Unilateral Option
Arbitration clauses: An
unequivocal choice for
arbitration under the ECHR?

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Abstract
Unilateral option arbitration clauses (UAC) are clauses under which the parties bound by it are restricted to bringing proceedings in a particular jurisdiction, while at the same time providing one or more parties the option to elect that a dispute be referred to arbitration. The latter right is unilateral in that it may only be invoked by the beneficiary party or parties that are designated in the UAC. This article submits that the concept of a UAC is compliant with the European Convention on Human Rights (ECHR). More particularly it argues that UACs meet the requirements – developed through the case law of the European Court of Human Rights (ECtHR) – that the waiver of the right to access to an impartial and independent court established by law is agreed upon freely and unequivocally. It is concluded that there is nothing in the ECtHR’s case law to suggest that a UAC conferring the choice for arbitration or litigation only to the beneficiary of the UAC would be contrary to these requirements.

Keywords
Unilateral option clause, unequivocal, ECHR

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1. Introduction

A unilateral option arbitration clause (UAC) is a clause under which the parties bound by it are restricted to bringing proceedings in a particular jurisdiction, while at the same time providing one or more parties the option to elect that the dispute be referred to arbitration.¹

This article submits that the concept of a UAC is compliant with the European Convention on Human Rights (ECHR). More particularly it argues that, as a general rule, UACs meet the requirement – developed through the case law of the European Court of Human Rights (ECtHR) – that the waiver of the right to access an impartial and independent court established by law is agreed upon freely and unequivocally.

Section 2 discusses the typical form, application and operation of UACs. Section 3 provides an overview of the discussions on the validity of UACs in the American context, in which UACs have been the topic of debate for decades. Section 4 discusses the requirements for a valid renouncement of the fundamental right of access to a state court as provided for in Article 6 ECHR.

Based on these analyses, it is submitted (in Section 5) that UACs are compliant with the ECHR’s requirements, provided that the criteria for waiver of the (fundamental) right to access to a state court are fulfilled.

2. The typical form, application and operation of UACs

A. Form and operation of UACs

In its most common form, a UAC provides a party or parties to a contract with the option of unilaterally submitting a dispute to arbitration, whilst the other party (or parties) are restricted to bringing proceedings in the courts of a particular jurisdiction.² UACs may also provide all the parties to the agreement with the right to opt for arbitration, without the need to obtain the consent from the other party or parties to the contract. This article focuses on what is referred to as asymmetrical UACs. These are clauses that grant only one of the parties the advantage of choosing to have the dispute be resolved by means of arbitration or litigation, depending on what best suits its interests.³

It is generally irrelevant which of the parties – the beneficiary of the UAC or its counterpart – initiates the (litigation or arbitration) proceedings. If the party that is not the beneficiary of the UAC commences (court) litigation, this does not bar the beneficiary from (unilaterally) invoking the right to arbitrate.⁴ To that effect, the beneficiary of the UAC requests the court to decline jurisdiction in favour of arbitration. Conversely, if the beneficiary of the UAC acts as a claimant, it

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¹ S. Nesbitt and H. Quinlan, ‘The Status and Operation of Unilateral or Optional Arbitration Clauses’, 22 Arbitration International (2006), p. 133, 134.
² Ibid., p. 133.
³ H. Smit, ‘The unilateral Arbitration Clause: A Comparative Analysis’, 20 American Review of International Arbitration (2009), p. 391, 393; L. Nidam, ‘Unilateral Arbitration Clauses in Commercial Arbitration’, 5 Arbitration & Dispute Resolution Law Journal (1996), p. 147; and M. Scherer, ‘A Cross-Channel Divide Over Unilateral Dispute Resolution Clauses’, in H.A. Grigera Naón and B.G. Affaki (eds.), Jurisdictional Choices in Times of Trouble (Kluwer Law International, 2015), p. 10-20, the latter noting that ‘unilateral dispute resolution clauses have in common that they offer a unilateral (onesided) option granting one party a choice in which forum to bring the dispute, whereas the other party has no such choice’.
⁴ B. van Zelst, ‘UACs in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context’, 33 Journal of International Arbitration (2016), p. 365-378.
may choose at its own discretion to either commence (court) litigation or arbitration. The counterparty is then bound by this choice. The circumstances in which the beneficiary may exercise its right to either arbitrate or litigate ultimately depends on the specific language that is contained in the UAC.

