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

Gordon Nardell (Twenty Essex) · Thursday, July 29th, 2021

In the wake of *BEG* (see [Part I](#)), what conclusions can we draw about the place of arbitral independence and impartiality in the ECtHR's Article 6 jurisprudence?

State Responsibility and Private Arbitral Proceedings

Is a contracting State now in principle answerable under the Convention for the conduct of all private arbitral proceedings taking place within its jurisdiction, or is the position more nuanced?

The ECtHR has rejected any suggestion that the responsibility of the State, or the operation of the guarantee of independence and impartiality itself, is dependent on there being some “public” character to the underlying arbitral proceedings – whether in the shape of a public law arbitral institution (*Mutu and Pechstein*) or a public sector party to the proceedings (*BEG*). In *BEG*, the ECtHR affirmed that the key mechanism for engaging responsibility is the interaction between arbitration and the State's legal order. Interestingly the ECtHR noted that the Rome Chamber of Commerce was a “local authority established under public law” (judgment [63]). However, its articulated reasons for accepting jurisdiction *ratione personae* make no reference to that and essentially match those in *Mutu and Pechstein* (where the ECtHR expressly recognised the private character of the CAS).

On that basis, it is not easy to see what sort of arbitral proceeding taking place within a Contracting State might escape the ambit of the Convention. Every Contracting State confers some jurisdiction on its courts to assist or supervise arbitral proceedings seated within its territory, and to enforce awards made in proceedings seated there or elsewhere. The requirement to exhaust domestic remedies means that any case reaching the ECtHR merits stage has been the subject of an exercise of jurisdiction by the competent national court. The territorial limitation in Article 1 of the Convention to matters within a State's “jurisdiction” may raise interesting questions at the margins – for example, where the alleged breach arises in arbitral proceedings seated, and physically held, outside the State concerned. Investor-State arbitration under the auspices of ICSID, a creature of public international law, raises delicate issues of allocation of responsibility. Even then, a Convention issue could conceivably arise if the Contracting State authorities enforce an award alleged to result from patent disregard of the safeguards contemplated by Article 6.

Waiver

It is now firmly settled that in applying the doctrine of waiver to arbitration, the ECtHR will carefully distinguish between different elements of the rights guaranteed by Article 6(1). The ECtHR affirmed in *BEG* its relaxed approach to parties conferring jurisdiction – over “pecuniary” disputes at any rate – on a body other than a “classic” State court. The ECtHR made clear that it recognised the benefits, for the parties themselves and the wider public interest, of enabling parties to opt for arbitration by waiving their Article 6(1) “right to a court”. But equally clear is the much finer-grained approach the ECtHR takes to any suggestion that a party has consequently renounced the procedural guarantees ordinarily expected of civil justice. *BEG* demonstrates that even in a “voluntary” case, the ECtHR will carefully scrutinise not only the arguments of the respondent State but the conclusions of the national courts themselves.

This last point is of interest given the ECtHR’s repeated disclaimers of the role of “fourth instance” appeal against domestic judicial decisions (see generally, [here](#) and [here](#)).

Once more, the exhaustion requirement means that the domestic courts will nearly always have formed a view on the subject-matter of the Strasbourg complaint. But the crucial point is that the rights in play before the ECtHR are by definition human rights. The Italian courts focused on whether the challenge to NI was technically brought in time, and on supposed common knowledge about his background in the parties’ sphere of activity. But that fell far short of enquiring whether the evidence established BEG’s “free and unequivocal” renunciation of a Convention right. It is precisely the need to ask the right question, and to answer it through a searching analysis of the facts, that constitutes the “minimum safeguard” commensurate with the importance of the right allegedly waived. In the absence of such an exercise by the domestic courts, the ECtHR not surprisingly conducted its own review of the evidence and reached a different conclusion.

