution validates the unilateral nature of consent in compulsory arbitration.

The above shows the distinction drawn by the ECtHR between the ability to pursue private dispute resolution such as arbitration, and thus waive some of the procedural guarantees provided for by Article 6(1) of the ECHR, and the inability to waive those rights forming part of the inherent concept of human dignity. These cases further show the increasing recognition of the role of human rights in arbitration and the corresponding assumption of power taken by the ECtHR to assert them.

Conclusion

Despite the initial welcome and spectacular development of human rights and private dispute resolution mechanisms, both now face legitimacy crises amplified by global issues, such as climate change, growing inequality and COVID-19.

Human rights and arbitration have come under greater scrutiny over issues of efficiency in recent years. President Spano remarked that case management must be improved to reduce the time and costs needed to resolve disputes for the ECtHR to remain relevant in the next 5-10 years. He made clear that such internal reforms within the Court would form the cornerstone of his mandate as President of the ECtHR. Parallels can be drawn between the ECtHR and arbitral institutions in this respect. Because a lack of support is particularly prevalent at the grassroots level, it is essential for the ECtHR and arbitral institutions to reform to inspire greater confidence and communicate this to the wider public.

President Spano and Mr Kaplan concluded that a harmonious integration of human rights principles into all areas of law and society is crucial, with human rights and contract law to start being taught in schools.

Concepts like the margin of appreciation, which has been employed to balance public interest objectives with individual human rights in the ECtHR and for rights granted through other pre-agreed international instruments, such as investment agreements, are gaining greater attention. The applicability of the concept in arbitration has been noted in a number of recent cases concerning investor-state and commercial arbitrations. It is therefore vital that the level of deference or discretion used by the judiciary and arbitral tribunals is monitored so as not to exceed their powers.

The role of the ECtHR in safeguarding the rights of individuals against the exploitation of vulnerable parties in situations of unilateral consent to compulsory arbitration is also exercised with support for arbitration as a mechanism of dispute resolution. It is clear that while agreement to private dispute resolution requires a waiver of Article 6(1) ECHR, this does not equate to a waiver of a right to due process and ensures that arbitration is carried out in an efficient and effective manner.

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