**B. Benefits and areas of application**

The reasons for the beneficiary of the UAC to exercise its right to opt either for or against arbitration will depend on the circumstances of each particular case. Arbitration may be the preferred dispute resolution mechanism for a party that seeks a swift and informal means of resolving a given dispute. In other cases, court litigation may be preferred in view of the availability of procedural mechanisms such as pretrial motions, extended discovery and appeals. These mechanisms are not always available in arbitration.

UACs are found most commonly in tenancy and construction contracts. However, they are also found in the field of financial services, in which UACs are becoming increasingly commonplace. Where financial institutions used to prefer litigation over arbitration, it has been submitted that the increasing internationalization of banking and finance transactions and inconsistencies in court decisions, combined with the relative ease of enforcement of arbitral awards, have attracted actors in the financial services sector towards the use of arbitration.

**C. How is a UAC invoked?**

A beneficiary may invoke the UAC ‘directly’ by commencing arbitral proceedings in conformity with the provisions of the UAC. These may provide that the arbitration takes place under the auspices of an arbitral institution and/or provide the seat of the arbitration. Subsequently, the arbitral tribunal must be appointed in accordance with the parties’ agreement. The arbitral tribunal will – pursuant to the principle of *competence* – assess whether the UAC does indeed constitute a valid agreement to arbitrate. On that basis, it will either assume or deny jurisdiction. It is important to note that the conclusion of the tribunal that a valid arbitration agreement exists, may

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5. H. Smit, *American Review of International Arbitration* (2009), p. 393. See also, W.W. Park, ‘Text and Context in International Dispute Resolution’, *Boston University International Law Journal* (1997), p. 191, 207.

6. S. Nesbitt and H. Quinlan, *Arbitration International* (2006), p. 133.

7. See the 2013 International Arbitration Survey conducted by Queen Mary University London and PwC, concluding that ‘litigation is the clear favorite for respondents in the Financial Services sector’. The report is available at, PriceWaterhouseCoopers, ‘Corporate choices in International Arbitration’, *PWC* (2013), http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf. See also, N. Horn, ‘The Development of Arbitration in International Financial Transactions’, *Arbitration International* (2000), p. 279, 283 et seq.; W.W. Park, ‘Arbitration in Banking and Finance’, *Annual Review Of Banking Law* (1998), p. 213, 216; S. Cirelli, ‘Arbitration, Financial Markets and Banking Disputes’, *American Review Of International Arbitration* (2003), p. 243, 268; M. Davies, ‘The Use of Arbitration in Loan Agreements in International Project Finance: Opening Pandora’s Box or an Unexpected Panacea?’, *Journal of International Arbitration* (2015), p. 143, 171.

8. I. Hanefeld, ‘Arbitration in Banking and Finance’, *New York University Journal of Law and Business* (2012), p. 917, 923.

9. This is, albeit recommendable in view of discussions over these issues being undesirable in the light of the otherwise complex nature of the UAC, generally not a requirement.