This element of *BEG* carries important lessons for Contracting State courts – and arbitral tribunals and institutions themselves – determining questions of waiver of arbitrator conflicts under national law or arbitral rules. Those decisions must take proper account of the high value of the right to an independent and impartial tribunal. They must focus on evidence of what a party actually knew, rather than on what might supposedly be “common knowledge” within the arbitral or business community.

Also noteworthy is the ECtHR’s position on arbitrator disclosure. Its rejection of the domestic courts’ approach to NI’s silence on his links with Enel, which effectively placed the onus on BEG to discover those matters for itself, reinforces developments elsewhere such as the UK Supreme Court’s recognition in *Halliburton v. Chubb* (see also [here](#)) of a positive duty of disclosure of facts that might reveal a conflict.

Independence and Impartiality in Arbitral and Judicial Proceedings: Same Difference?

There is now a welcome convergence between the test for a disqualifying conflict developed in the international arbitration context and the ECtHR’s articulation of the Article 6 test for independence and impartiality. Neither requires actual proof of subjective bias. Compare the ECtHR’s repeated references to “legitimate doubts” with Gary Born’s 2014 formulation:

It is not necessary for a party challenging an arbitrator to demonstrate that the individual lacks independence or impartiality; it is instead sufficient to show that there is enough ‘doubt’ or ‘suspicion’ as to an arbitrator’s impartiality to justify either not appointing or removing the arbitrator.

([here](#) pp. 1911 et seq. On the importance of appearances see also [Halliburton 1](#), 54-55.)

However, in determining what is “enough” doubt, does the ECtHR now expect an arbitrator to meet the same measure of independence and impartiality as a State court judge?

As noted in [Part I](#), in *Mutu and Pechstein* the ECtHR referred to the “flexible” application of the Article 6 standard to arbitration bearing in mind the parties’ role in appointing the tribunal, but gave no indication how that “flexibility” might manifest itself in practice. In Ms. Pechstein’s “compulsory” case the ECtHR appeared to assimilate the arbitral standard closely to the judicial standard. *BEG* was explicitly treated as a “voluntary” case. Yet every indication in the ECtHR’s formulation and application of the test is that there is no discernible difference between the judicial and arbitral standards of independence and impartiality. There is some logic to that. While the parties, rather than the State, appoint “their” tribunal, the whole point of examining the links (past and present) between an arbitrator and a party is precisely to ensure the tribunal’s objective separation from the parties.

The only explicit indication in *BEG* of a material difference in the standards applicable to judicial and arbitral proceedings concerned the question of waiver. At judgment, 141, the ECtHR commented:

By employing such a test... as regards the need for a voluntary and unequivocal waiver of the right to an impartial adjudicator... the Court emphasises that it has been developed in the context of arbitral proceedings... without having to decide whether a similar waiver would be valid in the context of purely judicial proceedings

So it might be harder to establish an effective waiver of independence and impartiality in relation to a State court than an arbitral tribunal. But once the ECtHR finds no valid waiver, the quality of independence and impartiality expected of an arbitral tribunal is essentially the same as, or not materially less than, that expected of a civil court hearing a comparable case. That appears to be so whether the submission to its jurisdiction was “compulsory” or “voluntary”.

Protection of Arbitral Integrity: Tough Love?

What about the ECtHR’s overall attitude to arbitration? Not everyone in the dispute resolution community will welcome the growing prospect of parties to arbitral proceedings “having a go” in Strasbourg after losing an arbitrator challenge in the domestic courts. In *BEG*, however, the ECtHR expressly acknowledged arbitration as a beneficial form of dispute resolution. In other words the ECtHR’s insistence that arbitral proceedings observe the high procedural standards set by Article 6(1) is founded in a desire to ensure that arbitration maintains those beneficial qualities and thus its attractiveness. Just as insufficient guarantees of a judge’s independence from the executive may

harm public confidence in the administration of justice (as the ECtHR observed in *Mutu and Pechstein* and *BEG*), the insufficiency of an arbitrator's independence from a party is liable to harm the business community's confidence in arbitral justice – to the detriment of arbitration itself. Tough love indeed.


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