10. For a discussion see, N. Blackaby et al., *Redfern and Hunter on International Arbitration* (6th edition, Oxford University Press, 2015), para. 5.105 et seq.
be challenged in setting-aside proceedings before the competent court at the seat of the arbitration.\textsuperscript{11}

A beneficiary may invoke the UAC ‘indirectly’ by requesting the court seized by its counterpart to ‘refer the parties to arbitration’ as per Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).\textsuperscript{12} This provision requires – by means of a reference to Article II(1) of the New York Convention – that the agreement to arbitrate be ‘in writing’.\textsuperscript{13} Consequently, the beneficiary will have to submit before the court that the UAC should be construed as an (albeit, unilateral option) arbitration agreement under which the court should refer the parties to arbitration. It will be submitted below that this is congruent to the requirement under the ECHR that a waiver of procedural rights requires minimum guarantees that are commensurate to the importance of the rights waived.\textsuperscript{14}

The state court may also be called upon to assess the validity of the UAC – the part constituting the arbitration agreement more particularly – after an arbitral award has been rendered. This may initially be done by the court of the seat of the arbitration. Secondly, a state court may be seized of an action to recognize and enforce an arbitral award.\textsuperscript{15}

The norms provided in the ECHR are equally applicable to court proceedings that are related to arbitration concerning the jurisdiction (direct reliance), setting-aside and recognition and enforcement phases.\textsuperscript{16} Consequently, a court faced with such an action will have to investigate whether the UAC meets the criteria established by the ECHR. It will thus have to assess whether the waiver of the right of access to a court established by law was in accordance with the case law of the ECHR.\textsuperscript{17}

In a matter brought before the English courts by a non-beneficiary of a UAC, it was argued that the option invoked by the beneficiary could only operate where the UAC was invoked directly, that is, in cases where the beneficiary acted as the claimant. The court found in favour of the beneficiary, arguing that the construction of the UAC by the non-beneficiary was contrary to ‘the commercial sense of the clause as a whole’ which – according to the English court – was ‘to give “better” rights to [the beneficiary]’ than to its counterparty.\textsuperscript{18} This seems to me to be a correct application of the concept. Otherwise the non-beneficiary could render the UAC inoperative by simply commencing proceedings before a (competent) state court.

Moreover, at the stage of recognition and enforcement of an arbitral award, the court seized must assess the validity of the UAC under the applicable law. Under Article V(1)(a) of the New York Convention, the law applicable to the arbitration agreement is ‘the law to which the parties

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\item \textsuperscript{11} For a comparative discussion of the attitude of the EU Member States towards UACs, see, B. van Zelst, 33 Journal of International Arbitration (2016), p. 365-378. On the challenges of arbitral awards more generally, see N. Blackaby et al., Redfern and Hunter on International Arbitration, p. 10.01 et seq.
\item \textsuperscript{12} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made at New York 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
\item \textsuperscript{13} G.B. Born, International Commercial Arbitration (2nd edition, Kluwer Law International, 2014), p. 636 et seq.
\item \textsuperscript{14} See, Section 4 below.
\item \textsuperscript{15} As per Article III of the New York Convention.
\item \textsuperscript{16} S. Besson, ‘Arbitration and Human Rights’, 24 ASA Bulletin (2006), p. 395, 416; and R. Briner and F. von Schlabendorff, ‘Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration’, in R. Briner et al. (eds.), Law of International Business and Dispute Settlement in the 21st Century (Carl Heymanns Verlag KG, 2001), p. 89, 92, 109.
\item \textsuperscript{17} This will be discussed in Section 4 below.
\item \textsuperscript{18} Three Shipping Ltd. v. Harebell Shipping Ltd, [2005] 1 Lloyds Rep 509.
\end{itemize}
have subjected it or, failing any indication thereon, ( . . . ) the law of the country where the award was made’. If the UAC is valid under this law, recognition and enforcement may not be refused on the basis that the award that is sought to be recognized and enforced is not based on a valid arbitration agreement.

A second issue that may arise at the stage of recognition and enforcement of an award based on a UAC is whether such an award should be considered contrary to the public policy of the court which is requested to grant an exequatur. In this context, it has been submitted that the public policy exception provided for in the New York Convention only concerns (a violation of) international public policy. In this context, international public policy is construed as a narrow concept. In view thereof, the lack of balance in (the negotiations leading up to an) the arbitration agreement should not per se be considered as a violation of such international public policy.

3. Discussion of UACs in the American context

In the EU Member States, the debate surrounding UACs constitutes a relatively recent debate. In the United States, however, the debate on the validity and enforceability of UACs goes back over half a century. This section will set out the key issues that are present in the American debate. An understanding of these key issues is helpful in comprehending the assessment of the validity of UACs in the European (human rights) context that is provided, below, in paragraph 4.

As with any contract, an agreement to arbitrate requires consent from the parties involved. In common law systems, the idea that contracting requires ‘mutuality of obligation’ has long historical roots. It is therefore unsurprising that in the early cases under US (State) law, UACs were scrutinized for lacking such mutuality. After all, a UAC is, by its very nature, a one-sided agreement, providing only one of the parties the choice between arbitration and litigation.

In later decisions, it was recognized that the doctrine of consideration requiring that ‘either both of the parties are bound, or neither is bound’ does not necessarily entail that the assent manifested by the parties is symmetric in time, place or form. Consequently, in those decisions the doctrine of mutuality of obligations was no longer held to preclude the enforceability of UACs. In the words of the Third Circuit, ‘[i]t is of no legal consequence that the arbitration clause gives [one of the parties] the option to litigate arbitrable issues in court, while requiring [the other] to invoke arbitration’.

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19. Article V(1)(a) of the New York Convention.
20. A.-J. van den Berg, The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation (Asser/ Kluwer, 1981), p. 382.
21. For a comparative discussion – arguing that even under national public policy, UACs are generally acceptable, see B. van Zelst, 33 Journal of International Arbitration (2016), p. 365-378.
22. Ibid. See also, M. Scherer, in H.A. Grigera Naón and B.G. Affaki (eds.), Jurisdictional Choices in Times of Trouble, p. 10-20.
23. C.R. Drahozal, ‘Nonmutual Agreements to Arbitrate’, 27 Journal of Corporate Law (2002), p. 357.
24. See, e.g. Deutsch v. Long Island Carpet Cleaning Co., 158 N.Y.S.2d 876; Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811 and Hull Dye & Print Works, Inc. v. Riegel Textile Corp., 325 N.Y.S.2d 782. UACs were ruled to be in conformity with the mutuality requirement in, amongst others, Matter of Tavkorian, 95 N.Y.S.2d 240 and Affiliated Coat & Apron Supply Co., 153 N.Y.S.2d 970.
25. L. Niddam, ‘Unilateral Arbitration Clauses in Commercial Arbitration’, 5 Arbitration and Dispute Resolution Law Journal (1996), p. 147. See also, C.R. Drahozal, 27 Journal of Corporate Law (2002), p. 357.
26. Charles Harris v. Green Tree Financial Corporation, 183 F.3d 173 (3d Cir. 1999). For further discussion see, C.R. Drahozal, 27 Journal of Corporate Law (2002), p. 542 et seq.
That is not to say that no circumstances could exist under which UACs would be rendered unenforceable. In consumer law and employment transactions, the US Courts – those in California in particular – have applied a more stringent test, requiring that the UAC satisfies the substantive element of unconscionability. One of those elements is that the UAC has ‘at least some reasonable justification based on business realities’. This approach – apparently aimed at protecting weaker parties – was criticized by Drahozal as the reappearance of ‘the ghost of mutuality (.), this time cloaked in the garb of unconscionability’. This, it is argued, leads to legal uncertainty. In Drahozal’s view this is particularly pressing as ‘[i]n fact, consumers, employees, and society as a whole may actually be worse off as a result of a mutuality requirement, even under skeptical assumptions about business behavior’.

Drahozal’s views are starkly contrasted by those of the late eminent arbitration scholar Hans Smit. He argued that UACs were ‘patently unfair’ and had ‘no place in an enhanced system of adjudication and should be held unenforceable in all circumstances’. However, Smit also concluded that the ‘division among the courts and the scarcity of penetrating commentary leave a great measure of uncertainty’ as to the enforceability of UACs. In view of this ‘undesirable’ uncertainty, Smit advises arbitration institutions to ‘outlaw (. . .) the use of [UACs] in arbitrations they administer by providing in their rules that any form of unilateral or option clause will be converted in an arbitration clause without the optional or unilateral feature’ thereby prohibiting that ‘the parties are relegated to resolving their disputes in the courts’, should the UAC be struck down.

This is, however, not the position that is generally applied by the US courts. UACs are in principle acceptable under US law, provided that they comply with the doctrine of unconscionability.

4. UACs and the ECHR

A. Introduction

In the following sections, UACs will be assessed from the perspective of the ECHR. Article 6 of the ECHR provides that: ‘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 (.)’.

27. Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669, 692 (Cal. 2000), ‘[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification (.) based on “business realities”’.
28. C.R. Drahozal, ‘Non-mutual Agreements to Arbitrate’, 27 Journal of Corporate Law (2002), p. 547.
29. Ibid., p. 555.
30. H. Smit, 20 American Review of International Arbitration (2009), p. 403.
31. H. Smit, ‘Contractual Modifications of the Arbitral Process’, 113 Penn State Law Review (2009), p. 995, 1010.
32. Ibid.
33. I understand Rau as sharing this conclusion. See: A.S. Rau, ‘Asymmetrical Arbitration Clauses – The United States’, in H.A. Grigera Naón and B.G. Affaki (eds.), Jurisdictional Choices in Times of Trouble, p. 21-54.
Much has been written about the relevance of Article 6 ECHR to the ambit of arbitration, in particular with respect to the issue of whether that article applies directly to arbitration. This section will, however, focus on the possibility of and requirements for the waiver of the rights that are provided under Article 6 ECHR.

B. Waiver of rights provided under Article 6 ECHR

It seems clear that the arbitral process does not meet several of the requirements that are stipulated in Article 6 ECHR. Hearings in (commercial) arbitrations are generally not public, the tribunal may be considered not to be ‘established by law’ and arbitral awards are seldom pronounced publicly. It has even been questioned how the process of the nomination of arbitrators at some arbitral institutions relates to the requirements of independence and impartiality of the arbitral tribunal.

However, as early as 1962 the European Commission on Human Rights concluded that:

the inclusion of an arbitration clause in an agreement between individuals amounts legally to partial renunciation of the exercise of those rights defined by Article 6(I) whereas nothing in the text of that Article nor any other article of the Convention explicitly prohibits such renunciation, whereas the Commission is not entitled to assume that the Contracting States, in accepting the obligations arising under Article 6(I) intended to prevent persons from coming under their jurisdiction from entrusting the settlement of certain matters to arbitrators.

In making this statement, the European Commission on Human Rights suggested that citizens (including legal entities) of the Contracting States, may waive the fundamental rights provided by the ECHR. This suggestion was subsequently corroborated by the ECtHR in its 1980 decision in Deweer v. Belgium. More particularly the ECtHR considered:

[i]n 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.

It follows from this jurisprudence that the right to access the courts may be waived in favour of arbitration. The requirements for such a waiver are discussed in the following sections.

34. See, amongst others, N. McDonald, ‘More Harm than Good? Human Rights Considerations in International Commercial Arbitration’, 20 Journal of International Arbitration (2003), p. 523, 538; M. Emberland, ‘The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration’, 20 Journal of International Arbitration (2003), p. 355, 363; S. Besson, 24 ASA Bulletin (2006), p. 395, 416; A. Jaksic, ‘Procedural Guarantees of Human Rights in Arbitration Proceedings – A Still Unsettled Problem?’, 24 Journal of International Arbitration (2007), p. 159, 171.
35. A. Samuel, ‘Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View’, 21 Journal of International Arbitration (2004), p. 413, 437.
36. ECtHR, X v. Federal Republic of Germany, Judgment of 5 March 1962, Application No. 1197/61.
37. See, ECtHR, Deweer v. Belgium, Judgment of 27 February 1980, Application No. 6903/75, para. 49.
C. Requirements for a valid waiver under Article 6 ECHR

It follows from the above that arbitration in principle does not violate the safeguards provided by Article 6(1) ECHR. However, both the European Commission on Human Rights and the ECtHR require that the waiver of the right to access to an impartial and independent court established by law is freely agreed as ‘absence of constraint is at all events one of the conditions to be satisfied, this much is dictated by an international instrument founded on freedom and the rule of law’. 38

In addition, the ECtHR has considered that a waiver must in any case be ‘unequivocal’. 39 Although it is unclear whether this requirement of ‘unequivocality’ entails that the waiver must be made in writing, the ECtHR does require that ‘in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance’. 40

That is not to say that the ECtHR has excluded the possibility that a waiver can be made implicitly. However, the matters in which the ECtHR allow for a tacit waiver are limited to cases concerning the right to a public hearing. In this particular context, the ECtHR considered that ‘neither the letter nor the spirit of Article 6 § 1 would have prevented them from waiving this right [to have the proceedings conducted in public] of their own free will, whether expressly or tacitly’. 41 In later decisions, the ECtHR has added that ‘any such waiver must be made in an unequivocal manner and must not run counter to any important public interest’. 42

Given the importance of the right that is waived and given the fact that the New York Convention requires an arbitration agreement to be in writing, it seems logical to assume that the right to access to a competent state court is to be waived in writing. Moreover, the validity of a tacit waiver must not be assumed too easily. From the referred decision in Albert and Le Compte, it may be derived that the waiver of the right to a public hearing must also be in accordance with relevant provisions of national law, ‘conducting disciplinary proceedings of this kind in private does not contravene Article 6 para. 1 (article 6 -1) if the domestic law so permits and this is in accordance with the will of the person concerned’. 43

A last aspect of the requirements for a waiver of procedural rights provided for by Article 6(1) ECHR that is relevant for the purposes of this inquiry is the possibility to waive rights in advance. In the Pastore v. Italy 44 and Jakob Boss v. Germany 45 cases, the ECtHR considered more generally that an arbitration agreement can, in principle, validly waive other rights in advance. 46 In the matter leading to

38. Ibid., ‘the disputed arbitration clause might have been regarded as contrary to the Convention if X had signed under constraint, which was not the case’.
39. See, ECtHR, Neumeister v. Austria, Judgment of 7 May 1974, Application No. 1936, p. 16, para. 36; ECtHR, Le Compte, Van Leuven and De Meyere v. Belgium, Judgment of 23 June 1981, Application No. 7238/75, 6878/75, para. 59; and ECtHR, Albert and Le Compte v. Belgium, Judgment of 10 February 1983, Application No. 7299/75, 7496/76, para. 35. Although this case law chiefly relates to criminal cases, it may be deduced from the ECtHR’s general phrasing (that a ‘waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner’) that this case law equally applies to civil matters.
40. See, ECtHR, Pfeiffer & Plankl v. Austria, Judgment of 25 February 1992, Application No. 10802/84, para. 37.
41. ECtHR, Albert and Le Compte v. Belgium, para. 59.
42. ECtHR, Håkansson and Sturesson v. Sweden, Judgment of 21 February 1990, Application No. 11855/85, para. 66.
43. ECtHR, Albert and Le Compte v. Belgium, para. 35 (emphasis added).
44. ECtHR, Pastore v. Italy, Judgment of 25 May 1999, Application No. 464/83/99.
45. ECtHR, Jakob Boss v. Germany, Judgment of 2 December 1991, Application No. 18479/91.
46. T. Schultz, ‘Human rights: a speed bump for arbitral procedures? An exploration of safeguards in the acceleration of justice’, 9 International Arbitration Law Review (2006), p. 8, 18, 23.
the decision in *Osmo Suovanieme v. Finland* – a case concerning the waiver of the right to challenge an arbitrator for lack of impartiality – the ECtHR subsequently considered, ‘that the waiver [at issue] made during the arbitration proceedings was unequivocal within the meaning of the case-law cited. 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’.47

The ECtHR furthermore – applying the test that a waiver of a procedural right ‘requires minimum guarantees commensurate to its importance’48 – considered that the applicant, Mr Suovaniemi, ‘had approved [the] arbitrator despite their being aware of the grounds for challenging him’ and was represented by counsel ‘throughout the arbitration’. It is in this context that the ECtHR ruled that ‘the waiver was accompanied by sufficient guarantees commensurate to its importance’. Lastly, the ECtHR noted that in the proceedings before the national courts, the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings.49

In view of these considerations it has been proposed that a waiver of a procedural guarantee by means of an arbitral agreement ‘before the fact’ is – in the absence of express provisions to the contrary – valid if the following conditions are met:

(i) The waiver is unequivocal, entailing that it should preferably be made in an express statement. It should not be made implicitly.

(ii) The waiver is made with informed consent, entailing that:

(a) the party giving the waiver is (or has been) aware of the rights waived and of the risks involved and

(b) the waiver is accompanied by guarantees commensurate to the importance of the right that is waived.50

Let us now turn to the analysis of whether UACs are compliant with these requirements as set out by the ECtHR.

5. Analysis: UACs are compliant with the requirements under the ECHR

It follows from the above that the mere choice for arbitration (in the form of a UAC) does not exclude the application of the ECHR as a whole. The waiver of certain procedural rights by virtue of a UAC only affects the specific right(s) in question. This also follows from the aforementioned (1962) decision by the European Commission on Human Rights, which refers to an arbitration clause amounting to a ‘partial renunciation’ of the rights laid down in Article 6(1) ECHR.51 Moreover, the procedural safeguards provided by the ECHR are applicable in proceedings related to arbitration.52

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47. ECtHR, *Suovaniemi and others v. Finland*, Judgment of 23 February 1999, Application No. 31737/96.
48. ECtHR *Pfeiffer & Plankl v. Austria*, para. 37.
49. ECtHR, *Suovaniemi and others v. Finland*.
50. G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, 2004), p. 206.
51. J.C. Landrove, ‘European Convention on Human Rights’ impact on Consensual Arbitration’, in M. Hottelier, S. Besson and F. Werro (eds.), *Human Rights at the Center. Les droits de l’homme au Centre* (Schulthess, 2006), p. 73, 83.
52. See, S. Besson, 24 *ASA Bulletin* (2006), p. 399.
Nevertheless, a party may waive his or her rights of due process in accordance with the ECHR. Although it is not required under the ECtHR’s case law – as the case may be under US State law – that a ‘reasonable justification based on business realities’ for the UAC exists, a waiver of the right to access to a state court, under the ECHR, must be unequivocal. Furthermore, the case law of the ECtHR requires minimum guarantees commensurate to the importance of the right that is waived. In other words, the more relevant the procedural right that is waived, the more stringent the test will be as to whether such a waiver is unequivocal, as is required by the ECtHR’s jurisprudence.

It is submitted that a properly drafted UAC meets these requirements. After all, a UAC – provided that it is freely concluded – provides for an unequivocal renouncement of the right to access a domestic court. There is nothing in the ECtHR’s case law to suggest that this is different in the case of a UAC which confers the choice for arbitration or litigation on the beneficiary of the UAC. After all, under a UAC the parties agree to submit the dispute to arbitration, albeit subject to the choice made by the beneficiary of the UAC – on the basis of the right explicitly so granted to it by the non-beneficiary – to opt for arbitration.